

liam J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L.Rev. 2548 (2004).

Finally and relatedly, the majority's worry that my reading of Rule 11(e) and § 3582(c) would "eliminate[] the concept of finality with regard to guilty pleas" seems to me much overblown. *Ante* at 1126. Under my reading of the relevant rules and statutes, the government need merely assert its rights under Rule 11(e) and the guilty plea will stand and finality will be preserved. Even if the government fails to assert a Rule 11(e) objection, a district court might *still* be able to enforce the rule on its own motion if it disagrees with the parties' arguments. See *United States v. Mitchell*, 518 F.3d 740, 750 (10th Cir.2008) (suggesting that courts may raise certain claim-processing rules *sua sponte*). It is only in the (surely exceedingly) few cases where no one disputes the plea's illegality that a plea may be undone without engaging the great grinding gears of an appeal or collateral lawsuit. Nothing about this arrangement should come as a surprise either for, after all, "[o]urs is an adversarial system of justice" in which the parties are usually "presum[ed] . . . responsible for raising their own defenses." *Id.* at 749. Congress may of course override this presumption anytime it wishes and elevate a claim-processing defense into a jurisdictional limitation. But that remains its job to do, not ours.

I respectfully dissent.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Albert Preston ALEXANDER, a/k/a Alexander Preston, a/k/a Albert Shadon, a/k/a Preston Alexander, a/k/a Albert Reton Alexander, a/k/a Albert Preton Alexander, Defendant-Appellant.

No. 14-7058.

United States Court of Appeals,
Tenth Circuit.

Sept. 21, 2015.

Background: Defendant pled guilty in the United States District Court for the Eastern District of Oklahoma to failure to register as sex offender, and he appealed.

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

- (1) defendant was qualified to be Tier III sex offender under Sex Offender Registration and Notification Act (SORNA), and
- (2) defendant's California conviction for inducing another to engage in sexual conduct by misrepresentations creating fear did not fall within scope of exception to SORNA's definition of "sex offense."

Affirmed.

Holmes, Circuit Judge, concurred and filed opinion.

1. Mental Health 469(6)

Court of Appeals reviews challenge to offense-level calculation under Sex Offender Registration and Notification Act (SORNA) for abuse of discretion, reviewing legal conclusions de novo and factual findings for clear error. Sex Offender Registration and Notification Act, § 102 et seq., 42 U.S.C.A. § 16901 et seq.

2. Mental Health ↪469(2)

Defendant's California conviction for inducing another to engage in sexual conduct by misrepresentations creating fear was comparable to federal offenses of aggravated sexual abuse or sexual abuse, and thus defendant was qualified to be Tier III sex offender under Sex Offender Registration and Notification Act (SORNA); California statute required more than fraudulent misrepresentation, and federal statutes did not require greater fear than what was defined in California statute. 18 U.S.C.A. §§ 2241, 2242; Sex Offender Registration and Notification Act, § 111(4)(A)(i), 42 U.S.C.A. § 16911(4)(A)(i); West's Ann.Cal.Penal Code § 266c.

3. Mental Health ↪469(6)

Court of Appeals reviews de novo whether violation of state statute constitutes "sex offense" under Sex Offender Registration and Notification Act (SORNA). Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C).

4. Mental Health ↪469(2)

Sexual conduct is not "consensual" under Sex Offender Registration and Notification Act (SORNA) if consent is induced by fear. Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C).

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

5. Mental Health ↪469(2)

Defendant's California conviction for inducing another to engage in sexual conduct by misrepresentations creating fear did not involve consensual sexual conduct, and thus did not fall within scope of exception to Sex Offender Registration and Notification Act's (SORNA) definition of "sex offense"; SORNA's inclusion of federal statutes prohibiting aggravated sexual abuse and sexual abuse implied that one of

SORNA's purposes was to protect against those who used fear to induce others to agree to sexual activity. Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C); West's Ann.Cal.Penal Code § 266c.

6. Statutes ↪1318

Rule of lenity has no application when customary tools of statutory interpretation convince court of specific meaning for statutory language.

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Edward Snow, Assistant United States Attorney, (Mark F. Green, United States Attorney, and Linda A. Epperley, Assistant United States Attorney, with him on the brief), Muskogee, OK, for Plaintiff-Appellee.

Before HARTZ, HOLMES, and MATHESON, Circuit Judges.

HARTZ, Circuit Judge.

Under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901–16962, a sex offender must register in each jurisdiction where he resides, *see id.* § 16913(a), and update that registration promptly upon moving, *see id.* § 16913(c). Failure to do so is a crime. *See* 18 U.S.C. § 2250. The duration of the offender's registration requirement depends on his "tier," which reflects the severity of his predicate sex offense. *See* 42 U.S.C. §§ 16911(2)–(4), 16915(a). The offender's tier also affects his guidelines sentencing range if he is convicted of failure to register. *See* USSG § 2A3.5(a).

Defendant Albert Alexander pleaded guilty in 2012 to violating California Penal Code § 266c, which prohibits inducing another to engage in sexual conduct by misrepresentations creating fear. As required by California law, he registered as a sex offender in that state. But he did not register as a sex offender in Oklahoma when he moved there, and he was indicted in the United States District Court for the Eastern District of Oklahoma on one count of violating 18 U.S.C. § 2250. He filed a motion to dismiss the indictment on the ground that his § 266c conviction did not trigger SORNA's registration requirement. He argued that § 266c covers only consensual sexual conduct and so falls within SORNA's exception from the definition of *sex offense* for an "offense involving consensual sexual conduct . . . if the victim was an adult. . . ." 42 U.S.C. § 16911(5)(C). When the motion was denied, he entered a conditional plea of guilty, *see Fed. R.Crim.P.* 11(a)(2), permitting him to raise on appeal the issues he now presents to us: (1) his classification as a tier III sex offender when the district court imposed sentence and (2) the denial of his motion to dismiss.¹ Exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we affirm. We reject Defendant's argument (part of which was not preserved below and is reviewed only for plain error) that a violation of § 266c does not qualify for tier III, and we hold that sexual conduct induced by the misrepresentations required under § 266c is not consensual within the meaning of the term in SORNA.

I. TIER III CLASSIFICATION

[1] Under the sentencing guidelines the offense level for failing to register under SORNA depends on whether the

1. Defendant also argues that SORNA violates the Commerce Clause and the Tenth Amendment. We rejected these arguments in *United States v. White*, 782 F.3d 1118, 1123–28 (10th Cir.2015), decided during the pendency of

predicate sex offense is classified as tier I, tier II, or tier III. *See USSG* § 2A3.5(a) (base offense level is 16 for tier III offenders; 14 for tier II offenders; and 12 for tier I offenders). Tier III is the classification for one whose "offense . . . is comparable to or more severe than [the federal crimes of] . . . aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)." 42 U.S.C. § 16911(4)(A)(i). We review a challenge to an offense-level calculation for abuse of discretion, reviewing legal conclusions *de novo* and factual findings for clear error. *See White*, 782 F.3d at 1128–29.

As a general rule, to make the comparison required by § 16911, we apply what is called the categorical approach, examining the statutory elements of the state and federal offenses to see whether the defendant's prior offense is comparable to or more severe than § 2241 or § 2242. *See id.* at 1130–36.

The California statute under which Defendant was convicted states:

Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act, is punishable by imprisonment in a county jail for not more than one year or in the state prison for two, three, or four years.

this appeal. As Defendant's counsel conceded at oral argument, this panel is bound by those rulings. *See, e.g., United States v. Meyers*, 200 F.3d 715, 720 (10th Cir.2000).

Cal.Penal Code § 266c (2014). The statute defines *fear* as “the fear of physical injury or death to the person or to any relative of the person or member of the person’s family.” *Id.*

The relevant elements of the first comparator statute, 18 U.S.C. § 2241, are “knowingly caus[ing] another person to engage in a sexual act—. . . (2) 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. . . .” § 2241(a)(2). And the relevant elements of § 2242 are “knowingly—(1) 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); . . . or attempt[ing] to do so. . . .” § 2242(1).

Defendant argues that he cannot be classified in tier III because the California statute “sweeps more broadly” than the federal offenses of aggravated sexual abuse (§ 2241) or sexual abuse (§ 2242). Aplt. Br. at 18. First, he appears to contend that to violate § 266c it is necessary only to “fraudulently induce[] another to consent to a sexual act,” but that such conduct would not violate the federal statutes. *Id.* at 17. Second, he asserts that § 266c “punishes a person who induces a consensual sexual act by fraudulent representation made with the intent to create fear,” which is a less severe offense than § 2241 and § 2242, which, he says, require that a sexual act follow “a direct threat or action that created fear.” *Id.* Third, he argues that § 266c is less severe because it “defines fear more broadly” than § 2241 and § 2242. *Id.* We reject each argument (the second, under plain-error review).

[2] Defendant’s first contention is based on a false premise. Section 266c is not violated by the mere act of fraudulent-

ly inducing consent to a sexual act. The statute requires more—a fraudulent representation “that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person’s free will, and does cause the victim to so act.” Cal.Penal Code § 266c. It is therefore irrelevant that the federal statutes cannot be violated by (just any) misrepresentation.

Defendant’s second argument is that § 2241 and § 2242, unlike § 266c, require “a direct threat or action that created fear.” Aplt. Br. at 17. In other words, even though both federal statutes are satisfied by “placing th[e] other person in fear,” 18 U.S.C. §§ 2241(a)(2), 2242(1), Defendant is saying that “placing” can be accomplished only by direct threat or action. But this argument is forfeited because he failed to argue below that the federal statutes do not encompass fear induced by fraud; our review is therefore only for plain error. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011); *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006). Because Defendant does not argue plain error, we could end our analysis there. *See Richison*, 634 F.3d at 1130–31. In any event, we see no reason to limit the meaning of “placing . . . in fear” by excluding the making of false representations that induce fear, and we are aware of no precedent saying that. *See Teague*, 443 F.3d at 1318–19 (for asserted error to be “plain,” it must be “clear under current law” (internal quotation marks omitted)).

Finally, Defendant contends that § 266c defines *fear* more broadly than § 2241 and § 2242, because *fear* under the California statute means “the fear of physical injury or death to the person or to any relative of the person or member of the person’s family,” Cal.Penal Code § 266c, while the

federal statutes require “fear that any person will be subjected to death, *serious* bodily injury, or kidnapping.” Aplt. Br. at 17 (internal quotation marks omitted). Defendant is right about § 2241 but he misreads § 2242. Section 2241 requires inducing fear of death, serious bodily injury, or kidnapping. But § 2242 does not. Indeed, that is why § 2242 is entitled “Sexual abuse” while § 2241 is entitled “Aggravated sexual abuse.” What § 2242(1) prohibits is “knowingly—(1) 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)” (emphasis added). Perhaps the fear required by § 2242(1) must be more than *de minimis*, but it surely does not require greater fear than what is defined in the California statute—“the fear of physical injury or death to the person or to any relative of the person or member of the person’s family” that “would cause a reasonable person in like circumstances to act contrary to the person’s free will.” Cal.Penal Code § 266c.

Defendant has failed to show that § 266c can be violated in a manner that would not also violate § 2241 (if the fear is that a person will be subjected to death, serious bodily injury, or kidnapping) or, at least, § 2242 (if the fear is otherwise). The California statute is therefore “comparable” to the federal statutes. Defendant is qualified to be a tier III sex offender.

We can briefly dispose of the one case cited by Defendant as support for his tier-classification argument, *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133–34 (9th Cir.2014), cert. denied, — U.S. —, 135 S.Ct. 124, 190 L.Ed.2d 95 (2014). The Ninth Circuit held that an Oregon sex-abuse statute was not comparable to the federal statutes because “[n]onconsensual

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.” *Id.* at 1134. *Cabrera-Gutierrez* does not help Defendant because such intercourse would not violate § 266c either. *Cabrera-Gutierrez* does not suggest that there could be a violation of § 266c that is not a violation of the federal statutes.

II. DEFENDANT’S CONVICTION

[3] SORNA requires registration for a *sex offender*, see 42 U.S.C. § 16913(a), defined as “an individual who was convicted of a sex offense,” § 16911(1). SORNA defines *sex offense* broadly to include, as relevant here, “a criminal offense that has an element involving a sexual act or sexual contact with another,” § 16911(5)(A)(i), and “a Federal offense . . . under . . . chapter 109A . . . of Title 18,” § 16911(5)(A)(iii). SORNA’s definition of *sex offense* is limited by two exceptions. See §§ 16911(5)(B), (C). One concerns foreign convictions. The exception relevant here states:

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) (emphasis added). SORNA does not define *consensual sexual conduct*, nor has any published decision. The district court held that Defendant’s § 266c conviction does not fall within § 16911(5)(C). We review de novo whether a violation of a state statute constitutes a *sex offense* under SORNA. See *United States v. Nichols*, 775 F.3d 1225, 1228

(10th Cir.2014); *United States v. Black*, 773 F.3d 1113, 1115 (10th Cir.2014); *United States v. Welch*, 327 F.3d 1081, 1089–90 (10th Cir.2003).

Defendant contends that he did not have to register under SORNA because his California conviction for violating § 266c involved *consensual sexual conduct*. He argues that “consent even when obtained under fraudulent circumstances is still consent.” Aplt. Br. at 10. He points to California cases that support his view, relying particularly on *Boro v. Superior Court*, 163 Cal.App.3d 1224, 210 Cal.Rptr. 122 (1985). In *Boro* the defendant, charged with rape, obtained the victim’s consent to sexual intercourse by representing himself as a doctor and telling her that she had contracted a highly infectious and potentially fatal disease that could be cured only by painful and expensive surgery or by sexual intercourse with an anonymous donor who had been injected with a serum that would cure the disease. See *id.* at 123. The California Court of Appeals agreed with *Boro* that the charge should have been dismissed because the victim “precisely understood the nature of the act, but, motivated by a fear of disease, and death, succumbed to [Boro]’s fraudulent blandishments.” *Id.* at 126. The court relied on authority stating:

[I]f deception causes a misunderstanding as to the fact itself (fraud in the *factum*) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done but merely to some collateral matter (fraud in the *inducement*).

Id. at 124 (internal quotation marks omitted).

Boro is not controlling here. The word *consensual* that we are construing appears in a federal statute, and federal law governs its interpretation. See *Johnson v. United States*, 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (in determining whether state offense required use of physical force, the meaning of *physical* force under 18 U.S.C. § 924(e)(2)(B)(i) “is a question of federal law, not state law”); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111–12, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), superseded by 18 U.S.C. § 921(a)(20) (“Whether one has been ‘convicted’ within the language of the [federal] gun control statutes is necessarily . . . a question of federal, not state law, despite the fact that the predicate offense and its punishment are defined by the law of the State.”); *United States v. Dyke*, 718 F.3d 1282, 1292 (10th Cir.2013) (“Neither, of course, does state law normally dictate the meaning of a federal statute, at least absent some evidence Congress sought to defer to and incorporate state law”).

As mentioned, however, SORNA does not define *consensual sexual conduct*. And the only relevant references to the term in the legislative history address consensual sexual conduct between juveniles and consensual sexual conduct between adults that was criminalized by state sodomy laws. See 152 Cong. Rec. H5705–01, at 5723–24 (daily ed. July 25, 2006) (statement of Rep. Scott expressing concern about penalties for teenagers who engaged in consensual sex); H.R. Rep. No. 105–256, at 40–41 (Sept. 18, 1997) (dissenting views expressing concern about registration requirements for those convicted of consensual adult sodomy or similar offenses); 105 Cong. Rec. H7626, at H7629–30 (daily ed. Sept. 23, 1997) (statement of Rep. Jackson–Lee expressing concern about registration requirements for consensual adult activity). This legislative history is not illuminating on the question before us.

Unfortunately, but not surprisingly, the dictionary also does not assist us in resolving whether consent induced by misrepresentation is *consensual* within SORNA's meaning. Definitions of *consent* generally speak in terms of volition or will. *See, e.g.*, Black's Law Dictionary 368 (10th ed.2014) (defining *consent* as "[a] voluntary yielding to what another proposes or desires"); Webster's Third New International Dictionary 482 (2002) (defining *consent* as "capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action...."). But they do not parse the concept further to suggest whether a misrepresentation makes an act involuntary. For example, they do not tell us whether sexual conduct is involuntary if one misrepresents hair color or occupation.

We therefore turn to the statutory context to guide our decision. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (stating the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotation marks omitted)). The purpose of the national sex-offender-registry law is to ensure that law enforcement and communities can track and warn of the presence of convicted sexual predators. *See 42 U.S.C. § 16901* (SORNA declaration of purpose); *United States v. Kebodeaux*, — U.S. —, 133 S.Ct. 2496, 2505, 186 L.Ed.2d 540 (2013). SORNA provisions offer strong clues about the sort of predators it is concerned about. We note in particular (1) that among the federal offenses defined as constituting a *sex offense* under SORNA are sex-abuse crimes defined in Chapter 109A of Title 18, *see 42 U.S.C. § 16911(5)(A)(iii)*, which include 18 U.S.C. §§ 2241 and 2242, and (2) that tier III includes those convicted of an offense comparable to those defined in § 2241 and

§ 2242, *see 42 U.S.C. § 16911(4)(A)(i)*. As we previously explained in our tier III discussion, § 2241 and § 2242 proscribe knowingly causing another person to engage in a sexual act by "placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping," 18 U.S.C. § 2241(a)(2), or in fear of some other kind, *see id.* § 2242(1). Neither provision places any restriction on the method used to "place[] that other person in fear." The obvious inference is that SORNA, among other things, is intended to warn against those who use fear to cause others to engage in sexual acts.

[4] We see no principled reason to distinguish between a perpetrator who places another person in fear by brandishing a weapon and one who induces fear by deception (such as by pretending to have a weapon or by concocting a disease), so long as the fear overwhelms opposition to engaging in sexual conduct. We conclude that sexual conduct is not *consensual* under SORNA if the "consent" is induced by fear.

Our conclusion finds support in the Model Penal Code, a source to which the Supreme Court has often turned to interpret undefined terms in federal criminal statutes. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408–10, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (Court interprets *extortion* for purposes of the Hobbs Act and RICO as consistent with the Model Penal Code and modern state statutes); *Salinas v. United States*, 522 U.S. 52, 64–65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (Court supports its interpretation of *conspiracy* in RICO by noting the contemporary understanding of the offense reflected in the Model Penal Code); *Taylor v. United States*, 495 U.S. 575, 598 & n. 8, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (Court rejects argument that Congress intended

burglary, as used in the Armed Career Criminal Act, to have its restrictive common-law meaning, but chooses instead the more expansive contemporary meaning reflected in the Model Penal Code and other modern authority and statutes). *But see Yates v. United States*, — U.S. —, 135 S.Ct. 1074, 1087–88, 191 L.Ed.2d 64 (2015) (rejecting Model Penal Code comment on meaning of *tangible object* as inapplicable in context of Sarbanes–Oxley Act). The Model Penal Code recognizes consent as a defense to certain offenses. *See* § 2.11(1), (2), at 393. But it distinguishes consent, which is effective as a defense, from assent, which may not suffice. In particular, it provides that “assent does not constitute consent if . . . it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.” § 2.11(3)(d), at 393. In other words, whether assent is effective consent despite deception depends on the purpose of the criminal statute—what the law is meant to prevent—and the nature of the deception. Thus, if a purpose of SORNA is to combat predators who induce others to engage in sexual conduct by creating fear, then assent to sexual conduct that is induced by deception that creates fear is not effective consent.

[5] The application of this analysis to the present case is straightforward. The inclusion of 18 U.S.C. §§ 2241 and 2242 within the definition of *sex offense* implies that one of SORNA’s purposes is to protect against those who use fear to induce others to agree to sexual activity. Sexual activity that results from fear induced by misrepresentation therefore cannot be *consensual sexual conduct*. To deem such assent as consent is to excuse conduct that the law seeks to prevent. The California statute under which Defendant was convicted prohibits inducing someone to engage in sexual conduct by making misrepresentations that create fear—indeed, “fear of physical injury or death” that

“would cause a reasonable person . . . to act contrary to the person’s free will.” Cal.Penal Code § 266c. A violation of that statute therefore is not *consensual sexual conduct* under SORNA.

[6] Defendant argues that we should apply the rule of lenity because “[t]he federal definition of sex offense does not speak to situations where consent was induced through deception” and “§ 16911(5)(C) does not state that consent must be completely knowing and voluntary.” Aplt. Br. at 9. But the rule of lenity has no application when, as in this case, the customary tools of statutory interpretation convince the court of a specific meaning for statutory language. *See United States v. Castleman*, — U.S. —, 134 S.Ct. 1405, 1416, 188 L.Ed.2d 426 (2014) (“[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.”) (internal quotation marks omitted).

IV. CONCLUSION

We AFFIRM the district court’s denial of Defendant’s motion to dismiss the indictment and its classification of Defendant as a tier III sex offender.

HOLMES, Circuit Judge, concurring.

With one salient exception, I fully join in the outcome and reasoning of the majority’s well-written and cogent opinion. The exception relates to Part I of the majority’s opinion and, more specifically, its discussion of whether Mr. Alexander qualifies as a tier III offender. Unlike the majority, I am not convinced that Mr. Alexander’s prior offense under California Penal Code § 266c is comparable to or more severe than the aggravated sexual-abuse offense proscribed by 18 U.S.C. § 2241.

See 42 U.S.C. § 16911(4)(A)(i). However, I have no difficulty concluding that § 266c satisfies the comparable-to-or-more-severe-than standard with respect to the sexual-abuse offense outlawed by 18 U.S.C. § 2242. Therefore, I would not definitively opine on the former question—whether Mr. Alexander qualifies as a tier III offender under § 2241—but nevertheless would affirm the district court's sentencing order on the ground that Mr. Alexander *does* qualify as a tier III offender under § 2242.

Briefly stated, there is a reasonably persuasive argument to be made that the fear required by § 266c is broader than that contemplated by § 2241. For example, we have described the fear requirement of § 2241 as being “heightened,” “specific and severe.” *United States v. Holly*, 488 F.3d 1298, 1303 (10th Cir.2007). Further, § 2241 requires fear of “death, *serious* bodily injury, or kidnapping.” 18 U.S.C. § 2241(a)(2) (emphasis added). Section 266c, in contrast, requires only fear of “physical injury or death.” Cal.Penal Code § 266c. While there is little caselaw interpreting *how* serious the physical injury must be under § 266c, the California legislature’s decision to amend the statute in 1992, to omit “unlawful” as a qualifier to “physical injury” suggests an intent to broaden the kinds of injuries that might qualify under the statute. See 1992 Cal. Legis. Serv. 224 (S.B.1960) (West). This view is bolstered by the fact that certain other provisions of the California Penal Code punishing sexual misconduct that use the modifier “unlawful” appear to envision the victim being placed in fear of more serious injuries. See Laurie Levenson & Alex Ricciardulli, *Proof of sex crimes—Factors establishing victim’s lack of consent—Fraud*, California Criminal Law § 7:16 n. 2 (database updated Dec. 2014) (suggesting that fear in § 266c “appears to be broader than the fear of immediate and unlawful bodily injury” in other provisions

of the penal code); *see, e.g.*, Cal.Penal Code § 261 (defining rape as sexual intercourse accomplished “against a person’s will by means of . . . fear of immediate and unlawful bodily injury”); Cal.Penal Code § 286 (proscribing “an act of sodomy when the act is accomplished against the victim’s will by means of . . . fear of immediate and unlawful bodily injury on the victim or another person”). Accordingly, it is far from clear to me that Mr. Alexander’s prior offense under California Penal Code § 266c satisfies the comparable-to-or-more-severe-than standard with regard to 18 U.S.C. § 2241. And, because I need not resolve that question, I would not.

I need not resolve the inquiry as to § 2241 because, in my view, it is patent that Mr. Alexander’s prior § 266c offense *does* satisfy the relevant standard with respect to the sexual-abuse offense proscribed by § 2242. *See* 18 U.S.C. § 2242. In addition to the reasoning that the majority articulated, I note that the fear element of the § 2242 crime is satisfied “when the defendant’s actions implicitly place the victim in fear of *some* bodily harm.” *United States v. Castillo*, 140 F.3d 874, 885 (10th Cir.1998) (emphasis added). As the Ninth Circuit has held, “[a] reasonable construction of § 2242(1) is that it encompasses *all* fears of harm to oneself or another *other than* death, serious bodily injury or kidnapping.” *United States v. Gavin*, 959 F.2d 788, 790 (9th Cir.1992) (emphases added); *see also* *United States v. Henzel*, 668 F.3d 972, 977 (7th Cir.2012) (collecting cases and stating that “[i]n the § 2242 context we define the concept of ‘fear’ broadly”).

Indeed, § 2242 has been applied in situations strikingly similar to those that the California legislature presumably envisioned in enacting § 266c. *See, e.g.*, *United States v. Johns*, 15 F.3d 740, 742 (8th Cir.1994) (noting that the defendant “cul-
tivated a relationship with [the victim] over a period of time, during which he induced her to trust him, and then used that trust to his advantage”); *United States v. Johnson*, 100 F.3d 1250, 1254 (8th Cir.1996) (“[T]he defendant . . . induced [the victim] to trust him, and then used that trust to his advantage.”).

vated [the victim's] fear and *compliance* through his position as spiritual teacher and healer" and "taught her that events in her life, including the abuse, were ordained by the spirits and that harm would come to her or loved ones if she disrespected the spirit" (emphasis added); *see also United States v. King*, 215 F.3d 1338, 2000 WL 725480, at *4 (10th Cir.2000) (unpublished) (sufficient evidence that the victim "would not have *agreed* to [the defendant's] extremely invasive [sexual] actions but for the physical and spiritual consequences she feared would occur if she did not submit to his treatment" (emphasis added)). Thus, regardless of whether § 266c involves non-comparable or appreciably less severe conduct than the aggravated sexual-abuse offense defined in 18 U.S.C. § 2241, it is clear that § 266c's requirement of fear of "physical injury" is comparable to or more severe than the requisite fear of "some bodily injury" under § 2242. As such, the district court properly classified Mr. Alexander as a tier III sex offender under 42 U.S.C. § 16911(4).

For the foregoing reasons, I respectfully concur.



In re Shawn J. GIESWEIN, Movant.

No. 15-6138.

United States Court of Appeals,
Tenth Circuit.

Sept. 21, 2015.

Background: Defendant, acting pro se, sought authorization to file second or successive motion to vacate his sentence.

Holdings: The Court of Appeals held that:

- (1) Supreme Court's decision in *Johnson v. United States*, holding that residual clause of Armed Career Criminal Act (ACCA) violated due process, an-

nounced new rule of constitutional law, but

- (2) *Johnson* rule was not retroactively applicable.

Authorization denied.

1. Criminal Law ↗1668(1)

If, in light of the documents submitted with an application to file a second or successive motion to vacate a sentence, it appears reasonably likely that the application satisfies the stringent requirements for such a motion, the court will grant the application. 28 U.S.C.A. § 2255(h).

2. Criminal Law ↗1668(3)

Supreme Court's decision in *Johnson v. United States*, holding that residual clause of Armed Career Criminal Act (ACCA) violated due process, announced new rule of constitutional law, as required for defendant to obtain authorization to file second or successive motion to vacate his sentence, where *Johnson* overruled two prior Supreme Court cases that had concluded otherwise, and thus it applied constitutional principle in decision that was contrary to, rather than dictated by, its own precedent. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 924(e); 28 U.S.C.A. § 2255(h)(2).

3. Criminal Law ↗1668(3)

Case announces a new rule, as required for a defendant to obtain authorization to file a second or successive motion to vacate a sentence, when it breaks new ground or imposes a new obligation on the government, or, in other words, when the result is not dictated by precedent existing at the time the defendant's conviction becomes final. 28 U.S.C.A. § 2255(h)(2).

4. Criminal Law ↗1668(3)

Under the statutory provision governing second or successive motions to vacate a sentence based on a new rule of constitu-

PYCA Industries, 81 F.3d at 1421 (“One of the primary policies behind requiring a justification for Rule 54(b) certification is to avoid piecemeal appeals.”)

In light of the foregoing, the plaintiff’s motion for entry of final judgment [Doc. 59] is DENIED.

III. Conclusion

For the reasons stated herein,

IT IS ORDERED that McDermott’s “Motion for Partial Summary Judgment” [Doc. 57] is GRANTED. IT IS FURTHER ORDERED that the matter of amount of the costs of defense, attorneys’ fees and expenses incurred by McDermott in defense of Hefren’s claims is hereby REFERRED to the magistrate judge for consideration and recommendation. Pursuant to Rule 54(d)(2)(D), the magistrate judge shall prepare a Report recommending the amount to be awarded to McDermott, in consideration of the appropriate standards and evidence to be submitted by the parties.

IT IS FURTHER ORDERED that plaintiff’s “Motion to Certify as Final Judgment Under FRCP 54(b)” [Doc. 59] is DENIED.

It appears this Ruling adjudicates all remaining claims in this matter. The parties shall confirm via a joint letter to the Court within the next ten (10) days of this Ruling, whether the foregoing is accurate and whether there remain any issues for trial, currently scheduled on September 8, 2014.

UNITED STATES

v.

Matthew BAPTISTE, Defendant.

No. EP-13-CR-2311-KC.

United States District Court,
W.D. Texas,
El Paso Division.

Signed July 24, 2014.

Background: Defendant pled guilty to false statement and the parties submitted briefing as to whether defendant was required to register under the Sex Offender Registration and Notification Act (SORNA) since plea involved admitting to having sexual contact with a minor.

Holdings: The District Court, Kathleen Cardone, J., held that:

- (1) SORNA provision listing criminal offenses requiring sex offender registration is not exclusive set of federal criminal offenses requiring registration;
- (2) *Chevron*, rather than *Skidmore*, framework applied;
- (3) SORNA was ambiguous;
- (4) attorney general’s interpretation was reasonable;
- (5) defendant was not required to register; and
- (6) even if noncategorical approach applied, defendant was not required to register.

Ordered accordingly.

1. Mental Health ☐469(2)

Provision of the Sex Offender Registration and Notification Act (SORNA) that lists criminal offenses requiring sex offender registration is not exclusive set of federal criminal offenses requiring registration. Sex Offender Registration and Notification



Act, § 111(5)(A)(iii), 42 U.S.C.A. § 16911(5)(A)(iii).

2. Administrative Law and Procedure
☞431

An agency's interpretation of an ambiguous statute may receive *Chevron* deference only if Congress delegated authority to the agency generally to make rules carrying the force of law and if the agency interpretation claiming deference was promulgated in the exercise of that delegated authority.

3. Administrative Law and Procedure
☞432

If Congress has not delegated to an agency the authority to make rules carrying the force of law, or if the agency interpretation at issue was not promulgated in the exercise of such authority, *Chevron* deference is not warranted to the agency's interpretation of an ambiguous statute; in such situations, the agency interpretation is entitled to respect only to the extent it has the power to persuade.

4. Administrative Law and Procedure
☞431, 434

The weight of deference afforded to agency interpretations under *Skidmore* depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.

5. Mental Health ☞469(1)

Chevron, rather than *Skidmore*, framework applied to determine what level of deference was warranted for The National Guidelines for Sex Offender Registration and Notification, issued by Attorney General, which provided guidance and assistance in implementing sex offender registration and notification programs under the Sex Offender Registration and Notification Act (SORNA); guidelines were

product of formal notice-and-comment rulemaking pursuant to authority expressly granted by Congress, Congress explicitly left gap for attorney general to fill, and guidelines complied with procedures set out in the Administrative Procedure Act (APA). 5 U.S.C.A. § 553; Sex Offender Registration and Notification Act, § 112(b), 42 U.S.C.A. § 16912(b).

6. Mental Health ☞469(2)

Provision of The National Guidelines for Sex Offender Registration and Notification defining "any conduct that by its nature is a sex offense against a minor" in the Sex Offender Registration and Notification Act (SORNA) was not an interpretive rule, and therefore, *Chevron* framework applied to determine deference to give provision; guideline governed conduct of members of the public and set forth individual rights and duties, attorney general employed formal notice-and-comment rulemaking procedures in promulgating guidelines pursuant to Congress's grant of statutory authority, and guidelines were broad and detailed set of regulations. 5 U.S.C.A. § 553; Sex Offender Registration and Notification Act, § 112(b), 42 U.S.C.A. § 16912(b).

7. Mental Health ☞469(2)

Sex Offender Registration and Notification Act (SORNA) was ambiguous as to whether conduct underlying a conviction can subject a defendant to registration notwithstanding elements of the conviction, for purposes of determining whether attorney general's interpretation of SORNA in The National Guidelines for Sex Offender Registration and Notification warranted deference in determining whether defendant was required to register after he pled guilty to false statements; definition of sex offense in SORNA was an offense against a minor that involved conduct that by its nature was a sex offense against a minor,

which restated “sex offense” as “sex offense.” 18 U.S.C.A. § 1001; Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913.

8. Mental Health ☞469(2)

Attorney general’s interpretation that courts should use the categorical approach to determine whether an offense was a sex offense under the Sex Offender Registration and Notification Act (SORNA) was reasonable, warranting deference in determining whether defendant was required to register after pleading guilty to false statement; SORNA provided circular definition for sex offense, attorney general required status of victim as a minor to be an element, clarifying SORNA, and attorney general’s guidelines provided examples of offenses that would qualify. Sex Offender Registration and Notification Act, § 111(7)(I), 42 U.S.C.A. § 16911(7)(I).

9. Mental Health ☞469(2)

Under the categorical approach, defendant who pled guilty to false statement was not required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), even though defendant admitted to engaging in sexual contact with a minor; false statement did not contain element involving status of victim as a minor. 18 U.S.C.A. § 1001; Sex Offender Registration and Notification Act, § 111(7)(I), 42 U.S.C.A. § 16911(7)(I).

10. Mental Health ☞469(2)

Even if noncategorical approach applied to determine whether an offense required registration under the Sex Offender Registration and Notification Act (SORNA), defendant who pled guilty to false statement was not required to register, even though he admitted to sexual contact with a minor in his plea; acts involving the minor did not comprise conduct giving rise to false statement conviction, conviction

was based on making false statements to law enforcement agents, and victim of false statement was the government, not the minor. 18 U.S.C.A. § 1001; Sex Offender Registration and Notification Act, § 111(7)(I), 42 U.S.C.A. § 16911(7)(I).

Ian Martinez Hanna, U.S. Attorney’s Office, El Paso, TX, Richard Thomas, Sr., United States Attorney’s Office, Fort Bliss, TX, for United States.

Erik Anthony Hanshew, Shane Michael McMahon, Office of the Federal Public Defender, El Paso, TX, for Defendant.

ORDER

KATHLEEN CARDONE, District Judge.

On this day, the Court considered the above-captioned case. Because False Statement, 18 U.S.C. § 1001, does not constitute a sex offense as defined by the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 et seq. (“SORNA”), it is hereby **ORDERED** that Defendant shall not be required to register as a sex offender as a condition of supervised release.

I. BACKGROUND

On October 23, 2013, the Grand Jury sitting in El Paso, Texas returned an Indictment charging Defendant with two counts of Abusive Sexual Contact, 18 U.S.C. § 2244(b). Indictment, ECF No. 3. On March 14, 2014, Defendant entered into a plea agreement (“Plea Agreement”) with the government, pursuant to which he agreed to plead guilty to a one count Information charging him with False Statement in violation of 18 U.S.C. § 1001(a)(2). Plea Agreement, ECF No. 40. As part of the

plea agreement, Defendant admitted to the facts set out in an attached factual basis (“Factual Basis”).

The Factual Basis provides that:

On September 26, 2012 Matthew Baptiste (Baptiste) was interviewed by Federal Bureau of Investigation (FBI) Special Agents (SAs) with respect to an allegation of sexual contact made against him by M.A.M.A. was a then-seventeen year old foreign exchange student from Japan who was being hosted by Baptiste in his home. At the time M.A. made the claim against Baptiste the Baptiste family resided on Ft. Bliss in an area under the exclusive jurisdiction of the United States.

Over the course of the interview Baptiste made several representations to the FBI SAs including that on the night of September 13, 2012 his wife was physically present in their home the entire evening; that on the night of September 13, 2012 Baptiste did not receive a massage from M.A.; and that on the night of September 13, 2012 Baptiste had never touched M.A.’s inner thighs and licked her vagina with his tongue.

These statements were not factually true in that on the night of September 13, 2012 Baptiste’s wife was not home the entirety of the evening, she was performing 24 hour Staff Duty Officer duty at her military command’s headquarters and this duty kept her out of the home for the majority of those 24 hours; on the evening of September 13, 2012 Baptiste did receive a massage from M.A.; and that on the evening of September 13, 2012 Baptiste did touch M.A.’s inner thighs did [sic] lick M.A.’s vagina with his tongue.

Baptiste now admits that these statements were materially false in that Defendant’s false statements were an attempt to avoid further investigation and

questioning by Federal Bureau of Investigation Special Agents into the allegation of sexual contact made against him by M.A. Baptiste further admits that when making these materially false statements he acted with the knowledge that his conduct was unlawful.

Plea Agreement 6

The Court held a plea hearing on March 14, 2014, and accepted Defendant’s guilty plea. ECF No. 42.

On June 4, 2014, the United States Probation Department filed its Presentence Investigation Report (“PSR”). PSR, ECF No. 45. As part of the PSR’s sentencing options, the probation officer recommended that the Court impose special conditions of supervised release, to include that Defendant participate in a sex offender treatment program, that Defendant not associate with children under the age of eighteen except in the presence of an adult, and that Defendant not reside within 1,000 feet of a school without approval of a probation officer, among other conditions. PSR 22-23. Although the PSR did not state that sex offender registration is a mandatory condition of supervised release pursuant to 18 U.S.C. § 3583(d), the Court sua sponte raised the issue of registration under SORNA to resolve any ambiguity as to Defendant’s registration requirements pursuant to 42 U.S.C. § 16913. The Court ordered the parties to brief the issue.

On June 22, 2014, Defendant filed his Sentencing Memorandum. Def.’s Mem., ECF No. 51. The government filed its Brief on June 25, 2014. Gov’t’s Br., ECF No. 54. Defendant filed a Supplement to his Sentencing Memorandum on July 7, 2014, Def.’s Suppl., ECF No. 56, and the government filed its Response on July 10, 2014. Gov’t’s Resp., ECF No. 57.

II. DISCUSSION

A. Analysis

In its brief, the government argues that the Court should look to the facts and circumstances surrounding the criminal offense at issue in this case, False Statement, to determine whether it constitutes a “sex offense” as defined by SORNA. Gov’t Br. 4, 6. According to the government, Defendant admitted to the facts set forth in the Factual Basis of the Plea Agreement regarding his sexual conduct with M.A., who was a minor pursuant to federal law. *Id.* at 6. Therefore, the government argues, Defendant’s conviction for False Statement involves “conduct that by its nature is a sex offense against a minor,” within the meaning of 42 U.S.C. § 16911(7)(I), and § 16913 mandates sex offender registration. *Id.* at 6–7.

The government also argues that, if the Court concludes that sex offender registration is not a mandatory condition of supervised release under the facts of this case, the Court should nonetheless require Defendant to register as a sex offender pursuant to the Court’s discretionary power to do so. *Id.* at 7 (citing 18 U.S.C. § 3583(d)(1)–(3)).

Defendant argues that he need not register as a sex offender because the sex offender registration statute provides a closed set of federal offenses that mandate sex offender registration, and the offense to which Defendant pleaded guilty, False Statement, is not an enumerated offense. Def.’s Mem. 4. Defendant further contends The National Guidelines for Sex Offender Registration and Notification (“SMART Guidelines”), which provide guidance and assistance in implementing sex offender registration and notification programs, constitute the Attorney General’s interpre-

tation of SORNA, and § 16911(7)(I) in particular. Def.’s Suppl. 1–2. As such, Defendant explains the Court should accord that interpretation deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Id.* at 2–4. According to Defendant, such deference results in a finding that Defendant is not required to register. *See id.*

Specifically, the relevant portion of the SMART Guidelines provides:

Conduct by Its Nature a Sex Offense Against a Minor (§ 111(7)(I)): The final clause covers “[a]ny conduct that by its nature is a sex offense against a minor.” It is intended to ensure coverage of convictions under statutes defining sexual offenses in which *the status of the victim as a minor is an element of an offense*, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,052 (Jul. 2, 2008) (emphasis added).

Defendant argues that the SMART Guidelines require a sentencing court, when deciding whether to impose sex offender registration as a condition of supervised release, to employ what is known as the “categorical approach,” whereby the court considers only the elements of the offense without considering the facts and circumstances surrounding the offense. *Id.* at 3–5.¹ Defendant further argues that, under

1. As the United States Court of Appeals for the Ninth Circuit explained in *United States v.*

Mi Kyung Byun, 539 F.3d 982, 990 (9th Cir. 2008),

this approach, his conviction for False Statement pursuant to 18 U.S.C. § 1001 does not require him to register as a sex offender because the offense does not contain an element that the victim be a minor child.² *Id.* at 3 (citing SMART Guidelines, 73 Fed.Reg. at 38,052).

Defendant further argues that because registration as a condition of supervised release is not mandated pursuant to Texas law, the Court should not impose sex offender registration based upon Texas law, nor upon the Court's discretionary power to do so. Def.'s Mem. 2–9. The Court addresses these arguments in turn.

1. SORNA and the scope of § 16911(5)(A)(ii)

[1] Pursuant to SORNA, a person must register as a sex offender, and keep that registration current, if that person is a “sex offender,” which the statute defines as “an individual who was convicted of a sex offense.” *United States v. Gonzalez-Medina*, 757 F.3d 425, 428 (5th Cir.2014) (citing 42 U.S.C. §§ 16913(a), 16911(1)). As relevant here, SORNA defines a “sex offense” 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; [or]

[i]n 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. *Byun*, 539 F.3d at 990.

2. 18 U.S.C. § 1001 provides:

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18. 42 U.S.C. § 16911(5)(A).

SORNA defines “criminal offense” in turn as “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)) or other criminal offense.” *Id.* § 16911(6). Finally, SORNA defines “specified offense against a minor” as set out in § 16911(5)(A)(ii) in the following way:

(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:

- (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.

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years.

18 U.S.C. § 1001.

- (F) Video voyeurism as described in section 1801 of Title 18.
- (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.

Id. § 16911(7).

Defendant, relying on the canon of statutory construction of *expressio unius est exclusio alterius*, which provides that the “expression of some connotes the exclusion of others,” see *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 238 (5th Cir.2012), first argues that § 16911(5)(A)(iii) sets out a closed set of federal offenses for which a person must register, and that the federal false statement offense to which he pleaded guilty is not enumerated there. Def.’s Mem. 4. It is true that, as Defendant points out, unlike 5(A)(iii), subsections (5)(A)(i) and (5)(A)(ii) do not use the modifier “federal” to describe the criminal offenses constituting sex offenses in those subsections. See 42 U.S.C. § 16911(5)(A). This could indicate that § 16911(5)(A)(iii) is the exclusive list of federal offenses requiring registration. See *id.* Further, the definition of “criminal offense” in § 16911(6) also does not include the term “federal,” in defining criminal offenses when it provides “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) or other criminal offense.” *Id.* § 16911(6). Thus, it is possible, as Defendant claims, that § 16911(5)(A)(i) and (A)(ii) do not apply to a federal criminal offense such as his; therefore, his offense cannot constitute a sex offense. See Def.’s Mem. 4. However, the court finds this argument to be unpersuasive for the following reasons.

In *United States v. Dodge*, 597 F.3d 1347 (11th Cir.2010), the United States Court of Appeals for the Eleventh Circuit considered the same argument regarding the statutory language of 16911(5)(A) and 16911(6) and the applicability of § 16911(5)(A)(i) and (5)(A)(ii) to federal criminal offenses. See *Dodge*, 597 F.3d at 1351–53. The *Dodge* court found that looking at the statute as a whole, including its plain language, its structure, its legislative history, and its purpose, a federal criminal offense not enumerated in § 16911(5)(A)(iii) may still qualify as a sex offense under § 16911(5)(A)(i) or (ii). *Dodge*, 597 F.3d at 1352–53. The *Dodge* court noted, in particular, that § 16911(7), which sets forth the list of offenses that constitute a “specified offense against a minor” includes “video voyeurism” as described in 18 U.S.C. § 1801. *Id.* at 1352. The *Dodge* court explained that “[i]f Congress intended that 42 U.S.C. § 16911(5)(A)(iii) represent a closed universe of federal crimes requiring SORNA registration, Congress would not have listed another specific federal crime in defining ‘specified offense against a minor,’ the definition of sex offense in § 16911(5)(A)(ii). See *id.* at 1352–53. Moreover, the court in *Dodge* explained that § 16911(6), though not listing “federal offense” as within the definition of “criminal offense,” does state “or other criminal offense,” which the *Dodge* court reasoned must include federal offenses. See *id.* at 1352.

Moreover, although not directly addressing the issue Defendant has raised, the Ninth Circuit on at least two occasions, in *United States v. Becker*, 682 F.3d 1210 (9th Cir.2012) and *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir.2008), required the defendant to register as a sex offender based on the violation of a federal criminal statute not enumerated in

§ 16911(5)(A)(iii). See *Becker*, 682 F.3d at 1212–13 (citing *Byun*, 539 F.3d at 990–94).

The Court finds the reasoning in *Dodge* and the results in the Ninth Circuit cases to be persuasive. For the reasons set forth in *Dodge*, the Court finds that § 16911(5)(A)(iii) is not the exclusive set of federal criminal offenses requiring sex offender registration, and that § 16911(5)(A)(i) and (ii) may include federal criminal violations in their definitions of sex offense.³

The offense to which Defendant pleaded guilty, False Statement, is not one of the enumerated federal offenses in section § 16911(5)(A)(iii), and therefore this subsection is inapplicable to Defendant. See 42 U.S.C. § 16911(5)(A)(iii); Def.’s Mem. 4–5; Gov’t Br. 2. Also, as Defendant explains, § 16911(5)(A)(i), is inapplicable to the facts of this case because the false statement offense at issue does not have “an element involving a sexual act,” which this provision requires. See § 16911(5)(A)(i); Def.’s Mem. 5; Gov’t’s Br. 2; see 18 U.S.C. § 1001. The Court must consider, however, whether Defendant’s offense constitutes “a specified offense against a minor” within the meaning of § 16911(5)(A)(ii).

2. Specified offense against a minor based upon § 16911(7)

Section 16911(7) defines the term “specified offense against a minor” in § 16911(5)(A)(ii) as follows: “[t]he term ‘specified offense against a minor’ means an offense against a minor that involves any of the following: . . . (I) Any conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii), 16911(7)-(7)(I). And, as set out above, the

3. The Court has reviewed the SMART Guidelines for insight into this issue but they pro-

relevant portion of the SMART Guidelines provides:

Conduct by Its Nature a Sex Offense Against a Minor (§ 111(7)(I)): The final clause covers “[a]ny conduct that by its nature is a sex offense against a minor.” It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

SMART Guidelines, 73 Fed.Reg. at 38,052 (emphasis added).

In determining the meaning of “specific offense against a minor,” the Court first considers Defendant’s argument that the Court must defer to the Attorney General’s interpretation of this provision in the SMART Guidelines. To do so, the Court begins by setting out the law of *Chevron* deference.

a. *Chevron* deference

Under the Supreme Court’s holding in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), courts must defer to an agency’s reasonable interpretation of an ambiguous statute that the agency is tasked with implementing. *Martinez v. Mukasey*, 519 F.3d 532, 542–43 (5th Cir.2008) (citing *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). “Administrative agencies are entrusted with the authority to administer Congressionally-created programs, a

vide no clarification.

power which necessarily involves filling in statutory gaps created, either expressly or implicitly, by Congress.” *Id.* (citations omitted). When the court reviews an agency’s interpretation of a statute that the agency administers, the court first considers whether Congress has directly spoken to the question at issue. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If Congress has explicitly spoken, both the court and the agency must “give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43; *Martinez*, 519 F.3d at 543. If, by contrast, “Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778. In that case, Courts give agency interpretations “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844, 104 S.Ct. 2778; *Orellana-Monson v. Holder*, 685 F.3d 511, 517 (5th Cir.2012). The same is true when Congress implicitly delegates authority to an agency on a matter within the statute. *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778; *Martinez*, 519 F.3d at 543.

A *Chevron* analysis requires two steps: First, the court considers “whether ‘the statute is silent or ambiguous with respect to the specific issue’ before it;” second, the court considers “whether the agency’s answer is based on a permissible construction of the statute.” *Orellana-Monson*, 685 F.3d at 520 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999)).

b. Applicability of *Chevron* deference to the SMART Guidelines

Before deciding whether the SMART Guidelines are accorded *Chevron* deference, however, the Court must first decide whether *Chevron* is the appropriate framework at all. To do so, the court assesses

preliminary issues including reviewing the administrative decision-making process to determine whether the agency’s action is entitled to *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 226–31, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). The Court also considers a related argument advanced by the government that the SMART Guidelines provisions at issue are “interpretive rules” and do not warrant *Chevron* deference. Gov’t’s Resp. 4–6. Although not raised by the parties, the Court also considers the applicability of the *Chevron* framework in the criminal context.

i. Administrative rulemaking

[2] Under the Supreme Court’s decision in *Mead*, an agency’s interpretation of an ambiguous statute may receive *Chevron* deference only if Congress “delegated authority to the agency generally to make rules carrying the force of law,” and if the “agency interpretation claiming deference” was “promulgated in the exercise of that [delegated] authority.” *BCCA Appeal Grp. v. U.S. E.P.A.*, 355 F.3d 817, 825 (5th Cir.2003) (quoting *Mead*, 533 U.S. at 226–27, 121 S.Ct. 2164).

[3, 4] However, if Congress has not delegated to the agency the authority to make rules carrying the force of law, or if the agency interpretation at issue was not promulgated in the exercise of such authority, *Chevron* deference is not warranted. See *Gonzales v. Oregon*, 546 U.S. 243, 255–56, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (citing *Mead*, 533 U.S. at 226–27, 121 S.Ct. 2164). In such situations, the agency interpretation is “‘entitled to respect’ only to the extent it has the power to persuade.” *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). “The weight of deference afforded to agency interpretations under *Skidmore* depends upon ‘the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.’” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, — U.S. —, 133 S.Ct. 2517, 2533, 186 L.Ed.2d 503 (2013) (quoting *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161).

[5] For the following reasons, the Court concludes that *Chevron*, rather than *Skidmore*, is the appropriate framework to determine the level of deference to which the SMART Guidelines are entitled. First, the SMART Guidelines are the product of formal notice-and-comment rulemaking pursuant to authority expressly granted by Congress to the Attorney General. In the SORNA statute, Congress explicitly left a gap for the Attorney General to fill, by expressly delegating authority to the Attorney General to issue “guidelines and regulations to interpret and implement this subchapter.” See 42 U.S.C. § 16912(b). This grant of authority over “the relevant subchapter” applies to 42 U.S.C. §§ 16901–16962, the SORNA statute. See *United States v. Stevenson*, 676 F.3d 557, 564 (6th Cir.2012). With this unambiguous grant of authority to the Attorney General, § 16912(b) allows the Attorney General to implement both substantive and interpretive regulations regarding the statute. *Id.*; see *United States v. Bridges*, 741 F.3d 464, 468 & n. 5 (4th Cir.2014).

Further, the SMART Guidelines have been properly promulgated complying with the notice-and-comment procedures as set

4. As explained by the *Stevenson* court:

The SMART guidelines were published in the Federal Register on May 30, 2007, and made open to comments until August 1, 2007. 72 Fed.Reg. at 30,210, 30212. The Attorney General published the final guidelines in the Federal Register on July 2, 2008, responding to the comments he received. 73 Fed.Reg. 38,030, 38,031, 38,-

out in the Administrative Procedures Act (“APA”), 5 U.S.C. § 553. See *Bridges*, 741 F.3d at 468; *Stevenson*, 676 F.3d at 565–66.⁴ Indeed, the Second Circuit has stated that the SMART Guidelines were an act of substantive rulemaking and have the force and effect of law. *United States v. Lott*, 750 F.3d 214, 217–18 (2d Cir.2014) (“These proposed guidelines carry out a statutory directive to the Attorney General, in section 112(b) of SORNA 42 U.S.C. § 16912(b)) to issue guidelines to interpret and implement SORNA.” (quoting 72 Fed. Reg. 30,210 (May 30, 2007));⁵ *Stevenson*, 676 F.3d at 565; see also *Mead*, 533 U.S. at 229, 121 S.Ct. 2164 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”). Both the Fourth Circuit and the Sixth Circuit have accorded *Chevron* deference to the SMART Guidelines. See *Bridges*, 741 F.3d at 468 & n. 5; *Stevenson*, 676 F.3d at 564–65.

Based upon this persuasive authority, this Court is confident that these fundamental *Mead* considerations of congressional delegation of agency authority and formal agency rulemaking procedures have been satisfied in the promulgation of the SMART Guidelines. Accordingly, the Court proceeds to consider the government’s related argument that the *Chevron* framework should not apply to the portion

035–36. Applying the thirty-day advance publication requirement, the SMART guidelines became final August 1, 2008.

Stevenson, 676 F.3d at 566 n. 8.

5. Though the *Lott* court quotes the Interim proposed SMART Guidelines, the Final SMART Guidelines provide the same. See 73 Fed.Reg. at 38,030.

of the SMART Guidelines interpreting § 16911(7)(I) because it is merely an “interpretive rule.” *See* Gov’t’s Resp. 4–6

ii. Interpretive rule

The government asserts that the relevant section of the SMART Guidelines explaining the meaning of § 16911(7)(I) is an “interpretive rule” because it interprets or explains the meaning of the statute, as opposed to a “substantive rule” which implements the statute. *Id.* (citing *Guardian Fed. Sav. and Loan Ass’n v. Fed. Sav. and Loan Ins. Corp.*, 589 F.2d 658 (D.C.Cir.1978)). As such, the government contends it is not entitled to the force of law and should not be accorded *Chevron* deference. *Id.* The Court disagrees.

The Supreme Court had occasion to address a similar argument in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171–174, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007). There, the issue was whether a Department of Labor regulation exempting domestic service employees engaged in companionship services from provisions of the Fair Labor Standards Act applied to individuals employed by an employer other than the family or household using the services. *Coke*, 551 U.S. at 162, 127 S.Ct. 2339. Citing to *Mead*, the Respondent in that case argued that the regulation was not legally binding because it was an “interpretive” regulation, not to be used to fill a statutory gap, rather intended to describe the agency’s opinion of the meaning of the statute. *Id.* at 172, 127 S.Ct. 2339 (citing *Mead*, 533 U.S. at 232, 121 S.Ct. 2164).

The Supreme Court unanimously held that the so-called interpretive regulation in the case was to be accorded *Chevron* deference. *Id.* at 172–73, 127 S.Ct. 2339. The Court rested this conclusion on sever-

al factors. First, the Court noted that the rule “directly governed the conduct of members of the public,” “affecting individual rights and obligations.” *Id.* (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979)). Second, the Court explained that the agency engaged in full notice-and-comment rulemaking procedures, which the agency would not have needed to do if the regulation were an “interpretive rule” within the meaning of the APA. *Id.* at 173, 127 S.Ct. 2339 (citing 5 U.S.C. § 553(b)(3)(A) (exempting from notice-and-comment procedures “interpretative rules,”⁶ general statements of policy, or rules of agency organization, procedure, or practice)). Additionally, the Court noted that each time it amended the rule, the agency engaged in full notice-and-comment rulemaking procedures. *Id.* The Court also observed that the agency had historically treated the regulation as binding for thirty years. *Id.* Finally, the Court explained,

the ultimate question is whether Congress would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of “gap-filling” authority. Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s deter-

6. The terms “interpretative rules” and “interpretive rules” are used interchangeably in this

body of law. *See Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 855 n. 2 (8th Cir.2013).

mination. *See Mead*, at 229–233, 121 S.Ct. 2164.

Id. at 173–74, 127 S.Ct. 2339.

Thus, that a regulation interprets or fills gaps in a statute’s text does not place the regulation outside of *Chevron*’s domain. *See id.*

[6] Applying this analysis to the SMART Guidelines defining “any conduct that by its nature is a sex offense against a minor,” the Court finds that the *Chevron* framework applies to this regulation. First, like the regulation at issue in *Coke*, the SMART Guidelines govern the conduct of members of the public and set forth individual rights and duties. *See Coke*, 551 U.S. at 172–73, 127 S.Ct. 2339. The SMART Guidelines define “sex offense” through the term “specified offense against a minor,” and they explain the scope of the term. *See* 42 U.S.C. § 16911(1), 16911(5)(A)(ii), 16911(7)(I); SMART Guidelines, 73 Fed.Reg. at 38,052. It is the scope of this term which determines whether an individual convicted of a criminal offense must register as a sex offender and maintain registration information. *See* 42 U.S.C. §§ 16911, 16913. And, it is therefore the scope of this term which determines whether an individual faces criminal prosecution for failing to fulfill this duty to register and to maintain registration information. *See* 18 U.S.C. § 2250. For this reason, the rule sets forth rights and duties of individuals and governs the conduct of the public. *See Coke*, 551 U.S. at 172–73, 127 S.Ct. 2339.

Second, as explained above, the Attorney General employed formal notice-and-comment rulemaking procedures in the promulgation of the SMART Guidelines pursuant to Congress’s very broad grant

7. The Court notes that in *Chevron* itself, the EPA regulations at issue interpreted the term “stationary source” in the Clean Air Act. *See*

of statutory authority to the Attorney General in § 16912(b). *See Lott*, 750 F.3d at 217–18; *Bridges*, 741 F.3d at 468; *Stevenson*, 676 F.3d at 565–66. This also indicates that the Attorney General was not announcing a so-called “interpretive rule,” as the term is defined in the APA, because the issuance of an interpretive rule would not have required the complete rulemaking procedures followed with this regulation. *See Coke*, 551 U.S. at 173, 127 S.Ct. 2339.

Finally, the SMART Guidelines are a broad and detailed set of regulations, the product of considerable effort and focus. The provision at issue, the definition of “sex offense” itself, is of fundamental import to the statute and regulations which were designed to ensure sex offender registration. *See* 42 U.S.C. § 16913; SMART Guidelines, 73 Fed.Reg. at 38,030 (“The SORNA reforms are generally designed 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.”). It is through the provision of the SMART Guidelines addressing § 16911(7)(I) that the Attorney General has focused on the meaning of that statutory section and addressed its meaning. *See* SMART Guidelines, 73 Fed.Reg. at 38,052.

For all of these reasons, the Court finds that Congress intended the federal courts to defer to the SMART Guidelines, particularly this section of the SMART Guidelines explaining the meaning of § 16911(7)(I). *See Coke*, 551 U.S. at 172–74, 127 S.Ct. 2339.⁷ Therefore, this section

Catholic Health Initiatives v. Sebelius, 617 F.3d 490, 494 n. 4 (D.C.Cir.2010) (emphasis added). The mere fact that an administrative

of the SMART Guidelines is subject to the *Chevron* framework even though it may “interpret” a provision of a statute.

iii. *Chevron* framework in the criminal context

Finally, the Court recognizes that this is a criminal case and it is not wholly clear whether *Chevron* applies with full force in a criminal matter. *See United States v. Orellana*, 405 F.3d 360, 369 (5th Cir.2005); *see also Crandon v. United States*, 494 U.S. 152, 177, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (“The law in question, a criminal statute, is not administered by any agency but by the courts.... The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”). In *Orellana*, the Fifth Circuit declined to accord *Chevron* deference to an agency regulation in a criminal case. *Orellana*, 405 F.3d at 369. There, the court questioned the relevance of *Chevron* deference to an agency’s interpretation of a statute imposing criminal liability, “particularly where the promulgating agency lacks expertise in the subject matter being interpreted.” *Id.* (citing *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995)). However, in *United States v. Flores*, 404 F.3d 320 (5th Cir. 2005), the Fifth Circuit found that deference, though not necessarily full *Chevron* deference, to an agency regulation was appropriate in the criminal context because the regulation involved was “both reasonable and consistent with [] interpretive norms for criminal statutes.” *United States v. Flores*, 404 F.3d 320, 326–27 (5th

regulation serves a primarily interpretive purpose cannot possibly mean that the regulation

Cir.2005) (citation omitted). Other courts of appeal have also noted this lack of clarity. *See Nat'l Labor Relations Bd. v. Okla. Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir.2003) (explaining it is “not entirely clear exactly how the *Chevron* analysis is affected by the presence of criminal liability in a statute being interpreted by an agency,” and that deference may depend upon “considerations of the agency’s particular expertise”); *but see Yi v. Fed. Bureau Of Prisons*, 412 F.3d 526, 535 (4th Cir.2005) (applying *Chevron* deference to regulation interpreting ambiguous statute regarding the Bureau of Prisons’ granting of Good Conduct Time instead of applying the Rule of Lenity); *cf. Sash v. Zenk*, 428 F.3d 132, 135 (2d Cir.2005) (Sotomayor, J.) (applying *Chevron* deference to BOP regulation related to sentence administration because “the provision interpreted [] defines neither the scope of criminal liability nor the penalty applicable to criminal punishment”).

These cases indicate that some amount of deference should be accorded to agency regulations in the criminal context when (1) the agency has expertise in the area, (2) the regulation is consistent with the interpretive norms accorded criminal statutes, and (3) when the regulation does not interpret the scope of criminal liability or punishment; nevertheless, it is unclear what level of deference such regulations deserve. *See Orellana*, 405 F.3d at 369, *Flores*, 404 F.3d at 326–27; *Okla. Fixture Co.*, 332 F.3d at 1287; *Sash*, 428 F.3d at 135. With this in mind, the Court begins by considering the propriety of applying the *Chevron* framework to the SMART Guidelines.

First, a number of federal courts of appeal have held that “SORNA is a non-

is not entitled to *Chevron* deference categorically. *See id.*

punitive, civil regulatory scheme, both in purpose and effect.” *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir.2013); *Bridges*, 741 F.3d at 468 & n. 5; *United States v. Davis*, 352 Fed.Appx. 270, 272 (10th Cir.2009) (citing *United States v. Comstock*, 507 F.Supp.2d 522, 530 (E.D.N.C.2007) (citing cases), *rev’d on other grounds*, 560 U.S. 126, 130 S.Ct. 1949, 176 L.Ed.2d 878 (2010)). As a noncriminal statute, it would seem that Justice Scalia’s concern in his concurrence in *Crandon*, and the uncertainty regarding deference among the Courts of Appeal, would not be implicated by SORNA as a civil regime. *See Orellana*, 405 F.3d at 369.

Second, as explained above, Congress has explicitly left a gap for the Attorney General to fill in the SORNA statute, by expressly delegating authority to the Attorney General to issue “guidelines and regulations to interpret and implement this subchapter.” *See* 42 U.S.C. § 16912(b). This grant of authority over “the relevant subchapter” applies to 42 U.S.C. §§ 16901–16962, the SORNA statute. *See Stevenson*, 676 F.3d at 564. With this unambiguous grant of authority to the Attorney General, § 16912(b) would allow the Attorney General to promulgate both substantive and interpretive regulations regarding the statute. *Id.*; *see Bridges*, 741 F.3d at 468 & n. 5.

Further, as also set out above, the Attorney General promulgated the SMART Guidelines through formal notice-and-comment procedures as set out in the Administrative Procedures Act, 5 U.S.C. § 553. *See Bridges*, 741 F.3d at 468; *Stevenson*, 676 F.3d at 565–66. The Guidelines were an act of substantive rulemaking and have the force and effect of law. *Lott*, 750 F.3d at 217–18 (“These proposed guidelines carry out a statutory directive to the Attorney General, in section 112(b) of SORNA 42 U.S.C. § 16912(b)) to issue

guidelines to interpret and implement SORNA.” (quoting 72 Fed.Reg. 30,210 (May 30, 2007)); *Stevenson*, 676 F.3d at 565; *see also Mead*, 533 U.S. at 229, 121 S.Ct. 2164 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”). Indeed both the Fourth Circuit and the Sixth Circuit have specifically ruled that courts should accord *Chevron* deference to the SMART Guidelines. *See Bridges*, 741 F.3d at 468 & n. 5; *Stevenson*, 676 F.3d at 564–65.

These various courts of appeal were not concerned by this intersection of *Chevron* deference and criminal law in the instance of the SMART Guidelines and SORNA. In addition, this precedent demonstrates Congress’s belief that the Attorney General has expertise in the administration of sex offender registration, and that rulemaking in this area was rightly within his purview. All of this counsels in favor of the application of the *Chevron* framework to SORNA and the SMART Guidelines.

However, a district court in Vermont has found SORNA to be a “hybrid regulatory scheme, with criminal and noncriminal applications.” *United States v. Piper*, No. 1:12-cr-41-jgm-1, 2013 WL 4052897, at *6 (D.Vt. Aug. 12, 2013). The *Piper* court explained that although SORNA contains civil provisions that set out minimal standards for state sex offender registries, an offender who fails to register faces criminal sanctions. *Id.* With regard to this dual nature of SORNA, the Second Circuit has explained:

SORNA “establishes a comprehensive national system for the registration” of sex offenders, 42 U.S.C. § 16901, and makes federal funding contingent on state registries meeting minimal nation-

al standards. 42 U.S.C. § 16925. The baseline set by these standards covers “[t]he classes of persons who will be required to register; the means by, and frequency with which, registration information will be verified; the duration of registration; the time for reporting of changes in registration information; and the classes of registrants and the information about them that will be included on public sex offender [w]eb sites.” SMART Guidelines, 73 FR at 38032. SORNA also requires sex offenders to maintain current information with state registries. 42 U.S.C. § 16913. This “federal duty” is enforced through criminal penalties.

United States v. Guzman, 591 F.3d 83, 93 (2d Cir.2010).

While the relevant subchapter of SORNA in which Congress delegated rulemaking authority to the Attorney General is 42 U.S.C. §§ 16901–16962, *see Stevenson*, 676 F.3d at 564, the criminal enforcement provisions do not appear in this subchapter, rather in the criminal code. *See Piper*, 2013 WL 4052897, at *6. So there is support for the notion that SORNA does not, in fact, authorize the Attorney General to interpret its criminal enforcement provision. *Id.*

Nevertheless, as the Court in *Piper* explained, § 16911 is a definitional section, and it is the definition of “sex offense” which determines who must register as a sex offender under § 16913, and therefore, who is subject to criminal liability for failing to register pursuant to 18 U.S.C. § 2250. *Id.* at *3–4. Thus, as the court in *Piper* noted, the definition of “sex offense” in SORNA in particular “serves both criminal and noncriminal functions,” by determining the applicability of national standards such as coverage requirements for state registries as well as criminal liability under 18 U.S.C. § 2250. *Id.* at *7. Quot-

ing the Second Circuit in *Guzman*, the *Piper* court noted that § 2250 and § 16913 are “clearly complementary: without § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance.” *Id.* (quoting *Guzman*, 591 F.3d at 90). Still, given this hybrid nature of SORNA and the definition of the term “sex offense,” the *Piper* court accorded *Chevron* deference to the SMART Guidelines to maintain consistency in the definition “sex offense” in both the criminal and noncriminal contexts. *Id.* (citing *inter alia United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992)). The court found that applying *Chevron* deference would advance the “fair warning that must underlie criminal law” and SORNA’s goal to “attempt to unify sex offender registries throughout the United States.” *Id.* (citing *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012)).

This Court agrees with the district court in *Piper*. For the reasons explained there, namely consistency across the civil and criminal provisions of the statute as well as to provide the fair warning fundamental to criminal law, the Court believes that the *Chevron* framework is applicable to the SMART Guidelines. Further, because Congress delegated a broad grant of authority to the Attorney General to promulgate these rules, because the Attorney General subjected the rules to the formal rulemaking process, and because this case does not involve a criminal prosecution for failure to register under 18 U.S.C. § 2250, the Court finds the *Chevron* framework applicable here.

Having concluded that the *Chevron* framework applies to the SMART Guidelines, the Court proceeds to steps one and two of the *Chevron* analysis to determine whether the Court must defer to the At-

torney General's interpretation of § 16911(7)(I).

c. Deference in light of *Chevron*

Relying on *Chevron*, Defendant argues the Court should defer to the Attorney General's interpretation of § 16911(7)(I) included in the SMART Guidelines, which states that the subsection "ensures coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense." Def.'s Suppl. 1-2. (citing SMART Guidelines, 73 Fed.Reg. at 38,052). Under this interpretation, argues Defendant, the False Statement offense at issue in this case is not a sex offense because it does not include the status of the victim as a minor as an element. *Id.* at 4.

The government argues that the SMART Guidelines are intended to set a national "floor, not a ceiling" for an expansive reading of sex offender classification and registration, so the regulatory provision is not entitled to deference by the Court. Gov't's Resp. 3 (citing SMART Guidelines 73 Fed.Reg. at 38,046). The Court addresses these arguments below.

i. *Chevron* step one

[7] In the first step of the *Chevron* analysis, the Court inquires "whether 'the statute is silent or ambiguous with respect to the specific issue' before it." *Aguirre-Aguirre*, 526 U.S. at 424, 119 S.Ct. 1439 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). Defendant posits that the issue before the Court for *Chevron* purposes is whether a conviction for False Statement under 18 U.S.C. § 1001 subjects a person to SORNA's registration requirements. Def.'s Suppl. 3. In the alternative, Defendant asserts that more generally the issue before the Court is whether the conduct underlying a conviction can subject a defendant to registration notwithstanding

the elements of the conviction. *Id.* at 3 n. 3.

Regardless of which manner the question is framed, the Court finds that the statute is ambiguous. The relevant provisions of the statute provide that a person must register if that person is a "sex offender," 42 U.S.C. § 16913, which the statute defines as "an individual who was convicted of a sex offense." *Id.* § 16911(1). As explained above, SORNA defines "sex offense" as "(ii) a criminal offense that is a specified offense against a minor." *Id.* § 16911(5)(A)(ii). As relevant in this case, SORNA defines "specified offense against a minor" in subsection (ii) in the following way: "The 'term specified offense against a minor' means an offense against a minor that involves any of the following: . . . (I) Any conduct that by its nature is a sex offense against a minor." *Id.* § 16911(7)(I). Expanding these nested provisions, the Court discerns the definition of "sex offense" to be "an offense against a minor that involves . . . [a]ny conduct that by its nature would be a sex offense against a minor." *Id.* § 16911(1), 16911(5)(a)(ii), 16911(7)(I). This definition restates "sex offense" as a "sex offense," explaining it to be an offense against a minor involving conduct that by its nature is a sex offense against a minor. The phrase "conduct that by its nature is a sex offense" begs the questions "what conduct" and "what is the nature of that conduct" that would constitute a "sex offense." The Court finds that this definition of "sex offense" is circular, and as such, § 16911(7)(I) is inherently ambiguous. See *Fogo De Chao Churrascaria, LLC v. U.S. Dept. of Homeland Sec.*, 959 F.Supp.2d 32, 40–41 (D.D.C.2013) (finding, in the *Chevron* context, that "defining 'specialized knowledge' as 'special knowledge' or 'advanced knowledge,' the plain language of [the statute] is not clear, but rather is circular and 'inherently ambigu-

ous'") (citing *United States v. Bestfoods*, 524 U.S. 51, 56, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998)).

Further, as the court in *Piper* found, § 16911(7)(I) is ambiguous as to whether courts should employ the categorical or noncategorical approach, that is, whether courts should look only to the elements of the offense or to the surrounding facts and circumstances as well, when determining whether an offense is a specified offense against a minor under § 16911(7)(I).⁸ See *Piper*, 2013 WL 4052897, at *8–9. The court in *Piper* found this ambiguity based on, among other things, the use of the word "convicted" in § 16913. *Id.* The *Piper* court pointed to the Supreme Court's holding in *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), which found the use of the word "convicted" instead of "committed" in a sentencing enhancement statute for certain prior criminal convictions indicated that the court should look only to certain categories of crimes and not the facts underlying them. *Piper*, 2013 WL 4052897, at *8 (citing *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143). The court in *Piper* determined, therefore, that while the use of "convicted" in § 16911(1) counsels in favor of the categorical approach, other provisions and subsections of the statute militate in favor of employing the noncategorical or factual approach. *Id.* at *8–9. The *Piper* court also referred to the Ninth Circuit's holding in *Byun*, and noted that the *Byun* court found that the presence of these indicators created "a modicum of

ambiguity" in the statute. *Id.* at *9. This Court agrees with the *Piper* court and finds ambiguity in the statute for this additional reason.

Notwithstanding the above, the Ninth Circuit in *Byun* resolved the ambiguity itself without considering the SMART Guidelines, by making "the best reading of the statutory structure and language of [SORNA]." *Id.* (citing *Byun*, 539 F.3d at 992). However, the *Chevron* issue was not before the *Byun* court,⁹ so the fact that the *Byun* court went ahead and resolved the ambiguity itself does not preclude this Court from concluding the statute is ambiguous. See *Byun*, 539 F.3d at 992. Because this Court has before it a regulation that was the product of formal rulemaking and promulgated pursuant to an explicit grant of authority from Congress, what is of concern for this Court is whether the statute is ambiguous. See *Mead*, 533 U.S. at 226–30, 121 S.Ct. 2164. And because this Court finds the statute to be ambiguous, if the agency's interpretation is a reasonable one, the reasonable agency interpretation controls, not the preferred interpretation of this Court. See *Silva-Trevino v. Holder*, 742 F.3d 197, 199 (5th Cir.2014) (citing *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)). Finding ambiguity in the statute, the Court must proceed to *Chevron* step two.

ii. *Chevron* step two

Because the Court finds the language of § 16911 to be ambiguous both as to the

8. The *Piper* court refers to these classifications as the "elemental" and "factual" approaches for categorical and noncategorical respectively.
9. There is no mention of *Chevron* in the *Byun* opinion so it appears that the issue was not before that court. Moreover, *Byun* was decided on July 1, 2008, and the SMART Guidelines were published on July 2, 2008. Compare *Byun*, 539 F.3d at 982 (stating the date of

the opinion as July 1, 2008, with SMART Guidelines, 73 Fed.Reg. at 38,030 (stating that the Guidelines are published Wednesday, July 2, 2008)). Further, *Byun* was amended on August 14, 2008, but only to correct the name of the territorial district of the court below and the name of the presiding district judge from whom the case had been appealed. See *Byun*, 539 F.3d at 982.

definition of “sex offense” as “[a]ny conduct that by its nature is a sex offense against a minor” in § 16911(7)(I), and as to whether “sex offense” requires a court to take the categorical or noncategorical approach in determining whether a criminal conviction is a sex offense under SORNA, the Court proceeds to step two of the *Chevron* analysis. *See Aguirre-Aguirre*, 526 U.S. at 424, 119 S.Ct. 1439. In step two, the court must determine whether the agency’s interpretation is “based on a permissible construction of the statute.” *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850–51 (5th Cir.2013) (quoting *Mead*, 533 U.S. at 230, 121 S.Ct. 2164). And, “if the agency’s interpretation is reasonable, it will be upheld.” *Id.* (quoting *Smiley v. Citibank, N.A.*, 517 U.S. 735, 744–45, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996)); *Martinez*, 519 F.3d at 542–43. “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. 2778.

[8] Defendant argues that the interpretation of § 16911(7)(I) is reasonable because taking the categorical approach to determining whether an offense is as a sex offense based on § 16911(7)(I), as the Attorney General has done here, is supported by the presence in the statute of the usual indicators that courts look to in determining whether to apply the categorical approach. Def.’s Suppl. 3–4. Defendant’s primary focus here is the use of the word “convicted” in the definition of “sex offender” in § 16911(1), that is a “‘sex offender’ means an individual who was *convicted* of a sex offense.” *See id.* (emphasis added); *see also Byun*, 539 F.3d at 991; *Piper*, 2013 WL 4052897, at *8–9. As Defendant

explains, the use of the word “conviction” in a statute generally calls for the categorical approach. Def.’s Suppl. 5 (citing *Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1685, 185 L.Ed.2d 727 (2013) (“‘Conviction’ is the relevant statutory hook for the categorical approach.”)). This signal from Congress, Defendant asserts, supports the reasonableness of the Attorney General’s interpretation. *Id.* The government does not argue that this interpretation is not a permissible or reasonable interpretation.

The Court finds this to be a reasonable interpretation. As explained above with regard to the ambiguity of § 16911(1) and § 16911(7), there are indications in the text of the statute that the categorical approach could apply to § 16911. The Attorney General chose to fill the gaps there by interpreting the phrase “any conduct that by its nature is a sex offense against a minor” to require the status of the victim as a minor to be an element of such an offense. *See SMART Guidelines* 73 Fed. Reg. at 38,052. This interpretation clarifies the meaning of the provisions, and removes the ambiguity stemming from the circular language in the definitions in the statute. *See Piper*, 2013 WL 4052897, at *11.

The government argues that this regulatory provision is not intended to delimit or qualify the term “sex offense,” rather it is meant to define a regulatory floor in the establishment of state sex offender registries themselves. Gov’t’s Resp. 3. The Court disagrees. The provision of the SMART Guidelines applicable to § 16911(7)(I) further states “[j]urisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.” SMART Guidelines, 73 Fed.Reg. at 38,052. This language does not counsel that this provision

is meant as a “floor,” as the government argues. What it indicates is the opposite, that the preceding sentence is the Attorney General’s interpretation of the statute, and that jurisdictions can comply with this interpretation by “including convictions for such offenses in their registration requirements.” *See id.*

Furthermore, the SMART Guidelines provide examples of the sorts of offenses that would qualify as a specified offense against a minor under § 16911(7)(I). The SMART Guidelines state that this statutory provision “is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons.” *Id.* These examples of qualifying offenses serve to clarify the ambiguity in § 16911(7)(I); indeed, they demonstrate an awareness of the presence of the ambiguity in the statute, and explain the purpose and meaning of the provision by listing specific offenses that are intended to be covered by this subsection. *See id.*

The government cites to the recent Fifth Circuit opinion *Gonzalez-Medina*, 757 F.3d 425, for the proposition that the Court must take the noncategorical approach and look to facts surrounding the offense in determining whether it constitutes a sex offense. Gov’t’s Resp. 6–8 (citing *Gonzalez-Medina*, 757 F.3d at 430–32). However, the Fifth Circuit’s holding in *Gonzalez-Medina* does not dictate the outcome here. In that case, the Fifth Circuit considered the meaning of § 16911(5)(C), the age differential exception to a sex offense, which is not at issue in this case. *Gonzalez-Medina*, 757 F.3d at 428–29. The Court cited the SMART Guidelines, along with *Byun*, for the prop-

osition that “other age-specific SORNA provisions similarly appear to call for a circumstance-specific, rather than categorical, approach as to age determinations.” *See id.* at 431 (citations omitted).

Indeed, the SMART Guidelines do call for a fact specific approach to age determinations. *See SMART Guidelines*, 73 Fed. Reg. at 38,052–53. Moreover, though the Fifth Circuit took the fact specific approach to age determinations, the *Gonzalez-Medina* court clearly stated that it was not interpreting the term “sex offense,” the term at the heart of the issue in this case. *See Gonzalez-Medina*, 757 F.3d at 429 n. 1. And notably, although not considering whether to accord *Chevron* deference to the SMART Guidelines, the Fifth Circuit did look to them for guidance. *Gonzalez-Medina*, 757 F.3d at 431–32.

Though as the Fifth Circuit explained in *Gonzalez-Medina*, the SMART Guidelines favor applying the fact specific approach to age determinations, the SMART Guidelines counsel a different approach, that is the categorical approach, to determining whether an offense constitutes “any conduct that by its nature is a sex offense against a minor.” *See SMART Guidelines*, 73 Fed. Reg. at 38,052. So although the *Gonzalez-Medina* opinion suggests that the SMART Guidelines require a factual approach to certain provisions of § 16911, the case does not stand for the proposition that every subsection of § 16911 requires a factual, noncategorical approach. Rather, *Gonzalez-Medina* supports this Court’s finding that it should turn to the SMART Guidelines to seek guidance as to the meaning of provisions of § 16911, and, as a result, that this Court should apply the categorical approach to § 16911(7)(I). *See Gonzalez-Medina*, 757 F.3d at 431–32; SMART Guidelines, 73 Fed. Reg. at 38,052.

Furthermore, the interpretations of § 16911(7)(I) by the Ninth Circuit in *Byun*

and the Eleventh Circuit in *Dodge*, that § 16911(7)(I) warrants a noncategorical or factual approach to determining whether an offense constitutes “any conduct that by its nature is a sex offense against a minor,” do not foreclose the holding here. As explained above, the *Byun* court did not have occasion to consider the SMART Guidelines, as the case was decided one day before the publication of the final SMART Guidelines in the Federal Register: *Byun* was decided on July 1, 2008, and the SMART Guidelines were published on July 2, 2008. Compare *Byun*, 539 F.3d at 982 (stating the date of the opinion as July 1, 2008), with SMART Guidelines, 73 Fed.Reg. at 38,030 (stating that the Guidelines are published Wednesday, July 2, 2008). Moreover, it does not appear that the parties in *Byun* raised the SMART Guidelines, or the issuance of *Chevron* deference to them, to the Ninth Circuit. See generally *Byun*, 539 F.3d 982; see 72 Fed.Reg. 30,210.¹⁰ Nor does it appear that the parties raised these arguments before the Eleventh Circuit in *Dodge*, and that court relied heavily on the ninth circuit’s reasoning in *Byun*. See *Dodge*, 597 F.3d at 1353–56.

Importantly, employing the categorical approach as set out by the SMART Guidelines to the facts of *Dodge* would not require a different result. In that case, the offense of conviction was 18 U.S.C. § 1470, knowingly transmitting obscene material to a person less than sixteen years old, with the knowledge that the person is less than sixteen years old. See *id.* at 1351. Clearly, that offense has as an element the

10. Although the Attorney General had promulgated an interim rule on February 27, 2007, prior to the Ninth Circuit’s decision in *Byun*, the Ninth Circuit later found the interim rule was improperly promulgated because it failed to comply with the notice and comment requirements of the APA, and refused to consider the retroactivity provisions. *United*

status of the victim as a minor, so the SMART Guidelines would not preclude the finding that § 1470 was a sex offense, even taking the categorical approach. See SMART Guidelines, 73 Fed.Reg. at 38,052; 18 U.S.C. § 1470.¹¹

Finally, the Court finds it important to discuss one matter that the government does not specifically address. In its briefing with the Court, the government states that “[i]t is the Government’s position that § 16911(7)(I)’s coverage requirement can, and properly should, also be met by requiring individuals to register as sex offenders who engaged in any other conduct that by its nature is a sex offense against a minor.” Gov’t’s Resp. 4.

To the extent that the government is informing the Court that it, as the representative of the Attorney General, interprets § 16911(7)(I) differently from what is set out in the SMART Guidelines, *Chevron* deference to the government’s position first advanced in a litigation brief is inappropriate. See *Pool Co. v. Cooper*, 274 F.3d 173, 177 n. 3 (5th Cir.2001) (litigation briefs not entitled to *Chevron* deference). And while *Skidmore* deference, which as explained above, is usually accorded to agency interpretations of statutes they administer which do not carry the force of law, the Fifth Circuit has found that interpretations advanced in litigation briefs are due a level of deference described by the Supreme Court as “near indifference.” *Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 928 (5th Cir.2012); see *Mead*, 533 U.S. at 228, 121 S.Ct. 2164

States v. Mattix, 694 F.3d 1082, 1083 (9th Cir.2012) (citing *United States v. Valverde*, 628 F.3d 1159 (9th Cir.2010)).

11. The issue not before it, this Court does not make a specific finding as to whether a conviction for 18 U.S.C. § 1470 is a sex offense under SORNA.

(citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988)). “Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.” *Bowen*, 488 U.S. at 213, 109 S.Ct. 468; *see Luminant*, 675 F.3d at 928. The Fifth Circuit concluded that the court is only bound to extend “some modicum of deference” to interpretations advanced in a litigation brief. *Id.* (citing *Mead*, 533 U.S. at 228, 121 S.Ct. 2164 and noting that the approach outlined in *Skidmore* “has produced a spectrum of judicial responses,” with deference to litigation briefs at the lowest end of that spectrum). With this small amount of deference appropriate, the Court does not find the government’s position persuasive.

The Court finds the Attorney General’s interpretation of the § 16911(7)(I) as stated in the SMART Guidelines to be reasonable, so the Court proceeds to apply that interpretation to this case. *See Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

d. Deference to the SMART Guidelines

[9] The Court, applying the categorical approach set forth in the SMART Guidelines to the facts of this case, concludes that Defendant is not required to register as a sex offender. As stated above, the only provision of § 16911 that possibly includes Defendant’s offense of False Statement as a sex offense is § 16911(7)(I) defining “specific offense against a minor” as “[a]ny conduct that by its nature is a sex offense against a minor.” *See 42 U.S.C. § 16911(7)(I)*. The SMART Regulations interpreting this subsection state in part: “Any conduct that by its nature is a sex offense against a minor. It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense.” SMART Guidelines,

73 Fed.Reg. at 38,052. The crime to which Defendant has pleaded guilty, False Statement, under 18 U.S.C. § 1001, provides *inter alia*:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
 (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years.

18 U.S.C. § 1001.

As is apparent, 18 U.S.C. § 1001 does not contain an element involving the status of the victim as a minor. *See 18 U.S.C. § 1001*. False Statement is therefore not a specified offense against a minor, nor is it a sex offense under SORNA. *See 42 U.S.C. § 16911*. Accordingly, Defendant has not pleaded guilty to a sex offense under SORNA and registration is not required under federal law. *See 42 U.S.C. §§ 16911, 16913*.

e. According lesser deference than *Chevron*

Moreover, if this Court’s conclusion that the SMART Guidelines are properly evaluated under the *Chevron* framework is incorrect in the criminal context or for some other reason, the Court nonetheless accords the SMART Guidelines significant respect under *Skidmore*. *See Skidmore*, 323 U.S. at 140, 65 S.Ct. 161. The deference accorded to agency interpretations under *Skidmore* varies based upon “the

thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.’” *Nassar*, 133 S.Ct. at 2533 (quoting *Skidmore*, 323 U.S. at 140, 65 S.Ct. 161). The Court finds the SMART Guidelines persuasive in interpreting § 16911(7)(I) for the reasons set forth in the discussion of “interpretive rules” and because the SMART Guidelines foster consistency between the civil and criminal functions of SORNA, as explained by the court in *Piper*. See *Piper*, 2013 WL 4052897, at *6–7. The Court further finds the SMART Guidelines persuasive because they are reasonable and consistent with the judiciary’s interpretive norms for criminal statutes, as explained below. See *Flores*, 404 F.3d at 326–27.

Additionally, the Court reaches this conclusion because the SMART Guidelines are thorough, providing insight into the many aspects of the SORNA statute. See generally SMART Guidelines, 73 Fed.Reg. at 38,030–38,070. The SMART Guidelines are well-developed, the product of formal rulemaking and the result of public input which has been incorporated into the final regulations. *Id.* at 38,030–32 (noting receipt of “[a]pproximately 275 comments” which the Department of Justice “considered carefully” and incorporated into the final regulations). And, a number of courts of appeal have looked to them for direction in interpreting SORNA, whether or not formally according them *Chevron* deference. See, e.g., *Gonzalez-Medina*, 757 F.3d at 432–32; *Bridges*, 741 F.3d at 468 & n. 5; *Lott*, 750 F.3d at 217–18; *Stevenson*, 676 F.3d at 564–65.

Given the thoroughness of the SMART Guidelines, the specificity with which they address the issue before this Court, the regard in which they are held by other courts, and the formality through which

they were created, the Court finds the SMART Guidelines persuasive as to the question in this case: whether a conviction for False Statement under 18 U.S.C. § 1001 constitutes a sex offense as “[a]ny conduct that by its nature is a sex offense against a minor” pursuant to 42 U.S.C. § 16911(7)(I). The Court finds that it does not because it is not the type of offense which § 16911(7)(I) was intended to reach. See SMART Guidelines 73 Fed. Reg. at 38,052.

f. Applying the noncategorical approach

[10] Moreover, even if the Court concluded that the SMART Guidelines are not worthy of either *Chevron* deference or *Skidmore* respect, the result would be the same. If this Court adopted the noncategorical approach, and considered the facts and circumstances surrounding Defendant’s offense, still the Court would not find that Defendant was “convicted of a sex offense” pursuant to SORNA. See 42 U.S.C. §§ 16911(1), 16913.

42 U.S.C. § 16911(1) provides that “[t]he term ‘sex offender’ means an individual who was convicted of a sex offense.” 42 U.S.C. § 16911(1). And, as relevant in this case and as discussed above, a sex offense is “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” See *id.* § 16911(7)(I). The Court believes that by using the word “convicted” in § 16911(1), Congress intended, or the statute means, that a court must look to the conduct underlying the offense of conviction to determine whether an offense constitutes a sex offense. See *id.* The word “convicted” ties the conduct that “by its nature is a sex offense against a minor” to the conduct of the offense of conviction. See 42 U.S.C. § 16911(1), 16911(7)(I). Under this reasoning, it is the offense of conviction that must qualify as a sex of-

fense against a minor given the elucidating facts surrounding the conviction, as determined by the noncategorical approach.

Looking to the facts of this case, it is true that within the factual basis, to which Defendant admitted as part of the Plea Agreement, Defendant admitted he engaged in acts that involved sexual contact with a minor. Specifically, the false statements Defendant made were:

that on the night of September 13, 2012 his wife was physically present in their home the entire evening; that on the night of September 13, 2012 Baptiste did not receive a massage from M.A.; and that on the night of September 13, 2012 Baptiste had never touched M.A.'s inner thighs and licked her vagina with his tongue.

Plea Agreement 6.

And Defendant further admitted:

These statements were not factually true in that on the night of September 13, 2012 Baptiste's wife was not home the entirety of the evening, she was performing 24 hour Staff Duty Officer duty at her military command's headquarters and this duty kept her out of the home for the majority of those 24 hours; on the evening of September 13, 2012 Baptiste did receive a massage from M.A.; and that on the evening of September 13, 2012 Baptiste did touch M.A.'s inner thighs did [sic] lick M.A.'s vagina with his tongue.

Id.

However, the acts involving the minor, M.A., while the subject matter of the false statement, do not comprise the conduct giving rise to the False Statement conviction. *See* 18 U.S.C. § 1001; *see generally* Plea Agreement. Such acts, if charged in

12. The Court recognizes that "in some situations a sexual act might not even be the prerequisite to a registerable 'sex offense.'"

the information to which Defendant pleaded guilty, might well give rise to a sex offense conviction as defined by § 16911, but the conduct giving rise to such an uncharged and unconvicted offense is not the source of the conviction here.

Moreover, the primary victim of a false statement offense is the government. *See United States v. Rodriguez-Rios*, 14 F.3d 1040, 1045 (5th Cir.1994) (en banc) (citing *United States v. Gilliland*, 312 U.S. 86, 93, 61 S.Ct. 518, 85 L.Ed. 598 (1941)); *United States v. Montemayor*, 712 F.2d 104, 107 (5th Cir.1983). Indeed, the purpose of the false statement statute is "to protect the government from practices that would pervert its legitimate functions." *Rodriguez-Rios*, 14 F.3d at 1045 (citing *Gilliland*, 312 U.S. at 93, 61 S.Ct. 518).

In the cases cited by the government to support the use of the noncategorical approach and to consider the facts underlying the offense of conviction, *United States v. Dodge* and *United States v. Byun*, the direct victims of the offense and its conduct were not the government, but rather a minor. In *Dodge* the conduct at issue was knowingly transferring obscene material to a person less than sixteen years old under 18 U.S.C. § 1470. *Dodge*, 597 F.3d at 1351. The victim of the offense was a minor, and the facts showed that the acts constituting the conduct of the offense of conviction were sexual in nature.¹² *See id.* at 1355. In *Byun*, the conduct at issue was importation of an alien for prostitution pursuant to 18 U.S.C. § 1324 and § 1328; the facts demonstrated that the victim was a minor, and the conduct of the offense, importing an alien for prostitution was also sexual in nature. *See Byun*, 539 F.3d at 983, 994.

See Dodge, 597 F.3d at 1355. Under the facts here, however, sexual acts are implicated.

Those courts looked to the facts to shed light upon the conduct which constituted the offenses of conviction to determine if those convictions were a sex offense. *See id.* at 994; *Dodge*, 597 F.3d at 1351, 1355. But in looking at the facts and circumstance of the offense of conviction, the courts did not transform the offense of conviction into a completely different offense to find the existence of a sex offense. In fact, in determining whether the offense of conviction was a sex offense, the core of the offenses in *Dodge* and *Byun* was not altered by consideration of the facts; the convictions had been and remained importing aliens for prostitution and transferring obscene material to a person under the age of sixteen, respectively. *See id.* at 994; *Dodge*, 597 F.3d at 1351, 1355. The facts considered by the courts in *Byun* and *Dodge* revealed the offenses of conviction to be sex offenses based upon the conduct giving rise to the conviction, but they did not turn the offenses of conviction into completely different offenses. *See Byun*, 539 F.3d at 994; *Dodge*, 597 F.3d at 1351, 1355.

The facts of both *Dodge* and *Byun* present a very different situation from the case at hand. In this case, the conduct constituting the offense of False Statement are the three false statements Defendant made to the FBI. The minor is not the primary victim of the False Statement. *See Rodriguez-Rios*, 14 F.3d at 1045. For the Court to find a sex offense in the False Statement conviction in this case, it would be necessary for the facts of the case to transform the conduct giving rise to the False Statement offense from knowingly making a false statement to the United States government into some form of abusive sexual contact under 18 U.S.C. § 2244. The courts in *Byun* and *Dodge* did not go this far, and this Court is unwilling to do so here.

Finding that registration pursuant to SORNA for this federal offense is not required as a condition of supervised release, the Court turns to whether Defendant must register under Texas law and whether the Court should impose registration pursuant to its discretionary powers to do so.

3. Registration under Texas law as a condition of supervised release

With regard to registration pursuant to Texas law, the government states, “The determination as to whether the Defendant must register as a sex offender under the laws of the state of Texas, absent a determination that he must register under SORNA, will ultimately be adjudicated by the state of Texas.” Gov’t’s Br. 13. This is not entirely true. This Court can make a determination as a condition of his supervised release whether Defendant must register under Texas law. *See United States v. Arms*, 349 Fed.Appx. 889, 891–92 (5th Cir.2009) (citing *United States v. Talbert*, 501 F.3d 449, 452 (5th Cir.2007)).

Defendant argues that registration is not required under Texas law. Def.’s Mem. 1–4. The government comes very close to conceding this point. Gov’t’s Br. 13–14. Based upon a review of Defendant’s arguments, and based upon the government’s response, it would appear that Defendant need not register as a sex offender under Texas law. However, the Court refrains from making a determination on this issue.

4. Discretionary imposition of registration requirements as condition of supervised release

Finally, the government requests that, should the Court find that registration is not mandatory, the Court impose registration as a sex offender as a discretionary condition of supervised release. *See* Gov’t’s Br. 7 (citing 18 U.S.C. § 3583(d)(1)-

(3)). These discretionary conditions of supervised release

must be related to one of four factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need ... to afford adequate deterrence to criminal conduct; (3) the need ... to protect the public from further crime of the defendant; and (4) the need ... to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

United States v. Ellis, 720 F.3d 220, 225 (5th Cir.2013) (citations and quotation marks omitted).

Upon consideration of the facts of this case, the Court finds that the government's concerns are better addressed by conditions of supervised release other than sex offender registration. The Court shall impose such conditions by separate order.

III. CONCLUSION

For the foregoing reasons, the Court finds that Defendant shall not be required to register as a sex offender as a condition of supervised release pursuant to 42 U.S.C § 16913.

SO ORDERED.



Gerald BARLOW, et al., Plaintiffs,

v.

**LOGOS LOGISTICS, INC. and
Apptree, Inc., Defendants.**

Case No. 10-cv-14371.

United States District Court,
E.D. Michigan,
Southern Division.

Signed July 20, 2014.

Background: Leased drivers brought action against staff leasing agency, alleging that failure to pay overtime wages to drivers whom it had leased to a motor carrier violated Fair Labor Standards Act (FLSA).

Holding: Following jury trial, the District Court, Stephen J. Murphy, III, J., held that leased drivers were exempt from overtime provisions of FLSA under motor carrier exemption.

Ordered accordingly.

1. Automobiles ☞116

Labor and Employment ☞62

The Secretary of Transportation has jurisdiction over workers (1) who are employed by a motor carrier engaged in interstate commerce and (2) whose activities directly affect the safety of vehicle operations. 49 U.S.C.A. § 31502(b)(1).

2. Administrative Law and Procedure ☞431

If the statutory text does not compel a particular conclusion, courts should defer to an agency's reasonable interpretations of a statute that it administers.

3. Labor and Employment ☞2290(4)

Drivers leased to motor carrier by staff leasing agency were "employees" under Motor Carrier Act (MCA), and thus were under jurisdiction of Secretary of



KeyCite Blue Flag – Appeal Notification

Appeal Filed by [CURTIS BARKER v. UNITED STATES](#), 8th Cir., June 29, 2022

2022 WL 1749252

Only the Westlaw citation is currently available.

United States District Court,
W.D. Missouri, Western Division.

Curtis David BARKER, Plaintiff,

v.

UNITED STATES of America, Respondent.

Case No. 4:21-cv-00470-RK-P

|

Crim. No. 4:16-00084-CR-RK-1

|

Signed 05/31/2022

Attorneys and Law Firms

Curtis David Barker, Talladega, AL, Pro Se.

[William A. Alford, III](#), United States Attorney's Office, Kansas City, MO, for Respondent.

ORDER

[ROSEANN A. KETCHMARK](#), JUDGE UNITED STATES DISTRICT COURT

*¹ Movant is incarcerated at the Federal Correctional Institution in Talladega, Florida, where he is serving a 180-month sentence for drug and firearm offenses. (Crim. Doc. 62.)¹ Movant pled guilty to his crimes (*id.*), and he unsuccessfully challenged the validity of his convictions on appeal. (Crim. Doc. 71-1.) Now before the Court is Movant's pro se motion to vacate, set aside, or correct this sentence pursuant to [28 U.S.C. § 2255](#). (Doc. 1.) The motion is fully briefed. (Docs. 7, 11, 14, 18.)² Movant seeks relief under [§ 2255](#) challenging the Court's order at sentencing regarding "special sex offender conditions" imposed on supervised release. Movant also asserts a claim of ineffective assistance of appellate counsel for failing to challenge this special condition on direct appeal.

After careful consideration and for the reasons explained below, Movant's motion to vacate, set aside or correct his

sentence pursuant to [§ 2255](#) is **GRANTED in part** and **DENIED in part**.³ Specifically, Movant's motion to vacate, set aside, or correct his sentence is granted as to the judgment entered April 18, 2019, in *United States v. Barker*, 4:16-cr-00084-RK-1 (Crim. Doc. 62), imposing as a mandatory condition Movant "must comply with the requirements of the Sex Offender Registration and Notification Act ['SORNA'],” and as a special condition Movant shall comply with federal sex offender registration requirements. Movant's motion is otherwise denied.

I. Background

On September 19, 2018, Movant entered a guilty plea before this Court pursuant to a written plea agreement to three counts: felon in possession of a firearm and ammunition; possession of marijuana and cocaine with the intent to distribute; and possession of a firearm in furtherance of drug trafficking. (Crim. Docs. 53, 54.) Movant's plea agreement included the following appeal waiver:

With respect to all other issues [other than the denial of his pretrial motion to suppress evidence], however, [Movant] expressly waives his right to appeal his sentence, directly or collaterally, on any ground except claims of (1) ineffective assistance of counsel; (2) prosecutorial misconduct; or (3) an illegal sentence. An "illegal sentence" includes a sentence imposed in excess of the statutory maximum, but does *not* include less serious sentencing errors, such as a misapplication of the Sentencing Guidelines, an abuse of discretion, or the imposition of an unreasonable sentence.

*² (Crim. Doc. 53 at 14.)

The presentence investigation report ("PSR") completed by the Probation Office prior to Movant's sentencing included as part of Movant's criminal history a 1981 conviction under Florida state law for attempted sexual battery. (Crim. Doc. 57 at 9.) In the sentencing section, the PSR recommended as a special condition to any term of supervised release, among

others, that “[t]he defendant shall comply with all state and federal sex offender registration requirements.” (*Id.* at 26.) Movant did not object to the PSR’s special conditions as to any term of supervised release to be imposed. (*See id.* at 28-32.)

Movant’s counsel (who represented Movant both at plea/sentencing and on appeal) submitted an affidavit in the Government’s supplemental response wherein counsel attests that prior to sentencing Movant received a copy of the PSR and that counsel “visited in person with [Movant] to review, explain and discuss the PS[R] in its entirety, including the suggested special condition … that he comply with all state and federal sex offender registration requirements.” (Doc. 14-1.) Counsel attests Movant “initially questioned the applicability” of the condition but “indicated that he understood that any legal objection would be meritless and that this condition would not constitute a new requirement that he register as a sex offender,” and “then indicated that he had no objection to this provision.” (*Id.*) In his reply to the Government’s supplemental response, Movant asserts he did not see the PSR “on paper” or otherwise until “he was at Oklahoma City” after sentencing. (Doc. 18 at 3.)

At the sentencing hearing, after imposing a term of supervised release after imprisonment, the Court ordered that Movant “shall comply with the mandatory and standard conditions that have been adopted by this Court” in addition to “the special conditions that are outlined in section D of the presentence investigation report,” (Sent. Tr. at 27-28), which includes the sex offender registration requirement as noted above. Neither Movant nor Movant’s counsel objected at the sentencing hearing to this special condition. Finally, the Court’s written judgment requires that Movant “comply with the requirements of the Sex Offender Registration and Notification Act [SORNA]” and “comply with all state and federal sex offender registration requirements” on supervised release. (Crim. Doc. 62 at 3, 5.)

II. Legal Standard

Under 28 U.S.C. § 2255, a federal prisoner may collaterally attack (1) a sentence imposed in violation of the Constitution or federal law, (2) a sentence for which the court lacked jurisdiction to impose, (3) a sentence that exceeds the maximum authorized by law, or (4) a sentence that is otherwise subject to collateral attack. § 2255(a). Generally, an evidentiary hearing is required “[u]nless the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief.” § 2255(b). At the same time, a district court may grant § 2255 relief without an evidentiary

hearing “where there is no disputed question of fact and the files and the records of the case establish conclusively that the petitioner is entitled to relief.” *Umanzor v. United States*, No. C 11-4024-MWB, 2012 WL 124377, at *4 (N.D. Iowa Jan. 17, 2012) (citing *Grady v. United States*, 269 F.3d 913, 918 (8th Cir. 2001)).

III. Discussion

*3 Movant asserts four grounds for relief under § 2255. In Grounds One, Two, and Four, Movant claims he was denied effective assistance of appellate counsel because his attorney failed to challenge the Court’s order as a condition of supervised release that he comply with federal and state sex offender registration requirements. (Doc. 1 at 4-5, 8.) To prevail on these claims, Movant must show that counsel’s performance was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (*Strickland* applies to the claims of ineffective assistance of appellate counsel). Relatedly, in Ground Three, Movant claims the Court erred by “impos[ing] special sex offender conditions … without any explanation … [because he] did not qualify for it” since the instant criminal conviction was not related to the earlier Florida attempted sexual battery conviction and because he is not required to register as a sex offender under either state or federal law. (Doc. 1 at 7.)

First, to the extent Movant raises a claim of error by the Court, the Government argues Movant has procedurally defaulted this claim by failing to raise it on direct appeal. Generally, a § 2255 movant cannot assert on post-conviction relief a claim he did not raise on direct appeal. *McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001)). A movant can overcome this procedural default, however, “by demonstrating cause for the default and prejudice or actual innocence.” *Id.* (citing *Bousley v. United States*, 523 U.S. 614, 622 (1984)). As the Eighth Circuit has recognized, “[i]neffective assistance of appellate counsel may [itself] constitute cause and prejudice to overcome a procedural default.” *Becht v. United States*, 403 F.3d 541, 545 (8th Cir. 2005) (citation omitted). In other words, an ineffective assistance of appellate counsel claim (as Movant asserts here) can serve as both an independent claim for habeas relief as well as to excuse procedural default of a claim. *Id.* For this reason, the Court considers first Movant’s claim for ineffective assistance of appellate counsel as both an independent claim for relief under § 2255 as well as to overcome the procedural default as to Movant’s third Ground for habeas relief.

To establish ineffective assistance of appellate counsel, Movant “must show that appellate counsel’s performance was constitutionally deficient and that he was prejudiced by that deficiency.” *Charboneau v. United States*, 702 F.3d 1132, 1136 (8th Cir. 2013) (citing *Strickland*, 466 U.S. at 687). In other words, Movant must demonstrate (1) “counsel’s performance was objectively unreasonable” and (2) “a reasonable probability that the outcome of the appeal would have been different if counsel had raised the claim.” *Roe v. Delo*, 160 F.3d 416, 418 (8th Cir. 1998) (citation and quotation marks omitted).

Movant argues appellate counsel⁴ was constitutionally ineffective in representing him on appeal because counsel (1) failed to research Movant’s files and records that would have revealed that his earlier Florida conviction does not require him to register as a sex offender under either state or federal law, and (2) failed to raise the issue on direct appeal. Movant argues appellate counsel’s decision not to raise this challenge could not have been a strategic decision because the sex-offender-registration special condition on supervised release does not apply to Movant and the Court did not “give reason[s] as to why Mr. Barker qualified for the special condition[].”

A. Prejudice

First, the Court considers *Strickland*’s prejudice prong. Under this prong, the Court considers whether there is a reasonable probability that had appellate counsel raised this claim, it would have been meritorious. See *Becht*, 403 F.3d at 546; *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994) (“counsel’s failure to advance a meritless argument cannot constitute ineffective assistance”).

*⁴ Because Movant failed to object to this condition of supervised release at sentencing or otherwise, had appellate counsel challenged this special condition on direct appeal, it would have been subject (as unpreserved) to plain error review. See *United States v. Carlson*, 406 F.3d 529, 531 (8th Cir. 2005). “Plain error occurs if the district court deviates from a legal rule, the error is clear under current law, and the error affects the defendant’s substantial rights.” *United States v. Ristine*, 335 F.3d 692, 694 (8th Cir. 2003) (citation and quotation marks omitted). In addition, the Eighth Circuit regularly enforces appeal waivers, such as the one here, so long as (1) the appeal falls within the scope of the waiver, (2) the appeal waiver and plea agreement were entered into knowingly and voluntarily, and (3) enforcing the appeal

waiver will not result in a miscarriage of justice. *United States v. Andis*, 333 F.3d 886, 890-91 (8th Cir. 2003) (enforcing appeal waiver where all three of these factors were satisfied).

1. Appeal Waiver

Accordingly, the Court first considers whether Movant’s appeal would have otherwise been barred by the waiver in the plea agreement.

At his change-of-plea hearing, Movant affirmatively indicated he understood the subsections of the plea agreement in which he waived his right to appeal his conviction and sentence except for the listed grounds, and the Court questioned Movant at length concerning the voluntariness and knowledge of his plea. (See Plea Tr. at 19.) Additionally, and contrary to Movant’s unsupported argument otherwise, that Movant seeks to challenge the special conditions to his supervised release does not in itself make his plea (including the appeal waiver) unknowing or involuntary. See *United States v. Blue Coat*, 340 F.3d 539, 541-42 (8th Cir. 2003); *Andis*, 333 F.3d at 892 (considering enforcement of appeal waiver in light of challenge to conditions of supervised release); but see *United States v. Icker*, 13 F.4th 321, 326 (3d Cir. 2021) (holding appeal waiver unenforceable because the plea agreement did not specifically set forth the sex offender registration condition that movant sought to challenge in post-conviction relief). The record supports that Movant knowingly and voluntarily agreed to the appeal waiver.

Although Movant knowingly and voluntarily agreed to the appeal waiver (and plea agreement generally), the next inquiry concerns whether the appeal – challenging the condition of supervised release that he comply with sex offender registration requirements – would fall within the scope of the waiver. Movant expressly agreed to waive his right to appeal his sentence “on any ground” except prosecutorial misconduct, ineffective assistance, and an illegal sentence. The agreement defined “illegal sentence” as *including* a sentence beyond the statutory maximum but *not including* misapplication of the Sentencing Guidelines, an abuse of discretion, or the imposition of an unreasonable sentence. When faced with this kind of appeal waiver, the Eighth Circuit has recognized such language “implies that there exists a range of sentencing errors and that not all of those errors fall within the scope of the waiver.” *United States v. Bradford*, 806 F.3d 1151, 1155 (8th Cir. 2015). And unless the government shows the movant “clearly and

unambiguously waived his right to bring this appeal,” the court will not enforce the appeal waiver and will instead proceed to the merits of the claim. *Id.*

Indeed, in *Andis*, the Eighth Circuit recognized that plea agreements must be “strictly construed” and that “any ambiguities ... will be read against the Government and in favor of a defendant’s appellate rights.” 333 F.3d at 890. In the context of the present motion, the Government has not shown Movant clearly and unambiguously waived his right to challenge the conditions of supervised release. And specifically, Movant argues here that the condition of supervised release that he must comply with state and federal sex offender registration requirements is not itself lawful. If true, this argument “might bring his sentence within the appeal waiver’s definition of illegal sentence.” *Bradford*, 806 F.3d at 1155.⁵ Accordingly, the Court does not find the appeal waiver would bar review of Movant’s claim had it been raised on direct appeal. Therefore, the Court will proceed to analyzing the claim under the plain error standard that would apply to the merits had this claim been raised on direct appeal.

2. Substantive Review for Plain Error

*5 The crux of Movant’s argument appears to be that because his earlier conviction under Florida law for attempted sexual battery does not require registration as a sex offender under either state or federal law, the condition that he comply with state and federal sex offender registration requirements is not permitted by law. *Title 18 of the United States Code, § 3583(d)* provides, in relevant part: “The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act.” In *United States v. Rhone*, 535 F.3d 812 (8th Cir. 2008), the Eighth Circuit held that, under § 3583(d), “before the district court could require Rhone to register under SORNA, as a condition of supervised release, it had to first determine” whether Rhone was required to register under SORNA based on his previous conviction. *Id.* at 813-14. There, the Eighth Circuit held the district court abused its discretion when it failed to “make an independent determination whether” Rhone was required to register as a sex offender (in that case, under federal law) based on a prior conviction.

In opposing the instant motion for relief under § 2255, the Government attempts to distinguish *Rhone* by arguing in

that case the sentencing court “expressly directed that the defendant register as a sex offender under SORNA,” whereas here, Movant was “merely directed ... [to] register if *he were required to*.” (Doc. 7 at 10.) The Court does not find the Government’s attempted distinction persuasive.

In *Rhone*, the written judgment stated: “The defendant must remain in compliance with all sex offender registration and public notification requirements ... The defendant must read and sign the Offender Notice and Acknowledgment of Duty to Register as a Sex Offender form.” 535 F.3d at 814. At the sentencing hearing, as the Eighth Circuit set out in its opinion, while pronouncing the special condition largely as stated above the district court also noted, “I don’t know if he was on the sex offender registration requirement” and, after discussion with the probation officer who indicated Rhone was not subject to the registry although the law may have recently changed to require him to register, the Court stated, “[i]f [federal registration law] applies, then you’ll have to register. If it does not, then you won’t have to, so the prison officials and Probation will help you sort that out.” *Id.* *Rhone* explicitly held, in addition to the holding above, that district courts “may not improperly delegate this legal determination [whether a defendant must register as a sex offender under federal law] to the probation office or the Bureau of Prisons.” *Id.* at 815.

In this case, at Movant’s sentencing hearing, the Court ordered that Movant comply with the mandatory and standard conditions that have been adopted by this Court as well as “the special conditions that are outlined in section D of the presentence investigation report.” The special conditions in the PSR included that Movant “shall comply with all state and federal sex offender registration requirements.” The written judgment also included, as a mandatory condition of supervised release, that Movant comply with SORNA and as a special condition that Movant “shall comply with all state and federal sex offender registration requirements.” The Government argues these conditions only require Movant to register as a sex offender “if *he were required to*,” not that he affirmatively register. In other words, *Rhone* aside, the Government argues the condition that Movant comply with sex offender registration requirements is the equivalent of the mandatory condition on supervised release that an offender generally must comply with state and federal law.

To support this argument, the Government primarily relies on *United States v. Branch*, 421 F. App’x 659 (8th Cir. 2011). In *Branch*, the Eighth Circuit affirmed a federal registration

requirement as a condition of supervised release after the defendant was convicted under 18 U.S.C. § 1952 for misusing facilities of interstate commerce to run an illegal business, having transported a 17-year-old female across state lines for the express purpose of prostitution. *Id.* at 660-61. The Eighth Circuit determined the sole issue before the Court “whether the condition [that Movant “comply with all federal, state and local sex offender registration laws and provide verification of registration to the probation officer”] itself is valid.” *Id.* at 661. Ultimately, the court of appeals held the district court did not abuse its discretion because the condition “simply requires compliance with the law.” *Id.* at 662.

*6 Critically, though, in *Branch* the condition “simply require[d] compliance with the law” because the instant federal offense to which the defendant had plead guilty (and for which a term of supervised release was thereby imposed) itself provided the sex offense for which the defendant was required to register. See *id.* at 660-61 (defendant plead guilty to misusing interstate commerce to run an illegal business, having transported a 17-year-old female across state lines for the express purpose of prostitution); see also § 1952(b)(1994) (defining “unlawful activity” under this criminal statute as including “prostitution offenses in violation of the laws of the State in which they are committed or of the United States”).

This principle in *Branch* is borne out further by the *Branch* Court’s reliance on an earlier Eighth Circuit opinion: *United States v. Jorge-Salgado*, 520 F.3d 840 (8th Cir. 2008). See *Branch*, 421 F. App’x at 661-62 (quoting *Jorge-Salgado*). In *Jorge-Salgado*, the Eighth Circuit had earlier held that a district court did not abuse its discretion in requiring a defendant to register as a sex offender as a requirement of his supervised release “based on his previous conviction of criminal sexual conduct” under state law. 520 F.3d at 841. Specifically, the Eighth Circuit reasoned the district court did not abuse its discretion in doing so because the defendant’s

failure to register as a sex offender would have violated this mandatory condition [under § 3583(d)], that an offender “not commit another Federal, State, or local crime during the term of supervision”] because he would have committed a state crime under Minnesota law if he did not re-register as a sex offender based on the present convictions.

Id. at 843. Viewed in this way, *Branch* and *Jorge-Salgado*, particularly in light of *Rhone*, do not support the Government’s argument (extended to its natural end) that a sentencing court may always include as a condition of

supervised release that the defendant comply with state and federal sex offender registration requirements without regard to whether or not the defendant is actually required to do so. See also *United States v. Wallette*, 686 F.3d 476, 485 (8th Cir. 2012) (“Plain error results if the district court fails to make the necessary individualized findings for imposing a special condition.”) (citation omitted). In both *Branch* and *Jorge-Salgado*, it appears the condition that a defendant comply with sex offender registration requirements was functionally the same as the requirement that the offender comply with state and federal law – and therefore was not an error for which the defendants were entitled to appellate relief – because the offender was otherwise required to register under the law: the *Branch* defendant having just been convicted under 18 U.S.C. § 1952 involving the transportation of a 17-year old across state lines for purposes of prostitution, and the *Jorge-Salgado* defendant having been required to register as a sex offender under Minnesota state law for a prior state-law offense.⁶ And *Rhone* (decided after *Jorge-Salgado*) held that the condition of supervised release that a defendant register as a sex offender under at least federal law requires an individualized determination that may not be delegated to the probation office or the Bureau of Prisons.

*7 Here, no individualized inquiry was undertaken whether Movant is required to register as a sex offender under federal law (that is, under SORNA) based on his earlier state-law conviction for attempted sexual battery. Neither do the instant crimes of conviction for federal drug and firearm offenses independently give rise to such a registration requirement, as was the case in *Branch*. Plain error review is a high bar, however. “Plain error occurs if the district court errs, the error is clear under current law, and the error affects the defendant’s substantial rights.” *United States v. James*, 792 F.3d 962, 970 (8th Cir. 2015). In the context of conditions for supervised release, the Eighth Circuit has recognized: “Where the basis for an imposed condition is ‘sufficiently evident’ and ‘can be discerned’ from the record, ‘reversal is not required by a lack of individualized findings.’ ” *United States v. Carson*, 924 F.3d 467, 474 (8th Cir. 2019) (finding although the district court plainly erred by failing to support special conditions with individualized findings as required by law, the defendant was not entitled to relief on appeal under plain error review where “the reasons for the challenged conditions [were] sufficiently evident from the record”); cf. *Rhone*, 535 F.3d at 814 (vacating judgment imposing special condition requiring compliance with sex offender registration laws where the record did not provide “the basis for imposing [the special condition] on Rhone”). Accordingly, the Court considers

whether a sufficient basis for the challenged special condition “can be discerned from the record.”

i. Federal Sex Offender Registration

Under SORNA, federal law provides “[a] sex offender shall register ... in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” 34 U.S.C. § 20913(1). Section 20911(1) defines “sex offender” as “an individual who was convicted of a sex offense.” In turn, federal law defines a “sex offense” as:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a[n] [enumerated] Federal offense ... ;
- (v) a military offense specified by the Secretary of Defense ... ; or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

§ 20911(5)(A). A “criminal offense” is defined to include a state-law offense. § 20911(6). Only the first clause (the “elements” definition) and the second clause (the “minor” definition) are potentially applicable here.

As the Government acknowledges in its suggestions in opposition to Movant’s motion, a federal district court in Florida has recently held an essentially identical version of attempted sexual battery under Florida law as that under which Movant was earlier convicted does not constitute a sex offense under SORNA’s elements definition. (Doc. 7 at 11 n.5 (citing *United States v. Bemis*, No. 8:19-cv-458-T-33AAS, 2020 WL 1046827, at *3 (M.D. Fla. Mar. 4, 2020), appeal dismissed, No. 20-11288-AA, 2020 WL 3669601 (11th Cir. June 10, 2020))).

In *Bemis*, to determine whether the attempted sexual battery offense under Florida law⁷ satisfied the first definition of a sex offense under SORNA, the district court applied the “categorical approach” looking to the elements of the prior offense with SORNA’s elements definition. 2020 WL 104827, at *2 (citing *United States v. Vineyard*, 945 F.3d 1164, 1170 (11th Cir. 2019) (concluding the categorical

approach applies to this definition of sex offense under SORNA)). The *Bemis* court concluded under the categorical approach looking only to the elements of the prior offense and SORNA’s elements definition, that because Florida’s attempted sexual battery offense is broader than the elements definition (where the phrases “‘sexual contact’ and ‘sexual act’ both require that the act be related to or motivated by sexual gratification”), as a matter of law the defendant was not required to register under SORNA. *Id.* at *3.

*8 It does not appear the Eighth Circuit itself has decided the issue if the categorical approach (or a circumstance-specific approach) applies to determine whether a state-law crime is a SORNA sex offense with elements involving a sexual act or sexual contact with another. At the same time, federal courts generally agree the categorical approach applies to determine whether a particular prior conviction qualifies as a sex offense under the elements definition of SORNA. *Vineyard*, 945 F.3d at 1170; *United States v. Helton*, 944 F.3d 198, 203 (4th Cir. 2019); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015); see *United States v. Gilchrist*, No. 3:19-147, 2021 WL 808753, at *4 (M.D. Pa. Mar. 3, 2021) (recognizing while Third Circuit has not decided this issue, the majority of circuits apply the categorical approach to this question; doing the same); *United States v. Marrero*, No. 19-cr-608 (ERK), 2020 WL 6637584, at * (E.D.N.Y. Nov. 12, 2020); *United States v. Ballantyne*, No. CR 11-43-BLG-JDS, 2013 WL 3995265, at *1 (D. Mont. Aug. 5, 2013). And when faced with similar statutory definitions and comparisons, the Eighth Circuit also generally employs the categorical approach. See, e.g., *Ortiz v. Lynch*, 796 F.3d 932, 935 (8th Cir. 2015) (employing categorical approach to determine whether prior conviction was “crime of violence,” itself defined as “an offense that has as an element the use, attempted use, or threatened use of physical force”).

Under the categorical approach, courts “focus only on whether the elements of the crime of conviction sufficiently match the [federal definition],” and “[i]f the state offense sweeps more broadly, or punishes more conduct than the federal definition, the conviction does not qualify as a predicate offense” under the federal statutory scheme. *United States v. Vanoy*, 957 F.3d 865, 867 (8th Cir. 2020) (citations omitted).

The phrases “sexual contact” and “sexual act” are not defined in SORNA. “As in any statutory construction case, [the court] start[s], of course, with the statutory text, and proceed[s] from the understanding that unless otherwise defined, statutory

terms are generally interpreted in accordance with their ordinary meaning.” *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (cleaned up). Looking to the plain or ordinary meaning of SORNA’s use of the undefined phrases “sexual contact” and “sexual act” to define sex offenses to which SORNA’s registration requirement attach, other federal courts have held the phrases require a sexualdesireor gratification component. *Helton*, 944 F.3d at 207; *Vineyard*, 945 F.3d at 1171-72. In a similar fashion, albeit in the sentencing context, the Eighth Circuit has held the plain and ordinary meaning of the term “sexual” necessarily includes that an “intent in committing the [act] is to seek libidinal gratification.” *United States v. Garcia-Juarez*, 421 F.3d 655, 659 (8th Cir. 2005) (quoting *United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001)); *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009) (employing the same definitional framework to the phrase “sexual abuse” relating to statutory sentencing enhancement).

For the same reasons explained in *Bemis*, Movant’s conviction under Florida law for attempted sexual battery does not qualify as a sex offense under the elements definition within SORNA. The Florida offense lacks the same intent element otherwise present in an offense with an element of “sexual contact” and “sexual act” as used in SORNA and the plain meaning of those terms defined by federal courts. *See also Ortiz*, 796 F.3d at 936-37 (where state statute is broader than the federal definition, the state statute does not “categorically” meet the federal standard).

Bemis did not, however, consider the second definition of a sex offense under SORNA as a “specified offense against a minor.” Federal law defines “specified offense against a minor” as “[1] Criminal sexual conduct involving a minor [or] [2] Any conduct that by its nature is a sex offense against a minor.” § 20911(7). Rather than a categorical approach, the Eighth Circuit has held for *this* definition courts should instead take a “circumstance-specific approach” and look to the “circumstances that underlie [the prior] conviction” to determine if a state conviction qualifies as a sex offense under SORNA. *United States v. Hill*, 820 F.3d 1003, 1006 (8th Cir. 2016).

*9 As reflected in the PSR, Movant was charged with – and ultimately entered a plea of nolo contendere and was sentenced to five years’ probation for –

Unlawfully attempt[ing] to commit sexual battery upon [T.R.], a person over the age of eleven (11) years, without her consent, by attempting to cause his fingers to penetrate or unite with the vagina of said [T.R.], and in the process of said attempt to commit the said sexual battery and used physical force not likely to cause injury to the said [T.R.], and in the furtherance of said attempt did tie the said [T.R.] to a bed, did gag her with a sock, pull down her pants, expose her breasts, and remove a tampon from her vagina, with the intent to commit sexual battery, contrary to F.S. 777.04(1), F.S. 777.04(4)(c) and F.S. 794.011(5).

(Crim. Doc. 57 at 9; *see also* Doc. 14-2 at 1.)

Here, it is not clear Movant’s 1981 state conviction qualifies as a SORNA sex offense under the minor definition for the sole reason it is not discernable on the record whether the victim of Movant’s detestable and graphic criminal acts was in fact a minor. Accordingly, considering *Rhone*, the Court must conclude had this claim been raised on direct appeal it would have been meritorious, even under plain error review. *See United States v. Deatherage*, 682 F.3d 755, 763 (8th Cir. 2012) (plain error is a “formidable standard of review that is not met if the reasons for the imposition are discernable from the record”) (cleaned up); *United States v. Davis*, 452 F.3d 991, 995 (8th Cir. 2006) (finding plain error where sentencing court failed to impose special condition based on individualized inquiry and when “such an individualized analysis would have affected the outcome of the proceeding”); *cf. United States v. Thompson*, 888 F.3d 347, 352 (8th Cir. 2018) (finding no plain error in imposing sex-offender-related discretionary special condition under § 3583(d) where defendant was a felon who is required to register as a sex offender under federal law); *James*, 792 F.3d at 970 (finding no plain error regarding sex offender condition when defendant is required to register under SORNA); *United States v. Carson*, 924 F.3d 467, 474 (8th Cir. 2019) (district court’s failure to make individualized findings for special condition of supervised release was not plain error where

“reasons for the challenged conditions [were] sufficiently evident from this record”).

Nonetheless, even if the victim was a minor and/or Movant's prior conviction otherwise qualifies as a SORNA sex offense, the record also affirmatively demonstrates Movant is otherwise not now required to register under SORNA. Federal law sets forth three “tiers” of sex offenders, where each tier sets forth the length of time a sex offender must register under SORNA. Specifically, a “tier I” and “tier II” sex offender must register for 15 and 25 years, respectively, while a “tier III” offender must register for their lifetime. [34 U.S.C. § 20915\(a\)](#). The three tiers of sex offenders are defined as follows:

- I sex offender: “a sex offender other than a tier II or tier III sex offender.”

- Tier II sex offender:

[A] sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

***10** (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.

- Tier III sex offender:

[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 offense:

(i) aggravated sexual abuse or sexual abuse (as described in [\[18 U.S.C. §§ 2241 & 2242\]](#)); or

(ii) abusive sexual contact (as described in [\[18 U.S.C. § 2244\]](#)) 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

[§ 20911\(2\)-\(4\)](#). Even assuming the prior offense qualifies as a “sex offense” under SORNA, at this point Movant would only be required to register under SORNA if he were classified as a tier III offender with the lifetime registration requirement.⁸

The Eighth Circuit has not yet decided whether courts should apply the categorical or circumstance-specific approach in determining SORNA-tier classification. See [United States v. Mulverhill](#), 833 F.3d 925, 929-30 (8th Cir. 2016) (noting the issue was not addressed in *Hill* and declining in that case to “wade into the quagmire of which approach applies to the three tier classifications,” finding no plain error where district court applied the categorical approach). Nonetheless, as another district court in this circuit has recognized, the vast consensus among federal courts is that the categorical approach applies to determine whether a prior offense is “comparable to or more severe than” an enumerated federal offense, and most federal courts agree the circumstance-specific approach applies to determine whether an offense was “committed against a minor” or “against a minor who has not attained the age of 13 years.” [United States v. Laney](#), No. 20-CR-3053-LTS-KEM, 2021 WL 2373845, at *5-6 & *5 n.8 (N.D. Iowa, Mar. 26, 2021), adopted by No. CR20-3053-LTS, 2021 WL 1821188 (N.D. Iowa May 6, 2021) (collecting cases).⁹

***11** At the time of Movant's prior conviction, Florida law classified attempted sexual battery as a second-degree felony, see [State v. Rider](#), 449 So. 2d 903, 903 n.3 (Fla. Ct. App. 1984) (quoting F.S.A. § 794.011(5) (1981)), punishable by a maximum of five years' imprisonment. See [Willis v. State](#), 446 So.2d 210, 211 (Fla. Ct. App. 1984) (citing F.S.A. § 775.082(3)(d) (1981)). Thus, regardless whether the victim

was a minor, the necessary inquiry here is whether Movant's attempted sexual battery offense is comparable to or more severe than aggravated sexual abuse (18 U.S.C. § 2241), sexual abuse (18 U.S.C. § 2242), or abusive sexual contact (18 U.S.C. § 2244).

Critically, §§ 2241 and 2242 criminalize “sexual act[s]” under certain aggravating circumstances. §§ 2241(a)-(c), 2242. Federal law defines “sexual act” under these statutes 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;
- (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; or
- (D) 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). Similarly, § 2244 criminalizes “sexual contact” that would otherwise be punishable under §§ 2241 or 2242 had the sexual contact been a sexual act or otherwise “knowingly engages in sexual contact with another person without that other person's permission.” § 2244(a), (b). “Sexual contact” is similarly 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.” § 2246(3).

At the time of Movant's earlier conviction, Florida law defined “attempted sexual battery” as when “[a] person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious physical injury[.]” *Rider*, 449 So. 2d at 903 n.3 (quoting F.S.A. § 794.011(5)). State law defined “sexual battery” at that time 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.” *Id.* at 903 n.1 (quoting F.S.A. § 794.011(1)(f) (1981)). Even if Movant's

prior state-law conviction did qualify as a “sex offense” under the elements definition of SORNA or otherwise, it does not appear Movant would be classified as a tier III offender. Under the categorical approach, Florida's attempted sexual battery offense is broader than the tier III comparable offenses, and therefore even if Movant did otherwise qualify as a SORNA sex offender, it does not appear he is otherwise required to register under SORNA at this time.

Accordingly, for these reasons, the Court does not conclude this claim would have been meritless had appellate counsel raised this issue on appeal and there is a reasonable probability had this issue been raised on direct appeal, Movant would have been successful even under plain error review as to a challenge concerning the condition of supervised release that he comply with federal sex offender registration law or SORNA. See *Davis*, 452 F.3d at 995.

ii. State Sex Offender Registration

*12 On the other hand, even presuming the reasoning in *Rhone* applies to the same extent as to a requirement an offender comply with state sex offender registration laws, see also *United States v. Mayo*, 642 F.3d 528, 631 (8th Cir. 2011) (recognizing special conditions on supervised release imposed under § 3583(d) “must be supported by individualized findings about [their] appropriateness for that particular defendant”), Movant has not demonstrated a reasonable probability he would have been entitled to relief on appeal as to the condition of supervised release that Movant comply with the state sex offender registration law, however.

Movant argues he is not required to register as a sex offender under Florida law. Looking to Florida law, it appears Movant may well be correct. In particular, Florida law defines in relevant part a “sexual offender” – i.e., one who must register under Florida's sexual offender registration law, F.S.A. § 943.0435(2) – as: a person convicted of attempting to commit sexual battery (§ 794.011) “and [h]as been released on or after October 1, 1997, from a sanction [including probation, see § 943.0435(1)(b)] imposed for any conviction of an offense ... and does not otherwise meet the criteria for registration as a sexual offender under chapter 944 or chapter 985.” § 943.0435(1)(h)(1)(a). The Florida state court sentenced Movant to five years' probation on August 3, 1981, from which the PSR indicates he was discharged on July 25, 1987. (Crim. Doc. 57 at 9.) Thus, Florida's registration law does not appear to apply to Movant.

Movant fails to recognize, however, compliance with state sex offender registration laws not only emanates from the state of conviction but also from a defendant's state of residence, for example. Movant's PSR records a legal address (or personal residence) for Movant as within the State of South Carolina. (Crim. Doc. 57 at 4.) Under South Carolina's sex offender registration law, a person residing in the State of South Carolina who has plead *nolo contendere* to a "similar offense" as a specific enumerated offense must register as a sex offender under South Carolina law. [S.C. Code Ann. § 23-3-430\(a\)](#). One such offense, notwithstanding other enumerated offenses involving a minor of a particular age, *see* [§ 23-3-430\(C\)\(4\)-\(6\)](#), is third-degree criminal sexual conduct. South Carolina law defines third-degree criminal sexual conduct as "engag[ing] in sexual battery with the victim and ... us[ing] force or coercion to accomplish the sexual battery in the absence of aggravating circumstances." [S.C. Code Ann. § 16-3-654](#); *see* [§ 23-3-430\(C\)\(3\)](#) (citing [§ 16-3-654](#) as an enumerated offense requiring registration under South Carolina law).

Important here, South Carolina law defines "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." [S.C. Code Ann. § 16-3-651\(h\)](#). Finally, [S.C. Code Ann. § 16-1-80](#) provides that an attempt "must be punished as for the principal offense." *See also* [S.C. Code Ann. § 16-3-820](#) ("Assault with intent to commit criminal sexual conduct ... shall be punishable as if the criminal sexual conduct was committed.")¹⁰ To determine whether another jurisdiction's crime requires registration in South Carolina, state courts "look to the conduct involved, the elements of the offense, and the public policy behind the enactment of the statutes." [Lozada v. S.C. Law Enforcement Div.](#), 719 S.E.2d 258, 259 (S.C. 2011) (citation omitted).

*¹³ As noted above, Movant was convicted of attempted sexual battery upon a person over the age of 11 years and used physical force and violence not likely to cause serious physical injury. *See Rider*, 449 So.2d at 903 n.3. Moreover, Florida law defined "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." *Id.* at 903 n.1 (quoting F.S.A. § 794.011(1)(f) (1981)). Given the elements of the offense and the

specific circumstances and conduct involved in Movant's prior conviction, it appears that regardless of any federal requirement to register, Movant would be required to register under South Carolina's sex-offender-registration law as a resident of South Carolina.¹¹ Therefore, consistent with *Jorge-Salgado* and *Branch*, Movant would not be entitled to relief under plain error review concerning the special condition that he comply with state registration requirements where on the record it would otherwise be a crime were Movant not to comply with South Carolina's registration requirement (his place of residence as reflected in the PSR). *See S.C. Code Ann. § 23-3-470*. Because this claim as to the special condition regarding compliance with state sex offender registration law would have been without merit on appeal, particularly under plain error review, appellate counsel is not ineffective for failing to raise it. *See Rodriguez*, 17 F.3d at 226.

B. Deficient Performance

When applying the deficient performance prong of the *Strickland* analysis, the Eighth Circuit applies a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Charboneau*, 702 F.3d at 1136 (quoting *Strickland*, 466 U.S. at 689). "To demonstrate that appellate counsel was ineffective, [movant] 'must ... show that his counsel was objectively unreasonable in failing to find arguable issues to appeal – that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them.' " *Williams v. Ludwick*, 761 F.3d 841, 845 (8th Cir. 2014) (quoting *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Movant argues appellate counsel failed to "research 'all' of Mr. Barker['s] files and records as he stated he did so, [because] if he would have, he would have seen that the 'SPECIAL CONDITIONS['] imposed on Mr. Barker for Supervise[d] Release cannot be imposed" because his earlier conviction for attempted sexual battery does not require he register as a sex offender under SORNA. (Doc. 1 at 4.)¹²

As explained above, a special condition of supervised release regarding federal sex offender registration requires an individualized inquiry whether the offender is so required to register as a matter of law. Appellate counsel was aware of Movant's prior conviction and Movant's concern regarding the challenged special condition in light of Movant's prior state-law conviction. In the supplemental affidavit appellate counsel states prior to sentencing he reviewed the PSR with Mr. Barker "in its entirety, including the suggested

special condition” regarding sex offender registration and “[w]hile [Movant] initially questioned the applicability” of the condition, Movant later “indicated that he understood that any legal objection would be meritless and that this condition would not constitute a new requirement that he register as a sex offender,” only that he must “comply with registration requirements should they otherwise apply[.]” (Doc. 14-1.) And additionally, counsel represented Movant at sentencing where no individualized inquiry as to this special condition occurred. On whole, this suggests the failure to raise this issue on appeal was not a deliberate strategy.¹³

*¹⁴ The record here, including appellate counsel's affidavit, suggests appellate counsel was aware of both the special condition of supervised release and Movant's prior conviction under Florida law. After sentencing, the error regarding the lack of individualized inquiry whether Movant is required to register as a sex offender under SORNA in light of the limited record before the district court would have been apparent to a reasonably competent appellate attorney. “Effective assistance requires the provision of reasonably informed advice on material issues.” *Mayfield v. United States*, 955 F.3d 707, 711 (8th Cir. 2020) (if counsel advised defendant sentencing enhancement applied, such advice was not professionally reasonable where “[r]adimentary research would have revealed” that the enhancement did not apply because the prior state conviction did not qualify as a conviction that triggered the sentencing enhancement under federal law). “‘An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.’” *Id.* (quoting *Hinton v. Ala.*, 571 U.S. 263, 274 (2014)). Accordingly, because the claim at least as to the requirement Movant comply with federal sex offender registration law had a reasonable likelihood of success even on plain error

review, the Court finds Movant has satisfied the *Strickland* performance prong. See *Roe v. Delo*, 160 F.3d 416, 419 (8th Cir. 1998) (in such a case where there is sufficient contrary evidence to overcome the presumption of reasonable assistance, the ineffectiveness prong “turns on whether an objectively reasonable attorney would have presented the issue for plain error review because it had a reasonable likelihood of success”).

IV. Conclusion

In sum, Movant has satisfied both *Strickland* prongs as to his claim of ineffective assistance of appellate counsel regarding the conditions of supervised release Movant comply with federal sex offender registration law (SORNA). Therefore, Movant is entitled to post-conviction relief on this claim under § 2255 as both an independent claim for ineffective assistance of appellate counsel and, since ineffectiveness of appellate counsel overcomes the procedural default, on his independent claim for relief. Accordingly, Movant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is **GRANTED in part** as to the judgement entered April 18, 2019, in *United States v. Barker*, 4:16-cr-00084-RK-1 (Crim. Doc. 62), imposing as a mandatory and special condition of supervised release that Movant comply with federal sex offender registration requirements. Movant's motion to vacate, set aside or correct his sentence is otherwise **DENIED**. An amended judgment reflecting the same is forthcoming.¹⁴

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 1749252

Footnotes

- 1 “Crim. Doc.” refers to the docket entry number in the criminal case, No. 4:16-cr-00084-RK-1. “Doc.” refers to the docket entry number in Movant's civil case, No. 4:21-cv-00470-RK-P.
- 2 Docs. 14 and 18 are the Government's supplemental filing and Movant's response to the Government's supplemental filing, as ordered by the Court (see Doc. 12).
- 3 At the outset, the Court emphasizes this § 2255 proceeding concerns only the special condition of Movant's supervised release that he comply with state and federal sex offender registration laws. This case does not

implicate in any regard an independent classification by the Bureau of Prisons as to Movant relating to his confinement within the BOP. To the extent habeas relief under § 2255 is granted here, such relief concerns only the conditions of supervised release as set forth in the Court's judgment entered April 18, 2019 (Crim. Doc. 62). See § 2255(b) (relief available under § 2255 is limited to vacating and setting aside the judgment and for resentencing or "correct[ing] the sentence as may appear appropriate").

- 4 It appears from the record Movant's plea/sentencing counsel also represented Movant on appeal (at least through the filing of Movant's notice of appeal and initial briefing before the Eighth Circuit). (See Doc. 63); *United States v. Barker*, No. 19-1880 (8th Cir.).
- 5 Notably, the appeal waiver used here is functionally more limited as far as waiving the right to appeal than that contained in *Andis* or *Blue Coat*. See *Andis*, 333 F.3d at 892 (holding appeals waiver encompassed challenge to conditions of supervised release where the plea agreement waived "all rights to appeal whatever sentence is imposed"); *Blue Coat*, 340 F.3d at 542 (holding appellant waived right to appeal special conditions of supervised release where plea agreement waived the right to appeal his sentence *except for* "a departure below the guideline range").
- 6 In *Jorge-Salgado*, the Eighth Circuit looked explicitly to Minnesota law in reasoning the defendant's "failure to register as a sex offender would have violated this mandatory condition of supervised release because he would have committed a state crime under Minnesota law if he did not re-register as a sex offender based on the present convictions." 520 F.3d at 843.
- 7 It appears the only meaningful difference between the attempted sexual battery offense involved in *Bemis* and the one under which Movant was convicted here involves the minimum age of the victim. Compare *Bemis*, 2020 WL 1046827, at *2 (defining the offense as: "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") (quoting F.S.A. § 794.011(5) (2002)) with *State v. Rider*, 449 So. 2d 903, 903 n.3 (Fla. Ct. App. 1984) ("A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious physical injury[.]") (quoting F.S.A. § 794.011(5) (1981)).
- 8 Inasmuch as SORNA applies retroactively, Movant would no longer be required to register under SORNA should he be classified as a tier I or II sex offender. See also 28 CFR § 72.5(b) (the federal registration requirement begins to run when the sex offender is sentenced for the offense giving rise to the registration requirement when not sentenced to a term of imprisonment); (Doc. 14-2 at 9 (sentencing Movant to a term of five years' supervised release on August 3, 1981).) Were Movant classified under federal law as a tier I or tier II sex offender, his registration term expired 1996 and 2006, respectively. *United States v. Red Tomahawk*, No. 1:17-cr-106, 2018 WL 772081, at *5 (D.N.D. Feb. 7, 2018) (concluding as a matter of law SORNA does not itself contain a tolling provision).
- 9 Categorical approach applies to whether the prior offense is comparable to or more severe than an enumerated federal offense: *United States v. Walker*, 931 F.3d 576, 580 (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); *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1, 3 (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); *United States v. Marrero*, No. 19-cr-608 (ERK), 2020 WL 6637584, at *2 (E.D.N.Y. Nov. 12, 2020); *United States v. Church*, 461 F. Supp. 3d 875, 883 (S.D. Iowa 2020); *United States v. Phillips*, No. 8:16-cr-117-T-33MAP, 2016 WL 5338711, at *2-3 (M.D. Fla. Sept. 23, 2016); *United States v. Marrowbone*, 102 F. Supp. 3d 1101, 1107-08 (D.S.D. 2015).

Circumstance-specific approach applies to determine whether an offense was committed against a minor: *United States v. Escalante*, 933 F.3d 395, 401-02 (5th Cir. 2019); *Walker*, 931 F.3d at 580; *Berry*, 814 F.3d at 197.

- 10 Section 16-3-820 is also separately listed in South Carolina's sex-offender-registration law. See § 23-3-430(C) (9).
- 11 It does not appear South Carolina's sex offender registration framework includes the same temporal limitation as under Florida's sex offender registration scheme. See also *Wiesart v. Stewart*, 665 S.E.2d 187, 187-88 (S.C. Ct. App. 2008) (considering retroactivity of certain amendments or components of sex offender registration law based upon a 1979 Maryland conviction for indecent exposure).
- 12 Because Movant's claim would have been meritless as to the special condition that he register under state law as explained above, Movant cannot show prejudice to establish ineffective assistance of appellate counsel and the Court therefore does not consider *Strickland*'s deficient performance prong as to that claim. See *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997) (when applying *Strickland* framework, the court "need not reach the performance prong if [the court] determine[s] that the defendant suffered no prejudice from the alleged ineffectiveness") (citation omitted).
- 13 Of course, the Court recognizes that the sole issue that was raised on appeal – a suppression-of-evidence challenge – was specifically carved out of the appeal waiver in the plea agreement. (Crim. Docs. 53, 71.) Nonetheless, the special-condition issue only arose later at sentencing after entry of the guilty plea pursuant to the plea agreement.
- 14 Pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, a hearing is not required prior to modifying the conditions of supervised release if the relief "is favorable to the person and does not extend the term of probation or of supervised release." Fed. R. Crim. P. 32.1(c)(2)(B).

ing Eng'srs, 561 F.3d at 277–78 (internal quotation marks omitted). Such substantial contacts are absent here.

Given the undisputed facts in this case, we can only conclude that BRF did not purposefully avail itself of the privilege of doing business in Maryland. Thus, the district court correctly held that it lacked personal jurisdiction over BRF.

IV.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.



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.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Brian Keith BERRY, Defendant–
Appellant.

Federal Public Defender Office, Amicus
Supporting Appellant.

No. 14-4934.

United States Court of Appeals,
Fourth Circuit.

Argued: Dec. 10, 2015.

Decided: Feb. 19, 2016.

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

1. Criminal Law ☞1156.2

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.

2. Sentencing and Punishment ☞651

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.

3. Criminal Law ☞1139, 1158.34

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.

4. Mental Health ☞469(2)

“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).

5. Mental Health ☞469(2)

"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).

6. Mental Health ☞469(2)

"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).

7. Mental Health ☞469(2)

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 No-

tification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

8. Statutes ☞1079

When interpreting any statute, court begins by analyzing statutory text.

9. Mental Health ☞469(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 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).

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.

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 offi-

cials 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.

[1-3] 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 discre-

tion 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

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 con-

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 *Desamps 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. *Desamps*, 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, *Price*, 777 F.3d at

sideration 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.

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 sex-

ual 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)(A)(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.

2. The portions of the tier III definition found

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

in 42 U.S.C. § 16911(4)(B) and (C) are irrele-

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

vant 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 par-

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*,

ticularly 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).

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

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.”).

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 classifi-

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 Defen-

cation 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.*

dant's 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



UNITED STATES of America,
Plaintiff-Appellee,

v.

Shaquille Montel ROBINSON,
Defendant-Appellant.

No. 14-4902.

United States Court of Appeals,
Fourth Circuit.

Argued: Oct. 29, 2015.

Decided: Feb. 23, 2016.

Background: Suspect was indicted for being a felon in possession of a firearm and ammunition. The United States District Court for the Northern District of West Virginia, Robert W. Trumble, Magistrate Judge, 2014 WL 4064038, entered report and recommendation, finding that evidence of firearm recovered from suspect during traffic stop should be suppressed. The District Court, Gina M. Groh, Chief District Judge, 2014 WL 4064035, adopted in part and rejected in part the report and recommendation. Suspect was subsequently convicted, in the District Court, on his guilty plea, of being a felon in possession of firearm and ammunition. Suspect appealed.

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

(1) stop of suspect was justified;

- (2) in states which broadly allow public possession of firearms, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that person is dangerous for *Terry* purposes;
- (3) suspect's failure to respond immediately to police officer's questions did not provide objective indication of dangerousness; and
- (4) fact that suspect was seen loading firearm in, and was subsequently stopped in high crime area, did not provide objective indication that he was dangerous.

Reversed and vacated.

Niemeyer, Circuit Judge, dissented, and filed opinion.

1. Searches and Seizures ↪70

Police may conduct a limited pat-down for weapons when there is reasonable suspicion that a suspect is both armed and dangerous. U.S.C.A. Const.Amend. 4.

2. Criminal Law ↪1139, 1158.12

In reviewing the denial of a motion to suppress, the Court of Appeals examines a district court's factual findings for clear error and its legal conclusions de novo. U.S.C.A. Const.Amend. 4.

3. Criminal Law ↪1144.12

In reviewing the denial of a motion to suppress, the Court of Appeals views the evidence in the light most favorable to the government, as the prevailing party before the district court. U.S.C.A. Const.Amend. 4.

4. Arrest ↪60.2(10), 60.3(1)

Automobiles ↪349(2.1)

An law enforcement officer may conduct a brief investigatory "stop," including a traffic stop, based on reasonable suspi-

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:13-CR-329-FL-1

UNITED STATES OF AMERICA,)
)
)
)
v.)
)
BRIAN KEITH BERRY,)
)
Defendant.)

ORDER

This matter is before the court upon mandate from the United States Court of Appeals for the Fourth Circuit, vacating this court's December 15, 2014, amended judgment, and remanding for recalculation of defendant's sentencing range. Where defendant has been released from custody, upon consent of the parties, the court dispenses with a resentencing hearing. In conjunction with this order, the court enters an amended judgment for time served, along with a statement of reasons specifying that defendant is subject to a guideline range of 24 to 30 months imprisonment, with supervised release remaining at five years, based upon a Tier I sex offender classification, in accordance with the Fourth Circuit's February 19, 2016, opinion in this matter.

SO ORDERED, this the 28th day of April, 2016.



LOUISE W. FLANAGAN
United States District Judge

vated assault, charge him with that....”
(App.315.)

Later, when defense counsel again reiterated his argument concerning the finding of uncharged offenses, the Court again stated, “[b]ut your point is, so I can make sure I digest it and think about it appropriately. Your point is, not only in this case, but in every case where an enhancement applies, isn’t that really your point?” (App.323.) Defense counsel then argued in part, “I would say anybody who pleads guilty should not get the statutory maximum. That’s just fundamentally wrong.” (App.323.)

In outlining its sentence, the District Court again addressed defense counsel’s argument about promoting respect for the law and providing just punishment. The Court first recounted in detail Jones’s lengthy and violent criminal history before stating:

I’ve also considered the sentencing goal of promoting respect for the law and the related goal of imposing a sentence that is sufficient, but not greater than necessary, to effectuate the sentencing goals.

I do not dispute that the guideline range here, driven by the enhancements, is significant. And clearly much more significant than it otherwise would have been without them. But the defendant finds himself in that range because of his conduct and no other reason.

(App.329.) We conclude that the District Court’s thorough questioning and thoughtful discussion at sentencing refutes any contention that it somehow ignored defense counsel’s argument. *cf. Begin*, 696 F.3d at 411 (finding that the district court “asked no questions” concerning an argument of defense counsel, in holding that the court failed to address it). We, thus, reject Jones’s argument to the contrary.

III.

For the reasons stated above, we affirm in part and reverse in part the District Court’s judgment of sentence. The sentence is vacated and the case is remanded for resentencing.



UNITED STATES of America,
Appellant in No. 12-3952

v.

Blake BROWN, Jr., Appellant
in No. 12-4085.

Nos. 12-3952, 12-4085.

United States Court of Appeals,
Third Circuit.

Submitted Under Third Circuit
LAR 34.1(a) Dec. 19, 2013.

Filed: Jan. 15, 2014.

Background: Defendant charged with violation of the Sex Offender Registration and Notification Act (SORNA) for failing to register as a sex offender moved to dismiss the indictment. The United States District Court for the Western District of Pennsylvania, Joy Flowers Conti, J., granted the motion. The government appealed.

Holding: The Court of Appeals, Jordan, Circuit Judge, held that statutory exemption to SORNA for offender not more than four years older than victim did not apply to defendant.

Vacated with directions to reinstate indictment.

1. Mental Health ↪469(2)

Statutory exemption to the Sex Offender Registration and Notification Act (SORNA), providing that offender was not required to register as sex offender if the underlying offense involved consensual conduct with victim who was at least 13 years old and the offender was not more than four years older than the victim, did not apply to defendant; although defendant was 17 years old and victim was 13 years old at time of offense, statute was not ambiguous as to meaning of "not more than four years older," and defendant was four years and four months older than victim. Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C).

2. Criminal Law ↪1139

Questions of statutory construction are reviewed de novo.

3. Statutes ↪1079

The starting point for interpreting a statute is the language of the statute itself.

4. Statutes ↪1123

When words are not defined within the statute, an interpreting court construes them in accordance with their ordinary or natural meaning.

5. Statutes ↪1102

Ambiguity is a creature not of definitional possibilities but of statutory context, so the touchstone of statutory analysis should always be the statute itself.

6. Criminal Law ↪12.7(2)

The simple existence of some statutory ambiguity is not sufficient to warrant application of the rule of lenity, which provides that the ambiguity should be resolved in favor of the criminal defendant, for most statutes are ambiguous to some degree.

7. Criminal Law ↪12.7(2)

The rule of lenity, which provides that an ambiguity in a criminal statute should be resolved in favor of the criminal defendant, is an interpretative method of last resort and need not be applied when the intent of Congress is already clear based on an analysis of the plain meaning of the statute.

Donovan J. Cocas, Esq., Office of United States Attorney, Pittsburgh, PA, for the United States of America.

Lisa B. Freeland, Esq., Kimberly R. Brunson, Esq., Office of Federal Public Defender, Pittsburgh, PA, for Blake Brown, Jr.

Before: JORDAN, VANASKIE and GREENBERG, Circuit Judges.

OPINION OF THE COURT

JORDAN, Circuit Judge.

Both the government and the defendant, Blake Brown, Jr., appeal an order of the United States District Court for the Western District of Pennsylvania dismissing the indictment of Brown for failing to register as a sex offender. For the reasons that follow, we will vacate the order and direct that the indictment be reinstated.

I. Background

The Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. § 16901 *et seq.*, requires individuals convicted of certain sex crimes to submit identifying information to state and federal sex offender registries. §§ 16912(a), 16913–16914, 16919(a). It is a violation of SORNA for such individuals to travel in "interstate or foreign commerce" and "knowingly fail[] to register or update a

registration.” 18 U.S.C. § 2250(a). While the term “sex offender” is tautologically defined as someone who has been convicted of a “sex offense,” 42 U.S.C. § 16911(1), Congress was careful to delineate specific circumstances in which a conviction involving sex will not lead to classification as an offender under SORNA. Among other things,¹

[a]n offense involving consensual sexual conduct is *not* a sex offense for the purposes of [SORNA] . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

42 U.S.C. § 16911(5)(C) (emphasis added). That exception is the pivot on which this case turns.

In August 2011, Brown was charged with failing to register under SORNA based on his 2003 conviction for third degree lewd molestation in violation of Florida Statute § 800.04(5). Although he had previously registered when he moved from Florida to New York, he failed to register after he later moved to Pennsylvania in October 2010. At the time of his arrest, he was staying with his father in McKeesport, Pennsylvania, and admitted knowing

1. The quoted language appears to be limited to minors, but a separate exception pertains to adults, making an offense involving consensual sexual conduct a “sex offense” for purposes of SORNA only if the adult victim was “under the custodial authority of the offender at the time of the offense.” 42 U.S.C. § 16911(5)(C).
2. The exception set forth in 42 U.S.C. § 16911(5)(C) requires the offense to be based on a consensual act. The parties appear to agree that the conduct underlying Brown’s 2003 conviction was “consensual,” as that term is used in SORNA. One may, of course, question the meaning of “consensual” when the word is applied to a 13-year-old’s decisions, but that issue is not before us.
3. In withdrawing its prior approval of Brown’s guilty plea, the District Court relied

that he needed to register, though he claimed he “did not have the time” to do so. (PSR ¶ 43.)

Brown pled guilty as charged, but, when it came time for sentencing, the District Court *sua sponte* raised various concerns regarding SORNA’s applicability. In particular, the Court expressed doubt that Brown was indeed a “sex offender,” given that—according to the U.S. Probation Office’s Presentence Investigation Report—he was 17 years old and his victim was 13 years old at the time they engaged in the consensual sexual contact that was the basis of Brown’s 2003 conviction.² As the Court saw it, giving Brown the benefit of SORNA’s “not more than 4 years older” exception was “a question of . . . the interests of justice.” (App. at 203.) The Court therefore decided to withdraw its previous approval of Brown’s guilty plea.³

Although the government and Brown eventually stipulated that Brown’s “date of birth was exactly four years and four months (52 months) prior to the date of birth of the victim in the offense of Lewd Molestation” (Supp.App. at 50–51), the District Court, in an order dismissing the indictment,⁴ held that the exception in 42

on Rule 11(b)(3) of the Federal Rules of Criminal Procedure. It is debatable whether the District Court had authority to reject the plea after accepting it; Rule 11(b)(3) does not address a judge’s revocation of a plea acceptance, but case law suggests that a judge can revoke an acceptance if there is no factual basis for a plea, *United States v. Hecht*, 638 F.2d 651, 653 (3d Cir.1981). We need not address the issue, however, because we are vacating the Court’s decision on other grounds.

4. Brown twice moved to dismiss the indictment. The Court rejected the first effort, but appears to have invited the second. (App. at 151 n. 5 (“[T]he government has since indicated its willingness to stipulate to all facts necessary to resolve the interpretation of SORNA’s consensual sexual conduct excep-

U.S.C. § 16911(5)(C) is “grievous[ly]” ambiguous as applied to Brown (App. at 149). According to the Court, a “colloquial” reading would render Brown eligible for the exception in the statute since, “[t]he common question, ‘how old are you?’ is colloquially interpreted to mean, ‘how many complete years have transpired since the date of your birth?’” (*Id.* at 147 & n. 2.) Because Brown was 17 years old and the victim was 13 years old at the time of the incident, the Court reasoned that Brown could be seen as falling within the exception since he was not “more than 4 years older than the victim,” but rather was exactly four years older.

At the same time, the Court acknowledged that Brown indeed “was more than four years older than the victim because

tion, which leaves the court more flexibility to consider a pretrial motion to dismiss without itself finding facts or making credibility determinations that should be left to the jury.”). It is the District Court’s order responding to that second motion that we now address.

5. The rule of lenity is a doctrine providing “that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishment, should resolve the ambiguity in favor of the more lenient punishments.” BLACK’S LAW DICTIONARY 1449 (9th ed.2009).
6. In his cross-appeal, Brown raises the following additional arguments: (1) that SORNA encroaches upon state’s power and violates the Tenth Amendment; (2) that Congress exceeded its authority under the Commerce Clause in enacting SORNA; (3) that application of SORNA to preenactment offenders violates the ex-post facto clause; (4) that SORNA unconstitutionally infringes on the right to travel; (5) that prosecution under SORNA violates the Due Process Clause; (6) that federal courts must apply a categorical approach in evaluating SORNA predicate offenses; and (7) that Congress violated the non-delegation doctrine by giving the Attorney General blanket authority to determine the applicability of SORNA to offenders who were convicted of sex offenses before SORNA was enacted.

he was born more than four years before the victim.” (*Id.* at 147–48.) Math would therefore seem to dictate that Brown could not claim the exception, but, the Court said, if “Congress [had] intended for such a strict measurement of age to apply (particularly in the context of comparing two people’s relative ages), Congress could have defined the difference in reference to months.” (*Id.* at 5.) Because Congress did not specify how “years” were to be calculated, and because resort to legislative history did not clarify what was meant by the word “years,” the Court applied the rule of lenity to dismiss the indictment.⁵

The government timely appealed the dismissal, and Brown filed a cross-appeal seeking to preserve a variety of issues.⁶

Given the attention we and other circuit courts have already paid to the first five issues, we do not address them again here. Brown in fact concedes that our decision in *United States v. Shenandoah*, 595 F.3d 151, 158–63 (3d Cir.2010), abrogated on other grounds by *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012), forecloses those arguments. He raises them only to “preserve[] [them] for further review.” (Brown’s Opening Br. at 56–60.)

We do not have to address Brown’s “categorical approach” argument, given his stipulation regarding consent and regarding his age and the age of his victim. It is nevertheless worth noting that the categorical approach was created to prevent “sentencing courts from inquiring into the facts underlying prior convictions, fearing that this would unleash endless re-litigation of old charges and raise Sixth Amendment concerns.” *United States v. Tucker*, 703 F.3d 205, 209 (3d Cir.2012) (citing *Taylor v. United States*, 495 U.S. 575, 601–02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). We are not addressing sentencing here but a separate crime.

Finally, with respect to the question of whether Congress violated the non-delegation doctrine, the District Court did not address non-delegation either in its memorandum opinion and order denying Brown’s first motion to dismiss the indictment or in the later memorandum opinion and order granting dis-

II. Discussion⁷

[1, 2] The dispositive question before us is what is meant by the word “years” in 42 U.S.C. § 16911(5)(C). The District Court decided that the use in that statute of the phrase “more than 4 years older than the victim” is “susceptible to more than one reasonable interpretation” (App. at 3), but we disagree.

[3–5] “[T]he starting point for interpreting a statute is the language of the statute itself.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). When words are not defined within the statute, we construe them “in accordance with [their] ordinary or natural meaning.” *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). We do not, however, do so blindly.

[F]requently words of general meaning are used in a statute . . . and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Holy Trinity Church v. United States, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L.Ed. 226 (1892). In such cases, resorting to dictionary definitions may be helpful. *See MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (stating, based on “[v]irtually every dictionary,” that “to

missal. We therefore abstain from ruling on it, so that, on remand, the District Court may consider the issue in the first instance.

7. The District Court had subject matter jurisdiction under 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because the District Court’s decision turns on statutory construction, we review the matter de novo. *Samaroo v. Samaroo*, 193 F.3d 185,

modify’ means to change moderately or in minor fashion”). Ultimately, though, “[a]mbiguity is a creature not of definitional possibilities but of statutory context,” *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994), so the touchstone of statutory analysis should, again, be the statute itself.

As already noted, § 16911(5)(C) provides that an offense involving consensual sexual conduct is not a sex offense under SORNA as long as the victim “was at least 13 years old and the offender was not more than 4 years older than the victim.” 42 U.S.C. § 16911(5)(C). In common usage, a year means 365 consecutive days (except, of course, when a leap year adds a day) or 12 months. *See, e.g.*, Black’s Law Dictionary 1754 (9th ed. 2009) (“A consecutive 365-day period beginning at any point.”). We therefore conclude that the term “4 years” is not ambiguous: it is quite precisely 1,461 days⁸ or 48 months. While the word “years” on its own or in some colloquial usage could perhaps be thought ambiguous, the word is not floating in abstract isolation or casual conversation here; it is set in the specific terms of a specific statute, and it has a discernible meaning in that context. “[M]ore than 4 years” means anything in excess of 1,461 days.

Considering “years” to mean whole years only, as the District Court suggests, would lead to strange results in the application of SORNA. The government rightly notes that using the “‘colloquial method’ of calculating whether an offender was ‘more than 4 years older’ than his victim

189 (3d Cir.1999) (“We must review legal conclusions and questions of statutory construction de novo.”)

8. Because every fourth year is a leap year, and there are 366 days in a leap year, there are $365 + 365 + 365 + 366$ days, or 1,461 days in a four-year time frame.

would create alternating windows of time” in which the same offense involving the same two participants “sometimes would require registration under SORNA and sometimes [would] not, depending upon the time of the year their sexual congress took place.” (Gov’t’s Opening Br. at 20.) In other words, if we take Brown’s Florida offense as an example and we were to assume that Brown’s date of birth was May 1, 1984, and his victim’s date of birth was September 1, 1988—exactly four years and four months later—Brown would only need to register under SORNA if he had been convicted of having sexual contact with her at any point between May 1st through August 31st of any year between 2002 and 2004, when he was “colloquially” five years older, but he would not need to register for a conviction involving the same conduct at other times.⁹ That cannot be the law.

The District Court expressed concern that considering “4 years” literally as an

accumulation of lesser units of time could “require a calculation down to the month, day, hour, minute, or even second in order to calculate the difference in age between a defendant and victim.” (App. at 5 (footnote omitted).) But demanding some precision—at least as to days¹⁰—is more sound than the conclusion that no one is “more than 4 years older” than someone else unless he is actually five years older.

[6, 7] Because the words “no more than 4 years older” have a clearly discernible meaning here, applying the rule of lenity was not necessary. We have held that the “simple existence of some statutory ambiguity . . . is not sufficient to warrant application of the rule of lenity, for most statutes are ambiguous to some degree.” *United States v. Kouevi*, 698 F.3d 126, 138 (3d Cir.2012) (quoting *Dean v. United States*, 556 U.S. 568, 577, 129 S.Ct. 1849, 173 L.Ed.2d 785 (2009)) (internal quotation marks omitted) superseded on

9. To be specific, a “colloquial” reading of the sort considered by the District Court creates windows of time in which Brown sometimes is five years older than the victim and other times is “not more than four years older”: between September 1, 2001, and April 30, 2002, Brown would be 17 years old and his victim 13 years old; between May 1, 2002, and August 31, 2002, Brown would be 18 years old and his victim 13 years old; between September 1, 2002, and April 30, 2003, Brown would be 18 years old and his victim 14 years old; between May 1, 2003, and August 31, 2003, Brown would be 19 years old and his victim 14 years old; between September 1, 2003, and April 30, 2004, Brown would be 19 years old and his victim 15 years old; and between May 1, 2004, and August 31, 2004, Brown would be 20 years old and his victim 15 years old.

The overall span of time during which this is relevant is between September 1, 2001, when the victim turns 13 years old (triggering the possible application of SORNA’s “not more than 4 years older” exception), and August 31, 2004, just before she turns 16 years

old, because the statute under which Brown was convicted, Florida Statute § 800.04, criminalizes an act such as Brown’s only when the victim is under 16 years of age.

10. It seems highly unlikely that a prosecution will ever be brought on the basis that someone who is exactly 4 years older than another by birth-date will be prosecuted under SORNA on the theory that, by hours or minutes, the offender was “more than 4 years older.” We are not required to address extreme hypotheticals. See *Poole v. Family Court*, 368 F.3d 263, 269 (3d Cir.2004) (“We will not permit our interpretation of Rule 4(a)(6) to be governed by such an extreme hypothetical. If at some time in the future we are presented with such an outrageous case, we are confident that we have the tools to ensure that the right to appeal is not defeated.”); see also *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 238 (3d Cir.2013) (recognizing the concern that “[t]he terror of extreme hypotheticals produces much bad law” (quoting *Marozsan v. United States*, 852 F.2d 1469, 1498 (7th Cir.1988) (Easterbrook, J., dissenting)) (internal quotation marks omitted)).

other grounds. Rather, the rule only applies in those cases “in which a reasonable doubt persists about a statute’s intended scope,” *United States v. Doe*, 564 F.3d 305, 315 (3d Cir.2009) (internal quotation marks omitted), after consulting “every thing [sic] from which aid can be derived.” *United States v. Cruz*, 106 F.3d 1134, 1139 n. 6 (3d Cir.1997) (quoting *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)) (internal quotation marks omitted). The rule is therefore an interpretative method of “last resort” and “need not be applied when the intent of Congress is already clear based on an analysis of the plain meaning of the statute.” *Valansi v. Ashcroft*, 278 F.3d 203, 214 n. 9 (3d Cir. 2002).¹¹

Though we have not ruled before on the meaning of “years” in this exact context,¹² several state courts have interpreted how to count “years” when applying sexual offense statutes. The Connecticut Supreme Court observed that “common sense dictates that in comparing the relative ages of individuals, the difference in their ages is determined by reference to their respective birth dates.” *State v. Jason B.*, 248 Conn. 543, 729 A.2d 760, 767 (1999). Florida, Wisconsin, and North Carolina have each relied on that interpretation to conclude that the phrase “more than 4 years older” within 42 U.S.C. § 16911(5)(C) or similar statutes means more than 1,461 days older. See *State v. Marcel*, 67 So.3d 1223, 1225 (Fla.Dist.Ct.App.2011) (“If a defendant is one day past the four-year eligi-

bility . . . [he] clearly is ‘greater’ or ‘of a larger amount’ than four years.”); *State v. Parmley*, 325 Wis.2d 769, 785 N.W.2d 655, 662 (Wis.Ct.App.2010) (“From these cases we conclude that to calculate the disparity of ages . . . to determine if an actor is exempt from registering as a sex offender, the time between the birth dates of the two parties is to be determined.”); *State v. Faulk*, 200 N.C.App. 118, 683 S.E.2d 265, 267 (2009) (“Neither our legislature nor this Court deals only in whole integers of years, and, as such, this argument must fail. So too does defendant’s argument that a plain language analysis of the statute requires this Court to consider the everyday conversational meaning of age differences . . . ”). That conclusion is, we think, entirely correct.

III. Conclusion

Because Brown was, as he has stipulated, more than 4 years older than his victim at the time of the offense giving rise to his 2003 conviction, we will vacate the order dismissing the indictment and direct that the indictment be reinstated.



11. It is true that on one occasion we stated that “the rule of lenity should be employed to ‘resolv[e] any ambiguity in the ambit of [a criminal] statute’s coverage,’ *United States v. Carr*, 25 F.3d 1194, 1214 (3d Cir.1994) (alterations in original) (citation omitted). That comment, however, cannot be taken literally, since doing so would be at odds with our own precedent, as set forth in the cases cited above, and with Supreme Court precedent. See *Chapman v. United States*, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)

(“The rule of lenity, however, is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act’ . . . ”).

12. Cf. *Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor v. Gardner*, 882 F.2d 67, 71 (3d Cir.1989) (holding that the word “year” in that federal regulation “means 365 days”).

the “shocks the conscience” standard to Counts 5, 6, and 7. On remand, the district court is instructed to consider the claim of inadequate medical care under the deliberate indifference standard outlined in Senty-Haugen, and to consider the remaining claims under the standard for punitive conditions of confinement outlined in Bell. “In considering whether the conditions . . . are unconstitutionally punitive,” the court must “review the totality of the circumstances of [Appellants’] confinement.” Morris, 601 F.3d at 810.

III.

For the foregoing reasons, we affirm the district court’s dismissal of Count 3 but vacate the district court’s dismissal of Counts 5, 6, and 7, and remand for further proceedings not inconsistent with this opinion.



UNITED STATES of America,
Plaintiff - Appellee

v.

KT BURGEE, also known as Kape
Teal Burgee, Defendant -
Appellant

No. 19-3034

United States Court of Appeals,
Eighth Circuit.

Submitted: October 20, 2020

Filed: February 24, 2021

Rehearing and Rehearing En Banc
Denied April 26, 2021

Background: Defendant was convicted in the United States District Court for the District of South Dakota, Roberto Lange, Chief Judge, 2019 WL 1332858, of failing

to register as a sex offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

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

- (1) defendant’s prior conviction qualified as a sex offense under SORNA;
- (2) district court did not err in considering evidence that was not used during defendant’s plea hearing in his state-court prosecution, in determining that defendant’s state-court conviction qualified as a sex offense under SORNA; and
- (3) SORNA was not void for vagueness as applied to defendant.

Affirmed.

1. Sentencing and Punishment \Leftrightarrow 95

When determining whether a defendant’s prior conviction falls within the ambit of a federal statute, courts apply different approaches depending on the statutory language.

2. Mental Health \Leftrightarrow 469(2)

Court of Appeals employs the circumstance-specific approach to determine whether defendant’s prior conviction falls within the ambit of the Sex Offender Registration and Notification Act; under this approach, it examines the specific conduct the defendant engaged in while committing the underlying crime. 34 U.S.C.A. § 20911(7)(I).

3. Sentencing and Punishment \Leftrightarrow 95

Under the categorical approach to determining whether a defendant’s prior conviction falls within the ambit of a federal statute, courts must determine if the ordinary case, or generic commission, of the underlying crime falls within the statute.

4. Mental Health \Leftrightarrow 469(2)

Defendant’s prior state-court conviction for sexual exploitation of a minor qual-

ified as a sex offense under Sex Offender Registration and Notification Act (SORNA), using the circumstance-specific approach, and thus defendant was required to register as a sex offender under SORNA; defendant's conduct of raping 14 year old girl was conduct that by its nature was a sex offense against a minor. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(7)(I); S.D. Codified Laws § 22-22-24.3.

5. Mental Health ☞469.5

District court did not err in considering evidence that was not used during failure-to-register defendant's plea hearing in his state-court prosecution for sexual exploitation of a minor, in determining that defendant's state-court conviction qualified as a sex offense under Sex Offender Registration and Notification Act (SORNA) using the circumstance-specific approach, as district court conducted a trial to determine the facts of defendant's conduct, required government to prove the facts beyond a reasonable doubt, and defendant had option to exercise his right to jury trial. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(7)(I); S.D. Codified Laws § 22-22-24.3.

6. Sentencing and Punishment ☞329

A sentencing court, in determining whether defendant's prior conviction falls within the ambit of a federal statute, cannot engage in factfinding because there is no jury present to determine the facts.

7. Mental Health ☞469.5

Sentencing and Punishment ☞95

A district court's consideration of any reliable evidence in determining whether a failure-to-register defendant's prior conviction falls within the ambit of Sex Offender Registration and Notification Act does not run afoul of *Shepard v. United States*, 125 S.Ct. 1254, which limited sentencing courts to examining the statutory definition, charging document, written plea agree-

ment, transcript of plea colloquy, and any explicit factual find by the trial judge to which the defendant assented in imposing a heightened sentence based on a prior conviction using the categorical approach, because the constitutional evidentiary concerns that arise during factfinding at sentencing are not present at the guilt phase of a trial. 34 U.S.C.A. § 20911(7)(I).

8. Mental Health ☞469.5

When determining whether a failure to register defendant's prior offense involves conduct that by its nature is a sex offense against a minor, as required for Sex Offender Registration and Notification Act to apply, a district court may admit any reliable evidence. 34 U.S.C.A. § 20911(7)(I).

9. Criminal Law ☞385

"Reliable evidence" is simply evidence that is trustworthy enough to be admissible under the rules of evidence.

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

10. Constitutional Law ☞1132(33)

Defendant's conduct in failing to register as a sex offender for two years after being convicted of a sex offense against a minor under South Dakota law for raping a 14-year old was clearly proscribed by under Sex Offender Registration and Notification Act (SORNA), which obligated those who were convicted of a criminal offense that involved any conduct that by its nature was a sex offense against a minor to register and maintain current information with appropriate authorities, and thus SORNA was not void for vagueness as applied to defendant. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(7)(I).

11. Criminal Law ☞1139

Court of Appeals reviews void-for-vagueness challenges de novo.

12. Constitutional Law ~~☞~~1131

When reviewing a statute for vagueness, courts first determine if a statute is vague as applied to the defendant's conduct, and only if it is will they consider whether a statute is facially unconstitutional.

13. Constitutional Law ~~☞~~1131

A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

14. Constitutional Law ~~☞~~1131

If a statute gave adequate warning, under the defendant's specific set of facts, that the defendant's behavior was a criminal offense, then the statute is not vague.

Appeal from United States District Court for the District of South Dakota - Pierre

Kevin Koliner, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, District of South Dakota, Sioux Falls, SD, Jay P. Miller, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, District of South Dakota, Pierre, SD, for Plaintiff - Appellee.

KT Burgee, Pro Se.

Bryan Dean, FEDERAL PUBLIC DEFENDER'S OFFICE, Bismarck, ND, Randall B. Turner, FEDERAL PUBLIC DEFENDER'S OFFICE, Pierre, SD, for Defendant - Appellant.

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

1. The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

2. In relevant part, the statute provides, "A person is guilty of sexual exploitation of a

SMITH, Chief Judge.

KT Burgee pleaded guilty to sexual exploitation of a minor under South Dakota law. For two years, he regularly registered as a sex offender as required by the federal Sex Offender Registration and Notification Act (SORNA). Then, he stopped. Burgee was charged and found guilty of failing to register under SORNA in federal district court.¹ Burgee's SORNA obligation arose because he had been convicted of an offense that involved "conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). On appeal, he urges us to overrule our decision in *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016); reverse the district court for relying on unreliable evidence; and hold § 20911(7)(I) void for vagueness. We deny each of these claims for relief and affirm the district court.

I. Background

In June 2014, Burgee pleaded guilty to violating a South Dakota statute titled "Sexual exploitation of a minor."² The factual basis for the plea was this: He "had contact with a minor," and "his DNA was found on her neck and . . . in her underwear." Mem. in Supp. of Def.'s Mot. to Dismiss Indictment, Ex. C, at 7:5–8, *United States v. Burgee*, No. 3:18-cr-30164-RAL, 2019 WL 1332858 (D.S.D. 2019), ECF No. 27-3. At the plea hearing, Burgee acknowledged that his plea would require him to register as a sex offender and undergo a psychosexual evaluation.

As required, Burgee registered as a sex offender pursuant to both SORNA and South Dakota law. But in September 2016,

minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors . . ." S.D. Codified Laws § 22-22-24.3.

he stopped registering. Two years later, Burgee was arrested and indicted by a federal grand jury for failing to register under SORNA, in violation of 18 U.S.C. § 2250(a).

During the federal proceedings, Burgee filed a motion to dismiss the indictment, arguing three grounds for relief. First, he contended that the district court should apply the categorical approach to determine whether his state-law conviction qualified as a sex offense under § 20911(7)(I). Second, he averred that even if the district court could properly apply the alternative circumstance-specific approach, it should look only to evidence used for the plea hearing. Lastly, he argued § 20911(7)(I) should be declared void for vagueness. The district court denied his motion as to each of these grounds. The case proceeded to a bench trial where Burgee renewed his motion to dismiss. It was again denied.

During the trial, the district court heard evidence additional to that relied on by the state court in Burgee's plea hearing. Specifically, the government submitted video of the minor victim's forensic interview, which was recorded three days after Burgee committed the offending acts.³ In her interview, the 14-year-old girl recounted how Burgee attended her mother's party. During the party, she was sleeping in bed with her little sister. She awakened with Burgee beside her and kissing her face. Burgee took off her clothes and raped her. She recalled feeling fluid coming out of her vagina afterwards. The district court also heard evidence from a nurse practitioner who evaluated the 14-year-old girl twice within two and a half weeks of the underlying conduct. The nurse practitioner found that the girl's injuries were consistent with rape and took swabs to collect DNA foreign to the girl. And the government presented a forensic scientist who

analyzed semen found on the girl's underwear. It matched Burgee's DNA. The district court also admitted Burgee's state sex-offender registration materials in which Burgee acknowledged his duty to register under South Dakota law.

The district court found that Burgee had been convicted of a qualifying SORNA sex offense—i.e., “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. § 20911(7)(I). Because the qualifying-offense element was the only element of his conviction that Burgee challenged, the district court found him guilty of failing to register as a sex offender.

II. Discussion

Burgee argues that the district court should be reversed for three reasons. First, he argues that the district court should have employed the categorical approach, not the circumstance-specific approach, to determine whether his conviction qualified as a sex offense under § 20911(7)(I). Next, he contends that, even under the circumstance-specific approach, the district court should have limited its review to evidence used at his plea hearing because it was the only reliable evidence. Finally, Burgee urges us to find § 20911(7)(I) void for vagueness.

SORNA obligates those identified as sex offenders to register and maintain current information with the appropriate authorities. As relevant here, it defines a *sex offender* as a person “convicted of” “a criminal offense that is a specified offense against a minor.” 34 U.S.C. § 20911(1) & (5)(A)(ii). And a “specified offense against a minor” includes “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” *Id.* § 20911(7)(I). Put simply, a sex

3. Burgee waived hearsay and foundation ob-

jections to the video interview.

offender under § 20911(7)(I) is a person who was convicted of an offense against a minor that involved conduct that by its nature is a sex offense against a minor.

A. Circumstance-Specific Approach

[1–3] When determining whether a defendant's prior conviction falls within the ambit of a federal statute, courts apply different approaches depending on the statutory language.⁴ This court employs the circumstance-specific approach under § 20911(7)(I). Under this approach, we examine the specific conduct the defendant engaged in while committing the underlying crime. *Hill*, 820 F.3d at 1005. Burgee urges us to use the categorical approach. Under that approach, courts must determine if the ordinary case, or generic commission, of the underlying crime falls within the statute. *See Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 1211, 200 L.Ed.2d 549 (2018).

In *Hill*, we held that § 20911(7)(I) "manifestly invites" application of the circumstance-specific approach. 820 F.3d at 1005. Here, the district court followed the circumstance-specific approach to determine that Burgee's underlying conduct was "conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). But Burgee asks us to overrule *Hill* and instead apply the categorical approach. According to Burgee, *Hill*'s holding is suspect because of the subsequent Supreme Court decisions in *Dimaya* and *Davis*. See

4. For example, in *Nijhawan v. Holder*, the Supreme Court held that a statutory provision, which read "an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000*," required the circumstance-specific approach because "the italicized language" "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." 557 U.S. 29, 32, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (alteration in original) (quoting 8 U.S.C.

Gresham v. Swanson, 866 F.3d 853, 855 (8th Cir. 2017) (explaining that a prior panel decision controls "unless an intervening Supreme Court decision has superseded it").

Dimaya and *Davis*, however, are distinguishable. In *Dimaya* and *Davis*, the Supreme Court interpreted 18 U.S.C. §§ 16(b) and 924(c)(3)(B), respectively. Both statutes define, in relevant part, "crime of violence" as an "offense that . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. §§ 16(b) & 924(c)(3)(B). In both cases, the Court applied the categorical approach, relying heavily on the term *offense*, which meant "a generic crime," not "the specific acts in which an offender engaged on a specific occasion." *Davis*, 139 S. Ct. at 2328 (quoting *Nijhawan*, 557 U.S. at 33–34, 129 S.Ct. 2294); *see also Dimaya*, 138 S. Ct. at 1217 (explaining that the statutory "text creates no draw: Best read, it demands a categorical approach"). Thus, it was the statutory text in *Davis* and *Dimaya* that required the Court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Davis*, 139 S. Ct. at 2328 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)); *see also Dimaya*, 138 S. Ct. at 1218 (stating that "the absence of terms alluding to a crime's

§ 1101(a)(43)(M)(i)). And, as discussed below, the Supreme Court in *United States v. Davis* addressed a statutory provision defining a qualifying offense as one "that is a felony" and "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" and stated that "the statutory text commands the categorical approach." — U.S. —, 139 S. Ct. 2319, 2324, 2328, 204 L.Ed.2d 757 (2019) (quoting 18 U.S.C. § 924(c)(3)(B)).

circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit").

[4] *Hill* survives the decisions in *Davis* and *Dimaya*. Just as *Davis*'s and *Dimaya*'s holdings are based on statutory text, so too is *Hill*'s holding. The *Hill* court held that because § 20911(7)(I) explicitly references the offense *conduct*, the statutory "text evidently commands . . . a circumstance-specific approach." *Hill*, 820 F.3d at 1006. *Conduct*, after all, is "[t]he way a person acts." *Conduct*, *The American Heritage Dictionary of the English Language* (5th ed. 2011). Thus, *Hill* explained that arguments for a categorical approach "simply founder[] on the plain words of the statute." *Hill*, 820 F.3d at 1005. In fact, the *Hill* court found the text so clear that it declined to give deference to the Attorney General's regulation that indicated the categorical approach should apply to the statute. *Id.* at 1006. *Hill*'s precedential value has not been altered, and it forecloses Burgee's argument.

B. Reliable Evidence

[5] Burgee also challenges the district court's reliance on evidence that was not used during his plea hearing. According to Burgee, district courts employing the circumstance-specific approach should only consider the "facts the defendant admitted or was convicted of as shown by the prior judicial record." Appellant's Br. at 15–16. The relevant documents under his approach would be "the statutory subdivision of conviction, the charging instrument (insofar as it tracks the actual conviction, as here), the judgment of conviction, and—most crucial—the plea colloquy and factual basis." Appellant's Reply Br. at 7 n.6.

Again, *Hill* resolves Burgee's issue. In *Hill* we explicitly declined to limit district courts' review under § 20911(7)(I) to specific documents, like those the Supreme

Court had laid out in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). 820 F.3d at 1005. In *Shepard*, the Supreme Court held that when sentencing courts apply the categorical approach, they are "generally limited to examining 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." 544 U.S. at 16, 125 S.Ct. 1254. The *Shepard* Court explained that a sentencing court could not delve beyond the facts the defendant was convicted of to "make a disputed finding of fact" because the Constitution "guarantee[s] a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." *Id.* at 25, 125 S.Ct. 1254.

[6, 7] In *Hill*, because we did not apply the categorical approach, our course tacked differently. Instead of limiting district courts to specific documents, we held that they may "consider any reliable evidence." 820 F.3d at 1005. This does not run afoul of *Shepard* because the constitutional evidentiary concerns that arise during factfinding at sentencing are not present at the guilt phase of a trial. Under *Shepard*, a sentencing court cannot engage in factfinding because there is no jury present to determine the facts. *Shepard*, 544 U.S. at 25, 125 S.Ct. 1254 (stating that "the Sixth and Fourteenth Amendments . . . guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence"). Under *Hill*, defendants get a trial and thus have the right to a jury. This is just what the Sixth Amendment contemplates: "[A] jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Descamps v. United States*, 570 U.S. 254, 269, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Burgee got just such a trial. The court conducted a trial to determine the

facts of Burgee's offense conduct. The government had to prove the facts beyond a reasonable doubt, and Burgee had the option to exercise his right to a jury trial. He chose not to.

[8, 9] When determining whether a defendant's prior offense involves "conduct that by its nature is a sex offense against a minor," a district court may admit any reliable evidence. *Hill*, 820 F.3d at 1005. Reliable evidence is simply evidence that is trustworthy enough to be admissible under the rules of evidence. Cf. *Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) ("The Supreme Court explained that evidentiary reliability means trustworthiness."); see also *United States v. Sutton*, 916 F.3d 1134, 1140 (8th Cir. 2019) (holding that the challenged hearsay was "not reliable" because the "witnesses were at times admittedly untruthful, had accounts that were internally inconsistent and inconsistent with one another, and demonstrated motives to minimize their own involvement in the assault"). District courts regularly perform factfinding and are well equipped to assess evidence admissibility. The district court did so here. Burgee does not challenge the district court's inclusion of any specific piece of evidence, so our inquiry is at an end.

C. Vagueness

[10, 11] Finally, Burgee challenges § 20911(7)(I) as void for vagueness. We review void-for-vagueness challenges de novo. *United States v. Buie*, 946 F.3d 443, 445 (8th Cir. 2019).

[12–14] When reviewing for vagueness, we first determine if a statute is vague as applied to the defendant's conduct, and only if it is will we consider whether a statute is facially unconstitutional. *United States v. Brammer*, 832 F.3d 908, 909–10 (8th Cir. 2016). This is because "a 'plaintiff who engages in some conduct that is clear-

ly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)). Thus, if "the statute gave adequate warning, under [the defendant's] specific set of facts, that the defendant's behavior was a criminal offense," then the statute is not vague. *United States v. Palmer*, 917 F.3d 1035, 1038–39 (8th Cir. 2019) (quoting *United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002)).

As we have explained, the district court's factual findings were proper. Burgee's actions with the 14-year-old victim of his offense constituted "conduct that by its nature is a sex offense against a minor" under § 20911(7)(I). Burgee failed to register as a sex offender under SORNA and South Dakota law for two years. His conduct was clearly proscribed. Section 20911(7)(I) is thus not void for vagueness as applied to Burgee.

III. Conclusion

We follow the precedent established in *Hill* and employ the circumstance-specific approach to the application of § 20911(7)(I). The district court used reliable evidence in finding the requisite facts by putting the government's proof through the rigors of the admissibility standards of the rules of evidence in a contested hearing. We also conclude that § 20911(7)(I) is not void for vagueness as applied to Burgee. Accordingly, we affirm.



Eric Christopher DROEGEMEIER,
Plaintiff,

v.

William P. BARR, Attorney General of
the United States; Kirstjen M. Nielsen,
Secretary of the Department of Home-
land Security; L. Francis Cissna, Di-
rector of U.S. Citizenship and Immi-
gration Services; Edward A. Newman,
District Director of the Vermont Ser-
vice Center, U.S. Citizenship and Im-
migration Services, Defendant.

CV 19-14-M-DLC

United States District Court,
D. Montana,
Missoula Division.

Signed 09/17/2019

Background: Petitioner for alien relative brought Administrative Procedure Act (APA) action against federal officials, challenging decision by United States Citizenship and Immigration Services (USCIS) to deny petition on ground that petitioner had been convicted of specified offense against minor, specifically offense involving conduct that by its nature was sex offense against minor. Officials moved to dismiss.

Holdings: The District Court, Dana L. Christensen, J., held that:

- (1) Board of Immigration Appeals (BIA) had not acted arbitrarily or capriciously in determining petitioner's conviction could carry adverse consequences even though conviction had been vacated, but
- (2) BIA's conclusion that petitioner had been convicted for commission of specified offense against minor was not entitled to *Chevron* deference.

Motion denied.

1. Administrative Law and Procedure

☞2299

Aliens, Immigration, and Citizenship

☞404

Ordinary administrative law principles, including the two-step *Chevron* test, govern challenges to construction of immigration statutes by the Board of Immigration Appeals (BIA).

2. Administrative Law and Procedure

☞2299

Aliens, Immigration, and Citizenship

☞404

The District Court is tasked with reviewing determination of purely legal questions regarding the Immigration and Nationality Act (INA) by the Board of Immigration Appeals (BIA) *de novo* but also giving deference to the BIA's interpretation of immigration laws. Immigration and Nationality Act § 101 et seq., 8 U.S.C.A. § 1101 et seq.

3. Administrative Law and Procedure

☞2210

Under *Chevron*, the court must first determine whether Congress has directly spoken to the precise question at issue.

4. Administrative Law and Procedure

☞2210

If the intent of Congress is clear, that is the end of the *Chevron* analysis, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

5. Statutes ☞1072

A court uses traditional tools of statutory construction to ascertain congressional intent.

6. Administrative Law and Procedure

☞2210, 2211

If the statute is ambiguous or silent on the issue, the court proceeds to step two of the *Chevron* test, where the ques-

tion for the court is whether the agency's answer is based on a permissible construction of the statute.

7. Administrative Law and Procedure
☞2211

Review under *Chevron* step two is deferential; the court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

8. Administrative Law and Procedure
☞2300

Aliens, Immigration, and Citizenship
☞183

Board of Immigration Appeals (BIA) did not act arbitrarily or capriciously in violation of Administrative Procedure Act (APA) standard of judicial review in determining that California misdemeanor conviction, of citizen petitioner for alien relative, for annoying or molesting child under 18 years of age could carry adverse consequences for petition even though conviction had been vacated under state rehabilitative statute; Immigration and Nationality Act was ambiguous as to whether citizen's conviction remained conviction for purposes of Act even after it was vacated under state rehabilitative statute, and BIA's interpretation that, like vacated convictions of aliens, vacated convictions of citizens remained convictions for Immigration and Nationality Act (INA) purposes was reasonable. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(48)(A); Cal. Penal Code § 647.6(a).

9. Administrative Law and Procedure
☞2205

If a statutory term is, in fact, ambiguous, the administering agency is entitled to heightened deference under *Chevron*, meaning that its decision must be upheld unless the court finds that its construction of the term is not permissible.

10. Aliens, Immigration, and Citizenship
☞183

Conclusion by Board of Immigration Appeals (BIA) that petitioner for alien relative had been convicted for specified offense against minor, specifically offense involving conduct that by its nature was sex offense against minor, so as to justify petition's denial under Immigration and Nationality Act (INA) was not reasonable, and thus was not entitled to *Chevron* deference, where petitioner had been convicted of California misdemeanor of annoying or molesting child under 18 years of age, the conduct element of which could be satisfied by relatively minor conduct, including brief touching of child's shoulder, and the intent element of which could be established merely by showing that subject of otherwise natural sexual interest was under 18 years of age. Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154; 34 U.S.C.A. § 20911(7)(I); Cal. Penal Code § 647.6(a).

11. Aliens, Immigration, and Citizenship
☞271

In the context of immigration law, 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, rather than allowing examination of the underlying facts of a crime.

12. Aliens, Immigration, and Citizenship
☞271

The categorical approach to determining whether the crime of which a defendant was convicted meets statutory requirements to have immigration consequences is in contrast to the circumstantial or case-by-case method that requires the district court to inquire into the facts of the particular case.

13. Aliens, Immigration, and Citizenship
☞271

A slight variation to the categorical approach to determining whether the state crime of which a defendant was convicted meets federal statutory requirements to have immigration consequences, the modified categorical approach, applies where the state statute of conviction is broader than the generic federal offense and is also divisible, meaning that it comprises multiple, alternative versions of the crime, at least one of which corresponds to the generic offense.

14. Aliens, Immigration, and Citizenship
☞271

Under the modified categorical approach to determining whether the state crime of which a defendant was convicted under a divisible statute of conviction meets federal statutory requirements to have immigration consequences, a court considers a limited class of judicially noticeable documents to determine whether the version of the crime corresponding to the generic offense was the basis of the conviction.

15. Aliens, Immigration, and Citizenship
☞271

One option for determining whether the crime of which an offender was convicted meets statutory requirements to have immigration consequences is the circumstantial approach, which focuses on the specific way in which an offender committed the crime on a specific occasion, looking to the facts and circumstances underlying an offender's conviction.

16. Aliens, Immigration, and Citizenship
☞271

The circumstantial approach to determining whether the state crime of which a defendant was convicted meets federal statutory requirements to have immigration consequences may be triggered when focusing on the specific elements of the

state statute does not resolve the question of whether the state statute is equivalent to the federal provision.

17. Aliens, Immigration, and Citizenship
☞271

The circumstantial approach to determining whether the crime of which a defendant was convicted meets statutory requirements to have immigration consequences properly applies only where its application does not conflict with fundamentally fair procedures.

18. Infants ☞1594

Sex Offenses ☞21(1)

The conduct element of the California misdemeanor of annoying or molesting a child under 18 years of age can be satisfied by relatively minor conduct, including a brief touching of a child's shoulder. Cal. Penal Code § 647.6(a).

19. Infants ☞1544, 1582

While the California statute defining the misdemeanor of annoying or molesting a child under 18 years of age does require unnatural or abnormal sexual interest or intent, that can be established merely by showing that the subject of an otherwise natural sexual interest was under 18 years of age. Cal. Penal Code § 647.6(a)(2).

Benjamin M. Darrow, Darrow Law, Missoula, MT, Jeffrey B. Widdison, Pro Hac Vice, McKinney Immigration Law, Wilmington, NC, Jeremy L. McKinney, Pro Hac Vice, McKinney Immigration Law, Greensboro, NC, for Plaintiff.

Lindsay Marie Vick, U.S. Department of Justice - Civil Division, Washington, DC, for Defendant.

ORDER

Dana L. Christensen, Chief District
Judge

Before the Court is the Motion to Dismiss of the Federal Defendants. (Doc. 13.) In this lawsuit, Plaintiff Eric Christopher Droegeemeier (“Droegeemeier”) challenges the U.S. Citizenship and Immigration Services’ denial of his I-130 Petition for Alien Relative, which he filed on behalf of his wife, Russian citizen Marina Droegeemeier (“Marina”). At issue is whether the agency violated the Administrative Procedure Act (“APA”) when it denied Droegeemeier’s petition on the ground that Droegeemeier “has been convicted of a specified offense against a minor,” 8 U.S.C. § 1154(1)(A)(viii)(I)—more specifically here, of “an offense . . . that involves . . . [a]ny conduct that by its nature is a sex offense against a minor,” 34 U.S.C. § 20911(7)(I).

HISTORY AND PROCEDURAL BACKGROUND¹

In early 1998, Droegeemeier, an American citizen, was charged with one felony count of “lewd act upon a child” and one felony count of “anal and/or genital penetration by foreign object,” with both charges relating to events alleged to have occurred in 1996. (Doc. 1-7.) In March 2003—over five years later—and in exchange for the dismissal of the felony charges, Droegeemeier pled guilty to the misdemeanor violation of California Penal Code 647.6(a), which prohibits “annoy[ing] or molest[ing] [a] child under 18 years of age.” (Doc. 1-7 at 2.) He was sentenced to three years of probation. On June 15, 2010, a California court ordered that Droegeemeier’s guilty plea “be set aside and vacated and a plea of not guilty be entered and that the complaint be, and is hereby, dis-

missed” pursuant to a rehabilitative statute, California Penal Code § 1203.4.

Droegeemeier married Marina on January 10, 2009 in Grand Junction, Colorado. (Doc. 1-3.) Marina is a Russian citizen, born in 1986 in the Kabardino-Balkar Autonomous Soviet Socialist Republic, located in the far southwest corner of the former USSR, just north of Georgia. (Doc. 1-4.) Shortly after the wedding, the couple began seeking citizenship for Marina. Droegeemeier filed a pro se Petition for Alien Relative, and Marina concurrently filed a pro se adjustment of status application. (Docs. 1 at 8 & 1-5.)

In 2010, the United States Citizenship and Immigration Services (the “Services”) issued a Notice of Intent to Deny Droegeemeier’s petition on the basis of his prior conviction under California Penal Code § 647.6(a). (Doc. 1-5.) The Services wrote that this conviction “may render [him] ineligible to act as a petitioner” and that Droegeemeier therefore “must submit” “[c]ertified copies of all existing police reports and court records relating to the offense”; “[a]ny existing trial transcripts”; “any other criminal, violent or abusive behavior, incidents, arrests, and/or convictions”; and “[t]he terms and conditions of [his] sentence, release, parole, [and/or] probation.” (*Id.*)

Droegeemeier filed a response, arguing that: (1) because California vacated his plea of guilt under California Penal Code § 1203.4, he had not been “convicted” of violating § 647.6(a); (2) violation of § 647.6(a) is not a “specified offense against a minor” and therefore is not grounds for denying his petition; and (3) even if Droegeemeier had been convicted of a specified offense against a minor, his petition should be granted because he does

1. For purposes of this Order only, the facts alleged in the Complaint and presented in Droegeemeier’s supporting documents are ac-

cepted as true. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 4, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010).

not pose a danger to Marina. (Doc. 1-7 at 2–6.) He attached as criminal records the underlying criminal complaint (listing the two felony counts upon which he was not convicted) and the check-box judgment form listing his crime of conviction and imposing criminal penalties. (Doc. 17 at 15–18.) The Services rejected Droegeheimer's arguments and denied his petition on June 10, 2011. (Doc. 1-6.)

Droegeheimer timely appealed the Services' denial of his petition to the Board of Immigration Appeals (the “Board”), making the same arguments previously made to the Services. (Docs. 1 at 9, 1-8, & 1-9.) The Board dismissed his appeal on March 10, 2017. In response to Droegeheimer's argument that he had not been convicted of a crime, the Board relied heavily on its 2017 decision of *In re Calcano de Millan*, 26 I. & N. Dec. 904 (BIA 2017), in which it held that relief under California penal code § 1203.3 does not render a conviction void for the purpose of determining whether a citizen may petition for a status change for an alien family member. As for Droegeheimer's contention that his offense was not a “specified offense against a minor,” the Board referred to an earlier decision, *In re Introcaso*, 26 I. & N. Dec. 304 (2014), for the proposition that a petitioner bears the burden of proving, looking to the facts and circumstances of an underlying proceeding, that a conviction does not bar the filing of a petition.

LEGAL STANDARD

[1, 2] Droegeheimer's challenge is brought pursuant to the APA, which demands that this Court “hold unlawful and set aside agency actions, findings, and con-

2. This Court has been tasked with reviewing the Board's “determination of purely legal questions regarding the INA *de novo*” but also giving deference to the Board's “interpretation of immigration laws.” *Chowdhury v. INS*, 249 F.3d 970, 972 (9th Cir. 2001); *accord Gonzalez Romo v. Barr*, 933 F.3d 1191 (9th Cir. 2019) (“We review the BIA's determina-

clusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Ordinary administrative law principles, including the two-step *Chevron* test, govern challenges to the Board's construction of immigration statutes. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999).²

[3–5] Under *Chevron*, the Court must first determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court uses “traditional tools of statutory construction” to ascertain congressional intent. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1187 (9th Cir. 2001) (en banc) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778).

[6, 7] If, on the other hand, the statute is ambiguous or silent on the issue, the Court proceeds to step two of the *Chevron* test, where “the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Review under step two is deferential; the Court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844, 104 S.Ct. 2778.

tion of purely legal questions regarding the Immigration and Nationality Act *de novo*, with appropriate deference.”) (quoting *Kankamalage v. I.N.S.*, 335 F.3d 858, 861 (9th Cir. 2003)). The Court understands the cited cases to mean that it must first apply *Chevron* and second, if *Chevron* deference is unwarranted, review *de novo*.

DISCUSSION

Congress passed the Adam Walsh Act (“AWA”) “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and internet pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims.” Pub. L. No. 109-248, pmb., 120 Stat. 587 (2006). The AWA overhauled federal law relating to sex offenses against children. As relevant here, the AWA amended the Immigration and Nationality Act (“INA”) by placing a new limitation on family requests for citizenship changes, providing that a citizen is not entitled to petition for a change in a spouse’s immigration status if that citizen “has been convicted of a specified offense against a minor.” 8 U.S.C. § 1154. The amended statute cross-references another provision of the AWA, which defines “a specified offense against a minor” to include, as relevant here, “an offense . . . that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. § 20911(7)(I).

Droegemeier challenges the Board’s determination that, absent discretionary relief, he was foreclosed from seeking a status change for Marina. He argues that he has not “been convicted of a specified offense against a minor” because: (1) his conviction was vacated; and (2) the offense at issue does not qualify as a “specified offense.”

I. The Board’s Construction of “Conviction”

[8] Droegemeier and the Federal Defendants dispute whether the Board acted

3. Droegemeier does not dispute that, if he were an alien, he would remain convicted of a crime despite rehabilitation under California Penal Code § 1203.4. Nor should he. Clearly, Droegemeier “has entered a plea of guilty,” and “the judge has ordered some form of punishment, penalty or restraint on [his] liberty to be imposed.” 8 U.S.C.

arbitrarily and capriciously in finding that Droegemeier was “convicted” of a crime when his conviction was later vacated under a rehabilitative statute. The INA provides a statutory definition of “conviction,” but it applies only to aliens:

- [t]he term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A).

The Board interprets the definition of conviction applicable to citizens, such as Droegemeier, to precisely track the statutory definition applicable to aliens. *In re Calcaneo de Millan*, 26 I. & N. Dec. 904.³ The Board recognized that the INA “do[es] not provide a definition of the term ‘conviction’ that is specifically applicable to United States citizens in visa petition proceedings” because the definition of “conviction” expressly applies only to aliens. *Id.* at 906. Finding the definition “ambiguous” as to its application to United States citizens, the Board found “no reason to apply a different interpretation of the term ‘conviction’ to United States citizens” than to nonresident and lawful permanent resident aliens. *Id.* It therefore concluded that United States citizens whose convictions

§ 1101(a)(48)(A). This is not to say that an earlier conviction may always be considered; as the Board has noted, there may be constitutional reasons to find an exception to the statutory definition when a conviction is vacated for reasons other than rehabilitation. See *In re Adamiak*, 23 I. & N. Dec. 878, 879 (2006).

are vacated under a rehabilitative statute should be treated as aliens are—that is, they “ha[ve] been convicted” of an offense for purposes of determining eligibility to file a petition under 8 U.S.C. § 1154(1)(A)(viii)(I). *Id.* at 906.

[9] The Court is limited to considering whether the agency acted arbitrarily or capriciously in extending to citizens the statutory definition applicable to aliens. 5 U.S.C. § 706(2)(A). If the term “conviction” is, in fact, ambiguous as applied to citizens, the agency is entitled to heightened deference under *Chevron*, meaning that its decision must be upheld unless the Court finds that its construction of the term is not “permissible.” *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

Droegemeier contends that the phrase “with respect to an alien” in § 1101(a)(48)(A) renders the meaning of the term “conviction” unambiguous with respect to a U.S. citizen. Droegemeier convincingly argues that, under the common tools of statutory construction, the express reference to aliens suggests that Congress did not intend for the same definition to apply to citizens. See *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312–13 (9th Cir. 1992) (“[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.” (quoting *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270, 20 L.Ed. 570 (1871))). However, while the Court agrees that § 1101(a)(48)(A) does not extend to citizens, it does not follow that the inapplicability of a statutory definition renders the definition of the same term unambiguous as to individuals outside the scope of the statute.

Indeed, the Board did not disagree that, on its face, § 1101(a)(48)(A) applies only to aliens. It found that, because the term “conviction” is ambiguous, it must determine how to apply it to citizens. Applying the definition applicable to aliens under

§ 1101(a)(48)(A) served treble goals of “provid[ing] a uniform definition”; serving the “purpose of the Adam Walsh Act ‘to protect children from sexual exploitation and crimes’”; and ensuring “consisten[cy] with guidelines set forth by the Attorney General regarding the implementation of SORNA, which is title I of the Adam Walsh Act.” *In re Calcano de Millan*, 26 I. & N. Dec. at 907 (citations omitted).

The Court agrees that it is ambiguous whether a citizen’s conviction remains a conviction for purposes of the INA and AWA even after it is vacated under a state rehabilitative statute. As the Board reasoned in *In re Calcano de Millan*, “although the term ‘conviction’ is commonly used in legal parlance, it lacks a single common meaning.” *Id.* at 906 (collecting cases). Setting aside § 1101(a)(48)(A), the Board would still need to determine whether the rehabilitative statute applied to Droegemeier changed his conviction status for immigration purposes.

Notably, the Board has elsewhere “distinguished between situations in which a conviction is vacated based on post-conviction events, such as rehabilitation, and those in which a conviction is vacated because of a defect in the underlying criminal proceedings.” *In re Adamiak*, 23 I. & N. Dec. 878, 879 (2006); see also *Pickering v. Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006) (“[T]he BIA correctly interpreted the law by holding that, when a court vacates an alien’s conviction for reasons solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.”).

Given the ambiguity in the definition of “conviction” applicable to residents, the Board’s construction of the term is not impermissible. The weight of authority supports the Board’s construction. The

Ninth Circuit, following “[c]ommon sense and . . . precedent,” has clearly held that adverse immigration consequences may result from “a conviction that was vacated ‘for equitable, rehabilitation, or immigration hardship reasons.’” *Prado v. Barr*, 923 F.3d 1203, 1206 (9th Cir. 2019) (quoting *Nath v. Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006)).

Droegemeier has not brought to the Court’s attention any case in which a court held that a state rehabilitative statute, such as California Penal Code § 1203.4, prevents the federal government from considering a prior conviction in any legal context. Instead, Droegemeier argues at length that the Board failed to give “full faith and credit” to the California state court proceeding vacating his conviction. 28 U.S.C. § 1738 (“The Acts of the legislature of any State . . . [and] judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State.”).

Droegemeier overstates the effect of California Penal Code § 1203.4. In fact, the rehabilitative statute does not, without exception, “release[] [a defendant] from all penalties and disabilities” under California state law. Cal. Penal Code § 1203.4(a)(1). Rehabilitated defendants, like Droegemeier, may still be unable to possess a firearm, hold public office, or drive a car. Cal. Penal Code § 1203.4(a); Cal. Vehicle Code § 13555. California law simply does not provide that a defendant granted relief under § 1203.4 is on the same footing as individuals who were never convicted of a crime. And, of course, California cannot tell the United States how to execute its laws. See *Prado*, 923 F.3d at 1206 (“[W]hether one has been ‘convicted’ within the language of [federal] statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predi-

cate offense and its punishment are defined by the laws of the state.” (quoting *United States v. Campbell*, 167 F.3d 94, 97 (2d Cir. 1999))).

Finally, Droegemeier contends that the Board’s understanding of the term “conviction” conflicts with the principle that statutes should, where possible, be construed to avoid significant constitutional problems. See *Zadvydas v. Davis*, 533 U.S. 678, 689, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). However, the Court cannot make out an “unconstitutional procedural and substantive due process violation” resulting from the Board’s determination that Droegemeier’s conviction still stands for immigration purposes. (Doc. 17 at 17.) To the degree that Droegemeier argues that the AWA does not apply to him because he was convicted before its enactment, that argument is foreclosed by Ninth Circuit law. *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018) (Because “the punitive aspects of the Adam Walsh Act do not outweigh its non-punitive purposes[,]” its application to individuals convicted prior to enactment “does not violate the Ex Post Facto Clause.”). Nor can Droegemeier succeed on a claim that the denial of his petition violates a constitutional right to live with Marina in the United States; his “strong interest in living with [his] family member[]” does not “override[] Congress’ plenary power [over immigration].” *Id.* at 988.

The Board did not act arbitrarily and capriciously in determining that the Droegemeier’s conviction carries adverse consequences even though he has received the benefit of partial rehabilitation.

II. Whether Droegemeier Was Convicted for the Commission of “a Specified Offense against a Minor”

[10] The question remains whether Droegemeier’s conviction is one that bars

the petition he filed on Marina's behalf. As to this point, Droege's challenge is two-fold. More generally, he argues that the Board acted arbitrarily and capriciously in its general analytical method by applying the circumstantial approach rather than the categorical approach. Second, Droege specifically contends that the Board violated the APA when it found that his offense of conviction is "a specified offense against a minor" such that he may not petition for a change in Marina's immigration status.

The Court cannot agree with Droege that, as a matter of law, the Board must apply the categorical or modified categorical approach to answer whether a particular offense is "a specified offense against a minor." 34 U.S.C. § 20911(7). The statutory language is broad and ambiguous, and it seems, at first glance, that the Board is entitled to considerable deference in construing that language. *Chevron*, 467 U.S. at 842–843, 104 S.Ct. 2778.

However, the Court finds that the Federal Defendants are not entitled to dismissal on the grounds that the Board's interpretation of the AWA and INA is permissible. *Id.* First, Board's method of applying the circumstantial approach in the underlying administrative proceeding is based in a misunderstanding of the precedent it cited for support. See *Motor Vehicle Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 53, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (creating "reasoned decisionmaking" standard). What is more, the Board's application of the circumstantial approach prevented it from seeing what is clear enough in the relevant statutory provisions themselves: Droege's conviction does not fall under the AWA. Thus, while the relevant statutes are seemingly ambiguous, they do not permit the construction given by the Board. *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778 ("If a court, in employing traditional tools of

statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

In denying Droege's appeal, the Board devoted one paragraph to Droege's argument that his California misdemeanor conviction does not constitute a conviction for a "specified offense against a minor." As relevant to this case, a "specified offense against a minor" is one "that involves," in relevant part, "[a]ny conduct that by its nature is a sex offense against a minor." 8 U.S.C. § 1154; 34 U.S.C. § 20911(7). The Board wrote that "[g]iven the broad category of offenses that Congress identified in invoking the protections afforded by the Adam Walsh Act, we conclude that an offense in violation of California Penal Code § 647.6(a) can constitute conduct that by its nature is a sex offense against a minor." (Doc. 1-10 at 3 (emphasis added).) Citing its decision in *Introcaso*, the Board reasoned that an "adjudicator may properly examine the circumstances of a crime" and that Droege "bore the evidentiary burden to establish that his offense did not bar approval of the visa petition," a burden that the Board found unmet in this case. (*Id.*)

Because the reasoning in Droege's own administrative proceeding is minimal, the Court looks to *Introcaso*, the case cited as precedent. There, the Board held that § 20911(7)(I) "contain[s] circumstance-specific language that invites inquiry into the underlying facts or conduct of a conviction to determine whether it is for a disqualifying offense." 26 I. & N. Dec. at 309. To determine whether a state conviction qualifies as an offense "that involves" "conduct that by its nature is a sex offense against a minor," the Board applies "a circumstance-specific inquiry, rather than . . . the categorical approach," looking beyond the elements of the statute of conviction to "the

underlying conduct, as well as the minority of the victim.” *Id.* at 309–10.

[11, 12] Droegeemeier raises the threshold question of whether the Board may, consistent with the APA, apply the circumstantial approach to find facts outside the record of the underlying state court proceeding. He contends that the Board was required to apply the categorical approach to analyze his state conviction. “In the context[] of immigration law . . . , 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 . . . , rather than allowing examination of the underlying facts of a crime.” *United States v. Mi Kyung Byun*, 539 F.3d 982, 990 (9th Cir. 2008). “Th[e] categorical approach is in contrast to the circumstantial or case-by-case method that requires the district court to inquire into the facts of the particular case.” *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993). Under the categorical approach, a court “examin[es] only the statutory definition of the crime to determine whether the state statute of conviction renders an alien removable under the statute of removal.” *Mielewczyk v. Holder*, 575 F.3d 992, 994 (9th Cir. 2009).

[13, 14] A slight variation, the “modified categorical approach,” applies where “the state statute of conviction is broader than the generic federal offense and is also ‘divisible,’ meaning that it ‘comprises multiple, alternative versions of the crime,’ at least one of which ‘correspond[s] to the generic offense.’” *Alvarado v. Holder*, 759 F.3d 1121, 1126 (9th Cir. 2014) (quoting *Descamps v. United States*, 570 U.S. 254, 262, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)). Under the modified categorical approach, a court “consider[s] a limited class

of judicially noticeable documents to determine whether the applicable alternative . . . was the basis of the conviction.” *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1241 (9th Cir. 2014).

[15] The third option, adopted by the Board in *Introcaso* and applied against Droegeemeier in the relevant administrative proceeding, is the circumstantial approach, which focuses “on the specific way in which an offender committed the crime on a specific occasion,” “look[ing] to the facts and circumstances underlying an offender’s conviction.” *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). The circumstantial approach might be applied to determine, for example: the amount of money involved in a crime of fraud, *Nijhawan*, 557 U.S. 29, 129 S.Ct. 2294, 174 L.Ed.2d 22; whether the victim of a sex trafficking crime was a minor, *Mi Kyung Byun*, 539 F.3d at 993⁴; or whether the victim of an assault was a family member such that the assault constituted domestic violence, *Bianco v. Holder*, 624 F.3d 265, 272–73 (5th Cir. 2010); *but see Tokatly v. Holder*, 371 F.3d 613 (9th Cir. 2004) (holding that categorical approach informs whether an offense is one of domestic violence). At least three circuits apply some form of circumstantial approach to determine whether a crime involves “[a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. 20911(7)(I); *see Mi Kyung Byun*, 539 F.3d 982; *United States v. Price*, 777 F.3d 700 (4th Cir. 2015); *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010) (en banc).

[16] The circumstantial approach may be triggered when “[f]ocusing on the specific elements of [the state] statute” does not resolve the question of whether the state statute is equivalent to the federal

4. In *Mi Kyung Byun*, the Ninth Circuit expressly “dr[e]w no conclusion as to whether a non-categorical approach is permitted with

regard to any facts other than the age of the victim.” 539 F.3d at 994 n.15.

provision. *Bianco*, 624 F.3d at 269. Thus, the Fourth Circuit has applied the circumstantial approach to determine under what theory the defendant was convicted of common-law assault and battery when the common-law crime encompassed both sexual and nonsexual violent offenses and could be pursued under widely disparate theories. *Price*, 777 F.3d at 705–06.

[17] The approach properly applies only where its application does not conflict with “fundamentally fair procedures.” *Nijhawan*, 557 U.S. at 41, 129 S.Ct. 2294. The petitioner’s burden of proving that the underlying offense is not a qualifying sex offense under the circumstantial approach appears to be without analogue in the federal courts. In the immigration context, the circumstantial approach may arise in civil deportation proceedings, where the burden falls on the government to prove, “by clear and convincing evidence,” that an underlying offense falls under § 20911. *Id.* at 42, 129 S.Ct. 2294; *accord Bianco*, 624 F.3d at 272–73. Somewhat closer to the Board’s analysis are those criminal cases in which a sentencing court imposed sex offender registration requirements as part of a defendant’s term of supervision upon finding, using the circumstantial approach, that the defendant’s offense of conviction is “a specified offense against a minor” triggering SORNA. *See Mi Kyung Byun*, 539 F.3d 982; *Price*, 777 F.3d 700; *Dodge*, 597 F.3d at 1353. However, the Board is not similarly situated with a sentencing court, which is well-informed of the conduct giving rise to the crime for which the defendant is sentenced.

None of the courts developing and applying the circumstantial approach appears to have anticipated—let alone authorized—the Board’s free-wheeling inquiry into the nature of the underlying offense, unmoored

5. On this point, the Board was equivocal, determining only that Droegemeier’s crime of conviction “can constitute conduct that by its

from the elements of the crime itself. The Board, unlike the courts cited above, used the circumstantial approach not to determine whether Droegemeier’s crime of conviction is a qualifying offense⁵ but to determine whether Droegemeier at any point relevant to the underlying crime *may* have committed an offense triggering rejection of his petition. That approach, coupled with the requirement that Droegemeier somehow prove that his crime did not in actuality involve “[a]ny conduct that by its nature is a sex offense against a minor,” essentially barred him from successfully filing a petition. Absent relitigation of the underlying offense, how could Droegemeier, who pled guilty to the misdemeanor crime, prove that his conduct does not fall under § 20911(7)(I)? *See Bianco*, 624 F.3d at 272–73 (authorizing use of circumstantial approach to determine whether violent offense was a crime of domestic violence but holding “that the government has the burden to prove the domestic relationship by clear and convincing evidence”); see also *Moncrieffe v. Holder*, 569 U.S. 184, 201, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013) (“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.”).

The cases cited in *Introcaso* simply do not support the Board’s interpretation of them. And, while the Court takes no view of whether *Introcaso* itself is legally erroneous, the Board’s analysis in the underlying administrative proceeding is foreclosed by the terms of the relevant federal and state statutes themselves.

As a matter of straightforward statutory interpretation, the Federal Defendant’s arguments in favor of dismissal fail. Droegemeier’s claim that he did not commit a sex offense against a minor fails because he did commit such an offense, and the Board’s claim that he did not commit such an offense fails because he did not commit it. The Board’s interpretation of the statute is therefore erroneous.

nature is a sex offense against a minor.” (Doc. 1-10 at 3 (emphasis added).)

gemeier's charge of conviction does not involve "conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). Indeed, a conviction under California Penal Code § 647.6(a) does not, despite the misleading (and perhaps archaic) use of the term "molest" in the statute itself, demand a finding that wrongful sexual conduct occurred.

[18, 19] "The conduct element of § 647.6(a) can be satisfied by 'relatively minor conduct,' including a 'brief touching of a child's shoulder.'" *Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) (quoting *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1000 (9th Cir. 2008)). While the criminal statute does require "'unnatural or abnormal sexual interest or intent,' . . . this can be established 'merely by showing that the subject of an otherwise natural sexual interest was under eighteen.'" *Id.* (quoting *Nicanor-Romero*, 523 F.3d at 1000–01). For this reason, the Ninth Circuit has concluded that a conviction under § 647.6(a) is neither a conviction for "a crime of moral turpitude," *Nicanor-Romero*, 523 F.3d at 1007–08, nor a conviction for a "sexual abuse of a minor," *United States v. Pallares-Galan*, 359 F.3d 1088, 1099 (9th Cir. 2004).

The Ninth Circuit discussed at length the "catchall provision for 'conduct that by its nature is a sex offense against a minor'" in *Mi Kyung Byun*, 539 F.3d at 988–90. In that case, a criminal defendant argued that she did not commit a "specified sex offense against a minor" when she transported a minor to the United States with the intent that the minor would work out of the defendant's night club as a prostitute. *Id.* at 983–84, 988. The defendant was convicted of smuggling aliens into the United States for purposes of prostitution, but the statute of conviction was silent as to the age of the defendant's victims. The Court determined that, although the defendant's conduct did not fall

within a specific category described in 34 U.S.C. § 20911(7), it fell under the catchall provision.

The Court's reasoning in *Mi Kyung Byun* was twofold. First, the defendant's conduct closely mirrored that of a listed offense—"solicitation [of a minor] to practice prostitution." *Id.* at 988; 34 U.S.C. § 20911(7)(E). Following ordinary rules of textual interpretation, general terms within a provision are construed as similar to specific terms found within the same provision; the defendant's conduct likely fell under the catchall provision because it was similar in kind and degree to solicitation of a minor. *Id.*; see, e.g., *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."). Second, the Court looked at the statute more broadly, finding that the defendant's conduct qualifies her for designation as a "tier II sex offender," "a circumstance that supports the conclusion[] . . . that it is a 'specified offense against a minor.'" *Mi Kyung Byun*, 539 F.3d at 988–89.

On this point, too, *Mi Kyung Byun* is immediately distinguishable from the instant case. There, the crime of conviction was analogous to two provisions within the AWA. In contrast, no specific provision proscribes conduct which, while itself non-sexual and perhaps legal, nonetheless constitutes "a specified offense" solely because of the defendant's mental state.

As a matter of relatively simple statutory construction, the AWA is indifferent to offenses that are made illegal only because of the defendant's mental state. There is no specific provision addressing such an offense, and the text of the AWA and INA themselves mandate that wrongful conduct actually occur. The AWA demands that Droegemeier's petition be denied if he is "convicted" of an offense that "involves," in relevant part, "[a]ny conduct that by its

nature is a sex offense against a minor.” 8 U.S.C. § 1154; 34 U.S.C. § 20911(7). However, a conviction under California Penal Code § 647.6(a) stands even where there is no such “conduct” but only sexual interest or intent.

There is no theory under which a prosecutor could procure a conviction under § 647.6(a) only by proving conduct falling under § 20911(7)’s purview. Nor could a reviewing court or agency look to the criminal records to find a discrete fact, such as the victim’s age, clarifying that the offense qualifies as “a specified offense against a minor.” Thus, assuming that the Board generally may apply the circumstantial approach in its analysis, the circumstantial approach should not have been triggered in the first instance. As the Board indicated in Droegeimer’s administrative proceeding, a petitioner could be convicted under § 647.6(a) for an offense that does not involve “conduct that by its nature is a sex offense against a minor.” (Doc. 1-10 at 3.) *See supra* n.5.

Because the Board’s decision in this case is in direct conflict with the INA, as amended by AWA, the Board is not entitled to *Chevron* deference, and the Federal Defendants are not entitled to dismissal.

IT IS ORDERED that the Federal Defendants’ Motion to Dismiss (Doc. 13) is DENIED.

Lauren Ashley SMITH, Plaintiff,

v.

Chase Joseph RIPLEY, State of Montana by and through the Child and Family Services Division of the Montana Department of Public Health and Human Services, John Does 1-5, and Jane Does 6-10, Defendants.

CV 19-173-DLC

United States District Court,
D. Montana,
Missoula Division.

Signed March 12, 2020

Background: Plaintiff filed § 1983 action in state court against state and state child protection specialist alleging that specialist violated her constitutional rights and state law by raping her and that state failed to properly hire, train, and supervise specialist. After removal, state moved to dismiss vicarious liability claims against it.

Holdings: The District Court, Dana L. Christensen, J., held that:

- (1) state was not subject to vicarious liability for specialist’s conduct pursuant to respondeat superior doctrine, but
- (2) plaintiff’s claim fell within scope of nondelegable duty exception to respondeat superior doctrine.

Motion denied.

1. Federal Civil Procedure ↗1771

Presented with motion to dismiss for failure to state claim, court asks not whether plaintiff will ultimately prevail, but whether her complaint is sufficient to cross federal court’s threshold. Fed. R. Civ. P. 12(b)(6).

2. Federal Civil Procedure ↗673, 1772

Complaint need not be model of careful drafter’s art nor must it pin plaintiff’s



the question of what standard should apply, the employer was asking the Board to include additional employees in a proposed bargaining unit. *Specialty Healthcare*, 357 N.L.R.B. No. 83, at *2. The Board was free to clarify the applicable standard. See *Bell Aerospace*, 416 U.S. at 294, 94 S.Ct. 1757 (“[T]he Board is not precluded from announcing new principles in an adjudicative proceeding....”).

We therefore conclude that the Board did not violate the Administrative Procedure Act.

III.

For the reasons stated, we deny Dreyer's petition for review and grant the Board's cross-petition for enforcement.

*PETITION FOR REVIEW DENIED
AND CROSS-PETITION FOR EN-
FORCEMENT GRANTED*



UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas Earl FAULLS, Sr.,
Defendant-Appellant.

No. 14-4595.

United States Court of Appeals,
Fourth Circuit.

Argued: Oct. 28, 2015.

Decided: May 5, 2016.

Background: Defendant was convicted in a jury trial in the United States District Court for the Western District of Virginia, Glen E. Conrad, Chief Judge, of kidnap-

ping, interstate domestic violence, and possessing firearm in furtherance of crime of violence, and he was sentenced to prison term of 295 months and required to register as sex offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

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

- (1) court declined to reach defendant's ineffective assistance of counsel claim on direct appeal;
- (2) trial court reasonably admitted prior act evidence; and
- (3) offense of interstate domestic violence was divisible, triggering application of modified categorical approach and supporting imposition of registration requirement under SORNA.

Affirmed.

Shedd, Circuit Judge, concurred and filed opinion.

1. Criminal Law \Leftrightarrow 1139

Court of Appeals will consider de novo a defendant's argument that he was denied the effective assistance of counsel at a criminal proceeding. U.S.C.A. Const. Amend. 6.

2. Criminal Law \Leftrightarrow 1119(1)

Court of Appeals declined to reach defendant's ineffective assistance of counsel claim on direct appeal, absent any conclusive evidence of ineffective assistance on the face of the record. U.S.C.A. Const. Amend. 6.

3. Criminal Law \Leftrightarrow 1153.1, 1153.5

Court of Appeals will review evidentiary rulings for abuse of discretion, and it will reverse a district court's decision to admit prior acts evidence only if such admission is arbitrary or irrational. Fed. Rules Evid. Rule 404(b), 28 U.S.C.A.

4. Criminal Law ☞368.18, 373.12, 673(5)

Court reasonably admitted prior act evidence of two prior incidents in which domestic violence defendant confronted his estranged wife; evidence was relevant to issues other than character or propensity, as jury could reasonably conclude that defendant's motive in prior incidents was to stop ex-wife from leaving marital home or, more generally, marriage, and that defendant controlled and dominated ex-wife, which helped to explain her state of mind and her apparent willingness to remain with defendant during events leading to charged offenses, and court gave jury clear limiting instructions regarding this evidence. 18 U.S.C.A. §§ 924(c), 1201(a)(1), 2261(a)(2), (b)(4); Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

5. Criminal Law ☞368.4

Evidence of prior wrongs may be admitted in order to show the defendant's motive, opportunity, intent, preparation, or plan, or to show the victim's state of mind. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

6. Criminal Law ☞368.8

To be admissible under any theory, prior act evidence must be (1) relevant to an issue other than character, (2) necessary, and (3) reliable. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

7. Criminal Law ☞368.15

Prior act evidence is "necessary," as required to be admissible, when it is probative of an essential claim or an element of the charged offense or when it furnishes part of the context of the crime. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

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

8. Criminal Law ☞368.13, 673(5)

Court may exclude prior act evidence if its probative value is substantially out-

weighed by a danger of unfair prejudice, but the danger of prejudicial effect subsides when the district court gives proper limiting instructions, particularly in the face of overwhelming evidence of guilt. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

9. Criminal Law ☞1156.6

Generally, the Court of Appeals will review a district court's imposition of special conditions of supervised release for abuse of discretion.

10. Criminal Law ☞561(1)

Constitution requires a jury to find, beyond a reasonable doubt, the elements of the criminal offense charged.

11. Jury ☞34(6)

Sentencing and Punishment ☞322.5

Under *Apprendi*, other than the fact of a prior conviction, any 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.

12. Jury ☞34(6)

Sentencing and Punishment ☞322.5

Under *Apprendi*, the distinction between a substantive offense element and a sentencing or penalty enhancement is meaningless when the enhancement requires facts or circumstances, separate from those composing the base offense, to have taken place in order to trigger a greater punishment than the base offense statutorily carries.

13. Jury ☞34(6)

Sentencing and Punishment ☞322.5

Any facts that increase the prescribed statutory minimum penalty, i.e., facts that establish a new or higher mandatory minimum sentence, must be submitted to a jury, and proved beyond a reasonable doubt.

14. Mental Health ~~☞~~469(2)

Jury's finding, beyond a reasonable doubt, that defendant committed aggravated sexual abuse did not answer statutory question of whether that finding was element of his offense of interstate domestic violence, which was prerequisite to imposition of requiring him to register under Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. § 2261(a)(2), (b)(4); Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i).

15. Mental Health ~~☞~~469(2)

In applying the traditional categorical approach for determining the character of a prior conviction under the Sex Offender Registration and Notification Act (SORNA), the court compares the elements of the defendant's offense of conviction to the elements of the federal offense, or generic offense, and there is a categorical match if the elements comprising the statute of conviction are the same as, or narrower than, those of the generic offense. Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i).

16. Criminal Law ~~☞~~1028, 1139

Although the Court of Appeals generally does not consider issues not passed upon below, it will consider such issues de novo if the question is purely one of law and it perceives no injustice or unfair surprise in considering the issue.

17. Mental Health ~~☞~~469(2)

Modified categorical approach for determining the character of a prior conviction under the Sex Offender Registration and Notification Act (SORNA), applies only to "divisible statutes," meaning those containing alternative elements, and it entails a brief "detour" in the analysis, in that the court, before looking for a categorical match, must consider a limited

number of trial documents, including the indictment and jury instructions, to determine which alternative element formed the basis of the conviction, and only then does the traditional elements-based approach resume. Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i).

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

18. Mental Health ~~☞~~469(2)

Defendant's offense of conviction, interstate domestic violence, necessarily swept more broadly and criminalized more conduct than generic federal sex offense defined under Sex Offender Registration and Notification Act (SORNA), precluding any categorical match when determining character of defendant's offense under SORNA; while defendant's offense constituted crime of violence, this did not necessarily mean that it constituted sex offense. 18 U.S.C.A. § 2261(a)(2); Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i); U.S.S.G. § 4B1.2, commentary (n.1), 18 U.S.C.A.

19. Mental Health ~~☞~~469(2)

Where a statute defines an offense broadly, rather than alternatively, the statute is not divisible, and the modified categorical approach for determining the character of a prior conviction under the Sex Offender Registration and Notification Act (SORNA) simply has no role to play. Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i).

20. Mental Health ~~☞~~469(2)

General divisibility of a statute defining an offense is not enough to trigger the modified categorical approach for determining the character of a prior conviction

under the Sex Offender Registration and Notification Act (SORNA); only if at least one of the categories into which the statute may be divided constitutes, by its elements, the generic federal offense is the statute “divisible” in that context.

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

21. Mental Health ↪469(2)

Defendant's crime of conviction, interstate domestic violence, by its crime of violence element, encompassed additional, alternative offense elements, and thus was divisible, triggering application of modified categorical approach and supporting imposition of registration requirement under Sex Offender Registration and Notification Act (SORNA) at sentencing for this offense, where, in order to convict defendant of interstate domestic violence, jury was charged with finding, unanimously and beyond reasonable doubt, commission of specific underlying crime of violence, in this case aggravated sexual abuse, as well as elements of that offense. 18 U.S.C.A. § 2261(a)(2), (b)(4); Sex Offender Registration and Notification Act, § 111(5)(A)(i), 42 U.S.C.A. § 16911(5)(A)(i).

Affirmed by published opinion. Judge DIAZ wrote the opinion, in which Judge SHEDD and Judge HARRIS joined. Judge SHEDD wrote a separate concurring opinion.

DIAZ, Circuit Judge:

Thomas Faulls was convicted of kidnapping in violation of 18 U.S.C. § 1201(a)(1), interstate domestic violence in violation of 18 U.S.C. § 2261(a)(2) and (b)(4), and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). The district court sentenced Faulls to 295 months' imprisonment and also required him to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16911 *et seq.*

On appeal, Faulls contends that his counsel was ineffective in opening the door to testimony by a government expert, and in failing to object to the district court's decision to keep the jury late one evening. He also contends that the district court erred in admitting prior acts evidence and in requiring him to register as a sex-offender. For the reasons that follow, we affirm.

I.

We recite the relevant evidence in the light most favorable to the government. *United States v. Seidman*, 156 F.3d 542, 547 (4th Cir.1998).

A.

Thomas and Lori Faulls were married for about twenty-five years; they had two children. Their marriage was volatile, and they separated in June 2012.

Following their separation, the couple's interactions were marked by a series of violent episodes, three of which are relevant here. On June 28, 2012, Lori re-

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Before SHEDD, DIAZ, and HARRIS, Circuit Judges.

turned to the marital home in Mineral, Virginia, to gather some of her belongings (the “Mineral incident”). There, Faulls confronted her about the separation and expressed frustration that their children never answered his calls. He approached Lori with a gun and laughed when she asked if he was going to kill her. When Lori told Faulls that she was staying with a friend, Faulls called the friend to say that she ruined his marriage by allowing Lori to stay with her and that it would be her fault if Lori died. Faulls then began yelling at Lori, telling her that the marital home was her home and demanding to know why she was leaving. Instead of leaving immediately, Lori stayed with Faulls to calm him down. When she did leave, Faulls followed her and, at some point, hit her car with his truck.¹

Shortly after this incident, Lori moved to Williamsburg, Virginia, to live with her daughter Britnee. In mid-August 2012, Faulls came to Britnee’s apartment and confronted her for not answering his calls (the “Williamsburg incident”). When Britnee tried to call 911, Faulls attacked the women and took their cell phones and car keys. Faulls allowed Britnee to leave, but he repeatedly demanded that Lori return home. Eventually, Lori was able to convince Faulls to leave the apartment.²

The third incident resulted in Faulls’s convictions. On August 22, 2012, Lori drove Faulls to a repair shop, purportedly to pick up his truck. In fact, the truck was parked behind the marital home. On the way, Faulls pretended to call the shop to see if his truck was ready, but he actually called one of the couple’s children, knowing that no one would answer. Faulls told Lori that the truck was not ready and

they returned to the house, where Lori declined his invitation to come inside. Faulls became angry and revealed that his truck had been parked behind the house the whole time. He took Lori’s cell phone and car keys, then showed her a pair of zip ties that had been fashioned into handcuffs. He asked Lori whether she “wanted to do this the easy way or the hard way.” J.A. 215. Faulls then ordered her into the truck, where Lori saw his shotgun in the backseat. Faulls locked the passenger door, and before driving away, threw Lori’s cell phone out the window. That night, Faulls and Lori stayed at a hotel in Elkins, West Virginia, nearly 200 miles from Mineral.

The next morning, Faulls sought to have sex with Lori. Lori told him that she was uncomfortable but eventually acquiesced out of fear. That day, Faulls and Lori went to several stores, where Lori bought clothes and hygiene products. They also stopped at a liquor store and purchased a bottle of vodka.

That evening, Faulls and Lori went to a restaurant and bar. Faulls got drunk and told patrons sitting nearby that Lori was his wife and that he had kidnapped her. The pair left shortly thereafter and, after discovering that there were no rooms available at a nearby hotel, began walking back toward the truck. At that point, Lori fled. She saw two women getting into a car and asked them to take her to the police. The women drove her to the sheriff’s office, where Lori reported what had happened to her.

B.

Prior to trial, the district court preliminarily denied the government’s motion to

2. Lori did not report this incident to the police.

1. Lori told police that she wasn’t sure if it was an accident or if Faulls acted intentionally because she “was scared to death.” J.A. 198–99.

allow a domestic violence expert to testify in the government's case-in-chief, stating that admission would depend on the scope of defense counsel's examination of the witnesses. At trial, the government called the bartender at the restaurant where Faulls and Lori stopped for the evening. On cross-examination, Faulls's counsel asked the bartender whether Lori was free to leave and whether he believed Lori was being held against her will. The bartender answered that Lori was free to leave and that, from what he observed, she was not being held against her will. Although Faulls's counsel insisted that he merely asked the questions to help the jury understand how close Lori was to the bar's exit, the court concluded that counsel had opened the door to the government's expert because the issue of whether Lori could have fled had "both a physical and a psychological component." J.A. 392.

The expert's testimony focused on her research regarding intimate partner violence, risk factors involved with this type of violence, and the psychological components of abuse. She did not testify that Lori had been a victim of domestic violence, and the court addressed the jury before the testimony to emphasize that the expert had never interviewed or examined Lori.

The district court also allowed the government to introduce evidence of the Mineral and Williamsburg incidents under Federal Rule of Evidence 404(b). The court twice gave the jury a limiting instruction regarding this evidence, stating that it could be considered only to prove "the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in connection with" Faulls's charges, but not as evidence of Faulls's character or propensity to commit the offenses. J.A. 200, 402.

At the end of the first day of trial, weather reports forecast a snowstorm that threatened a delay in the proceedings. The lawyers did not want Lori to testify over two days, so the court asked the jurors if they would be willing to stay late to complete her testimony. Faulls's counsel did not object, and though at least one juror did not want to stay late, the court chose to complete the testimony that evening. The court adjourned at 7:40 PM.

The jury convicted Faulls of kidnapping, interstate domestic violence, and possessing a firearm in furtherance of a crime of violence. The jury also determined that Faulls committed aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(2), which served as the predicate crime of violence for the interstate domestic violence charge and also enhanced Faulls's sentencing range. The district court further enhanced Faulls's sentencing range after it determined that Faulls obstructed justice when he called his mother from jail and asked her to convince Lori not to testify.

II.

A.

[1] We first consider Faulls's argument that he was denied effective assistance of counsel, an issue we review de novo. *United States v. Hall*, 551 F.3d 257, 266 (4th Cir.2009). Faulls contends that his counsel was ineffective during his cross-examination of the bartender, thereby opening the door to allow the government to call its domestic violence expert. Faulls also contends that his counsel was ineffective when he failed to object to the court's decision to keep the jury late to complete Lori's testimony.

[2] We decline to reach Faulls's claim. Unless an attorney's ineffectiveness conclusively appears on the face of the record,

such claims are not addressed on direct appeal. *United States v. Benton*, 523 F.3d 424, 435 (4th Cir.2008). Because there is no conclusive evidence of ineffective assistance on the face of this record, we conclude that Faulls's claim should be raised, if at all, in a 28 U.S.C. § 2255 motion. See *United States v. Baptiste*, 596 F.3d 214, 216 n. 1 (4th Cir.2010).

B.

[3] Next, we consider whether the district court correctly admitted prior acts evidence under Rule 404(b). We review evidentiary rulings for abuse of discretion, *United States v. Queen*, 132 F.3d 991, 995 (4th Cir.1997), and will not reverse a district court's decision to admit prior acts evidence unless it was "arbitrary or irrational," *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir.1988) (citing *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir.1986)).

[4] Faulls asserts that the district court should not have admitted testimony regarding the Mineral and Williamsburg incidents because the evidence was neither relevant nor necessary to the charges. Alternatively, Faulls argues that the probative value of the evidence was substantially outweighed by its prejudicial effect because the evidence (if believed) demonstrated a pattern of domestic violence.

[5] Evidence of prior wrongs is not admissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed.R.Evid. 404(b)(1). However, such evidence may be admissible for other purposes, including to show motive, opportunity, intent, preparation, or plan. *Id.* 404(b)(2). Prior act evidence is also admissible under Rule 404(b) to show the victim's state of mind. *E.g.*, *United*

States v. Powers, 59 F.3d 1460, 1464 (4th Cir.1995).

[6–8] To be admissible under any theory, the prior act evidence must be "(1) relevant to an issue other than character; (2) necessary; and (3) reliable." *United States v. Siegel*, 536 F.3d 306, 317 (4th Cir.2008) (quoting *United States v. Wells*, 163 F.3d 889, 895 (4th Cir.1998)). Evidence is necessary when it is "probative of an essential claim or an element of the offense," *Queen*, 132 F.3d at 997, or when it "furnishes part of the context of the crime," *United States v. McBride*, 676 F.3d 385, 398 (4th Cir.2012) (quoting *Rawle*, 845 F.2d at 1247 n. 4). Even so, a district court may exclude the proffered evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed.R.Evid. 403. The danger of prejudicial effect subsides when the district court gives proper limiting instructions, particularly in the face of overwhelming evidence of guilt. See *Powers*, 59 F.3d at 1468; see also *United States v. Briley*, 770 F.3d 267, 275 (4th Cir.2014) ("Rule 404(b) is a rule of inclusion.").

We discern no error in the district court's evidentiary rulings. First, the evidence was relevant to issues other than character or propensity. A jury could reasonably conclude that Faulls's motive with respect to the Mineral and Williamsburg incidents was to stop Lori from leaving the marital home or, generally, the marriage. That same jury could conclude that Faulls committed the charged offenses because he was again upset that Lori wanted to leave the marital home and rejected his invitation to come inside.

A jury could also reasonably conclude that the evidence demonstrated Faulls's control and domination over Lori, which was necessary to explain Lori's state of mind and her apparent willingness to remain with Faulls during the events leading

to the charged offenses, even though Lori and Faulls were out in public, surrounded by others. *See Powers*, 59 F.3d at 1467 (concluding that evidence of previous physical abuse by a father accused of sexually assaulting his daughter was necessary to show the power and control he had over his victim and his victim's fear of retribution for standing up to or reporting him).

Finally, we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to Faulls. The evidence was highly probative, as it demonstrated Faulls's domination over Lori, his motive for committing the offenses, and Lori's state of mind throughout the ordeal. Additionally, the district court gave the jury clear limiting instructions—reminding the jury that it should not consider the evidence to prove Faulls's character or his propensity to commit the charged offenses—which obviated the danger of prejudice.

C.

Last, we consider whether the district court correctly required Faulls to register as a sex offender based on his conviction for interstate domestic violence.

[9] The parties dispute whether Faulls preserved this claim for appeal, and the resolution of this preliminary question directs our standard of review. Usually, we review a district court's imposition of special conditions of supervised release for abuse of discretion. *United States v. Holman*, 532 F.3d 284, 288 (4th Cir.2008). The government argues, however, that Faulls failed to object at sentencing, thus cabining our review to plain error. Although Faulls did not formally object when the district court asked for Faulls's thoughts on this issue—responding merely, “[W]e denied from the beginning this is a sex offense, but I would obviously leave it to the discretion of the Court,” J.A.

510—we conclude that Faulls preserved the issue for review. *See United States v. Lynn*, 592 F.3d 572, 577–79 (4th Cir.2010) (abandoning a “formulaic” objection standard and providing, with examples, that the goal of the contemporaneous-objection rule is to preserve the record and alert the district court to its responsibility to address the issue).

1.

Faulls contends that the district court should not have reached the question of whether his conviction for interstate domestic violence was a sex offense because the government gave “no clear indication that this should be a sex offender case based on the [Department of Justice’s] own guidelines.” Appellant’s Br. at 24. If by this Faulls means that the government did not urge the district court to impose SORNA registration as a condition of supervised release, he is mistaken. If, on the other hand, Faulls means that the Department of Justice Guidelines require the government to give notice, he has not pointed this court to such a requirement, and we have not found one. In any event, Faulls cannot credibly claim to have been surprised by the issue, given that the district court’s local standing order directs the probation officer to determine whether sex offender registration is appropriate, and gives the court discretion to impose the condition of supervised release at sentencing.

2.

Turning to the merits of the imposed condition, sex offenders are required to register in every jurisdiction in which the offender resides, works, and attends school. 42 U.S.C. § 16913(a). A sex offender is someone who is convicted of a sex offense, which in relevant part is defined as a criminal offense that “has an

element involving a sexual act or sexual contact with another,” or a “Federal offense . . . under chapter 109(A) [Sexual Abuse offenses under 18 U.S.C. § 2241 *et seq.*]” 42 U.S.C. § 16911(1), (5)(A)(i), (iii).

Fauls contends that because interstate domestic violence is not one of the enumerated crimes that qualifies as a sex offense under SORNA, *see* § 16911(5)(A)(iii), the inquiry ends there, and the district court erred. Fauls is incorrect, however, because the statute also provides other definitions of a sex offense, including an offense with an element “involving a sexual act or sexual contact with another.” § 16911(5)(A)(i).

The government says that Fauls’s interstate domestic violence conviction satisfies this definition. The government’s argument begins with the offense elements of interstate domestic violence, which are (1) the defendant and victim are spouses or intimate partners; (2) the defendant caused the victim to travel in interstate commerce by force, coercion, duress, or fraud; (3) the defendant, in the course of or to facilitate such travel, committed a crime of violence against the victim; and (4) the defendant committed such acts knowingly and willfully. 18 U.S.C. § 2261(a)(2). Here, the government alleged kidnapping under § 1201(a)(1) and aggravated sexual abuse under § 2241(a)(2) as the underlying crimes of violence. The jury convicted Fauls of kidnapping and also found beyond a reasonable doubt that Fauls had committed aggravated sexual abuse.

Interstate domestic violence also contains a penalty enhancement for offenders whose qualifying violent conduct constitutes sexual abuse under chapter 109A, including aggravated sexual abuse. *See* §§ 2241, 2261(b)(4). Because the jury found that Fauls committed aggravated sexual abuse, he faced an increased statu-

tory maximum penalty ranging from five years’ imprisonment to “any term of years or life” imprisonment. §§ 2241(a), 2261(b)(4)-(5).

The government contends that the statutory enhancement is an “element” of the interstate domestic violence offense under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which in turn means that it is also an element of the offense for purposes of determining whether Fauls was convicted of a sex offense under SORNA. Because aggravated sexual abuse “requires engaging in a sexual act, [which] . . . necessarily requires physical contact” with another, *United States v. White*, 782 F.3d 1118, 1137 (10th Cir.2015), the government contends that Fauls was convicted of “a criminal offense that has an element involving a sexual act or sexual contact with another,” 42 U.S.C. § 16911(5)(A)(i), and accordingly, was subject to sex offender registration under SORNA. We agree with the government’s conclusion but not its reasoning.

3.

[10–12] The Constitution requires a jury to find, beyond a reasonable doubt, the elements of the criminal offense charged. In *Apprendi*, the Supreme Court held that this bedrock principle also applies to sentencing, declaring that “[o]ther than the fact of a prior conviction, any 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.” 530 U.S. at 490, 120 S.Ct. 2348. Thus, the distinction between a substantive offense element and a sentencing (or penalty) enhancement is meaningless when the enhancement requires facts or circumstances—separate from those composing the base offense—to have taken place in order to trigger a greater punishment than the base offense

statutorily carries. *Id.* at 476–78 & n. 4, 120 S.Ct. 2348.

[13] In *Alleyne v. United States*, the Court extended this rule to facts that increase the prescribed statutory minimum penalty—i.e., facts that establish a new or higher mandatory minimum sentence. — U.S. —, 133 S.Ct. 2151, 2162–63, 186 L.Ed.2d 314 (2013). The Court reasoned that the “impossib[ility] [of] disput[ing] that facts increasing the legally prescribed floor aggravate the punishment” leads to the logical conclusion that “the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.” *Id.* at 2161 (emphasis omitted).

[14] Here, the jury found Faulls guilty of interstate domestic violence. For purposes of enhancing Faulls’s sentence, the jury also found beyond a reasonable doubt that Faulls had committed aggravated sexual abuse. Relying on *Apprendi* and *Alleyne*, the government contends that the jury’s finding also necessarily means that aggravated sexual abuse is an element of the charged interstate domestic violence offense for purposes of SORNA. We do not agree. The fact that a jury made the finding necessary for the sentencing enhancement certainly cures any *Apprendi* issue, but it does not answer the statutory question of whether that same finding is an “element” of Faulls’s “offense” under § 16911(5)(A)(i).

The government directs us to *United States v. Campbell*, 259 F.3d 293 (4th Cir. 2001), as support for its view, but that case is inapposite. In *Campbell*, we held that the penalty enhancements in 18 U.S.C. § 111(b) were substantive elements of the offense that needed to be proved to the jury beyond a reasonable doubt, not sentencing enhancements the court could deem satisfied despite the jury’s opposite

finding. 259 F.3d at 298–300. But there we were conducting a constitutional inquiry. See also, e.g., *United States v. Brown*, 757 F.3d 183, 188 (4th Cir. 2014) (observing that the drug quantity attributable to the conspiracy, as provided in the penalty subsection of 21 U.S.C. § 841, was a question for the jury under *Alleyne* because of the mandatory minimum sentences each quantity category carried), cert. denied, — U.S. —, 135 S.Ct. 229, 190 L.Ed.2d 173 (2014); *United States v. Promise*, 255 F.3d 150, 156–57 (4th Cir. 2001) (en banc) (holding the same under *Apprendi*). The statutory question here is substantially different.

Accordingly, we must look elsewhere for guidance. Recall that for SORNA’s sex-offender registration requirements to properly apply to Faulls, he must have been convicted of a “criminal offense that has an *element* involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(i) (emphasis added). Recently, in *United States v. Price*, 777 F.3d 700 (4th Cir.), cert. denied — U.S. —, 135 S.Ct. 2911, 192 L.Ed.2d 941 (2015), we confronted the question of whether the defendant was convicted of a sex offense in order to determine whether SORNA’s sex-offender registration requirements should apply. Although we were analyzing SORNA’s definition of a sex offense in § 16911(5)(A)(ii) (“specified [criminal] offense against a minor”) and its extension at § 16911(7) (expanding subsection (5)(A)(ii)’s definition), we nonetheless examined the statutory language of § 16911(5)(A)(i). *Id.* at 707–08. In holding that the facts-based “circumstance-specific” approach applies to a sex offense determination under § 16911(5)(A)(ii), (7), we noted in dicta that Congress’s use of “elements” in § 16911(5)(A)(i) (the subsection before us now) “implicat[es] the cate-

gorical and modified categorical frameworks.” *Id.* at 708.³

Other courts of appeals have also found these frameworks relevant to the determination of what constitutes a sex-offense under SORNA, although none has squarely applied them in the precise context before us. *See United States v. Rogers*, 804 F.3d 1233, 1234–38 (7th Cir.2015) (affirming the district court’s decision to enhance defendant’s sentence under Guideline § 2A3.5(b)(1)(A) for committing a sex offense while in failure-to-register status, and finding that the categorical approach applies to the threshold definition of a sex offense under § 16911(5)(A)(i)); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir.2014) (distinguishing § 16911(5)(A)(i) from § 16911(5)(C), and applying the circumstance-specific approach to the defendant’s prior state conviction for having sexual intercourse with a child age sixteen or older), *cert. denied*, — U.S. —, 135 S.Ct. 1529, 191 L.Ed.2d 562 (2015); *United States v. Mi Kyung Byun*, 539 F.3d 982, 991–92 (9th Cir.2008) (comparing § 16911(5)(A)(i) to § 16911(7)(I), and applying the circumstance-specific approach to the defendant’s federal conviction for importation of an alien for purposes of prostitution). Following the lead of *Price* and our sister circuits, we proceed here to apply the categorical and modified categorical approaches.

3. Cf. *United States v. Berry*, 814 F.3d 192, 195 (4th Cir.2016) (providing that courts have “embraced” the categorical and modified categorical approaches in determining a sex offender’s tier classification).

4. The district court did not have the benefit of our decision in *Price*, and neither party on appeal has urged that we apply the elements-based approach to determine whether Faulds was convicted of a sex offense. Although we generally do not consider issues not passed upon below, the question before us is purely one of law, and we perceive no injustice or

[15, 16] Thus, we “focus[] solely on the elements” of interstate domestic violence, rather than on “the specific way in which [Faulds] committed the crime,” to determine whether interstate domestic violence qualifies as a criminal offense with an element involving a sexual act or contact. *Price*, 777 F.3d at 704–05 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)).⁴ In applying the traditional categorical approach, we compare the elements of the defendant’s offense of conviction to the elements of the federal offense (also called the “generic” offense). There is a categorical match if “[t]he elements comprising the statute of conviction [are] the same as, or narrower than, those of the generic offense.” *Id.* at 704; e.g., *United States v. Torres-Miguel*, 701 F.3d 165, 168–69 (4th Cir.2012) (finding no categorical match between defendant’s California felony threat conviction and a “crime of violence” under the U.S. Sentencing Guidelines because threatening to commit a crime against another that will result in death or serious injury (crime of conviction) does not necessarily require “the use, attempted use, or threatened use of physical force against [another]” (generic offense)).

[17] The modified categorical approach is almost identical, but it applies only to divisible statutes—those containing alternative elements—and it entails a brief “de-

unfair surprise in doing so here. See *Sington v. Wulff*, 428 U.S. 106, 120–21, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (“The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.”). Nor are we bound by the district court’s reasoning—or the arguments advanced by the parties—in exercising our plenary review. *United States v. Segers*, 271 F.3d 181, 183 (4th Cir.2001); *United States v. Rhynes*, 218 F.3d 310, 320 (4th Cir.2000).

tour.” *Price*, 777 F.3d at 705. Before looking for a categorical match, we consider a limited number of trial documents, including the indictment and jury instructions, to determine which alternative element formed the basis of the conviction. *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2284–85, 186 L.Ed.2d 438 (2013). Then the traditional elements-based approach resumes. *Id.*; *e.g.*, *United States v. Castleman*, — U.S. —, 134 S.Ct. 1405, 1414, 188 L.Ed.2d 426 (2014) (applying the modified categorical approach to a Tennessee statute that defined assault in three distinct ways, and finding that the defendant’s conviction for “intentionally or knowingly caus[ing] bodily injury to the mother of his child” qualified as a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) because it “necessarily involve[d] the use of physical force” (internal quotation marks omitted)).

Under either approach, we compare the elements of interstate domestic violence with the generic offense—here, SORNA’s definition of a sex offense: “a criminal offense that has as an element involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(i). As relevant, to be convicted of interstate domestic violence, the defendant must commit an underlying crime of violence against a spouse or intimate-partner victim. *See* 18 U.S.C. § 2261(a)(2). A crime of violence is defined as

[A]n offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§ 16.

[18] It is well established that some sex offenses qualify as crimes of violence.

See U.S. Sentencing Guidelines Manual § 4B1.2, comment. (n.1) (U.S. Sentencing Comm’n 2012) [hereinafter U.S.S.G. § 4B1.2] (including “forcible sex offenses” in the enumerated list of established crimes of violence); *United States v. Peterson*, 629 F.3d 432, 435 (4th Cir. 2011) (calling the Guidelines commentary “authoritative and binding”). But a crime of violence is not *necessarily* a sex offense, which means that interstate domestic violence necessarily “sweeps more broadly” and criminalizes more conduct than the generic federal sex offense, precluding a categorical match. *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) (quoting *Descamps*, 133 S.Ct. at 2283).

As a result, we consider whether interstate domestic violence is divisible for purposes of the modified categorical approach, meaning it must “set[] out one or more elements of the offense in the alternative.” *Descamps*, 133 S.Ct. at 2281. In *Descamps v. United States*, the Supreme Court found that California’s burglary statute “d[id] not concern any list of alternative elements” but rather “involve[d] a simple discrepancy” between generic burglary, which requires unlawful entry, and California’s statute, which does not. *Id.* at 2285. So although California’s statute was defined using disjunctive elements, *see* Cal.Penal Code Ann. § 459 (West 2010) (defining burglary as the entering of certain locations “with intent to commit grand or petit larceny or any felony” (emphasis added)), and therefore “refer[red] to several different crimes,” *Descamps*, 133 S.Ct. at 2284 (quoting *Nijhawan*, 557 U.S. at 35, 129 S.Ct. 2294), none of those crimes required breaking and entering. Because California’s burglary statute did not match the generic version of burglary envisioned by the federal statute, applying the modified categorical approach was improper.

[19] We grappled with the reach of *Descamps* in *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir.2013). There, we announced that “[w]here the statute defines the offense broadly rather than alternatively, the statute is not divisible, and the modified categorical approach simply ‘has no role to play.’” *Cabrera-Umanzor*, 728 F.3d at 350 (quoting *Descamps*, 133 S.Ct. at 2285). Although we did not explain the broad-alternative distinction, we found that the divisibility determination turns on the availability of a categorical fit, and not on the strict statutory inclusion of textual alternatives.

[20] In deciding whether a Maryland child abuse conviction constituted a crime of violence for sentencing purposes, we said that the disjunctive state statute was “generally divisible” because the offender could be either a family member or an individual with responsibility for the child’s supervision, either physical abuse or sexual abuse constituted the abuse element of the statute, and sexual abuse could be alternatively defined as sexual molestation or sexual exploitation. *Id.* at 352 (defining the elements of Md.Code Ann., Crim. Law § 35C). But general divisibility, we said, was not enough: “[O]nly if at least one of the categories into which the statute may be divided constitutes, *by its elements*, [the generic federal offense]” is the statute divisible “for purposes of applying the modified categorical approach.” *Id.* Because no arrangement of the state child-abuse statute’s alternative elements lined up with the elements of a crime of violence, we found the statute indivisible. *Id.*

[21] Applying these cases to the particular statute before us, we hold that

5. And as Judge Shedd’s concurrence notes, we have applied the categorical approach to instant offenses when determining whether the defendant should be sentenced as a “career offender” under the Sentencing Guide-

Fauls’s crime of conviction encompasses, by its crime of violence element, additional, alternative offense elements, “effectively creat[ing] several different crimes.” *Descamps*, 133 S.Ct. at 2285. This is so because a defendant convicted of interstate domestic violence may have committed, for example, assault with a deadly weapon, murder, or sexual assault as the underlying crime of violence. See, e.g., *United States v. Barnette*, 644 F.3d 192, 197–98 (4th Cir.2011) (murder); *United States v. Brown*, 295 F.3d 152, 153–54 (1st Cir.2002) (sexual assault); *United States v. Bowe*, 309 F.3d 234, 236 (4th Cir.2002) (assault with a deadly weapon).

Admittedly, the offense of interstate domestic violence presents an unusual set of circumstances for the divisibility analysis. To begin with, the offense does not set out on its face, in the disjunctive or otherwise, a list of alternative crimes that constitute the offense, but rather requires the defendant to commit an underlying “crime of violence.” This case also requires that we compare a *contemporaneous* federal conviction—rather than (as is more typical) a *prior*, state conviction—to the generic federal offense.

But these anomalies have no bearing on the modified categorical approach’s application here. See *United States v. Ortiz-Gomez*, 562 F.3d 683, 684–85 (5th Cir.2009) (applying the modified categorical approach to a state statute criminalizing the communication of a threat to “commit any crime of violence” to determine what underlying crime of violence supported the defendant’s conviction).⁵ Importantly, in a prosecution for interstate domestic violence, the jury is charged with finding,

lines for having committed a “crime of violence.” See *United States v. Johnson*, 953 F.2d 110, 114 (4th Cir.1991); accord *United States v. Martin*, 215 F.3d 470, 474 (4th Cir. 2000).

unanimously and beyond a reasonable doubt, the commission of a specific underlying crime of violence, as well as the elements of that offense. *See Omargharib*, 775 F.3d at 198–99 (looking to how the Virginia courts instruct juries with respect to larceny to determine whether the offense is defined to include multiple alternative elements); *United States v. Royal*, 731 F.3d 333, 341 (4th Cir.2013) (same, with Maryland assault statute). Interstate domestic violence therefore consists of multiple alternative elements, as we define them for modified categorical approach purposes: “Elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’” *Omargharib*, 775 F.3d at 198 (quoting *Royal*, 731 F.3d at 341).

Treating interstate domestic violence as divisible for purposes of the modified categorical approach dovetails with the inquiry’s function and harmonizes its purpose. “The point of the categorical inquiry [after all] is not to determine whether the defendant’s conduct *could* support a conviction for a [sex offense], but to determine whether the defendant was *in fact convicted* of a crime that qualifies as a [sex offense].” *Cabrera-Umanzor*, 728 F.3d at 350.

Here, without looking to the relevant documents in the record, we would have no way of knowing whether Faulls’s conviction constitutes a sex offense because we do not know from the facial elements of § 2261(a)(2) what underlying offense substantiated the finding of domestic violence. But when we look to the jury instructions and the indictment, we see that the underlying crime of violence—aggravated sexual abuse—and its elements were put to the jury and found unanimously beyond a reasonable doubt. *See* Suppl J.A. 615, 650–55; J.A. 11. This analysis thus furthers

the categorical framework’s purpose without frustrating its goal of “avoid[ing] conducting ‘mini-trials’ for each prior offense.” *United States v. Gomez*, 690 F.3d 194, 200 (4th Cir.2012) (quoting *United States v. Spence*, 661 F.3d 194, 198 (4th Cir.2011)).

Our interpretation also comports with our past practice. *See, e.g., United States v. Rivers*, 595 F.3d 558, 563 (4th Cir.2010) (“[O]nly when a statute prohibits different types of behavior such that it can be construed to enumerate separate crimes can a court modify the categorical approach....”); *Gomez*, 690 F.3d at 198 (applying the modified approach when “different types of behavior satisfy an element of the offense and the proscribed behaviors constitute at least two separate crimes”). And it is consistent with the practice of our sister circuits. *See, e.g., United States v. Mahone*, 662 F.3d 651, 654 (3d Cir.2011) (calling for the modified approach “[w]hen the enumerating statute invites inquiry”), abrogated on other grounds by *Descamps*, 133 S.Ct. 2276; *United States v. Williams*, 627 F.3d 324, 327–28 (8th Cir.2010) (providing that the modified categorical approach is used when “the conviction criminalizes both conduct that does and does not qualify as [the generic federal offense]”).

Our holding also aligns with SORNA’s legislative goal of “strengthen[ing] and increas[ing] the effectiveness of . . . sex offender registration and notification [for the protection of the public]”. *United States v. Gould*, 568 F.3d 459, 464 (4th Cir.2009) (quoting The National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38030, 38030 (July 2, 2008)); *see also Taylor v. United States*, 495 U.S. 575, 581–90, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (looking to the statutory background and purpose of the ACCA to determine how to apply the categorical approach to the state offense at issue).

Congress passed SORNA to fill the “gaps” and “loopholes” left by its predecessor act’s “patchwork” standards, which “allowed for numerous heinous crimes” to be unaffected by registration requirements. *Gould*, 568 F.3d at 473–74. It would make little sense, then, in the context of a law that was designed to bolster public protection through comprehensive sex-offender registration, to bar courts from peering behind the statutory curtain to determine what offense the defendant actually committed when the offense of conviction contains as an element another generic federal crime acting as a placeholder for the substantive offense.

In sum, because aggravated sexual abuse “involv[es] a sexual act or sexual contact with another,” Faulls was convicted of a criminal offense that “has an element involving a sexual act or sexual contact with another”—a sex offense. 42 U.S.C. § 16911(5)(A)(i). Accordingly, the district court did not err in requiring Faulls to register as a sex offender under SORNA.

III.

For the reasons given, we affirm the district court’s judgment.

AFFIRMED

SHEDD, Circuit Judge, concurring:

The majority applies the categorical approach to determine if Faulls’s conviction for interstate domestic violence is a “sex offense” under 42 U.S.C. § 16911(5)(A)(i). Regardless of whether the categorical approach should apply to past convictions under this section, if I were deciding this issue on a clean slate, I would not apply it in the context of this case, which involves an instant offense. As the Tenth Circuit has explained, “the practical difficulties of conducting an ad hoc mini-trial” that drive us to apply the categorical approach to a

past conviction “do not apply when the court is examining the conduct of the defendant in the instant offense.” *United States v. Riggans*, 254 F.3d 1200, 1203–04 (10th Cir.2001) (quotation marks and alterations omitted); see also *United States v. Williams*, 690 F.3d 1056, 1069 (8th Cir. 2012) (same).

The categorical approach does not save judicial resources because we are continuously called upon to determine whether past convictions—on a state-by-state basis—qualify as predicate offenses in multiple contexts, including sentencing. This situation has left “[t]he dockets of our court . . . clogged with these cases.” *United States v. Vann*, 660 F.3d 771, 787 (4th Cir.2011) (Agee, J., concurring). Further, the categorical approach is the antithesis of individualized sentencing; we do not consider what the individual to be sentenced has actually done, but the most lenient conduct punished by his statute of conviction. This flaw is even more apparent in cases like this one, involving instant offenses: the district judge sat through Faulls’s trial, heard the evidence against him, and witnessed the jury’s finding that Faulls committed aggravated sexual abuse against his wife. The categorical approach then requires the “counter-intuitive procedure” whereby that same judge “must ignore the actual trial record and the facts and inferences drawn from the testimony” to determine if Faulls’s conviction was for a “sex offense.” *United States v. Stoker*, 706 F.3d 643, 651 (5th Cir.2013) (Jones, J., concurring).

Notwithstanding my view, however, circuit precedent rejects this distinction between past convictions and instant offenses. See *United States v. Johnson*, 953 F.2d 110, 114 (4th Cir.1991) (noting the “substantial intuitive appeal” of applying a circumstance-specific approach to instant offenses but nonetheless concluding that

the approach “must . . . be rejected”); *United States v. Martin*, 215 F.3d 470, 474 (4th Cir.2000) (applying categorical approach to instant conviction “no matter how clear it may be from the record” that the defendant committed a crime of violence). I therefore concur in Judge Diaz’s thoughtful opinion for the court.



- (2) defense counsel’s investigation of defendant’s family was adequate;
- (3) counsel did not perform deficiently in presenting mitigating evidence, despite defendant’s contention that counsel should have presented more witness testimony; and
- (4) counsel’s stipulation that defendant, who escaped custody and murdered security guard and law enforcement officer, was imprisoned at time of the murders did not amount to ineffective assistance of counsel.

Affirmed.

William Charles MORVA,
Petitioner–Appellant,

v.

David ZOOK, Warden, Sussex I State
Prison, Respondent–Appellee.

No. 15-1.

United States Court of Appeals,
Fourth Circuit.

Argued: March 22, 2016.

Decided: May 5, 2016.

Background: After his murder conviction and death sentence were affirmed on direct appeal, 278 Va. 329, 683 S.E.2d 553, and his state petition for writ of habeas corpus was denied, 285 Va. 511, 741 S.E.2d 781, defendant petitioned for federal habeas as relief. The United States District Court for the Western District of Virginia, Michael F. Urbanski, J., denied petition, and defendant appealed.

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

- (1) Virginia Supreme Court’s determination that defendant had no due process right to appointment of a prison-risk-assessment expert was not contrary to clearly established federal law;

1. Sentencing and Punishment ☞1653, 1658

Although Virginia juries are not instructed to give special weight to aggravating factors or to balance aggravating and mitigating evidence in a capital case, juries are required to consider relevant mitigating evidence in determining a sentence in a capital case. West’s V.C.A. § 19.2–264.4(C, D).

2. Habeas Corpus ☞842

Federal court of appeals reviews de novo the district court’s denial of a defendant’s petition for a writ of habeas corpus. 28 U.S.C.A. § 2254.

3. Habeas Corpus ☞461, 508

Virginia Supreme Court’s determination that capital murder defendant had no due process right to appointment of a prison-risk-assessment expert, in order to rebut Commonwealth’s claim that defendant would be a future danger to society if life sentence was imposed, was not contrary to clearly established federal law, as would warrant habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA); there was no clearly established federal law requiring the appointment of a state-funded nonpsychiatric expert.

CONCLUSION

Plaintiffs' motion for attorney's fees (Dkt. # 241) and their supplemental motion for attorney's fees (Dkt. # 327) are granted. Plaintiffs are awarded attorney's fees in the amount of \$4,711,430.70, and costs in the amount of \$174,174, for a total award of \$4,885,604.70. Defendants are hereby directed to pay that amount to Stris & Maher, LLP, within thirty (30) days after the date of entry of this Decision and Order.

IT IS SO ORDERED.

- (1) Virgin Islands statute was indivisible;
- (2) as a matter of first impression, use of categorical approach was required for interpreting SORNA's application to an individual's predicate sex offense on a pretrial motion to dismiss indictment; and
- (3) under categorical approach, defendant had not committed a qualifying prior sex offense as defined by SORNA, and thus defendant's failure to register did not violate SORNA.

Motion granted.



UNITED STATES of America

v.

Alden GEORGE, Defendant.

16 CR 197 (KMW)

United States District Court,
S.D. New York.

Signed 11/29/2016

Background: Defendant, who had previously been convicted of unlawful sexual contact in the first degree accomplished through force or coercion under Virgin Islands law, was charged with failure to register as a sex offender as allegedly required under the Sex Offender Registration and Notification Act (SORNA). Defendant moved to dismiss the indictment on the ground that he had not committed a qualifying prior sex offense.

Holdings: The District Court, Kimba M. Wood, J., held that:

performed a substantial amount of the work on this case, the Court will direct that pay-

1. Indictment and Information ↪86(2), 87(7), 110(3)

An indictment need do little more than to track the language of the statute charged and state the time and place in approximate terms of the charged crime. Fed. R. Crim. P. 7(c)(1).

2. Indictment and Information ↪71.2(2), 4)

An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events. U.S. Const. Amend. 5; Fed. R. Crim. P. 7(c)(1).

3. Indictment and Information ↪55

An indictment need not be perfect, and common sense and reason are more important than technicalities. Fed. R. Crim. P. 7(c)(1).

4. Indictment and Information ↪55

The defendant has the right to challenge an indictment on the ground that it

ment be made to that firm.

fails to allege a crime within the terms of the applicable statute. Fed. R. Crim. P. 7(c)(1), 12(b)(2).

5. Indictment and Information ☞144.1(1)

A district court can resolve a dispute without trial of the general issue when a motion to dismiss an indictment is made solely upon an issue of law, and not fact. Fed. R. Crim. P. 7(c)(1).

6. Indictment and Information ☞144.1(1)

The categorical approach to statutory interpretation in a pretrial examination of the validity of the government's indictment requires a district court to look only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.

7. Mental Health ☞433(2)

Language of Virgin Islands statute for unlawful sexual contact in the first degree accomplished through force or coercion rendered the statute indivisible, as would support categorical approach in interpreting Sex Offender Registration and Notification Act (SORNA) application to an individual's predicate sex offense; each clause contained within statute enumerated different means of satisfying the same element, the commission of sexual contact. 42 U.S.C.A. § 16911 et seq.

8. Mental Health ☞469(2), 469.5

Categorical approach was required for interpreting application of Sex Offender Registration and Notification Act (SORNA) to an individual's predicate sex offense on a pretrial motion to dismiss an indictment, such that registration would be required for anyone whose predicate conviction violated a statute, the element(s) of which are the same as, or narrower than, SORNA's elements, and registration would not be required if the element(s) of the

statute of conviction are defined more broadly than SORNA's elements, even if the actual conduct that led to the predicate conviction would otherwise be covered by SORNA. 42 U.S.C.A. § 16911(5)(A)(i).

9. Mental Health ☞469.5

At pretrial motion to dismiss indictment stage, under categorical approach, defendant's prior conviction under Virgin Islands statute for unlawful sexual contact in the first degree accomplished through force or coercion was not a qualifying sex offense under the Sex Offender Registration and Notification Act (SORNA), and thus defendant's failure to register did not violate SORNA; Virgin Islands statute contained broader definition of sexual contact than SORNA, Virgin Islands statute included touching of lips but SORNA does not, Virgin Islands statute was indivisible, and there existed possibility that sexual contact element of crime for which defendant was convicted was for conduct not prohibited by federal law. 42 U.S.C.A. § 16911(5)(A)(i).

Karin Portlock, United States Attorney's Office, New York, NY, for United States of America.

Opinion and Order

KIMBA M. WOOD, District Judge:

Defendant Alden George ("George") is charged in a one-count indictment with failure to register as a sex offender as is allegedly required under the Sex Offender Registration and Notification Act, 42 U.S.C. 16911, *et seq.* ("SORNA"). SORNA states that an individual convicted of a qualifying sex offense in any territory over which the United States Government has jurisdiction is required to register as a sex offender pursuant to SORNA, and to up-

date the registration as necessary. 42 U.S.C. § 16913. SORNA also provides that any individual with a prior qualifying sex offense who “travels in interstate commerce” . . . and knowingly “fails to register or update a registration” violates SORNA. 18 U.S.C. § 2250.

Defendant moves to dismiss the indictment on the ground that he has not committed a qualifying prior sex offense. For the reasons set forth below, the Court GRANTS the defendant’s motion to dismiss the indictment.

I. BACKGROUND

The defendant’s alleged violation of SORNA stems from a prior sex offense committed in the United States Virgin Islands. On September 24, 2003, the defendant was charged in a four-count indictment in the Virgin Islands with First Degree Rape in violation of 14 Virgin Islands Code (“V.I.C.”) § 1701(2) and 14 V.I.C. § 331; First Degree Unlawful Sexual Contact in violation of 14 V.I.C. 1708(1); Second Degree Burglary in violation of 14 V.I.C. § 433; and First Degree Assault in violation of 14 V.I.C. § 295(3). Gov. Ex. B, *Government of the Virgin Islands v. Alden W. George, Jr.*, Information and Accompanying Affidavit (Sept. 24, 2003). This indictment followed his conduct on the night of August 31, 2003, when he entered a woman’s home and used force to initiate nonconsensual sexual contact. *Id.*

On April 20, 2005, defendant pled guilty to Count II of the indictment, which read: “On or about August 31, 2003, in St. Thomas, Virgin Islands, Alden W. George Jr., intentionally touched a person’s intimate parts to arouse or to gratify the sexual desires of any person, not the perpetrator’s [sic] spouse, and he used force or coercion to accomplish that sexual contact, to wit; he touched [the victim’s] vagina

with his penis in violation of 14 V.I.C. Section 1708(1).” Gov. Ex. D, *People of the Virgin Islands v. Alden George*, Judgment (June 10, 2005). The defendant was sentenced to four years in prison. *Id.* Upon his release in 2006 he registered as a sex offender in the Virgin Islands, as was required by his conviction. He also acknowledged his ongoing obligation to update his registration, and to re-register in any jurisdiction to which he moves if so required. Gov. Ex. E, Sexual Offender/Sexual Predator Registration Form (Oct. 27, 2016).

The defendant failed to continuously update his registration in the Virgin Islands. A warrant was thus lodged for his arrest in July of 2013. Gov. Ex. F, Warrant for the Arrest of Alden George and Accompanying Affidavit (July 11, 2013). The defendant then moved to New York, where he was also allegedly required to register as a sex offender. He failed to do so, which led to his indictment on March 9, 2016, and his arrest on March 22, 2016.

SORNA states that individuals convicted of a “sex offense,” as defined in the Act, must register and update their sex offender registration as the statute requires. SORNA defines a “sex offense” as “a criminal offense that has an element involving a sexual act or sexual contact with another.” 42 U.S.C. §§ 16911(1) and (5)(A)(i). The Act further specifies the conduct that qualifies as a “sexual act” or “sexual contact.” A “sexual act” involves contact with or penetration of the penis, vulva, anus, or genital opening. 18 U.S.C. § 2246(2). “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 an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3). The Virgin Islands statute under which the defendant was convicted, 14 V.I.C. § 1708(1),

defines “sexual contact” differently. It defines sexual contact as “any touching of another person with the genitals, or any touching of the genitals, anus, groin, inner thighs, buttocks, *lips*, or breasts of another person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.” 14 V.I.C. § 1699(d) (defining “sexual contact” for the purposes of § 1708(1)) (emphasis added). The defendant argues that because the Virgin Islands statute of his conviction defines a sex offense more broadly than does SORNA, SORNA does not require him to register as a sex offender. Specifically, because SORNA does not include “lips” in its definition of a sexual act or sexual contact, the defendant maintains that he did not commit a SORNA-qualifying offense.

If a court were to employ a fact-based approach and rely on defendant’s allocution, it could easily conclude that defendant’s conduct falls within SORNA’s definition of “sexual contact.” But precedent interpreting a similar federal statute, and case law in other circuits interpreting SORNA itself, require a more complex analysis.

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. Using the categorical approach to statutory interpretation, SORNA would require registration of anyone whose predicate conviction violated a statute, the element(s) of which are the same as, or narrower than, SORNA’s elements. It does not require registration if the element(s) of the statute of conviction are defined more broadly than SORNA’s elements, even if the actual conduct that led to the predicate conviction would otherwise be covered by SORNA. In other words, notwithstanding that defendant allocuted to conduct covered by SORNA, the fact that the Virgin Islands stat-

ute defines “sexual offense” as including merely touching a person’s lips requires the conclusion that SORNA does not apply to violations of the Virgin Islands statute at issue.

The Government argues that the defendant’s Virgin Islands conviction plainly subjects him to SORNA’s registration requirements. It believes the defendant’s reliance on the categorical approach to be misplaced in two ways. First, this method of statutory interpretation, the Government contends, should not be employed by courts in the pre-trial stage of litigation, but rather only at sentencing. It also argues that because the categorical approach was developed in cases involving another statute (the Armed Career Criminal Act, or “ACCA”), it should not be used in interpreting SORNA’s reach.

II. LEGAL STANDARD

a. The Standard for Sufficiency of an Indictment

[1, 2] Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” An indictment need not be prolix; it “need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the charged crime.” United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998). “An indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events.” United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992). So long as it meets these minimal requirements, the indictment is “enough to call for trial of the charge on the merits.” Costello v.

United States, 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956).

b. The Standard for Challenging an Indictment

[3–5] An indictment “need not be perfect, and common sense and reason are more important than technicalities.” United States v. De La Pava, 268 F.3d 157, 162 (2d Cir. 2001). However, the defendant has the right to challenge an indictment on the ground that it fails to allege a crime within the terms of the applicable statute. United States v. Aleynikov, 676 F.3d 71 (2d Cir. 2012). See also Fed.R.Crim.P. 12(b)(2) (“A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.”) A court can resolve a dispute “without trial of the general issue” when a motion to dismiss an indictment is made solely upon an issue of law, and not fact. United States v. Heicklen, 858 F.Supp.2d 256, 276 (S.D.N.Y. 2012) (Wood, J.).

c. Assessing an Underlying Offense of Conviction Under SORNA

[6] Defendant’s motion to dismiss raises a pure question of law; he asks the Court to determine which approach to statutory interpretation should be used to evaluate a predicate offense under SORNA, and, using the correct approach, decide whether his predicate offense is covered by SORNA. Defendant’s motion rests on the contention that the court is permitted to, and should, employ the “categorical approach” to a pretrial examination of the validity of the Government’s indictment. The categorical approach to statutory interpretation requires a court to look “only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” Taylor v. United States, 495 U.S. 575, 600, 110 S.Ct.

2143, 109 L.Ed.2d 607 (1990). Thus, in the SORNA context, a court would look only to the text of the predicate statute, and compare it to SORNA’s text.

The categorical approach has traditionally been used during sentencing; the Supreme Court devised it in order to ensure that defendants being sentenced were not subject to enhanced punishment for underlying conduct not covered by the federal statute at issue. See Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). In response to imperfections in the application of the categorical approach, the Supreme Court developed, as an alternative, what it termed the “modified categorical approach.” As this Circuit noted in United States v. Beardsley, “[t]he modified categorical approach grew out of a recognition that the categorical approach presented a problem in cases where the statute of prior conviction covers multiple subjects. Since state and federal criminal statutes are written in various styles, and are not always limited to single subjects, the categorical approach, strictly applied, would often make it impossible to apply [an] enhancement even when it is apparent that it should be applicable.” 691 F.3d 252, 260 (2d Cir. 2012).

This “modified” approach permits a court to take a limited look at the facts underlying a defendant’s predicate conviction in order to determine whether his crime falls within the conduct proscribed by the statute at issue. In creating the modified categorical approach the Supreme Court allowed deviation from the categorical approach, but only where one can be certain that defendant’s predicate conduct fits within the enhancing statute. The Supreme Court has decided that the needed certainty is supplied only after trial, by the fact finder, at which point one can ascertain the contours of the ele-

ment(s) of conviction.¹ That is, when a predicate conviction is based on a statute that contains more than one element, it is the verdict that reflects the element(s) of conviction. Courts tasked with evaluating a conviction under a statute that can be violated in different ways are required by case law to distinguish between “elements” and “means.” The Supreme Court has defined an “element” as “what the jury must find beyond a reasonable doubt to convict the defendant . . . [or], at a plea hearing, what the defendant necessarily admits when he pleads guilty.” Mathis v. United States, — U.S. —, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016). “Means,” by contrast, need not be proven beyond a reasonable doubt, and need not be specified within the charging instrument. Mathis, 136 S.Ct. at 2250.

If a statute is divided into elements (e.g., with one element being “sexual offense by kissing,” and another element being “sexual offense by rape”), it will be decided at trial which “element” was satisfied. The Supreme Court terms statutes that contain more than one element “divisible.” In other words, a divisible statute is one where two individuals can commit the same offense by satisfying a different element, or a distinct subsection, contained within the statute. If, however, a statute contains only one general element (e.g., sexual touching) and no distinct subsections, the verdict will not reveal what specific means of sexual touching resulted in conviction. Such a statute is “indivisible.” Courts have applied the categorical approach to indivisible statutes, and the modified categorical approach to divisible statutes. See Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); Descamps v. United States, — U.S. —, 133 S.Ct.

1. As Justice Kennedy pointed out in his concurrence in Descamps v. United States, the Court will not rely on a guilty plea allocution, because a defendant may plead carelessly to

2276, 186 L.Ed.2d 438 (2013); Mathis v. United States, — U.S. —, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016).

The distinction between a divisible statute and an indivisible statute is often subtle and difficult to discern. This past year, the Supreme Court provided some guidance. In Mathis v. U.S., it described an indivisible statute in this way:

[S]uppose 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. See *Descamps*, 133 S.Ct. at 2289; *Richardson / v. U.S.J*, 526 U.S. [813] at 817, 119 S.Ct. 1707 [143 L.Ed.2d 985 ([1999])]. 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 “conclude[d] that the defendant used a knife” while others “conclude[d] he used a gun,” so long as all agreed that the defendant used a “deadly weapon.” *Ibid.*; see *Descamps*, 133 S.Ct. at 2288 (describing “means,” for this reason, as “legally extraneous circumstances”).

Mathis at 2249 (2016). According to Mathis, a predicate statute that contains a greater number of means of satisfying an element than the means contained within the same element in the corresponding federal statute is indivisible, and thus not subject to the modified categorical approach. See also United States v. Beardsley, 691 F.3d 252, 264 (2d Cir. 2012) (hold-

certain facts, not knowing that the allocution may trigger severe consequences later. — U.S. —, 133 S.Ct. 2276, 2293, 186 L.Ed.2d 438 (2013).

ing that where a statute of prior conviction merely lists a number of different factual means of satisfying the same single element, the statute is not divisible).

III. DISCUSSION

a. The Categorical vs. the Modified Categorical Approach

Based on the principles laid out in Mathis and Descamps, the Virgin Islands statute at issue is indivisible. Under Virgin Islands law, “[u]nlawful sexual contact in the first degree accomplished through force or coercion has three elements. The Government must prove, beyond a reasonable doubt, that: (1) the perpetrator engaged in sexual contact; (2) the person with whom the perpetrator engaged in sexual contact was not the person’s spouse; and (3) the sexual contact was accomplished by force or coercion.” Potter v. Government of Virgin Islands, 48 V.I. 446, 457 (App. Div. 2006) (citing 14 V.I.C. § 1708(1)).

[7] The Government concedes that in order to sustain a conviction under 14 V.I.C. § 1708(1), the prosecutor thus need not prove in which form of sexual contact the defendant engaged. For example, the jury need not find that the defendant touched genitals, as opposed to lips. Each clause contained within 14 V.I.C. § 1699(d) enumerates a different *means* of satisfying the same element—the commission of “sexual contact” in violation of 14 V.I.C. § 1708(1). The language of the defendant’s Virgin Islands statute of conviction renders the statute indivisible.

b. The Categorical Approach’s Application to a Pre-Trial Motion to Dismiss a SORNA Indictment

[8] The Government further concedes that if the reasoning of Mathis and Descamps applies in the SORNA context, the Virgin Islands statute at issue would be

subject to the categorical approach. It argues, however, that this Court need not be constrained by Descamps and its progeny. It first maintains that the categorical approach might not apply to the provision of SORNA at issue because the categorical approach may be limited to cases applying the Armed Career Criminal Act. It then argues that even if the categorical approach were to apply to SORNA, it would apply only in the context of sentencing, and not earlier by way of a pretrial motion to dismiss. The Government’s arguments are not persuasive.

As the Government notes, courts need not automatically apply the categorical approach to every indivisible statute; Taylor, Descamps and Mathis all dealt with the ACCA specifically. The Second Circuit Court of Appeals has not had occasion to examine whether it is proper to apply the categorical approach to § 16911(5)(A)(i) of SORNA and if so, whether the issue may be raised in a pretrial motion to dismiss.

The Court first considers whether the categorical approach applies to § 16911(5)(A)(i) of SORNA as a general matter. The Court decides that it does. The function of SORNA and the ACCA are similar in that they both subject a defendant to an enhanced penalty (or obligation) if the defendant’s prior conviction(s) meets the enhancing statute’s requirements. Other courts have applied the categorical approach to certain sections of SORNA, including the section at issue here. See United States v. Morales, 801 F.3d 1, 5 (1st Cir. 2015) (applying the categorical approach to SORNA § 16911(4)); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1135 (9th Cir. 2014) (applying the categorical approach to SORNA § 16911(4)); United States v. Gonzalez-Medina, 757 F.3d 425, 430 (5th Cir. 2014) (recognizing *in dictum* that the stat-

utory wording of SORNA's definition of "sex offense" in § 16911 (5)(A)(i) "strongly suggests the categorical approach applies.").²

The Government maintains that instances in which courts have applied the categorical approach to SORNA predicate convictions in the *sentencing* context are inapplicable when interpreting the same predicate conviction on a pretrial motion to dismiss. At least one court has dismissed a SORNA indictment after examining predicate conduct under the categorical approach. *See United States v. Johnson*, 2012 WL 5195976 (E.D. Wisc. Oct. 18, 2012) (recommendation on defendant's motion to dismiss SORNA indictment adopted by District Court at 2012 WL 5199584).

The Government rightly notes the reluctance of some courts, in the SORNA context specifically, to impose the categorical framework at the pretrial stage of a criminal proceeding. *See United States v. Brown*, 2012 WL 604185, at *5 (W.D. Pa. Feb. 24, 2012) (holding that "[a]ny discussion concerning whether a categorical approach should be used is not relevant under the [pretrial stage] of the case"); *United States v. Miller*, 694 F.Supp.2d 1259, 1266–68 (M.D. Ala. 2010) ("Given the nature of Miller's argument, the court

must conclude he does not establish, or even properly allege, that the indictment fails to state an offense. Rather, Miller's argument appears to be that he cannot be *convicted* of violating § 2250(a) because he is not required to register as a sex offender. It is now well-established that, at this stage of a criminal action, the court may not "look[] beyond the face of the indictment and rul[e] on the merits of the charges against [a defendant].").

However, in the instances where a court has dismissed similar challenges to indictments under different provisions of SORNA,³ it often had a compelling reason to do so; it wanted to give the Government the opportunity to present factual evidence at trial that would shed light on whether the defendant had committed a qualifying predicate offense. *See, e.g., United States v. Piper*, 2012 WL 4757696 at *2 (D. Vt. Oct. 5, 2012) ("Whether [the defendant's] state convictions ... constitute sex offenses, for the purposes of SORNA, goes to the sufficiency of the Government's evidence. To decide this motion to dismiss, the defendant would have the Court look beyond the face of the indictment and draw inferences as to the proof that would be introduced by the Government at trial. Such an inquiry is premature before trial."); *United States v. Brown*, 2012 WL 604185 (W.D. Pa. Feb. 24, 2012) (denying

2. As the Government notes, some courts have declined to extend the categorical approach to the provision of SORNA involving offenses against minor victims. *See, e.g., United States v. Gonzalez-Medina*, 757 F.3d 425, 428–31 (5th Cir. 2014) (holding that "Congress contemplated a non-categorical approach to the age-differential determination in the § 16911(5)(C) exception"); *United States v. Mi Kyung Byun*, 539 F.3d 982, 990–94 (9th Cir. 2008) (holding that "as to the age of the victim, the underlying facts of a defendant's offense are pertinent in determining whether she has committed a 'specified offense against

a minor' and is thus a sex offender"); *United States v. Dodge*, 597 F.3d 1347, 1353–55 (11th Cir. 2010) (holding that non-categorical approach applies "in determining what constitutes a 'specified offense against a minor'"). However, as this case law indicates, § 16911(5)(C) of SORNA differs from the one at issue here; it naturally invites a fact-based inquiry, while § 16911(5)(A)(i) does not.

3. A court has yet to deny a motion to dismiss an indictment under the specific provision of SORNA at issue here.

motion to dismiss SORNA indictment because the age of the victim presented a factual issue properly reserved for trial); United States v. Miller, 694 F.Supp.2d 1259, 1266–68 (M.D. Ala. 2010) (denying the same motion based on the same factual issue of the age differential between the defendant and victim).

The Court expects no such evidence to be presented here. No additional facts the Government might offer at a later date would shed light on the purely legal question of whether the Virgin Islands statute is written such in a way that violating it constitutes a predicate offense under SORNA § 16911(5)(A)(i).⁴ Even if the Government were to prove the defendant possessed the requisite intent in failing to register, the Court would be left with the same legal decision it faces now. The Court would need to determine whether the crime for which defendant was convicted constitutes a SORNA predicate offense under the categorical approach. It would compare the two statutes at issue, one of which defines “sexual contact” differently than the other. No evidence produced at a later date would shed any light on this purely legal issue of statutory interpretation.

The Government has not presented a compelling reason why this Court should not decide this legal issue now. To decline to resolve it until a later date, as the Government requests, would only unnecessarily expend Court time and taxpayer resources.

4. The only fact in dispute is whether defendant possessed the requisite intent to violate SORNA. Defendant argues that his long history of schizophrenia, and his history of failing to take his medications, render it unlikely that the Government can prove that defendant had the intent to fail to register under SORNA. It is likely that proving the type[s] of schizophre-

c. Under the Categorical Approach, the Government has Failed to State an Offense

[9] The Court determines that when the categorical approach is applied to the defendant’s Virgin Islands conviction, the defendant has not violated SORNA’s registration requirements. 14 V.I.C. § 1699(d) contains a broader definition of sexual contact than that which is used in SORNA. The Virgin Islands statute includes touching of the lips, and SORNA does not. Because the Virgin Islands statute is indivisible, and because there exists the possibility, however small, that the “sexual contact” element of the crime for which defendant was convicted was for conduct not prohibited by the federal law, he has not committed a sex offense as defined by §§ 16911(5)(A)(i) and 2246(3) of SORNA.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS the defendant’s motion to dismiss the indictment.

SO ORDERED.



nia from which the defendant has suffered would require costly testimony from psychiatrists, after which the Government would face the daunting task of proving that defendant was taking needed medication during his time in this country (defendant lives in a homeless shelter).

low the “district court to exercise [it] in the first instance.”³² Accordingly, we remand the issue of whether to stay the proceedings concerning the other parties to the district court.

* * *

The district court’s denial of NOV Norway’s motion to compel is VACATED. The case is REMANDED to the district court to decide whether to stay proceedings concerning the other parties under the doctrine of equitable estoppel.



UNITED STATES of America,
Plaintiff-Appellee

v.

Nazario GONZALEZ-MEDINA,
Defendant-Appellant.

No. 13-40927.

United States Court of Appeals,
Fifth Circuit.

July 2, 2014.

Background: Defendant was convicted, following a bench trial, in the United States District Court for the Southern District of Texas of failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

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

(1) circumstance-specific, rather than categorical, approach applied to determination of whether a sex offense complied with four-year age differential in exception to SORNA for offenses involving consensual sexual conduct if victim was at least 13 years old and offender

³². *Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825,

was not more than four years older than victim, and

- (2) defendant did not qualify for exception to SORNA registration requirements.

Affirmed.

Emilio M. Garza, Circuit Judge, filed dissenting opinion.

1. Criminal Law \Leftrightarrow 260.11(1, 4)

The court of appeals reviews a district court’s finding of guilt after a bench trial for substantial evidence and its legal conclusions de novo.

2. Mental Health \Leftrightarrow 469(2)

A circumstance-specific, rather than categorical, approach applied to determination of whether a sex offense complied with four-year age differential in exception to the Sex Offender Registration and Notification Act (SORNA) registration requirements for offenses involving consensual sexual conduct if victim was at least 13 years old and offender was not more than four years older than victim; the exception contained no reference to the elements of the offense, but referenced underlying conduct, other exceptions to SORNA called for non-categorical analysis, other age-specific SORNA provisions called for circumstance-specific approach, and circumstance-specific approach was most consistent with SORNA’s broad purpose of protecting the public from sex offenders. Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C).

3. Mental Health \Leftrightarrow 469(2)

A court must look to the language, structure, and purpose of the particular statutory provision to determine whether categorical or non-categorical approach ap-

plied to four-year age differential in exception to the Sex Offender Registration and Notification Act (SORNA) registration requirements for offenses involving consensual sexual conduct if victim was at least 13 years old and offender was not more than four years older than victim. Sex Offender Registration and Notification Act, § 111(5)(C), 42 U.S.C.A. § 16911(5)(C).

4. Mental Health \Leftrightarrow 433(2)

The purpose of the Sex Offender Registration and Notification Act (SORNA) is to protect the public from sex offenders and offenders against children, and to establish a comprehensive national system for the registration of those offenders. Sex Offender Registration and Notification Act, § 102, 42 U.S.C.A. § 16901.

5. Statutes \Leftrightarrow 1318

The rule of lenity only applies if, after considering the text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.

6. Mental Health \Leftrightarrow 469(2)

Defendant's prior conviction for having sexual intercourse with a child age 16 or older, in violation of Wisconsin law, did not qualify for exception to the Sex Offender Registration and Notification Act (SORNA) registration requirements for offenses involving consensual sexual conduct if victim was at least 13 years old and offender was not more than four years older than victim; government presented evidence, which defendant did not dispute, that he was in fact more than four years older than the victim at the time of his Wisconsin offense. Sex Offender Registration and Notification Act, § 102, 42 U.S.C.A. § 16901; 18 U.S.C.A. § 2250(a); W.S.A. 948.09.

7. Courts \Leftrightarrow 90(2)

A panel of Court of Appeals may not overturn the prior decision of another panel absent an intervening change in law, such as a statutory amendment or a contrary or superseding decision by either the Supreme Court or the Court of Appeals en banc.

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Marjorie A. Meyers, Federal Public Defender, Timothy William Crooks, Assistant Federal Public Defender, Federal Public Defender's Office, Houston, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, GARZA, and HIGGINSON, Circuit Judges.

HIGGINSON, Circuit Judge:

Nazario Gonzalez-Medina appeals his conviction for failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). On appeal, Gonzalez-Medina contends that he was not required to register as a sex offender because his Wisconsin conviction under Wisc. Stat. § 948.09 for having sexual intercourse with a child age sixteen or older does not qualify as a "sex offense" within the meaning of the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16901 *et seq.* Gonzalez-Medina further contends that SORNA's registration requirement and criminal penalty exceed Congress's authority under the Commerce Clause. For the

reasons articulated below, we AFFIRM Gonzalez-Medina's conviction.

I.

Gonzalez-Medina was born in Mexico in 1979 or 1980 and is a Mexican citizen. On June 24, 2005, he was charged in Wisconsin state court with having sexual intercourse with a child age sixteen or older in violation of Wisc. Stat. § 948.09. He pleaded no contest to the charge and was sentenced to sixty days in jail. Two years later, on November 28, 2007, Gonzalez-Medina was convicted in Texas state court of aggravated assault and sentenced to two years imprisonment. Prior to his release from state prison, Texas authorities informed Gonzalez-Medina of his duty to register as a sex offender for the duration of his lifetime based on his Wisconsin conviction. He signed a sex offender registration form and was later deported to Mexico. Three years later, on September 7, 2012, federal authorities found Gonzalez-Medina in a city jail in San Benito, Texas. A subsequent investigation revealed that he had been living in Texas for over a year and had not updated his sex offender registration after returning to the United States.

On September 25, 2012, a federal grand jury indicted Gonzalez-Medina for failure to register as a sex offender in violation of 18 U.S.C. § 2250(a), and illegal reentry in violation of 8 U.S.C. § 1326(a). Gonzalez-Medina pleaded guilty to the illegal-reentry charge. He then moved to dismiss the failure-to-register charge on the ground that his prior Wisconsin conviction does not qualify as a "sex offense." SORNA defines a "sex offense" as, *inter alia*, "a criminal offense that has an element involving a sexual act or sexual contact with another." See 42 U.S.C. § 16911(5)(A)(i). SORNA includes an exception to its definition of "sex offense" for "[a]n offense involving 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." 42 U.S.C. § 16911(5)(C). In his motion, Gonzalez-Medina argued that the court should apply the categorical approach to the age-differential determination in the § 16911(5)(C) exception. He further argued that Wisc. Stat. § 948.09 is not a "sex offense" under the categorical approach because it does not include a four-year age differential as an element.

[1] The district court denied the motion, and Gonzalez-Medina waived his right to a jury trial. After a bench trial, the district court found Gonzalez-Medina guilty of failure to register as a sex offender. The court first found that Gonzalez-Medina knowingly failed to register as a sex offender upon his return to the United States in May 2011. The court next found that Gonzalez-Medina had a duty to register because his Wisconsin conviction falls under SORNA's definition of "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." See 42 U.S.C. § 16911(5)(A)(i). Finally, the court found that the age-differential exception in § 16911(5)(C) does not apply because the Wisconsin judgment listed Gonzalez-Medina as 24 years old at the time of his Wisconsin offense. The district court rejected application of the categorical approach to analyzing the age-differential language in the § 16911(5)(C) exception as inconsistent with the statutory language and intent of Congress. The court later sentenced Gonzalez-Medina to fifty-one months imprisonment and three years of supervised release on both his illegal-reentry and failure-to-register counts, to run concurrently. Gonzalez-Medina timely appealed. We review a district court's finding of guilt after a bench trial for substantial evidence and its legal conclusions *de novo*. *United States v. Morgan*, 311 F.3d 611, 613 (5th Cir.2002).

II.

A.

Gonzalez-Medina was convicted for violating 18 U.S.C. § 2250(a), which provides a criminal penalty for whoever (1) “is required to register under [SORNA]”; (2) “travels in interstate or foreign commerce . . .”; and (3) “knowingly fails to register or update a registration as required by [SORNA].”

Gonzalez-Medina disputes the first element—that he was required to register under SORNA. SORNA requires an individual to register if he or she is a “sex offender,” 42 U.S.C. § 16913(a), and defines “sex offender” as “an individual who was convicted of a sex offense,” *id.* at § 16911(1). SORNA defines “sex offense” expansively as, *inter alia*:

- (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[.]

Id. at § 16911(5)(A). SORNA provides exceptions to this definition of “sex offense,” including the exception at issue in this case:

- (C) *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.*

Id. at § 16911(5)(C) (emphasis added).

On appeal, Gonzalez-Medina contends that the categorical approach applies to the age-differential determination in the § 16911(5)(C) exception, and that his Wisconsin conviction does not qualify as a “sex offense” under the categorical approach because the statute that formed the basis

of his conviction does not include a four-year age differential as an element. *See* Wisc. Stat. § 948.09 (“Whoever has sexual intercourse with a child who is not the defendant’s spouse and who has attained the age of 16 years is guilty of a Class A misdemeanor.”). He further contends that, as a result, his Wisconsin offense is broader than SORNA’s definition of “sex offense” and he hypothetically could have been convicted despite being less than four years older than the victim. Under the categorical approach, a court would be limited to comparing the elements of the Wisconsin statute to SORNA’s definition of “sex offense,” and could not consider the facts underlying the conviction. *See, e.g., Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). The government responds that the text and purpose of SORNA indicate that Congress intended courts to be able to look at the factual circumstances of the conviction, rather than just the statutory elements, in determining the age differential between the victim and offender for the § 16911(5)(C) exception.

[2] Gonzalez-Medina does not dispute the district court’s finding that his Wisconsin conviction falls within SORNA’s definition of “sex offense” as “a criminal offense that has an element involving a sexual act or sexual contact with another.” *See* 42 U.S.C. § 16911(5)(A)(i). Nor does he dispute the district court’s finding that he was in fact more than four years older than the victim at the time of his Wisconsin offense. Additionally, the parties appear to agree that if the categorical approach applies to the age differential in § 16911(5)(C), Gonzalez-Medina’s Wisconsin conviction does not qualify as a “sex offense” because the Wisconsin statute does not include a four-year age differential as an element. Accordingly, the sole issue on appeal is whether the categorical

approach applies to the four-year age differential in the § 16911(5)(C) exception.¹ For the following reasons—based on the language, structure, and broad purpose of SORNA—we conclude that Congress contemplated a non-categorical approach to the age-differential determination in the § 16911(5)(C) exception.

B.

We start with the language of the statute. At the outset, SORNA defines a “sex offender” as “an individual who was *convicted of* a sex offense.” 42 U.S.C. § 16911(1) (emphasis added). Courts have held, particularly in the context of criminal sentencing and immigration law, that the use of the term “convicted” can signal a categorical analysis. *See Taylor v. United States*, 495 U.S. 575, 600–01, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (noting that the term “conviction,” rather than “committed,” in the Armed Career Criminal Act (“ACCA”) requires an examination of the statute of conviction rather than any underlying facts); *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (applying the categorical approach to the residual clause of the definition of “violent felony” in the ACCA); *see also Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1685, 185 L.Ed.2d 727 (2013) (“‘Conviction’ is ‘the relevant statutory hook.’”); *Silva-Trevino v. Holder*, 742 F.3d 197, 201–02 (5th Cir. 2014). Accordingly, SORNA’s use of the term “convicted” might trigger the categorical approach, at least to some extent, in determining if a defendant has been “convicted of” a sex offense.

The use of the term “convicted,” however, is not always determinative. For in-

1. Contrary to the dissent’s implication, this court need not decide the applicability of the categorical approach to the phrase “involving consensual sexual conduct” in the (5)(C) exception, as the parties do not raise this issue

stance, in *Nijhawan v. Holder*, 557 U.S. 29, 32, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009), the Supreme Court interpreted an immigration statute that rendered deportable any alien “*convicted of* an aggravated felony at any time after admission.” (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)) (emphasis added). The statute defined “aggravated felony” as, *inter alia*, “an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000.*” *Id.* (quoting 8 U.S.C. § 1101(a)(43)(M)(i)) (emphasis added). The Court held that, despite the use of the term “convicted,” the italicized language relating to victim loss could be determined based on the particular facts of the case, rather than the categorical approach. *Id.* The Court found a number of factors persuasive, including: (1) the words “*in which*” modifying “offense” “can refer to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements of the offense”; (2) the “aggravated felony” definition lists certain other offenses that “almost certainly” call for circumstance-specific determinations; and (3) a categorical approach would leave the definition with “little, if any, meaningful application” as most fraud statutes do not include the relevant \$10,000 monetary loss threshold as an element. *Id.* at 37–40, 129 S.Ct. 2294.

Similarly, in *United States v. Hayes*, 555 U.S. 415, 418, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), the Court interpreted a criminal law prohibiting the possession of a firearm by any person “*convicted of* a misdemeanor crime of domestic violence.” (quoting 18 U.S.C. § 922(g)(9)) (emphasis added). The statute defined “misdemeanor crime of domestic violence” as a misde-

on appeal. For the same reason, this court need not decide the applicability of the categorical approach to the definitions of “sex offense” in 42 U.S.C. § 16911(5)(A).

meanor that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, *committed by a current or former spouse . . .*” *Id.* at 420, 129 S.Ct. 1079 (quoting 8 U.S.C. 921(a)(33)(A)) (emphasis added). The Court held that the domestic-relationship requirement need not be an element of the predicate statute of conviction and could be determined under the circumstance-specific approach. *Id.* at 418, 129 S.Ct. 1079. The Court looked to the statutory language (“committed by”), the broad Congressional purpose, and the fact that only one-third of states had criminal statutes that specifically proscribed domestic violence when the provision was enacted. *Id.* at 421–29, 129 S.Ct. 1079.

[3] Accordingly, here, as in *Nijhawan* and *Hayes*, the use of the term “convicted” is not determinative. We must look to the language, structure, and purpose of the statutory provision. See, e.g., *Silva-Trevino*, 742 F.3d at 200–05 (analyzing statutory language, structure, and purpose to determine whether the categorical approach applies to the “crime involving moral turpitude” determination in 8 U.S.C. § 1182(a)(2)(A)(i)). As described below, a number of considerations, including some of the same considerations present in *Nijhawan* and *Hayes*, weigh against application of the categorical approach to the age-differential determination in the § 16911(5)(C) exception.

First, a comparison of the definition of “sex offense” in § 16911(5)(A)(i) and the exception in § 16911(5)(C) lends support for a non-categorical approach to the age-differential determination in the exception. Subsection (5)(A)(i) defines a “sex offense” as “a criminal offense that has an *element* involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(i) (emphasis added). The definition’s focus on the “element[s]” of the predicate offense strongly suggests that a categorical

approach applies to (5)(A)(i). In contrast, the (5)(C) exception excludes from the definition of “sex offense” an offense “*involving* 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.” *Id.* at § 16911(5)(C) (emphasis added). The exception contains no reference to the “elements” of the offense. Instead, Congress defined the exception in terms of the “conduct” “*involv[ed]*” in the “offense.” The exception’s reference to conduct, rather than elements, is consistent with a circumstance-specific analysis. See *United States v. Byun*, 539 F.3d 982, 992 (9th Cir.2008) (reasoning that § 16911(7)(I)’s reference to “conduct” suggests that “it is the underlying ‘conduct,’ not the elements of the crime of conviction, that matter”).

Second, the other exception to the definition of “sex offense,” located in § 16911(5)(B), calls for a non-categorical analysis. The (5)(B) exception provides that:

(B) A foreign conviction is not a sex offense for purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused. . . .

42 U.S.C. § 16911(5)(B). This exception requires an inquiry into facts outside of the statute of conviction and into the circumstances of the country in which the conviction took place. In *Nijhawan*, the Supreme Court found it significant that the statute in question featured other provisions that “almost certainly” called for a non-categorical analysis. 557 U.S. at 37, 129 S.Ct. 2294 (“More importantly, however, the ‘aggravated felony’ statute differs from the ACCA in that it lists certain other ‘offenses’ using language that almost certainly does not refer to generic crimes but refers to specific circumstances.”). Similarly here, 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.

Third, other age-specific SORNA provisions similarly appear to call for a circumstance-specific, rather than categorical, approach as to age determinations. *See, e.g.*, 42 U.S.C. § 16911(8); *see also Byun*, 539 F.3d at 993–94 (holding that a non-categorical approach applies as to the victim’s age in the § 16911(7) definition of “specified offense against a minor”); National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,052–53 (July 2, 2008) (interpreting the victim’s age to be a circumstance-specific determination in a number of SORNA provisions).

[4] Finally, application of a non-categorical approach to the age differential in the § 16911(5)(C) exception is most consistent with SORNA’s broad purpose. Congress enacted SORNA to “protect the public from sex offenders and offenders against children” and to “establish[] a comprehensive national system for the registration of those offenders.” 42 U.S.C. § 16901. SORNA’s language confirms “that Congress cast a wide net to ensnare as many offenses against children as possible.” *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc).

Application of the categorical approach to the (5)(C) age-differential determination would frustrate SORNA’s broad purpose and restrict SORNA’s reach. Gonzalez-Medina contends that a predicate statute of conviction can qualify as a sex offense only if it includes a four-year (or more) age differential as a statutory element. Yet, a significant number of federal and state statutes that fall into SORNA’s definition

2. Although the dissent focuses on the fact that over half of states have statutory rape laws that include an age differential, the language

of “sex offense” in § 16911(5)(A) do not include an age differential as an element. *See, e.g.*, 18 U.S.C. § 2251(a) (child pornography); Tex. Penal Code §§ 43.02, 22.011 (statutory rape and child prostitution).² Of the statutes that do include an age differential as an element, only a fraction include an age differential of four or more years. *See, e.g.*, Miss. Code Ann. § 97–3–65 (three-year age differential). Application of the categorical approach in this context would cause statutes without such an age differential as an element to fall outside of SORNA’s definition of “sex offense.” We do not believe that Congress intended the age-differential language in the (5)(C) exception to restrict the reach of SORNA in this manner. *See Nijhawan*, 557 U.S. at 40, 129 S.Ct. 2294; *Hayes*, 555 U.S. at 427, 129 S.Ct. 1079.

In sum, all of the above considerations support application of a non-categorical approach to the age-differential determination in the (5)(C) exception.

C.

Gonzalez-Medina contends that the Sixth Amendment concerns present in the sentencing context require a categorical approach to the § 16911(5)(C) age-differential exception. Gonzalez-Medina asserts that the categorical approach is necessary in order to protect a defendant’s right to a jury determination of the four-year age differential. Gonzalez-Medina cites *Apprendi v. Jersey* for the proposition that “[o]ther than the fact of a prior conviction, any 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.” 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The government represented

- of the (5)(C) exception does not restrict its application to statutory rape offenses.

in its brief and at oral argument that the prosecutor in a failure-to-register prosecution under 18 U.S.C. § 2250(a) is required to prove beyond a reasonable doubt to the jury (or to the court in the case of a jury-waived trial) that the criteria for the (5)(C) exception are not met, including the four-year age differential, thus eliminating any Sixth Amendment concerns. *See Nijhawan*, 557 U.S. at 40, 129 S.Ct. 2294; *Hayes*, 555 U.S. at 426, 129 S.Ct. 1079.³

[5] Gonzalez-Medina further contends that the age-differential exception is ambiguous as to whether the categorical approach applies and the rule of lenity requires that the ambiguity be resolved in his favor. “[T]he rule of lenity only applies if, after considering the text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.” *United States v. Castleman*, — U.S. —, 134 S.Ct. 1405, 1416, 188 L.Ed.2d 426 (2014) (quoting *Barber v. Thomas*, 560 U.S. 474, 488, 130 S.Ct. 2499, 177 L.Ed.2d 1 (2010)). For the reasons above, the (5)(C) exception does not rise to the level of a “grievous ambiguity,” requiring this court to “simply guess as to what Congress intended.” Instead, the language, structure, and broad purpose of SORNA all indicate that Congress intended a non-categorical approach to the age-differential determination in (5)(C).

[6] We therefore hold that a non-categorical approach applies for purposes of determining the age differential in the § 16911(5)(C) exception. A four-year age differential need not be an element of the

3. Gonzalez-Medina also contends that application of the categorical approach avoids the “practical difficulties and potential unfairness” of relitigating facts related to a prior conviction years later in a subsequent criminal proceeding. *See Taylor*, 495 U.S. at 601, 110 S.Ct. 2143. This concern, however, is

predicate offense. In this case, the government presented evidence, and Gonzalez-Medina did not dispute, that he was in fact more than four years older than the victim at the time of his Wisconsin offense. Accordingly, the district court properly found that the (5)(C) exception does not apply and that Gonzalez-Medina was required to register as a sex offender.

III.

[7] In his second issue on appeal, Gonzalez-Medina contends that SORNA’s criminal penalty and civil registration requirement exceed Congress’s power under the Commerce Clause. Gonzalez-Medina acknowledges that his challenge is foreclosed by *United States v. Whaley*, 577 F.3d 254 (5th Cir.2009). In *Whaley*, this court held that SORNA’s criminal penalty under 18 U.S.C. § 2250(a)(2)(B) falls within Congress’s power to regulate the channels of interstate commerce. *Id.* at 258. This court further held that SORNA’s civil registration requirement falls within Congress’s power under the Commerce Clause and the Necessary and Proper Clause as a means of “furthering the goal of preventing offenders from ‘slipping through the cracks’ by changing jurisdictions.” *Id.* at 260. We may not overturn the prior decision of another panel of our court absent an intervening change in law, such as a statutory amendment or a contrary or superseding decision by either the Supreme Court or this court *en banc*. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir.2008). Gonzalez-Medina does not assert that there has been an intervening change in law after the *Whaley* deci-

less pressing where the disputed fact in the subsequent criminal proceeding is limited to the age of the victim and offender at the time of the prior offense. Ordinarily, age can be ascertained from documentary evidence or brief witness testimony.

sion. Accordingly, we have no occasion to revisit *Whaley* in this case.⁴

IV.

For the foregoing reasons, we AFFIRM the district court's judgment and Gonzalez-Medina's conviction for failure to register as a sex offender under 18 U.S.C. § 2250(a).

EMILIO M. GARZA, Circuit Judge,
dissenting:

The majority holds that when determining whether an individual's prior sex offense conviction falls within the Sex Offender Registration and Notification Act ("SORNA")'s consensual-sex exception, courts may undertake an independent factual inquiry into the ages of the offender and victim at the time of the offense. Respectfully, I disagree. I would instead hold that the consensual-sex exception requires courts to apply the categorical approach, which does not permit examination of the facts underlying a defendant's prior conviction. Because the categorical approach compels the conclusion that Gonzalez-Medina was not convicted of a SORNA "sex offense," I would vacate his conviction for failure to register.

I

When we are asked to determine whether an individual's prior state conviction constitutes a generic offense provided in a

4. Gonzalez-Medina also states that if the court vacates his SORNA conviction, the court should vacate his sentence for his illegal-reentry charge to allow the government and district court to consider an additional one-level reduction for acceptance of responsibility under U.S. Sentencing Guidelines Manual § 3E1.1(b). Because we affirm Gonzalez-Medina's SORNA conviction, we need not reach this request. Furthermore, we perceive no error in the district court's award of a two-level, rather than three-level, reduction for acceptance of responsibility under

federal statute, we generally apply the categorical approach. *See United States v. Espinoza*, 733 F.3d 568, 571 (5th Cir. 2013). Under this approach, courts ask only whether the elements of the prior state offense correspond to the elements of the generic federal offense—that is, whether the prior conviction "necessarily implies" that the individual is "guilty of all the elements of [the generic offense]."¹ *See Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (applying categorical approach in determining whether prior offense triggers sentencing enhancement under Armed Career Criminal Act ("ACCA")). Even when state offenses are broader than the generic federal offense, courts still must look only to "the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600, 110 S.Ct. 2143.

At the outset, it is important to grasp the specific distinctions between SORNA and the Wisconsin statute. SORNA imposes federal criminal liability on any person who, having been "convicted of a sex offense," fails to register in his jurisdiction of residency. *See* 42 U.S.C. § 16911(1); *id.* § 16913(a); 18 U.S.C. § 2250(a). The statute excludes from its "sex offense" definition any "offense involving consensual sexual conduct" in which the victim was "at least 13 years old and the offender was not more than 4 years older than the

§ 3E1.1. *See United States v. Kleinebreil*, 966 F.2d 945, 952–53 (5th Cir. 1992).

1. For simplicity's sake, I use "categorical approach" here to refer to both the categorical and modified categorical approaches, since the latter "merely helps implement the categorical approach when a [petitioner] was convicted of violating a divisible statute." *See Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2285, 186 L.Ed.2d 438 (2013). As the Government recognizes, the Wisconsin statute at issue here is not divisible, so the modified categorical approach is inapplicable.

victim.” 42 U.S.C. § 16911(5)(C). By contrast, the Wisconsin statute under which Gonzalez–Medina was convicted in 2005 imposes misdemeanor criminal liability on an individual who has “sexual intercourse with a child . . . who has attained the age of 16 years” Wisc. Stat. § 948.09.² Unlike SORNA, the Wisconsin statute contains no non-consent element or age differential; that is, it does not exempt offenses involving “consensual sexual conduct” in which the victim was “at least 13 years old and the offender was not more than 4 years older than the victim.” 42 U.S.C. § 16911(5)(C).

Because of these distinctions, the majority recognizes and the parties agree that if SORNA’s consensual-sex exception is evaluated under the categorical approach, then Gonzalez–Medina had no obligation to register under SORNA. *Ante* at 428. Because the Wisconsin statute lacks a consensual-sex exception, it criminalizes a different range of conduct than does SORNA. Thus, Gonzalez–Medina’s Wisconsin conviction does *not* “necessarily impl[y]” that he is “guilty of all the elements” of a SORNA sex offense. *Taylor*, 495 U.S. at 599, 110 S.Ct. 2143. Accordingly, the Government can neither prove that Gonzalez–Medina is “an individual who was convicted of a sex offense” under SORNA, 42 U.S.C. § 16911(1), nor penalize him for failing to register, 18 U.S.C. § 2250(a).

Under the categorical approach, because Gonzalez–Medina was not convicted of a

2. A “child” is “a person who has not attained the age of 18 years.” Wisc. Stat. § 948.01(1).

3. See *Nijhawan v. Holder*, 557 U.S. 29, 38–40, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (applying “circumstance-specific” approach when text of federal statute focuses on facts underlying a prior conviction, rather than merely elements of that offense, and when practical consequences of applying the categorical approach would undermine legislative purpose); *United States v. Hayes*, 555 U.S. 415, 426, 129

sex offense under SORNA, he cannot be criminally liable for failing to register as a sex offender. This should be the end of our inquiry.

II

The majority, however, does not apply the categorical approach. Rather, today’s opinion relies on cases in which the Supreme Court concluded that a strictly categorical approach would not be faithful to the statutory text and Congressional intent.³ However, the majority misapplies these precedents and thus erroneously departs from the categorical approach.

The majority first emphasizes that the text of the consensual-sex exception refers to “an offense *involving* consensual sexual conduct,” rather than to general statutory elements. 42 U.S.C. § 16911(5)(C) (emphasis added); *see ante* at 430. To be sure, the Supreme Court has explained that a statute’s focus on specific factual circumstances “in which” an offense occurred can counsel against the categorical approach. *Nijhawan*, 557 U.S. at 38–39, 129 S.Ct. 2294 (quoting 8 U.S.C. § 1101(a)(43)(M)(i)). But the majority overlooks the Court’s reasoning in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), which involved statutory language substantially more similar to SORNA’s consensual-sex exception. In *James*, the Court applied the categorical approach to the ACCA’s residual clause defining a “violent felony”

S.Ct. 1079, 172 L.Ed.2d 816 (2009) (holding that Government can prove that prior offense was “misdemeanor crime of domestic violence” by establishing victim’s relationship to offender as factual matter, without relying solely on elements of statute). I further observe that aside from *Hayes*, the Supreme Court has not deployed the circumstance-specific approach in applying a criminal statute such as SORNA; *Nijhawan* involved a noncitizen’s removability. *See Nijhawan*, 557 U.S. at 33, 129 S.Ct. 2294.

as including an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *James*, 550 U.S. at 196, 127 S.Ct. 1586 (emphasis added). Given the similarity between the ACCA’s language in *James* and the consensual-sex exception’s reference to offenses “involving consensual sexual conduct,” I would follow *James* and apply the categorical approach. 42 U.S.C. § 16911(5)(C) (emphasis added).

The majority next reasons that the consensual-sex exception requires a circumstance-specific approach because such an approach almost certainly applies to an adjacent exception concerning whether a “foreign conviction . . . was not obtained with sufficient safeguards for fundamental fairness and due process.” 42 U.S.C. § 16911(5)(B), *see ante* at 430. Even assuming that the majority’s reading of the (5)(B) foreign conviction exception is correct, I would not conclude that the two exceptions’ proximity mandates a circumstance-specific approach.

The *Nijhawan* Court explained that “[w]here . . . Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.” *Nijhawan v. Holder*, 557 U.S. 29, 39, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). In that case, the Court considered a provision of the Immigration and Nationality Act (“INA”) that defined an “aggravated felony” to include:

an offense that—

4. Additionally, the majority misunderstands *Nijhawan*’s reasoning: The *Nijhawan* Court did not simply conclude that “other provisions” in the statute called for a circumstance-specific approach. *Ante* at 430. This principle would require courts to scour a statute to determine whether categorical or circumstance-specific approaches should be applied anywhere else, and when different

(i) involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000; or
(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds \$10,000....

8 U.S.C. § 1101(a)(43)(M). The Court first determined that subparagraph (M)(ii) must require a circumstance-specific approach: Because no offense “described in section 7201 of title 26” has a loss amount as an element, the categorical approach would render the tax-evasion provision “pointless.” *Nijhawan*, 557 U.S. at 38, 129 S.Ct. 2294. Turning to subparagraph M(i), the Court then explained that “it is identical in structure to [M(ii)],” and uses “similar statutory language.” *Id.* at 38–39, 129 S.Ct. 2294. Although the Court did not expressly enumerate these “similar” features, it likely found salient the parallel phrases “in which” and the express specifications of an amount of loss.⁴

By contrast, the SORNA exceptions here do not share substantially similar “statutory language” or “structure.” *Id.* at 39, 129 S.Ct. 2294. The consensual-sex exception at issue here and its preceding provision appear as follows:

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

provisions require different approaches, courts would be left wondering “to which category [the provision at issue] belongs.” *Nijhawan*, 557 U.S. at 38, 129 S.Ct. 2294. Rather, the Court ultimately relied on an immediately “adjoining provisio[n]” that called for a circumstance-specific approach and—crucially—that shared similar language and structure. *Id.* at 39, 129 S.Ct. 2294.

(C) Offenses involving 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.

42 U.S.C. § 16911(5). Here, the two exceptions do not employ any similar language beyond the phrase “is not a sex offense.” Likewise, the structure of the two exceptions is similar only insofar as both employ a conditional clause beginning with “if....” In short, I see no similarities in these provisions’ text and structure so compelling as to warrant importing the circumstance-specific approach from subparagraph (5)(B) to (5)(C). Cf. *Sebelius v. Auburn Reg'l Med. Ctr.*, — U.S. —, 133 S.Ct. 817, 825, 184 L.Ed.2d 627 (2013) (rejecting argument that statutory provision is jurisdictional by virtue of proximity to other jurisdictional requirements).

Third, the majority looks to two persuasive authorities—the Ninth Circuit decision in *United States v. Byun*, 539 F.3d 982 (9th Cir.2008), and Department of Jus-

tice Guidelines. See ante at 430–31. But these authorities do not bind this Court and, in any event, concern entirely different statutory provisions and language. Thus, they do not determine the outcome in this case. See, e.g., *Byun*, 539 F.3d at 991 (reasoning that the word “committed,” in contrast to “convicted,” counsels in favor of circumstance-specific approach under 42 U.S.C. § 16911(3)(A)).

Fourth, the majority asserts that SORNA’s broad purpose of creating a “comprehensive national system for the registration of [sex] offenders” requires a circumstance-specific approach. See ante at 431 (quoting 42 U.S.C. § 16901). This purpose, the majority claims, would be dramatically undermined by the categorical approach, since many state sex offense statutes do not contain a four-year age-differential exception consistent with SORNA’s. To be sure, both the *Nijhawan* and *Hayes* Courts surveyed state laws and concluded that because the categorical approach would render the federal law inapplicable in a substantial majority of states, Congress must have intended courts to take a circumstance-specific approach.⁵ However, over half of the states have age-differential exceptions in their statutory rape laws.⁶ Thus, SORNA’s purpose would not be

5. In *Nijhawan*, the Court opted for a circumstance-specific approach when only eight states had fraud statutes with a monetary threshold consistent with that of the federal offense. See *Nijhawan*, 557 U.S. at 40, 129 S.Ct. 2294 (“We do not believe Congress would have intended (M)(i) to apply in so limited and so haphazard a manner.”). Similarly, in *Hayes*, the Court concluded that because only about one-third of states had statutes specifically criminalizing domestic violence, a provision of the Gun Control Act of 1968, 18 U.S.C. § 922(g)(9), prohibiting firearm possession by a person convicted of a “misdemeanor crime of domestic violence” would have been a “dead letter” in the remaining two-thirds of the states. *Hayes*, 555 U.S. at 427, 129 S.Ct. 1079.

6. The Government recognizes that at least in 2004, twenty-seven states defined sex offenses against minors with reference, in part, to age differentials. See generally The Lewin Group, *Statutory Rape: A Guide to State Laws and Reporting Requirements* 8 (2004). Additionally, I note that in adopting a circumstance-specific approach, this Court has previously reasoned that the “categorical approach would render the crime of domestic violence as a basis for removal [of a noncitizen] under [8 U.S.C. §] 1227(a)(2)(E)(i) inapplicable in about one-half of the States.” *Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir.2010). In *Bianco*, however, the panel relied substantially on the Supreme Court’s circumstance-specific approach in *Hayes*, which happened also to apply a circumstance-specific approach in evaluating the generic federal crime of do-

eviscerated by our applying the categorical approach.

The majority further submits that both parties underestimate the categorical approach's potential impact on SORNA because "the language of the (5)(C) exception does not restrict its application to statutory rape offenses." *Ante* at 431 n. 2. To be sure, general sexual assault offenses (involving non-minors) do not require that the offender and victim be of any particular age. But even under the categorical approach, so long as the lack of consent is an element of the state sex offense, the offender will not fall within SORNA's consensual-sex exception. Although the parties have not briefed the issue, according to one treatise, "slightly less than half of the states" require the lack of consent as an element of rape, while others require "force" or "compulsion." See 2 Subst. Crim. L. § 17.4 (2d ed.2013). While the categorical approach would exclude convictions in these "force" jurisdictions from SORNA's registration requirement, in light of the many states that do require non-consent, SORNA would, again, not be rendered "pointless." *Nijhawan*, 557 U.S. at 38, 129 S.Ct. 2294; see also Tex. Penal Code § 22.011(a)(1) (criminalizing sex acts committed with "another person . . . without that person's consent"); N.Y. Penal Law § 130.20 (defining sexual misconduct as a sexual act committed "with another person without such person's consent"); Cal.Penal Code § 261(a) (defining rape as sexual intercourse "against a person's will" or committed when other cannot consent).

Absent clearer statutory language or legislative intent mandating otherwise, the categorical approach must govern. Con-

mestic violence. See *id.* at 271–73 (applying *Hayes*). I therefore do not understand *Bianco* (or the Supreme Court's precedents) to establish a rigid bright-line rule on the number of states whose laws would not fit the elements of a federal statute, thus triggering the circumstance-specific approach.

gress, by choosing to base SORNA's registration requirement on prior state convictions, acted with full awareness of the potential effects of disparate state sex offense regimes.⁷ If Congress wishes to broaden SORNA's scope and remedy inconsistencies across states, it may certainly choose to do so.

III

While the majority makes much of the Supreme Court's circumstance-specific approach in *Nijhawan*, scant attention is paid to our subsequent decision in *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014), which clarified our application of *Nijhawan*. In *Silva-Trevino*, the BIA permitted consideration of evidence beyond the record of conviction in determining whether a noncitizen had been convicted of a "crime involving moral turpitude" under the INA, 8 U.S.C. § 1182(a)(2)(A)(i). We rejected this approach, instead applying the categorical approach. We concluded that *Nijhawan* did not govern since the aggravated felony fraud provision in that case defined "a subset of a category of convictions"—fraud and deceit resulting in a loss of at least \$10,000. *Id.* at 204. By contrast, because the broad category of "crime involving moral turpitude" contained "no such subset," we had "no . . . permission to abandon the categorical approach." *Id.*

Here, like the statute in *Silva-Trevino*, SORNA establishes a broad category of "sex offenses" that trigger the registration requirement. The consensual-sex exception does not establish a "subset" of offenses, *id.* at 204; rather, it merely carves

7. Further, as Gonzalez-Medina notes, in most states, where the age of consent is sixteen, he would not even have been convicted for engaging in consensual sexual activity with a sixteen year-old.

out an exclusion from this broad category. In light of our reasoning in *Silva-Trevino*, the majority's reliance on *Nijhawan* is misguided.

Additionally, the majority understates the circumstance-specific approach's potential to spawn unwieldy re-litigation of past convictions under the consensual-sex exception. This practical concern is one of the primary rationales animating the categorical approach, which strictly limits the means by which federal courts may determine whether prior convictions fit within generic federal offenses. *See Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1690–91, 185 L.Ed.2d 727 (2013).

The majority claims that the concern for resource-consuming re-litigation is “less pressing where the disputed fact . . . is limited to the age of the victim and offender at the time of the prior offense,” because “age can be ascertained from documentary evidence or brief witness testimony.” *Ante* at 432 n. 3. Indeed, the ages of the offender and victim are at the center of this particular dispute, and if the Government would need to prove only these additional facts to establish that a SORNA defendant is a federal sex offender, then there would be somewhat less reason to fear the specter of mini-trials.

8. For instance, under the majority's circumstance-specific approach, a seventeen-year-old offender convicted of sexually assaulting a thirteen-year-old victim would satisfy the exception's age-differential requirement. But the Government, as it concedes, would still need to prove beyond a reasonable doubt that the offense did *not* involve “consensual sexual conduct.” Consent is a potential problem for Gonzalez-Medina as well, since under the categorical approach, the lack of consent as an element of statutory rape might undermine SORNA's applicability to statutory rapists. *See, e.g.*, Miss.Code Ann. § 97-3-65 (statutory rape). In response, he essentially submits that lack of consent is an *implied* element of statutory rape because state laws presume minor victims of statutory rape to be incap-

able of giving consent. *See, e.g.*, *United States v. Rodriguez*, 711 F.3d 541, 561 (5th Cir.2013) (“For these reasons, we conclude that the ‘generic, contemporary meaning’ of ‘statutory rape’ sets the age of consent as a person under the age of majority as defined by statute.”). Thus, by Gonzalez-Medina's logic, the categorical approach would *not* exclude a statutory rapist from SORNA's registration requirement unless he comes within the age-differential exception (as determined by examining only the elements of the state sex offense law). While today's case does not require us to resolve the complex issue of consent, adopting the circumstance-specific approach could require future courts to take on a difficult task.

and not the courts, to effect and refine the aims of SORNA.⁹

IV

The SORNA consensual-sex exception is governed by the categorical approach. Under that approach, because the Wisconsin statute did not contain a comparable exception, the Government failed to prove beyond a reasonable doubt that Gonzalez-Medina was convicted of a “sex offense” as defined in SORNA. Accordingly, Gonzalez-Medina’s SORNA conviction must be vacated.

Respectfully, I dissent.



LUMINANT GENERATION COMPANY, L.L.C.; Energy Future Holdings Corporation, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; Gina McCarthy, Administrator, United States Environmental Protection Agency, Respondents.

9. The majority professes not to reach the question of “the applicability of the categorical approach to the phrase ‘involving consensual sexual conduct’ in the (5)(C) exception.” *Ante* at 429 n. 1. This claim is belied by the majority’s relying on this very phrase to conclude that “[t]he exception’s reference to conduct, rather than elements, is consistent with a circumstance-specific analysis.” *Ante* at 430. In any event, the majority fails to explain how a future court could ever conclude in a principled manner that while, under today’s decision, a circumstance-specific approach governs the age differential, a categorical approach applies to the “consensual

Luminant Generation Company, L.L.C.; Big Brown Power Company, L.L.C., Petitioners,

v.

United States Environmental Protection Agency; Gina McCarthy, Administrator, United States Environmental Protection Agency, Respondents.

Nos. 12-60694, 13-60538.

United States Court of Appeals,
Fifth Circuit.

July 3, 2014.

Background: Power plant operators filed petitions challenging legal sufficiency of notice of violation issued by Environmental Protection Agency (EPA) pursuant to Clean Air Act (CAA).

Holding: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that EPA’s issuance of notice of violation was not final agency action.

Petitions dismissed.

1. Environmental Law ~~☞~~661

In order for Environmental Protection Agency’s (EPA) action to be “final,” and thus subject to review by Court of Appeals pursuant to Clean Air Act (CAA), action must mark consummation of agency’s decisionmaking process, and action must be

sexual conduct” phrase in the very same statutory provision. *See* 42 U.S.C. 16911(5)(C). As explained above, *supra* note 8, this case does not require us to discuss exhaustively the implications of either a categorical or circumstance-specific approach for the phrase “consensual sexual conduct.” However, the majority is mistaken in implying that its opinion leaves open the question of whether a categorical or circumstance-specific approach *applies to this phrase at all*. After today’s decision, a circumstance-specific approach governs the consensual-sex exception in its entirety—including both the phrase “consensual sexual conduct” and the age differential.



KeyCite Blue Flag – Appeal Notification
Appeal Filed by [MARK HARDER v. USA](#), 7th Cir., August 20, 2021

2021 WL 3418958

Only the Westlaw citation is currently available.
United States District Court, W.D. Wisconsin.

Mark HARDER, Petitioner,

v.

UNITED STATES of America, Respondent.

21-cv-188-jdp, 14-cr-67-jdp

|

Signed 08/05/2021

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OPINION and ORDER

[JAMES D. PETERSON](#), District Judge

*¹ Mark Harder petitions for habeas relief under [28 U.S.C. § 2255](#), challenging his 2014 conviction for failing to register as a sex offender as required under the Sex Offender Registration and Notification Act. Harder contends that his predicate conviction—a 1998 Louisiana conviction for indecent behavior with a juvenile—is not a “sex offense” as that term is defined in SORNA, and that his trial counsel was ineffective for failing to so advise him.

Harder's petition is untimely, and he offers no justification for the delay. But I consider the merits because his petition raises issues pertinent to several recent cases in this court. The SORNA definition of “sex offense” is broad, particularly so for offenses with minor victims. Applying a mostly categorical analysis, I conclude that Harder's conviction under the Louisiana statute constitutes a SORNA sex offense. Harder's petition is denied.

In 1998, Harder was charged with “aggravated oral sexual battery” of a 15-year-old boy. Presentence Report, Dkt. 22, ¶ 58.¹ Harder pleaded guilty to an amended charge of “indecent behavior with a juvenile” in violation of [Louisiana Revised Statute § 14:81](#). He was sentenced to a six-year term of incarceration and he was required under Louisiana law to register as a sex offender until 2023. He was reincarcerated on the Louisiana conviction in 2005 and released from custody in 2008. At some point, Harder moved to Wisconsin, but he did not register as a sex offender.

In 2014, Harder pleaded guilty to failing to register as a sex offender in violation of SORNA. He was sentenced to 24 months incarceration and five years of supervised release. Judgment was entered December 1, 2014. He did not appeal, so his conviction became final when the appeal deadline expired on December 31, 2014.

In 2017, Harder admitted violations of the conditions of his release. His supervision was revoked and he was sentenced to 12 months incarceration and three years of supervised release. Dkt. 40. He appealed; the appeal was dismissed as frivolous. Dkt. 50.

In 2018, Harder admitted several violations of the conditions of his release. Although he disputed that he had violated the condition that he not have contact with juveniles, I found that he had violated that condition as well. His supervision was revoked and he was sentenced to 24 months incarceration and four years of supervised release. Dkt. 59. He appealed. The court of appeals remanded the case with instructions to delete or revise Special Condition No. 11 pertaining to third-party notification. Dkt. 71. Special Condition No. 11 was modified. Dkt. 72.

In 2021, I found that Harder had again violated the conditions of his release, and I revoked his supervision. Harder was sentenced to 24 months incarceration and four years of supervised release. Dkt. 88. He appealed, but voluntarily dismissed the appeal. Dkt. 94.

While Harder's supervised release was under review in 2021, Harder filed the petition for habeas relief that is now before the court. He had not previously raised the issue that his Louisiana conviction was not a SORNA “sex offense.”

BACKGROUND

ANALYSIS

A. Harder's petition is untimely

*2 Harder concedes that his petition is untimely, Dkt. 1, at 2, because it was filed long after the one-year limitations period in § 2255(f). Harder did not appeal his federal conviction and it became final long ago. And he does not purport to rely on any right newly recognized by the Supreme Court. He simply contends that under a proper legal analysis, he is actually innocent, and that “[a]ctual innocence defeats any otherwise applicable affirmative defense of procedural default.” *Id.* (citing *McQuiggin v. Perkins*, 569 U.S. 383 (2013)). The government doesn't contest the point and moves straight to the merits. Dkt. 3, at 2 n.2.

The parties pass too quickly over the timeliness issue. *McQuiggin* involved a claim of actual innocence based on newly discovered evidence. The Supreme Court held that the untimeliness of the petition was not a bar to the presentation of evidence of actual innocence, although the timing of the petition would be a factor to consider in whether a convincing showing of actual innocence could be made. But a convincing showing of actual innocence merely opened the gateway to considering the merits of the habeas petition, which would ultimately succeed only if the petitioner showed a violation of his constitutional rights. Actual innocence was not a free-standing ground for habeas relief.

Harder's claim of actual innocence is predicated not on new evidence, or even a change in the law, but on a putative legal error that has lain unnoticed for years. Harder could have raised this issue on direct appeal, but he did not appeal. And, even failing to raise it on direct appeal, he could have raised it in a petition alleging ineffective assistance of counsel under § 2255. See *Fuller v. United States*, 398 F.3d 644, 650 (7th Cir. 2005) (ineffective assistance of counsel claims may be raised for first time in § 2255 motion). Ordinarily a petition under § 2255 would be subject to the one-year limitations period, meaning that Harder would have had to file his petition by December 31, 2015. But that might be overcome with equitable tolling by showing diligence and cause for the delay. *Ademiju v. United States*, 999 F.3d 474, 477 (7th Cir. 2021). Harder offers no evidence of his diligence or any justification for delay, so I conclude that he is not entitled to equitable tolling. But Harder proposes something much more radical: that the legal error of his trial counsel is simply not subject to the § 2255 limitations period.

Harder's position cannot be squared with *Lund v. United States*, 913 F.3d 665 (7th Cir.), cert. denied, 140 S. Ct. 191 (2019), in which the court of appeals enforced the § 2255

statute of limitations on a similar claim. Lund brought an untimely petition under § 2255 based on *Burrage v. United States*, 571 U.S. 204 (2014), a Supreme Court decision issued after his conviction that would have made him legally innocent of causing death by the distribution of heroin. The court of appeals, citing and applying *McQuiggin*, affirmed the denial of Lund's petition, reasoning that Lund could not use *Burrage* both as the basis for his claim of actual innocence to overcome his procedural default and as the substantive basis for his habeas petition. *Id.* at 668. Allowing him to do so would “completely undermine the statute of limitations from bringing initial § 2255 motions.” *Id.* The court of appeals rejected the idea that “[e]very time there is a retroactive interpretation of a criminal law, petitioners convicted under it would have an initial § 2255 claim based on the new interpretation indefinitely.” *Id.* at 669.

Harder doesn't assert any new or retroactive interpretation of the law as the basis for his § 2255 claim. Harder, unlike Lund, expressly contends that his trial counsel was ineffective. But Harder doesn't contend that trial counsel was ineffective in any way other than by missing the legal principle that Harder contends makes him innocent. Harder's perfunctory assertion of ineffective assistance of counsel does not escape the reasoning of *Lund*: under Harder's view, he would have a § 2255 claim that endures indefinitely, completely undermining the statute of limitations. The court concludes that Harder, like Lund, is not entitled to use his tardy assertion of actual innocence to overcome the statute of limitations.

*3 But even if Harder's claim were not barred as untimely, it fails on the merits.

B. Harder is a sex offender under SORNA

The parties agree that whether Harder's Louisiana conviction is a SORNA sex offense is determined by a categorical analysis, which requires the court to compare the Louisiana statute of conviction to the SORNA definition of “sex offense,” without regard to Harder's actual offense conduct. If the scope of the Louisiana statute is broader than the definition of sex offense under SORNA, then a conviction under the Louisiana statute is not a sex offense and Harder should not have been convicted of failing to register.

1. Sexual act/sexual contact

Harder's main argument is that the Louisiana statute prohibiting “indecent behavior with juveniles” doesn't meet the SORNA definition in 34 U.S.C. § 20911(5)(A)(i), because

that part of the SORNA definition requires actual contact with the victim, but the Louisiana statute doesn't.

The parties agree about the Louisiana side of the equation. The statute provides, in pertinent part:

§ 81. Indecent behavior with juveniles

A. Indecent behavior with juveniles is the commission of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, 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. Lack of knowledge of the child's age shall not be a defense.

[Louisiana Rev. Stat. § 14:81](#) (1998). The statute does not necessarily require actual contact with the juvenile; it also prohibits lewd or lascivious acts committed "in the presence of any child."

The parties' dispute concerns the interpretation of the SORNA definition at issue, which is:

a criminal offense that has an element involving a sexual act or sexual contact with another;

[34 U.S.C. § 20911\(5\)\(A\)\(i\)](#). The government contends that the terms "sexual act" and "sexual contact" should be given their ordinary meaning, so that "sexual act" would mean any act that is sexual, including, for example, masturbation. Thus, a conviction under a statute that criminalized masturbating in front of someone is a sex offense, because it has an element involving a sexual act with another, even though no touching of the victim was required.

Harder contends that the terms "sexual act" and "sexual contact" should be given the special definitions used in United States Code Chapter 109A, relating to federal sex abuse crimes. Both terms, as defined in the federal sex abuse chapter, require actual touching of the victim. "Sexual act" means:

(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;

(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; or

*4 (D) 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\(2\)](#). "Sexual contact" is defined as follows:

the term "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\(3\)](#). Both definitions require contact with specified body parts of the victim. A lewd act committed in the presence of the victim, but without touching the victim, would not qualify as a sexual act as that term is defined in Chapter 109A. So the question is whether the Chapter 109A definitions for the terms "sexual act" and "sexual contact" should be imported into the definition in [§ 20911\(5\)\(A\)\(i\)](#) of SORNA.

Some courts, including this one, have used the Chapter 109A definitions in conducting categorical analyses of SORNA predicate offenses. See [United States v. Walker](#), 931 F.3d 576, 581 (7th Cir. 2019); [United States v. Thayer](#), No. 20-CR-88, slip op. at 6–7 (W.D. Wis. June 29, 2021). One theory behind this approach might be that [§ 20911\(5\)\(A\)\(i\)](#) is intended merely to cover state offenses that are the equivalent of federal sex abuse crimes. I'm not persuaded that this is the proper approach, for two primary reasons.

First, some, but not all, parts of the SORNA definition of sex offense expressly cite federal definitions. The several tiers of sex offenders are defined, in part, by reference to specific

federal crimes. For example, a Tier II offender includes one convicted of “abusive sexual contact (as described in [section 2244 of title 18, United States Code](#)).” And the multi-part definition of sex offense in [§ 20911\(5\)\(A\)](#) also includes references to several specified federal crimes:

the term “sex offense” means--

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under [section 1152 or 1153 of title 18, United States Code](#)) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or [117, of title 18, United States Code](#);
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of [Public Law 105-119 \(10 U.S.C. 951 note\)](#); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Congress plainly demonstrated the intent to incorporate some federal definitions into SORNA, but it did not do so in subsection (5)(A)(i).

Second, the structure of SORNA supports using the broader, plain meaning of “sexual act” and “sexual contact.” An offender who is convicted of abusive sexual contact under [18 U.S.C. § 2244](#) is classified as a Tier II sex offender, thus subject to a 25-year registration requirement. [§ 20911\(3\)\(A\)\(iv\)](#). Abusive sexual contact would include, among other things, sexual touching of the defined intimate parts of a minor by use of threats; it is the least serious of the federal sex abuse crimes. Tier I sex offenders are less serious offenders subject to only a 15-year registration period. A conviction for any federal sex abuse crime puts the defendant in Tier II. So the tier structure demonstrates that SORNA also applies to a broader range of offenses, including offenses less serious than the federal sex abuse crimes.

*[5](#) The better interpretation of [§ 20911\(5\)\(A\)\(i\)](#) is that “sexual act” and “sexual contact” do not incorporate the restrictive definitions from Chapter 109A, but reach a fuller range of sex offenses. “Sexual act” in this subsection means any act that is sexual, regardless of whether it involves

touching the victim. Under this interpretation, the Louisiana crime of indecent behavior with juveniles is a categorical match to the SORNA definition of sex offense in [34 U.S.C. § 20911\(5\)\(A\)\(i\)](#).

But even if [§ 20911\(5\)\(A\)\(i\)](#) were construed restrictively as Harder urges, his petition would nevertheless fail because there is another SORNA definition of sex offense applicable to his Louisiana conviction.

2. Specified offense against a minor

The SORNA definition of sex offense also includes offenses that are “a specified offense against a minor.” [34 U.S.C. § 20911\(5\)\(A\)\(ii\)](#). Those specified offenses are, in turn, defined in [§ 20911\(7\)](#). That section bears the heading “Expansion of definition of ‘specified offense against a minor’ to include all offenses by child predators,” which leaves little doubt that Congress intended a particularly capacious definition of “sex offense” for crimes involving minor victims.

Which brings us to Harder’s secondary argument: that his conviction under Louisiana law is not a “specified offense against a minor” because it encompasses conduct “well beyond that prohibited by federal statutes.” Dkt. 1, at 7. (The argument is scantily stated in a single paragraph; it could be deemed forfeited.)

The government’s counterargument is that subsection (7) calls for a circumstance-specific evaluation of Harder’s actual offense conduct. I am not persuaded, because that would invite judicial fact-finding that would be inconsistent with purposes of categorical analysis, one of which is to protect a defendant’s right to a jury trial on any fact that increases his sentence exposure. *See Thayer*, at 2–4.

But even sticking with the categorical approach, and thus eschewing consideration of Harder’s offense conduct, a conviction under the Louisiana statute constitutes a sex offense. The SORNA definition of “specified offense against a minor” provides, in pertinent part:

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:

...

(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.

[34 U.S.C. § 20911\(7\).](#)

Paragraph (I) would appear to be the broadest part of the definition, but it uses the term it purports to define—sex offense—so it is circular in a way that makes it difficult to interpret. So I'll focus on the definition in paragraph (H), particularly the part that defines sex offense to include any offense that involves “criminal sexual conduct involving a minor.” The Louisiana statute requires a minor victim, in fact a victim under the age of sixteen. The statute requires the defendant to commit an act that is lewd or lascivious and that is intended to arouse or gratify the sexual desire of either person, so the statute requires sexual conduct. Penalties under the Louisiana statute are a fine and a prison sentence of up to seven years, meeting the SORNA definition of “criminal offense.” [§ 20911\(6\)](#). The Louisiana statute sweeps no more broadly than the definition in subsection (7)(H).

3. The SORNA exception for close-in-age defendants

*⁶ Harder doesn't mention it, but there is a mismatch with the carve-outs for close-in-age defendants. The Louisiana statute requires an age difference of more than two years between the defendant and the victim. But SORNA includes a more generous exception for consensual conduct if the victim is at least 13 and the defendant is no more than four years older. [34 U.S.C. § 20911\(5\)\(C\)](#). Thus, the Louisiana statute would criminalize consensual sexual conduct by a 18-year-old defendant with a 15-year-old victim, but that would not constitute a sex offense under SORNA.

But the SORNA carve-out for a close-in-age defendant does not call for categorical analysis. The court of appeals has

held that the text of [§ 20911\(5\)\(C\)](#) calls for consideration of the actual offense conduct. *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015). (“This language [in [§ 20911\(5\)\(C\)](#)] 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.”).² The factual record establishes that the exception does not apply to Harder: his victim was 15, and at the time of the offense Harder was 35. Presentence Report, ¶ 58 (Dkt. 22, in Case No. 14-cr-67).

CONCLUSION

There is a categorical match between the SORNA definition of sex offense and the Louisiana statute. The SORNA exception for close-in-age defendants requires me to consider the facts of Harder's offense conduct, which show that the exception does not apply. I therefore conclude that Harder was previously convicted of a sex offense, and he was thus properly convicted of failing to register as a sex offender. But because Harder's petition raises complex legal questions that reasonable jurists might have resolved differently, I will grant Harder a certificate of appealability. See *Miller El v. Cockrell*, 537 U.S. 322, 336 (2003).

ORDER

IT IS ORDERED that:

1. Mark Harder's petition for habeas relief under [28 U.S.C. § 2255](#) is DENIED.
2. Harder is GRANTED a certificate of appealability.

All Citations

Slip Copy, 2021 WL 3418958

Footnotes

¹ Docket citations in the background section are to Harder's underlying criminal case, No. 14-cr-67.

² This is a point that I missed in my decision in *Thayer*. In *Thayer*, I concluded that the difference in the “Romeo and Juliet” exceptions in SORNA and in the Minnesota statute defining criminal sexual contact was a categorical mismatch that required dismissal of the indictment. But if, as *Rogers* holds, the application of

the SORNA exception in § 20911(5)(C) requires consideration of the underlying offense conduct, and not a strictly categorical analysis, then Thayer was not entitled to dismissal of the indictment on that ground.

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jury.” See *United States v. Chavez*, 894 F.3d 593, 601 (4th Cir. 2018) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). A claim of trial error predicated on these principles is generally characterized as a *Napue* claim. We have recognized, however, that a meritorious *Napue* claim requires “a showing of the falsity and materiality of testimony.” See *Daniels v. Lee*, 316 F.3d 477, 493 (4th Cir. 2003) (internal quotation marks omitted).

Bush’s *Napue* claim is doomed because he cannot show that McDowell presented false testimony. Bush’s position is that McDowell gave perjured testimony when he testified on direct examination that he first engaged in drug transactions with Bush in 2013, but then asserted on cross-examination that those transactions began in 2011. On further examination, however, Bush’s lawyer clarified any confusion that could have arisen regarding the timeframe of McDowell’s drug dealings with Bush. In any event, if McDowell’s testimony contained inconsistencies, they would not support a *Napue* claim. See *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987) (“Mere inconsistencies in testimony by government witnesses do not establish the government’s knowing use of false testimony.”).

Because Bush has failed to prove that an error occurred during McDowell’s trial testimony, Bush is unable to satisfy the plain error standard of review. We therefore reject his *Napue* claim.

III.

Pursuant to the foregoing, we reject Bush’s contentions of error and affirm the criminal judgment of the district court.

AFFIRMED



UNITED STATES of America,
Plaintiff - Appellee,

v.

Anthony Dale HELTON, Defendant -
Appellant.

No. 18-4663

United States Court of Appeals,
Fourth Circuit.

Argued: September 20, 2019

Decided: December 3, 2019

Amended: December 4, 2019

Background: Defendant charged with failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA) moved to dismiss indictment. The United States District Court for the Northern District of West Virginia, Gina M. Groh, Chief Judge, 2018 WL 9850220, denied the motion. Defendant appealed.

Holdings: The Court of Appeals, Quattlebaum, Circuit Judge, held that conviction for voyeurism in violation of South Carolina law was “sex offense” requiring registration under SORNA.

Affirmed.

Floyd, Circuit Judge, filed dissenting opinion.

1. Mental Health 433(2)

The purpose of the Sex Offender Registration and Notification Act (SORNA) is to protect the public from sex offenders and offenders against children by establishing a comprehensive national system for the registration of those offenders. 34 U.S.C.A. § 20901.

2. Mental Health \ominus 469(5)

The Sex Offender Registration and Notification Act (SORNA) requires those designated as a “sex offender” to register and keep current their sex offender status in each jurisdiction where they reside, are employees, or are enrolled as students. 34 U.S.C.A. § 20913.

3. Mental Health \ominus 469.5

A defendant commits the crime of failure to register as a sex offender if he (1) is a sex offender required to register under the Sex Offender Registration and Notification Act (SORNA), (2) travels in interstate commerce, and (3) knowingly fails to register or update his registration as required by SORNA. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913.

4. Criminal Law \ominus 1139

Where a district court’s denial of a motion to dismiss an indictment depends solely on a question of law, the appellate court reviews the denial de novo.

5. Mental Health \ominus 469(2)

Under the categorical approach for determining whether a defendant’s prior state conviction constitutes a sex offense requiring defendant to satisfy the registration requirements of the Sex Offender Registration and Notification Act (SORNA), a court looks to the statutory definition of the state crime to determine whether the criminalized conduct falls within the definition of “sex offense” under SORNA. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5)(A)(i)-(v), 20913.

6. Federal Courts \ominus 3082

Mental Health \ominus 469(2)

Under the categorical approach for determining whether a defendant’s prior state conviction constitutes a sex offense requiring defendant to satisfy the registration requirements of the Sex Offender Registration and Notification Act (SOR-

NA), a federal court is bound by the interpretation of the state statute of conviction articulated by that state’s courts. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5)(A)(i)-(v), 20913.

7. Mental Health \ominus 469(2)

Under the categorical approach for determining whether a defendant’s prior state conviction constitutes a sex offense requiring defendant to satisfy the registration requirements of the Sex Offender Registration and Notification Act (SORNA), a federal court focuses on the minimum conduct required to sustain a conviction for the state crime, but such conduct must give rise to a realistic probability, not a theoretical probability that a state would apply the law and uphold a conviction based on such conduct. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5)(A)(i)-(v), 20913.

8. Mental Health \ominus 469(2)

To find that a defendant’s prior state conviction constitutes a sex offense requiring defendant to satisfy the registration requirements of the Sex Offender Registration and Notification Act (SORNA), a federal court must find that the elements of the state statute of conviction are the same as, or narrower than, those of a generic sex offense for the state conviction to be categorical match. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5)(A)(i)-(v), 20913.

9. Mental Health \ominus 469(2)

Conviction for voyeurism in violation of South Carolina law constituted a “sex offense” requiring registration under the Sexual Offender Registration Act (SORNA); although South Carolina’s voyeurism statute did not require physical contact, physical contact was not required to qualify as “sexual act” under SORNA definition of “sex offense,” and South Carolina stat-

ute required knowingly viewing another person for the purpose of arousing or gratifying sexual desire, so that it qualified as "sexual act" under SORNA. 34 U.S.C.A. § 20911(5)(A)(i); S.C. Code Ann. §§ 16-17-470(B), 23-3-430.

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

10. Mental Health ☞433(2)

The National Guidelines for Sex Offender Registration and Notification promulgated by the Attorney General pursuant to the Sex Offender Registration and Notification Act (SORNA) have the force and effect of law. 34 U.S.C.A. §§ 20911, 20912(b).

11. Statutes ☞1079

A court's interpretation of a statute must begin with the relevant statutory text.

12. Statutes ☞1077

A core principal of statutory interpretation counsels judicial restraint in order to maintain a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made.

13. Constitutional Law ☞2473

Statutes ☞1123

Giving statutory terms their plain meaning, when not statutorily defined, helps to minimize disagreement between the judicial and legislative branches of government by preserving congressional enactments as written and avoids causing friction by creating, through the power of precedent, statutes foreign to those Congress intended.

14. Statutes ☞1136

A statute's use of the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.

15. Statutes ☞1136

When term "include" is utilized in a statute, it is generally improper to conclude that entities or items not specifically enumerated are excluded.

16. Statutes ☞1373

Because "include" and its variations are more often than not the introductory term for an incomplete list of examples, their use before a list is afforded a presumption of nonexclusively in statutory interpretation.

17. Statutes ☞1122

When a statutory definition states that a word "means" something, this clearly denotes that this is the word's only meaning.

Appeal from the United States District Court for the Northern District of West Virginia, at Martinsburg. Gina M. Groh, Chief District Judge. (3:18-cr-00016-GMG)

ARGUED: Nicholas Joseph Compton, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. Lara Kay Ombs-Bott-eicher, OFFICE OF THE UNITED STATES ATTORNEY, Martinsburg, West Virginia, for Appellee. ON BRIEF: Kristen M. Leddy, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Martinsburg, West Virginia, for Appellant. William J. Powell, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Wheeling, West Virginia, for Appellee.

Before AGEE, FLOYD, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge QUATTLEBAUM wrote the opinion, in which Judge AGEE joined. Judge FLOYD wrote a dissenting opinion.

QUATTLEBAUM, Circuit Judge:

We address for the first time whether a conviction under South Carolina's voyeurism¹ statute constitutes a "sex offense" requiring registration under the Sexual Offender Registration Act ("SORNA"). Arguing it does not, Helton moved to dismiss the indictment alleging that he failed to register as a sex offender under SORNA. The district court denied Helton's motion, holding that a conviction under South Carolina's voyeurism statute constitutes a sex offense requiring registration under SORNA.

On appeal, our central question is whether a conviction under the statute constitutes "a criminal offense that has an element involving a sexual act or sexual contact with another." 34 U.S.C. § 20911(5)(A)(i). The answer to that question turns on the definitions of "sexual act" and "sexual contact," which are not provided by SORNA. Helton argues we should use the definitions of those terms found in 18 U.S.C. § 2246, a different federal statute. Under § 2246, "sexual act" and "sexual contact" require physical contact with another. Helton argues that since the South Carolina voyeurism statute does not require such physical contact, it is not a criminal offense involving a "sexual act" or "sexual contact."

But accepting Helton's argument would require us to rewrite SORNA. Although Congress could have easily drafted SORNA to limit "sexual act" and "sexual con-

1. Without intending to make light of the serious issues posed by SORNA and this case, a brief digression into the origins of voyeurism statutes provides some historical context. Statutory prohibitions of voyeurism are often colloquially called "Peeping Tom" statutes. The term "Peeping Tom" dates to the legend of Lady Godiva, an English noblewoman whose husband, the Earl of Mercia, levied oppressive taxes on the people of Coventry, England. After Lady Godiva took pity on the

tact" to conduct involving physical contact with another, it did not, leaving those terms undefined. Keeping with our previous decisions, we decline to apply the § 2246 definitions of "sexual act" and "sexual contact" outside of their place in Title 18 Chapter 109A, in the absence of statutory language to do so. Instead, we define SORNA's use of these terms in accordance with their ordinary meaning. In doing so, it becomes clear that a violation of the voyeurism statute—which does not require physical contact, but does require the voyeuristic act to be in furtherance of "arousing or gratifying sexual desire"—is a criminal offense involving a "sexual act" or "sexual contact" that requires registration under SORNA.

For these reasons, and as more fully described below, we affirm the district court and conclude that a conviction under South Carolina's voyeurism statute constitutes a sex offense requiring registration under SORNA.

I.

A.

[1-3] Before reviewing the facts of this case, we begin with an overview of SORNA. Congress enacted SORNA "[i]n order to protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 34 U.S.C. § 20901. This system requires those designated as a "sex offender" under SOR-

townspeople, and her husband rebuffed her initial pleas to lift the taxes, she agreed to ride unclothed on horseback through the streets of Coventry if he would grant them relief. According to the legend, a proclamation was issued to the town, which required the people to stay indoors and shut their windows to give her absolute privacy. As she rode through town, covered only by her long hair, a tailor, now known as "Peeping Tom," disobeyed the proclamation by watching her pass by.

NA to register and keep current their sex offender status in each jurisdiction where they reside, are employees or are enrolled as students. 34 U.S.C. § 20913. A defendant violates 18 U.S.C. § 2250(a) if he (1) is a sex offender required to register under SORNA, (2) travels in interstate commerce and (3) knowingly fails to register or update his registration as required by SORNA.

SORNA defines a “sex offender” as “an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). To define “sex offense,” SORNA identifies five categories of conduct:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. § 20911(5)(A)(i)–(v). Any conduct that falls within one of these five categories, and does not trigger one of the two narrow exceptions in § 20911(5)(B)–(C), constitutes a “sex offense” under SORNA.

B.

Against this backdrop, we turn to the facts of this appeal. In 2012, Helton pled guilty to voyeurism in violation of S.C. Code § 16-17-470(B). He was sentenced to three years of incarceration, with credit

for time served and one year of probation. In addition, S.C. Code § 23-3-430 required Helton to register as a sex offender in South Carolina. Following his release from prison, Helton moved to Virginia but later relocated to West Virginia. In both states, Helton registered as a sex offender under the applicable state laws.

However, when the West Virginia State Police later attempted to verify Helton’s address, they discovered that he no longer occupied his last known West Virginia residence and was not registered as a sex offender in any other state. They soon determined that Helton had moved to Rockingham County, Virginia without updating his registration in West Virginia or re-registering in Virginia. Helton was subsequently arrested by the Rockingham County Sheriff’s Department for failing to update his registration in West Virginia.

A federal grand jury in West Virginia indicted Helton for failing to register and update his registration as a sex offender as required by SORNA, in violation of 18 U.S.C. § 2250(a). The indictment alleged that Helton was a sex offender under SORNA because his voyeurism conviction in South Carolina qualified as a sex offense.

Helton moved to dismiss the indictment. He argued that because his South Carolina voyeurism conviction did not feature an element involving a “sexual act” or “sexual contact,” his conviction did not fall within SORNA’s definition of “sex offense.” 34 U.S.C. § 20911(5)(A). Helton argued the definitions of “sexual act” and “sexual contact” from 18 U.S.C. § 2246, which require physical contact with another, should be used to define those terms under SORNA. He then argued that since South Carolina’s voyeurism statute does not require physical contact with another, violating it does not constitute a sex offense requiring SORNA registration.

[4] The district court rejected this argument. Instead, the court interpreted “sexual act” and “sexual contact” in accordance with their ordinary meaning, and held that the South Carolina statute’s requirement that the voyeuristic act be committed “for the purpose of arousing or gratifying sexual desire” was the element of the offense that involved a sexual act. Accordingly, the district court held that a conviction under South Carolina’s voyeurism statute is a sex offense that required Helton to register as a sex offender under SORNA. Based on that conclusion, the court denied Helton’s motion to dismiss the indictment. Helton entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. Helton timely appealed following his sentencing.²

II.

A.

Since Helton pled guilty to violating South Carolina’s voyeurism statute, we must determine whether a violation of that statute is a “sex offense” under SORNA. To answer that question, we first must decide what analytical framework to apply. The Supreme Court has provided three potential frameworks for us to consider: the “categorical approach,” the “modified categorical approach” and the “circumstance-specific approach.” *United States v. Price*, 777 F.3d 700, 704 (4th Cir. 2015). The district court held, and the parties agreed at oral argument, that the categorical approach should be applied to determine if Helton’s South Carolina voyeurism conviction meets the SORNA definition of “sex offense.” We agree that, under our precedent, applying the categorical approach is appropriate to resolve Helton’s

case. See *Price*, 777 F.3d at 708; *United States v. Faulls*, 821 F.3d 502, 512 (4th Cir. 2016); *United States v. Berry*, 814 F.3d 192, 195–96 (4th Cir. 2016).

[5–8] Under the categorical approach, we look to the statutory definition of the state crime to determine whether the criminalized conduct falls within the definition of “sex offense” under SORNA. See *United States v. Battle*, 927 F.3d 160, 164 (4th Cir. 2019). In doing so, we are “bound by the interpretation of such offense articulated by that state’s courts.” *United States v. Winston*, 850 F.3d 677, 684 (4th Cir. 2017). This analysis “focus[es] on the minimum conduct required to sustain a conviction for the state crime,” *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016) (internal quotation marks omitted), but such conduct “must give rise to a ‘realistic probability, not a theoretical probability’ that a state would apply the law and uphold a conviction based on such conduct.” *Battle*, 927 F.3d at 165 (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)). We must find that the elements of the statute of conviction are “the same as, or narrower than, those of the generic offense in order to find a categorical match.” *Price*, 777 F.3d at 704.

B.

[9] With our analytical framework determined, we now analyze whether a South Carolina voyeurism conviction is a “sex offense” under SORNA. In doing so, we ask whether the minimum conduct required to violate the voyeurism statute is the same as, or narrower than, the minimum conduct required by SORNA’s definition of “sex offense.” If it is, the district court did not err in denying the motion. If

2. Where, as here, a district court’s denial of a motion to dismiss an indictment depends solely on a question of law, we review the

denial de novo. *United States v. Bridges*, 741 F.3d 464, 467 (4th Cir. 2014).

it is not, Helton's motion to dismiss should have been granted.

The parties and the district court agree that § 20911(5)(A)(i) is the relevant SORNA sex offense category to Helton's case. That subsection defines "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." 34 U.S.C. § 20911(5)(A)(i). Therefore, to decide if a conviction under the South Carolina voyeurism statute constitutes a "sex offense" under SORNA, we must answer the central question of this appeal: whether the voyeurism statute "has an element involving a sexual act or sexual contact with another." *Id.* Making this question more difficult is the fact that neither "sexual act" nor "sexual contact" are defined in SORNA.

[10] Although SORNA does not define "sexual act" or "sexual contact," Congress expressly delegated authority to the Attorney General to "issue guidelines and regulations to interpret and implement" SORNA. 34 U.S.C. § 20912(b). Pursuant to this authority, the Attorney General promulgated the National Guidelines for Sex Offender Registration and Notification ("SMART Guidelines"), 73 Fed. Reg. 38,030 (July 2, 2008). As we have stated, "[t]hese Guidelines 'can and do have the force and effect of law.'" *United States v. Bridges*, 741 F.3d 464, 468 (4th Cir. 2014).

Section IV of the SMART Guidelines explains that a "sex offense" under § 20911 of SORNA "encompasses a broad range of offenses of a sexual nature under the law of any jurisdiction" 73 Fed. Reg. 38,050.³ The section then describes the offenses that constitute a "sexual act" or "sexual contact" under § 20911(5)(A)(i), the relevant category to Helton's case. In ad-

3. However, an earlier section of the SMART Guidelines also cautions that the term "sex offense" does not "refer to any and all crimes

dressing that subsection, the SMART Guidelines state:

The offenses covered by this clause should be understood to include all sexual offenses whose elements involve: (i) Any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person's body, either directly or through the clothing. Cf. 18 U.S.C. 2246(2)–(3) (federal law definitions of sexual act and sexual contact).

73 Fed. Reg. 38,051. In addition, the SMART Guidelines note that among the only offenses explicitly excluded from the § 20911 "sex offense" categories are those "involving consensual sexual conduct between adults, and offenses involving consensual sexual conduct with minors at least 13 years old where the offender is not more than four years older." See 73 Fed. Reg. 38,037.

1.

Largely repeating his arguments below, Helton contends a violation of the South Carolina voyeurism statute does not require a sexual act or sexual contact under SORNA. He claims that while "sexual act" and "sexual contact" are not defined in 34 U.S.C. § 20911(5)(A)(i), those terms are defined in 18 U.S.C. § 2246(2)–(3), which provide the definitions for 18 U.S.C. Chapter 109A "Sexual Abuse" offenses. The definitions in § 2246(2)–(3) require physical contact with another. See 18 U.S.C. § 2246(2)–(3). Helton argues "sexual act" and "sexual contact" must be narrowly read to incorporate the definitions from § 2246 and exclude all offenses falling outside their scope. Applying Helton's narrow reading, South Carolina's voyeurism offense does not, under the categorical ap-

of a sexual nature," but only to those covered by the five categories in § 20911(5)(A). 73 Fed. Reg. 38,045.

proach, fall within the definitions of “sexual act” or “sexual contact” because it does not require physical contact with another.

Helton claims that the SMART Guidelines support his narrow interpretation of “sexual act” and “sexual contact.” He asserts that because the SMART Guidelines expressly reference forms of physical contact with another—and cite the § 2246 definitions, which require physical contact with another—any sex offense under § 20911(5)(A)(i) must also involve such physical contact. Since South Carolina’s voyeurism statute can be violated without any form of physical contact, Helton argues that it cannot, under the categorical approach, fall within the § 20911(5)(A)(i) definition of “sex offense” under SORNA.

2.

[11] We disagree. To explain, we begin, as we must, with the relevant statutory text. *See Sebelius v. Cloer*, 569 U.S. 369, 376, 133 S.Ct. 1886, 185 L.Ed.2d 1003 (2013). Even though Congress had the opportunity, it did not incorporate the § 2246 definitions into § 20911(5)(A)(i). Congress knew how to do so, as it explicitly named the Title 18 Chapter 109A “Sex Abuse” offenses—which use the § 2246 definitions of “sexual act” and “sexual contact”—among the federal crimes that expressly constitute a “sex offense” under § 20911(5)(A)(iii). In contrast, Congress did not incorporate Chapter 109A or the § 2246 definitions into § 20911(5)(A)(i). Therefore, interpreting § 20911(5)(A)(i) to only comprise of offenses with elements falling within the § 2246 definitions would effectively rewrite § 20911(5)(A)(i) to im-

pose a limitation that Congress did not make.⁴

[12, 13] Rewriting § 20911(5)(A)(i) to impose such a limitation would also require us to depart from a core principle of statutory interpretation. This principle, which is based on the separation of powers, counsels restraint in order to “maintain[] a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made.” *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *In re Brown*, 932 F.3d 162, 170 (4th Cir. 2019). Giving terms their plain meaning, when not statutorily defined, helps “to minimize disagreement between the branches by preserving congressional enactments” as written and avoids causing “friction by creating (though the power of precedent) statutes foreign to those Congress intended.” *Almendarez-Torres*, 523 U.S. at 238, 118 S.Ct. 1219. Even if Congress’ failure to reference the § 2246 definitions of “sexual act” and “sexual contact” in § 20911(5)(A)(i) resulted from less-than-meticulous drafting and not a conscious policy decision, we may not displace the plain meaning of the statutory text. Helton’s reading invites us to rewrite the statute based on speculation as to Congress’ intent. That is not the proper role for this Court.

Helton’s interpretation of § 20911(5)(A)(i) is also at odds with the text of the pertinent SMART Guidelines. The SMART Guidelines state that the definition of “sex offense” under § 20911(5)(A)(i)—“a criminal offense that has an element involving a sexual act or

4. Similarly, this Court and many of our sister circuits have declined to incorporate the Chapter 109A definition of “sexual abuse” into other parts of the U.S. Code which leave the term undefined, choosing instead to give the term its ordinary meaning. *See, e.g., United States v. Hubbard*, 480 F.3d 341 (5th Cir. 2007); *United States v. Maiteen*, 806 F.3d 857 (6th Cir. 2015); *United States v. Colson*, 683 F.3d 507 (4th Cir. 2012); *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007).

ed States v. Hubbard, 480 F.3d 341 (5th Cir. 2007); *United States v. Maiteen*, 806 F.3d 857 (6th Cir. 2015); *United States v. Colson*, 683 F.3d 507 (4th Cir. 2012); *United States v. Sinerius*, 504 F.3d 737 (9th Cir. 2007).

sexual contact with another”—“should be understood to *include* all offenses whose elements involve: (i) Any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person’s body, either directly or through the clothing.” 73 Fed. Reg. 38,051 (emphasis added).

[14–17] The phrase “to include” is critical. Both the Supreme Court and this Court have held that “the term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.” *United States v. Hawley*, 919 F.3d 252, 256 (4th Cir. 2019) (quoting *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65 (1941)). In fact, “[w]hen ‘include’ is utilized in a statute, it is generally improper to conclude that entities not specifically enumerated are excluded.” *Hawley*, 919 F.3d at 256 (quoting *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 426 (4th Cir. 1999)); see also Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) (“The verb *to include* introduces examples, not an exhaustive list.”); *Include*, Black’s Law Dictionary (8th ed. 2004) (“To contain as part of something. The participle *including* typically indicates

5. In contrast, when a statutory definition states, for example, that a word “means” something, this clearly denotes that this is the word’s *only* meaning. See *Helvering v. Morgan’s Inc.*, 293 U.S. 121, 125 n.1, 55 S.Ct. 60, 79 L.Ed. 232 (1934) (“The natural distinction would be that where ‘means’ is employed, the term and its definition are to be interchangeable equivalents, and that the verb ‘includes’ imports a general class, some of whose particulars are those specified in the definition.”).
6. The manner in which the SMART Guidelines cite § 2246 actually cuts against Helton’s argument that physical contact with another is required under § 20911(5)(A)(i). While Helton contends that the SMART Guidelines’ reference to § 2246(2)–(3) indi-

a partial list . . . some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing.”) (emphasis original). Because “include” and its variations are “more often than not the introductory term for an incomplete list of examples,” *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991), their use before a list is afforded a presumption of nonexclusively in statutory interpretation. See Scalia & Garner at 132–33.⁵

Applying this precedent and other persuasive authority, we read the conduct described in the SMART Guidelines to impose a nonexclusive list. Like Congress in drafting the statute itself, the Attorney General could have easily written the SMART Guidelines to indicate that “sexual act” and “sexual contact” under § 20911(5)(A)(i) require physical contact with another.⁶ For example, instead of “to include,” the Attorney General could have used “to be limited to,” “to mean,” “to be defined as” or other similar language. If he had, Helton might have the better end of the argument. By instead using “to include,” the Attorney General indicated the examples contained in the SMART Guidelines are non-exclusive. Our job is to follow the actual language of the SMART Guide-

cates that the contact required under § 20911(5)(A)(i) is “comparable and similar” to the conduct listed in § 2246 (Appellant’s Supp. Br. at 3), this ignores, among other things, the SMART Guidelines’ use of the “*Cf.*” signal in the citation. This signal is generally understood to precede a citation offering a proposition that is analogous *but different* to the one being made by the author. See *The Bluebook: A Uniform System of Citation* R.1.2(a), at 59 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015). This shows that the Attorney General chose not to define “sexual act” and “sexual contact” under SORNA as those terms are defined under § 2246.

lines, not construe an interpretation inconsistent with the text.

Notably, this conclusion is consistent with our decision in *United States v. Fugit*, 703 F.3d 248 (4th Cir. 2012). There, the term “sexual activity” was left undefined in 18 U.S.C. § 2422. Fugit, like Helton here, urged this Court to incorporate the § 2246 definition of “sexual act” as its meaning. *See id.* at 255. We rejected Fugit’s argument holding, “we find ‘no indication that Congress intended to import the definitions of chapter 109A to [another] chapter.’” (quoting *United States v. Sonnenberg*, 556 F.3d 667, 670 (8th Cir. 2009)). Our decision relied on not only the text of § 2422 but also the text of § 2246. Specifically, we noted that “[s]ection § 2246 explicitly limits the definitions provided therein to the chapter in which it resides” because “the very first words of the section are ‘[a]s used in this chapter’ (with various definitions following), and the section’s title is ‘[d]efinitions for chapter.’” *Fugit*, 703 F.3d at 256. We continue to find this reasoning compelling and apply it here.

In short, Helton’s argument requires the definitions of “sexual act” and “sexual contact” to involve physical contact with another. But neither Congress in drafting § 20911(5)(A)(i), nor the Attorney General in promulgating the SMART Guidelines, chose to include language imposing such a limitation. Therefore, we decline to do so here.

3.

Since “sexual act” and “sexual contact” are not defined by the text of SORNA or Section IV of the SMART Guidelines, we look to their ordinary meaning. *See Cloer*, 569 U.S. at 376, 133 S.Ct. 1886 (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91, 127 S.Ct. 638, 166 L.Ed.2d 494 (2006)) (“[u]nless otherwise defined, statutory

terms are generally interpreted in accordance with their ordinary meaning.’”). In doing this, we note that the plain text of the South Carolina voyeurism statute does not require any form of physical contact. Therefore, like the district court, we focus our analysis on whether the South Carolina voyeurism statute has an element involving a “sexual act” rather than “sexual contact.”

Following our practice, we look to dictionaries of common usage to discern the ordinary meaning of “sexual act.” *See Fugit*, 703 F.3d at 254. Black’s Law Dictionary defines an “act” as “[s]omething done or performed, esp. voluntarily; a deed” and “[t]he process of doing or performing; an occurrence that results from a person’s will being exerted on the external world.” *Act*, Black’s Law Dictionary (8th ed. 2004). While Black’s Law Dictionary does not define “sexual,” Webster defines it as, “of or relating to the sphere of behavior associated with libidinal gratification.” *Webster’s New International Dictionary* 2082 (3d ed. 1993); *see also Fugit*, 703 F. 3d at 254 (using this definition of “sexual” to define the statutory term “sexual activity”); *United States v. Diaz-Ibarra*, 522 F. 3d 343, 349 (4th Cir. 2008) (using this definition of “sexual” to define the statutory term “sexual abuse”). These definitions indicate that, as a matter of ordinary meaning, a “sexual act” is a something done voluntarily that relates to sexual desire or gratification.

4.

Using the ordinary meaning of “sexual act,” we now evaluate whether the South Carolina voyeurism statute can be violated without voluntarily doing something that relates to sexual desire or gratification. The text of the statute indicates that it cannot. A person commits voyeurism under the South Carolina statute “if, for the

purpose of arousing or gratifying sexual desire of any person, he or she knowingly views . . . another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy." S.C. Code § 16-17-470(B). Knowingly viewing another person without that person's consent qualifies as a voluntary "act." Further, the requirement that this viewing be done "for the purpose of arousing or gratifying sexual desire of any person," associates the viewing with sexual desire and gratification. Thus, a violation of the South Carolina voyeurism statute is a "sexual act" under the ordinary meaning of the term. Accordingly, the minimum conduct required for one to be convicted under the South Carolina voyeurism statute falls within the § 20911(5)(A)(i) definition of "sexual act."⁷

5.

Our dissenting colleague disapproves of our definition of a "sexual act." He argues that it sweeps too broadly because it covers "any crime committed with a sexual intent." *Post* at 212. However, it is broad because Congress constructed the phrase "sexual act" out of two broad terms without limiting or defining them. If the ordinary meaning of the phrase is broader than Congress intended, Congress can narrow its meaning with the stroke of a pen. But it is not our place to rewrite statutes based on how we divine Congress' intent.

Further, the alternative definition that our colleague suggests for "sexual act"—"something sexual that is voluntarily done," *post* at 209 is no less broad. It

7. This conclusion is consistent with the way the voyeurism statute is treated by other sections of South Carolina law and with its interpretation by the state's courts. As the district court noted, an indictment under the voyeu-

simply inserts the word "sexual" into the ordinary meaning of "act." *See Act*, Black's Law Dictionary (8th ed. 2004) (defining "act" as "[s]omething done . . . voluntarily."). For the dissent's definition of "sexual act" to be different from the ordinary meaning on which we rely, "sexual" would need to be defined as something other than "of or relating to the sphere of behavior associated with libidinal gratification." *Webster's New International Dictionary* 2082 (3d ed. 1993). But the dissent offers neither a different definition of "sexual" nor a source for it. Thus, we are left with an alternative definition of "sexual act" that—like six in one hand and a half dozen in the other—is a distinction without a difference. In the end, we respectfully suggest the dissent's beef should be with Congress, not with the majority.

III.

For the reasons set forth above, we conclude that a conviction under South Carolina's voyeurism statute constitutes a "sexual act" within the § 20911(5)(A)(i) definition of a "sex offense." Helton was therefore required to register and keep current his registration as a sex offender under SORNA pursuant to 18 U.S.C. § 2250(a). The district court's denial of Helton's motion to dismiss was proper. The district court's judgment is

AFFIRMED.

FLOYD, Circuit Judge, dissenting:

I agree with my colleagues in the majority that we must apply the categorical approach to determine whether South Carolina voyeurism is "a criminal offense that has an element involving a *sexual act*," 34

rism statute lists the charge as "sex/voyeurism," and S.C. Code § 23-3-430 requires those convicted of voyeurism to register as sex offenders.

U.S.C. § 20911(5)(A)(i) (emphasis added), thereby triggering a duty to register under SORNA. *See ante* at 203–07. I also agree that the SMART Guidelines do not provide us with an answer to that question. Although the Guidelines expressly reference forms of physical contact with another by citing to the definition of “sexual act” and “sexual contact” under the federal statute criminalizing sexual abuse, *see* 18 U.S.C. § 2246(2)–(3), they do not purport to provide an all-encompassing definition. Rather, as the majority points out, the Guidelines merely state that offenses covered by § 20911(5)(A)(i) should be understood to “include” all sexual offenses whose elements involve “[a]ny type or degree of genital, oral, or anal penetration” or “any sexual touching of or contact with a person’s body, either directly or through the clothing.” 73 Fed. Reg. 38,030, 38,051 (July 2, 2008) (citing 18 U.S.C. § 2246(2)–(3)). Because the Guidelines do not foreclose the possibility that “sexual act” includes a broader range of conduct than that proscribed in § 2246, we must look to the plain meaning of that term to determine its scope.

Where the majority and I begin to part ways, however, is in our understanding of the ordinary meaning of “sexual act.” Looking to the dictionary definition of “sexual” and “act,” my colleagues conclude that, “as a matter of ordinary meaning, a ‘sexual act’ is something done voluntarily that relates to sexual desire or gratification.” *Ante* at 207. But in doing so, they read “sexual” as supplying the motivation for the act, as opposed to modifying the nature of the act itself. In other words, under the majority’s definition, a culpable state of mind transforms conduct that would otherwise not be sexual into a sexual act.

This reading draws too heavily on the meaning of the adjective “sexual” as op-

posed to the noun it modifies: “act,” which is “something done . . . voluntarily.” *Ante* at 207 (citing *Act*, Black’s Law Dictionary (8th ed. 2004)); *accord American Heritage Dictionary of the English Language* 16 (4th ed. 2006) (“something done or performed”); *Merriam-Webster’s Collegiate Dictionary* 1011 (11th ed. 2003) (“the doing of a thing”). Therefore, the plain meaning of “sexual act” is something sexual that is voluntarily done—not something voluntarily done for sexual purposes.

Critically, the two (non-SORNA) cases cited by the majority do not support its construction of “sexual act.” To be sure, in *United States v. Fugit*, 703 F.3d 248, 254–55 (4th Cir. 2012), and *United States v. Diaz-Ibarra*, 522 F.3d 343, 348–50 (4th Cir. 2008), this Court adopted the same dictionary definition of “sexual” employed by the majority here—“of or relating to the sphere of behavior associated with libidinal gratification,” *ante* at 207 (citing *Webster’s New International Dictionary* 2082 (3d ed. 1993))—and ultimately held that “sexual activity” and “sexual abuse,” respectively, were intent-centered phrases. But in both of these cases, the dictionary definition of the noun in question justified reading “sexual” to supply the motive.

Take *Fugit*, for example. There, we held that the plain meaning of “sexual activity” under 18 U.S.C. § 2422(b), which criminalizes enticing minors to engage in illegal sexual activity, “comprises conduct connected with the ‘active pursuit of libidinal gratification’ on the part of any individual.” *Fugit*, 703 F.3d at 255–56 (emphasis added). Yet we only did so after observing that the most pertinent dictionary definition of “activity” was “an occupation, pursuit, or recreation in which a person is active.” *Id.* at 255. Unlike “act,” which is something done voluntarily, “pursuit”—and thus “activity”—at least implicitly refer to the *purpose* behind the act. *See*

Random House College Dictionary 1074 (rev. ed. 1980) (defining “pursuit” as “the act of pursuing” and “an effort to secure or attain something”); *Merriam-Webster’s Collegiate Dictionary* 1011 (defining “pursuing” as “to find or employ measures to obtain or accomplish; seek”); *American Heritage Dictionary of the English Language* 1423 (defining “pursuing” as “[t]o strive to gain or accomplish”).¹

The same can be said of the word “abuse,” which we interpreted as part of the phrase “sexual abuse of a minor” in the Sentencing Guidelines’ crime-of-violence provision in *Diaz-Ibarra* to mean “the use or misuse of a person for purposes of sexual gratification.” 522 F.3d at 350; *see id.* at 349 (arriving at this definition only after consulting several dictionary definitions of the word “abuse,” which revealed that “at the highest level of generality, ‘abuse’ means misuse or use for an incorrect or bad purpose”); *id.* at 350 (“However one styles it, ‘sexual abuse’ is an intent-centered phrase; the misuse of the child for sexual purposes completes the abusive act.” (emphasis added)); *see also United States v. Alfaro*, 835 F.3d 470, 476–77 (4th Cir. 2016) (“The court in *Diaz-Ibarra* thus did not hold that the word ‘sexual’ must always and in all circumstances be defined to include an intent to gratify sexual urges; it held that an intent to gratify sexual urges is central to and

1. Furthermore, in *Fugit*, the Court also reasoned that its definition of “sexual activity” rendered the statutory scheme “coherent as a whole,” given that § 2422(b) “was designed to protect children from the act of solicitation itself.” 703 F.3d at 255 (internal quotation marks omitted). By forbidding the knowing persuasion, inducement, enticement, or coercion of a minor, we explained, the statute sought to punish “an intentional attempt to achieve a *mental* state—a minor’s assent—regardless of the accused’s intentions concerning the actual consummation of sexual activities with the minor.” *Id.* (internal quotation marks omitted); *see also id.* (“The pri-

therefore is part of the ordinary meaning of the phrase ‘sexual abuse.’ ”).

The foregoing differences between “sexual act,” on the one hand, and “sexual activity” and “sexual abuse,” on the other, require us to interpret those phrases differently. *See Alfaro*, 835 F.3d at 476; *cf. Yates v. United States*, 574 U.S. 528, 537, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (“[I]dentical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.”). Despite the non-descriptive nature of the word “act,” and the absence of any indicia of intent in its definition as “something voluntarily done,” the majority allows a dictionary’s broad definition of “sexual” as “of or relating to the sphere of behavior associated with libidinal gratification” to subsume the word “act” entirely.

Moreover, even if the adjective “sexual” could be plausibly read to modify “act” in this way, I disagree that the “ordinary meaning” of sexual act embraces any and all actions that are done with sexual gratification in mind, even if the act itself is not inherently sexual. *See Smith v. United States*, 508 U.S. 223, 241–42, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (Scalia, J., dissenting) (noting that although dictionaries define the word “use” very broadly, there is “[a] distinction between how a

mary evil that Congress meant to avert by enacting § 2422(b) was the psychological sexualization of children, and this evil can surely obtain in situations where the contemplated conduct does not involve interpersonal physical contact.”). In the SORNA context, however, registration requirements are triggered by “sex offense” convictions, 34 U.S.C. §§ 20911(1), 20913(a), which are defined, among other ways, by reference to crimes that have an element involving a sexual act or sexual contact with another, 34 U.S.C. § 20911(5)(A)(i); in other words, the relevance of the offender’s state of mind is not immediately apparent.

word *can be* used and how it *ordinarily is used*"). The South Carolina voyeurism statute illustrates why. Setting aside the requisite sexual purpose, all that is required to commit the act of voyeurism under the statute is "knowingly view[ing] . . . another person, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy." S.C. Code Ann. § 16-17-470(B). There is no textual requirement that the act committed by the voyeur involve touching, viewing of nudity or private parts, or sexual conduct in any way, other than the subjective state in the voyeur's mind. Although the voyeurism statute requires that viewing be done with a sexual intent, the same act could be done without any sexual purpose, such as a burglar casing a victim's house. Given the clear delineation of acts (*actus reus*) and mental states (*mens rea*) within criminal law, I find this intent-driven interpretation of the word "act" particularly troubling.

In sum, though I agree with my colleagues in the majority to the extent they suggest that a common-sense definition of "sexual act" likely includes a broader range of conduct than that encompassed in § 2246, we need not decide just how broad that range of conduct is in order to resolve this case. That is because voyeurism, at least under South Carolina law, does not require *any* sexual act.

This conclusion is consistent with the SMART Guidelines, even if those Guidelines do not require us to adopt the definition of "sexual act" in § 2246 for the reasons already stated. By citing the definition of "sexual act" under § 2246 with a "*Cf.*" signal, the Guidelines suggest that the definition of "sexual act" under SOR-

NA is at least analogous to one that requires interpersonal physical contact. *See* 73 Fed. Reg. at 38,051. Additionally, as the majority acknowledges, the Guidelines caution that "the term 'sex offense' is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of 'sex offense' appearing in SORNA," 73 Fed. Reg. at 38,045, such as crimes that have an element involving a "sexual act," 34 U.S.C. § 20911(5)(A)(i). Yet it is difficult to imagine a crime of a sexual nature that is not captured by the majority's expansive definition of "sexual act."

Finally, the structure and purpose of the statute also convince me that in promulgating SORNA's registration requirements and criminal penalties, Congress did not intend "sexual act" to sweep so broadly. As discussed, under subsections 5(A)(i) and (5)(A)(ii), "sex offense" is defined to include "a criminal offense that has an element involving a sexual act or sexual contact with another," 34 U.S.C. § 20911(5)(A)(i), and "a criminal offense that is a specified offense against a minor," *id.* § 20911(5)(A)(ii); *see also id.* § 20911(7) (outlining specified offenses against minors for purposes of subsection 5(A)(ii)). But "sex offense" also is defined, in subsection 5(A)(iii), by reference to the following enumerated federal offenses: 18 U.S.C. § 1591 (sex trafficking of children or by force, fraud, or coercion); 18 U.S.C. §§ 2241–2245 (sexual abuse); 18 U.S.C. §§ 2251–2252c, 2260 (sexual exploitation and other abuse of children); 18 U.S.C. §§ 2421–2425 (transportation for illegal sexual activity and related crimes).²

Notably missing from this list of federal offenses is video voyeurism under 18

2. Specifically, subsection 5(A)(iii) defines "sex offense" as "a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chap-

ter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18." 34 U.S.C. § 20911(5)(A)(iii).

U.S.C. § 1801. Rather than list this statute as an enumerated offense under subsection (5)(A)(iii), Congress included it as a registerable offense in the more expansive³ part of the statute outlining specified offenses against *minors*. See 34 U.S.C. § 20911(5)(A)(ii), (7)(F). Put another way, Congress knew how to incorporate 18 U.S.C. § 1801 into the definitional provision of SORNA, but chose not to do so in subsection (5)(A)(iii). That Congress felt it necessary to include video voyeurism among the specified offenses against a minor in subsection (7) also suggests that it did not think such conduct qualified as a crime that has an element involving a sexual act or contact with another under subsection (5)(A)(i). Thus, when § 20911 is read as a whole, the strong negative implication is that video voyeurism committed against *adults* is not a registerable offense.

This is important because the federal video voyeurism statute categorically requires conduct far more egregious than South Carolina's voyeurism statute, including filming the victim's private parts. See 18 U.S.C. § 1801.⁴ Indeed, particularly in light of SORNA's purpose, see 34 U.S.C. § 20901, and its "focus on children," *United States v. Price*, 777 F.3d 700, 709 (4th Cir. 2015); *see also United States v. Dodge*,

597 F.3d 1347, 1355 (11th Cir. 2010) (noting that Congress intended to "cast a wide net to ensnare as many offenses against children as possible"), it seems even less plausible that Congress would have intended to include voyeurism, and a far less serious version of voyeurism at that, in the narrower part of the statute.

* * *

We should not lightly convert any crime committed with a sexual intent into a registerable offense under SORNA, which places onerous requirements on registered sex offenders and exposes them to criminal liability for failing to comply with those requirements, *see Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2121, 204 L.Ed.2d 522 (2019). For the foregoing reasons, I would hold that South Carolina voyeurism categorically is not a sex offense under SORNA and reverse and remand with instructions to dismiss the indictment. Therefore, I respectfully dissent.



3. *See generally United States v. Price*, 777 F.3d 700, 708–09 (4th Cir. 2015) ("Th[e] contrasting terminology indicates that Congress drafted subsections (5)(A)(ii) and (7) to cover a broader range of prior offenses than those reached by subsection (5)(A)(i).... Although subsection (5)(A)(i) includes certain prior offenses without regard to whether the victim was a child or an adult, subsections (5)(A)(ii) and (7) are applicable only where the victim was a minor. In light of SORNA's focus on children, Congress's use of broader language in defining a 'sex offense' for victims who are minors makes clear its intention that the circumstance-specific approach should apply [under the catch-all provision of subsection (7)(I)].").

4. Compare 18 U.S.C. § 1801(a) ("Whoever ... has the intent to capture an image of a private

area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy"), and *id.* § 1801(b) (defining "private area" to mean "naked or undergarment clad genitals, pubic area, buttocks, or female breast"), *with* S.C. Code Ann. § 16-17-470(B) ("A person commits the crime of voyeurism if, for the purpose of arousing or gratifying sexual desire of any person, he or she knowingly views, photographs, audio records, video records, produces, or creates a digital electronic file, or films *another person*, without that person's knowledge and consent, while the person is in a place where he or she would have a reasonable expectation of privacy." (emphases added)).

nied ownership. Fifth, and most importantly, before the probation officers searched the drive, Makeeff telephoned them and *admitted* that the USB drive *did contain child pornography*; therefore, Makeeff had violated the terms of his supervised release. As a result, the parole officers were justified in searching the USB drive based on a reasonable suspicion that it contained child pornography. We therefore conclude that the probation officers had both the requisite reasonable suspicion and the search condition necessary to lawfully search the USB drive.

III. Conclusion

Accordingly, we affirm the judgment of the district court.



UNITED STATES of America,
Plaintiff-Appellee

v.

John Oliver HILL, also known as John
Benson, Defendant-Appellant.

No. 15-3193.

United States Court of Appeals,
Eighth Circuit.

Submitted: March 18, 2016.

Filed: April 29, 2016.

Rehearing Denied June 14, 2016.

Background: Following a guilty plea after denial of motion to dismiss, defendant was convicted in the United States District Court for the Western District of Arkansas—Fayetteville, Timothy L. Brooks, J., of failing to register as a sex offender. Defendant appealed.

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

- (1) courts should employ a circumstance-specific approach when determining whether an offender's conduct was by its nature a sex offense against a minor, as would render the conviction arising from that conduct a "sex offense" under SORNA;
- (2) *Chevron* deference was unwarranted regarding Attorney General's interpretation of SORNA's provision setting forth conduct that constitutes "specified offense against a minor"; and
- (3) defendant's indecent-exposure conviction in South Carolina involved conduct that by its nature was a sex offense against a minor and thus constituted a sex offense under SORNA.

Affirmed.

1. Mental Health ☐469(2)

Courts should employ a circumstance-specific approach, which allows court to examine particular circumstances in which offender committed the crime on a particular occasion, when determining whether an offender's conduct was by its nature a sex offense against a minor, as would render the conviction arising from that conduct a "sex offense" under SORNA. Sex Offender Registration and Notification Act, §§ 111(1), (5)(A)(ii), (7)(I), 113(a, c), 42 U.S.C.A. §§ 16911(1), (5)(A)(ii), (7)(I), 16913(a, c).

2. Administrative Law and Procedure ☐438(24)

Mental Health ☐469(2)

Court of Appeals would not accord *Chevron* deference to Attorney General's interpretation of SORNA's provision setting forth conduct that constitutes "specified offense against a minor," when Court of Appeals was determining whether cir-

cumstance-specific approach or categorical approach should be applied in determining whether defendant's indecent-exposure conviction was for a "sex offense" under SORNA, where statutory provisions at issue were unambiguous regarding proper method of analysis. Sex Offender Registration and Notification Act, § 111(7)(I), 42 U.S.C.A. § 16911(7)(I).

3. Mental Health ~~☞~~469(2)

Defendant's indecent-exposure conviction in South Carolina involved conduct that by its nature was a sex offense against a minor and thus constituted a "sex offense" under SORNA; arrest affidavit stated that defendant masturbated in front of 11-year-old child, defendant was ordered to register with South Carolina's child-abuse registry, and South Carolina law required defendants who were convicted of indecent exposure to register with child-abuse registry only when act on which conviction was based involved sexual or physical abuse of child. Sex Offender Registration and Notification Act, §§ 111(1), (5)(A)(ii), (7)(I), 113(a, c), 42 U.S.C.A. §§ 16911(1), (5)(A)(ii), (7)(I), 16913(a, c); S.C.Code 1976, § 17-25-135(A).

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

Ashleigh R. Buckley, AUSA, argued, Fort Smith, AR, for Plaintiff-Appellee.

Christopher Aaron Holt, AFPD, argued, Jose Alfaro, AFPD and Anna Marie Williams, AFPD, on the brief, Fayetteville, AR, for Defendant-Appellant.

Before WOLLMAN, ARNOLD, and SHEPHERD, Circuit Judges.

1. The Honorable Timothy L. Brooks, United States District Judge for the Western District

ARNOLD, Circuit Judge.

After John Hill was indicted for failing to register as a sex offender, *see* 18 U.S.C. § 2250, he moved to dismiss the indictment because the statute under which he was indicted was unconstitutional and because he was not a "sex offender" within its meaning. When the district court¹ denied the motion, Hill pleaded guilty, reserving his right to appeal the denial, and this appeal ensued.

Hill moved from South Carolina to Arkansas after he pleaded guilty in a South Carolina state court to a charge of "wilfully, maliciously, and indecently expos[ing] his person in a public place, on property of others, or to the view of any person on a street or highway." *See* S.C.Code Ann. § 16-15-130(A)(1). The state court ordered Hill to register in both sex-offender and child-abuse registries, which he did. Some years thereafter, Congress enacted the Sex Offender Registration and Notification Act (SORNA) "to protect the public from sex offenders and offenders against children," 42 U.S.C. § 16901, and to make more uniform and effective the patchwork of sex-offender registries throughout the United States. *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012). Congress gave SORNA teeth by criminalizing a sex offender's knowing failure to register or update certain information. *See* 18 U.S.C. § 2250(a). As relevant here, SORNA requires sex offenders to register in jurisdictions where they reside and to update their information within three business days after changing residence. 42 U.S.C. § 16913(a), (c). Hill did not update his information for several months after moving to Arkansas, prompting the government's indictment.

of Arkansas.

Hill maintains, first, that the district court should have dismissed the indictment because SORNA violates the non-delegation doctrine and exceeds Congress's power under the Commerce Clause. As Hill concedes, however, circuit precedent forecloses these arguments. *See United States v. Manning*, 786 F.3d 684, 685–86 (8th Cir.2015).

Hill's more serious contention is that the district court should have dismissed the indictment because his conviction for indecent exposure did not trigger SORNA's registration requirements since he is not demonstrably a "sex offender." SORNA defines a "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). In turn, as relevant, a "sex offense" includes "a criminal offense that is a specified offense against a minor." 42 U.S.C. § 16911(5)(A)(ii). A "specified offense against a minor" includes "conduct that by its nature is a sex offense against a minor." 42 U.S.C. § 16911(7)(I).

The question in this case boils down to whether Hill's prior offense involved "conduct that by its nature is a sex offense against a minor." Hill argues that courts should look simply at the statute underlying his conviction to determine whether its elements show categorically that it is a sex offense against a minor. He insists that we could not look at the facts underlying his conviction but only at the crime's statutory definition. *See Ortiz v. Lynch*, 796 F.3d 932, 935 (8th Cir.2015). That would require us to presume that Hill's conviction rested upon nothing more than the least of the acts criminalized as "indecent exposure," *see id.*, which the government presumably concedes would not be a "sex offense."

The government contends, however, that we should apply a circumstance-specific approach in determining whether Hill's conviction was for a "sex offense." *See*

Nijhawan v. Holder, 557 U.S. 29, 36, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). When doing that, we would examine the "particular circumstances in which an offender committed the crime on a particular occasion." *Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1691, 185 L.Ed.2d 727 (2013). The government further maintains that we would not be limited to reviewing certain documents like indictments, plea agreements, transcripts of plea colloquies, jury instructions, and findings of fact and conclusions of law from a bench trial, *see Shepard v. United States*, 544 U.S. 13, 20, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to determine the facts underlying a prior conviction. *See Nijhawan*, 557 U.S. at 41, 129 S.Ct. 2294. Instead, we could consider any reliable evidence. *See United States v. Price*, 777 F.3d 700, 705 (4th Cir.2015).

[1] The government has the better argument. Three other circuits 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 all three have reached the same conclusion: Courts should employ a circumstance-specific approach. *See id.* at 708; *United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir.2010) (en banc); *United States v. Mi Kyung Byun*, 539 F.3d 982, 991–92 (9th Cir.2008). We agree because we think that the text and purposes of SORNA compel that conclusion.

Hill's argument simply founders on the plain words of the statute. As we noted, § 16911(7)(I) explains that a "specified offense against a minor" includes "conduct that by its nature is a sex offense against a minor," which manifestly invites an examination of the specific conduct in which the defendant engaged. SORNA's announced purposes, moreover, buttress our conclusion. Congress enacted the statute to protect children from sex offenders, and it purposely defined its terms broadly to

"cast a wide net to ensnare as many offenses against children as possible." *Dodge*, 597 F.3d at 1355. Various subsection headings in SORNA illustrate its intended breadth. For example, the title of the subsection defining "sex offense," which carries the name of a specific child victim, states that it is an "expansion of [the] sex offense definition." 42 U.S.C. § 16911(5). In addition, the title of the subsection defining the phrase "specified offense against a minor" is "Expansion of definition of 'specified offense against a minor' to include all offenses by child predators." 42 U.S.C. § 16911(7). These provisions only confirm what the text evidently commands: a circumstance-specific approach.

[2] In determining that we may examine the circumstances that underlie Hill's conviction for indecent exposure, we reject Hill's contention that we should accord deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) to the Attorney General's "SMART Guidelines" interpreting § 16911(7)(I), which apparently recommends a categorical approach. See Office of the Attorney General; National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,052 (July 2, 2008). We agree with the Fourth Circuit that *Chevron* deference is inappropriate in these circumstances because the statutory provisions at issue are unambiguous regarding the proper method of analysis. See *Price*, 777 F.3d at 709 n. 9.

[3] Turning now to a consideration of Hill's offense conduct, it is evident that he committed a "sex offense" within the meaning of SORNA. According to the relevant arrest affidavit, Hill masturbated in front of an eleven-year-old child. While we might ordinarily hesitate to give much weight to facts contained in an arrest affi-

davit, other, more reliable information concludes the matter against Hill. For example, as we have already said, Hill's record of conviction for indecent exposure notes that he was ordered to register in the child-abuse registry. South Carolina law requires those who are convicted of indecent exposure to register with the state's child-abuse registry only when the act on which the conviction "is based involved sexual or physical abuse of a child." S.C. Code Ann. § 17-25-135(A). In addition, Hill's sex-offender registration notes that the victim of his offense was an eleven-year-old girl. Because Hill's conviction for indecent exposure therefore evidently involved an eleven-year-old victim, he committed a "sex offense" that was a "specified offense against a minor" because it was "conduct that by its nature is a sex offense against a minor." He was thus obligated to register and update his information under SORNA, and so the district court correctly rejected his motion to dismiss the indictment.

Affirmed.



UNITED STATES of America,
Plaintiff-Appellee

v.

YAN NAING, Defendant-Appellant.

No. 15-2153.

United States Court of Appeals,
Eighth Circuit.

Submitted: Feb. 12, 2016.

Filed: May 2, 2016.

Background: Alien defendant, who was citizen of Burma, pled guilty in the United

tend. Indeed, if Respondents execute their parole authority in accordance with the ICE Directive, there should be little cause for concern. Pursuant to the ICE Directive's provisions, "absent additional factors," arriving aliens who have demonstrated a credible fear of persecution "*should*" be released to parole. ICE Directive No. 11002.1, ¶ 6.2 (emphasis added). By its terms, the ICE Directive encourages release to parole supervision. To be sure, there will no doubt be occasions where continued detention is strongly desired, and, of course, this decision does nothing to erode the Attorney General's discretionary authority to grant or deny parole. *See* 8 U.S.C. § 1182(d)(5)(A). However, if Respondents follow the ICE Directive, individuals who are not likely to be a flight risk or a danger to the community will have been released on parole before six months have passed. Where an individual is detained for six months, Respondents should, under the ICE Directive, have a good reason for the continued detention and should therefore be able to readily meet the clear and convincing evidence standard of proof with respect to the denial of bond. Conversely, if Respondents are unable to meet their burden at the bond hearing, that failure should indicate that parole would have been appropriate at an earlier time.

CONCLUSION

For the foregoing reasons, Respondents' motion to dismiss (Dkt. 27) is denied, and Petitioners' motion for a preliminary injunction (Dkt. 38) is granted.

SO ORDERED.



UNITED STATES of America,
Plaintiff,

v.

Joshua MORCIGLIO, Defendant.

17 Cr. 531 (RWS)

United States District Court,
S.D. New York.

Signed 11/16/2017

Background: Defendant charged with failing to register as a sex offender, in violation of Sex Offender Registration and Notification Act (SORNA), filed motion to dismiss indictment.

Holdings: The District Court, Sweet, J., held that:

- (1) as a matter of first impression, circumstance-specific, rather than categorical, approach applied in determining whether defendant was entitled to application of SORNA's four-year age differential exception to registration requirements, and
- (2) defendant did not qualify for exception to SORNA registration requirements.

Motion denied.

1. Mental Health ~~§~~469(2)

Pursuant to an application of the categorical approach for determining whether a prior conviction constitutes a "sex offense" under SORNA, if the statute defining defendant's prior offense has the same elements as, or defines the crime more narrowly than, the generic crime, then the prior conviction can serve as a predicate; but if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a predicate, even if the defendant actually committed the offense in its generic form. 34 U.S.C.A. § 20911(5).

2. Mental Health ~~☞~~469(2)

Circumstance-specific, rather than categorical, approach applied in determining whether defendant charged with failing to register as a sex offender was entitled to exception to the Sex Offender Registration and Notification Act (SORNA) registration requirements for offenses involving consensual sexual conduct if victim was at least 13 years old and offender was not more than four years older than victim; exception contained no reference to the elements of the offense, but referenced underlying conduct. 34 U.S.C.A. § 20911(5)(C).

3. Mental Health ~~☞~~469(2)

Defendant's prior conviction for having sexual intercourse with a child age 16 or older, in violation of Pennsylvania law, did not qualify for exception to the Sex Offender Registration and Notification Act (SORNA) registration requirements for offenses involving consensual sexual conduct if victim was at least 13 years old and offender was not more than four years older than victim, where defendant was more than four years older than the victim at the time of his offense. 34 U.S.C.A. § 20911(5)(C); 18 Pa. Cons. Stat. Ann. § 3127.

OPINION

Sweet, D.J.

Defendant Joshua Morciglio ("Morciglio" or the "Defendant") has moved to dismiss the single-count indictment (the "Indictment"), which charges him with violating 18 U.S.C. § 2250 by failing to register under the federal Sex Offender Registration and Notification Act ("SORNA")¹. Based on the facts and conclusions set forth below, the motion of the Defendant is denied.

I. Facts & Prior Proceedings

On or about April 14, 2016, the Defendant was convicted in Dauphin County Court of indecent exposure, criminal solicitation of statutory sexual assault, and corruption of minors, in violation of 18 Pa. C.S.A. §§ 3127, 902, 3122, and 6301. The Defendant was sentenced to an indeterminate sentence of 11 months and 15 days to 1 year and 11 months' imprisonment. He was convicted of the following Pennsylvania crimes:

1. Criminal solicitation of statutory sexual assault, which criminalizes a person's soliciting "sexual intercourse with a complainant ... who is under the age of 16 years [where] that person is ... four years older but less than eight years older than the complainant." 18 Pa. C.S.A. §§ 902(a), 3122.1(a)(1).
2. Indecent exposure, which criminalizes a person's "exposing his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should

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1. Effective September 1, 2017, the SORNA provisions previously located at 42 U.S.C. § 16911 have been relocated to 34 U.S.C. § 20911. See 42 U.S.C. § 16911. The language of the statute remains identical. See *id.* The parties submitted their briefs within one

month of this change, and understandably cited to the former statutory locations in their moving papers. All references to SORNA and its provisions in this Opinion are to the current location at 34 U.S.C. § 20911.

know that this conduct is likely to offend, affront or alarm.” *See id.* § 3127(a).

3. Corruption of minors, which provides that: “Whoever, being of the age of 18 years and upwards, by any course of conduct in violation of Chapter 31 (relating to sexual offenses) corrupts or tends to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of an offense under Chapter 31 commits a felony of the third degree.” *See id.* § 6301(a)(1)(ii).

Police reports reflect that the Defendant was 22 when he solicited the 14 year old victim. Following his release from custody, the Defendant was designated by the State of Pennsylvania as a Tier One sex offender, requiring him to register as such for a period of fifteen years. In addition, the Defendant was required to wear an electronic monitoring ankle bracelet as part of his parole supervision.

On or about December 15, 2016, following his release from prison, the Defendant signed a Pennsylvania State Sex Offender Registration Form acknowledging his duties as a sex offender, including his obligation to notify the Pennsylvania State Police of any change of home address within three days of moving, and that if he moved to another state, he may be required to register as a sex offender within ten days of establishing residence. On that form, the Defendant provided an address in Harrisburg City, Pennsylvania as his registered residence. However, about one week later, on or about December 21, 2016, the Defendant cut off his ankle bracelet and absconded supervision. The Defendant was apprehended by officers of the New York City Police Department in the Bronx on or about January 9, 2017.

On August 23, 2017, the Defendant was charged with traveling in interstate commerce and knowingly failing to register and update a registration as required by SORNA. The Defendant filed the instant motion to dismiss the Indictment on September 13, 2017. This motion was heard and marked fully submitted on October 25, 2017.

II. The Motion to Dismiss the Indictment is Denied

On a motion to dismiss the Indictment, the facts stated therein and factual conclusions therefrom must be accepted as true. Fed. R. Crim. P. 12(b). Here, the Indictment charges the Defendant with violating SORNA, which makes it a crime for a sex offender who “is required to register under [the Act]” and who “travels in interstate . . . commerce” to “knowingly fail[] to register or update a registration.” 18 U.S.C. § 2250(a). The resolution of this motion hinges on the approach applied to interpreting the statutory definitions listed in SORNA. Accordingly, the following recap of the relevant statutory language is in order.

A “sex offender” subject to SORNA’s registration requirement is defined as “an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). A “sex offense” is defined, in relevant part, as “a criminal offense that has an element involving a sexual act or sexual contact with another,” *id.* § 20911(5)(A)(i), or “a criminal offense that is a specified offense against a minor,” *id.* § 20911(5)(A)(ii). However, excepted from this definition of “sex offense” are “offense[s] involving consensual sexual conduct . . . [where] the victim was at least 18 years old and the offender was not more than 4 years older than the victim.” *Id.* § 20911(5)(C). To further define the first definition of a “sex offense,” a “sexual act” involves contact

with or penetration of the penis, vulva, anus, or genital opening, *see* 18 U.S.C. § 2246(2), and “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 any intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” *Id.* § 2246(3). A “specified offense against a minor,” as it defines “sex offense,” includes, as relevant, offenses that involve “solicitation to engage in sexual conduct.” 34 U.S.C. § 20911(7)(C).

The outcome of this inquiry depends on whether the Defendant may take cover under the 34 U.S.C. § 20911(5)(C) Exception (the “§ 20911(5)(C) Exception” or the “Exception”). The Defendant argues that the Court must apply a categorical approach in determining whether any of Morciglio’s prior convictions constitutes a “sex offense” under SORNA, such that the relevant comparison is between the elements of the state crimes and SORNA. The Government asserts that a circumstance-specific approach governs all of SORNA’s age-based exceptions, including 34 U.S.C. § 20911(5)(C). Accordingly, the Government argues that Morciglio must show that the actual conduct underlying his prior convictions meets the standards of the Exception. On the one hand, if the categorical approach is applied, the Defendant is not subject to SORNA because the scope of each Pennsylvania statute under which the Defendant was convicted reaches more broadly than the comparable provision under SORNA. On the other hand, Morciglio was 22 when he solicited a 14

2. The following fictional example illustrates the difference between the Pennsylvania statute and SORNA. A person in Pennsylvania who is exactly 19 years old and who solicits consensual sexual intercourse with a complainant who is exactly 15 years old has violated the state statute. *See* 18 Pa. C.S.A. §§ 902(a), 3122.1(a)(1) (criminalizing sexual

year old, making him clearly subject to SORNA’s strictures under a fact-based approach. The parties do not dispute that the approach applied necessarily determines the outcome of this motion.

[1] Under a categorical approach, a court is limited to comparing the elements of the prior offense to SORNA’s definition of “sex offense,” and cannot consider the facts underlying the conviction. *See Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013) (noting that under a “formal categorical approach . . . courts may ‘look only to the statutory definitions’—*i.e.*, the elements—of a defendant’s prior offenses, and *not* ‘to the particular facts underlying those convictions’”) (emphasis in original) (internal citation omitted). Pursuant to an application of the categorical approach, if the statute defining the defendant’s prior offense “has the same elements as the ‘generic’ . . . crime, then the prior conviction can serve as [a] . . . predicate; so too if the statute defines the crime more narrowly. . . . But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as [a] . . . predicate, even if the defendant actually committed the offense in its generic form.” *Id.*

Three Pennsylvania statutes are at issue here. First, as to Pennsylvania’s statute for criminal solicitation of statutory sexual assault, because it criminalizes conduct that SORNA exempts, it is not the case that anyone who violated the state statute *necessarily* violated SORNA as well.² See 18 Pa. C. S.A. §§ 902(a); 3122.1(a)(1). Ac-

intercourse where the victim “is under the age of 16 years” and the other person is “four years older but less than eight years older”). However, this person would be exempt from the strictures of SORNA because this person is “not more than four years older than the victim.” *See* 34 U.S.C. § 20911(5)(C) (emphasis added).

cordingly, the state solicitation statute may not serve as a stand-in for SORNA.

Second, Pennsylvania's indecent exposure statute also reaches more broadly than SORNA's definition of "sex offense." *See id.* § 3127(a). While the state statute criminalizes "expos[ing] his or her genitals," SORNA's definition of "sex offense," which consists of sub-definitions of "sexual act," "sexual contact," and "specified offense against a minor" cover a narrower, more specific set of criteria. *See* 18 U.S.C. §§ 2246(2)–(3); 34 U.S.C. § 20911(7)(C). As such, the state statute is broader than, and cannot be treated as a predicate to, SORNA.

Finally, Pennsylvania's corruption of minors statute criminalizes "any course of conduct" that "corrupts or tends to corrupt the morals of any minor." *See* 18 Pa. C.S.A. § 6301(a)(1)(ii). This statute is also very broad, indeed broad enough to cover similar conduct made criminal by the criminal solicitation of statutory sexual assault statute. Accordingly, any conduct that violates 18 Pa. C.S.A. § 3122.1(a)(1) would also necessarily violate 18 Pa. C.S.A. § 6301(a)(1)(ii). Since the former is not a SORNA-qualifying offense, the latter one is not either. In sum, if a categorical approach is applied, the Defendant is not subject to SORNA, and therefore has not violated it by failing to register as a sex offender in New York.

Under a specific-circumstance approach, the inquiry involves the specific facts of the offense, rather than the elements of the state crimes. *See United States v. George*, 223 F.Supp.3d 159, 166 n.2 (S.D.N.Y. 2016). The Defendant must show that the actual conduct underlying his prior convictions meets the standards of the Exception in order to claim they are not "sex offense[s]." The Exception only covers offenses "involving 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." 34 U.S.C. § 20911(5)(C). Accordingly, pursuant to this approach, the eight-year age gap between the Defendant and the victim bars him from claiming that his conviction is exempt from SORNA.

[2] While the Second Circuit has not reached this issue, every court to address the matter, including the Fifth and Seventh Circuits, has found that Congress contemplated a facts-based approach to the Exception's age-differential determination. *See also United States v. George*, 223 F.Supp.3d 159, 166 n.2 (S.D.N.Y. 2016) (noting in dicta that the § 20911(5) (C) Exception "naturally invites a fact-based inquiry"). Absent a compelling reason to diverge from the approach adopted by other courts, the circumstance-specific approach similarly applies here.

The Fifth Circuit in *United States v. Gonzalez-Medina*, 757 F.3d 425, 429 (5th Cir. 2014) determined that the circumstance-specific approach applies to age-based exceptions to SORNA, including, as relevant here, § 20911(5)(C). Gonzalez-Medina had appealed his conviction for failure to register as a sex offender, arguing that, pursuant to a categorical analysis, his Wisconsin conviction did not qualify as a "sex offense" under SORNA because the state statute does not include a four-year age difference as an element. *Id.* at 426. The court acknowledged that, in general, SORNA requires a categorical analysis, but that SORNA's "language, structure, and broad purpose" demonstrate that "Congress contemplated a non-categorical approach to the age-differential determination in the [§ 20911(5)(C)] exception." *Id.* at 429. The Fifth Circuit sided with the Government based on a combination of four arguments. First, Congress defined the Exception in terms of "conduct" rather than as consisting of "elements." *Id.* at 430. There is little dispute that SORNA's

definition of “sex offense,” which invokes the word “element,” invites a categorical approach. *Id.* However, “[t]he exception’s reference to conduct, rather than elements, is consistent with a circumstance-specific analysis.”³ *Id.* Second, the other exception to the definition of “sex offense” calls for a circumstance-specific approach, and “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.* Third, “other age-specific SORNA provisions similarly appear to call for a circumstance-specific . . . approach as to age determinations.” *Id.* at 431. Finally, the court found that a non-categorical approach aligned most with Congress’s broad purposes in enacting SORNA: to “protect the public from sex offenders and offenders against children and to establish[] a comprehensive national system for the registration of those offenders.” *Id.* (citation omitted).

The Seventh Circuit in *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) reads the § 20911(5)(C) Exception in the same light. The defendant engaged in incest after having failed to register as a sex offender while living in West Virginia, and then again upon moving to Indiana. *Id.* at 1234. He urged the court to apply the categorical approach to the Exception because the relevant Indiana incest offense did not include non-consent as an element,

3. The Defendant relies on the Honorable Emilio M. Garza’s dissent in *Gonzalez-Medina*, 757 F.3d at 434–35, for the proposition that the “involves conduct” language as used here and in the Armed Career Criminal Act (“ACCA”) indicates adherence to the categorical approach. *See* Def.’s. Reply Br. 2. Moreover, the Defendant also directs the Court to apply the rule of lenity to the extent that § 20911(5)(C)’s text is ambiguous as to which approach applies. *See id.* The Defendant is not incorrect in noting that the Court in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586,

unlike § 20911(5)(C). *Id.* at 1236. The court noted that “[t]he exception uses fact-specific language, strongly suggesting that a conduct-based inquiry applies.” *Id.* at 1237. The court concluded:

In short, although the basic definition of “sex offense” . . . requires a categorical, elements-based inquiry, the exception . . . is not similarly limited. Whether the exception applies depends on several fact-based inquiries: Was the victim an adult? If so, was the sexual conduct consensual? Was the victim under the custodial authority of the offender at the time? Was the specified age differential present?

Id. The court considered the facts in light of these questions, and maintained the district court’s finding that the exception did not apply. *Id.* Apart from the Fifth and Seventh Circuits, no other court has addressed this issue.

[3] In light of the analyses carried out by our sister circuits, and absent a compelling reason to stray from their well-reasoned conclusions, this Court similarly applies the circumstance-specific approach to the Exception’s age-differential determination. Accordingly, the specific facts of the Defendant’s case must be applied against the Exception. Because the Defendant was 22 years old when he engaged in sexual conduct with a 14 year old, § 20911(5)(C) does not excuse his conduct.

167 L.Ed.2d 532 (2007) (overruled on other grounds by *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)) applied the categorical approach pursuant to the “involves conduct” language found in the ACCA. However, he is incorrect in providing that this leads to the conclusion that the circumstance-specific analysis is inapplicable here. Rather, the combination of other factors laid out by the majority establish that Congress intended that the age-differential determination be subject to a factual inquiry.

III. Conclusion

For the reasons set forth above, the Defendant's motion to dismiss the Indictment is denied.

It is so ordered.



Jacob FRYDMAN, et al., Plaintiffs,

v.

Albert AKERMAN, et al., Defendants.

14-cv-5903 (JGK)

14-cv-8084

United States District Court,
S.D. New York.

Signed December 2, 2017

Filed 12/04/2017

Background: Owner and two of owner's limited liability companies (LLCs) brought action against former investment advisor, alleging breach of settlement agreement, thereby voiding of release in agreement. Parties each moved for summary judgment.

Holdings: The District Court, John G. Koeltl, J., held that:

- (1) law of the case doctrine did not preclude district court from reconsidering prior ruling based on new issue of collateral estoppel;
- (2) resolution of disputed issue in arbitration proceeding by enforcing release in favor of former investment advisor, necessarily required arbitrators to find that former advisor did not breach settlement agreement, and thus collateral estoppel barred breach of contract claim; and
- (3) plaintiffs were in privity with, and were adequately represented in, prior arbitration, and thus collateral estoppel barred claim.

Plaintiffs' motion denied, and defendant's motion granted.

1. Judgment \Leftrightarrow 713(1)

The doctrine of collateral estoppel may preclude a party, or its privy, from relitigating an issue that the party previously litigated and lost.

2. Judgment \Leftrightarrow 958(1)

District courts have broad discretion to determine when collateral estoppel should be applied.

3. Judgment \Leftrightarrow 713(1)

A district court must satisfy itself that application of the doctrine of collateral estoppel is fair.

4. Courts \Leftrightarrow 99(1)

The "law of the case doctrine" commands that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise.

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

5. Courts \Leftrightarrow 99(6)

Law of the case doctrine did not preclude former investment advisor from raising collateral estoppel as an affirmative defense to claim contesting enforceability of settlement agreement or release, notwithstanding district court's determining in prior ruling that fact dispute existed regarding whether advisor had violated settlement agreement; collateral estoppel had not previously been raised.

6. Alternative Dispute Resolution \Leftrightarrow 417

Resolution of disputed issue in Financial Industry Regulatory Authority (FINRA) arbitration enforcing release in favor of former investment advisor, necessarily required arbitrators to find that former

UNITED STATES of America,
Plaintiff-Appellee,
v.
Charles Kenneth MULVERHILL,
Defendant-Appellant.

No. 15-3241

United States Court of Appeals,
Eighth Circuit.

Submitted: June 17, 2016

Filed: August 16, 2016

Background: Defendant was convicted following guilty plea in the United States District Court for the Western District of Missouri of failure to register as a sex offender, and was sentenced to 57 months' imprisonment. Defendant appealed.

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

- (1) district court did not plainly err in accepting defendant's plea of guilty to failure to register as a sex offender, and
- (2) district court's use of total offense level of 23 instead of 21 was plain error.

Affirmed in part, vacated in part, and remanded.

1. Criminal Law \Leftrightarrow 1030(1)

To prevail under plain-error review, defendant must show: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.

2. Criminal Law \Leftrightarrow 1030(1)

To prevail on plain error review, it is enough that an error be plain at the time of appellate consideration.

3. Criminal Law \Leftrightarrow 1030(1)

In the absence of controlling precedent of either the Court of Appeals or the Supreme Court, the district court is granted more discretion under the plain error

standard simply because the less guidance there is, the smaller the realm of decisions that would be clearly or obviously wrong under current law.

4. Criminal Law \Leftrightarrow 1031(4)

District court did not plainly err in accepting defendant's plea of guilty to failure to register as a sex offender under Sex Offender Registration and Notification Act (SORNA); although defendant argued that he was a Tier I sex offender based on prior California convictions for lewd and lascivious acts with a child under 14 years old and was therefore not required to register as a sex offender during time period set forth in indictment because 15-year period had expired, during his change-of-plea hearing, defendant agreed with government's recitation of the facts that although he was required to register as a sex offender, he had failed to do so. 18 U.S.C.A. § 2250(a); 42 U.S.C.A. § 16915(a).

5. Criminal Law \Leftrightarrow 1042.3(1)

Sentencing and Punishment \Leftrightarrow 301

District court plainly erred in using a total offense level of 23 instead of 21 based on presentence report's (PSR's) inadvertent error of assigning to defendant a total offense level of 23 when sentencing defendant for failure to register as a sex offender; Guidelines range for a total offense level of 23 with a criminal history category of I was 46 to 57 months' imprisonment, and Guidelines range for correct total offense level of 21 with a criminal history category of I was 37 to 46 months' imprisonment, and district court made no affirmative statements or indications of its intention to impose same sentence even if defendant's total offense level were lower. 18 U.S.C.A. § 2250(a); U.S.S.G. § 1B1.1 et seq.

6. Criminal Law **1042.3(1)**

When a defendant is sentenced under an incorrect Sentencing Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.

Appeal from United States District Court for the Western District of Missouri—Springfield

David R. Mercer, Asst. Fed. Public Defender, Springfield, MO, argued (Laine Cardarella, Fed. Public Defender, Kansas City, MO, Michelle Nahon Moulder, Asst. Fed. Public Defender, Springfield, MO, on the brief), for appellant.

Casey M. Clark, Asst. U.S. Atty., Springfield, MO, argued (Tammy Dickinson, U.S. Atty., Kansas City, MO, on the brief), for appellee.

Before SMITH, GRUENDER, and BENTON, Circuit Judges.

SMITH, Circuit Judge.

Charles Mulverhill pleaded guilty to one count of failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a) and was sentenced to 57 months' imprisonment. On appeal, Mulverhill argues that the district court plainly erred¹ in (1) accepting his guilty plea based on an erroneous classification of him as a Tier III sex offender under the Sex Offender Registration and Notification Act (SORNA), and (2) calculating his total offense level based on an inadvertent error in the presentence investigation report (PSR). We affirm the district court's acceptance of Mulverhill's guilty plea. However, we vacate Mulverhill's sentence and remand for resentenc-

ing based on our conclusion that Mulverhill was "sentenced under an incorrect Guidelines range" due to the PSR error and that such error is "sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, — U.S. —, 136 S.Ct. 1338, 1345, 194 L.Ed.2d 444 (2016).

I. Background

On December 26, 1989, Mulverhill was convicted of two counts of lewd and lascivious acts with a child under 14 years old, in violation of § 288(a) of the California Penal Code, and sentenced to 272 days in custody and 6 years of probation. On March 14, 1990, Mulverhill registered as a sex offender upon his release from jail in California. On May 14, 2001, he moved to Arizona and continually maintained his registration status until September 4, 2012. In June 2014, Mulverhill moved to Springfield, Missouri, but he never registered as a sex offender in Missouri.

On April 2, 2015, Mulverhill was charged with failure to register as a sex offender "[b]etween June 19, 2014, and January 30, 2015," in violation of 18 U.S.C. § 2250(a). The indictment provided notice to Mulverhill that upon conviction he would receive no more than ten years in prison. Mulverhill subsequently pleaded guilty to the charge. During the change-of-plea hearing, the district court advised Mulverhill that "[t]he authorized punishment for the offense as established by the Congress is not more than ten years' imprisonment," and Mulverhill confirmed that he was "aware that's the authorized punishment for the offense." The district court also asked the government to "recite the evidence that the government thinks [it] could present if [Mulverhill] chose to go to trial" and ad-

1. Mulverhill concedes that he failed to object in the district court to the purported errors

that he now raises.

vised Mulverhill to “listen carefully” to the evidence. The government stated that, as a result of his prior California sex-offense conviction, Mulverhill was required to register under SORNA; but, as of January 29, 2015, neither the Greene County, Missouri Sheriff’s Office nor the Missouri State Highway Patrol had any record of Mulverhill ever having registered as a sex offender. The government further stated that “[u]pon his arrest in this case, Mr. Mulverhill admitted to law enforcement officers that he had had a qualifying conviction in his background, acknowledged his obligation to register and that he had lived in Missouri since at least March of 2014 but had failed to register as required.” After the government completed its recitation of the factual basis for the plea, Mulverhill confirmed to the district court that nothing said was “inaccurate” and that he was guilty of the described conduct.

Following the entry of Mulverhill’s guilty plea, the district court ordered the preparation of the PSR. The PSR recommended a base offense level of 16 pursuant to U.S.S.G. § 2A3.5(a)(1) because the offense involved “failure to register as a [Tier III] sex offender.” (Alteration in original.) The PSR recommended an eight-level enhancement under U.S.S.G. § 2A3.5(b)(1)(C) for committing a sex offense against a minor (S.L.M.) while in a failure-to-register status. The PSR additionally recommended that Mulverhill receive a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b), resulting in a total offense level of 21. Mulverhill did not have any criminal history points, resulting in a criminal history category of I. The PSR, however, mistakenly stated later in the document that Mulverhill’s “total offense level” was “23” and that based on that offense level and a criminal history category of I, his Guidelines range was 46 to 57 months’ imprisonment. Mulverhill did not object to this portion of the PSR prior to sentencing.

At sentencing, the district court stated, “The [PSR] concludes an offense level of 23 and a criminal history category of one.” Mulverhill objected only to the PSR’s recommended eight-level enhancement for committing a sex offense against a minor. The government then put on evidence in support of the enhancement. Deputy United States Marshal Anthony Cable testified that a flash drive contained text messages between S.L.M., a 14-year-old girl, and Mulverhill. Several text messages from S.L.M. stated that she wanted to have sex with Mulverhill. In response to one of her texts, Mulverhill wrote, “I know, luh [sic] you.” In other messages, S.L.M. expressed her hope that she was not pregnant, and Mulverhill replied that he also hoped that she was not pregnant. Mulverhill directed S.L.M. to erase all of her e-mails. Deputy Cable also reviewed photographs of S.L.M. on Mulverhill’s cell phone, which showed S.L.M. clothed and sleeping on a bed. Deputy Cable testified that a report from the Missouri Department of Social Services, Children’s Division, contained an interview of Mulverhill in which he said that S.L.M. sometimes slept in his bed and that he knew it was inappropriate. Deputy Cable read excerpts from S.L.M.’s statement in which she described how Mulverhill had intercourse with her and sexually abused her in other ways.

At the conclusion of the evidence, the district court overruled Mulverhill’s objection to the eight-level enhancement. The court concluded that the total offense level was 23, applied a criminal history category of I, and calculated an advisory Guidelines range of 46 to 57 months. Mulverhill did not object to this calculation. The government argued that the sentence should be at least 57 months’ imprisonment and stated that an upward variance would be appropriate. Mulverhill asked the court to grant a downward variance from the Guidelines range or, alternatively, for a

sentence on the low end of the Guidelines range.

In rendering Mulverhill's sentence, the court commented that

[h]ad [S.L.M.'s] mother not known and had S.L.M. not known of your situation as someone required to register, I think I would have exceeded the guidelines. I would have gone above the guidelines. But since they knew and the mother allowed you to live there anyw[ay] and shut her eyes as to what was going on, I can't really blame the failure to register for what occurred.

The court ultimately imposed a sentence of 57 months' imprisonment, the high end of the advisory range, and supervised release for life.

II. Discussion

On appeal, Mulverhill argues that the district court plainly erred in (1) accepting his guilty plea based on an erroneous classification of him as a Tier III sex offender under SORNA, and (2) calculating his total offense level based on an inadvertent error in the PSR.

[1, 2] To prevail under plain-error review, Mulverhill "must show: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Brave Bull*, No. 15-2143, 828 F.3d 735, 739, 2016 WL 3671702, at *2 (8th Cir. July 11, 2016) (citation omitted). "[I]t is enough that an error be 'plain' at the time of appellate consideration." *United States v. Fast Horse*, 747 F.3d 1040, 1042 (8th Cir. 2014) (quoting *Henderson v. United States*, — U.S. —, 133 S.Ct. 1121, 1130–31, 185 L.Ed.2d 85 (2013); citing *United States v. Webster*, 84 F.3d 1056, 1067 (8th Cir. 1996)

2. "These tier levels are incorporated into the United States Sentencing Guidelines and used to determine the defendant's base offense lev-

("[T]he proper focus is the law applicable on appeal rather than at trial.").

[3] In the absence of controlling precedent of either this court or the Supreme Court, the district court is granted more discretion under the plain error standard simply because the less guidance there is, the smaller the realm of decisions that would be clearly or obviously wrong under current law.

United States v. Lachowski, 405 F.3d 696, 698 (8th Cir. 2005).

A. Guilty Plea

[4] We first address whether the district court plainly erred in accepting Mulverhill's plea of guilty to failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). "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." *United States v. Morales*, 801 F.3d 1, 3 (1st Cir. 2015).² Tier III concerns "[t]he most egregious offenders." *Id.* (citing 42 U.S.C. § 16911(4)(A)). It provides, in relevant part, that

[t]he 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 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)

el." *United States v. Taylor*, 644 F.3d 573, 576 (7th Cir. 2011) (citing U.S.S.G. § 2A3.5).

against a minor who has not attained the age of 13 years....

42 U.S.C. § 16911(4)(A).

Similarly, a “tier II sex offender” is defined, in relevant part, as

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

42 U.S.C. 16911(3)(A).

“The final category, Tier I, serves as a catch-all provision for convicted sex offenders not otherwise grouped into Tier II or Tier III.” *Morales*, 801 F.3d at 3 (citing 42 U.S.C. § 16911(2)). A sex offender must keep his or her registration current for “(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.” 42 U.S.C. § 16915(a).

Mulverhill argues that the district court plainly erred in accepting his guilty plea to failure to register as a sex offender, in violation of § 2250(a), because, using a categorical approach, neither of his two convictions under California Penal Code

§ 288(a) for lewd and lascivious acts with a child under 14 years old qualify as an offense “comparable to or more severe than” any of the listed federal statutes in the definitions for Tier III or Tier II sex offenders. *See* 42 U.S.C. § 16911(3)–(4).³ Mulverhill contends that he is a Tier I sex offender and was therefore not required to register as a sex offender during the time period set forth in the indictment because the 15-year period had expired. *See* 42 U.S.C. § 16915(a)(1).

We recently held in *United States v. Hill* that courts should employ a circumstance-specific approach—not a categorical approach—in determining whether an offender’s conduct was by its nature a sex offense against a minor, thereby rendering the conviction arising from such conduct a “sex offense” under SORNA. 820 F.3d 1003, 1005 (8th Cir. 2016) (citing 42 U.S.C. § 16911(5)(A)(ii) and (7)(I)). Under the circumstance-specific approach, a court “examine[s] the ‘particular circumstances in which an offender committed the crime on a particular occasion.’” *Id.* (quoting *Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1691, 185 L.Ed.2d 727 (2013)). The court rejected application of the categorical approach to § 16911(5)(A)(ii) and (7)(I) of SORNA, which “look[s] simply at the statute underlying [the] conviction to determine whether its elements show categorically that it is a sex offense against a minor.” *Id.*

In *Hill*, we had no occasion to address whether a circumstance-specific or categorical approach applies to the three tier classifications set forth in § 16911(2), (3), and (4). We, however, note our sister circuits’ admitted difficulty in answering this question. *See, e.g., United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015) (“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 am-

3. Mulverhill concedes that he is a “sex offend-

er” under SORNA. *See* 42 U.S.C. § 16911(1).

biguous."); *United States v. Forster*, 549 Fed.Appx. 757, 767 (10th Cir. 2013) (unpublished) ("However, it is far from clear whether a categorical approach should be applied in the SORNA context." (citations omitted)); *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.").

Here, we need not wade into the quagmire of which approach applies to the three tier classifications set forth in § 16911(2), (3), and (4). Even assuming that the categorical approach does apply, we conclude that the district court committed no plain error by not applying that approach to Mulverhill's prior convictions to determine his appropriate tier classification. We advance two reasons for this conclusion. First, during his change-of-plea hearing, Mulverhill agreed with the government's recitation of the facts that although he was required to register as a sex offender, he had failed to do so as of January 29, 2015. Mulverhill's admission constitutes a sufficient factual basis for the guilty plea.

Second, even if we consider Mulverhill's duty to register as a sex offender between June 19, 2014, and January 30, 2015, as a purely legal question, the district court committed no plain error in not applying a categorical approach to Mulverhill's California convictions. This is so because (1) we lack controlling precedent on the question of whether a circumstance-specific approach or categorical approach is applicable to the three tier classifications set forth in § 16911(2), (3), and (4); (2) our *Hill* decision indicates that such an approach *does not* apply in other subsections of the same statute; and (3) our sister circuits have had difficulty in determining whether

the circumstance-specific or categorical approach applies to § 16911(2), (3), and (4). See *Fed. Crop Ins. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985) ("Because of the lack of controlling precedent within the Eighth Circuit and the split of authority among other courts, we decline to hold that the district court committed plain error in instructing the jury as to the preponderance of evidence standard.")

B. Total Offense Level

[5] Mulverhill next argues that the district court plainly erred in using a total offense level of 23 instead of 21 based on the PSR's inadvertent error of assigning to him a total offense level of 23.

The government concedes that "the total offense level was 21" and that "the district court mistakenly applied a total offense level of 23." Nonetheless, it argues that Mulverhill cannot show a reasonable probability that he would have received a lesser sentence but for the alleged error. We disagree.

[6] The Guidelines range for a total offense level of 23 with a criminal history category of I is 46 to 57 months' imprisonment; by contrast, a Guidelines range for Mulverhill's *correct* total offense level of 21 with a criminal history category of I is 37 to 46 months' imprisonment. "When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez*, 136 S.Ct. at 1345. Here, Mulverhill "need not make a further showing of prejudice beyond the fact that the erroneous guidelines range 'set the wrong framework for the sentencing proceedings.'" *United States v. Tegeler*, No. 15-2911, 650 Fed. Appx. 903, 905 n.3, 2016 WL 3057789, at *3 n.3 (8th Cir. May 31, 2016) (unpublished)

per curiam) (quoting *Molina-Martinez*, 136 S.Ct. at 1345).

Nonetheless, the government argues that part of the sentencing colloquy in which the district court “contemplated aloud a situation where it would have exceeded the Guidelines” indicates that no reasonable probability exists that Mulverhill would receive a lesser sentence. We recognize that “[t]here may be instances when, despite application of an erroneous Guidelines range, a reasonable probability of prejudice does not exist. The sentencing process is particular to each defendant, of course, and a reviewing court must consider the facts and circumstances of the case before it.” *Molina-Martinez*, 136 S.Ct. at 1346 (citation omitted). The present case is not a situation in which the government has shown “that the court ‘would have arrived at the same term of imprisonment absent the procedural error.’” *Tegeler*, 650 Fed.Appx. at 905 n.3, 2016 WL 3057789, at *3 n.3 (quoting *United States v. Henson*, 550 F.3d 739, 742 (8th Cir. 2008); citing *United States v. Sanchez-Martinez*, 633 F.3d 658, 660–61 (8th Cir. 2011); *United States v. Woods*, 670 F.3d 883, 887 (8th Cir. 2012)). The district court made no affirmative statements or indications of its intention to impose the same sentence even if Mulverhill’s total offense level were lower.

Accordingly, we find that the district court plainly erred in calculating Mulverhill’s total offense level as 23; therefore, Mulverhill is entitled to resentencing under a correctly calculated Guidelines range utilizing a total offense level of 21.

III. Conclusion

Accordingly, we vacate Mulverhill’s sentence and remand for resentencing.



UNITED STATES of America,
Plaintiff-Appellee,

v.

E.T.H., JUV Defendant-Appellant.

No. 15-1672

United States Court of Appeals,
Eighth Circuit.

Submitted: November 19, 2015

Filed: August 18, 2016

Background: Juvenile was originally adjudicated a juvenile delinquent for assaulting a federal officer, and, following revocation of prior supervision term, the United States District Court for the District of South Dakota imposed a combination of official detention and juvenile delinquent supervision. Juvenile appealed.

Holding: The Court of Appeals, Smith, Circuit Judge, held that maximum term of supervision that court could impose after revoking supervision term was determined by using his age at time of revocation. Reversed and remanded.

1. Infants \Leftrightarrow 2874, 2906

Court of Appeals has jurisdiction to review a sentence pronounced under the Federal Juvenile Delinquency Act (FJDA) to determine whether it was imposed in violation of law or is plainly unreasonable. 18 U.S.C.A. §§ 3742(a)(1), (4), 5031 et seq.

2. Infants \Leftrightarrow 2661

District court enjoys broad discretion when sentencing juvenile offenders under the Federal Juvenile Delinquency Act (FJDA), indeed, broader discretion than when sentencing an adult. 18 U.S.C.A. § 5031 et seq.

3. Infants \Leftrightarrow 2908

Court of Appeals reviews de novo a district court’s interpretation of the rele-

2023 WL 5487646

Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Tyrone PEELE, Plaintiff
v.
OBERLANDER et al., Defendants

CIVIL ACTION No. 21-2785
|
Signed August 22, 2023
|
Filed August 24, 2023

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MEMORANDUM

Pratter, United States District Judge

*1 Pending before the Court are various motions relating to Tyrone Peele's claim that it is unlawful to require him to register as a sex offender for the rest of his life, based upon his 1999 conviction for rape. These motions include Mr. Peele's *pro se* § 2254 habeas petition and the magistrate judge's Report and Recommendation, Mr. Peele's *pro se* motion to set aside judgment, and Mr. Peele's *pro se* motion for a temporary restraining order and preliminary injunction. Mr. Peele argues that (1) he does not meet the requirements set forth in the Sex Offender Registration and Notification Act (SORNA) for a tier III sex offender, thus he cannot be required to register as a sex offender for life, and (2) the application of SORNA's registration requirements to Mr. Peele violates the *Ex Post Facto* Clause because SORNA was enacted after Mr. Peele was convicted for rape. For the reasons set forth below, Mr. Peele's arguments regarding the application of SORNA are without merit. The Courts adopts the Report and Recommendation and denies Mr. Peele's habeas petition, his

motion to set aside judgment, and his motion for a temporary restraining order and preliminary injunction.

BACKGROUND

Mr. Peele pled guilty to rape and corrupting the morals of a minor on April 19, 1999. That same day, Mr. Peele was sentenced to a term of five to ten years' imprisonment to be followed by five years of probation.¹ Mr. Peele did not pursue a direct appeal or state collateral attack on this conviction. In September 2012, Mr. Peele filed a habeas corpus petition claiming ineffective assistance of counsel, failure of the prosecution to disclose evidence, and that his guilty plea was unlawfully induced. The District Court denied Mr. Peele's petition as time-barred, and the Third Circuit Court of Appeals affirmed the denial.

*2 On June 23, 2021, Mr. Peele filed this § 2254 habeas petition and, in response to a court order, Mr. Peele filed an amended petition using the proper form. In the amended petition, Mr. Peele claims that: (1) the requirement that he register as a sex offender for the rest of his life violates the *Ex Post Facto* Clause; (2) his right to be free from double jeopardy was violated; and (3) the trial court lacked subject matter jurisdiction over his alleged crimes. On February 24, 2022, Mr. Peele filed a motion to withdraw his actual innocence, double jeopardy, and lack of subject matter jurisdiction claims. Thus, Mr. Peele's only remaining claim relates to the alleged violation of the *Ex Post Facto* Clause. The Commonwealth filed a response to Mr. Peele's § 2254 petition arguing that his remaining claim lacked merit.

The magistrate judge to whom Mr. Peele's petition was referred issued a Report and Recommendation in which she concluded that Mr. Peele's only remaining claim lacks merit, and she therefore recommended that Mr. Peele's habeas petition be dismissed without an evidentiary hearing. Mr. Peele filed objections to the Report and Recommendation.

In addition to his § 2254 habeas petition, Mr. Peele has filed multiple *pro se* motions in this civil case. He filed a Motion to Set Aside Judgment, which appears to relate to a November 25, 2020 letter from the Pennsylvania State Police and signed by Sergeant O.E. Rowles, Commander of the Megan's Law Section, informing Mr. Peele that he appeared on the Megan's Law Registry as a sexual offender, and that his sexual offender classification was a lifetime classification. Mr. Peele appears to argue that the November 25, 2020

letter constitutes libel and contains false statements. Mr. Peele also filed a motion for a temporary restraining order and a preliminary injunction. In this motion, Mr. Peele seeks to enjoin the defendants from using his name, image, or likeness as a registered sex offender under SORNA or Megan's Law because he argues that this registration is illegal. He further seeks the removal of his name, image, or likeness from the registry. The Commonwealth did not file a response to either of these motions.

DISCUSSION

I. Mr. Peele's § 2254 Habeas Petition

A. The Petition Is Not Second or Successive

At the outset, the Court must first determine whether Mr. Peele's present habeas petition is an unauthorized second or successive habeas petition. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. § 2244, imposes restrictions on the filing of second or successive habeas petitions, including that courts dismiss claims presented in second or successive § 2254 habeas petitions unless:

- (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

Courts have concluded that "if the prisoner did not have an opportunity to challenge the state's conduct in a prior § 2254 petition," then "such a claim is not 'second or successive,' and therefore is not subject to the § 2244(b) gatekeeping requirements." *Restucci v. Bender*, 599 F.3d 8, 10 (1st Cir. 2010); *see also United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) ("Prisoners may file second-in-time petitions based on events that do not occur until a first petition is

concluded."). "[T]he Supreme Court has confirmed that a numerically second petition is not properly termed 'second or successive' to the extent it asserts claims whose predicates arose after the filing of the original petition." *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010).

*3 Mr. Peele's present habeas petition is numerically his second filed habeas petition. But, because his claim is based entirely on events that he could not have challenged in his original habeas petition as they had not yet occurred, his petition is not subject to dismissal as an unauthorized "second or successive" habeas petition. *See Restucci*, 599 F.3d at 10. The only claim remaining in Mr. Peele's present habeas petition is "that the requirement that he register as a sex offender for the rest of his life, which he learned about on November 25, 2020, violates the *Ex Post Facto* Clause, because his sex offense took place in 1998, which predates the existence of the Pennsylvania statute which requires his life-time registration." R. & R. at 2. In support of his habeas petition, Mr. Peele attaches the aforementioned November 25, 2020 letter from Sgt. Rowles informing him of his lifetime registration as a sex offender. Further, Mr. Peele bases the challenge to his registration on *Commonwealth v. Muniz*, which was not decided by the Pennsylvania Supreme Court until 2017. 164 A.3d at 1223.

Because the November 25, 2020 letter was not issued to Mr. Peele until approximately eight years after the district court denied his first habeas petition, and because *Muniz* was not decided by the Pennsylvania Supreme Court until approximately five years after his first habeas petition was denied, Mr. Peele could not have challenged his lifetime registration as a sex offender in 2012, when he filed his original habeas petition. Thus, the Court concludes that Mr. Peele's petition is appropriate and will not dismiss the petition as a "second or successive" habeas petition.²

B. Standard of Review

A federal district court cannot grant a petition for habeas corpus "unless the adjudication of the claim ... resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or ... resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

If a party timely objects to a magistrate judge's report and recommendation, the court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Regardless of whether timely objections are made, district courts "may accept, reject, or modify, in whole or in part," the magistrate judge's findings or recommendations. *Id.* (emphasis added). Hence, the Court is obliged to review independently the issues at hand, even if, as is the case here, the district court and the magistrate judge are in agreement as to the result.

C. The Sex Offender Registration and Notification Act

Mr. Peele claims "that the requirement that he register as a sex offender for the rest of his life, which he learned about on November 25, 2020, violates the *Ex Post Facto* Clause, because his sex offense took place in 1998, which predates the existence of the Pennsylvania statute which requires his life-time registration." R. & R. at 2. Mr. Peele also appears to argue that because he does not satisfy the requirements of a "tier III sex offender," as defined by SORNA, he is not subject to the lifetime registration requirement, thus requiring him to register for life is unlawful.

1. Mr. Peele Is a Tier III Sex Offender Under SORNA

Under SORNA, "[t]he term 'sex offender' means an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). There are three tiers of sex offenders. *See id.* § 20911(2)–(4). Relevant to Mr. Peele's case is tier III, which SORNA defines 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:

- *4 (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.

34 U.S.C. § 20911(4).

Pursuant to 18 U.S.C. § 2241(a), "[w]hoever ... knowingly causes 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 kidnapping" is guilty of aggravated sexual abuse. *Id.* § 2241 (a)(1)–(2). A person is guilty of sexual abuse, *inter alia*, if he "knowingly ... engages in a sexual act with another person if that person is ... physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or ... engages in a sexual act with another person without that other person's consent." *Id.* § 2242(2)–(3).

Mr. Peele was convicted of, and pled guilty to, raping a minor. In Pennsylvania, the offense of rape is defined as follows:

A person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

(1) By forcible compulsion.

(2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

(3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring.

(4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.

(5) Who suffers from a mental disability which renders the complainant incapable of consent.

18 Pa. Cons. Stat. § 3121(a). Rape, as defined by Pennsylvania law, is "comparable to ... aggravated sexual abuse or sexual abuse ... as described in sections 2241 or 2242 of Title 18." 34 U.S.C. § 20911(4)(A)(i). The state offense requires sexual intercourse by force or threat or in scenarios where the complainant lacks the capacity to consent to the sexual act. *See* 18 U.S.C. §§ 2241(a), 2242(1)–(2); 18 Pa. Cons. Stat. § 3121(a). So, Mr. Peele, who is convicted of rape in Pennsylvania, qualifies as a tier III sex offender under SORNA. *See* 34 U.S.C. § 20911(4)(A)(i).

SORNA sets forth different registration requirements for each tier of sex offender. *Id.* § 20913. “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.” *Id.* § 20913(a). “A sex offender shall keep the registration current for the full registration period” 34 U.S.C. § 20915(a). For a tier III sex offender, “[t]he full registration period is ... the life of the offender.” 34 U.S.C. § 20915(a)(3). Thus, anyone who is convicted of rape in Pennsylvania, and who qualifies as a tier III sex offender under SORNA, is required to register as a sex offender for life. *See Commonwealth v. Lacombe*, 234 A.3d 602, 612, 616 (Pa. 2020) (providing that persons convicted of rape in Pennsylvania “are subject to lifetime registration”).

***5** Mr. Peele is thus required to register as a sex offender for the rest of his life. 34 U.S.C. §§ 20911(A)(i), 20915(a)(3). Although Mr. Peele attempts to argue that he does not qualify as a tier III sex offender because the individual whom he raped was not under the age of thirteen at the time of the crime, his argument is unavailing. The statute clearly states that an offender is a tier III sex offender if they commit an offense comparable to either “(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.” *Id.* § 20911(4)(A) (emphasis added). An offender qualifies as a tier III sex offender if *either* of these conditions is satisfied. Because Mr. Peele committed an offense comparable to aggravated sexual abuse, the age of the individual whom he raped is immaterial to his classification as a tier III sex offender. Mr. Peele is a tier III sex offender and thus is lawfully required to register as a sex offender for his entire life.

2. SORNA Does Not Violate the *Ex Post Facto* Clause

Mr. Peele argues that SORNA violates the *Ex Post Facto* Clause. “The *Ex Post Facto* Clause of the Constitution forbids any law that changes the punishment, and inflicts a greater punishment for pre-existing conduct.” *United States v. Shenandoah*, 595 F.3d 151, 158 (3d Cir. 2010) (internal quotation marks omitted), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012); *see also* U.S. Const. Art. I § 9. Generally, Mr. Peele argues that because SORNA is being retroactively applied to his 1999 rape conviction, it violates the *Ex Post Facto* Clause. Mr. Peele

bases his argument on the Pennsylvania Supreme Court’s decision in *Muniz*, in which the Court held that “retroactive application of SORNA ... violates the ex post facto clause of the United States Constitution.” *Muniz*, 164 A.3d at 1218.

Mr. Peele, however, neglects to address the state General Assembly’s response to *Muniz*. “In response to *Muniz* ... the [Pennsylvania] General Assembly enacted Subchapter I [of SORNA], the retroactive application of which became the operative version of SORNA for those sexual offenders whose crimes occurred between April 22, 1996 and December 20, 2012,” *Lacombe*, 234 A.3d at 615. Because Mr. Peele’s crime occurred in 1998, Subchapter I is the operative provision of SORNA as applied to Mr. Peele. “With regard to Subchapter I, the General Assembly declared its intent that the statute ‘shall not be considered as punitive,’ *Id.* at 615 (quoting 42 Pa. Cons. Stat. § 9799.51(b)(2)). Subchapter I also provides that persons convicted of rape “are subject to lifetime registration.” *Lacombe*, 234 A.3d at 612, 616.

In *Lacombe*, the Pennsylvania Supreme Court held that “Subchapter I does not constitute criminal punishment,” thus, any claims that it violates the *Ex Post Facto* Clause must necessarily fail, *id.* at 626–27, because the *Ex Post Facto* Clause only forbids punitive laws which modify or increase the punishment for pre-existing conduct. *Shenandoah*, 595 F.3d at 158. In so holding, the Pennsylvania Supreme Court recognized that in *Muniz*, the Court’s “decision regarding violation of [the *Ex Post Facto*] clause depend[ed] on a determination of whether SORNA’s retroactive application to [Muniz] constitute[d] punishment.” *Muniz*, 164 A.3d at 1208. Because Subchapter I as enacted is not punitive, its retroactive application does not violate the *Ex Post Facto* Clause. *Lacombe*, 234 A.3d at 626–7. Moreover, the General Assembly explicitly intended Subchapter I to be retroactively applied. *Id.* at 615 (“Subchapter I applies to those convicted of a sexually violent offense after April 22, 1996, but before December 20, 2012.”) (citing 42 Pa. Cons. Stat. § 9799.52(1), (2)).

To date, the Third Circuit Court of Appeals has not issued a binding and precedential opinion holding that SORNA Subchapter I is or is not punitive or that its retroactive application violates the *Ex Post Facto* Clause. However, following *Lacombe*, numerous courts in this circuit have held that the application of SORNA does not violate the *Ex Post Facto* Clause. *See, e.g., Thomas v. Blocker*, No. 21-cv-1943, 2022 WL 2870151, at *3 n.8 (3d Cir. July 21, 2022) (“[Appellant’s] *ex post facto* claim fails because

we have already held that federal SORNA, and specifically the retroactive registration requirement, does not violate the *ex post facto* clause."); *Webster v. Tice*, No. 20-cv-476, 2021 WL 6274465, at *2 (E.D. Pa. Dec. 7, 2021) (denying petitioner's claim "that it [was] unconstitutional to subject him to []s registration requirement because they were enacted after he committed his crime" because, according to *Lacombe*, the registration requirements do not constitute criminal punishment and thus application of SORNA does not violate the *Ex Post Facto Clause*); *Reaves v. Rowles*, No. 21-cv-904, 2021 WL 5416248, at *6 (M.D. Pa. Nov. 19, 2021) (concluding that plaintiff's claim regarding *ex post facto* issues relating to the "instant sex offender registration requirement has already been settled using well established constitutional standards").

*6 The application of SORNA's registration requirement to Mr. Peele does not violate the *Ex Post Facto Clause*.

* * * * *

For all of these reasons, the Court adopts the Report and Recommendation and denies Mr. Peele's habeas petition.

D. A Certificate of Appealability Will Not Issue

A habeas petitioner may appeal the final order in a habeas proceeding only if a judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Because Mr. Peele has failed to show a denial of his constitutional rights, and because reasonable jurists would not find this Court's resolution of Mr. Peele's claims "debatable or wrong," a certificate of appealability will not issue. *Id.*

II. Mr. Peele's Motion to Set Aside Judgment

Mr. Peele filed a *pro se* motion to set aside judgment. Construing Mr. Peele's motion liberally, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), he seems to be seeking to set aside the November 25, 2020 letter from Sgt. Rowles informing Mr. Peele that he appears on the Megan's Law Registry as

a sexual offender, and that his sexual offender classification is for Mr. Peele's lifetime. Mr. Peele appears to argue that the November 25, 2020 letter should be set aside because it constitutes libel and contains false statements. He further asserts five legal defects or errors which he seeks review of: (1) timely objections, (2) official oppression, (3) false oath, (4) obstruction of justice, and (5) "misjoiner." Pet'r.'s Mot. to Set Aside J. at ECF 2. However, Mr. Peele does not state with specificity what these legal defects and errors relate to, nor does he demonstrate how these purported defects warrant the relief he seeks.

Although Mr. Peele does not state under which Federal Rule of Civil Procedure he is moving, the Court construes his motion to set aside judgment as being brought under either Federal Rule of Civil Procedure 59(e) or 60(b), which govern motions seeking relief from a judgment. Rule 59(e) states that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). Rule 60(b) provides the following six grounds for relief from a final judgment, order, or proceeding:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- *7 (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b)(1)–(6).

To the extent Mr. Peele seeks to set aside the November 25, 2020 letter under Rules 59(e) or 60(b), he cannot do so because this letter does not constitute a judgment. A "judgment" is "[a] court's final determination of the rights and obligations of the parties in a case." *Judgment*, *Black's Law Dictionary* (11th ed. 2019). The November 25, 2020 letter was issued by the Pennsylvania State Police, not the Court, and it was signed by Sgt. Rowles, not a judge. The letter reads, in relevant part:

Please use this correspondence as *confirmation the Pennsylvania State Police Megan's Law Section has received and processed or reviewed your sexual offender registration information*. You now appear on the Megan's Law Registry pursuant to 42 Pa. C.S. Chapter 97, as a sexual offender.

Additionally, your sexual offender classification is Lifetime. You are required to register as a sexual offender with the Pennsylvania State Police for Lifetime. Furthermore, you are required to verify your registration information Every 12 Months at an approved registration site during the ten dates before the following date(s) each year: 22 – Jun

Nov. 25, 2020 Letter, Doc. No. 5 at ECF 21 (emphasis added). The letter plainly does not reflect a *court's* determination of Mr. Peele's rights or obligations; instead, it confirms the Pennsylvania State Police's receipt of Mr. Peele's sexual offender registration. It strains logic to say that this letter is a "judgment" such that Mr. Peele could plausibly seek to set it aside under Rules 59(e) or 60(b).

For these reasons, the Court denies Mr. Peele's motion to set aside judgment.³

III. Mr. Peele's Motion for a Temporary Restraining Order and a Preliminary Injunction

Mr. Peele seeks to enjoin the defendants from using his name, image, or likeness as a registered sex offender under SORNA or Megan's Law because he argues that his registration as a sex offender is illegal. He further seeks the removal of his name, image, or likeness from the registry.

***8** "A temporary restraining order is a 'stay put,' equitable remedy that has as its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation." *J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267, 273 (3d Cir. 2002) (quoting *Foreman v. Dall. Cnty.*, 193 F.3d 314, 323 (5th Cir. 1999)). The standard for determining whether a movant is entitled to a temporary restraining order is the same as that used for a preliminary injunction: the movant must demonstrate "(1) a likelihood of success on the merits; (2) he or she will suffer irreparable harm if the injunction is denied; (3) granting relief will not result in even greater harm to the nonmoving party; and (4) the public interest favors such relief," *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir.

2010); *see also EXL Lab'ies, LLC v. Egolf*, No. 10-cv-6282, 2010 WL 5000835, at *3 (E.D. Pa. Dec. 7, 2010) ("The standard for granting a temporary restraining order under Federal Rule of Civil Procedure 65 is the same as that for issuing a preliminary injunction."), "The failure to establish any of these elements, however, renders the issuance of an injunction inappropriate." *Bradley v. Amazon.com, Inc.*, No. 17-cv-1587, 2021 WL 5631754, at *2 (E.D. Pa. Dec. 1, 2021), "Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (internal quotation marks omitted). Movants face a "heavy burden," *Lane v. New Jersey*, 753 F. App'x 129, 131 (3d Cir. 2018), and "must establish entitlement to [injunctive] relief by clear evidence." *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 526 (3d Cir. 2018).

The Court will first consider the likelihood of success on the merits. "At the preliminary injunction stage, plaintiffs need only show a reasonable probability that their ... claims will succeed on the merits." *Miller v. Mitchell*, 598 F.3d 139, 147 (3d Cir. 2010). As set forth above, Mr. Peele's claim regarding the application of SORNA's registration requirement to him has no merit. In *Lacombe*, the Pennsylvania Supreme Court held that because SORNA Subchapter I—the operative SORNA provision with respect to Mr. Peele's rape conviction—does not constitute criminal punishment, it does not violate the *Ex Post Facto* Clause. 234 A.3d at 626–27. It is thus not unlawful to require sex offenders to register under SORNA. Further, Courts in the Third Circuit have concluded, based on *Lacombe*, that *ex post facto* claims regarding the application of SORNA's registration requirements are without merit. *See, e.g., Thomas*, 2022 WL 2870151, at *3 n.8; *Webster*, 2021 WL 6274465, at *2; *Reaves*, 2021 WL 5416248, at *6. Thus, Mr. Peele cannot show a reasonable probability that this claim will succeed. *Miller*, 598 F.3d at 147.

Mr. Peele's claim that *lifetime* registration, in particular, is unlawful also has no merit. Mr. Peele pled guilty to raping a minor. Under SORNA, Mr. Peele qualifies as a tier III sex offender because rape is comparable to aggravated sexual abuse or sexual abuse. *See* 34 U.S.C. § 20911(4)(A)(i). As a tier III sex offender, Mr. Peele is subject to lifetime registration requirements. *See* 34 U.S.C. § 20915(a)(3). Moreover, the Pennsylvania Supreme Court and the Pennsylvania General Assembly have made it explicitly clear that individuals convicted of rape "are subject to lifetime registration." *Lacombe*, 234 A.3d at 616. Again, Mr. Peele has shown no probability of success on this claim.

Because Mr. Peele has failed to establish the first element required for a temporary restraining order and a preliminary injunction, injunctive relief is not warranted. *Bradley*, 2021 WL 5631754, at *2. For these reasons, the Court denies Mr. Peele's motion for a temporary restraining order and a preliminary injunction.

For the reasons set forth above, the Court adopts the Report and Recommendation and denies Mr. Peele's § 2254 habeas petition. A certificate of appealability will not issue.

The Court also denies Mr. Peele's Motion to Set Aside Judgment and his Motion for a Temporary Restraining Order and a Preliminary Injunction.

*9 Appropriate orders follow.

CONCLUSION

All Citations

Not Reported in Fed. Supp., 2023 WL 5487646

Footnotes

- 1 At the time of Mr. Peele's sentencing, Pennsylvania's Megan's Law was in effect, which required sex offenders to

register a current address with the Pennsylvania State Police upon release from incarceration[or] being placed on parole The State Police must be notified of an offender's change of address and a current address must be registered. The period of registration under this provision is ten years

Commonwealth v. Williams, 733 A.2d 593, 595 (Pa. 1999). Later,

[t]he [Pennsylvania] General Assembly enacted SORNA in response to the federal Adam Walsh Child Protection and Safety Act of 2006, which mandates that states impose on sex offenders certain tier-based registration and notification requirements in order to avoid being subject to a penalty, *i.e.*, the loss of federal grant funding. Accordingly, Pennsylvania's General Assembly sought to comply with this federal legislation by providing for the expiration of prior registration requirements, commonly referred to as Megan's Law [III], as of December 20, 2012, and for the effectiveness of SORNA on the same date.

Commonwealth v. Muniz, 164 A.3d 1189, 1203-04 (Pa. 2017), *cert. denied*, 138 S. Ct. 925 (2018) (internal citations and quotation marks omitted).

- 2 The Commonwealth arrives at the same conclusion. In its response to Mr. Peele's present habeas petition, it argues that Mr. Peele's claim should not be dismissed under § 2244(b) because it was not ripe in 2012.

- 3 Even if the Court were to liberally construe Mr. Peele's motion as seeking to set aside a *judgment*, Mr. Peele's motion fails because it is untimely under Rules 59(e) and 60(c). Mr. Peele's motion is untimely under Rule 59(e), which requires a motion to be filed "no later than 28 days after the entry of judgment," Fed. R. Civ. P. 59(e), because Mr. Peele filed his motion on December 12, 2022, more than two years after the letter was issued on November 25, 2020. Mr. Peele's motion is untimely under Rule 60(c) because it was made "more than a year after" the letter was issued, and Mr. Peele has not demonstrated that his motion was "made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "[A] motion under Rule 60(b)(6) filed *more than a year after final judgment* is generally untimely unless 'extraordinary circumstances' excuse the party's failure to proceed sooner" *Walker v. Dauphin Cnty. Prison*, No. 06-cv-1442, 2021 WL 6337514, at *1 (M.D. Pa. Feb. 24, 2021) (emphasis added); *accord Moolenaar v. Gov't of V.I.*, 822 F.2d 1342, 1348 (3d Cir. 1987)

(concluding that a Rule 60(b)(6) motion filed nearly two years after district court's initial judgment was not made within a reasonable time).

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2024 WL 5087916

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

Silas Bernard PETERSON, Petitioner - Appellant,
v.

UNITED STATES of America, Respondent - Appellee.

No. 22-55490

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Submitted November 5, 2024 * Pasadena, California

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FILED DECEMBER 12, 2024

Appeal from the United States District Court for the Central District of California, André Birotte Jr., District Judge, Presiding, D.C. Nos. 5:18-cr-00037-AB-1, 2:21-cv-07883-AB

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David Ransom Friedman, Claire Kelly, Assistant U.S. Attorneys, DOJ - Office of the U.S. Attorney, Los Angeles, CA, for Respondent - Appellee.

Before: SCHROEDER, CALLAHAN, and WALLACH, **
Circuit Judges.

offense” definition, and that the district court should have instead used the “categorical approach,” looking only to the elements of the underlying state conviction. *See Descamps v. United States*, 570 U.S. 254, 261 (2013) (“The key [to the categorical approach] ... is elements, not facts.”). Peterson argues that the 1993 conviction was not a SORNA qualifying offense under a categorical approach, or even under a circumstance-specific approach, and that the district court’s conclusion that he committed a “sex offense” requiring registration under SORNA should be reversed. *See* 34 U.S.C. § 20911(7)(I). We disagree.

Underlying this case is Peterson’s 1993 conviction. Peterson pleaded guilty to three counts under California Penal Code § 288(a), which provided:

288. (a) Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1¹ of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

Cal. Penal Code § 288(a) (effective 1989).²

*1 Silas Bernard Peterson appeals the district court’s order denying his motion under 28 U.S.C. § 2255 to vacate his convictions and sentence under 18 U.S.C. § 2250(a) for failure to register as a sex offender after traveling in interstate commerce under the Sex Offender Registration and Notification Act (“SORNA”). We review the district court’s decision to deny a motion under § 2255 de novo. *United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021). We have jurisdiction under 28 U.S.C. §§ 2253 and 2255(d). We affirm.

The district court correctly determined that Peterson’s 1993 conviction requires him to keep a current SORNA registration. Peterson argues that the district court erred in taking a “circumstance-specific” approach to analyzing whether his state conviction falls within SORNA’s “sex

Years passed after Peterson’s conviction. Peterson registered as a sex offender in California as recently as 2005. However, after Congress passed SORNA in 2006, *see* Pub. L. No. 109-248, §§ 101–55, 120 Stat. 587 (2006), Peterson traveled interstate, including between California and Georgia, without updating his registration as required by the federal statute. In 2018, Peterson was charged with and pleaded guilty to failure to register as a “sex offender” under SORNA, which requires sex offenders to register and keep an updated registration when traveling in interstate commerce. 18 U.S.C. § 2250(a) (1). In 2021, Peterson filed a § 2255 motion, which the district court denied. The district court held that Peterson’s § 288(a) conviction was a “sex offense” under SORNA. Under SORNA, a “sex offense” is “a criminal offense that is,” 34

U.S.C. § 20911(5)(A)(ii), “an offense against a minor that involves ... [a]ny conduct that by its nature is a sex offense against a minor,” 34 U.S.C. § 20911(7)(I).

***2** We review the district court's decision de novo and consider whether Peterson's prior conviction requires him to register under SORNA. *Juliano*, 12 F.4th at 940. Using a categorical approach, to which Peterson argues he is entitled, we need to “look only to the statutory definitions of the prior offenses,” to determine it is a “sex offense” under SORNA. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (describing the categorical approach in general). In other contexts, we have held that a conviction under § 288(a) constitutes “sexual abuse of a minor.” *See United States v. Medina-Maella*, 351 F.3d 944, 947 (9th Cir. 2003). A conviction under § 288(a) constitutes a “sexual offense” under SORNA. A “lewd or lascivious act ... with the body ... of a child [under 14] with the intent of arousing ... sexual desires of [the perpetrator] or of the child,” Cal. Penal Code § 288(a), is categorically “conduct that by its nature is a sex offense against a minor,” 34 U.S.C. § 20911(7)(I). Thus, Peterson was

convicted of a “sex offense” that requires registration under SORNA. 34 U.S.C. § 20911(1).

Peterson's argument that the district court should have used a categorical rather than a circumstance-specific approach is therefore without merit. Under either the categorical approach or the district court's circumstance-specific analysis, Peterson's prior offense is a SORNA qualifying offense.

Peterson also argues on appeal that he had ineffective assistance of counsel due to the counsel's failure to move to dismiss the SORNA charge. However, because we have concluded that Peterson's state conviction qualifies as a sex offense under SORNA, his ineffective assistance of counsel argument necessarily fails. *See Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 5087916

Footnotes

- * The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P.* 34(a)(2).
- ** The Honorable Evan J. Wallach, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.
- *** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
- 1 The district court stated that “[t]he other crimes provided for in Part 1 of California Penal Code, include bigamy, incest, sodomy, bestiality, and oral copulation.”
- 2 This statute has been amended several times since 1993, but this memorandum disposition relies upon the statute as in effect when Mr. Peterson was convicted in 1993.

not before us today and one on which we do not opine. For the sole reason that no public disclosure deprived it of jurisdiction, the judgment of the district court is

REVERSED.

(2) failing to register as sex offender under SORNA was not sex offense for purposes of Sentencing Guidelines.

Affirmed in part, vacated in part, and remanded for resentencing.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Antwain Guanterio PRICE,
Defendant-Appellant.

Bradley Nelson Garcia, Court-
Assigned Amicus Counsel.

No. 13-4216.

United States Court of Appeals,
Fourth Circuit.

Argued: Dec. 9, 2014.

Decided: Feb. 3, 2015.

Background: After defendant's motion to dismiss was denied, 2012 WL 3144669, he conditionally pleaded guilty in the United States District Court for the District of South Carolina, Joseph F. Anderson, Jr., J., to knowingly failing to register as a sex offender as required by the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

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

(1) circumstance-specific approach, or non-categorical approach, applied to assessment of whether defendant's prior common law offense of assault and battery of high and aggravated nature (ABHAN) satisfied statutory definition of "sex offense" under SORNA, and

1. Mental Health ☰469(2)

When determining whether a prior conviction was for a sex offense within the meaning of Sex Offender Registration Notification Act (SORNA), a district court must examine the underlying offense of conviction to determine whether it satisfies the statutory definition. 18 U.S.C.A. § 2250(a).

2. Mental Health ☰469(2)

The categorical approach for determining the character of a prior conviction for purposes of its subsequent application to federal sex offender registration law focuses solely on the elements of the offense of conviction, comparing those to the commonly understood elements of the generic offense identified in the federal statute; the elements comprising the statute of conviction must be the same as, or narrower than, those of the generic offense in order to find a categorical match.

3. Mental Health ☰469(6)

Because the categorical approach for determining the character of a prior conviction for purposes of its subsequent application to federal sex offender registration law looks squarely at the elements of the offense of conviction, a reviewing court is precluded from examining the circumstances underlying the prior conviction.

4. Mental Health ☰469(6)

If the defendant previously was convicted under a divisible statute, meaning that the offense contains a set of alternative elements, the reviewing court applying the modified categorical approach to char-

acterize a prior conviction for purposes of its subsequent application to federal sex offender registration law is entitled to refer to certain documents from the underlying case to discern which alternative element formed the basis of conviction.

5. Mental Health \bowtie 469(2)

The documents that may be referenced under the modified categorical approach for characterizing a prior conviction for purposes of its subsequent application to federal sex offender registration law are limited, but include: the indictment or information, the plea agreement or transcript of the plea colloquy, the court's formal legal rulings and factual findings of a bench trial, and jury instructions.

6. Mental Health \bowtie 469(2)

The focus of the modified categorical approach to characterize a prior conviction for purposes of its subsequent application to federal sex offender registration law remains squarely on the elements of the prior conviction; the reviewing court is not entitled to assess whether the defendant's actual conduct matches federal law.

7. Mental Health \bowtie 469(2)

The circumstance-specific approach, or noncategorical approach, for characterizing a prior conviction for purposes of its subsequent application to federal sex offender registration law focuses on the facts, not the elements, relating to the prior conviction; that broader framework applies when the federal law refers to the specific way in which an offender committed the crime on a specific occasion, rather than to the generic crime.

8. Mental Health \bowtie 469(6)

When utilizing the circumstance-specific approach, or noncategorical approach, for characterizing a prior conviction for purposes of its subsequent application to federal sex offender registration law, the

reviewing court may consider reliable evidence concerning whether the prior offense involved conduct or circumstances that are required by the federal law.

9. Mental Health \bowtie 469(6)

Circumstance-specific approach, or noncategorical approach, applied to assessment of whether defendant's prior common law offense of assault and battery of high and aggravated nature (ABHAN) satisfied statutory definition of "sex offense" under SORNA, due to text, structure, and purpose of relevant SORNA provisions, and lack of Sixth Amendment concerns. U.S.C.A. Const.Amend. 6; Sex Offender Registration and Notification Act, § 111(5)(A)(ii), (7)(I), 42 U.S.C.A. § 16911(5)(A)(ii), (7)(I).

10. Administrative Law and Procedure \bowtie 438(24)

Mental Health \bowtie 469(2, 6)

Federal regulations interpreting SORNA, commonly called the "SMART Guidelines," were not entitled to *Chevron* deference as to whether circumstance-specific approach, or noncategorical approach, should be utilized to determine whether a prior conviction was for a sex offense, since court was not willing to conclude that Congress's use of the terms "conduct" and "nature" of that conduct, combined with its omission of the word "element," was ambiguous or silent as to the proper method of analysis, or that Guidelines provided clear and reasonable interpretation of applicable subsections. Sex Offender Registration and Notification Act, § 111(5)(A)(ii), (7)(I), 42 U.S.C.A. § 16911(5)(A)(ii), (7)(I).

11. Sentencing and Punishment \bowtie 1250

Where a prior conviction may trigger a sentencing enhancement, increasing a defendant's punishment, the Sixth Amendment requires a reviewing court to apply

the categorical approach for characterizing a prior conviction for purposes of its subsequent application to federal law. U.S.C.A. Const. Amend. 6.

12. Mental Health \approx 469.5

Sentencing and Punishment \approx 1946

Failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA) was not sex offense for purposes of Sentencing Guidelines, and thus defendant was not subject to enhanced advisory Sentencing Guidelines range for supervised release after he had been convicted for failing to register; Sentencing Guidelines recommended that defendant receive five-year term of supervised release, rather than term within range of five years to life. 18 U.S.C.A. §§ 2250(a), 3583(k); U.S.S.G. § 5D1.2(b)(2), (c), 18 U.S.C.A.

13. Criminal Law \approx 1042.3(1)

When a defendant has failed to object on a sentencing contention being pursued on appeal, the issue is subject to plain error review only.

14. Criminal Law \approx 1030(1)

To obtain relief on plain error review, a court must find that an error was committed, the error was plain, and the error affected the defendant's substantial rights; if those threshold requirements are satisfied, the court also must decide whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

15. Criminal Law \approx 1042.3(4)

The erroneous calculation of an advisory Sentencing Guidelines range that causes a defendant to be sentenced to a more severe term of supervised release affects a defendant's substantial rights, as required for relief on plain error review.

16. Criminal Law \approx 1042.3(1)

Sentencing a defendant at the wrong Sentencing Guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings, as required for relief on plain error review.

ARGUED: Kimberly Harvey Albro, Office of the Federal Public Defender, Columbia, South Carolina, for Appellant. Tommie DeWayne Pearson, Office of the United States Attorney, Columbia, South Carolina, for Appellee. Bradley Nelson Garcia, O'Melveny & Myers, LLP, Washington, D.C., as Court-Assigned Amicus Counsel. **ON BRIEF:** John H. Hare, Assistant Federal Public Defender, Office of the Federal Public Defender, Columbia, South Carolina, for Appellant. William N. Nettles, United States Attorney, Office of the United States Attorney, Columbia, South Carolina, for Appellee. Gregory F. Jacob, Rakesh Kilaru, O'Melveny & Myers, LLP, Washington, D.C., for Court-Assigned Amicus Counsel.

Before MOTZ and KING, Circuit Judges, and ARENDA L. WRIGHT ALLEN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, vacated in part, and remanded by published opinion. Judge KING wrote the opinion, in which Judge MOTZ and Judge ALLEN joined.

KING, Circuit Judge:

Antwain Guanterio Price was charged in the District of South Carolina in May 2012 with knowingly failing to register as a sex offender as required by the Sex Offender Registration and Notification Act ("SOR-

NA”), in violation of 18 U.S.C. § 2250(a).¹ The single-count indictment alleged that Price was subject to SORNA’s registration requirement because of his prior South Carolina conviction for the common law offense of assault and battery of a high and aggravated nature (“ABHAN”). Price sought dismissal on the ground that his ABHAN conviction was not for a “sex offense” under SORNA. By order of August 2, 2012, the district court denied Price’s motion, predicated its ruling on the facts underlying the ABHAN conviction. *See United States v. Price*, No. 0:12-cr-00374, 2012 WL 3144669 (D.S.C. Aug. 2, 2012), ECF No. 55 (the “Denial Order”).² Price thereafter conditionally pleaded guilty to the § 2250(a) offense and was sentenced to two years in prison. The court also imposed a life term of supervised release, based on its determination that the ABHAN conviction was for a “sex offense” under section 5D1.2(b)(2) of the Sentencing Guidelines.

Price filed a timely notice of appeal, and we possess jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. On appeal, he maintains that the district court erred in declining to dismiss the indictment and in calculating his advisory Guidelines range for supervised release.

1. SORNA is primarily codified at 42 U.S.C. §§ 16901–16962, and a failure to register pursuant to its provisions violates 18 U.S.C. § 2250(a). As relevant here, § 2250(a) provides criminal penalties for any person who “is required to register under [SORNA],” “travels in . . . interstate commerce,” and “knowingly fails to register or update a registration as required by [SORNA].” 18 U.S.C. § 2250(a)(1), (2)(B), (3).
2. The Denial Order is found at J.A. 78–82. (Citations herein to “J.A.____” refer to the contents of the Joint Appendix filed by the parties in this appeal.)
3. We ordered the parties to submit supplemental briefing in this appeal to address re-

As explained below, we are satisfied that the Denial Order properly applied the “circumstance-specific approach” (sometimes called the “noncategorical approach”) in deciding that Price was subject to SORNA’s registration requirement. The court erred, however, in ruling that Price’s § 2250(a) conviction was for a sex offense under Guidelines section 5D1.2(b)(2). We therefore affirm in part, vacate in part, and remand for resentencing.³

I.

A.

We first address Price’s contention that his indictment should have been dismissed. Before delving into the relevant factual and procedural background, we review certain legal principles that are important to this issue.

1.

SORNA establishes a comprehensive regulatory scheme to track and provide community notification regarding convicted sex offenders. Pursuant thereto, a person convicted of a sex offense must register in each state in which he resides, is employed, or is a student. *See* 42 U.S.C. §§ 16911(1), 16913. If a sex offender

cent authorities that might be applicable, including *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and *United States v. Hemingway*, 734 F.3d 323 (4th Cir.2013). Because the government initially asserted that a different approach applied to an analysis of Price’s dismissal issue, we appointed amicus counsel (the “Amicus”) to argue the position of the district court—namely, that the circumstance-specific approach was the correct analytical vehicle. The government thereafter submitted a letter under Federal Rule of Appellate Procedure 28(j), altering its position and agreeing with the Amicus that the circumstance-specific approach is correct. The Amicus has ably discharged his duties, and we commend his efforts.

changes his residence, employment, or student status, he must update his registration within three business days, so that the sex offender registry remains current. *Id.* § 16913(c). SORNA also requires each state to maintain its own sex offender registry that conforms to SORNA's requirements. *Id.* §§ 16911(10)(A), 16912(a).

Although SORNA "is a non-punitive, civil regulatory scheme, both in purpose and effect," noncompliance with the statute can result in criminal prosecution under 18 U.S.C. § 2250(a). See *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013). A prerequisite to SORNA's registration requirement—and to criminal penalties under § 2250(a)—is that the defendant has been convicted of a sex offense. See 18 U.S.C. § 2250(a)(1); 42 U.S.C. §§ 16911(1), 16913. Section 16911(5)(A) of Title 42 includes the following definitions of a "sex offense" for purposes of SORNA:

- (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.

42 U.S.C. § 16911(5)(A)(i)-(ii).⁴ Subsection (5)(A)(ii)'s reference to a "specified offense against a minor" is further defined in subsection (7) of § 16911, which identifies multiple offenses—such as kidnapping, child pornography, and criminal sexual conduct, see *id.* § 16911(7)(A)-(H)—and contains a catch-all that encompasses "[a]ny conduct that by its nature is a sex offense against a minor," *id.* § 16911(7)(I).

2.

[1] A person who fails to properly register violates 18 U.S.C. § 2250(a) if his

4. SORNA also defines a "sex offense" to include certain specified federal and military offenses. See 42 U.S.C. § 16911(5)(A)(iii)-(iv). Additionally, an attempt or conspiracy to

prior conviction was for a sex offense within the meaning of SORNA. Therefore, a district court must examine the underlying offense of conviction to determine whether it satisfies the statutory definition. The Supreme Court has developed three analytical frameworks that potentially control the scope of materials that a court may consider in that regard, as well as the focus of the court's inquiry. Those frameworks are the "categorical approach," the "modified categorical approach," and, as previously mentioned, the "circumstance-specific approach" (also known as the "noncategorical approach").

[2, 3] First, the categorical approach focuses solely on the elements of the offense of conviction, comparing those to the commonly understood elements of the generic offense identified in the federal statute. See *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (requiring court to "look only to the fact of conviction and the statutory definition of the prior offense"). The elements comprising the statute of conviction must be the same as, or narrower than, those of the generic offense in order to find a categorical match. *Id.* at 599, 110 S.Ct. 2143. If, however, the court finds "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," there is no categorical match and the prior conviction cannot be for an offense under the federal statute. See *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). Because the categorical approach looks squarely at the elements of the offense of conviction, a reviewing court is precluded from examining the circum-

commit one of the enumerated sex offenses constitutes a sex offense. *Id.* § 16911(5)(A)(v).

stances underlying the prior conviction. See *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2283, 186 L.Ed.2d 438 (2013) (“The key . . . is elements, not facts.”).

[4–6] Second, the modified categorical approach is an off-shoot of the traditional categorical approach, and similarly focuses on elements rather than facts. The modified approach comes into play if the defendant was previously convicted under a divisible statute, meaning that the offense contains a set of alternative elements. See *Descamps*, 133 S.Ct. at 2281. In such circumstances, the reviewing court conducts an analysis identical to the categorical approach, but with a detour. That is, the court is entitled to refer to certain documents from the underlying case to discern which alternative element formed the basis of conviction. See *Shepard v. United States*, 544 U.S. 13, 19–20, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The documents that may be referenced are limited, but include: the indictment or information; the plea agreement or transcript of the plea colloquy; the court’s formal legal rulings and factual findings of a bench trial; and jury instructions. See *id.* at 20, 26, 125 S.Ct. 1254. The focus of the modified categorical approach remains squarely on the elements of the prior conviction, however, and the reviewing court is not entitled to assess whether the defendant’s actual conduct matches the federal statute.

[7, 8] Finally, the circumstance-specific approach (or, noncategorical approach) is a different species of analysis altogether. The circumstance-specific approach focuses on the facts—not the elements—relat-

5. We are satisfied to utilize the term “circumstance-specific” to describe this third approach, adhering to the example set by the Supreme Court in *Nijhawan*. See 557 U.S. at 34, 129 S.Ct. 2294 (using term “circum-

ing to the prior conviction. That 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. *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). 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.⁵

B.

Having identified and discussed the foregoing legal principles, we turn to the specifics of Price’s motion to dismiss. The relevant facts are not in dispute.

1.

On May 13, 2010, a grand jury in York County, South Carolina, returned an indictment charging Price with a single count of criminal sexual conduct with a minor. See S.C.Code Ann. § 16–3–655. The indictment—which did not refer to an ABHAN offense—alleged that, on or about December 15, 2007, Price committed “criminal sexual conduct with a minor” by “commit[ting] a sexual battery” on a victim who was twelve years old. J.A. 23. Price subsequently entered into plea negotiations with the prosecution.

Pursuant to those negotiations, on July 15, 2010, Price pleaded no contest to an ABHAN offense in the Court of General Sessions of York County. In the plea proceedings, the prosecutor represented that ABHAN was a lesser-included offense

stance-specific” to describe analytic framework “referring to the specific way in which an offender committed the crime on a specific occasion”).

of the charge in the indictment. At the time of Price's offense, ABHAN was a common law crime in South Carolina, the elements of which included "the unlawful act of violent injury to another, accompanied by circumstances of aggravation." See *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617, 624 (1997).⁶ The "circumstances of aggravation" requirement of an ABHAN offense could be satisfied in a number of ways, including

use of a deadly weapon, infliction of serious bodily injury, intent to commit a felony, disparity in age, physical condition or sex, indecent liberties, purposeful infliction of shame, resistance of law authority, and others.

Id. at 624 n. 17.

During Price's plea colloquy in the state court in 2010, the prosecutor—apparently pursuant to an oral plea agreement—summarized the factual basis for the ABHAN offense as follows:

These events occurred—reported to have occurred back between 2007 and 2008. Initially a report was made to the Akron Ohio Police Department that the step-father of the minor who was . . . eleven at the time in Ohio had been abused by Mr. Price, her step-father. This continued when the family moved to . . . Rock Hill, York County, South Carolina. The allegations were alleged to have happened at that house as well as another jurisdiction in South Carolina, and the victim would've been twelve years old at the time and she reported in 2009 that she had been abused and been required to perform oral sex on this defendant.

6. Although South Carolina codified ABHAN as a felony offense effective June 2, 2010, see S.C. Code Ann. § 16-3-600(B)(1), that enactment post-dated the commission of Price's offense. Thus, the common law crime of ABHAN is the only ABHAN offense relevant

J.A. 52. Price responded in the affirmative when the state court asked, "Do you agree if you went to trial those facts would be what the State would present to the jury?" *Id.* The court then accepted his no-contest plea to the ABHAN offense. The court also accepted Price's negotiated sentence, which was for time served, but required that Price be placed on South Carolina's central registry of child abuse and sex offender registry.

Following his release from state custody after his ABHAN conviction and sentencing, Price moved to Georgia. He registered there as a sex offender on July 27, 2010. Around November 1, 2010, Price moved to Ohio but failed to register as a sex offender there. As a result, the City of Akron issued a warrant for his arrest on February 1, 2011. Price, then a fugitive, resided in Arizona from September 2011 until February 2012. He moved back to South Carolina in February 2012, where he again failed to register as a sex offender. On March 17, 2012, Price was arrested on the basis of the Ohio warrant in Rock Hill, South Carolina.

2.

On April 2, 2012, a criminal complaint was filed in the District of South Carolina, alleging that Price had knowingly failed to register as a sex offender, in contravention of 18 U.S.C. § 2250(a). The single-count indictment for that offense was returned on May 1, 2012, alleging that Price's South Carolina ABHAN conviction in July 2010 was for a sex offense under SORNA, and that he violated § 2250(a) by travelling in interstate commerce and failing to register

to this appeal. See *United States v. Hemingway*, 734 F.3d 323, 327 n. 1 (4th Cir. 2013) (applying common law ABHAN elements—rather than statutory ones—because offense conduct occurred prior to enactment of ABHAN statute).

and update his registration as a sex offender, as required by SORNA.

By motion of June 21, 2012, Price sought dismissal of the indictment. He therein argued that his ABHAN conviction was not for a sex offense under SORNA, and therefore that he was not subject to SORNA's registration requirement. The district court denied Price's dismissal motion on August 2, 2012, deeming the record "sufficient to indicate that [Price] was convicted of a sex offense as defined by SORNA." See Denial Order 3. The court reasoned that it could review the record of Price's ABHAN conviction under the non-categorical approach—which we call the circumstance-specific approach—relying on decisions of the Ninth and Eleventh Circuits. *Id.* at 4 (citing *United States v. Dodge*, 597 F.3d 1347, 1354 (11th Cir. 2010) (en banc); *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008)). Employing that approach, the court reviewed the facts underlying Price's ABHAN conviction, as reflected in the plea colloquy in the York County proceedings. That colloquy revealed that the prosecutor had "recounted the facts of the offense: defendant forced his twelve year old step-daughter to perform oral sex on him." *Id.* at 3. Price "affirmatively answered that he knew those facts would be presented to the jury if he went to trial," evidencing that he understood the ABHAN charge. *Id.* The court observed that Price had agreed to register on the state sex offender registry. The court thus discerned "ample evidence to indicate that the ABHAN plea in this case rested on indecent liberties with a female as the aggravating circumstance, and therefore constituted a sex offense." *Id.* As a result, the court concluded that Price was required to register under SORNA and denied his motion to dismiss.

7. The Denial Order did not explicitly identify

On August 27, 2012, Price pleaded guilty in the district court to violating 18 U.S.C. § 2250(a), as charged in the indictment. Nonetheless, Price reserved his right, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, to appeal the court's denial of his motion to dismiss.

C.

[9] The issue with respect to the dismissal motion is purely legal and one that we review *de novo*: Did the district court err in applying the circumstance-specific approach to its assessment of whether Price's ABHAN offense satisfied the statutory definition of a "sex offense" under SORNA? See *United States v. Hatcher*, 560 F.3d 222, 224 (4th Cir. 2009) ("This Court reviews *de novo* the district court's denial of a motion to dismiss an indictment where the denial depends solely on questions of law."). At the outset, that question is circumscribed in certain respects. As the government now concedes, our decision in *United States v. Hemingway*, 734 F.3d 323, 333–34 (4th Cir. 2013), determined that the common law offense of ABHAN—on which Price was convicted in York County—is indivisible, rendering the modified categorical approach inapplicable. Additionally, because our review is *de novo* and we "may affirm on any grounds apparent from the record," *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005), we are entitled to focus on the definition of a "sex offense" provided by 42 U.S.C. § 16911(5)(A)(ii) and its extended definition at § 16911(7)(I), as those provisions contain the definition of a "sex offense" that is most relevant here. Read together, they define a "sex offense" as a criminal offense involving "[a]ny conduct that by its nature is a sex offense against a minor." See 42 U.S.C. § 16911(5)(A)(ii), (7)(I).⁷

which aspect of 42 U.S.C. § 16911's defini-

1.

We must assess, then, whether the categorical approach or the circumstance-specific approach applies to our analysis. At least two of our sister circuits have grappled with that very question, and each has concluded that what we call the circumstance-specific approach—which they refer to as the noncategorical approach—is applicable to an analysis under 42 U.S.C. § 16911(7). *See United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir. 2010) (*en banc*) (holding that “courts may employ a noncategorical approach to examine the underlying facts of a defendant’s offense, to determine whether a defendant has committed a ‘specified offense against a minor’ [under 42 U.S.C. § 16911(7)]”), *cert. denied*, — U.S. —, 131 S.Ct. 457, 178 L.Ed.2d 287 (2010); *United States v. Mi Kyung Byun*, 539 F.3d 982, 990–94 (9th Cir. 2008) (concluding that court should apply noncategorical approach to determination of age of victim under 42 U.S.C. § 16911(7)), *cert. denied*, 555 U.S. 1088, 129 S.Ct. 771, 172 L.Ed.2d 761 (2008). We agree with those courts of appeals and are satisfied to apply the circumstance-specific approach to our resolution of this appeal.

a.

First, the text, structure, and purpose of the relevant SORNA provisions show that Congress intended for the circumstance-specific approach to apply to an analysis of subsection (7)(I). The Supreme Court has repeatedly analyzed the specific terms in

tion of a “sex offense” it relied upon in determining that Price’s ABHAN conviction constituted a sex offense.

8. Repetition sometimes being helpful, 42 U.S.C. § 16911 defines a “sex offense” at subsections (5)(A)(i) and (5)(A)(ii) as follows:

federal statutes to determine whether Congress intended for an element- or fact-based approach to apply. For example, the Court has interpreted the words “conviction” and “element” to indicate that Congress meant for the statutory definition to cover a generic offense, implicating the categorical and modified categorical frameworks. *See, e.g., Taylor*, 495 U.S. at 600–01, 110 S.Ct. 2143 (reasoning that Congress’s use of words “conviction” and “element” in Armed Career Criminal Act, 18 U.S.C. § 924(e), supports categorical approach). By contrast, where a statute contains “language that . . . refers to specific circumstances” or conduct, the Court has determined that Congress meant to allow the circumstance-specific approach’s more searching factual inquiry concerning a prior offense. *See Nijhawan*, 557 U.S. at 37, 129 S.Ct. 2294.

The language and structure of § 16911 underscore the proposition that an analysis of subsection (7)(I) requires use of the circumstance-specific approach.⁸ Congress expressly referenced the “elements” of the offense in subsection (5)(A)(i), providing that one such element must involve “a sexual act or sexual contact with another.” But neither subsection (5)(A)(ii) nor its extension at subsection (7) refers to “elements.” That contrasting terminology indicates that Congress drafted subsections (5)(A)(ii) and (7) to cover a broader range of prior offenses than those reached by subsection (5)(A)(i). *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d

(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.

Additionally, a “specified offense against a minor” is defined at subsection (7)(I) to include “[a]ny conduct that by its nature is a sex offense against a minor.”

708 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”). Similarly, subsection (7)(I)’s 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. *See Nijhawan*, 557 U.S. at 37–39, 129 S.Ct. 2294. The text of SORNA thus indicates that Congress intended that the broader circumstance-specific analysis be applicable with respect to subsection (7)(I). *See Dodge*, 597 F.3d at 1354–55.

[10] The purpose of SORNA also supports the use of a circumstance-specific approach and our interpretation of subsection (7)(I). Although subsection (5)(A)(i) includes certain prior offenses without regard to whether the victim was a child or an adult, subsections (5)(A)(ii) and (7) are applicable only where the victim was a minor. Through SORNA, Congress sought “to protect the public from sex offenders and offenders against children,” and was responding “to the vicious attacks by violent predators.” 42 U.S.C. § 16901. In light of SORNA’s focus on children, Congress’s use of broader language in de-

9. We are also satisfied to reject Price’s contention that the federal regulations interpreting SORNA, commonly called the “SMART Guidelines,” are helpful to him here. *See* Office of the Attorney General, National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,052 (July 2, 2008). The SMART Guidelines address subsection (7)(I) by using terms such as “convictions” and “element,” which could indicate a preference for the categorical approach—had Congress used them in the text of subsection (7)(I). We need not accord *Chevron* deference to those Guidelines, although Price urges us to do so. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,

fining a “sex offense” for victims who are minors makes clear its intention that the circumstance-specific approach should apply. The Supreme Court reached a similar conclusion in *United States v. Hayes*, 555 U.S. 415, 426–27, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), where it analyzed a statute criminalizing firearm possession by persons convicted of a “misdemeanor crime of domestic violence.” Observing that Congress intended to close loopholes and apply the statute broadly to confront domestic violence, the Court reasoned that the legislative history supported use of a factual analysis on the specific issue of a domestic relationship. *See id.* We thus agree with the Eleventh Circuit’s well-reasoned conclusion in *Dodge* that the text and purpose of SORNA demonstrate Congress’s intention that the circumstance-specific approach should be utilized in an analysis of the applicability of subsection (7)(I). *See Dodge*, 597 F.3d at 1352–53.⁹

b.

[11] Second, Sixth Amendment concerns that compel the judicial use of the categorical approach in other contexts are simply not present here. In other situations—such as where a prior conviction may trigger a sentencing enhancement, increasing a defendant’s punishment—the

467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (concluding that, where federal statute is silent or ambiguous, administering agency’s permissible construction controls). To accept Price’s argument on that point, we would have to decide that Congress’s use of the terms “conduct” and “nature” of that conduct, combined with its omission of the word “element” in subsections (5)(A)(ii) and (7), is ambiguous or silent as to the proper method of analysis. We would then have to decide that the SMART Guidelines provide a clear and reasonable interpretation of those subsections. We are unwilling to accept those propositions.

Sixth Amendment requires a reviewing court to apply the categorical approach. *See Descamps*, 133 S.Ct. at 2288. As *Descamps* explained, the categorical approach is essential in the context of a sentencing enhancement, in order to ensure that a defendant's punishment is not increased on the basis of facts that were not found by a jury. *See id.* And "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id.*

Price argues, however, that the Sixth Amendment also requires use of the categorical approach in an analysis of a 42 U.S.C. § 16911(7)(I) issue, in order to ensure that the defendant was, in fact, convicted of a sex offense. On that point, the Supreme Court's *Nijhawan* decision is instructive. There, the Court considered whether the categorical approach was required by the Sixth Amendment to be used in the determination of a loss amount in a deportation proceeding. The petitioner argued that the loss-amount finding could lead to a more severe sentence in a criminal proceeding for illegal reentry, and thus contended that the Sixth Amendment required use of the categorical analysis with respect to loss amount. *See Nijhawan*, 557 U.S. at 40, 129 S.Ct. 2294. The Court disagreed, reasoning that "the later jury, during the illegal reentry trial, would have to find loss amount beyond a reasonable doubt," thereby "eliminating any constitutional concern." *Id.*

Here, even applying the circumstance-specific approach, Price was entitled to go to trial and have a jury determine beyond a reasonable doubt whether his York County conviction was for a sex offense under SORNA. Price gave up that Sixth Amendment right, however, when he pleaded guilty to the § 2250(a) offense in federal court. *See United States v. Ruiz*,

536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (observing that, by pleading guilty, defendant "forgoes not only a fair trial, but also other accompanying constitutional guarantees," including the Sixth Amendment right to a jury trial). Had Price gone to trial in the District of South Carolina, the prosecution would have borne the burden of proving, beyond a reasonable doubt, that he had been previously convicted of a sex offense—an essential element of 18 U.S.C. § 2250(a). The jury would thus have examined the evidence presented to it concerning the facts underlying Price's 2010 ABHAN offense, and then decided whether that evidence satisfied SORNA's definition of a "sex offense."

2.

In sum, we conclude that Congress intended for reviewing courts to utilize the circumstance-specific approach to determine whether a prior conviction was for a sex offense under SORNA, within the meaning of 42 U.S.C. § 16911(5)(A)(ii), as expanded by subsection (7)(I). We therefore affirm the district court's denial of Price's motion to dismiss the indictment.

II.

[12] Price additionally assigned error to the district court's calculation of his advisory Sentencing Guidelines range with respect to supervised release. Guidelines section 5D1.2 contains the applicable supervised-release provisions. As relevant here, subsection (a)(2) provides for an advisory range of one to three years for a defendant convicted of a Class C felony (such as a violation of 18 U.S.C. § 2250(a)), except as provided by subsections (b) and (c). Pursuant to subsection (b)(2), the term of supervised release "may be up to life if the offense is . . . a sex offense." Under subsection (c), the "term of super-

vised release imposed shall be not less than any statutorily required term of supervised release.”

The facts relating to Price’s sentence are straightforward. Price’s presentence report (the “PSR”), which was accepted by the district court at the sentencing hearing on March 14, 2013, concluded that the applicable statutory provision required imposition of a term of supervised release of five years to life. *See* 18 U.S.C. § 3583(k). The PSR computed Price’s advisory Guidelines range by first observing that the five-year minimum term of supervised release required by statute fixed the minimum advisory Guidelines range. *See* USSG § 5D1.2(c). The PSR then determined that Price’s § 2250(a) conviction was for a sex offense, and thus calculated the upper-end of the advisory range to be life, applying Guidelines section 5D1.2(b)(2). Consequently, the PSR concluded, Price’s advisory Guidelines range for supervised release was five years to life. Price made no objections to the PSR. The court then sentenced Price to twenty-four months in prison and imposed a life term of supervised release, “with the provisio” that he could seek to terminate supervision after five years if he complied with the conditions of release. *See* J.A. 115.

[13, 14] Price now argues that the district court erred in applying Guidelines section 5D1.2(b)(2) to increase the upper-limit of his advisory Guidelines range to a life term. He maintains that the offense at issue—failing to register as a sex offender in violation of § 2250(a)—is not a “sex offense” under that Guidelines provision. When a defendant has failed to object on a sentencing contention being pursued on appeal, the issue is subject to plain error review only. *See United States v. Grubb*, 11 F.3d 426, 440 (4th Cir.1993). To satisfy such a review, “we must find that (1) an error was committed, (2) the error

was plain, and (3) the error affected the defendant’s substantial rights.” *United States v. Ford*, 88 F.3d 1350, 1355 (4th Cir.1996). If those “threshold requirements are satisfied, we must also decide whether the error ‘seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* at 1355–56 (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

Our Court decided the precise issue raised by Price only a few weeks ago in *United States v. Collins*, 773 F.3d 25 (4th Cir.2014). Judge Floyd’s decision recognized that a clarifying amendment to the Guidelines, effective November 1, 2014, makes clear that “failing to register as a sex offender under SORNA is not a ‘sex offense’ for the purposes of the Guidelines.” *Id.* at 32. Thus, Price was not subject to the enhanced advisory Guidelines range for supervised release under section 5D1.2(b)(2). Moreover, a second clarifying amendment, also effective November 1, 2014, establishes that, where the statutory minimum term of supervised release is greater than the advisory Guidelines range, section 5D1.2(c) operates to create an advisory term of a “single point” at the statutory minimum. *Id.* The phrase “single point” refers to a Guidelines recommendation of a specific sentence, rather than a range. *See United States v. Goodwin*, 717 F.3d 511, 520 (7th Cir.2013) (“[T]he properly calculated advisory Guidelines ‘range’ for [defendant’s] offense appears to actually be a point: five years.”). As a result, the Guidelines recommend that Price receive a five-year term of supervised release, rather than a term within a range of five years to life.

[15, 16] In light of our *Collins* decision, Price has shown plain error that entitles him to relief. First, *Collins* establishes that the district court’s calculation of Price’s advisory Guidelines range as to

supervised release was erroneous. Second, because the issue concerning the Guidelines range calculation has been resolved in this Court, the error is plain. *See Henderson v. United States*, — U.S. —, 133 S.Ct. 1121, 1130, 185 L.Ed.2d 85 (2013) (concluding that, “whether a legal question was settled or unsettled at the time of trial, it is enough that an error be plain at the time of appellate consideration” (internal quotation marks omitted)). Third, the calculation error affected Price’s substantial rights because the record indicates that the erroneous calculation of the advisory Guidelines range caused him to be sentenced to a more severe term of supervised release. *See Ford*, 88 F.3d at 1356 (“The error clearly affected [defendant’s] substantial rights because the extra points caused [him] to be sentenced at a more severe guideline range.”). Finally, “sentencing a defendant at the wrong guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings.” *Id.*

We thus conclude that the district court’s calculation of Price’s advisory Guidelines range concerning supervised release was plainly erroneous and that the error should be recognized and corrected. We therefore vacate and remand for resentencing on the supervised release question.

III.

Pursuant to the foregoing, we affirm Price’s conviction for failing to register under SORNA, vacate the supervised release sentence, and remand for such further sentencing proceedings as may be appropriate.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED



BEYOND SYSTEMS, INC.,
Plaintiff-Appellant,

v.

KRAFT FOODS, INCORPORATED;
Vict. Th. Engwall & Co.; Kraft Foods
Global, Incorporated; Connexus Cor-
poration, Defendants-Appellees,

and

Hydra LLC; John Does
1–20, Defendants,

World Avenue USA, LLC, Intervenor,

James Joseph Wagner; Hypertouch,
Incorporated, Third-Party
Plaintiffs.

No. 13-2137.

United States Court of Appeals,
Fourth Circuit.

Argued: Oct. 29, 2014.

Decided: Feb. 4, 2015.

Background: Purported internet service provider (ISP) brought action against coffee producer, seeking statutory damages under Maryland’s and California’s anti-spam statutes. The United States District Court for the District of Maryland, Peter J. Messitte, Senior District Judge, ruled that ISP was barred from recovery. ISP appealed.

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

- (1) ISP had Article III standing, but
- (2) ISP consented to harm from spam emails, precluding ISP from recovering under Maryland and California anti-spam statutes.

Affirmed.

were ambiguous, we ought defer to the IRS's reasonable construction of this provision.⁴⁸ I would do so.

IV.

For the reasons above, I respectfully dissent.



UNITED STATES of America,
Plaintiff-Appellee

v.

Nicholas W. SCHOFIELD,

Defendant-Appellant.

No. 14-11293.

United States Court of Appeals,
Fifth Circuit.

Sept. 23, 2015.

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Texas to attempted transfer of obscene material to a minor. Defendant appealed.

Holdings: The Court of Appeals held that:

- (1) de novo review, rather than plain error review, applied to issue of whether defendant was required to register under Sex Offender Registration Notification Act (SORNA);
- (2) attempted transfer of obscene material to a minor can qualify as a sex offense under SORNA;
- (3) defendant's conduct in attempting to send video of adult male masturbating

guage and inconsistent with the examples provided in the regulation").

48. The IRS has also adopted this construction of § 7811(d) in various publications that are entitled to *Skidmore* deference. See I.R.S. Manual 13.1.14.3 (Oct. 31, 2004) ("A signed Form 911 or written statement will suspend

to 15-year-old girl was "specified offense against a minor," and thus fell within SORNA residual clause; and

- (4) SORNA residual clause was not ambiguous or vague.

Affirmed.

1. Criminal Law ☞1134.27

The Court of Appeals, not the parties, must determine the appropriate standard of review.

2. Criminal Law ☞1030(3), 1043(1)

De novo review, rather than plain error review, applied to issue of whether defendant was required to register under SORNA, since defendant preserved issues he raised in Court of Appeals and he challenged only district court's legal conclusions, not its factual findings; although defendant did not renew his objection to SORNA registration after district court imposed his sentence, his earlier objections both to presentence report and at his sentencing sufficiently preserved them. Sex Offender Registration and Notification Act, § 111(5)(A), 42 U.S.C.A. § 16911(5)(A).

3. Mental Health ☞469(2)

Attempted transfer of obscene material to a minor can qualify as a sex offense under SORNA, although it was not listed among federal offenses SORNA defined as sex offenses. 18 U.S.C.A. § 1470; Sex Offender Registration and Notification Act, § 111(5)(ii), 42 U.S.C.A. § 16911(5)(ii).

the running of limitations periods for assessment or collection of tax under IRC § 6501 and § 6502. A Form 911 or written statement will not however, suspend the period of limitations for filing refund claims."); I.R.S. Litigation Bulletin 360, *supra*; I.R.S. Form 911, *supra*; I.R.S. Program Manager Tech. Adv. Mem.2007-429, *supra*.

4. Mental Health ↪469(2)

Defendant's conduct in attempting to send video of adult male masturbating to 15-year-old girl was "specified offense against a minor," and thus fell within SORNA residual clause under both non-categorical and categorical approaches for determining what a court could consider when deciding whether defendant's offense qualified for sentencing enhancement under separate statutory provision; key was conduct that contained "sexual component" toward a minor. 18 U.S.C.A. § 1470; Sex Offender Registration and Notification Act, § 111(7), 42 U.S.C.A. § 16911(7).

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

5. Sentencing and Punishment ↪11

When applying the categorical approach for determining what a court can consider when deciding whether a defendant's offense qualifies for a sentencing enhancement under a separate statutory provision, a court compares 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 that triggers the sentencing enhancement.

6. Sentencing and Punishment ↪11

When applying the categorical approach for determining what a court can consider when deciding whether a defendant's offense qualifies for a sentencing enhancement under a separate statutory provision, if the offense of conviction has the same elements as the "generic" crime in the sentencing enhancement, then the prior conviction can serve as the predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime's elements.

7. Sentencing and Punishment ↪11

When applying the non-categorical approach for determining what a court can

consider when deciding whether a defendant's offense qualifies for a sentencing enhancement under a separate statutory provision, a court focuses on the facts, not the elements, relating to the prior conviction; in utilizing the non-categorical approach, the reviewing court may consider reliable evidence concerning whether the prior offense involved conduct or circumstances that are required by the sentencing statute.

8. Constitutional Law ↪1132(60)

Mental Health ↪469(2)

SORNA residual clause was not ambiguous or vague whether applied non-categorically or categorically to determine what a court can consider when deciding whether a defendant's offense qualifies for a sentencing enhancement under a separate statutory provision, and thus defendant had to register as sex offender after pleading guilty to attempted transfer of obscene material to a minor. 18 U.S.C.A. § 1470; Sex Offender Registration and Notification Act, § 111(5)(A)(ii), (7)(I), 42 U.S.C.A. § 16911(5)(A)(ii), (7)(I).

9. Mental Health ↪469(2)

Congress enacted SORNA with the intent to ensnare as many offenses against children as possible as sexual offenses. Sex Offender Registration and Notification Act, § 102 et seq., 42 U.S.C.A. § 16901 et seq.

Brian W. Portugal, Assistant U.S. Attorney, James Wesley Hendrix, Assistant U.S. Attorney, U.S. Attorney's Office, Dallas, TX, for Plaintiff-Appellee.

Frank Alton Granger, Charles, LA, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, DENNIS, and OWEN,
Circuit Judges.

PER CURIAM:

Nicholas W. Schofield pleaded guilty to one count of attempted transfer of obscene material to a minor, and the district court required him, as part of his sentence, to register as a sex offender after his release from prison. Schofield appeals the registration requirement. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In November 2013, Nicholas W. Schofield, who was twenty-four at the time, began sending text messages to a fifteen-year-old girl in San Angelo, Texas. Schofield identified himself as an eighteen-year-old mechanic named "Nick," and he continued to converse with the girl via text messages through February 2014. At that time, an undercover federal agent assumed the girl's side of the conversation, and Schofield continued the conversation with the agent through April 2014. Believing he was still communicating with the girl, Schofield sent the agent images of his erect penis, videos of himself and others masturbating, links to pornographic websites, and text messages describing himself masturbating. Schofield later admitted to sending eight pictures of his penis, three videos of himself masturbating, and messages describing himself masturbating and instructing the girl how to masturbate. Schofield also admitted to soliciting and receiving nude images of the girl.

On May 14, 2014, a grand jury indicted Schofield on one count of transfer of obscene material to a minor and four counts

1. The statute provides that:

Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of

of attempted transfer of obscene material to a minor, in violation of 18 U.S.C. § 1470.¹ Pursuant to a written plea agreement, Schofield pleaded guilty to one count of attempted transfer of obscene material to a minor—specifically, his attempted transfer via text message of a video of an adult male masturbating. The remaining counts were dismissed at sentencing. The district court sentenced Schofield to twenty-four months imprisonment and ordered him to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA).

Prior to and at sentencing, Schofield objected to the district court's requirement that he register as a sex offender under SORNA, arguing that the crime of attempted transfer of obscene material to a minor was not a sex offense within the meaning of SORNA and therefore did not require registration. Schofield contended that, because his offense is neither an enumerated federal offense nor a "specified offense against a minor" under 42 U.S.C. § 16911(5)(A), it is not a sex offense and therefore he is not required to register as a sex offender under SORNA. Schofield also argued that SORNA's definition of "sex offense" under 42 U.S.C. § 16911(5)(A) and (7)(I) is unconstitutionally vague. The district court overruled Schofield's objections and required him to register under SORNA upon release from prison. While Schofield waived the right to appeal his conviction as part of his plea agreement, he reserved the right to appeal the requirement to register as a sex offender. Schofield exercised that right and timely appealed.

16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both. 18 U.S.C. § 1470.

II. STANDARD OF REVIEW

[1, 2] The Government argues that this court's review is limited to plain error because Schofield did not object after the district court pronounced his sentence. Schofield apparently concedes that plain error is the proper standard of review. However, the court, not the parties, must determine the appropriate standard of review. *United States v. Torres-Perez*, 777 F.3d 764, 766 (5th Cir. 2015); see also *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) ("[N]o party has the power to control our standard of review."). Schofield objected both to the presentence report and at his sentencing, raising the same arguments in the district court as he now raises on appeal. Although Schofield did not renew his objection to SORNA registration after the district court imposed his sentence, his earlier objections sufficiently preserved the issues he now raises in this court. Based on Schofield's earlier objections, the district court was aware of his arguments concerning why SORNA registration was not required. Therefore, "the purposes of the preservation requirement were met in th[is] case[]—namely, the [defendant] 'raise[d] a claim of error with the district court in such a manner so that the district court may [have] correct[ed] itself and thus, obviate[d] the need for [this court's] review.'" *Torres-Perez*, 777 F.3d at 767 (quoting *United States v. Mondragon-Santiago*, 564 F.3d 357, 361 (5th Cir. 2009)). Because Schofield preserved the issues he now raises in this court and because he only challenges the district court's legal conclusions (not its factual findings), we review whether he is required to register under SORNA *de novo*. *United States v. Gonzalez-Medina*, 757 F.3d 425, 427 (5th Cir. 2014), cert. denied, — U.S. —, 135 S.Ct. 1529, 191 L.Ed.2d 562 (2015); *United States v. Morgan*, 311 F.3d 611, 613 (5th Cir. 2002) ("We review the district court's legal conclusions, however, *de novo*.").

III. DISCUSSION

SORNA, 42 U.S.C. §§ 16901–16962, establishes a national sex offender registry "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. A sex offender 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." 42 U.S.C. § 16913(a). SORNA defines a "sex offender" as a person "who was convicted of a sex offense." 42 U.S.C. § 16911(1). Excluding exceptions not relevant here, SORNA defines "sex offense" as:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C. § 16911(5)(A). Schofield's criminal offense did not involve sexual contact and was not a military offense, making subsections (i) and (iv) inapplicable here. Additionally, subsection (iii) does not include 18 U.S.C. § 1470, so Schofield's offense is not a sex offense under this subsection. Therefore, Schofield must register as a sex offender only if he attempted to commit an offense under subsection (v) that is "described in" subsection (ii) as "a criminal offense that

is a specified offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii), (v).

SORNA defines “criminal offense” as “a State, local, tribal, foreign, or military offense . . . or other criminal offense.” 42 U.S.C. § 16911(6). SORNA then defines “a specified offense against a minor” as an offense against a minor that involves any of the following:

- (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 section 1801 of Title 18.
- (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.

42 U.S.C. § 16911(7) (emphasis added). Subsection (I), the “SORNA residual clause,” is the relevant provision here since no other provision could encompass Schofield’s offense. Thus, for Schofield’s offense to constitute a sex offense, it must be a “criminal offense” that involves “any conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii), (7)(I). Our analysis of whether Schofield’s attempted transfer of obscene material to a minor constitutes a sex offense proceeds in three parts. First, we consider whether a violation of 18 U.S.C. § 1470 can qualify as a sex offense under SORNA when it is not listed among the federal offenses SORNA defines as sex offenses. Because we conclude that it can qualify as a sex offense, we next consider

whether Schofield’s offense is a “specified offense against a minor” under the SORNA residual clause. Finally, we address whether the SORNA residual clause is ambiguous or unconstitutionally vague. We conclude that because the attempted transfer of obscene material to a minor is a “specified offense against a minor” and because SORNA is neither ambiguous nor vague, Schofield’s offense is a sex offense, requiring SORNA registration.

A. Schofield’s Offense Can Qualify as a Sex Offense Under SORNA

[3] Although SORNA lists a number of federal offenses that qualify as sex offenses, Schofield’s offense—a violation of 18 U.S.C. § 1470—is not among them. Therefore, we first determine whether the attempted transfer of obscene material to a minor can qualify as a sex offense under SORNA. Because it is not an enumerated federal offense under 42 U.S.C. § 16911(5)(A)(iii), a violation of 18 U.S.C. § 1470 can only qualify as a sex offense if it is “a criminal offense that is a specified offense against a minor” under 42 U.S.C. § 16911(5)(A)(ii). Schofield argues that because subsection (iii) does not include 18 U.S.C. § 1470, Congress intended to exclude this offense as one of the federal offenses that qualify as sex offenses under SORNA. Schofield further argues that because Congress excluded 18 U.S.C. § 1470 from subsection (iii), this offense cannot qualify as a sex offense under subsection (ii), as this would extend the statute to offenses beyond those Congress intended to include. While this court has never confronted whether a violation of a federal statute not listed in subsection (iii) can nevertheless qualify as a sex offense, the Eleventh Circuit’s opinion in *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010) (en banc), is instructive.

In *Dodge*, the defendant violated the same federal statute as Schofield and ar-

gued, similar to Schofield, that because 18 U.S.C. § 1470 was not one of the federal offenses listed under 42 U.S.C. § 16911(5)(A)(iii), he could not be required to register as a sex offender under either subsection (ii) or (iii). *Id.* at 1351–52. After examining SORNA’s plain language, structure, legislative history, and purpose, the court rejected the defendant’s argument and held that a violation of 18 U.S.C. § 1470 could fall within subsection (ii). *Id.* at 1352. The court explained that “[t]aken as a whole, the statute does not suggest an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria” and that “[t]o exclude entirely the obscenity statutes from SORNA’s reach would be inconsistent with the broad purpose and scope of SORNA” *Id.* The court went on to hold that “[n]othing in the plain language of 42 U.S.C. § 16911(5)(A)(iii), when read together with the rest of the statute, prohibits an unenumerated federal offense such as 18 U.S.C. § 1470 from qualifying as a ‘specified offense against a minor’ [under subsection (ii)].”² *Id.* at 1353. We agree with the Eleventh Circuit. Additionally, we have previously explained that “SORNA’s language confirms ‘that Congress cast a wide net to ensnare as many offenses against children as possible.’” *Gonzalez-Medina*, 757 F.3d at 431 (quoting *Dodge*, 597 F.3d at 1355). Excluding a federal statute not explicitly enumerated in 42 U.S.C. § 16911(5)(A)(iii) is not consistent with “cast[ing] a wide net.” *Id.* Accordingly, we conclude that a violation of 18 U.S.C. § 1470 can qualify as a sex offense under subsection (ii).

2. The court also explained that “[i]f Congress intended that 42 U.S.C. § 16911(5)(A)(iii) represent a closed universe of federal crimes requiring SORNA registration, Congress would not have listed another specific federal crime in defining ‘specified offense against a minor’ [under § 16911(5)(A)(ii)].” *Dodge*, 597 F.3d at 1353.

B. Schofield’s Offense Falls Within the SORNA Residual Clause

[4] We now consider whether Schofield’s attempted transfer of obscene material to a minor constitutes a “specified offense against a minor” under subsection (ii). To do so, we look to § 16911(7), which includes a list of enumerated offenses and specific conduct that constitute “specified offense[s] as a minor.” However, because Schofield’s offense and conduct toward a fifteen-year-old girl do not fit squarely within any listed offenses or conduct, our inquiry focuses on whether Schofield’s offense involves “[a]ny conduct that by its nature is a sex offense against a minor,” 42 U.S.C. § 16911(7)(I), under the SORNA residual clause. The Supreme Court has announced three separate analytical frameworks that focus courts’ inquiries and control what courts may consider when deciding whether a defendant’s offense qualifies for a sentencing enhancement under a separate statutory provision, such as the SORNA residual clause. *See United States v. Price*, 777 F.3d 700, 704–05 (4th Cir. 2015), cert. denied, — U.S. —, 135 S.Ct. 2911, — L.Ed.2d — (2015). Two of those frameworks are relevant here: the categorical and non-categorical approaches.³

[5–7] First, when applying the categorical approach, courts “compare 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” that triggers the sentencing enhancement. *Descamps v. United States*, — U.S.

3. The third approach, the modified categorical approach, is not relevant to this case and neither party urges us to apply it. We note that some courts refer to the non-categorical approach as the circumstance-specific approach. *E.g., Price*, 777 F.3d at 705.

—, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). “If the [offense of conviction] has the same elements as the ‘generic’ . . . crime [in the sentencing enhancement], then the prior conviction can serve as [the] predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is ‘necessarily . . . guilty of all the [generic crime’s] elements.’” *Id.* at 2283 (last alteration in original) (quoting *Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). Second, courts applying the non-categorical approach focus “on the facts—not the elements—relating to the prior conviction.” *Price*, 777 F.3d at 705. “In utilizing the [non-categorical] approach, the reviewing court may consider reliable evidence concerning whether the prior offense involved conduct or circumstances that are required by the [sentencing] statute.” *Id.*

Schofield urges this court to apply the categorical approach to determine whether his conduct falls within the SORNA residual clause and thus within 42 U.S.C. § 16911(5)(A)(ii), while the Government argues that the non-categorical approach is appropriate here. Schofield argues that when a statute uses the term “convicted,” as SORNA does in 42 U.S.C. § 16911(1), the Supreme Court has directed lower courts to apply the categorical approach. See *Taylor*, 495 U.S. at 588–89, 110 S.Ct. 2143 (approving the use of the categorical approach when the defendant had been convicted of burglary). He further argues that the SORNA residual clause, when read in the context of the overall statute, provides an ambiguous, circular, and vague definition of “sex offense.” Schofield maintains that in the face of this ambiguity, courts have an obligation to apply the

categorical approach and find that conduct does not constitute a sex offense if the elements of the offense do not warrant it.⁴ Finally, Schofield argues that, although the SORNA residual clause was meant to capture as many offenses against children as possible as sex offenses, this does not require or direct courts to employ the non-categorical approach.

The Government contends that the non-categorical approach applies here because the SORNA residual clause makes the conduct of the defendant, not the elements of his offense, the focus of the inquiry. This is reinforced by the fact that the residual clause requires an inquiry into the “nature” of the conduct. Because the focus of the residual clause inquiry is conduct, and not whether the defendant was convicted of a particular crime, the Government argues that the non-categorical approach applies. *Price*, 777 F.3d at 705. The Government points to three separate cases where courts applied the non-categorical approach to interpret the SORNA residual clause. *Price*, 777 F.3d at 709–10 (applying the non-categorical approach to the SORNA residual clause when the defendant was convicted of assault and battery of a high and aggravated nature); *Dodge*, 597 F.3d at 1353–56 (applying the non-categorical approach to the SORNA residual clause when the defendant was convicted of a violation of 18 U.S.C. § 1470 and finding that the defendant committed a sex offense); *United States v. Mi Kyung Byun*, 539 F.3d 982, 990–93 (9th Cir.2008) (applying the non-categorical approach to the SORNA residual clause to determine whether the victim was a minor). The Government also notes that while this court has never applied the non-categorical approach to the SORNA residual clause, it has applied that approach to a different

4. Schofield also argues that the ambiguity in SORNA rises to the level of unconstitutional

vagueness. We address this issue below.

provision of SORNA. *See Gonzalez-Medina*, 757 F.3d at 429–32 (“[T]he language, structure, and broad purpose of SORNA all indicate that Congress intended a non-categorical approach to the age-differential determination in [42 U.S.C. § 16911(5)(C)].”). In that case, we also examined Supreme Court precedent and concluded that, contrary to Schofield’s contention that the term “convicted” requires a categorical approach, “[t]he use of the term ‘convicted’ . . . is not always determinative.” *Id.* at 429.

While circuit precedent and this court’s prior decision in *Gonzalez-Medina* tend to favor the application of the non-categorical approach, we need not decide which approach applies here because Schofield’s offense is a sex offense under both the non-categorical and categorical approaches. We begin with the non-categorical approach. Consistent with the “broad discretion [of courts] to determine what conduct is ‘by its nature’ a sex offense [under SORNA],” *Dodge*, 597 F.3d at 1355, we find that Schofield’s conduct in attempting to send a video of an adult male masturbating to a fifteen-year-old girl falls within the SORNA residual clause. As the court in *Dodge* noted, “[t]he key is conduct that contains a ‘sexual component’ toward a minor,” and “judges do not need a statute to spell out every instance of conduct that is a sexual offense against a minor.” *Id.* Schofield’s sending a video of an adult male masturbating clearly involves engaging with a fifteen-year-old girl on a sexual level, so his conduct includes a sufficiently “sexual component toward a minor” to fall within the SORNA residual clause. *Id.*

When applying the non-categorical approach to the SORNA residual clause, previous courts have considered the similarity between the conduct underlying the defendant’s offense and conduct that clearly requires registration under SORNA. *Dodge*, 597 F.3d at 1356; *Mi Kyung Byun*, 539 F.3d at 989–90. We observe that there is little difference between Schofield’s conduct as charged under 18 U.S.C. § 1470 and conduct that obviously requires registration. For example, 18 U.S.C. § 2252B(b) criminalizes the use of a “misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors.”⁵ Under this statute, which is one of the enumerated federal offenses constituting a sex crime under 42 U.S.C. § 16911(5)(A)(iii), depictions of acts of masturbation are included in the definition of “material that is harmful to minors.” Thus, if Schofield had attempted to deceive a fifteen-year-old girl into viewing the images he transmitted, he certainly would have been required to register under SORNA. As the *Dodge* court explained, “[i]t would be a bizarre result not to compel his registration simply because he is a truthful predator.” *Dodge*, 597 F.3d at 1356.

As with the non-categorical approach, Schofield’s offense also falls within the SORNA residual clause under the categorical approach, which requires us to compare the elements of Schofield’s offense of conviction and the elements of the offense requiring SORNA registration. Under a categorical approach to “[a]ny conduct that by its nature is a sex offense against a minor,” 42 U.S.C. § 16911(7)(I), we must determine whether a defendant’s offense of conviction includes two elements: (1) the victim is a minor and (2) the conduct is sexual in nature. Section 1470 requires that (1) the victim be less than sixteen years old, i.e., a minor, and (2) the material transferred be “obscene.” 18 U.S.C. § 1470. The offense of conviction clearly

5. The Eleventh Circuit also observed that there was little difference between the defendant’s conduct in *Dodge* and conduct that

“would undoubtedly be registerable under 18 U.S.C. § 2252B(b).” *Dodge*, 597 F.3d at 1355–56.

includes the first element of the SORNA residual clause—that the victim be a minor. The transfer of obscene material to a minor also includes the second element—that the conduct be sexual in nature—as the Supreme Court has defined obscenity in exclusively sexual terms. *See Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (“As a result, we now confine the permissible scope of such regulation [of obscene materials] to works which depict or describe sexual conduct.”). Because Schofield’s offense of conviction includes both elements of the SORNA residual clause, his offense is a sex offense under the categorical approach.

C. The SORNA Residual Clause Is Neither Ambiguous, Nor Vague

[8, 9] Because Congress enacted SORNA with the intent to “ensnare as many offenses against children as possible” as sexual offenses, *Gonzalez-Medina*, 757 F.3d at 431 (quoting *Dodge*, 597 F.3d at 1355), the statute necessarily includes multiple parts to the definition of “sex offense.” Schofield argues that defining a sex offense through the residual clause results in an ambiguous and unconstitutionally vague definition because reading (5)(A)(ii) and (7)(I) together defines a “sex offense” as “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii), (7)(I). Schofield points to two district court cases that found ambiguity in the SORNA residual clause because of this “circular” definition. *United States v. Baptiste*, 34 F.Supp.3d 662, 677 (W.D.Tex.2014); *see also United States v. Piper*, No. 1:12-cr-41-jgm-1, 2013 WL 4052897, at *9 (D.Vt. Aug. 12, 2013). Schofield also argues that because SORNA indicates the use of the categorical approach for some subsections but the non-categorical approach for others, it is unconstitutionally vague. Based on what Schofield describes as a circular, ambigu-

ous, and vague definition, he argues that (1) the statute’s ambiguity requires this court to defer to the regulations promulgated by the Department of Justice interpreting and applying SORNA (the “SMART Guidelines”), (2) this court should apply the categorical approach instead of the non-categorical approach, and (3) the SORNA residual clause is unconstitutionally vague.

In claiming that the residual clause is circular or ambiguous, Schofield misreads the statute. As the Government points out, “sex offense” as used in subsections 16911(1) and (5) is a term of art, to be defined later in the statute. Subsection 16911(7)(I) provides part of that definition and in doing so uses the term “sex offense” in its ordinary way, as a catch-all, to expand the universe of crimes encompassed by the statute, and its meaning is refined by the examples that surround it in the statute. The term “sex offense,” when used in its ordinary way, is not ambiguous or vague even if used as a catch-all. The “key” according to the *Dodge* court is whether the offense involves a “sexual component,” *Dodge*, 597 F.3d at 1355, and requiring courts and defendants to determine whether an offense involves a “sexual component” does not render the definition of “sex offense” ambiguous or vague. Indeed, Congress intended to expand the universe of offenses constituting sex offenses, and including an ordinary term to capture offenses not otherwise specified is consistent with that intent. *See id.* (“Congress’s stated purpose was to capture a wider range of conduct in its definition of a ‘sex offense.’”).

Because we do not find the SORNA residual clause circular or ambiguous, we take none of the actions Schofield requests. First given the absence of ambiguity in the statute, we need not address whether deference to the SMART Guidelines under *Chevron, U.S.A., Inc. v. Natu-*

ral Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is required. See *Price*, 777 F.3d at 709 n.9 (“We need not accord *Chevron* deference to [the SMART] Guidelines.”). Second, Schofield’s offense constitutes a sex offense under both the categorical and non-categorical approaches, so we need not consider which approach is more appropriate. Third, given that the residual clause is not ambiguous, it certainly does not rise to the level of unconstitutional vagueness, and we turn to recent Supreme Court guidance to confirm this.

The Supreme Court recently held that the residual clause in the Armed Career Criminals Act (ACCA) was unconstitutionally vague because it essentially required potential defendants to guess what “ordinary” instances of several crimes involved and “how much risk it takes for a crime to qualify as a violent felony.” *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 2557–58, 192 L.Ed.2d 569 (2015). The Court explained that instead of deciding whether a defendant’s conduct fell within the ACCA residual clause, courts were required, under the ACCA, to imagine the kind of conduct that a crime involves in the “ordinary case” and judge whether that abstraction involved a serious potential risk of physical injury. *Id.* Based on the Court’s reasoning in *Johnson*, we conclude that the SORNA residual clause is not unconstitutionally vague whether applied non-categorically or categorically. Under the non-categorical approach to the residual clause, we apply a qualitative standard— “[a]ny conduct that by its nature is a sex offense against a minor”— to the facts of an individual defendant’s case. The Court in *Johnson* noted that “laws [which] require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*,” like the SORNA residual clause, were distinguishable from the law it declared unconstitutionally vague. *Id.* at

2561. Similarly, the application of the categorical approach to the SORNA residual clause does not suffer from the same problems as the application of this approach to the ACCA residual clause. First, while the Court in *Johnson* found that the crimes listed prior to the ACCA residual clause were dissimilar, *Id.* at 2558, the crimes preceding the SORNA residual clause, which provide examples of “specified offense[s] against minor[s],” are much less divergent. For example, video voyeurism and child pornography are much more similar than burglary, arson, and extortion. Compare 42 U.S.C. § 16911(7)(F)-(G), with 18 U.S.C. § 924(e)(2)(B)(ii). Second, the Court in *Johnson*, 135 S.Ct. at 2558, found “repeated attempts and repeated failures” on the part of the Supreme Court and the courts of appeals “to craft a principled and objective standard out of the [ACCA] residual clause.” *Id.* No such failures are apparent with respect to the SORNA residual clause, see, e.g., *Dodge*, 597 F.3d at 1354–56 (applying the SORNA residual clause without noting any difficulty in crafting an appropriate standard).

Because the SORNA residual clause is neither ambiguous nor vague, we may apply its plain language to Schofield’s offense. A violation of 18 U.S.C. § 1470 can qualify as a sex offense under SORNA. Applying either the non-categorical or categorical approach to Schofield’s attempted transfer of obscene material to a minor, his offense of conviction falls within the SORNA residual clause, and he must therefore register as a sex offender.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.



UNITED STATES of America,
Plaintiff-Appellant,

v.

Thomas P. THAYER, Defendant-
Appellee.

No. 21-2385

United States Court of Appeals,
Seventh Circuit.

Argued March 29, 2022

Decided July 21, 2022

Background: Defendant, who had pled guilty to fourth-degree criminal sexual conduct under Minnesota law for groping his 14-year-old daughter while she slept, moved to dismiss indictment for failing to register as a sex offender upon move from Minnesota to Wisconsin, as required under the Sex Offender Registration and Notification Act (SORNA). The United States District Court for the Western District of Wisconsin, James D. Peterson, District Judge, 546 F.Supp.3d 808, adopted report and recommendation of Stephen L. Crocker, United States Magistrate Judge, and granted motion. Government appealed.

Holdings: The Court of Appeals, St. Eve, Circuit Judge, held that:

- (1) as a matter of first impression, courts should employ a circumstance-specific approach when determining whether an offender's conduct was by its nature a sex offense against a minor, as would render the conviction arising from that conduct a "sex offense" under SORNA;
- (2) *Chevron* deference did not apply to Department of Justice's implementing regulations; and
- (3) circumstance-specific approach applied when determining whether defendant's sexual conduct fell under "Romeo and Juliet" exception to SORNA.

Vacated and remanded.

Jackson-Akiwumi, Circuit Judge, filed dissenting opinion.

1. Mental Health ☺469(2)

The formal categorical approach and the modified categorical approach for determining whether a prior conviction constitutes a sex offense within the meaning of Sex Offender Registration and Notification Act (SORNA) require courts to ignore the defendant's actual conduct and look solely to whether the elements of the crime of conviction match the elements of the federal statute. 34 U.S.C.A. § 20901 et seq.

2. Mental Health ☺469(2)

Only where the elements of the state law mirror or are narrower than the federal statute can the prior conviction qualify as a predicate offense requiring compliance with the Sex Offender Registration and Notification Act (SORNA). 34 U.S.C.A. § 20901 et seq.

3. Mental Health ☺469(2)

The circumstance-specific approach for determining whether a prior conviction constitutes a sex offense within the meaning of Sex Offender Registration and Notification Act (SORNA) focuses on the facts, not the elements, of a prior conviction; courts applying the circumstance-specific approach look to the specific way in which an offender committed the crime on a specific occasion to determine whether the prior conviction qualifies as a predicate offense under SORNA. 34 U.S.C.A. § 20901 et seq.

4. Mental Health ☺469(2)

Determining whether Sex Offender Registration and Notification Act (SORNA) calls for categorical or circumstance-specific approach when determining whether prior conviction constitutes a sex

offense within the meaning of SORNA is question of statutory interpretation. 34 U.S.C.A. § 20901 et seq.

5. Criminal Law \Leftrightarrow 1139

Court of Appeals reviews district court's interpretation of federal statute de novo.

6. Statutes \Leftrightarrow 1082

In interpreting a statute, court begins with text, attending also to structure of statute as a whole and any relevant legislative history.

7. Mental Health \Leftrightarrow 469(4)

In interpreting Sex Offender Registration and Notification Act (SORNA), court considers any potential constitutional implications arising from applying circumstance-specific analysis when determining whether a prior conviction constitutes a sex offense within the meaning of SORNA. 34 U.S.C.A. § 20901 et seq.

8. Mental Health \Leftrightarrow 469(4)

In interpreting Sex Offender Registration and Notification Act (SORNA), court examines practical difficulties and potential unfairness of circumstance-specific approach for determining whether a prior conviction constitutes a sex offense within the meaning of SORNA. 34 U.S.C.A. § 20901 et seq.

9. Mental Health \Leftrightarrow 469(2)

Courts should employ a circumstance-specific approach which allows court to examine particular circumstances in which offender committed the crime on a particular occasion, rather than categorical approach, when determining whether an offender's conduct was by its nature a sex offense against a minor, as would render the conviction arising from that conduct a "sex offense" under Sex Offender Registration and Notification Act (SORNA); Congress was clearly capable of tethering

the definition of "sex offense" to the elements of a crime but elected not to do so and legislative record suggested that Congress intended provisions to apply to a broad range of conduct by child predators. 34 U.S.C.A. §§ 20911(5)(A)(ii), 20911(7)(I).

10. Statutes \Leftrightarrow 1377

Courts do not lightly assume that Congress has omitted from its adopted text the same requirements it nonetheless intends to apply, and the court's reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.

11. Statutes \Leftrightarrow 1211

As a general matter, when statutory language is obviously transplanted from other legislation, courts have reason to think it brings the old soil with it.

12. Administrative Law and Procedure \Leftrightarrow 2210

Chevron deference to agency interpretations of federal statutes is warranted only where the tools of statutory construction fail to reveal a clear meaning.

13. Administrative Law and Procedure \Leftrightarrow 2285

Mental Health \Leftrightarrow 469(2)

Chevron deference did not apply to Department of Justice's regulations implementing Sex Offender Registration and Notification Act (SORNA) that favored a categorical approach to determining whether an offender's conduct was by its nature a sex offense against a minor, as would render conviction arising from that conduct a "sex offense" under SORNA; the tools of statutory construction revealed a clear meaning of SORNA, specifically that courts should employ a circumstance-specific approach that allows court to examine particular circumstances in which offender committed the crime on a particular occa-

sion. 34 U.S.C.A. §§ 20911(5)(A)(ii), 20911(7)(I).

14. Jury ~~34~~(6)

Where defendant's punishment may be increased based on facts not found by jury, such as when dealing with sentencing enhancements or mandatory minimums, Sixth Amendment often compels categorical approach. U.S. Const. Amend. 6.

15. Mental Health ~~34~~69.5

The government bears the burden of proving beyond a reasonable doubt the defendant was previously convicted of a sex offense under Sex Offender Registration and Notification Act (SORNA), an essential element of statute requiring compliance with SORNA. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5)(A)(ii), 20911(7)(I).

16. Mental Health ~~34~~69(2)

Circumstance-specific approach which allows court to examine particular circumstances in which offender committed the crime on a particular occasion, rather than categorical approach, applied in determining whether defendant's sexual conduct with 14-year-old daughter fell under "Romeo and Juliet" exception to Sex Offender Registration and Notification Act (SORNA) relating to consensual sex between minors; exception relied on fact-based qualifiers rather than elements of an offense. 34 U.S.C.A. § 20911(5)(C).

West Codenotes

Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

Appeal from the United States District Court for the Western District of Wisconsin. No. 20-cr-88 — **James D. Peterson, Chief Judge**.

Julie Suzanne Pfluger, Megan R. Stelljes, Attorneys, Office of the United States

Attorney, Madison, WI, for Plaintiff-Appellant.

Joseph Aragorn Bugni, Jessica Arden Ettinger, Attorneys, Federal Defender Services of Wisconsin, Inc., Madison, WI, for Defendant-Appellee.

Roy T. Englert, Jr., Attorney, Kramer Levin Robbins Russell, Washington, DC, for Amicus Curiae.

Before FLAUM, ST. EVE, and JACKSON-AKIWUMI, Circuit Judges.

ST. EVE, Circuit Judge.

Appellant Thomas Thayer pled guilty to fourth-degree criminal sexual conduct under Minnesota law for groping his 14-year-old daughter while she slept. When Thayer later moved to Wisconsin without registering as a sex offender, the government indicted him for failing to comply with the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901, *et seq.*, in violation of 18 U.S.C. § 2250(a). The district court dismissed the indictment, finding § 20911(5)(A)(ii), applied through § 20911(7)(I), and § 20911(5)(C) of SORNA were categorically misaligned with Thayer's Minnesota statute of conviction. The government appeals, arguing the district court erred in analyzing these provisions of SORNA under the categorical method. We agree with the government and vacate and remand the judgment of the district court.

I.

A.

Before delving into the factual and procedural background, we review a few relevant legal principles.

SORNA establishes a comprehensive national system of registration for sex offenders, the purpose of which is to "protect the public from sex offenders and

offenders against children.” *Id.* § 20901. SORNA defines a “sex offender” as “an individual who was convicted of a sex offense.” *Id.* § 20911(1). “Sex offense” in turn encompasses both “a criminal offense that has an element involving a sexual act or sexual contact with another” and “a criminal offense that is a specified offense against a minor.” *Id.* § 20911(5)(A)(i)–(ii). As relevant to the latter definition of “sex offense,” a “specified offense against a minor” includes “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. § 20911(7)(I). Certain categories of consensual sexual conduct are exempted from the definition of “sex offense,” specifically “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.” *Id.* § 20911(5)(C). The clause of § 20911(5)(C) relating to consensual sex between minors is colloquially referred to as the “Romeo and Juliet” exception. SORNA obligates sex offenders to register as such in each state in which they reside, work, or are a student. *Id.* § 20913(a).

Although itself a civil regulatory scheme, noncompliance with SORNA is a crime under 18 U.S.C. § 2250. Criminal liability under § 2250 turns upon whether a prior conviction constitutes a “sex offense” within the meaning of SORNA. Answering this question requires courts to examine the underlying conviction and determine whether it satisfies SORNA’s statutory definition. The Supreme Court has identified three analytical frameworks to guide the lower courts, and to limit the universe of materials upon which they may rely, in making this determination.

[1, 2] The first and the second—the formal categorical approach and the modi-

fied categorical approach—require courts to ignore the defendant’s actual conduct and “look solely to whether the elements of the crime of conviction match the elements of the federal [] statute.” *Gamboa v. Daniels*, 26 F.4th 410, 415 (7th Cir. 2022) (internal quotations omitted); *see also Shular v. United States*, — U.S. —, 140 S. Ct. 779, 783, 206 L.Ed.2d 81 (2020). Only where “the elements of the state law mirror or are narrower than the federal statute can the prior conviction qualify as a predicate . . . offense.” *Gamboa*, 26 F.4th at 415 (internal quotations omitted).

[3] By contrast, the third method, the circumstance-specific approach, focuses on the facts—not the elements—of a prior conviction. Courts applying the circumstance-specific approach “look[] to ‘the specific way in which an offender committed the crime on a specific occasion’ to determine whether the prior conviction qualifies as a predicate offense under the federal statute at issue.” *United States v. Elder*, 900 F.3d 491, 498 (7th Cir. 2018) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)).

B.

Now to the specifics of this appeal. In a November 2003 criminal complaint, minor J.B. accused her father, appellant Thomas Thayer, of molesting her when she was 14 years old. According to J.B., she and Thayer fell asleep after a Christmas party in 2001. J.B. awoke to find her bra unhooked, her pants and underwear pulled aside, and Thayer touching her vagina. Upon noticing J.B. waking up, Thayer rolled over and went to sleep. During a subsequent law enforcement interview, Thayer admitted he was drunk on the night in question, “[found] himself in a bad position” with his daughter, and must have mistaken J.B. for his wife. Thayer ultimately pled guilty to

fourth-degree criminal sexual conduct under Minnesota law. Minn. Stat. § 609.345(1)(b). Thayer was sentenced to 33 months' imprisonment (stayed for 10 years) and 10 years' probation and was required by Minnesota law to register as a sex offender for 10 years. Minn. Stat. §§ 243.166(1)(a)(i)(iii), 243.166(6)(a).

Thayer moved to Wisconsin sometime between August 2017 and February 2020. Thayer did not register as a sex offender in Wisconsin. On July 9, 2020, the government indicted Thayer for failing to register as a sex offender as required by SORNA. Thayer moved to dismiss the indictment, arguing his Minnesota conviction did not qualify as a "sex offense" triggering an obligation to register. Applying a categorical analysis to the definition of "sex offense" under 34 U.S.C. § 20911(5)(A)(i) and to the Romeo and Juliet exception housed in 34 U.S.C. § 20911(5)(C), Thayer identified a mismatch between SORNA and the Minnesota statute underlying his conviction.

In a January 4, 2021 report, the magistrate judge recommended granting Thayer's motion to dismiss the indictment. Apparently looking to § 20911(5)(A)(i), the magistrate judge applied a categorical analysis and determined there was a mismatch between the Minnesota statute and SORNA's definition of "sexual contact." While the magistrate judge also identified an "elemental distinction" between the Minnesota statute and SORNA's Romeo and Juliet exception, he questioned whether that distinction satisfied the realistic probability of application threshold. The government objected to the magistrate judge's recommendation, reiterating its views that (1) the court should look to § 20911(5)(A)(ii) to define sex offense and that (2) § 20911(5)(C) and §§ 20911(5)(A)(ii) and (7)(I) should be analyzed under a circumstance-specific method.

The district court overruled the government's objections and, while it disagreed with the magistrate judge's analysis, accepted the report's ultimate conclusion. The district court held § 20911(5)(A)(ii), operating through § 20911(7)(I), provided the relevant definition of "sex offense" under SORNA—not, as Thayer suggested, § 20911(5)(A)(i). Nonetheless, the district court agreed § 20911(5)(A)(ii), applied through § 20911(7)(I), and the § 20911(5)(C) Romeo and Juliet exception called for a categorical approach and were misaligned with the Minnesota statute of conviction. The district court dismissed the indictment against Thayer on June 29, 2021.

II.

The government raises two narrow issues on appeal. First, the government contends the district court erred in analyzing § 20911(5)(A)(ii), as applied through § 20911(7)(I), under a categorical method. Second, the government claims the district court's application of a categorical approach to the Romeo and Juliet exception in § 20911(5)(C) runs afoul of *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015), which requires a circumstance-specific approach.

[4, 5] Determining whether a federal statute calls for a categorical or circumstance-specific approach is a question of statutory interpretation. *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2327, 204 L.Ed.2d 757 (2019). We review a district court's interpretation of a federal statute de novo. *White v. United Airlines, Inc.*, 987 F.3d 616, 620 (7th Cir. 2021).

[6–8] As with any issue of statutory interpretation, we begin with the text, attending also to the structure of the statute as a whole and any relevant legislative history. *Nijhawan*, 557 U.S. at 36–40, 129

S.Ct. 2294; *see also Taylor v. United States*, 495 U.S. 575, 600–01, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). Next, we consider any potential constitutional implications arising from applying a circumstance-specific analysis. *Descamps v. United States*, 570 U.S. 254, 267, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Finally, we examine the “practical difficulties and potential unfairness” of the circumstance-specific approach. *Taylor*, 495 U.S. at 601–02, 110 S.Ct. 2143.

A.

1.

For the purposes of SORNA, a “sex offender” is “an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). “Sex offense” is a defined term meaning:

- (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*[.]

Id. § 20911(5)(A) (emphasis added). A “specified offense against a minor” is itself defined to mean:

- [A]n offense against a minor that involves any of the following:
- (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 section 1801 of Title 18.
- (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.

Id. § 20911(7) (emphasis added).

[9] This appeal requires us to evaluate whether the definition of “sex offense” in § 20911(5)(A)(ii), as applied through § 20911(7)(I)—not § 20911(5)(A)(ii) broadly—is analyzed under a categorical approach or the circumstance-specific approach. This is an issue of first impression in this circuit. Every other court of appeals to consider this question—the Fourth, Eighth, Ninth, and Eleventh Circuits—has concluded the circumstance-specific approach applies. *United States v. Dailey*, 941 F.3d 1183 (9th Cir. 2019); *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016); *United States v. Price*, 777 F.3d 700 (4th Cir. 2015); *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010). We join our sister circuits and hold that § 20911(5)(A)(ii), as applied through § 20911(7)(I), demands a circumstance-specific analysis.

The text of SORNA, with its layered, cascading definitions, is not a model of clarity. The word “offense” on its own may refer either to “a generic crime” or to “the specific acts in which an offender engaged on a specific occasion.” *Davis*, 139 S. Ct. at 2328 (quoting *Nijhawan*, 557 U.S. at 33–34, 129 S.Ct. 2294). The meaning of “offense” depends upon its context within the surrounding statutory language. *See id.* The text of §§ 20911(5)(A)(ii) and (7)(I) makes clear “offense” refers to the “specific acts in which an offender engaged on a specific occasion.” *Id.* As noted, § 20911(7)(I) provides that a “specified offense against a minor” means an “offense” against a minor that involves “[a]ny conduct that by its nature is a sex offense

against a minor.” Thus, whether a given “offense” constitutes a “sex offense” under §§ 20911(5)(A)(ii) and (7)(I) turns upon the “nature” of the “conduct” that “offense” “involve[d].” 34 U.S.C. § 20911(7)(I). Explicit focus on the “conduct” underlying the prior offense, as opposed to the elements of that offense, refers to the specific circumstances of how a crime was committed, not to a generic offense. See *Nijhawan*, 557 U.S. at 37–39, 129 S.Ct. 2294; see also *Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 1218, 200 L.Ed.2d 549 (2018). The term “by its nature”—which typically denotes something’s “normal and characteristic quality” or “basic or inherent features”—reinforces this conclusion. *Davis*, 139 S. Ct. at 2329 (internal quotations omitted).

Section 20911(7)(I) directs courts to evaluate the nature of an individual’s conduct, not the nature of an offense or of a conviction. This grammatical structure distinguishes § 20911(7)(I) from 18 U.S.C. § 16(b), the statute at issue in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) and *Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), and from 18 U.S.C. § 924(c)(3)(B), the statute at issue in *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019). See *Davis*, 139 S. Ct. at 2329 (describing “the language of § 924(c)(3)(B) [a]s almost identical to the language of § 16(b)”). Section 16(b) defines a “crime of violence” as, in relevant part, an “offense that . . . by its nature[] involves a substantial risk” of the application of physical force. 18 U.S.C. § 16(b). The Supreme Court held a categorical analysis applied, observing the term “by its nature” modified “offense” and concluding the provision “requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner’s crime.” *Leocal*, 543 U.S. at 7, 125 S.Ct.

377; see also *Davis*, 139 S. Ct. at 2329; *Dimaya*, 138 S. Ct. at 1217. While SORNA’s highest-level definition of “sex offender” in § 20911(1) refers to a conviction—a term typically signifying a “crime as generally committed” and a categorical analysis—it is furthest in terms of proximity from the language of the specific sections at issue. *Dimaya*, 138 S. Ct. at 1217 (cleaned up); see also, e.g., *Taylor*, 495 U.S. at 600–01, 110 S.Ct. 2143. Whatever trivial ambiguity created by the use of “convicted” in § 20911(1) is consistently resolved in favor of a circumstance-specific analysis by the plain text of §§ 20911(5)(A)(ii) and (7)(I). *Dailey*, 941 F.3d at 1193.

[10] The juxtaposition of § 20911(5)(A)(i) and § 20911(5)(A)(ii) strengthens this conclusion. Section 20911(5)(A)(i) defines sex offense as “a criminal offense that has an *element* involving a sexual act or sexual contact with another.” 34 U.S.C. § 20911(5)(A)(i) (emphasis added). It refers explicitly to the “elements” of a crime in its definition of a sex offense, pointing conclusively to a categorical analysis. *United States v. Taylor*, — U.S. —, 142 S.Ct. 2015, 2020, 213 L.Ed.2d 349 (2022); *Rogers*, 804 F.3d at 1237. Section 20911(5)(A)(ii), in contrast, does not mention the elements of a crime. Instead, it defines a sex offense as “a criminal offense that is a specified offense against a minor.” 34 U.S.C. § 20911(5)(A)(ii). Congress was clearly capable of tethering the definition of “sex offense” to the elements of a crime but elected not to do so in § 20911(5)(A)(ii). “We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *Jama v. Immigr.*

& Customs Enft, 543 U.S. 335, 341, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005).

[11] SORNA's legislative history and purpose support a circumstance-specific approach to §§ 20911(5)(A)(ii) and (7)(I). SORNA's predecessor, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 *et seq.* (1994 ed.) (the "Wetterling Act"), conditioned federal funding to the states upon adoption of sex offender registration laws.¹ *Id.* § 14071(g)(2); *Gundy v. United States*, — U.S. —, 139 S.Ct. 2116, 2121, 204 L.Ed.2d 522 (2019). Congress quickly realized the Wetterling Act did not achieve the desired effect and passed SORNA as a "comprehensive bill to address the growing epidemic of sexual violence against children" to "address loop-holes and deficiencies" created by the resultant patchwork of inconsistent and varied state registration laws. H.R. Rep. No. 109-218 at 22 (2005). Of particular concern to Congress were "missing" or "lost" sex offenders who evaded registration require-

ments. *Gundy*, 139 S. Ct. at 2121. Congress intended, then, to fashion a wide net ensnaring as many child sex offenders as possible. *See id.* Accordingly, the declared purpose of SORNA is to "protect the public from . . . offenders against children." 34 U.S.C. § 20901. Sections 20911(5) and 20911(7) are framed as expansions of the definitions of "sex offense" and "specified offense against a minor," respectively. 34 U.S.C. §§ 20911(5), (7). The legislative record suggests Congress intended §§ 20911(5)(A)(ii) and (7)(I) to apply to a broad range of conduct by child predators.

[12, 13] Thayer directs our attention to the Department of Justice's regulations implementing SORNA, which favor a categorical approach to §§ 20911(5)(A)(ii) and (7)(I). *See* Office of the Attorney General, National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,052 (Jul. 2, 2008) [the SMART Guidelines]. *Chevron* deference to agency interpretations of federal statutes is warranted only where the tools of statutory

1. Thayer points to structural and linguistic similarities between the Wetterling Act's definition of "criminal offense against a victim who is a minor" and SORNA's definition of "specified offense against a minor" to suggest both refer to categories of criminal offenses, meaning §§ 20911(5)(A)(ii) and (7)(I) must be analyzed categorically. *Compare* 34 U.S.C. § 20911(7), *with* 42 U.S.C. § 14071(a)(3)(A). The dissent, too, points to § 14071(a)(3)(A)'s broad characterization of "criminal offense against a victim who is a minor" as "any criminal offense in a range of offenses specified by State law which is comparable to or exceeds" the subsequent enumerated offenses as evidence the Wetterling Act demanded a categorical analysis and §§ 20911(5)(A)(ii) and (7)(I) require the same treatment. Thayer and the dissent disregard the Wetterling Act's and SORNA's distinct structure and functions. Unlike SORNA, the Wetterling Act did not itself form the basis of independent criminal liability. Instead, the Wetterling Act merely established minimum conditions state registration laws had to meet to receive federal

funding. *Gundy*, 139 S. Ct. at 2121. There was no reason to analyze, categorically or otherwise, whether a prior conviction constituted a "criminal offense against a victim who is a minor," so the statutory language upon which the dissent relies does not bear the desired weight. It is entirely unsurprising, then, that Thayer fails to point to any precedent suggesting § 14071(a)(3)(A) itself was analyzed categorically. It is true that, as a general matter, "when statutory language 'is obviously transplanted from . . . other legislation,' we have reason to think 'it brings the old soil with it.'" *Davis*, 139 S. Ct. at 2331 (quoting *Sekhar v. United States*, 570 U.S. 729, 733, 133 S.Ct. 2720, 186 L.Ed.2d 794 (2013)). When drafting § 20911(7), however, Congress expressly omitted the portion of § 14071(a)(3)(A) cited by the dissent. Even if we are to understand § 14071(a)(3)(A) amounted to a legislative preference for a categorical analysis of the Wetterling Act (and we are not convinced), Congress elected to leave this "soil" in the past when drafting § 20911(7).

construction fail to reveal a clear meaning, and Thayer concedes that is not the case here. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Consequently, we decline to accord the SMART Guidelines interpretive weight. Whatever the preference of the Department of Justice, the text of §§ 20911(5)(A)(ii) and (7)(I) controls: a circumstance-specific analysis applies. *See, e.g., Dailey*, 941 F.3d at 1190–93; *Hill*, 820 F.3d at 1006; *Price*, 777 F.3d at 709 n.9.

[14, 15] Applying a circumstance-specific analysis to §§ 20911(5)(A)(ii) and (7)(I) does not implicate the same practical and Sixth Amendment concerns present in other contexts. Where a defendant's punishment may be increased based on facts not found by a jury, such as when dealing with sentencing enhancements or mandatory minimums, the Sixth Amendment often compels a categorical approach. *See Davis*, 139 S. Ct. at 2327; *Descamps*, 570 U.S. at 269–70, 133 S.Ct. 2276. Even applying the circumstance-specific approach, the government bears the burden of proving beyond a reasonable doubt the defendant was previously convicted of a sex offense under SORNA, an essential element of § 2250(a). If Thayer elects to go to trial, he is entitled to put the government to its burden before a jury. Should Thayer decide to plead guilty, he will concede the elements of § 2250(a) and waive his Sixth Amendment right to a jury determination of same. *Descamps*, 570 U.S. at 269–70, 133 S.Ct. 2276.

Thayer points to various practical difficulties under the circumstance-specific approach in determining whether the factual

2. *Johnson* briefly summarizes and reiterates the Supreme Court's holding and reasoning in *Taylor*. 576 U.S. at 596, 604–05, 135 S.Ct. 2551. Ultimately, *Johnson* examines whether § 924(e)(2)(B)(ii)'s residual clause is unconsti-

circumstances underlying his Minnesota conviction constitute a sex offense. Again, the government bears the burden of proving, beyond a reasonable doubt, Thayer is a sex offender. Any practical difficulties in meeting this threshold, evidentiary or otherwise, favor Thayer. *See Nijhawan*, 557 U.S. at 42, 129 S.Ct. 2294 (“[S]ince the Government must show the amount of loss by clear and convincing evidence, uncertainties created by the passage of time are likely to count in the alien’s favor.”). The dissent is concerned about the possibility of a defendant admitting to underlying conduct when pleading guilty to a state crime being held to his affirmation under oath in a subsequent SORNA proceeding. Of course, pleading guilty and avoiding the uncertainty of a trial generally presents benefits to both defendants and the government. The chance a defendant may later regret his decision to avail himself of these advantages or realize he misjudged the consequences does not alter our assessment of whether a categorical or circumstance-specific analysis applies to these provisions of SORNA.

Like the Fourth, Eighth, Ninth, and Eleventh Circuits, we conclude § 20911(5)(A)(ii), as applied through § 20911(7)(I), must be analyzed under the circumstance-specific method.

2.

The foregoing analysis is fully consistent with the Supreme Court's precedent in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (and its progeny, *Johnson v. United States*, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015)²) and our precedent in *United*

tutionally vague, holding it is. *Id.* at 597–606, 135 S.Ct. 2551. For our purposes, *Johnson* presents little additional analytical value. *Taylor* provides the relevant precedent for interpreting § 924(e)(2)(B)(ii).

States v. Walker, 931 F.3d 576 (7th Cir. 2019). In *Taylor*, the Supreme Court analyzed § 924(e)(2)(B)(ii) of the Armed Career Criminal Act (“ACCA”), which provides for sentencing enhancements for those with “three previous convictions . . . for a violent felony.” 18 U.S.C. § 924(e)(1). ACCA defines the term “violent felony” to mean “any crime punishable by imprisonment for a term exceeding one year . . . that” “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii). This provision of ACCA shares rough parallels with the provisions of SORNA at issue here: § 20901(1) and § 924(e)(1) both refer to convictions and § 20911(7) and § 924(e)(2)(B)(ii) both deal with crimes or offenses that involve specific conduct. Despite the superficial similarity between §§ 20911(5)(A)(ii) and (7)(I) and § 924(e)(2)(B)(ii), however, *Taylor*’s application of a categorical analysis to the latter does not mandate similar treatment for the former.

First, unlike § 20911(7)(I), § 924(e)(2)(B)(ii) includes a list of generic crimes, such as burglary, arson, and extortion. The Supreme Court determined these generic crimes demanded generic treatment. *Taylor*, 495 U.S. at 589–90, 600–01, 110 S.Ct. 2143. By contrast, while other portions of § 20911(7) refer to generic crimes—such as solicitation in § 20911(7)(E) or voyeurism under 18 U.S.C. § 1801 in § 20911(7)(F)—§ 20911(7)(I) addresses specific conduct alone. While the dissent considers this structural distinction (which it omits from its chart comparing the two statutes) insignificant and urges us to disregard it and treat the two statutes similarly, we are limited to considering the statute as drafted by Congress. Unlike § 924(e)(2)(B)(ii), when drafting § 20911(7),

Congress separated generic crimes and specific conduct into isolated subsections, and we must interpret § 20911(7)(I) accordingly. Second, ACCA’s legislative history unequivocally demonstrates “the enhancement provision has always embodied a categorical approach to the designation of predicate offenses.” *Id.* at 588–89, 601, 110 S.Ct. 2143. As previously discussed, SORNA’s legislative history points decisively in the opposite direction. Third, applying a circumstance-specific analysis to a sentencing enhancement raises practical difficulties and Sixth Amendment concerns that are not at issue when dealing with SORNA. *Id.* at 601–02, 110 S.Ct. 2143; *see also Johnson*, 576 U.S. at 605, 135 S.Ct. 2551.

In *Walker*, we concluded the Tier II and Tier III provisions in §§ 20911(3)–(4) of SORNA—which determine how long a sex offender must register—require a hybrid categorical and circumstance-specific analysis. 931 F.3d at 580. Tier classifications differ from the definition of “sex offender” in several crucial respects that render *Walker* inapplicable in this case. Unlike §§ 20911(5)(A)(ii) and (7)(I), SORNA’s tiering provisions instruct the court to compare a predicate offense to enumerated federal crimes. 34 U.S.C. §§ 20911(3)–(4). This compels a categorical approach. *Walker*, 931 F.3d at 579–80. Moreover, we did not conclude a hybrid approach applies throughout SORNA or preclude an entirely circumstance-specific inquiry in a different section of the statute. Sections 20911(5)(A)(ii) and 20911(7)(I) are wholly distinct from §§ 20911(3)–(4). Finally, the tiering provisions come into play only after a jury finds beyond a reasonable doubt a defendant committed a sex offense or after a defendant admits as much in a guilty plea. Thayer therefore overreads *Walker*.

B.

SORNA’s Romeo and Juliet exception excludes from the definition of “sex of-

fense” consensual sex where “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). The Minnesota statute under which Thayer was convicted criminalizes sexual conduct both where (1) “the complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant” and where (2) “the actor is . . . in a current or recent position of authority over the complainant.” Minn. Stat. § 609.345(1)(b). Applying a categorical analysis to SORNA’s Romeo and Juliet exception, the district court held that, because Minnesota criminalizes sex where one actor is in a position of authority over the other irrespective of the age differential between the two, the Romeo and Juliet exception and the Minnesota statute are categorically misaligned.

The district court’s analysis runs headlong into our precedent in *Rogers*, which held § 20911(5)(C) requires a circumstance-specific approach. 804 F.3d at 1237. Indeed, in a subsequent, unrelated case over which he presided, the district judge appears to have realized his error. See *Harder v. United States*, No. 21-cv-188-jdp, 2021 WL 3418958, at *6 & n.2 (W.D. Wis. Aug. 5, 2021) (noting “the SORNA carve-out for a close-in-age defendant does not call for categorical analysis” which “is a point that I missed in my decision in [*United States v.] Thayer* [546 F.Supp.3d 808 (W.D. Wis. 2021)]”). On appeal, Thayer asks us to overrule *Rogers* and find § 20911(5)(C) calls for a categorical analysis. We decline Thayer’s invitation, both because the holding in *Rogers* is correct and because doing so would compound the error by creating a direct circuit split with the Fifth Circuit. See *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014).

Section 20911(5)(C) delineates the Romeo and Juliet exception based on “offense[s] involving . . . conduct.” 34 U.S.C. § 20911(5)(C). As noted above, depending on the context of the statute and the surrounding language, “offense” may refer either to “a generic crime” or to “the specific acts in which an offender engaged on a specific occasion.” *Davis*, 139 S. Ct. at 2328 (quoting *Nijhawan*, 557 U.S. at 33–34, 129 S.Ct. 2294). The Romeo and Juliet exception’s focus on conduct, as opposed to elements, indicates “offense” refers to specific acts instead of to a generic crime. See *Dimaya*, 138 S. Ct. at 1218; *Nijhawan*, 557 U.S. at 37–39, 129 S.Ct. 2294; see also *Rogers*, 804 F.3d at 1237. The subsequent string of granular, fact-based qualifiers reinforces this conclusion. Section 20911(5)(C) applies only “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.’” *Rogers*, 804 F.3d at 1237 (quoting § 20911(5)(C)) (emphasis in original). These modifiers refer to the specific, individualized facts and circumstances of an offense, not the general elements. In *United States v. Gonzalez-Medina*, which predates *Rogers*, the Fifth Circuit reached the same conclusion based on much the same reasoning. 757 F.3d at 428–32.

Thayer suggests subsequent Supreme Court decisions in *Mathis v. United States*, 579 U.S. 500, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016), *Dimaya*, and *Shular v. United States*, — U.S. —, 140 S. Ct. 779, 206 L.Ed.2d 81 (2020) compel the opposite result. These cases offer little relevant guidance on determining whether § 20911(5)(C) requires a circumstance-specific approach at the outset and alter neither our analysis nor our ultimate conclusion. Both *Mathis* and *Shular* deal with provisions of ACCA already established to operate under a cat-

egorical framework and analyze, instead, which of the two potential categorical methods (formal or modified) applies. *Shular*, 140 S. Ct. at 783–84; *Mathis*, 579 U.S. at 506–07, 136 S.Ct. 2243. The text of the ACCA provisions at issue in *Mathis* and *Shular*—§ 924(e)(2)(B)(ii) and § 924(e)(2)(A)(ii), respectively—differ materially from § 20911(5)(C). Neither includes a list of factual qualifiers to the degree of specificity and nuance seen in § 20911(5)(C). Indeed, § 924(e)(2)(B)(ii)—thoroughly analyzed in *Taylor* and discussed above—enumerates a series of generic offenses. Similarly, *Dimaya* analyzes the definition of “crime of violence” in § 16(b), which focuses on the nature of the offense. *Dimaya*, 138 S. Ct. at 1217; see also *Leocal*, 543 U.S. at 7, 125 S.Ct. 377. Section 20911(5)(C), on the other hand, places conduct at the forefront of the analysis.

[16] We affirm our prior holding in *Rogers*; the text of § 20911(5)(C) compels a circumstance-specific analysis.

III.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

Jackson-Akiwumi, Circuit Judge,
dissenting.

The issue presented in this case is a close one; both sides have good arguments. The majority opinion thoroughly lays out

the best reasons for adopting the government’s position. Ultimately, however, I disagree with my colleagues’ conclusion that 34 U.S.C. § 20911(7)(I) calls for a circumstance-specific approach. As I see it, only when read in isolation does subsection (7)(I)’s reference to “conduct” suggest that courts should look at the underlying facts of a prior conviction. When viewed in context with the rest of the statute, the Sex Offender Registration and Notification Act’s definition for “specified offense against a minor” closely mirrors other statutes that the Supreme Court has held require a categorical approach. And although I recognize that my reading of the statute would create a circuit split, I disagree with the opinions of our sister circuits for the same reasons that I disagree with the majority opinion.

In particular, I see stronger parallels than the majority opinion does between § 20911(7)(I) and the residual clause of the Armed Career Criminal Act’s definition for “violent felony.” See 18 U.S.C. § 924(e)(2)(B)(ii); *Johnson v. United States*, 576 U.S. 591, 604, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (holding that residual clause is categorical). Both provisions are part of cascading statutory definitions. Both statutes start with a reference to the defendant’s prior convictions, before laying out different definitions for the qualifying convictions. And in defining the relevant offenses, both § 20911(7)(I) and § 924(e)(2)(B)(ii) refer to the offender’s “conduct.” Indeed, the relevant sections of each statute are strikingly similar:

	34 U.S.C. § 20911	18 U.S.C. § 924(e)
Reference to prior convictions	<p>"The term 'sex offender' means an individual who was <i>convicted</i> of a sex offense." 34 U.S.C. § 20911(1) (emphasis added).</p>	<p>Mandatory minimum applies to any offender who "has three previous <i>convictions</i> . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1) (emphasis added).</p>
Relevant subsection defining those prior convictions	<p>Sex offense includes "an offense against a minor that involves . . . [a]ny <i>conduct</i> that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(5)(A)(ii) and (7)(I) (emphasis added).</p>	<p>"[T]he term 'violent felony' means any [felony] crime . . . that . . . involves <i>conduct</i> that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).</p>

Beyond the provisions at issue here and in *Johnson*, the statutes have additional similarities. Just as a categorical interpretation of § 924(e)(2)(B)(ii) is consistent with the categorical approach used elsewhere in the ACCA, see *Taylor v. United States*, 495 U.S. 575, 600–01, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), a categorical interpretation of § 20911(7)(I) is consistent with the categorical approach used by other parts of SORNA. We have said that the definition of "sex offense" used in § 20911(5)(A)(i) is categorical, *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015), as are the definitions for "Tier II" and "Tier III" sex offender used in § 20911(3) and (4), *United States v. Walker*, 931 F.3d 576, 581 (7th Cir. 2019)

(adopting hybrid approach that starts with categorical method). Sections 20911(5)(A)(iii) and (iv) likewise use a categorical approach because they instruct courts to compare a predicate offense to enumerated federal and military crimes. The only outlier is § 20911(5)(C)'s "Romeo and Juliet" provision, which I agree with the majority opinion refers to underlying conduct. But that provision refers to an *exception* that applies only after a court has already concluded that a prior conviction qualifies as a sex offense. See *Rogers*, 804 F.3d at 1237. It would be odd for Congress to require the categorical approach for all definitions of "sex offense" found in § 20911 except for "specified offense against a minor" under

§ 20911(5)(A)(ii). See *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2328, 204 L.Ed.2d 757 (2019) (assuming that the word “offense” in § 924(e)(3) carries the same meaning throughout that subsection).

Other textual markers that the majority opinion insists are evidence of a circumstance-specific approach for § 20911(7)(I) are also present in § 924(e)(2)(B). The majority opinion emphasizes that a different subsection of SORNA, § 20911(5)(A)(i), explicitly defines “sex offenses” to include offenses with an “element” involving a sexual act. Thus, my colleagues believe, Congress’s exclusion of similar language in § 20911(5)(A)(ii) and (7)(I) should be seen as a conscious decision to eschew the categorical method. But the same argument could be made about § 924(e)(2)(B)(ii). Compare 18 U.S.C. § 924(e)(2)(B)(i) (defining violent felony to include offenses with an “element” of force) with *id.* § 924(e)(2)(B)(ii) (lacking any reference to “elements”). Yet the Supreme Court still concluded that the latter provision required a categorical approach, despite the absence of elemental language Congress put elsewhere in the statute. *Johnson*, 576 U.S. at 604, 135 S.Ct. 2551; *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143.

The majority opinion also notes that, unlike § 20911(7)(I), section 924(e)(2)(B)(ii) includes several generic crimes that require a categorical approach. (In full, the statute defines violent felony to include any conviction that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”) But again, no meaningful distinction between the two statutes exists. Subsection (7)(I) is only one clause of § 20911(7), which like § 924(e)(2)(B)(ii) enumerates several generic offenses like solicitation and voyeurism. The only difference is that Congress chose to enumerate

the offenses in § 20911(7) with the letters (A) through (I) instead of separating them with commas. I do not see this difference as significant, mainly because the Supreme Court already rejected the explanation that § 924(e)(2)(B)(ii) requires a categorical approach only because of the presence of generic offenses. *Johnson*, 576 U.S. at 604, 135 S.Ct. 2551.

Although *Johnson* was primarily about whether the residual clause was unconstitutionally vague, Justice Alito’s dissent urged the Court to save the provision by jettisoning the categorical method and adopting a circumstance-specific approach. In response, the Court carefully explained why the residual clause required a categorical approach apart from the clause’s proximity to the enumerated generic offenses:

Taylor had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act “refers to ‘a person who . . . has three previous convictions’ for—not a person who has committed—three previous violent felonies or drug offenses.” 495 U.S. at 600, 110 S.Ct. 2143. This emphasis on convictions indicates 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.” *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. “[T]he only plausible interpretation” of the law,

therefore, requires use of the categorical approach. *Id.*, at 602, 110 S.Ct. 2143. *Id.* at 604, 110 S.Ct. 2143.

My colleagues believe that on the topic of the categorical method, *Johnson* provides little analytical value beyond what the Court already said in *Taylor*. But I do not read the passage quoted above as superfluous. The Court’s rejection of the circumstance-specific approach was necessary to its holding because it had to explain why it refused to abandon the categorical method even when doing so would have allowed the Court to avoid an unconstitutional interpretation. See *id.* at 631–32, 135 S.Ct. 2551 (Alito, J., dissenting) (collecting authorities describing canon of constitutional avoidance); *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (defining *dictum* as statements that are “unnecessary to the decision” or “could have been deleted without seriously impairing the analytical foundations of the holding”). Because *Johnson* holds that the residual clause requires a categorical approach, we should assume that the Supreme Court would say the same about the text in § 20911(7)(I).

In addition to the text of the statute, the majority opinion reasons that a circumstance-specific approach is supported by (1) SORNA’s legislative history and (2) the lack of practical and Sixth Amendment concerns present in other contexts. I disagree with the majority opinion’s analysis on both grounds.

First, the legislative history is, at best, ambiguous. True, Congress intended SORNA to cast a “wide net.” Ante at 804. But even the most expansive interpretation of a statute must have clear delineations; a criminal law that “fails to give ordinary people fair notice of the conduct it punishes” is “standardless.” *Johnson*, 576 U.S. at

595, 135 S.Ct. 2551. And here, Congress lifted § 20911(7)(I) from a list of enumerated offenses that previously existed under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. Compare 34 U.S.C. § 20911(7)(I) and 42 U.S.C. § 14071(3)(A)(vii) (2002). “[W]hen statutory language is obviously transplanted from other legislation, we have reason to think it brings the old soil with it.” *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2331, 204 L.Ed.2d 757 (2019) (cleaned up). The old soil in this case is prefatory text that appeared with the list of qualifying offenses in the Wetterling Act, and which specified that a categorical approach applied. See 42 U.S.C. § 14071(3)(A) (2002) (explaining that a qualifying offense was “any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses”). The majority opinion dismisses this part of the legislative history by citing a lack of precedent confirming that the Wetterling Act was analyzed categorically. But as the majority opinion recognizes, litigants lacked cause to test the Wetterling Act’s definitions in court because that act did not include a criminal-liability component. Nonetheless, the Wetterling Act was not dead letter; states needed to construe the act’s definitions to determine which offenses they must make registrable to receive federal funding. See Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15110–02, 15113 (Apr. 4, 1996) (instructing states on how to construe the Wetterling Act). Accordingly, I do not see why a dearth of judicial opinions on the subject should lead us to ignore the Wetterling Act’s clear text—an important part of SORNA’s legislative history that sup-

ports Thayer's position.¹

Second, a circumstance-specific approach to § 20911(7)(I) is more impractical than the majority opinion suggests. Unless prior victims are forced to come back and testify—perhaps decades after the fact—any evidence the government would rely on to prove the underlying circumstances of a prior conviction could raise evidentiary or constitutional concerns. For example, the Eighth Circuit has adopted a circumstance-specific test for § 20911(7)(I), and in at least one case the government satisfied its burden by admitting at trial an old video of the victim's police interview. *United States v. KT Burgee*, 988 F.3d 1054, 1057 (8th Cir. 2021). That strategy worked only because the defendant failed to challenge the video's admissibility. *Id.* at 1060. But upon proper objection, this type of evidence could raise concerns about hearsay and a defendant's right to cross examine witnesses under the Confrontation Clause. See *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

The majority opinion insists that any practical difficulties under a circumstance-specific approach will benefit Thayer because the government has the burden to prove the facts underlying his prior conviction. Other defendants, however, will be unfairly punished under this approach. In many cases, the government is likely to rely on plea agreements to establish the underlying conduct of a conviction. But the facts put in the record at a plea hearing may not accurately reflect the strength of the government's case as to conduct outside the elements of conviction, especially since a defendant "may not wish to irk the

1. The majority opinion also points out that when Congress enacted SORNA, it omitted the prefatory text from the Wetterling Act. But the exclusion of this text in SORNA does not change the fact that when Congress drafted the phrase "any conduct that by its nature

prosecutor or court by squabbling about superfluous factual allegations." *Descamps v. United States*, 570 U.S. 254, 270, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). And for defendants who negotiated a plea deal, it would "seem unfair" to sandbag them with a duty to register after they thought they had pled down to a conviction that did not carry a registration requirement. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143.

Additional impracticalities stem from how SORNA's "sex offender" definition creates registration requirements as part of a civil regulatory scheme. As amicus points out, a circumstance-specific approach will create confusion about who is required under federal law to register. Will a pre-registration hearing be necessary to determine whether the state could have proven additional facts not included in the plea? These administrative headaches are not present under a categorical approach because, when the only issue is the existence of a prior conviction, adequate notice and an opportunity to challenge the registration requirement has typically already been provided through the prior criminal prosecution. See *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

Finally, although I agree with the majority opinion that § 20911 does not invoke the same Sixth Amendment concerns as the ACCA, see *Davis*, 139 S. Ct. at 2327, I do not see that as a reason to choose a circumstance-specific approach. Not every statute requiring a categorial approach has a Sixth Amendment component; the Supreme Court has adopted a categorical

is a sexual offense against a minor" as a definition in the Wetterling Act, it did so knowing the phrase would be construed categorically. It then copied this categorical definition essentially unchanged into SORNA.

approach for appropriate statutes even when no constitutional concerns are present. See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 200, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013) (adopting categorical approach to promote “judicial and administrative efficiency” for removal proceedings in which an immigration judge must determine whether a prior conviction is an “aggravated felony”). Indeed, the Court cited practical considerations rather than constitutional concerns when it reaffirmed the categorical approach in *Johnson*, 576 U.S. at 604, 135 S.Ct. 2551. After considering the text of § 20911(7)(I), the legislative history, and the other practical difficulties associated with a circumstance-specific approach, I would adopt the categorical method for § 20911(7)(I).

On that basis, I respectfully dissent.



David LANE, Jr., Plaintiff-Appellant,

v.

Michael PERSON, Defendant-Appellee.

No. 21-2710

United States Court of Appeals,
Seventh Circuit.

Submitted July 20, 2022 * —

Decided July 21, 2022

Background: Inmate brought § 1983 action against jail doctor, alleging deliberate indifference. After doctor prevailed at summary judgment, the United States District Court for the Northern District of

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal argu-

Indiana, Robert L. Miller, Jr., Senior District Judge, 2021 WL 4147027, awarded doctor \$4,017.59 in costs. Inmate appealed.

Holdings: The Court of Appeals held that:

- (1) district court abused its discretion by awarding witness’s full fee of \$2,750, and
- (2) witness fee was not recoverable as expert’s fee.

Affirmed as modified.

1. Federal Courts ☞3617

Court of Appeals asks two questions when reviewing award of costs: (1) whether cost imposed on losing party is recoverable and (2) if so, whether amount assessed for that item was reasonable.

2. Federal Courts ☞3617

In reviewing award of costs, Court of Appeals reviews carefully whether expense is recoverable, but will disturb decision on reasonableness only when there is clear abuse of discretion.

3. Costs, Fees, and Sanctions ☞881

There is a presumption that a prevailing party recovers costs; the presumption applies only to those costs that are enumerated in statute governing taxation of costs, however. 28 U.S.C.A. § 1920; Fed. R. Civ. P. 54(d).

4. Costs, Fees, and Sanctions ☞725

When prevailing party seeks witness fees, federal court is bound by statute limiting daily amount of such fees, absent contract or explicit statutory authority to contrary. 28 U.S.C.A. § 1821(b); Fed. R. Civ. P. 54.

ments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).

**UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
COOKEVILLE DIVISION**

UNITED STATES OF AMERICA)
)
v.)
) No. 2:12-00005
RONALD W. PAUL)
) Judge Trauger

MEMORANDUM

I. Introduction

Pending before the court is the Defendant's Renewed, Post-Appeal Motion To Dismiss The Government's Indictment And/Or Motion For New Trial (Docket No. 156) in this case, to which the Government has filed a Response (Docket No. 168). The Defendant filed the Motion subsequent to the Sixth Circuit's Order of May 24, 2016, which provides as follows:

Defendant-Appellant Ronald Paul appeals his convictions on three counts of failing to register or update registration under the federal Sex Offender Registration and Notification Act ('SORNA'). 18 U.S.C. § 2250.

We heard oral argument in the case on March 10, 2016. On April 4, 2016, the Supreme Court released its decision in *Nichols v. United States*, 136 S.Ct. 1113 (2016), holding that SORNA does not require an offender to update his registration after giving up residence in the United States to move abroad. We requested letter briefing from the parties addressing the effect of *Nichols* on this case.

Having considered the parties' briefing, we find the issue of residence was raised below but not adequately litigated such that we can adjudicate the appeal at this time. We accordingly REMAND this case to the district court for further proceedings in light of *Nichols*.

(Docket No. 141, at 1).

II. Analysis

A. Standard of Review

In his Motion, the Defendant takes the position that his Motion should be treated as a hybrid between a Rule 12(b)(3)(B)(v) motion to dismiss the indictment for failure to state an offense and a Rule 29(c) motion for judgment of acquittal. (Docket No. 156, at 18). The Defendant, alternatively, seeks a new trial on Count Three. The Defendant also seeks to raise issues that are unrelated to the *Nichols* opinion out of concern that they will be waived otherwise. (Id.) The Government requests that the court consider only the *Nichols* residency issue. The Government also takes the position that the remand order does not require the court to consider additional evidence. (Docket No. 168, at 7).

As a procedural matter, the court concludes that the posture of this case is most akin to one in which a defendant seeks to overturn his convictions after trial. Accordingly, the court will evaluate the parties' arguments as it would on a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. In reviewing a motion for a judgment of acquittal under Rule 29, a court must view the evidence in the light most favorable to the Government and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Welch*, 97 F.3d 142, 148 (6th Cir. 1996); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The court may not independently weigh the evidence nor judge the credibility of the witnesses who testified at trial. Id.

The Defendant alternatively requests a new trial on Count Three. Rule 33(a) of the Federal Rules of Criminal Procedure provides that a court may grant a new trial to a defendant "if the interests of justice so require." When considering a motion under Rule 33, a court may

weigh the evidence and assess the credibility of witnesses to insure that there is not a miscarriage of justice. United States v. Solorio, 337 F.3d 580, 589 n.6 (6th Cir. 2003); United States v. Ashworth, 836 F.2d 260, 266 (6th Cir. 1988).

The court will not consider the non-*Nichols* issues raised by the Defendant, as consideration of those issues appears to be outside the scope of the remand.

B. The Charges, Relevant Statutes, and Evidence Adduced at Trial

The Superseding Indictment charges the Defendant as follows:

COUNT ONE

THE GRAND JURY CHARGES:

On or about July 28, 2009, in the Middle District of Tennessee and elsewhere, RONALD W. PAUL, a person required to register under the Sex Offender Registration and Notification Act, did travel in interstate and foreign commerce and did knowingly fail to update a registration as required by the Sex Offender Registration and Notification Act.

In violation of Title 18, United States Code, Section 2250(a).

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

On or about October 23, 2009, in the Middle District of Tennessee and elsewhere, RONALD W. PAUL, a person required to register under the Sex Offender Registration and Notification Act, did travel in interstate and foreign commerce and did knowingly fail to update a registration as required by the Sex Offender Registration and Notification Act.

In violation of Title 18, United States Code, Section 2250(a).

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

On a date between on or about March 31, 2011, and on or about May 5,

2011, in the Middle District of Tennessee and elsewhere, RONALD W. PAUL, a person required to register under the Sex Offender Registration and Notification Act, did travel in interstate and foreign commerce and did knowingly fail to update a registration as required by the Sex Offender Registration and Notification Act.

In violation of Title 18, United States Code, Section 2250(a).

(Docket No. 65).

Title 18, United States Code, Section 2250(a) provides as follows:

(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.

The registration requirements are set forth in 42 U.S.C. § 16913l, which provides, in pertinent part, as follows:

(a) In general

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. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different

from the jurisdiction of residence.

* * *

(c) Keeping the registration current

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. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

The term “jurisdiction” includes states, the District of Columbia, and certain United States territories, but it does not include foreign countries. 42 U.S.C. § 16911(10). The term “resides” is defined in 42 U.S.C. § 16911(13) as “with respect to an individual, the location of the individual’s home or other place where the individual habitually lives.”

The “National Guidelines for Sex Offender Registration and Notification” issued by the Office of the Attorney General of the United States (SORNA Guidelines), 73 Fed. Reg. 38,030 (July 2, 2008), define “resides” to mean “the location of the individual’s home or other place where the individual habitually lives.” 73 Fed. Reg., at 38, 061. The Guidelines further state:

The scope of ‘habitually lives’ in this context is not self-explanatory and requires further definition. An overly narrow definition would undermine the objectives of sex offender registration and notification under SORNA. For example, consider the case of a sex offender who nominally has his home in one jurisdiction – e.g., he maintains a mail drop there, or identifies his place of residence for legal purposes as his parents’ home, where he visits occasionally – but he lives most of the time with his girlfriend in an adjacent jurisdiction. Registration in the nominal home jurisdiction alone in such a case would mean that the registration information is not informative as to where the sex offender is actually residing, and hence would not fulfill the public safety objectives of tracking sex offenders’ whereabouts following their release into the community.

‘Habitually lives’ accordingly should be understood to include places in which the

sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of ‘residence’ these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. Jurisdictions may specify in the manner of their choosing the application of the 30-day standard to sex offenders whose presence in the jurisdiction is intermittent but who live in the jurisdiction for 30 days in the aggregate over some longer period of time. Like other aspects of SORNA, the requirement to register sex offenders who ‘reside’ in the jurisdiction as defined in [42 U.S.C. § 16911(13)] is a minimum requirement, and jurisdictions in their discretion may require registration more broadly (for example, based on presence in the jurisdiction for a period shorter than 30 days).

As to the timing of registration based on changes of residence, the understanding of ‘habitually lives’ to mean living in a place for at least 30 days does not mean that the registration of a sex offender who enters a jurisdiction to reside may be delayed until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction in order to make his home or habitually live in the jurisdiction must be required to register within three business days, as discussed in Part X.A

73 Fed. Reg., at 38,061-62. See also United States v. Alexander, 817 F.3d 1205 (10th Cir. 2016)(applying the Guidelines).

As noted above, while this case was pending on appeal, the Supreme Court rendered its decision in *Nichols v. United States*, ___ U.S. ___, 136 S.Ct. 1113, 194 L.Ed.2d 324 (2016), holding that SORNA did not require the defendant in that case to update his registration in Kansas when he left the state to live in the Philippines. The defendant in *Nichols* complied with SORNA registration requirements “until November 9, 2012, when he abruptly disconnected all of his telephone lines, deposited his apartment keys in his landlord’s dropbox, and boarded a flight to Manila.” 136 S.Ct. at 1117. As the Court interpreted the requirements of the statute,

SORNA “requires a sex offender who changes his residence to appear, within three business days of the change, in person in at least one jurisdiction (but not a foreign country) where he resides, works, or studies, and to inform that jurisdiction of the address change.” *Id.* Focusing on the statute’s use of the term “resides,” in the present tense, the Court concluded that a person, like the defendant, who moves from Kansas to the Philippines no longer “resides” in Kansas for purposes of Section 16913(a), and therefore, is not required to update his registration in Kansas, as it is no longer a “jurisdiction involved” for purposes of Section 16913(c). *Id.* According to the Court, that same conclusion is supported by the requirement in Section 16913(c) that the defendant appear in person and register ““not later than 3 business days *after* each change of . . . residence.’’ *Id.*, at 1117-18 (quoting 42 U.S.C. § 16913(c)).¹ See also *Carr v. United States*, 660 Fed. Appx 329, 332 (6th Cir. Aug. 16, 2016).

The exhibits and testimony at trial in this case reveal the following relating to the issue of residence. First, the exhibits show the following:

2006 to 2008 – After release from state custody in July 2006, the Defendant registered as a sex offender at the Jackson County, Tennessee Sheriff’s Office on July 17, 2006, February 21, 2007, May 9, 2007, and June 28, 2007. (Government Exhibits 1-4).² The Defendant’s first registration listed his address as Martin Ridge Lane - his daughter’s house. Subsequent

¹ The Court pointed out that its conclusion would not create loopholes in SORNA’s nationwide sex-offender registration scheme because a recent amendment to the law, codified at 18 U.S.C. § 2250(b), criminalizes the knowing failure to provide information relating to intended travel in foreign commerce. *Id.*, at 1119. This amendment did not apply to the defendant in *Nichols* and does not apply to the charges in this case, because it was enacted after the conduct at issue.

² Under Tennessee law, the Defendant was required to register four times per year: in March, June, September and December. Tenn. Code Ann. § 40-39-204(b).

registrations listed his address as Gibson Hollow Road - the house the Defendant owned with his mother. (*Id.*) The Defendant flew to the Philippines on September 4, 2007 and stayed there until September 29, 2007. (Government Exhibits 13, 14; Docket No. 139, at #716-17). He then registered again in Jackson County on October 1, 2007, and December 6, 2007. (Government Exhibits 5, 6).

The Defendant traveled to the Philippines on January 8, 2008, and stayed there until March 29, 2008. (Government Exhibits 13, 14). He then registered in Jackson County on April 1, 2008, June 11, 2008, and August 29, 2008. (Government Exhibits 7, 8, 9). He again traveled to the Philippines on September 4, 2008 and stayed there until September 26, 2008. (Government Exhibits 13, 14). He registered in Jackson County on December 12, 2008. (Government Exhibit 10).

2009 – The Defendant registered in Jackson County on March 9, 2009. (Government Exhibit 11; Docket No. 139, at #717-18). He traveled to the Philippines on July 28, 2009 (the date alleged in Count One), and stayed there until September 24, 2009. (Government Exhibits 13, 14; Docket No. 139, at #718). The Defendant returned to Tennessee on September 24, 2009, and stayed here until October 23, 2009 (the date alleged in Count Two), when he flew to the Philippines. (*Id.*). The Defendant stayed in the Philippines until December 29, 2009, when he returned to Tennessee. (*Id.*) The Defendant registered in Jackson County on December 31, 2009. (Government Exhibit 12; Docket No. 139, at #655, #687-88, #720).

2010 & 2011 – The Defendant did not register at all in 2010 or 2011. (Docket No. 139, at #692-93, #720-22). He flew to the Philippines on January 29, 2010 and stayed until March 31, 2011, when he returned to Tennessee. (Government Exhibits 13, 14; Docket No. 139, at #720-

22). The Defendant was present in Tennessee from March 31, 2011 until May 5, 2011 – approximately 36 days (the date range alleged in Count Three). (*Id.*) On May 5, 2011, the Defendant traveled to the Philippines and stayed until March 31, 2012 (*Id.*).

The Defendant registered vehicles, in person, at the Jackson County Clerk's Office on April 2, 2011, April 8, 2011, and April 18, 2011. (Government Exhibits 15-17; Docket No. 139, at #740-43).

The testimony at trial relating to the Defendant's residence is as follows: in an interview with U.S. Marshal Marty Magnon on April 26, 2012, the Defendant said that he had traveled back and forth from the Philippines to Tennessee since 2007. (Docket No. 139, at #748). The Defendant said that he moved there in 2010 and that his wife lived there. (*Id.*, at #755-56). The Defendant said that he came back to Jackson County in 2011 to sell certain items to try and get some money because his wife had cancer and he needed to pay her medical bills in the Philippines. (*Id.*, at #757-58). The Defendant told Marshal Magnon that he was currently present in Jackson County to deal with a warrant that had been issued for him. (*Id.*, at #756-57).

Tamorah Ryan, an employee of the Jackson County Sheriff's Office, testified that, at one time, the Defendant told her he was going to go on vacation and asked what he needed to do, but she could not recall the date of the conversation. (Docket No. 139, at #690). She testified that she received a note from the Defendant, dated February 7, 2010, stating: "Tamorah: Here is my new address: Talusa Village Proper, Talamo, Davao City, Philippines." (*Id.*, at #691-92).

Deborah Lynn Gillihan, another employee of the Jackson County Sheriff's Office, testified that she spoke to the Defendant on the phone, in October 2010, and that he told her that he was living in the Philippines and that he subsequently sent her a copy of certain pages from

his passport. (*Id.*, at #710-14).

Deborah Hancock, the Defendant's daughter, testified that, when the Defendant was released from prison in 2006, he came to live with her in Jackson County on Martin Ridge Lane. (Docket No. 139, at #729). He later lived with his mother in Jackson County on Gibson Hollow Road in a house they bought together. (*Id.*, at #729-30). At some point, according to Ms. Hancock, the Defendant began making trips to the Philippines and would live with her when he returned to Tennessee, because he had sold the house he purchased with his mother. (*Id.*, at #730-31). Ms. Hancock specifically remembered taking the Defendant to the airport on May 5, 2011 for a flight to the Philippines. (*Id.*, at #731-32).

Ms. Hancock testified that the Defendant told her he was going to the Philippines to stay, at some point, "but he would be back periodically to do different things." (*Id.*, at #734). The Defendant told her that he was staying with a lady there that he eventually married. (*Id.*) Ms. Hancock testified that the Defendant received mail at her house. (*Id.*, at #736).

C. The Elements of the SORNA Offense Charged

Before determining whether the Defendant's convictions are sustainable, it is important to identify the elements of the SORNA failure to register offense. As set forth in *Carr v. United States*, 560 U.S. 438, 445, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010), the elements of the offense are: (1) the defendant was subject to SORNA's registration requirements; (2) the defendant traveled in interstate commerce; and (3) the defendant failed to register. The Supreme Court made clear in *Carr* that these elements must be satisfied in *sequence*, i.e. first, the defendant must be subject to SORNA's registration requirements; then the defendant must travel in interstate commerce; and finally, the defendant must fail to register. 130 S.Ct. at 2235. The Court

explained that “[a] sequential reading, the parties recognize, helps to ensure a nexus between a defendant’s interstate travel and his failure to register as a sex offender.” *Id.* Otherwise, the Court stated, “[p]ersons convicted of sex offenses under state law who fail to register in their State of conviction would . . . be subject to federal prosecution under § 2250 even if they had not left the State after being convicted – an illogical result given the absence of any obvious federal interest in punishing such offenders.” *Id.* (footnote omitted). *See also United States v. Trent*, 654 F.3d 574, 579 (6th Cir. 2011)(explaining that the SORNA elements “are to be satisfied sequentially.”)

D. Applying Nichols and Carr to this Case

Count One – Unlike *Nichols*, the evidence in this case relating to Count One does not support the conclusion that the Defendant abandoned all ties to Tennessee when he traveled to the Philippines on the date charged – July 28, 2009. Indeed, while the evidence indicates that the Defendant was in the Philippines during the period from July 28, 2009 to September 24, 2009, there is no other indication in the record that he intended to abandon his Tennessee residence and reside there at that point in time. The Defendant lived in Tennessee for the seven months in 2009 before he traveled to the Philippines on July 28, 2009, and in fact, the Defendant registered in Tennessee after that trip, on December 31, 2009. Thus, the holding in *Nichols* did not relieve the Defendant of his obligation to register in Tennessee in 2009.

That conclusion, however, does not resolve the issue of whether the Defendant’s failure to register in Tennessee in 2009 is a SORNA violation, as alleged in Count One. The operative date for purposes of Count One is July 28, 2009, and the Government’s theory at trial was that the Defendant violated SORNA on that date by failing to update his registration in Tennessee – by providing his Philippines address – when he flew to the Philippines on July 28, 2009. (“Count

I is that the defendant failed to update in July of 2009 when he left Tennessee for the Philippines.” (Government’s Closing, Docket No. 140, at #827)).

The Government now contends that the Defendant’s failure to register in June 2009 (as he was required to do by Tennessee state law), reflecting that he “resided” in Tennessee *and* the Philippines,³ resulted in a SORNA violation. (Docket No. 168, at 12 (“Paul knowingly failed to register under SORNA . . . in the second and third quarters of 2009, the dates of which correspond to Counts One and Two of the indictment. . .”)).

The flaw in that argument, however, is that *Carr* requires the failure to register element to occur *after* the travel in interstate commerce element. For purposes of Count One, then, the failure to register element had to occur after July 28, 2009. The evidence does indicate that the Defendant failed to register in September 2009, as required by Tennessee law, which would satisfy *Carr*’s requirement that the elements be met sequentially. The difficulty with that theory, however, is that it is not the theory advanced by the Government, and presented to the jury, at trial. In addition, Count One does not identify September 2009 as the date of the offense, and the Defendant would have been required to register on that date under state law, regardless of whether he had engaged in interstate/international travel prior to that date. A conviction based on such a disconnect appears to be untenable in light of the language of the *Carr* Court that a

³ For support, the Government cites 42 U.S.C. § 16914(a)(3), which provides that the information a registrant is to provide includes “[t]he address of each residence at which the sex offender resides or will reside.” As discussed below, under the SORNA Guidelines, a sex offender can be required to register more than one address if he “habitually resides” in those locations. Nevertheless, the Supreme Court expressly rejected Section 16914(a) as a basis for requiring notification before traveling abroad: “[That section] merely lists the pieces of information that a sex offender must provide if and when he updates his registration; it says nothing about whether the offender has an obligation to update his registration in the first place.” *Nichols*, 136 S.Ct. at 1118.

sequential reading of the elements of the statute helps to assure a *nexus between a defendant's interstate travel and his failure to register as a sex offender*. There simply appears to be no nexus between the Defendant's trip to the Philippines in July 2009, and any subsequent failure to register in Tennessee in September 2009. Accordingly, the court concludes that no rational trier of fact could have found the essential elements of the crime charged in Count One beyond a reasonable doubt, and the Defendant's conviction on Count One should be vacated.

Count Two – As with Count One, the evidence indicates that the Defendant still “resided” in Tennessee on the date charged in Count Two – October 23, 2009. There is no indication that the Defendant intended to change his residence to the Philippines when he flew to the Philippines on October 23, 2009. Thus, on that date, the Defendant still resided in Tennessee.

Also, as with Count One, the Government’s theory at trial was that: “He failed to update, failed to keep his registration current in October of 2009 when he left Tennessee for the Philippines.” (*Id.*) The Government now advances the theory that the Defendant’s failure to register as required by state law, reflecting both the Tennessee and Philippines addresses, was a SORNA violation as alleged in Count Two. The difficulty with that theory, however, is that the Defendant did register as required in Tennessee, in December 2009, when he returned to Tennessee *after* he flew in interstate/international commerce to visit the Philippines in October 2009. Thus, the third element of the offense has not been satisfied, and the Defendant’s conviction on Count Two cannot be sustained on this alternative theory.⁴ Accordingly, the court concludes that no rational trier of fact could have found the essential elements of the crime

⁴ Although the Defendant did not list his Philippines address in the December, 2009 registration, the Government does not appear to advance the theory that the SORNA violation was based on a “defective” registration.

charged in Count Two beyond a reasonable doubt, and the Defendant's conviction on Count Two should be vacated.

Count Three – As for Count Three, the Government argues that the Defendant “resided” in Tennessee during the 36-day period alleged in the Superseding Indictment – March 31, 2011 to May 5, 2011 - and, therefore, was required to register here. The Government relies on the evidence that the Defendant stayed at his daughter’s house during that time, received mail at her house, and registered vehicles during April 2011, listing a Tennessee address.

On the other hand, the evidence indicates that the Defendant believed he resided in the Philippines during that time period. This conclusion is supported by the Defendant’s statement to Marshal Magnon that he moved to the Philippines in 2010 and that his return trip to Tennessee in 2011 was to sell items to pay for his wife’s medical bills in the Philippines. It is also supported by the note the Defendant sent to the Jackson County Sheriff’s Office dated February 7, 2010 and providing a new address in the Philippines – and by his statement to Ms. Gillihan on the phone in October 2010, that he was living in the Philippines. Although the Defendant’s daughter was not specific as to dates, she testified that the Defendant told her he was going to the Philippines to stay but would return periodically to do certain things.

These facts raise the issue of whether a person can have more than one “residence” under SORNA, even when he or she may intend to have only one. As the Government points out, the SORNA Guidelines seem to suggest that the answer is yes:

‘Habitually lives’ accordingly should be understood to include *places* in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of ‘residence’ these Guidelines adopt is that a sex

offender lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days.

73 Fed. Reg., at 38,062 (emphasis added). Applying these Guidelines to the facts relating to Count Three, the court concludes that the Defendant resided in Tennessee, as well as the Philippines, during the 30-plus-day period charged in Count Three.

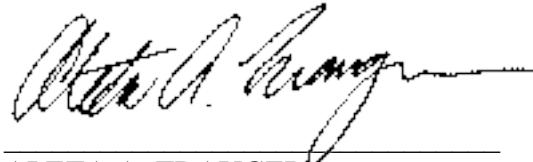
The Government's theory at trial as to Count Three was that the Defendant failed to both register and update his registration during that time because he was living at his daughter's address, which he had not reported in his most recent filings. ("And the third is that he failed to both register and update his registration in about a month-long period, a month and change, from March 31 to May 5, 2011. But really, we're talking about all throughout April 2011. That's the period of time, you've heard the evidence, he was living here in Tennessee at his daughter's house at an address he had not reported." (Government's Closing, Docket No. 140, at Page ID #827)). In fact, the Defendant had not registered at all since December 31, 2009.

Applying the elements as set forth in *Carr* to Count Three, then, the Defendant was required to register under SORNA, he traveled in interstate or foreign commerce when he flew to Tennessee from the Philippines on March 31, 2011, and he failed to register or update his registration to reflect that he was living at his daughter's residence in Tennessee during the period from March 31 to May 5, 2011. The *Carr* nexus issue is satisfied, given that the interstate/international travel was followed by the Defendant's residing in Tennessee and failing to register that Tennessee address as required.

Accordingly, the court concludes that a rational trier of fact could have found the

essential elements of the crime charged in Count Three beyond a reasonable doubt. The court also concludes that the interests of justice do not require a new trial on Count Three. The Defendant's conviction on Count Three should be sustained.

Enter this 13th day of March 2017.



ALETA A. TRAUGER
U.S. District Judge

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.](#)).

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: Allegra Glashauser, 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.

Opinion

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment entered on September 12, 2022, is **REVERSED**.

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.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

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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2026 WL 267605

Only the Westlaw citation is currently available.
United States District Court, N.D. Iowa, Western Division.

UNITED STATES OF AMERICA, Plaintiff,
v.
MANUEL NEGRETE-VACA, Defendant.

No. 25-CR-4055-LTS-KEM

|

Filed 02/02/2026

Attorneys and Law Firms

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ORDER

Kelly K.E. Mahoney Chief Magistrate Judge Northern District of Iowa

*1 Defendant Manuel Negrete-Vaca moves to dismiss the indictment charging him with failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. §§ 2250(a), (b). Doc. 23. Resolution of Negrete-Vaca's motion requires determining whether his prior Iowa conviction of assault with intent to commit sexual abuse constitutes a "sex offense" requiring registration. Defendant argues that to be a sex offense under SORNA, the crime must have a sexual-gratification element and that assault with intent to commit sexual abuse lacks that element. I agree and recommend **granting** the motion to dismiss.

I. BACKGROUND

On June 23, 2020, Negrete-Vaca was convicted of assault with intent to commit sexual abuse, in violation of Iowa Code § 709.11(3), in the Iowa District Court for Sac County.¹ Doc. 23-2. The victim was an adult. *See* Doc. 23-4. The indictment in this case charges Negrete-Vaca with failing to register as a sex offender in violation of SORNA from April 1, 2022, to August 5, 2024. Doc. 17. The indictment alleges that he was required to register because of his prior Iowa conviction. *Id.*

Defendant moved to dismiss the indictment, arguing that his Iowa conviction does not require SORNA registration.

Doc. 23. The Government filed a resistance (Doc. 28), and Defendant filed a reply (Doc. 29). The parties then filed supplemental briefing at my request. Docs. 30, 33, 34. The parties' arguments hinge on whether the federal SORNA statute and the Iowa assault with intent to commit sexual abuse statute both require a particular element, which is an issue of statutory interpretation and thus a legal question. Accordingly, this court can resolve the issue on a motion to dismiss.²

II. DISCUSSION

Defendant Manuel Negrete-Vaca's motion to dismiss the indictment in this case requires the court to determine whether assault with intent to commit sexual abuse under Iowa law constitutes a "sex offense" requiring registration as a sex offender under SORNA. Defendant argues that to be a sex offense under SORNA, the crime must have a sexual-gratification element and that Iowa's assault with intent to commit sexual abuse lacks that element. The Government asserts that "Iowa's definition of 'sex abuse' requires a 'sex act.' SORNA registration requires an 'element involving a sex act.... Therefore, defendant's sex abuse contains an 'element involving a sex act,' and defendant is a 'sex offender' under SORNA." Doc. 28 at 2. However, this simplification ignores the potential for different definitions of a "sex act" under Iowa law and a "sex act" under SORNA.

A. Sexual Offense Under SORNA

SORNA requires registration by a "sex offender."³ "Sex offender" is defined as a person "convicted of a sex offense."⁴ The definition of "sex offense" includes "a criminal offense that has an *element* involving a sexual act or sexual contact with another."⁵

*2 When a statute requires comparing a defendant's prior conviction to other offenses, "[f]ederal courts generally use one of two analytical approaches."⁶ Under the categorical approach, the court ignores the defendant's actual conduct and compares the elements of a prior offense with the elements of the federal statute.⁷ If the underlying offense extends more broadly, punishing more conduct than the federal definition, then the conviction does not qualify as a predicate offense.⁸ Under the circumstance-specific approach, on the other hand, the court considers the "particular circumstances in which

an offender committed the crime on a particular occasion.”⁹ Because the SORNA provision defining a sex offense as “a criminal offense that has an element involving a sexual act or sexual contact with another” requires looking at the “element[s]” of the offense, the categorical approach applies, and the court does not consider the underlying offense conduct.¹⁰ As such, the underlying conviction will only qualify as a sex offense under SORNA if the “statute under which he was convicted covers the same conduct as – or a narrower range of conduct than – SORNA.”¹¹ Both parties appear to agree about the application of the categorical approach to determine whether an underlying offense requires registration under SORNA.

SORNA does not define “sexual act” or “sexual contact.” When a statute leaves a term undefined, the court applies its “ordinary, contemporary, common meaning.”¹² Relying on dictionary definitions of the word “sexual,” circuit courts have defined a “sexual act” or “sexual contact” in SORNA as acts or contacts “related to or for the purpose of sexual gratification.”¹³ A district court in this circuit has agreed.¹⁴ In *Barker v. United States*, the Western District of Missouri defined sexual contact and sexual act consistent with their ordinary meaning to require a sexual gratification component, and that a Florida conviction for attempted sexual battery does not qualify as a sex offense under SORNA because it is not so limited.¹⁵ The court noted that in a sentencing context “the Eighth Circuit has held the plain and ordinary meaning of the term ‘sexual’ necessarily includes that an ‘intent in committing the [act] is to seek libidinal gratification.’ ”¹⁶

***3** Some district courts have looked to the definition of sexual act and sexual contact in 18 U.S.C. § 2246.¹⁷ That statute, entitled “Definitions for chapter,” defines terms “[a]s used in this chapter,”¹⁸ Chapter 109A, which sets out the federal offenses of aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, and abusive sexual contact.¹⁹ Because SORNA is not in Chapter 109A and importing a definition from § 2246 into SORNA conflicts with the language and structure of the statutes, circuit courts have uniformly rejected importing these definitions to SORNA.²⁰ Similarly, the Eighth Circuit has declined to import the Chapter 109A definitions of “sexual act” and “sexual contact” to a different chapter when analyzing a sentencing enhancement.²¹ Thus, I reject the importation of a definition from Chapter 109A into SORNA.

***4** Consistent with the Western District of Missouri, I find the Fourth and Eleventh Circuit’s analysis compelling and construe “sexual act” and “sexual contact” according to their ordinary meaning, which requires a purpose of sexual gratification. The Government does not identify authority holding that SORNA does not require an element sexual gratification to constitute a sexual act or sexual contact.

B. Iowa Assault with Intent to Commit Sexual Abuse

As previously noted, Defendant was convicted of violating Iowa Code § 709.11(3), which reads, “[a]ny person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse ... [i]s guilty of an aggravated misdemeanor if no injury results.” Assault with the intent to commit sexual abuse under Iowa law in 2020 required proof of an assault—which includes things like physical acts of violence or displaying a dangerous weapon in a threatening manner—“with the intent to commit sexual abuse.”²² Sexual abuse, in turn, is “[a]ny sex act ... when the act is performed with the other person” when “[t]he act is done by force or against the will of the other,” with a person incapable of giving consent due to a “mental defect or incapacity,” or with a child.²³ It is thus “a nonconsensual sex act.”²⁴ Intending to commit sexual abuse requires proof of “the intent to commit a sex act ... by force or against the will of the victim.”²⁵ In 2020, the Iowa Code defined “sex act” to mean:

[A] ny sexual contact between two or more persons by any of the following:

1. Penetration of the penis into the vagina or anus.
2. Contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person.
3. Contact between the finger or hand of one person and the genitalia or anus of another person
4. Ejaculation onto the person of another.
5. By use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.²⁶

Thus, “a ‘sex act’ requires some touching of the anus or genitalia” (although it may be through clothes).²⁷

Not all contact “between the specified body parts (or substitutes)” qualifies as a “sex act” for purposes of sexual abuse—the contact “must be *sexual* in nature.”²⁸ “The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it.”²⁹ In *State v. Pearson*, the Iowa Supreme Court stated:

[T]he contact between an adult and a child bouncing on his or her lap would not be sexual in nature unless the circumstances surrounding it suggested it was. *Such circumstances certainly include whether the contact was made to arouse or satisfy the sexual desires of the defendant or the victim. However, the lack of such motivation would not preclude a finding of sexual abuse where the context in which the contact occurred showed the sexual nature of the contact.* Other relevant circumstances include but are not limited to the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.³⁰

***5** Thus, the Court has held that sexual abuse requires a contact that is “sexual in nature,” but not necessarily for the purpose of sexual gratification. Other circumstances can demonstrate that the contact is sexual in nature.

Twenty-seven years later the Iowa Supreme Court declined to overrule *Pearson* and rejected the defendant’s argument that sexual abuse required proof he sought sexual gratification.³¹ In *State v. Montgomery*, the court stated “[t]he legislature codified a sexual gratification element for lascivious acts but not for sexual abuse, which can be proven by sexual contact without a motive of sexual gratification.”³² Pointing

to lascivious acts with a child, indecent contact with a child, lascivious conduct with a minor, and sexual exploitation by a counselor or therapist, the court stated that “[t]he legislature knows how to require that conduct be done” for sexual gratification “because it has codified that element in other criminal statutes.”³³ The court “reaffirm[ed] *Pearson* and again decline[d] to engraft an additional element the legislature omitted.”³⁴ Relying in part on the doctrine of legislative acquiescence, the court presumed that the legislature has acquiesced in the court’s interpretation because so many years passed following *Pearson*.³⁵ Because “[t]here are valid policy reasons why the legislature might want to criminalize sexual abuse that is not for the purpose of sexual gratification,” conduct may be sexual in nature and thus a sex act when “performed to exert power or control over the victim without a motivation of sexual gratification.”³⁶ As such, under Iowa law the act required for sexual abuse need not be made to arouse or satisfy the sexual desires of the defendant or the victim.

***6** Addressing *Montgomery* and *Pearson*, the Government does not contest that Iowa courts declined to add an element of sexual gratification but states that “a sexual nature is still required to be proven to secure a conviction for any sex act or sex abuse” and that “[n]o matter the gratification, the contact must still be sexual.” Doc. 28 at 5. The Government does not state clearly whether sexual gratification is required but rather asserts “even with the narrower statutory language here, assault with intent to commit sexual abuse qualifies as a sex offense.” This conclusion fails to address how, under the categorical approach, sexual abuse that does not have an element of sexual gratification can constitute a sexual offense that does include an element of sexual gratification.

Both parties rely on *United States v. Carrillo-Topete*, which is a non-SORNA case that held that a prior Iowa conviction for assault with intent to commit sexual abuse “related to” sexual abuse and thus triggered a mandatory minimum sentence for possessing child pornography.³⁷ The Eighth Circuit compared the definition of “sexual abuse” in the federal statute and under Iowa law and noted: “we have held that the two definitions are close enough” because “‘sex acts’ by force or against the will of someone else necessarily involve ‘physical … misuse or maltreatment, meaning ‘the full range of conduct’ covered by the Iowa statute ‘fits squarely within’ the generic federal definition.”³⁸ The Government relies heavily on that statement, but in characterizing them as “close enough” and using the term “fits squarely within” the

court was looking at the conduct itself, not any motivation for that conduct. Moreover, as Defendant points out, the court noted the “potential mismatch between the reference to ‘sexual gratification’ in the federal definition, and the absence of a sexual-purpose requirement in Iowa,” concluding that the defendant waived that argument.³⁹ Significantly, in that case eligibility did not require a statutory match-up of elements, but instead one offense must simply relate the other. As the Government acknowledges, this is an “admittedly broader” standard. Doc. 28 at 6.

The remaining consideration is whether assault to commit sexual abuse differs from sexual abuse by requiring a purpose of sexual gratification. While sexual abuse requires general intent, assault with intent to commit sexual abuse requires specific intent.⁴⁰ Iowa courts have stated that the standard for determining whether a defendant had the specific intent to commit sexual abuse is:

The overt act must reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. It need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.⁴¹

Recently, the court clarified that a defendant’s “overt act toward committing sexual abuse describes only one powerful form of circumstantial evidence from which specific intent can be inferred” but that specific intent is “to achieve a sex act specifically described in section 702.17,” without mentioning any purpose of gratification.⁴² In addition, “[e]vidence sufficient to prove necessary specific intent includes sexual comment, touching in a sexual manner, attempt to remove clothing, or an act in any other way which would indicate a *plan* to engage in sexual activity.”⁴³ The purpose then is to commit the defined sex act, not to achieve sexual gratification. For example, the Iowa Supreme Court has noted that the act

of a defendant placing a hand on a girl’s breast “was an assault and may have involved a sex oriented purpose” but “this act alone was not sufficient” because “the purpose of this conduct might well have been limited to fondling of the girl’s breast” and not to engage in a sex act as defined in § 702.17.⁴⁴ In *State v. Beets*, the Iowa Supreme Court upheld a conviction for assault with intent to commit sexual abuse because the trial court found that the defendant “committed an assault upon the victim by grabbing and fondling her body against her will” and “intended to commit a sex act of penis to vagina contact or contact between his penis and the hand of [the victim].”⁴⁵ The court concluded there was substantial evidence to support the conviction, without ever addressing any motivation for the defendant’s acts.⁴⁶ As such, Iowa courts may require some sort of plan or overt act to achieve a sex act for specific intent, but I have not found any Iowa authority limiting that plan or overt act to those with the purpose of sexual gratification. Indeed, there is no reason to add that element to the Iowa offense of assault with intent to commit sexual abuse when the Iowa offense of sexual abuse itself does not require it. And the parties have not identified any caselaw requiring that the defendant sought sexual gratification to commit assault with intent to commit sexual abuse under Iowa Code § 709.11.

*7 I agree with Defendant that the Iowa offense of assault with intent to commit sexual abuse encompasses acts that may not be motivated by sexual gratification. Because the Iowa offense is broader than SORNA’s definition of sex offense, Negrete-Vaca’s conviction for assault with intent to commit sexual abuse does not categorically qualify as a sex offense under SORNA. Thus, as a matter of law, Negrete-Vaca was not required to register as a sex offender under SORNA, and I recommend that indictment be dismissed.

III. CONCLUSION

I recommend **GRANTING** Negrete-Vaca’s motion to dismiss (Doc. 23).

Objections to this Report and Recommendation, in accordance with 28 U.S.C. § 636(b)(1), Federal Rule of Criminal Procedure 59(b), and Local Criminal Rule 59, must be filed within fourteen days of the service of a copy of this Report and Recommendation; any response to the objections must be filed within seven days after service of the objections. A party asserting such objections must arrange promptly for the transcription of all portions of the record that the district

court judge will need to rule on the objections.⁴⁷ Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections.⁴⁸ Failure to object to the Report and Recommendation waives the right to de novo review by the district court of any portion of the Report and

Recommendation, as well as the right to appeal from the findings of fact contained therein.⁴⁹

All Citations

Slip Copy, 2026 WL 267605

Footnotes

- 1 The Iowa District Court's Record of Plea of Guilty and Sentencing Order required Defendant to register as a sex offender with the state of Iowa pursuant to Iowa Code Chapter 692A. Doc. 23-2 at 3.
- 2 See ***United States v. Marrowbone***, 102 F. Supp. 3d 1101, 1107 (D.S.D. 2015); ***United States v. Church***, 461 F. Supp. 3d 875, 893-94 (S.D. Iowa 2020).
- 3 **34 U.S.C. § 20913(a)**.
- 4 **34 U.S.C. § 20911(1)**.
- 5 **34 U.S.C. § 20911(5)(A)(i)** (emphasis added). The other definitions of “sex offense” include specified federal and military offenses and certain crimes against minors and are inapplicable here. **34 U.S.C. § 20911(5)(A)(ii)-(v)**.
- 6 **Church**, 461 F. Supp. 3d at 882.
- 7 ***Id.*** (citing ***Mathis v. United States***, 136 S. Ct. 2243, 2248 (2016)).
- 8 ***Barker v. United States***, No. 4:16-00084-CR-RK-1, 2022 WL 1749252, at *8 (W.D. Mo. May 31, 2022); ***United States v. Laney***, No. CR20-3053-LTS, 2021 WL 1821188, at *2 (N.D. Iowa May 6, 2021); ***United States v. Thayer***, 40 F.4th 797, 800 (7th Cir. 2022).
- 9 ***United States v. Hill***, 820 F.3d 1003, 1005 (8th Cir. 2016) (quoting ***Moncrieffe v. Holder***, 569 U.S. 184, 202 (2013)).
- 10 See ***United States v. Vineyard***, 945 F.3d 1164, 1168, 1170 (11th Cir. 2019) (collecting cases); see also ***Barker***, 2022 WL 1749252, at *8 (stating that “federal courts generally agree the categorical approach applies to determine whether a particular prior conviction qualifies as a sex offense under the elements definition of SORNA” and “when faced with similar statutory definitions and comparisons, the Eighth Circuit also generally employs the categorical approach”), *aff’d*, No. 22-2375, 2023 WL 6844489 (8th Cir. Oct. 17, 2023); ***United States v. Marrowbone***, No. 4:24-CR-40106-RAL, 2025 WL 1951890, at *3 (D.S.D. July 16, 2025); ***United States v. Laney***, No. 20-CR-3053-LTS-KEM, 2021 WL 2373845, at *3–4 (N.D. Iowa Mar. 26, 2021), *report and recommendation adopted*, 2021 WL 1821188 (N.D. Iowa May 6, 2021).
- 11 **Vineyard**, 945 F.3d at 1170.
- 12 ***United States v. Sonnenberg***, 556 F.3d 667, 671 (8th Cir. 2009); see also ***United States v. Westerman***, 705 F. App’x 651, 652 (9th Cir. 2017) (“‘Sexual act’ and ‘sexual contact’ are undefined, so we use the ‘ordinary, contemporary, and common meaning of the statutory words’ ”).

13 See *Vineyard*, 945 F.3d at 1172 (defining “sexual contact” as “a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification”); *United States v. Helton*, 944 F.3d 198, 207 (4th Cir. 2019), as amended (Dec. 4, 2019) (defining “sexual act” as “something done voluntarily that relates to sexual desire or gratification”).

14 *Barker*, 2022 WL 1749252, at *8.

15 *Id.* (citing *United States v. Bemis*, No. 8:19-CR-458-T-33AAS, 2020 WL 1046827 (M.D. Fla. Mar. 4, 2020)).

16 *Id.* (citing *United States v. Garcia-Juarez*, 421 F.3d 655, 659 (8th Cir. 2005) and *Sonnenberg*, 556 F.3d at 671).

17 See, e.g., *United States v. Marrowbone*, No. 4:24-CR-40106-RAL, 2025 WL 1951890, at *6 (D.S.D. July 16, 2025). Section 2246 defines “sexual act” as follows:

(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;

(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; or

(D) 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). It 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.” **18 U.S.C. § 2246(3).**

18 **18 U.S.C. § 2246.**

19 The Government does not expressly offer a definition of “sexual act” or “sexual contact” under SORNA but it does equate Iowa’s law and federal definitions, stating they “substantially track” and cites 18 U.S.C. § 2246(2), (3) and Iowa Code §§ 702.17, 709.1. See Doc. 28 at 8.

20 *Vineyard*, 945 F.3d at 1173 (stating that the “argument that the definition of sexual contact used in 18 U.S.C. § 2246 should be imported into SORNA conflicts with the language and structure of both statutes” and “there is no legislative relationship between SORNA and [Section] 2246”); *Helton*, 944 F.3d at 207 (finding there was “no indication that Congress intended to import the definitions of chapter 109A to [another] chapter” and noting that Section 2246 “explicitly limits the definitions provided therein to the chapter in which it resides” because the wording and title of that section limits it to that chapter (“[a]s used in this chapter” and “[d]efinitions for chapter.”) (quoting *United States v. Fugit*, 703 F.3d 248, 255-56 (4th Cir. 2012)); *Westerman*, 705 F. App’x at 652 (“We are not persuaded that Congress intended ‘to import the elements of offenses delineated elsewhere in the U.S. Code,’ and therefore decline to import the definitions of ‘sexual act’ and ‘sexual contact’ found in 18 U.S.C. § 2246(2), (3).”).

21 See *Sonnenberg*, 556 F.3d at 670-71 (rejecting the argument that definitions of federal offenses from Chapter 109A should apply to a sentencing enhancement applicable if a prior state conviction was “under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward,” noting that “the statute does not instruct us to apply chapter 109A’s definitions”; the court

defined “sexual” for “sexual abuse” under its ordinary meaning as needing intent to seek libidinal gratification, and concluded that a prior conviction for committing lascivious act with children triggered the enhancement.).

22 **Iowa Code § 709.11** (2020) (assault with intent to commit sexual abuse); **Iowa Code § 708.1** (assault). The Iowa Supreme Court has interpreted this statute to mean: “(1) the defendant assaulted the alleged victim, (2) with the intent to commit a sex act, (3) by force or against the will of the victim.” **State v. Beets**, 528 N.W.2d 521, 523 (Iowa 1995).

23 **Iowa Code § 709.1.**

24 *In re A.G.*, 662 N.W.2d 374, 2003 WL 289261, at *1 (Iowa Ct. App. Feb. 12, 2003).

25 **Beets**, 528 N.W.2d at 523.

26 **Iowa Code § 702.17.**

27 *In re A.G.*, 2003 WL 289261, at *1.

28 **State v. Pearson**, 514 N.W.2d 452, 455 (Iowa 1994). In *State v. Monk*, the court held a jury could find sufficient evidence of sexual abuse when the defendants and victim were teenagers who were “good friends” and frequently engaged in “teasing, wrestling, and similar horseplay,” and during a party, defendants stuck a broom handle into the victim’s anus, after which “[e]veryone laughed before [the victim] pushed the broom away and ran to the bathroom crying.” The court recognized, however, that “the jury could have concluded the incident was not sexual in nature” and found error in the jury instruction defining a “sex act” based on “contact” between body parts, rather than specifically requiring “sexual contact.” 514 N.W.2d 448, 450-52 (Iowa 1994).

29 **Pearson**, 514 N.W.2d at 455.

30 **Id.**, at 455 (emphasis added).

31 **State v. Montgomery**, 966 N.W.2d 641, 645-46 (Iowa 2021).

32 **Id.**, at 646. Iowa Code § 709.8 (lascivious acts with a child) makes unlawful specified acts with a child “for the purpose of arousing or satisfying the sexual desires of either of them.”

33 **Id.**, at 651. Other sections of the Iowa Code also specify that a crime be “sexually motivated” (defined as “one of the purposes for commission of a crime is the purpose of sexual gratification of the perpetrator of the crime”), such as Iowa sex offender registration (Iowa Code § 692A.126), civil commitment (Iowa Code § 229A.2), harassment (Iowa Code § 708.15 requires registration if against a minor and sexually motivated).

34 **Montgomery**, 966 N.W.2d. at 646.

35 **Id.**, at 651.

36 **Id.** (favorably citing *State v. Davis*, 584 N.W.2d 913, 917 (Iowa Ct. App. 1998), in which the defendant suffocated his girlfriend with a pillow after she declined his request for sex, then beat her and put his fist inside her vagina, causing lacerations; the court rejected defendant’s argument that he desired to hurt his girlfriend by putting his fist in her vagina and that the act was therefore not sexual in nature, noting they were lovers, he asked for sex an hour before the contact, and her refusal prompted his violent behavior).

37 116 F.4th 792 (8th Cir. 2024).

38 **Id.**, at 794 (citations omitted).

39 *Id.*, at 794 n.2.

40 *State v. McNitt*, 451 N.W.2d 824, 824 (Iowa 1990).

41 *State v. Casady*, 491 N.W.2d 782, 787–88 (Iowa 1992) (quoting *State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989)).

42 *State v. Hawkins*, No. 23-1468, 2025 WL 3180318, at *4–6 (Iowa Nov. 14, 2025) (citation omitted).

43 *State v. Most*, 578 N.W.2d 250, 254 (Iowa Ct. App. 1998) (emphasis added).

44 *Radeke*, 444 N.W.2d at 478.

45 528 N.W.2d at 523.

46 *Id.*, at 524 (“Beets took a young member of his church to a secluded road late in the evening. He is much larger than she. He lunged at her, grabbing and fondling her. She protested and struggled against the assault. Beets attempted to make contact between his penis and her hand or her vagina. This evidence sufficiently supports the conviction of assault with intent to commit sexual abuse.”).

47 LCrR 59.

48 See Fed. R. Crim. P. 59.

49 *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

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2025 WL 3711872

Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee,
GREENEVILLE DIVISION.

UNITED STATES OF AMERICA, Plaintiff,
v.
MICHAEL PATRICK CATES, Defendant.

2:25-CR-00070-DCLC-CRW

|

Filed 12/22/2025

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Clifton L. Corker United States District Judge

*1 Defendant Michael Patrick Cates moves to dismiss the indictment charging him with failure to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”). He argues that his prior Virginia convictions for rape and forcible sodomy are not comparable to SORNA’s enumerated Tier III offenses, including sexual assault under 18 U.S.C. § 2242. According to Cates, because his Virginia offenses are general intent crimes and § 2242 requires specific intent, his prior convictions cannot support a Tier III classification. The motion therefore presents a question of law not yet addressed by the Sixth Circuit: whether sexual assault under § 2242 is a general intent offense. He also challenges the constitutionality of SORNA’s Tier classification system. For the reasons explained below, the Court concludes that § 2242 is a general intent crime and that Cates was properly classified as a Tier III sex offender and that SORNA’s Tier classification system is not unconstitutional. The motion [Doc. 17] is DENIED.

I. BACKGROUND

In 1985, Cates was convicted in Virginia of two counts of rape and one count of forcible sodomy and received a thirty-year sentence. Those convictions require him to register as a sex offender under SORNA, 18 U.S.C. § 2250(a). The parties dispute whether Cates is a Tier I offender who must register

for 15 years, or a Tier III offender who must register for life. If he is a Tier I offender, his registration obligations would have ended by April 23, 2014.¹

Cates was indicted for failing to register between October 23, 2024, and April 9, 2025. He now moves to dismiss the indictment on two grounds: (1) he is a Tier I offender, so his registration requirement ended before the allegations in the indictment, and (2) SORNA’s tier classifications are unconstitutionally vague. [Doc. 17]. The Government responded in opposition [Doc. 22], and Cates has replied [Doc. 24].

II. LEGAL STANDARD

Under Fed.R.Crim.P. 12(b), a defendant may raise by pretrial motion any issue “capable of determination without the trial of the general issue....” Fed. R. Crim. P. 12(b). The Sixth Circuit instructs district courts to “dispose of all motions before trial if they are capable of determination without trial of the general issue.” *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976). Courts may consider evidence outside the indictment when the challenge presents a pure question of law. See, e.g., *United States v. Church*, 461 F. Supp.3d 875, 880-81 (S.D. Iowa 2020) (granting a defendant’s motion to dismiss an indictment for failure to register under SORNA because the defendant was a Tier I offender).

III. ANALYSIS

A. Defendant’s SORNA Tier Classification

Cates first argues that Virginia’s rape and forcible sodomy statutes are overbroad in comparison to SORNA’s enumerated Tier II or III offenses. The Court will first consider SORNA’s tier classification scheme and the elements of his prior crimes of conviction before comparing them to the appropriate Tier III offenses.

1. SORNA and the Tier III Classification

*2 SORNA establishes a national sex-offender registry and requires offenders to register and keep their information current in each jurisdiction where they live, work, or attend school. 34 U.S.C. § 20913(a). How long an offender must register depends on the offender’s “Tier.” Tier I offenders must register for 15 years, Tier II offenders for 25 years, and Tier III offenders must register for life. 34 U.S.C. § 20915(a).

A Tier III offender is one whose predicate offense is punishable by imprisonment for more than one year and is “comparable to or more severe than” the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual contact against a minor under 13, or whose predicate offense involved child kidnapping. 34 U.S.C. § 20911(4). When deciding whether a prior offense is comparable to a Tier III sex offense, courts use the categorial approach. Under this approach, the analysis is limited to the elements of the state offense, not the acts the offender actually did. *United States v. Barcus*, 892 F.3d 228, 232 (6th Cir. 2018) (courts must ‘“compare’ what the state law offense requires—not what an individual defendant did—to the Tier III requirements.”). The focus is on the “the minimum conduct criminalized by the state statute.” *United States v. Southers*, 866 F.3d 364, 367 (6th Cir. 2017) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). A state offense is comparable only if its elements are the same as, or narrower than, the comparable Tier III offense. *Mathis v. United States*, 579 U.S. 500, 503 (2016). To show overbreadth, the defendant must demonstrate “a realistic probability, not a theoretical possibility” that the State prosecutes conduct falling outside the generic federal definition. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

2. Defendant's Prior Sex Offenses

Virginia's rape statute in effect at the time of Cates' conviction, Va. Code 18.2-61 (1982), covers sexual intercourse (1) obtained by force, threat, or intimidation, (2) through the victim's mental incapacity or physical helplessness, or (3) with a child under 13. Va. Code Ann. § 18.2-61 (1982). Rape is a general intent crime. *Velasquez v. Commonwealth*, 661 S.E.2d 454, 456 (Va. 2008) (“The required general intent is established upon proof that the accused knowingly and intentionally committed the acts constituting the elements of rape.”).

Virginia's forcible sodomy statute, Va. Code § 18.2-67.1 (1981), criminalizes certain sexual acts obtained through the same means as the rape statute.² This statute is divisible and the indictment confirms that Cates was convicted under the “against her will, by force, threat, intimidation, or through mental incapacitation or physical helplessness” variant. [Doc. 22-1, pg. 3]; see *Descamps v. United States*, 570 U.S. 254, 257 (2013) (noting that when a statute “sets out one or more elements of the offense in the alternative,” ... courts may “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.”). Forcible sodomy is also a general intent crime. *Bowden v. Commonwealth*, 667 S.E.2d 27, 29 (Va. Ct. App. 2008) (“[S]odomy, like rape, does not require a specific intent.”). Virginia's “mental incapacity or physical helplessness” provisions require that the defendant “knew or should have known” about the incapacity or helplessness. Va. Code Ann. § 18.2-67.10(3)-(4).

3. Defendant's Overbreadth Challenges

*3 Cates raises four arguments that the Virginia statutes are overbroad compared to the federal Tier II and III offenses. The Court will address each in turn.

Cates contends the only plausible federal comparator is “abusive sexual contact” under 18 U.S.C. § 2244, and that § 2242 is inapplicable. The Court disagrees. In selecting the appropriate federal comparator, the Court looks to the federal statute that prohibits the same type of offense conduct as the state statute. See *Barcus*, 892 F.3d at 232. In *Barcus*, the defendant had been convicted under Tennessee's aggravated sexual battery statute involving a victim under the age of 13. *Id.* The Sixth Circuit did not limit its analysis to § 2244, but instead compared the state statute to the Tier III requirements as a whole, examining the definitions of “sexual act” and “sexual conduct” across §§ 2241, 2242, and 2244. *Id.* The Sixth Circuit then focused its comparison on the federal provision whose definition of “sexual act” most closely corresponded to the conduct criminalized by the state statute. *Id.* (citing § 2246(2)(D)).

The same approach applies here. Virginia's rape and forcible sodomy statutes³ criminalizes conduct that closely tracks the federal offense in § 2242, which prohibits sexual acts accomplished by force or threats. Because § 2242 targets the same core conduct as the Virginia statutes, it is a proper Tier III comparator, and the Government correctly relies on it for purposes of the categorical analysis.

a. Mens Rea (General v. Specific Intent)

Cates argues that Virginia's rape and forcible sodomy statutes are Tier I offenses because they require only general intent, while the federal Tier II and Tier III comparator statutes allegedly require specific intent. The Government counters that § 2242 is a general-intent statute and, even if it were not, Virginia's “knew or should have known” mens rea for incapacity satisfies any heightened requirement.

Section 2242 requires that the defendant act “knowingly,” at least as to engaging in the sexual act. 18 U.S.C. § 2242. The Sixth Circuit has not addressed whether “knowingly” applies only to the act itself or to all elements of the offense. Other circuits are split. The Eighth and Tenth Circuits apply “knowingly” to each element, including knowledge of incapacity. *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc); *United States v. Earls*, 129 F.4th 850, 861 (10th Cir. 2025). The Seventh and Ninth Circuits, by contrast, treat § 2242 as a general-intent statute, requiring only that the defendant knowingly engaged in the sexual act. See Ninth Circuit Model Criminal Jury Instructions § 20.9 (2022); Seventh Circuit Pattern Jury Instructions 893 (2023); cf. *United States v. Price*, 980 F.3d 1211, 1215 (9th Cir. 2019).

*4 The Fifth Circuit confronted the same mens rea issue in *United States v. Brown*, 774 F. App'x 837 (5th Cir. 2019). Brown had been convicted at a Navy court-martial of abusive sexual contact and sexual assault under the Uniform Code of Military Justice (“UCMJ”). *Id.* at 838. After serving his sentence, he failed to register under SORNA and pled guilty. *Id.* Before sentencing, he objected to the PSR's classification of him as a Tier III offender, arguing that the UCMJ statute was broader than the federal comparator. His underlying conviction required proof that the defendant “committ[ed] a sexual act … when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware” of the act. *Id.* at 840 (quoting 10 U.S.C. § 920(b)(2)(B)). When the Fifth Circuit compared that statute to 18 U.S.C. § 2242, it faced the same question presented here: whether § 2242's “knowingly” requirement applies only to the act of engaging in the sexual act or to each element of the offense. If “knowingly” modified every element, the UCMJ's “knows or reasonably should know” language would be broader and thus not comparable. *Id.* At the time, the Fifth Circuit had not resolved that mens rea issue, just as the Sixth Circuit has not now. The district court nevertheless classified Brown as a Tier III offender, and the Fifth Circuit affirmed, noting the “unsettled state of the law”⁴ and concluding that, faced with competing interpretations, the district court's comparability finding was not plainly erroneous. *Id.* at 841.

This Court reaches the same conclusion. This Court must interpret the statute according to its text, structure, and the case law. This Court finds that the more natural reading of § 2242 is that “knowingly” modifies only the sexual act itself. Section 2242 makes it a crime to “knowingly--(2) engage[] in a sexual act with another person if that person is--” incapable of consent. The requirement of “knowingly” is separated by

two sets of interruptive punctuation from the distinct element relating to the victim's incapacity, and the “Supreme Court has instructed that criminal statutes of this construction are ‘most naturally’ read such that ‘knowingly’ modifies only the surrounding active verbs and not the separate subsidiary clauses.” *Bruguier*, 735 F.3d at 776 (Murphy, J., dissenting) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994)). Therefore, the “most natural grammatical meaning” of § 2242 is that ‘knowingly’ only modifies the surrounding verbs ‘engages’ and ‘attempts.’ *Id.* There is no reason here to deviate from the most natural grammatical meaning. *Id.* at 777. Indeed, the legislative history of the statute supports this reading. In drafting the statute, Congress initially contemplated applying a knowing mens rea to the victim's incapacity. *Id.* at 779 (noting the proposed language of § 2242 criminalized “knowingly engag[ing] in a sexual act with another person if such other person is *known by the offender to be*—(1) incapable of appraising the nature of the conduct.”). Revisions later removed the specific intent requirement. *Id.* Under this interpretation, § 2242 is a general-intent offense, and Virginia's rape and forcible sodomy statutes—which also require only general intent—do not sweep more broadly. Applying that interpretation here, Cates' Virginia convictions properly place him in Tier III.

b. Intimidation Variant

Cates argues that Virginia's rape statute is categorically overbroad because it criminalizes rape accomplished by “intimidation,” a term he says sweeps more broadly than the federal offense in § 2241. Virginia's statute allows conviction when intercourse is obtained by “force, threat or intimidation,” and Virginia courts have interpreted “intimidation” to include psychological pressure exerted on a vulnerable victim, even without an explicit threat. *Sutton v. Commonwealth*, 228 Va. 654, 663 (1985).

*5 This argument, however, relies on comparing Virginia's statute only to § 2241. That is not the correct—or the only—federal comparator. Section 2241 addresses aggravated sexual abuse involving force or threats of severe harm. Section 2242 separately criminalizes causing another to engage in a sexual act by placing that person in fear, except for the heightened threats covered by § 2241. 18 U.S.C. § 2242. Although the statutory phrasing differs, § 2242 encompasses the same types of intimidation that Virginia's statute covers. Because the federal scheme accounts for both physical force and lesser forms of coercive fear, Virginia's intimidation variant does not sweep more broadly and is not categorically overbroad.

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Cates also argues that § 2242(2) requires the defendant not only to knowingly engage in a sexual act, but also know that the victim was incapable of consent. He contends that Virginia's "knew or should have known" standard is therefore broader because it permits conviction based on negligence. But this argument hinges on how § 2242's "knowingly" requirement is interpreted. Because this Court has concluded that "knowingly" modifies only the act of engaging in the sexual act—not the victim's incapacity—§ 2242 is a general-intent offense. Under that reading, Virginia's incapacity provisions are not broader, and Cates's argument fails.

Even in circuits that follow *Bruguier* and treat § 2242 as requiring knowledge of the victim's incapacity, courts have still found "knew or should have known" language comparable. In *United States v. Church*, the district court evaluated Nebraska's first-degree sexual assault statute, which criminalizes sexual penetration when the defendant "knew or should have known" that the victim was mentally or physically incapable of resisting or appraising the conduct. 461 F. Supp. 3d 875, 888–89 (S.D. Iowa 2020). The court held that this incapacity provision "appears comparable" to § 2242, distinguishing it from a separate deception-based subsection that the federal statute does not cover.

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Cates also argues that the statutory-rape variant of Virginia's statute is overbroad because some federal statutes require that the victim be at least four years younger than the defendant. Virginia's third rape variant applies when the defendant knowingly engages in intercourse "with a female child under the age of thirteen." Va. Code § 18.2-61 (1982). Section 2242 does not contain an age-specific provision, so it is not the proper comparator. Instead, SORNA expressly classifies "abusive sexual contact ... against a minor who has not attained the age of 13 years" as a Tier III offense. 34 U.S.C. § 20911(4)(A)(ii). Section 2244, which defines abusive sexual contact, likewise imposes no age-difference requirement. Thus, Virginia's under-13 variant criminalizes the same conduct addressed in the federal scheme, unlike statutes such as § 2241 that impose a four-year age-gap requirement for older minors. *Compare* 34 U.S.C. § 20911(4)(A)(ii) (no age difference requirement), *with* 18 U.S.C. § 2241 (requiring that the victim be at least four years younger than the defendant if the victim is between ages 12 and 16).

4. Rule of Lenity

Cates argues that the rule of lenity requires dismissal. The rule of lenity applies only when there is genuine ambiguity that traditional canons of statutory construction cannot resolve. *United States v. Cain*, 583 F.3d 408, 417 (6th Cir. 2009). As the Court was able to resolve the issue of Cates' tier classification through traditional statutory interpretation canons, there is no ambiguity, and the rule of lenity does not apply.

B. SORNA's Constitutionality

*6 Cates argues that SORNA's tier classification scheme is unconstitutionally vague because it does not define key terms, articulate specific interpretive methods, or ensure uniform application. He contends that this lack of clarity prevents an ordinary person from understanding the consequences of a failure-to-register offense. A criminal statute violates the Fifth Amendment if it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Welch v. United States*, 578 U.S. 120, 124 (2016).

The Sixth Circuit has already addressed a materially similar challenge. In *United States v. Shepard*, the court held that the Sentencing Guideline incorporating SORNA's tier structure is not unconstitutionally vague. 658 F. App'x 260, 266–67 (6th Cir. 2016). The defendant in *Shepard* argued that he had been misclassified as a Tier II offender and that the system for determining tiers failed to provide adequate notice. *Id.* at 266. The Sixth Circuit rejected that claim, explaining that U.S.S.G. § 2A3.5, its application notes, and 42 U.S.C. § 16911 "unambiguously" set forth a clear process: the sentencing court compares the elements of the defendant's prior offense to the federal offenses enumerated in § 16911. *Id.* (citing *United States v. Lowry*, 595 F.3d 863, 866 (8th Cir. 2010)). The court concluded that "[n]othing about this statutory scheme" is so indeterminate that it fails to provide fair notice or invites arbitrary enforcement. *Id.* (quoting *Welch*, 578 U.S. at 124). Although *Shepard* addressed the Guideline rather than a constitutional attack on SORNA itself, the Guideline directly incorporates SORNA's tier framework. Had the underlying statutory scheme been unconstitutionally vague, the Guideline would likewise have been invalid. The Sixth Circuit's decision necessarily implies that SORNA's tiering system is constitutionally sound.

Much of Cates' argument focuses not on SORNA's text but on the difficulties courts encounter when applying the

categorical approach. That approach—though often criticized—reflects binding Supreme Court precedent. It can be complex, can yield different outcomes across jurisdictions, and can force courts into highly technical element-by-element comparisons. *See United States v. Cervenak*, 135 F.4th 311, 342 (6th Cir. 2025) (Griffin, J., dissenting) (describing the categorical approach as “absurd, convoluted, and nonsensical”). But these complications do not render SORNA vague. The Supreme Court has made clear that “what renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact has been proved, but rather the indeterminacy of what that fact is.” *United States v. Williams*, 553 U.S. 285, 306 (2008). SORNA’s tier scheme provides such a standard. It defines the categories of offenses, identifies the federal comparators, and directs courts to determine comparability by

applying the categorical approach. Defendants can ascertain which tier applies by examining the elements of their predicate offenses. Because SORNA supplies a workable and intelligible framework, it is not unconstitutionally vague.

IV. CONCLUSION

For these reasons, Cates’ motion to dismiss [Doc. 17] is **DENIED**.

SO ORDERED:

All Citations

Slip Copy, 2025 WL 3711872

Footnotes

- 1 Cates was released from prison on April 23, 1999.
- 2 A person commits forcible sodomy under Virginia law “if he or she engages in cunnilingus, fellatio, anilingus, or anal intercourse with the complaining witness, or causes the complaining witness to engage in such acts with any person, and (1) the complaining witness is less than thirteen years old, or (2) the act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness’s mental incapacity or physical helplessness.” Va. Code § 18.2-67.1 (1981)
- 3 18 U.S.C. § 2242 criminalizes sexual abuse involving a “sexual act,” including acts accomplished by threat or fear, or with a victim incapable of appraising the nature of the conduct or communicating unwillingness to participate. 18 U.S.C. § 2242. A “sexual act” includes penetrative intercourse or oral sex. 18 U.S.C. §§ 2246(2)(A)–(B). Those definitions encompass the conduct underlying Cates’s prior convictions for rape and forcible sodomy. By contrast, § 2244 applies to offenses involving “sexual contact,” defined as non-penetrative touching, including touching through clothing. 18 U.S.C. § 2246(3). Because Cates’s offenses involved sexual acts rather than sexual contact, § 2242—not § 2244—is the appropriate federal comparator.
- 4 Other district courts have come down on both sides of the circuit split. *Compare United States v. Goguen*, 218 F. Supp. 3d 111, 121 (D. Me. 2016) (finding that Connecticut’s general intent sexual assault in the second degree offense was comparable to § 2242), *with United States v. Harry*, No. CR 10-1915 JB, 2014 WL 6065677, at *15 (D.N.M. Oct. 14, 2014) (applying the knowing requirement to each element of § 2242); see also *United States v. Gilchrist*, No. CR 3:19-147, 2021 WL 808753, at *7 (M.D. Pa. Mar. 3, 2021) (finding that New York’s 1991 first degree rape statute with a general intent requirement was comparable to § 2241).

2025 WL 3711872

Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee,
GREENEVILLE DIVISION.

UNITED STATES OF AMERICA, Plaintiff,
v.
MICHAEL PATRICK CATES, Defendant.

2:25-CR-00070-DCLC-CRW

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Filed 12/22/2025

Attorneys and Law Firms

Meghan Lynn Gomez, United States Attorney, DOJ-United States Attorney's Office, Greeneville, TN, for Plaintiff.

MEMORANDUM OPINION AND ORDER

Clifton L. Corker United States District Judge

*1 Defendant Michael Patrick Cates moves to dismiss the indictment charging him with failure to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”). He argues that his prior Virginia convictions for rape and forcible sodomy are not comparable to SORNA’s enumerated Tier III offenses, including sexual assault under 18 U.S.C. § 2242. According to Cates, because his Virginia offenses are general intent crimes and § 2242 requires specific intent, his prior convictions cannot support a Tier III classification. The motion therefore presents a question of law not yet addressed by the Sixth Circuit: whether sexual assault under § 2242 is a general intent offense. He also challenges the constitutionality of SORNA’s Tier classification system. For the reasons explained below, the Court concludes that § 2242 is a general intent crime and that Cates was properly classified as a Tier III sex offender and that SORNA’s Tier classification system is not unconstitutional. The motion [Doc. 17] is DENIED.

I. BACKGROUND

In 1985, Cates was convicted in Virginia of two counts of rape and one count of forcible sodomy and received a thirty-year sentence. Those convictions require him to register as a sex offender under SORNA, 18 U.S.C. § 2250(a). The parties dispute whether Cates is a Tier I offender who must register

for 15 years, or a Tier III offender who must register for life. If he is a Tier I offender, his registration obligations would have ended by April 23, 2014.¹

Cates was indicted for failing to register between October 23, 2024, and April 9, 2025. He now moves to dismiss the indictment on two grounds: (1) he is a Tier I offender, so his registration requirement ended before the allegations in the indictment, and (2) SORNA’s tier classifications are unconstitutionally vague. [Doc. 17]. The Government responded in opposition [Doc. 22], and Cates has replied [Doc. 24].

II. LEGAL STANDARD

Under Fed.R.Crim.P. 12(b), a defendant may raise by pretrial motion any issue “capable of determination without the trial of the general issue....” Fed. R. Crim. P. 12(b). The Sixth Circuit instructs district courts to “dispose of all motions before trial if they are capable of determination without trial of the general issue.” *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976). Courts may consider evidence outside the indictment when the challenge presents a pure question of law. See, e.g., *United States v. Church*, 461 F. Supp.3d 875, 880-81 (S.D. Iowa 2020) (granting a defendant’s motion to dismiss an indictment for failure to register under SORNA because the defendant was a Tier I offender).

III. ANALYSIS

A. Defendant’s SORNA Tier Classification

Cates first argues that Virginia’s rape and forcible sodomy statutes are overbroad in comparison to SORNA’s enumerated Tier II or III offenses. The Court will first consider SORNA’s tier classification scheme and the elements of his prior crimes of conviction before comparing them to the appropriate Tier III offenses.

1. SORNA and the Tier III Classification

*2 SORNA establishes a national sex-offender registry and requires offenders to register and keep their information current in each jurisdiction where they live, work, or attend school. 34 U.S.C. § 20913(a). How long an offender must register depends on the offender’s “Tier.” Tier I offenders must register for 15 years, Tier II offenders for 25 years, and Tier III offenders must register for life. 34 U.S.C. § 20915(a).

A Tier III offender is one whose predicate offense is punishable by imprisonment for more than one year and is “comparable to or more severe than” the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual contact against a minor under 13, or whose predicate offense involved child kidnapping. 34 U.S.C. § 20911(4). When deciding whether a prior offense is comparable to a Tier III sex offense, courts use the categorial approach. Under this approach, the analysis is limited to the elements of the state offense, not the acts the offender actually did. *United States v. Barcus*, 892 F.3d 228, 232 (6th Cir. 2018) (courts must ‘“compare’ what the state law offense requires—not what an individual defendant did—to the Tier III requirements.”). The focus is on the “the minimum conduct criminalized by the state statute.” *United States v. Southers*, 866 F.3d 364, 367 (6th Cir. 2017) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). A state offense is comparable only if its elements are the same as, or narrower than, the comparable Tier III offense. *Mathis v. United States*, 579 U.S. 500, 503 (2016). To show overbreadth, the defendant must demonstrate “a realistic probability, not a theoretical possibility” that the State prosecutes conduct falling outside the generic federal definition. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

2. Defendant's Prior Sex Offenses

Virginia's rape statute in effect at the time of Cates' conviction, Va. Code 18.2-61 (1982), covers sexual intercourse (1) obtained by force, threat, or intimidation, (2) through the victim's mental incapacity or physical helplessness, or (3) with a child under 13. Va. Code Ann. § 18.2-61 (1982). Rape is a general intent crime. *Velasquez v. Commonwealth*, 661 S.E.2d 454, 456 (Va. 2008) (“The required general intent is established upon proof that the accused knowingly and intentionally committed the acts constituting the elements of rape.”).

Virginia's forcible sodomy statute, Va. Code § 18.2-67.1 (1981), criminalizes certain sexual acts obtained through the same means as the rape statute.² This statute is divisible and the indictment confirms that Cates was convicted under the “against her will, by force, threat, intimidation, or through mental incapacitation or physical helplessness” variant. [Doc. 22-1, pg. 3]; see *Descamps v. United States*, 570 U.S. 254, 257 (2013) (noting that when a statute “sets out one or more elements of the offense in the alternative,” ... courts may “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.”). Forcible sodomy is also a general intent crime. *Bowden v. Commonwealth*, 667 S.E.2d 27, 29 (Va. Ct. App. 2008) (“[S]odomy, like rape, does not require a specific intent.”). Virginia's “mental incapacity or physical helplessness” provisions require that the defendant “knew or should have known” about the incapacity or helplessness. Va. Code Ann. § 18.2-67.10(3)-(4).

3. Defendant's Overbreadth Challenges

*3 Cates raises four arguments that the Virginia statutes are overbroad compared to the federal Tier II and III offenses. The Court will address each in turn.

Cates contends the only plausible federal comparator is “abusive sexual contact” under 18 U.S.C. § 2244, and that § 2242 is inapplicable. The Court disagrees. In selecting the appropriate federal comparator, the Court looks to the federal statute that prohibits the same type of offense conduct as the state statute. See *Barcus*, 892 F.3d at 232. In *Barcus*, the defendant had been convicted under Tennessee's aggravated sexual battery statute involving a victim under the age of 13. *Id.* The Sixth Circuit did not limit its analysis to § 2244, but instead compared the state statute to the Tier III requirements as a whole, examining the definitions of “sexual act” and “sexual conduct” across §§ 2241, 2242, and 2244. *Id.* The Sixth Circuit then focused its comparison on the federal provision whose definition of “sexual act” most closely corresponded to the conduct criminalized by the state statute. *Id.* (citing § 2246(2)(D)).

The same approach applies here. Virginia's rape and forcible sodomy statutes³ criminalizes conduct that closely tracks the federal offense in § 2242, which prohibits sexual acts accomplished by force or threats. Because § 2242 targets the same core conduct as the Virginia statutes, it is a proper Tier III comparator, and the Government correctly relies on it for purposes of the categorical analysis.

a. Mens Rea (General v. Specific Intent)

Cates argues that Virginia's rape and forcible sodomy statutes are Tier I offenses because they require only general intent, while the federal Tier II and Tier III comparator statutes allegedly require specific intent. The Government counters that § 2242 is a general-intent statute and, even if it were not, Virginia's “knew or should have known” mens rea for incapacity satisfies any heightened requirement.

Section 2242 requires that the defendant act “knowingly,” at least as to engaging in the sexual act. 18 U.S.C. § 2242. The Sixth Circuit has not addressed whether “knowingly” applies only to the act itself or to all elements of the offense. Other circuits are split. The Eighth and Tenth Circuits apply “knowingly” to each element, including knowledge of incapacity. *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc); *United States v. Earls*, 129 F.4th 850, 861 (10th Cir. 2025). The Seventh and Ninth Circuits, by contrast, treat § 2242 as a general-intent statute, requiring only that the defendant knowingly engaged in the sexual act. See Ninth Circuit Model Criminal Jury Instructions § 20.9 (2022); Seventh Circuit Pattern Jury Instructions 893 (2023); cf. *United States v. Price*, 980 F.3d 1211, 1215 (9th Cir. 2019).

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This Court reaches the same conclusion. This Court must interpret the statute according to its text, structure, and the case law. This Court finds that the more natural reading of § 2242 is that “knowingly” modifies only the sexual act itself. Section 2242 makes it a crime to “knowingly--(2) engage[] in a sexual act with another person if that person is--” incapable of consent. The requirement of “knowingly” is separated by

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- 1 Cates was released from prison on April 23, 1999.
- 2 A person commits forcible sodomy under Virginia law “if he or she engages in cunnilingus, fellatio, anilingus, or anal intercourse with the complaining witness, or causes the complaining witness to engage in such acts with any person, and (1) the complaining witness is less than thirteen years old, or (2) the act is accomplished against the will of the complaining witness, by force, threat or intimidation, or through the use of the complaining witness’s mental incapacity or physical helplessness.” Va. Code § 18.2-67.1 (1981)
- 3 18 U.S.C. § 2242 criminalizes sexual abuse involving a “sexual act,” including acts accomplished by threat or fear, or with a victim incapable of appraising the nature of the conduct or communicating unwillingness to participate. 18 U.S.C. § 2242. A “sexual act” includes penetrative intercourse or oral sex. 18 U.S.C. §§ 2246(2)(A)–(B). Those definitions encompass the conduct underlying Cates’s prior convictions for rape and forcible sodomy. By contrast, § 2244 applies to offenses involving “sexual contact,” defined as non-penetrative touching, including touching through clothing. 18 U.S.C. § 2246(3). Because Cates’s offenses involved sexual acts rather than sexual contact, § 2242—not § 2244—is the appropriate federal comparator.
- 4 Other district courts have come down on both sides of the circuit split. *Compare United States v. Goguen*, 218 F. Supp. 3d 111, 121 (D. Me. 2016) (finding that Connecticut’s general intent sexual assault in the second degree offense was comparable to § 2242), *with United States v. Harry*, No. CR 10-1915 JB, 2014 WL 6065677, at *15 (D.N.M. Oct. 14, 2014) (applying the knowing requirement to each element of § 2242); see also *United States v. Gilchrist*, No. CR 3:19-147, 2021 WL 808753, at *7 (M.D. Pa. Mar. 3, 2021) (finding that New York’s 1991 first degree rape statute with a general intent requirement was comparable to § 2241).

2025 WL 3650247

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

UNITED STATES of America, Plaintiff,
v.
Arnold James BEGAY, Defendant.

No. CR-24-08110-001-PCT-DJH

Signed December 16, 2025

Attorneys and Law Firms

Brian E. Kasprzyk, Assistant U.S. Attorney, DOJ-United States Attorney's Office, Phoenix, AZ, for Plaintiff.

Matthew Poirier, Law Office of Matthew J. Poirier PLLC, Flagstaff, AZ, for Defendant.

ORDER

Diane J. Humetewa, United States District Judge

***1** At issue is the Government's Motion in Limine regarding the Defendant's status and registration requirement as a matter of law. (Doc. 54). Defendant Arnold James Begay ("Begay") has not filed a response and the time to do so has now passed.¹ For the reasons stated below, the Court will grant the Motion.

I. Background

Begay was convicted in the District of New Mexico for Aggravated Sexual Abuse of a Child in violation of 18 U.S.C. §§ 1153, 2241(c) and 2246 (D) in July of 2002. (Doc. 1 at ¶ 2). Begay's sentence following the conviction was 180 months of imprisonment and five years of supervised release thereafter. (Doc. 54-1 at 2, Ex. 1, Judgment in a Criminal Case). The Government's current charges against Begay stem from that original New Mexico conviction. The Government charged Begay on September 4, 2024, with one count of failure to register in the District of Arizona. (Doc. 1 at ¶ 1). According to the Government, between July 17, 2019, and through September 4, 2024, Begay was required to register under the Sex Offender Registration and Notification Act ("SORNA") because of his New Mexico conviction. (Doc. 1 at 2). Because he failed to register as a convicted sex

offender during that period, the Government brought a charge against Begay for knowingly failing to register and update a registration as required by SORNA. Now, the Government comes to the Court with a request that the Court instruct the jury that they find beyond a reasonable doubt that Begay was previously convicted under 18 U.S.C. §§ 1153, 2241 (c), and 2246 (D), making him a convicted sex offender, which if proven, means he was required to register under SORNA. (Doc. 54).

II. Legal Standard

A motion *in limine* is "a procedural mechanism to limit in advance testimony or evidence in a particular area." *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009). A party files a motion *in limine* to exclude anticipated prejudicial evidence before the evidence is introduced at trial. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). A court has the power to grant such motions pursuant to its "inherent authority to manage trials," even though such rulings are not explicitly authorized by the Federal Rules of Evidence. *Id.* at 41 n.4. Regardless of a court's initial decision on a motion *in limine*, it may revisit the issue at trial. *Id.* at 41–42 ("[E]ven if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.").

III. Discussion

The Government asserts the following chronology regarding Begay's conviction and subsequent notice of his requirement to register as a sex offender under SORNA. Begay was convicted of aggravated sexual abuse of a child on an Indian reservation under 18 U.S.C. § 2241(c). (Doc. 1 at ¶ 2). His conviction fell on July 16, 2001. (*Id.*) SORNA requires sex offenders to register their physical address with their local jurisdiction and update this information within three business days. *See* 34 U.S.C. 20913(c). At multiple points after his conviction, Begay received notice of his requirement to register as a sex offender. (Doc. 1 at ¶¶ 3–4). In fact, Begay did register as required several times after his New Mexico conviction. (*Id.* at ¶¶ 4–5). However, after Begay was released from the Bureau of Prisons on July 12, 2019, and moved to Shonto, Arizona (Navajo Nation territory), he failed to register as required. (*Id.* at ¶¶ 6–15).

***2** To address the Government's request that the jury be instructed to find beyond a reasonable doubt that Begay was previously convicted under 18 U.S.C. §§ 1153, 2241 (c), and 2246 (D), if proven, and was required to register as a

sex offender under SORNA, the Court finds that this is a reasonable request. SORNA makes it a federal crime for any person (1) who “is required to register under [SORNA],” and (2) who “travels in interstate or foreign commerce,” to (3) “knowingly fail[] to register or update a registration,” 18 U.S.C. § 2250(a); *Carr v. United States*, 560 U.S. 438 (2010).

The Government seeks clarification on whether Begay's New Mexico conviction for aggravated sexual abuse of a child on an Indian reservation under 18 U.S.C. § 2241(c), would qualify as a sex offense under SORNA, requiring Begay to register as a sex offender. The Court finds that Begay's 2002 New Mexico conviction places him squarely within the registration requirements of SORNA. *See* 18 U.S.C. § 2250(2)(A) (stating that a sex offender is defined for the purposes as SORNA as someone who is convicted under federal law, the law of the District of Columbia, Indian tribal law, or the law or any territory or possession of the United States); *see also* (Doc. 54-1, Ex. 1, Judgment in a Criminal Case). Begay's conviction was under 18 U.S.C. § 2241(c) and 18 U.S.C. § 2246 (D). (Doc. 54-1, Ex. 1, Judgment in a Criminal Case). A person convicted of a “sex offense” is a “sex offender” and is required to register in the sex offender registry as set out by 34 U.S.C. § 20911(1) and § 20913. Under SORNA's definitions of what qualifies as a sex offense, 34

U.S.C. § 20911, a federal offense prosecuted under section 20911 (5)(A)(iii) is a qualifying sex offense.

Begay was charged under section 1153 of Title 18, meeting the definition for the type of offense that meets the “sex offense” definition outlined by SORNA. *See* 34 U.S.C. § 20911 (5)(A)(iii). Therefore, if proven at trial that Begay was convicted in 2002 of aggravated sexual abuse of a child under 18 U.S.C. § 2241(c), 18 U.S.C. § 2246(D), and prosecuted under 18 U.S.C. § 1153, the Court can then instruct the jury that his conviction was the type of sex offense that mandates registration as a sex offender under SORNA.

Accordingly,

IT IS ORDERED that the Government's Motion in Limine (Doc. 54) regarding Defendant's status and registration requirement as a matter of law is **granted**, with the qualification that the Government must prove at trial that Defendant Arnold James Begay was convicted in New Mexico in 2002 of aggravated sexual abuse of a child; crime on an Indian reservation.

All Citations

Slip Copy, 2025 WL 3650247

Footnotes

1 The Court's Order on September 11, 2025, stated that “[A]ny motions in limine shall be filed no later than ten (10) business days before the Final Pretrial Conference. Responses shall be filed no later than five (5) business days before the Final Pretrial Conference. (Doc. 39 at 2). Begay was also allowed to represent himself with the assistance of Mr. Ulrich as stand-by counsel on September 10, 2025. (Doc. 38).

2020 WL 1046827

Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

UNITED STATES of America
v.
Troy BEMIS

Case No.: 8:19-cr-458-T-33AAS
|
Signed 03/04/2020

Attorneys and Law Firms

Candace Garcia Rich, US Attorney's Office, Tampa, FL, for United States of America.

ORDER

VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE

*1 This matter comes before the Court pursuant to Defendant Troy Bemis's Motion to Dismiss (Doc. # 24), filed on January 16, 2020. The United States of America responded in opposition on February 14, 2020. (Doc. # 31). Bemis filed a reply on February 28, 2020. (Doc. # 36). For the reasons that follow, the Motion is granted, and the indictment is dismissed.

I. Background

On October 2, 2019, Bemis was indicted for violating 18 U.S.C. § 2250(a), a section of the Sex Offender Registration and Notification Act (SORNA) that prohibits "knowing[] fail[ures] to register or update [sex offender] registration[s]." (Doc. # 1). The indictment alleges that Bemis violated SORNA by "knowingly fail[ing] to register as a sex offender and update his registration" despite "having previously been convicted in or around 2007, in Pinellas County, Florida, of Attempted Sexual Battery, an offense requiring him to register as a sex offender." (*Id.* at 1).

Bemis seeks to dismiss the indictment on the grounds that he is not a "sex offender" as defined by SORNA. (Doc. # 24). The United States has responded (Doc. # 31), and Bemis has replied. (Doc. # 36). The Motion is ripe for review.

II. Discussion

"This Court may resolve a motion to dismiss in a criminal case when the 'infirmity' in the indictment is a matter of law and not one of the relevant facts is disputed." *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1332 (M.D. Fla. 2004). Here, Bemis argues that the indictment should be dismissed because, under the undisputed facts, he does not qualify as a "sex offender" under SORNA.

SORNA's registration requirements apply to state and federal "sex offender[s]." 34 U.S.C. §§ 20911, 20913. SORNA defines "sex offender" as "an individual who [has been] convicted of a sex offense." *Id.* § 20911(1). With certain exceptions not applicable here, SORNA defines "sex offense" to include:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. § 20911(5)(A). The first provision, defining a qualifying sex offense as one with a "sexual act or sexual contact with another" element, is relevant here.

Bemis maintains that his conviction for Florida attempted sexual battery, under the 2002 version of the statute, is not a "sex offense" under the categorical approach. (Doc. # 24 at 6-7). Specifically, Bemis argues that Florida sexual battery (and thus attempted sexual battery) "is broader than SORNA's definition of 'sexual act' and 'sexual contact' because it does not require the offense to be 'related to sexual desire or gratification.'" (*Id.* at 7). Bemis also contends there is a "realistic probability" that "Florida would prosecute [Florida Statute] § 794.011(5) [(2002)] offenses where the defendant's motivation was not sexual gratification," but rather was motivated by a desire to humiliate, abuse, or degrade the victim. (*Id.* at 8-9); see *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (explaining that 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 the generic definition of a crime'").

*2 "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."

United States v. Vineyard, 945 F.3d 1164, 1170 (11th Cir. 2019). Thus, the Court "may only consider the fact of [Bemis's] conviction and the elements of [Florida's] sexual battery statute to determine whether [his] conviction qualifies as a sex offense under SORNA's sexual contact provision." Id. at 1169.¹ "Under the categorical approach, [Bemis's] conviction will only qualify as a sex offense under SORNA if the [] statute under which he was convicted covers the same conduct as — or a narrower range of conduct than — SORNA." Id. at 1170.

Here, at the time of Bemis's conviction, the relevant section of Florida's sexual battery statute read: "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." Fla. Stat. § 794.011(5) (2002). Florida law 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(1)(h). "[H]owever, sexual battery does not include an act done for a bona fide medical purpose." Id.

The United States argues that the Court should use the definitions of "sexual contact" and "sexual act" from 18 U.S.C. § 2246(2)(D) and (3), which contemplate a touching that is motivated by something other than sexual arousal, in determining whether Florida attempted sexual battery is a "sex offense" under SORNA. (Doc. # 31 at 2, 4-5); see 18 U.S.C. § 2246(3)(defining "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 Eleventh Circuit clearly rejected this argument in Vineyard. The Vineyard court explained that the "argument that the definition of sexual contact used in 18 U.S.C. § 2246 should be imported into SORNA conflicts with the language and structure of both statutes." Vineyard, 945 F.3d at 1173.

It concluded that "there is no reason to import any part of [Section] 2246(3)'s definition of sexual contact into SORNA because there is no legislative relationship between SORNA and [Section] 2246." Id. at 1174. Instead, the court used the plain meaning definition of "sexual contact": "a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification." Id. at 1172.

It is this definition of "sexual contact" that the Court will use here.² Similarly, the Court defines "sexual act" as "something done voluntarily that relates to sexual desire or gratification" — the plain meaning definition recently adopted by the Fourth Circuit. See United States v. Helton, 944 F.3d 198, 207 (4th Cir. 2019), as amended (Dec. 4, 2019)("[A]s a matter of ordinary meaning, a 'sexual act' is a something done voluntarily that relates to sexual desire or gratification.").

*3 Thus, "sexual contact" and "sexual act" both require that the act be related to or motivated by sexual gratification. But Florida's definition of sexual battery makes no mention of intent at all. See Aiken v. State, 390 So. 2d 1186, 1187 (Fla. 1980)(holding that "intent for sexual gratification is not an element of sexual battery" under Chapter 794, Fla. Stat.). Thus, as Bemis persuasively argues, "a 2002 Florida Sexual Battery (or an attempt to commit the same) could be committed without the defendant harboring any sexual desire or gratification for himself or anyone else." (Doc. # 24 at 7). Therefore, Florida's definition of "sexual battery" covers a broader range of conduct than SORNA's definition of "sex offense."

Because the Florida attempted sexual battery statute is broader than SORNA's definition of "sex offense," Bemis's conviction for Florida attempted sexual battery does not categorically qualify as a "sex offense" under SORNA. See Vineyard, 945 F.3d at 1170-71 ("If Tennessee's definition of sexual contact 'sweeps more broadly' than SORNA's, Vineyard's sexual battery conviction cannot qualify as a sex offense under the sexual contact provision of SORNA regardless of Vineyard's actual conduct in committing the offense."). Thus, as a matter of law, Bemis was not required to register as a sex offender under SORNA and the indictment must be dismissed.

Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED:

Defendant Troy Bemis's Motion to Dismiss (Doc. # 24) is **GRANTED**. The indictment (Doc. # 1) is dismissed. The Clerk is directed to **CLOSE** this case.

DONE and **ORDERED** in Chambers, in Tampa, Florida, this 4th day of March, 2020.

All Citations

Slip Copy, 2020 WL 1046827

Footnotes

- 1 Thus, the Court will not consider the description of the crime underlying Bemis's attempted sexual battery conviction as stated in the judgment, as the United States requests. (Doc. # 31 at 1).
- 2 Given the definition provided by the Eleventh Circuit, the Court will not adopt the broad definition of "sexual contact" that the United States alternatively proposes — that a sexual contact is "an unwanted touching of a sexual nature." (Doc. # 31 at 4).

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2025 WL 219732

Only the Westlaw citation is currently available.
United States District Court, W.D. Washington,
at Tacoma.

UNITED STATES of America, Plaintiff,
v.
Mitchell Ian BLACKBURN, Defendant.

CASE NO. CR7-05821 BHS
|

Signed January 16, 2025

Attorneys and Law Firms

Michael Dion, Richard Edward Cohen, U.S. Attorney's Office, Seattle, WA, for Plaintiff.

ORDER

BENJAMIN H. SETTLE, United States District Judge

*1 This matter is before the Court on Defendant Mitchell Blackburn's motion to terminate his sex offender registration requirement under 18 U.S.C. § 2250. Dkt. 50.

In 2008, Blackburn pled guilty to possession of child pornography. Dkt. 25. This Court sentenced him to fifteen months of custody followed by ten years of supervised release. *Id.* He was required to register as a sex offender as a condition of his supervision. *Id.* Blackburn completed his term of custody and began supervision on October 9, 2009.

Dkt. 44. He moved for early termination of his supervision in 2016, which the Court granted. Dkt. 47.

Blackburn moves to terminate his sex offender registration requirement under 18 U.S.C. § 2250. Dkt 50. He argues that he has served the statutory fifteen-year registration term and seeks an order from this Court terminating his sex offender registration requirement. *Id.*

The Government responds that Blackburn's motion is moot because his federal sex offender registration has already expired. Dkt. 51.

Under the Sex Offender Registration and Notification Act (SORNA), Blackburn is a tier I sex offender, required to register for fifteen years following his release from custody. 34 U.S.C. §§ 20911(1), 20915(a)(1). Blackburn was released from prison on October 9, 2009. His registration requirement accordingly expired on October 9, 2024. The Government is correct that Blackburn's motion as to his federal sex offender registration requirement is moot. This Court does not have jurisdiction over any state sex offender registration requirements that Blackburn may be subject to. See, e.g., *United States v. Juv. Male*, 670 F.3d 999, 1007 (9th Cir. 2012) (The federal sex offender registration requirement is "independent from any requirement under state law.").

The Court **DENIES** Blackburn's motion as moot.

IT IS SO ORDERED.

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2025 WL 2252580

Only the Westlaw citation is currently available.

United States District Court, W.D.
Arkansas, Harrison Division.

UNITED STATES of America, Plaintiff
v.
Edward Amos CASNER, Defendant

CASE NO. 3:25-CR-30001
|
Signed August 7, 2025

Attorneys and Law Firms

Devon Joy Still, Assistant U.S. Attorney, DOJ-United States Attorney's Office, Fort Smith, AR, for Plaintiff.

OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

*1 This matter came before the Court for a sentencing hearing on August 4, 2025. At the hearing, the Court took up Defendant Edward Amos Casner's objection that Probation improperly classified him as a Tier III sex offender, rather than a Tier II offender. *See* 34 U.S.C. § 20911(3), (4). After reviewing the briefing, receiving oral arguments, and studying the relevant case law, the Court determined Mr. Casner should be classified as a Tier I offender. Accordingly, the objection was **SUSTAINED IN PART**. This written order provides a more fulsome explanation of the Court's ruling from the bench.¹

In February 2025, Mr. Casner pleaded guilty to an information for failure to register as a sex offender, in violation of 18 U.S.C. § 2250. In 2013, Mr. Casner pleaded guilty to and was sentenced for child molestation in the first degree under Missouri law, Mo. Ann. Stat. § 566.067, which at the time of Mr. Casner's offense conduct² prohibited, *inter alia*, "subject[ing] another person who is less than fourteen years of age to sexual contact." Per the Presentence Investigation Report ("PSR"), Mr. Casner's underlying offense conduct included touching the genitals of an eight-year-old child over the child's clothing. (Doc. 26, ¶ 51).

The PSR calculated Mr. Casner's base offense level as a Tier III sex offender. Under 34 U.S.C. § 20911(4)(A)(ii), a person is a Tier III sex offender when their "offense ... 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." Mr. Casner objected to this classification and argued that, under Eighth Circuit precedent, the categorical approach applies to tier classifications. Thus, the defense argued, since the Missouri statute of conviction criminalized sexual contact with anyone *under 14 years old*, it was categorically broader than § 20911(4)(A)(ii), which related to sexual contact with persons *under 13 years old*. Mr. Casner argued he should be classified as a Tier II offender under § 20911(3)(A)(iv) for "abusive sexual contact (as described in section 2244 of title 18)" "against a minor" because the Missouri law criminalizing sexual contact against persons under 14 years old is not categorically broader than the offense of sexual contact "against a minor."

Mr. Casner is correct—to a degree—that the Eighth Circuit applies the categorical approach to tier classifications under the Sex Offender Registration and Notification Act ("SORNA"). *See United States v. Coulson*, 86 F.4th 1189, 1195 (2023). The categorical approach "does not permit a court to consider a defendant's actual underlying conduct." *Id.* at 1194 (citation omitted). Rather, it allows "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." *Id.*

*2 In *Coulson*, the Eighth Circuit analyzed whether the defendant had been properly classified as a Tier III offender under § 20911(4)(A)(ii) for a prior offense of forcible pandering. *Id.* The court there noted the differences between the categorical approach and a circumstance-specific approach that looks to the facts of the underlying offense. *Id.* The Eighth Circuit explained that it had found Congressional support for applying a circumstance-specific approach to other provisions of SORNA, namely § 20911(7)(I). *Id.* (citing *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016), which reasoned that a circumstance-specific approach was appropriate where subsection (7)(I) referred to the defendant's "conduct" rather than "offense"). The Eighth Circuit also noted that several circuits have adopted a "hybrid approach" in which they "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." *Id.* (citing *United States v. Berry*, 814 F.3d 192, 196–97 (4th Cir. 2016)); *see also United States v. Escalante*, 933 F.3d 395, 402 (5th Cir. 2019); *United States v. Walker*, 931 F.3d 576, 579–80 (7th Cir. 2019) (Barrett, J.); *United States v. Mi Kyung Byun*, 539 F.3d 982, 991 (9th Cir. 2008); *United States v. White*, 782 F.3d 1118, 1133–34 (10th Cir. 2015).

Mr. Casner argues that *Coulson* explicitly rejected the hybrid approach applied by various other circuits, but the Court does not read *Coulson* this way. Rather, *Coulson* appears to note the possibility of a hybrid approach, both where Congress separately identifies "conduct"—as was the case in *Hill*, 820 F.3d 1003 (8th Cir. 2016)—or a victim's age. *See Coulson*, 86 F.4th at 1194. *Coulson* had no occasion to either adopt or reject a hybrid approach as to a victim's age because it dealt only with § 20911(4)(A)(i), which did not include any age requirement.

The Court finds that *Coulson* sets forth that the categorical approach applies generally to tier classifications, but it does not preclude application of a hybrid approach in this case (i.e., using a circumstance-specific approach as to a victim's age). The Court finds persuasive the opinions of the Fourth, Fifth, Seventh, Ninth, and Tenth Circuits on this issue, and it similarly adopts a hybrid approach as to victim age. *See Berry*, 814 F.3d at 196–97; *Escalante*, 933 F.3d at 402; *Walker*, 931 F.3d at 579–80; *Mi Kyung Byun*, 539 F.3d at 991; *White*, 782 F.3d at 1133–34.

Even though, under the hybrid approach, the Court can look to the fact that the victim in Mr. Casner's underlying offense was eight years old, this does not necessarily place Mr. Casner in Tier III. There is another—more convoluted—twist here.

Whether the victim was a minor or a minor under thirteen years old is only *one* of the questions under § 20911(3)(A)(iv) and (4)(A)(ii). The other question is whether the offense was comparable to or more severe than "abusive sexual contact (as described in section 2244 of title 18)." Section 2244 includes cross-references to various other criminal statutes. Relevant here is § 2244(a)(5)'s cross-reference to § 2241(c), which criminalizes sexual contact with persons under 12 years old, and § 2244(a)(3)'s cross-reference to § 2243(a), which criminalizes sexual contact with persons 12 to 16 years old when the victim is at least four years younger than the perpetrator.

The question then becomes whether the categorical approach or circumstance-specific approach applies to this other question. The Seventh Circuit's decision in *Walker*, authored by then-Judge Amy Coney Barrett, squarely answers this question. 931 F.3d 576. There, the Seventh Circuit determined that the circumstance-specific approach applies *only* to the victim-age requirement set forth in § 20911(3)(A)(iv) and (4)(A)(ii); whereas the categorical approach applies to whether the offense was comparable to or more severe than abusive sexual contact as described in § 2244. *Id.* at 581. That is, the court could look to a victim's actual age for § 20911's age requirement, but not for any age requirements included in § 2244's cross-referenced statutes (e.g., § 2241(c) or § 2243(a)).

*3 The court in *Walker* recognized that this was a bizarre result: "While it may seem counterintuitive, it isn't enough to know" (when answering the question of abusive sexual contact as described in § 2244) "that [the] victims were four and six—nor is it enough to know that [the defendant] satisfies the 'against a minor who has not attained the age of 13' requirement of Tier III." *Id.* at 581. Rather, a court "must first consider whether [the state] conviction is a categorical match to 'abusive sexual contact (as described in section 2244 of title 18)' ... [i]f it is, [a court may] then consider the age of the victim to complete the tier-classification determination." *Id.* (citations omitted).

Applying this hybrid approach, the Seventh Circuit determined the defendant there was a Tier I offender because his underlying offense was categorically broader than any of § 2244's cross-referenced statutes. *Id.* at 582. The state statute of conviction there criminalized sexual contact with a person under 15 years old by anyone who is at least four years older than the victim. *Id.* at 578. The court determined that such a statute was categorically overbroad because, *inter alia*, the state statute "covers some victims between the ages of 12 and 15, and § 2241(c) does not," and the state statute "covers sexual contact against some victims under 12, and § 2243(a) does not." *Id.* at 582. Because of this overbreadth, the court concluded the first question—whether the offense was comparable to or more severe than abusive sexual contact as described in § 2244—was not met, so the defendant could not be a Tier III offender under § 20911(4)(A)(ii) or a Tier II offender under § 20911(3)(A)(iv).

The Court is persuaded by the Seventh Circuit's decision in *Walker*: it is squarely on-point, and its narrower use of the hybrid approach is consistent with the Eighth Circuit's justifications for adopting the categorical approach

in *Coulson*, 86 F.4th at 1195. The Court would also note that at least one other district court in this Circuit has adopted *Walker* on this issue. *See United States v. Laney*, 2021 WL 1821188 (N.D. Iowa May 6, 2021). The *Laney* opinion is well-reasoned and persuasive here.³

Turning to the application of the hybrid approach in Mr. Casner's case, under *Walker*, his prior conviction under state law, Mo. Ann. Stat. § 566.067, cannot constitute a predicate offense under § 20911(3)(A)(iv) or (4)(A)(ii) because it is categorically broader than the relevant offenses cross-referenced in § 2244.

The Court first addresses § 2241(c), which is cross-referenced in § 2244(a)(5). Through the cross-reference, this prohibits sexual contact with a person *under 12 years old*. Because the Missouri statute would criminalize sexual contact with 12 and 13 year olds, but the federal offenses would not, the state statute of conviction is categorically broader than § 2241(c), as incorporated by § 2244.

***4** Next, the Court addresses § 2243(a), which is cross-referenced by § 2244(a)(3). These statutes prohibit sexual contact with a person who is 12 to 16 years old *and* is at least four years younger than the perpetrator. Just as the court found in *Walker*, the state statute covers sexual contact with victims under 12, and § 2243(a) does not. Indeed, the state statute here is even broader than the statute in *Walker* because, unlike *Walker*, the Missouri statute does not have the four-year age differential requirement that is present in § 2243(a)(2). Nothing in the hybrid approach "suggest[s] 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." *United States v. Escalante*, 933 F.3d 395, 402 (5th Cir. 2019); *see also United States v. Marrero*, 2024 WL 1253643 (2d Cir. Mar. 25, 2024). While a 16 year old could hypothetically be prosecuted for sexual contact with a 13 year old under the Missouri statute,

that same conduct is not criminalized under the relevant federal law.⁴ For these two reasons, the Missouri statute is categorically broader than § 2243(a).

Unfortunately, "adherence to the categorical approach leads to a result in this case that is almost certainly contrary to any plain reading of [§ 20911]." *Escalante*, 933 F.3d 406. This is a prime example of why the categorical approach has "a reputation for crushing common sense in any area of the law in which its tentacles find an inroad." *Id.* "What began 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 man who was over 40 when he sexually assaulted an 8 year old cannot be categorized as a Tier III offender (or even a Tier II offender) because it is "theoretically possible" that the victim could have been 12 or 13 or that the perpetrator could have been less than four years older than the victim. *Id.* at 406–07. The categorical approach here relies on "reality-defying distinctions" and yields a "counterintuitive" and "absurd" result. *Id.* at 407.

Nevertheless, because the state statute of conviction, Mo. Ann. Stat. § 566.067, is not a categorical match for § 2244's cross-referenced offenses, it cannot serve as a predicate offense under § 20911(3)(A)(iv) or (4)(A)(ii). The parties have not put forth any other basis for classifying Mr. Casner as a Tier II or Tier III offender. Thus, the Court finds he is a Tier I offender, and it calculated his guideline base level offense for failure to register accordingly at sentencing. Defendant's objection is therefore **SUSTAINED IN PART**.

IT IS SO ORDERED on this 7th day of August, 2025.

All Citations

Slip Copy, 2025 WL 2252580

Footnotes

1 To the extent there are any contradictions between this written Order and the Court's ruling from the bench, the written Order controls.

- 2 For its analysis, the Court uses the version of the state statute in effect at the time of the offense conduct. See *Brown v. United States*, 602 U.S. 101, 120, 123 (2024) (holding that when applying the categorical approach in Armed Career Criminal Act cases, courts should compare the federal and state schedules that were in effect when the underlying offense occurred).
- 3 In *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008), the Ninth Circuit expanded the use of the circumstance-specific approach to include the age requirements found in § 2244's cross-referenced offenses. The Court agrees with the district court in *Laney* as to why *Walker* is more persuasive than *Byun*, including: (1) the *Byun* court analyzed SORNA as a civil statute creating registration requirements, and it noted that Sixth Amendment concerns might dictate a different outcome; (2) the defendant there did not challenge the Tier II determination, but the court still took it up; and (3) the *Byun* court did not separately look at whether a circumstance-specific approach should apply to both the first inquiry (abusive sexual contact as described in § 2244) and the second inquiry (minor or under 13, § 20911), it lumped the two together, which *Walker* specifically cautioned against. *Laney*, 2021 WL 1821188, at *6.
- 4 The parties did not address the second element of § 2243(a) that the victim be at least four years younger than the perpetrator. The Government had suggested combining § 2241(c) and § 2243(a) to get around the cross-references' age requirements—that is, using § 2241(c) to cover victims under 12 and using § 2243(a) to cover victims 12 to 16, which would ultimately be broader than the Missouri statute. While the Court thinks such an approach makes practical sense, there is no legal support for this approach—which the Government freely admitted. And, more importantly, such an approach overlooks the age differential element at § 2243(a) (2). Due to the age differential, even if the court combined § 2241(c) and § 2243(a), the Missouri statute would still be categorically overbroad.

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2025 WL 567019

Only the Westlaw citation is currently available.
United States District Court, E.D. Washington.

UNITED STATES of America, Plaintiff,

v.

Antoine William FITZGERALD, Defendant.

No. 2:24-CR-0059-RLP

|

Signed February 20, 2025

Attorneys and Law Firms

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Federal Public Defender, Adrien Lindsay Fox, Public Defenders, Federal Defenders of Eastern Washington and Idaho, Spokane, WA, for Defendant.

ORDER ON MOTION TO DISMISS INDICTMENT

REBECCA L. PENNELL, DISTRICT COURT JUDGE

*1 Before the Court is Defendant Antoine Fitzgerald's motion to dismiss the Indictment, charging him with failing to register as a sex offender in violation of 18 U.S.C. § 2250(a) (ECF No. 30). Oral argument was held on February 18, 2025. Mr. Fitzgerald was present and represented by Adrien L. Fox of the Federal Defenders of Eastern Washington and Idaho. Assistant United States Attorney Frieda K. Zimmerman appeared on behalf of the Government.

The charge in the Indictment is predicated on Mr. Fitzgerald's 1997 conviction for attempted rape in the second degree in violation of Washington law. ECF No. 30. In his motion, Mr. Fitzgerald argues the Indictment should be dismissed because his 1997 conviction is not comparable to a Tier II or III predicate offense under 18 U.S.C. § 2250(a). The Court finds Mr. Fitzgerald's 1997 is comparable to a Tier III offense and, as a result, denies Mr. Fitzgerald's motion.

BACKGROUND

Mr. Fitzgerald pleaded guilty to the crime of attempted rape in the second degree, former RCW 9A.44.050(1)(a) (1993) and

9A.28.020(1) (1994) in 1997. The current Indictment charges Mr. Fitzgerald with failure to register as a sex offender on or about April 16, 2024, in violation of the federal Sex Offender Registration and Notification Act ("SORNA"). See ECF No. 1.

SORNA's registration requirements differ depending on the "Tier" of a predicate sex offense. 34 U.S.C. § 20911. In relevant part, a Tier III offender is a sex offender whose offense is "comparable to or more severe than" aggravated sexual abuse (as described in section 2241 of Title 18). 34 U.S.C. § 20911(4)(A)(i). A Tier III offender is required to maintain a current registration for his or her entire life. 34 U.S.C. § 20915(a)(3). A Tier II offender is, in relevant part, "a sex offender other than a tier III sex offender" and whose offense is "comparable to or more severe" than "abusive sexual contact (as described in section 2244 of Title 18)" when committed against a minor. 34 U.S.C. § 20911(3)(A)(iv). A Tier II offender is required to register for twenty-five years. 34 U.S.C. § 20915(a)(2). A Tier I offender is "a sex offender other than a tier II or tier III sex offender." 34 U.S.C. § 20911(2). Tier I offenders must maintain their registration for fifteen years. 34 U.S.C. § 20915(a)(1).

Mr. Fitzgerald has filed a motion to dismiss the Indictment. He concedes his 1997 conviction qualifies as a sex offense under SORNA. But he argues the offense is not comparable to a Tier II or Tier III sex offense. According to Mr. Fitzgerald, his conviction qualifies as only a Tier I offense and because more than fifteen years have passed, he was no longer required to register under SORNA at the time of his offense conduct date. As a result, he argues the Government cannot sustain its SORNA charge against him. The Government responds that Mr. Fitzgerald's conviction qualifies as a Tier III sex offense because it is comparable to aggravated sexual abuse in violation of 18 U.S.C. § 2241.

ANALYSIS

When evaluating whether a conviction is "comparable to or more severe than" a federal crime within the meaning of SORNA, the Ninth Circuit uses the categorical approach. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014). Under the categorical approach, the Court is to compare the elements of attempted rape in the second degree with the elements of attempted aggravated sexual abuse under 18 U.S.C. § 2241. See *United States v. Descamps*, 570 U.S. 254, 260-61, 133 S.Ct. 2276, 186 L.Ed. 2d 438

(2013). Thus, Mr. Fitzgerald's prior conviction may properly serve as a predicate for his classification as a Tier III sex offense if the Washington statute for attempted rape in the second degree is defined more narrowly than, or has the same elements as, the "generic" federal crimes. *Cabrera-Gutierrez*, 756 F.3d at 1133. If, however, attempted rape in the second degree "sweeps more broadly" than the federal crimes, Mr. Fitzgerald's prior conviction cannot serve as a statutory predicate for his Tier III classification. *Id.* (quoting *Descamps*, 570 U.S. at 261).

***2** The "key" to the categorical comparison is only the "'statutory definitions'—i.e., the elements—of a defendant's prior offense and *not* 'to the particular facts underlying'" the conviction. *Descamps*, 570 U.S. at 261 (emphasis in original) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). The Court must presume Mr. Fitzgerald's prior conviction "rested upon [nothing] more than the least of th[e] acts criminalized" by attempted rape in the second degree. *United States v. Baldon*, 956 F.3d 1115, 1125 (9th Cir. 2020) (alterations in original) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91, 133 S. Ct. 1678, 185 L.Ed.2d 727 (2013)). Thus, the Court cannot consider the facts giving rise to Mr. Fitzgerald's conviction, even if such facts establish his conduct was equivalent to federal sexual abuse or aggravated sexual abuse. *Cabrera-Gutierrez*, 756 F.3d at 1133.

Mr. Fitzgerald was convicted of attempted second degree rape in violation of former RCW 9A.44.050(1)(a) (1993) and 9A.28.020(1) (1994). In 1996, former RCW 9A.44.050(1)(a) (1993) provided "[a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person ... [b]y forcible compulsion". Under former RCW 9A.28.020(1) (1994), "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime."

While a conviction for violation of former RCW 9A.44.050(1)(a) (1993) alone does not have a specific intent requirement, a conviction for attempted rape does. See *State v. Aumick*, 73 Wn. App. 379, 383, 869 P.2d 421 (1994), aff'd, 126 Wn.2d 422, 894 P.2d 1325 (1995). A conviction for attempted rape in the second degree in violation of former RCW 9A.44.050(1)(a) (1993) and RCW 9A.28.020(1) (1994) thus requires proof of two elements: (1) the defendant intended to engage in sexual intercourse by

forcible compulsion and (2) the defendant took a substantial step toward doing so. See also *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).

Washington defines sexual intercourse as follows:

- (1) "Sexual intercourse"
 - (a) has its ordinary meaning and occurs upon any penetration, however slight, and
 - (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
 - (c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.
- (2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010 (1994).

The federal offense for aggravated sexual abuse makes it a crime to knowingly cause another person to engage in a sexual act "by using force against that other person". 18 U.S.C.A. § 2241(a)(1). Attempt is expressly provided for within the federal statute for aggravated sexual abuse, to which we apply the common law definition. See *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000). Attempt at common law required the Government to prove "that the defendant had the specific intent to commit the underlying crime and took some overt act that was a substantial step toward committing that crime." *Id.* at 1190.

A conviction for an attempted violation of 18 U.S.C. § 2241(a) thus requires two essential elements: (1) the defendant intended to use force to cause the victim to engage in a sexual act and (2) the defendant did something that was a substantial step toward committing the crime. Model Crim. Jury Instr. 9th Cir. 20.2, Attempted Aggravated Sexual Abuse. See also *United States v. Sneeker*, 900 F.2d 177, 178-79 (9th Cir. 1990).

***3** A sexual act is defined as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving in 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;

(C) the penetration, however slight, of the anal or genital opening of another by 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; or

(D) 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).

Under both Washington and federal law, the intent at issue in an attempt crime is the that of accomplishing a criminal

result. *See, e.g., United States v. Linehan*, 56 F.4th 693, 705-06 (9th Cir. 2022); *DeRyke*, 149 Wn.2d at 913. *See also* Wayne R. LaFave, *Substantive Criminal Law* § 11.3 (Attempt – the mental state) (3d ed. 2024). Thus, under both attempted rape in the second degree in violation of former RCW 9A.44.050(1)(a) (1993) and 9A.28.020(1) (1994) and attempted aggravated sexual abuse in violation of 18 U.S.C. § 2241(a), the prosecution must prove the defendant (1) had an intent to use force to accomplish either penetrative sex or oral sex and (2) a substantial step towards doing so. This is a categorical match. Mr. Fitzgerald's challenge to the Indictment therefore fails.

ACCORDINGLY, IT IS ORDERED that Mr. Fitzgerald's motion to dismiss, **ECF No. 30**, is **DENIED**.

All Citations

Slip Copy, 2025 WL 567019

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2019 WL 6137445

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

UNITED STATES of America, Plaintiff,
v.
Michael FORTE, Defendant.
Case No. 3:15-cr-00062-SLG
|
Signed 11/19/2019

Attorneys and Law Firms

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Darrel J. Gardner, Federal Public Defender's Agency, Anchorage, AK, for Defendant.

ORDER RE MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255

Sharon L. Gleason, UNITED STATES DISTRICT JUDGE

*1 Before the Court at Docket 90 is defendant Michael Forte's Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255.¹ The government responded in opposition at Docket 101. Mr. Forte replied to the government's opposition at Docket 102. The Court finds that "the motion and the files and records of the case conclusively show that [Mr. Forte] is entitled to no relief" and thus no hearing is required or necessary to the determination of the motion.²

I. Factual and procedural background

In 1999, Mr. Forte pleaded guilty to and was convicted of Indecent Assault and Battery on a Person Aged 14 or Older in violation of Massachusetts state law.³ This conviction required him to register as a sex offender under Massachusetts law, but he did not comply with the Massachusetts registration requirements.⁴ In 2014, Mr. Forte left Massachusetts and came to Alaska but also did not register as a sex offender in Alaska.⁵

In 2015, Mr. Forte was charged in the District of Massachusetts with failure to register as a sex offender in

violation of 18 U.S.C. § 2250(a) due to his failure to register in Massachusetts.⁶ He was soon arrested in Alaska and arraigned on the District of Massachusetts complaint.⁷ The case was transferred from the District of Massachusetts to the District of Alaska pursuant to Federal Rule of Criminal Procedure 20, and Mr. Forte was arraigned on the Indictment returned in the District of Massachusetts.⁸ Mr. Forte pleaded guilty without a plea agreement.⁹ In October of 2015, the Court sentenced him to 18 months, and he is now on supervised release.¹⁰ Mr. Forte did not appeal his conviction.

II. Mr. Forte's procedural argument

Motions pursuant to 28 U.S.C. § 2255 are subject to a one-year statute of limitations.¹¹ Mr. Forte filed his § 2255 motion in June of 2019, more than three and a half years after his judgment became final. Mr. Forte maintains that his late motion should be excused because he is claiming actual innocence, which equitably tolls the statute of limitations.¹² Thus, Mr. Forte's claim of equitable tolling "rises and falls with [his] claim on the merits."¹³ The Court will consider the merits of his actual innocence claim to determine whether his petition is timely.

III. Mr. Forte's actual innocence argument

*2 The federal statute under which Mr. Forte was convicted, 18 U.S.C. § 2250, criminalizes the knowing failure to register or update a registration as required by the Sex Offender Registration and Notification Act ("SORNA").¹⁴ SORNA, in turn, requires that a "sex offender" must register and keep the registration current "in each jurisdiction where the offender resides...."¹⁵ As relevant here, a "sex offender" is someone who has been convicted of a "sex offense."¹⁶ A "sex offense" is defined as "a criminal offense that has an element involving a sexual act or sexual contact with another."¹⁷ SORNA does not define "sexual act" or "sexual contact," but those terms are defined in Title 18 of the United States Code.¹⁸

Mr. Forte asserts that under the categorical approach, his Massachusetts state conviction does not trigger SORNA because the Massachusetts law criminalizes a broader range of conduct than SORNA includes in its definition of a "sex offense." Specifically, Mr. Forte contends that Massachusetts state law defines "sexual contact" more broadly than does the Title 18 definition and thus "the definition of 'sexual

contact' necessary to commit indecent assault and battery ... is clearly not a categorical match with the Title 18 definition of 'sex offense.' "¹⁹ According to Mr. Forte, the Massachusetts conviction thus does not qualify as a predicate offense under SORNA.²⁰

The Court need not consider whether Massachusetts definition of "sexual contact" is a categorical match to "sexual contact" as defined by federal law. Here, Mr. Forte's conviction is for knowingly failing to register as required under SORNA, not for knowingly failing to register after being convicted of a crime that involved "sexual contact." Thus, any violation of SORNA—regardless of the specific definition applied—supports his conviction. Mr. Forte ignores that SORNA supplies other definitions of "sex offense" that apply to his case. A "sex offense" also includes "a criminal offense that is a specified offense against a minor."²¹ A "specified offense against a minor" includes any offense against a minor that involves "[a]ny conduct that by its nature is a sex offense against a minor."²² This provision is known as SORNA's residual clause or catchall provision.²³ In its prosecution of Mr. Forte for failing to register, the government specifically relied on the residual clause as the basis for the facts it would prove at trial: "In this case, it's the definition of a specified offense against a minor. And that term specified offense against a minor means an offense against a minor that involves any conduct that by its nature is a sex offense against a minor."²⁴

*³ The Ninth Circuit, relying on its earlier decision in *United States v. Byun*, has recently held that "the only acceptable interpretation of the residual clause is to apply a non-categorical approach regarding the age of the victim."²⁵ The Ninth Circuit's reasoning applies with equal force to support using the non-categorical approach regarding the entirety of the residual clause:

In determining the residual clause called for a non-categorical approach, we looked to three aspects of the law. First, while *Section 20911(5)(A)(i)* defines a sex offense as "a criminal offense that has an *element* involving a sexual act or sexual contact with another," *Section 20911(5)(A)(ii)*, which alternatively defines a sex offense as "a criminal offense that is a specified offense against a minor," "contains no reference to the crime's 'elements.'" Second, in *Section 20911(7)*, which defines "a specified offense against a minor," the words "against a minor" precede a general list of crimes—e.g., "kidnapping," "false

imprisonment," and "[u]se in a sexual performance"—that do not reference the victim's identity, suggesting, for example, that "any kidnapping offense becomes a 'specified offense against a minor' when the victim is a minor." Finally, and most pointedly, the residual clause covers "any *conduct* that by its nature is a sex offense against a minor." The use of "conduct" in the residual clause, as opposed to "conviction," strongly indicates a non-categorical approach applies.²⁶

The District of Nevada has also recently concluded that the non-categorical approach applies in determining whether a defendant's conduct in committing a predicate offense satisfies the specified-offense portion of the residual clause: "Nothing in the court's reasoning [in *Byun*] indicates that it intended to limit the use of the circumstance-specific approach to this fact [of the victim's age]."²⁷ An *en banc* Eleventh Circuit has also held that "[a]lthough the Ninth Circuit [in *Byun*] focused only on the age of the victim, 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.'"²⁸

Applying the non-categorical approach, a court examines "not just the elements of the crime but also 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.'"²⁹ Mr. Forte was convicted of Indecent Assault and Battery on Person Fourteen or Older.³⁰ Although this statute proscribes conduct that includes conduct directed at an adult victim, the parties here do not dispute that the victim in Mr. Forte's case was a sixteen-year old girl.³¹ Mr. Forte asserts that Massachusetts defines an indecent assault and battery as an intentional and unjustified touching of a private area, including, but not limited to, the breast, abdomen, thigh, buttocks, genital or pubic areas of a female.³² Here, the parties do not dispute that Mr. Forte's conduct involved him penetrating the victim's vagina with his penis and then ejaculating on her leg, despite her repeatedly telling him to stop, telling him he was hurting her, and trying to physically force him off of her.³³ This conduct is clearly a sex offense against a minor.³⁴ It constitutes a "specified offense against a minor" and, in turn, qualifies as a "sex offense."

*⁴ Because Mr. Forte was convicted of a sex offense as defined by SORNA, he was required to register under SORNA's directives. His knowing failure to do so violated [18 U.S.C. § 2250](#), and he is not actually innocent of that crime. Because Mr. Forte is not actually innocent of the crime of conviction, his procedurally defaulted [§ 2255](#) motion is not saved by an equitable tolling of the statute of limitations.

In light of the foregoing, IT IS ORDERED that the motion at Docket 90 is denied. The Court declines to issue a certificate

of appealability, as Mr. Forte has not "made a substantial showing of the denial of a constitutional right."³⁵ The Clerk of Court is directed to enter a final judgment in Case No. 3:19-cv-00183.

All Citations

Not Reported in Fed. Supp., 2019 WL 6137445

Footnotes

¹ Although Mr. Forte's motion lists him as the petitioner and the government as the respondent, a claim under [28 U.S.C. § 2255](#) is a continuation of the underlying criminal proceeding. *Grady v. United States*, 929 F.2d 468, 470 (9th Cir. 1991) ("§ 2255 is a further step in a defendant's criminal case rather than a separate civil action.").

² [28 U.S.C. § 2255\(b\)](#).

³ Docket 90 at 2; Docket 101 at 2.

⁴ Docket 101 at 3.

⁵ Docket 90 at 2; Docket 3–4. The Alaska Department of Public Safety determined that Mr. Forte's Massachusetts state conviction triggered his obligation to register in Alaska. Docket 101 at 4.

⁶ Docket 22-3.

⁷ Docket 22.

⁸ Docket 22; Docket 22-2; Docket 27.

⁹ Docket 27.

¹⁰ Docket 47; Docket 90 at 3.

¹¹ [28 U.S.C. § 2255\(f\)\(1\)](#).

¹² Docket 102 at 3. Mr. Forte expressly disavows that he is seeking to file a § 2241 petition. Docket 102 at 3 ("Mr. Forte need not avail himself of § 2255's 'escape hatch' to file a § 2241 petition, because his § 2255 petition [motion] is properly before the court.").

¹³ See *United States v. Dailey*, No. 18-10134, 2019 WL 5688814 at *9 (9th Cir. Nov. 4, 2019).

¹⁴ [18 U.S.C. § 2250\(a\)](#).

¹⁵ [34 U.S.C. § 20913\(a\)](#). "Defendants are not directly convicted of violating SORNA. Rather, the law applies to violations of existing state and federal criminal laws and mandates the registration of a 'sex offender' 'in

each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.’ ” *Dailey*, 2019 WL 5688814 at *4.

16 34 U.S.C. § 20911(1); see also *United States v. Pope*, 2019 WL 1919164 at *2 (slip copy) (D. Nev. Apr. 30, 2019) (“SORNA provides a multi-faceted definition to the term ‘sex offender.’ ”).

17 34 U.S.C. §§ 20911(1), 20911(5)(a)(i).

18 18 U.S.C. § 2246(2) (definition of a “sexual act”); 18 U.S.C. § 2246(3) (definition of “sexual contact”).

19 Docket 90 at 4–6.

20 The government does not address Mr. Forte’s categorical approach argument and instead maintains that Mr. Forte’s § 2255 motion is procedurally defaulted. Docket 101 at 11–15.

21 34 U.S.C. § 20911(5)(A)(ii).

22 34 U.S.C. § 20911(7)(l).

23 *Dailey*, 2019 WL 5688814 at *11; *Pope*, 2019 WL 1919164 at *2.

24 Docket 103 at 2 (partial transcript of entry of plea).

25 *Dailey*, 2019 WL 5688814 at *7.

26 *Dailey*, 2019 WL 5688814 at *6 (quoting *United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008)) (internal citations omitted, emphasis in *Dailey*).

27 *Pope*, 2019 WL 1919164 at * 3.

28 *United States v. Dodge*, 597 F.3d 1347, 1354 (11th Cir. 2010) (en banc).

29 *Dailey*, 2019 WL 5688814 at *13.

30 Mass. Gen. Law Ch. 265 § 13H (“Whoever commits an indecent assault and battery on a person who has attained age fourteen shall be punished by imprisonment in the state prison for not more than five years, or by imprisonment for not more than two and one-half years in a jail or house of correction.”).

31 Docket 40 at 7–9.

32 Docket 90 at 5 (citing *Commonwealth v. Lavigne*, 676 N.E.2d 1170 (Mass. Crt. App. 1997)).

33 Docket 40 at 8.

34 See *Byun*, 539 F.3d at 988 (using “common sense” to determine that “transporting a minor to the United States with the intent that she engage in prostitution” was “conduct that by its nature is a sex offense against a minor”).

35 28 U.S.C. § 2253(c)(2); see also *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (To make a substantial showing, the movant must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner of that the issues presented were adequate to deserve encouragement to proceed further.”) (internal quotations and citations omitted).

2025 WL 3266799

Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ramon FUERTES, a.k.a. Raymond
Cortez, Defendant-Appellant.

No. 24-12839

|

Non-Argument Calendar

|

Filed: 11/24/2025

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:23-cr-80208-MD-1

Attorneys and Law Firms

Jay A. Yagoda, Nicole D. Mariani, U.S. Attorney Service Southern District of Florida, U.S. Attorneys, DOJ-United States Attorney's Office, Miami, FL, Daniel Matzkin, U.S. Attorney, Webb Daniel Friedlander, LLP, Atlanta, GA, for Plaintiff-Appellee.

Christopher Haddad, Law Office of Christopher A. Haddad, PA, West Palm Beach, FL, for Defendant-Appellant.

Before Abudu, Tjoflat, and Anderson, Circuit Judges.

Opinion

PER CURIAM:

***1** Ramon Fuertes, a convicted sex offender, is required to register under the Sex Offender Registration and Notification Act ("SORNA") when certain events occur. A jury convicted Fuertes on four counts of failing to register as required, and the District Court sentenced him to 60 months' imprisonment. Fuertes appeals his conviction on multiple grounds. First, he argues that SORNA is unconstitutional under the non-delegation doctrine, First Amendment, and Fourteenth Amendment. Second, he argues that the District Court abused its discretion by admitting evidence of uncharged conduct that unfairly prejudiced him. Third, he argues that the District Court abused its discretion by denying two motions for mistrial based on certain statements made during trial. Finding none of Fuertes's arguments persuasive, we affirm.

I.

In 2010, Fuertes was sentenced for a federal sex offense conviction. At sentencing, the court notified Fuertes of his responsibility to comply with the requirements of SORNA. Based on his underlying offense, Fuertes was required to register as a sex offender in Florida and comply with Florida's sex offender registry requirements. Florida law required Fuertes to register in person every six months; report, within 48 hours, after using any electronic mail address or internet identifier; report, in person and within 48 hours, upon establishing a permanent, temporary, or transient residence in any state other than Florida—and that failure to register after crossing state lines may be a violation of federal and state law.

In May, 2023, the Palm Beach County Sheriff's Office ("PBSO") discovered that Fuertes had an undisclosed email address that he had created four months earlier. On May 30, after repeated attempts to inform Fuertes of his responsibility to register the undisclosed email address, PBSO informed Fuertes that felony charges would be filed for noncompliance.

A few days later, Fuertes booked a one-way flight to Atlanta, Georgia. Cell phone data shows that Fuertes never returned to Florida after boarding that flight. Fuertes never informed PBSO that he intended to spend any time in Georgia, permanently or otherwise. Three days after arriving in Georgia, Fuertes left a voicemail with PBSO stating that he was away for a family emergency, but he did not state his location. Eight days later, Fuertes left another voicemail stating that he was thinking about staying in Atlanta. A detective from PBSO informed Fuertes that he was required to register with the local sheriff's office in Georgia if he did not intend to return to Florida immediately.

Fuertes never registered in Georgia. By mid-July, a detective informed Fuertes that if he did not return to Florida, a warrant would be issued for his arrest. On October 24, U.S. Marshalls arrested Fuertes at a residence in Tucker, Georgia.

After his arrest, a search of Fuertes's phone revealed a Facebook profile he created on May 24, 2023, and an additional email address he created on May 22, 2023—neither of which were reported as required.

***2** Fuertes was charged under SORNA with four counts of "Failure of a Sex Offender to Properly Register." One count was for failing to register and update his registration

after terminating his residence in the Southern District of Florida and commencing residence in another jurisdiction, in violation of 18 U.S.C. § 2250(a). And the three other counts were for failing to register an electronic email address and remote communication identifier information—one count each for both email addresses and his Facebook profile.

A jury convicted Fuertes on all four counts, and the District Court sentenced him to 60 months' imprisonment.

Fuertes raises three issues on appeal.¹ First, he challenges SORNA on constitutional grounds. Next, he argues that the District Court abused its discretion by admitting three instances of uncharged conduct that unfairly prejudiced him. Finally, Fuertes argues that the District Court abused its discretion by denying two motions for mistrial. We address each issue in turn.

II.

Fuertes challenges the constitutionality of SORNA on several constitutional grounds. He argues that SORNA violates the non-delegation doctrine, the Fourteenth Amendment because the statute lacks a mens rea element, and the First Amendment by unduly burdening his free speech rights.

In his opening brief, Fuertes "re-argues and incorporates by reference" the points contained in his motion to dismiss at the District Court where he argued that the case should be dismissed based on constitutional grounds, without elaborating on them further. When a party merely rests on arguments raised before the district court, without specifying which arguments have merit or explaining how the district court erred, it is insufficient to make an argument on appeal. *United States v. Moran*, 778 F.3d 942, 985 (11th Cir. 2015). Therefore, we need not address Fuerte's constitutional challenge to SORNA.

III.

Next, Fuertes challenges the introduction of evidence pertaining to three instances of uncharged conduct: (1) his prior Florida convictions for failure to register as a sex offender; (2) a false lease and other evidence of squatting in the Georgia home; and (3) evidence of laying traps meant to impede law enforcement and resisting arrest.

We review the district court's evidentiary rulings for clear abuse of discretion. *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006). When applying the abuse of discretion standard, "we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004).

A.

First, we address the District Court's admission of Fuertes's prior state convictions for failing to register as a sex offender. Two of the prior convictions arise from the same judgment where Fuertes was convicted of: (1) failure to register his address with the driver's license office and (2) failure to properly register as required every six months as a sex offender. The third prior conviction reflects another judgment for failure to register his address with the driver's license office. The Court admitted the prior convictions under Federal Rule of Evidence 404(b) as prior bad acts evidencing knowledge and intent and found that their probative value was not substantially outweighed by their unfair prejudice.

***3** Rule 404(b) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, such evidence may be admissible for another purpose, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). In order for evidence to be admissible under Rule 404(b), "(1) it must be relevant to an issue other than defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy Rule 403." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (citations omitted).

Fuertes argues that the prior convictions were not relevant for a permissible purpose and their unfair prejudice substantially outweighed any probative value.

We agree with the District Court that the prior convictions were relevant under Rule 404(b). In order to convict under 18 U.S.C. § 2250(a), the jury must find that Fuertes: (1) was

required to register under SORNA, (2) was a sex offender, and (3) knowingly failed to register or update a registration as required by SORNA. Since Fuertes stipulated to the first two elements, and the government could easily prove that he did not register as required by SORNA because they had access to the sex offender registry, essentially the only fact at issue is whether Fuertes violated the statute “knowingly.” By pleading “not-guilty,” Fuertes placed his knowledge at issue. His prior convictions for a largely similar offense made it more likely that Fuertes knew of the requirements.

As to the third prong of the 404(b) analysis, the District Court correctly found that the prior convictions’ probative value was not substantially outweighed by their risk of unfair prejudice. As stated previously, Fuertes’s prior convictions were highly probative of proving the “knowingly” element of § 2250(a). The Court and parties took steps to mitigate the possibility of undue prejudice such as offering the evidence through a single witness and instructing the jury that it could only consider the prior convictions for non-propensity purposes. *See Edouard*, 185 F.3d at 1346 (finding that limiting instructions from the district court help mitigate unfair prejudice from Rule 404(b) evidence).

Fuertes argues that his defense at trial focused more on the affirmative defense that uncontrollable circumstances prevented him from complying with the registration requirements, as opposed to directly refuting the elements of § 2250(a). Therefore, he argues, the probative value of the prior convictions was lower than it would be otherwise, causing the unfair prejudice to substantially outweigh the probative value. We disagree. Even if Fuertes was making an affirmative defense, the prosecution was still required to prove all the elements of the crime—which required that it prove Fuertes’s knowledge. Therefore, we cannot find that the probative value was outweighed by unfair prejudice.

Fuertes also cites *United States v. Beechum* as evidence that where extrinsic evidence more closely resembles the charged offense, the unfair prejudice to the defendant is greater. 582 F.2d 898, 915, n.20 (5th Cir. 1978) (en banc).² Fuertes argues that where, as here, the state law offense and the federal law offense are largely identical, admission of prior convictions under the state law is highly prejudicial. However, the *Beechum* Court also states that the probative value of the extrinsic offense correlates positively with the likeness to the offense charged. *Id.* at 915. The Court further elaborates, that “[w]hether the extrinsic offense is sufficiently similar in its physical elements so that its probative value is

not substantially outweighed by its undue prejudice is a matter within the sound discretion of the trial judge.” *Id.* We find that the District Court did not abuse its discretion here.

B.

*4 The District Court admitted as intrinsic to the charged offense evidence that Fuertes created a fake rental agreement and was squatting at the property where he was ultimately arrested. The Court ruled that this evidence was inextricably intertwined with the charged offense. Fuertes argues that the evidence’s unfairly prejudicial effect substantially outweighs the probative value and therefore should have been excluded.³

Rule 404’s restriction on evidence of crimes, wrongs, or acts does not apply to evidence that is intrinsic to the charged crime. *United States v. Cenephat*, 115 F.4th 1359, 1365 (11th Cir. 2024). Evidence is intrinsic if it “arose out of the same transaction or series of transactions as the charged offense, is necessary to complete the story of the crime, or is inextricably intertwined with the evidence regarding the charged offense.” *Id.* (citations omitted). As with Rule 404 evidence, the district court must also find for intrinsic evidence that the probative value of the proffered evidence is not substantially outweighed by unfair prejudice. *United States v. Ford*, 784 F.3d 1386, 1393 (11th Cir. 2015).

Fuertes argues that the evidence is unfairly prejudicial because it portrays Fuertes in a bad light and suggests other criminality. Fuertes fails to show what makes this evidence specifically more unfairly prejudicial than any other piece of evidence the government might have introduced to prove Fuertes’s guilt. The evidence is highly probative because it shows that Fuertes knew the government would issue a warrant for his arrest and thus needed to conceal his identity. Furthermore, it showed Fuertes’s intent to remain in Georgia, something that was necessary for the government to demonstrate in order to prove its case. Finally, the District Court instructed the jury not to consider the evidence for an improper purpose.

Thus, we find that the District Court did not abuse its discretion when it admitted evidence of the false lease and squatting as intrinsic evidence.

C.

Finally, Fuertes appeals the District Court's admission as intrinsic to the charged offense evidence that he resisted arrest and laid a trap for law enforcement upon his arrest. The government introduced evidence that Fuertes was inside the house he was allegedly squatting in for an hour and a half before complying with the police's instruction to exit the house. After Fuertes exited, the police conducted a protective sweep of the area and found soap, water, and knives scattered along the front entryway—which the government argued was an attempt by Fuertes to impede law enforcement.

As with the fake rental agreement, Fuertes does not argue that the evidence of resisting arrest was improperly admitted as intrinsic. Rather, he argues that its admission was unfairly prejudicial because it tended to portray him as dangerous and that any probative value is marginal.

***5** We find that the District Court did not abuse its discretion when admitting this evidence. The evidence of him spreading soapy water and knives by his front door was probative of his guilty conscious. Like with the other evidence, the Court gave limiting instructions to the jury, thereby limiting its unfairly prejudicial effect. The District Court applied the correct legal standard and did not make a clear error in judgment by determining that its probative value was not substantially outweighed by its unfairly prejudicial effect.

Therefore, as to the admission of evidence regarding the three categories of uncharged conduct that Fuertes challenges, we find that the District Court did not abuse its discretion.

IV.

Finally, Fuertes argues that the District Court erred by denying two motions for mistrial.

The first motion concerns a remark made by Detective Terry Wise who testified that he “was concerned [Fuertes] was going to hurt the young lady,” referring to Fuertes's girlfriend. Fuertes argues that this comment was highly prejudicial because the stigma of violence associated with sex offenders is firmly rooted. This statement prompted Fuertes to move for

a mistrial, which the Court denied. However, the Court did order the jury to disregard the witness's statement.

The second motion concerns a remark made by the government while cross examining Fuertes on the fifth day of trial. In reference to the two email accounts at issue, the government attorney made the statement, “There's a lot of Ramon Fuertes information flying around,” to which Fuertes asked, “Is there?” The government responded, “A lot that was never reported, when it should have been.” Fuertes objected, and the Court sustained the objection, ordering the jury to disregard the government's statement. Fuertes then moved for a mistrial, arguing that suggesting there was additional evidence of Fuertes's misconduct beyond what was being presented to the jury was unfairly prejudicial. The Court denied the motion, finding that the level of prejudice did not warrant a mistrial.

We review the District Court's denial of motions for mistrial for an abuse of discretion. *United States v. Valois*, 915 F.3d 717, 723 n.2 (11th Cir. 2019).

A mistrial should be granted if the “defendant's substantial rights are prejudicially affected.” *United States v. Newsome*, 475 F.3d 1221, 1227 (11th Cir. 2007). That is, if there is “a reasonable probability that, but for the remarks, the outcome of the trial would have been different.” *Id.* (citations omitted). Furthermore, when the district court gives a curative instruction, the reviewing court will reverse “only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition.” *Id.* (quoting *United States v. Delgado*, 321 F.3d 1338, 1347 (11th Cir. 2003)). Finally, if the record contains sufficient independent evidence of guilt, the error is harmless and therefore does not warrant reversal. *Id.* (citing *United States v. Adams*, 74 F.3d 1093, 1097–98 (11th Cir.1996)).

We find no abuse of discretion in the Court's denial of either of Fuertes's motions for mistrial. In both instances, the Court instructed the jury to disregard the prejudicial statements and determined that the statements were not so prejudicial as to warrant a mistrial. And, as the District Court noted below, the jury had already heard prejudicial evidence, so the statements' unfairly prejudicial effect was lessened. These were two minor statements made over the course of a six-day trial. The marginal prejudicial effect was not so high as to make them incurable by the trial court's admonition.

V.

***6** In summary, we find that Fuertes did not properly preserve his challenge to the constitutionality of SORNA. Furthermore, we find that the District Court did not abuse its discretion by admitting the three challenged instances of

uncharged conduct or by denying either of Fuertes's motions for mistrial. Accordingly, Fuertes's conviction is affirmed.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2025 WL 3266799

Footnotes

- 1 In his opening brief, Fuertes raised a fourth issue regarding the District Court's application of two sentencing enhancements. However, Fuertes conceded the issue in his reply brief, so we need not address it here.
- 2 This court adopted all decisions of the United States Court of Appeals for the Fifth Circuit prior to close of business on September 30, 1981, as binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).
- 3 Fuertes mentions in passing in his brief that the lease and squatting were not inextricably intertwined with the charged offenses, and therefore that the evidence should not have been introduced as intrinsic. However, he does not develop his argument any further, and it is therefore abandoned. See *United States v. Jernigan*, 341 F.3d 1273, 1283, n.8 (11th Cir. 2003) (holding that appellants must, “[a]t the very least, ... devote a discrete, substantial portion of his argumentation” to the issue they wish to appeal, otherwise the issue is abandoned.).

127 F.4th 638

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

John HALE, Defendant-Appellant.

No. 24-5362

|

Decided and Filed: January 30, 2025

Synopsis

Background: Defendant, who pleaded guilty to and was convicted of failing to update his sex offender registration as required under the Sex Offender Registration and Notification Act (SORNA), moved for early termination of his ten-year term of supervised release four years and four months into the term. The United States District Court for the Middle District of Tennessee, Waverly D. Crenshaw, Jr., J., denied the motion. Defendant appealed.

[Holding:] The Court of Appeals, Larsen, Circuit Judge, held that a finding of exceptionally good behavior is not required before a district court may grant a motion for early termination of supervised release.

Vacated and remanded.

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

West Headnotes (6)

[1] Criminal Law Grant of probation or supervised release

Court of Appeals reviews a district court's denial of a motion for early termination of supervised release under the abuse-of-discretion standard. 18 U.S.C.A. § 3583(e)(1).

[2] Criminal Law Discretion of Lower Court

A district court abuses its discretion when it relies on clearly erroneous findings of fact, or

when it improperly applies the law or uses an erroneous legal standard.

[3] Sentencing and Punishment Discharge of probationer

A district court enjoys discretion to consider a wide range of circumstances when determining whether to grant early termination of a term of supervised release. 18 U.S.C.A. § 3583(e)(1).

[4] Sentencing and Punishment Discharge of probationer

In order to terminate a term of supervised release, a district court must conclude that the early termination of supervised release is warranted both by the defendant's conduct and also by the interest of justice. 18 U.S.C.A. § 3583(e)(1).

[5] Sentencing and Punishment Discharge of probationer

A district court may consider whether a defendant exhibited exceptionally good behavior when exercising its broad discretion to resolve motions for early termination of supervised release. 18 U.S.C.A. § 3583(e)(1).

[6] Sentencing and Punishment Discharge of probationer

A finding of exceptionally good behavior is not required before a district court may grant a motion for early termination of supervised release, though such behavior remains a relevant consideration. 18 U.S.C.A. § 3583(e)(1).

***639** Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 3:11-cr-00221-1—Waverly D. Crenshaw, Jr., District Judge.

Attorneys and Law Firms

ON BRIEF: Molly Rose Green, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. S. Carran Daughtry, UNITED STATES ATTORNEY'S OFFICE, Nashville, Tennessee, for Appellee.

Before: GILMAN, STRANCH, and LARSEN, Circuit Judges.

OPINION

LARSEN, Circuit Judge.

Appellant John Hale moved for early termination of supervised release four years and four months into his ten-year term of supervision. The district court denied his motion. For the reasons stated, we VACATE and REMAND for reconsideration of Hale's motion.

I.

In 2010, John Hale pleaded guilty to aggravated sexual battery by unlawful sexual contact. He was sentenced in Tennessee state court to eight years of imprisonment and lifetime supervision. As a result of his conviction, Hale was required to ***640** register as a sex offender in Tennessee. See Tenn. Code Ann. § 40-39-203; *see also* 18 U.S.C. § 2250(a).

In October 2011, Hale was indicted in the Middle District of Tennessee for traveling out of the state and failing to update his sex-offender registration in Tennessee as required under the federal Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). He pleaded guilty and was sentenced to fifteen months' imprisonment, to be served consecutive to his state sentence, and, upon release, to a term of ten years' supervised release with special conditions.

On June 8, 2018, after serving his sentences, Hale was released, and his supervision began. In January 2020, Hale violated a condition of his supervised release by consuming alcohol, and he was placed on a formal random-drug-testing program. Nearly three years later, he moved for early termination of his federal term of supervised release, having served approximately four years and four months of his ten-year term. He argued that, despite his January 2020 violation, he had otherwise complied with the conditions of

his supervision, warranting early termination. For support, he cited his sex-offender treatment, his limited number of violations, and letters from his state probation officer, therapist, and long-time friend attesting to his compliance. Hale's federal probation officer could not recommend early termination for a convicted sex offender due to office policy. The United States did not oppose Hale's motion for early termination.

The district court denied Hale's motion. The court commended Hale for his positive behavior, but determined that early termination of supervised release was not appropriate. Hale timely appealed.

II.

[1] [2] We review the district court's denial of a motion for early termination of supervised release under the abuse-of-discretion standard. *United States v. Webb*, 30 F.3d 687, 688 (6th Cir. 1994). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *United States v. Carter*, 463 F.3d 526, 528 (6th Cir. 2006) (citation omitted). Hale argues that the district court relied on both an improper legal standard and clearly erroneous facts when rejecting his motion.

A.

[3] [4] We begin with the legal standard that governs a motion for early termination of supervised release. A district court may, after considering a subset of the sentencing factors set forth in § 3553(a), terminate a term of supervised release "at any time after the expiration of one year of supervised release ... if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1). "The expansive phrases 'conduct of the defendant' and 'interest of justice' make clear that a district court enjoys discretion to consider a wide range of circumstances when determining whether to grant early termination." *United States v. Melvin*, 978 F.3d 49, 52 (3d Cir. 2020) (quoting *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014)). "The conjunction 'and' used in the statute clearly indicates that a district court must conclude that the early termination of supervised release is warranted both by the individual's conduct and also by the interest of justice." *United States v. Suber*, 75 F. App'x 442, 444 (6th Cir. 2003).

In *United States v. Atkin*, we stated that “[e]arly termination of supervised release ***641** is a discretionary decision that is *only* warranted in cases where the defendant shows changed circumstances—such as exceptionally good behavior.” 38 F. App’x 196, 198 (6th Cir. 2002) (per curiam) (emphasis added). And our subsequent unpublished decisions have consistently reiterated *Atkin*’s rule. *See, e.g., United States v. Zai*, 2024 WL 84084, at *2 (6th Cir. Jan. 8, 2024); *United States v. Bey*, 2023 WL 8043044, at *2 (6th Cir. Nov. 16, 2023) (order); *United States v. Butler*, 2023 WL 6552878, at *2 (6th Cir. June 14, 2023) (order). The district court here understandably followed suit. Relying on *Atkin*, the district court determined that Hale “d[id] not satisfy [*Atkin*’s] standard” because, “[a]lthough ... Hale’s behavior is admirable, it is far from exceptional and does not warrant early termination of supervised release.” R. 51 Dist. Ct. Order, PageID 144–45.

We agree with Hale that *Atkin* did not correctly state the legal standard when it said that early termination of supervised release is “*only* warranted” upon a showing of “exceptionally good behavior.” *Atkin*, 38 F. App’x at 198 (emphasis added). Section 3583(e)(1) requires the district court to determine whether early termination “is warranted by the conduct of the defendant released and the interest of justice,” in addition to certain § 3553(a) factors. The text does not make “exceptionally good” conduct an absolute prerequisite to relief. *Compare* 18 U.S.C. § 3582(c)(1)(A) (requiring a finding of “extraordinary and compelling” circumstances to warrant compassionate release); *and United States v. McCall*, 56 F.4th 1048, 1053–54 (6th Cir. 2022) (en banc) (same); *with* 18 U.S.C. § 3583(e)(1) (requiring consideration of “the conduct of the defendant released and the interest of justice”).

[5] That is not to say that a district court may not consider whether a defendant exhibited “exceptionally good behavior” when exercising its broad discretion to resolve motions for early termination of supervised release. Indeed, we might expect that district courts will “generally” find early termination proper only when exceptionally good conduct or other changed circumstances are present. *See Melvin*, 978 F.3d at 53. After all, compliance with all conditions “is expected of an individual on supervised release,” *Butler*, 2023 WL 6552878, at *2, and non-compliance is a ground for revocation, *see* 18 U.S.C. § 3583(e)(3). But we cannot find in the text of the statute a “blanket rule” requiring exceptional conduct as a prerequisite to early termination. *United States v. Ponce*, 22 F.4th 1045, 1048 (9th Cir. 2022).

We, like other circuits, seem to have gotten the idea that the statute invariably demands a showing of exceptionally good behavior from *United States v. Lussier*, a Second Circuit opinion. *See Atkin*, 38 F. App’x at 198 (citing *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir. 1997)); *see also Melvin*, 978 F.3d at 53 (discussing prior, but mistaken, reliance on *Lussier*); *Ponce*, 22 F.4th at 1047 (same). But, of course, *Lussier* does not bind us. What’s more, *Lussier* did not even involve the early-termination-of-supervised-release provision before us now, § 3583(e)(1). Instead, the question in *Lussier* was whether a district court could use a neighboring provision governing *modifications* of supervised release —§ 3583(e)(2)—to correct an allegedly illegal restitution condition. *See* 104 F.3d at 33. Section 3583(e)(2) makes no mention of the “conduct of the defendant” or “the interest of justice,” which is the critical language here. *See* 18 U.S.C. § 3583(e)(1). And it’s worth noting that, even with respect to § 3583(e)(2)’s modification provision, the Second Circuit has since clarified that *Lussier* “d[id] not require new or changed circumstances relating to the defendant in order to modify ***642** conditions of release, but simply recognize[d] that changed circumstances *may* in some instances justify a modification.” *United States v. Parisi*, 821 F.3d 343, 347 (2d Cir. 2016) (per curiam) (second emphasis added); *see also United States v. Abbring*, 2023 WL 3476310, at *2 (6th Cir. May 12, 2023) (order) (“Although a change in circumstances is not explicitly covered by § 3583(e)(2), this court has previously explained that ‘Section 3583(e)(2) allows district courts to adjust supervised release conditions to account for new or unforeseen circumstances.’ ” (quoting *United States v. Faber*, 950 F.3d 356, 359 (6th Cir. 2020))).

[6] Like the other circuits that originally relied on *Lussier*, we clarify today that § 3583(e)(1) does not require a finding of exceptionally good behavior before a district court may grant a motion for early termination of supervised release, though such behavior remains a relevant consideration. *See Melvin*, 978 F.3d at 53 (holding that “a district court need not find that an exceptional, extraordinary, new, or unforeseen circumstance warrants early termination of a term of supervised release before granting a motion under 18 U.S.C. § 3583(e)(1)’’); *see also Ponce*, 22 F.4th at 1047 (explaining that it is incorrect as a matter of law to require a threshold showing of “exceptionally good behavior” under § 3583(e)(1)). Because the district court here appears, understandably, to have read our unpublished caselaw to require a showing of “exceptionally good” behavior as a

threshold to relief, we vacate the district court's order and remand for reconsideration under the proper standard.

Because we remand for reconsideration, we do not reach Hale's argument that the district court relied on clearly erroneous facts about the terms of his state supervision. Hale's motion argued generally that he "no longer needs simultaneous state and federal supervision," and he noted that his state "supervision terms are extensive." R. 46 Motion for Early Termination, PageID 122, 124–25. Hale offered a long list of these terms. But the motion made no mention of any mandatory state-imposed sex-offender treatment. The district court concluded that Hale's "continued state supervision fails to erase the utility of his remaining federal term" because not all of his "state conditions overlap with his federal requirements." R. 51 Dist. Ct. Order, PageID 145. The court noted, in particular, that "only his federal conditions ...

explicitly require ongoing sex offender treatment." *Id.* Hale now argues that his state terms *do* require mandatory sex offender training, so the district court's finding was clearly erroneous. Because we remand for reconsideration under the proper legal standard, we decline to reach this question. On remand the district court may, in the exercise of its discretion, reconsider this question, including whether Hale's argument was properly developed in the initial motion.

* * *

We VACATE and REMAND in accordance with this decision.

All Citations

127 F.4th 638

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146 F.4th 405

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Jason Steven KOKINDA, Defendant - Appellant.

No. 22-4595

|

Submitted: March 6, 2025

|

Decided: July 28, 2025

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of West Virginia, Thomas S. Kleeh, J., of traveling in interstate commerce and knowingly failing to update his registration as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA). Following the denial of his motion for judgment of acquittal or a new trial, 2022 WL 5133482, defendant appealed. The Court of Appeals, Thacker, Circuit Judge, 93 F.4th 635, affirmed. The United States Supreme Court, 145 S.Ct. 124, granted certiorari, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832, which overruled *Chevron*.

Holdings: On remand, the Court of Appeals, Thacker, Circuit Judge, held that:

[1] term habitually lives, in SORNA's definition of a sex offender's residence, includes places in which a sex offender actually lives with some regularity;

[2] rule of lenity did not apply to compel Court of Appeals to construe SORNA so that its registration requirement did not apply to offenders like defendant who had no fixed abode;

[3] SORNA, as applied to defendant, did not violate the Tenth Amendment by conflicting with West Virginia's Sex Offender Registry Act;

[4] SORNA did not commandeer state officers to register sex offenders, like defendant, contrary to state law, in violation of Tenth Amendment;

[5] sentence enhancement was warranted on ground defendant committed the West Virginia offense of third degree sexual abuse against a minor while he was in failure to register status;

[6] sentence enhancement was warranted on ground defendant knowingly possessed child pornography while he was in failure to register status; and

[7] lifetime term of supervised release was warranted.

Affirmed.

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

West Headnotes (23)

[1] **Criminal Law** Review De Novo

Criminal Law Instructions

Court of Appeals reviews a district court's decision to give a particular jury instruction for abuse of discretion, and reviews whether a jury instruction incorrectly stated the law de novo.

[2] **Criminal Law** Construction and Effect of Charge as a Whole

Criminal Law Instructions

In reviewing the adequacy of jury instructions, the Court of Appeals determines whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.

[3] **Criminal Law** Instructions in general

Even if a jury was erroneously instructed, the Court of Appeals will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party's case.

- [4] **Criminal Law** Review De Novo
Generally, the Court of Appeals reviews constitutional claims de novo.
- [5] **Criminal Law** Constitutional questions
Unpreserved constitutional claims are reviewed by the Court of Appeals for plain error.
- [6] **Criminal Law** Sentencing
Criminal Law Sentencing
Court of Appeals reviews a sentence for reasonableness, whether inside, just outside, or significantly outside the Sentencing Guidelines range, and the Court applies a deferential abuse-of-discretion standard. U.S.S.G. § 1B1.1 et seq.
- [7] **Criminal Law** Sentencing
In reviewing a sentence, the Court of Appeals first must ensure that the district court did not commit a significant procedural error.
- [8] **Criminal Law** Sentencing
Only if a sentence is procedurally reasonable can the Court of Appeals evaluate the substantive reasonableness of the sentence, using the abuse of discretion standard of review.
- 1 Case that cites this headnote
- [9] **Administrative Law and Procedure** Questions of law or fact in general
Administrative Law and Procedure Construction, interpretation, or application of law in general
Courts, not agencies, decide all relevant questions of law and set aside any agency action inconsistent with the law as they interpret it.
- [10] **Administrative Law and Procedure** Construction, interpretation, or application of law in general
Constitutional Law Standards for guidance
Reviewing courts fulfill their role of independently interpreting a statute that delegates discretionary authority to an agency and effectuating the will of Congress, subject to constitutional limits, by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.
- [11] **Mental Health** Effect of assessment or determination; notice and registration
The term “habitually lives,” in connection with Sex Offender Registration and Notification Act’s (SORNA) definition of a sex offender’s residence as the place where the offender “habitually lives,” and therefore the jurisdiction in which the offender must register, includes more than a fixed abode and instead includes places in which a sex offender actually lives with some regularity, such as the place he stations himself during the day or sleeps at night, and not just where he could characterize his place of residence for self-interested reasons. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(13), 20912(b), 20913.
- 1 Case that cites this headnote
- [12] **Mental Health** Offenses and prosecutions
Rule of lenity did not apply to compel Court of Appeals to construe Sex Offender Registration and Notification Act (SORNA) in favor of defendant convicted of knowingly failing to update his registration as a sex offender in violation of SORNA to mean that SORNA’s registration requirement did not apply to transient sex offenders, such as defendant, who had no fixed abode; although SORNA was a non-punitive, civil regulatory scheme, both in purpose and effect, the criminal statute under which defendant was convicted was not

ambiguous, as it provided that whoever was required to register under SORNA and, inter alia, knowingly failed to register or update a registration as required was guilty of a crime. 18 U.S.C.A. § 2250; 34 U.S.C.A. §§ 20911(13), 20913.

[13] **Criminal Law** 🔑 Liberal or strict construction; rule of lenity

The rule of lenity applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the court can make no more than a guess as to what Congress intended.

[14] **Mental Health** 🔑 Offenses and prosecutions
States 🔑 Criminal justice

The Sex Offender Registration and Notification Act (SORNA), as applied to defendant convicted of traveling in interstate commerce to West Virginia and knowingly failing to update his registration as a sex offender in violation of SORNA, did not violate the Tenth Amendment by conflicting with West Virginia's Sex Offender Registry Act; no provision of West Virginia law prohibited defendant from registering, but instead, West Virginia law required him to register after visiting the state for a period of more than 15 continuous days or once he changed his residence to West Virginia. U.S. Const. Amend. 10; 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913; W. Va. Code Ann. §§ 15-12-9(b)(2), 15-12-9(c).

[15] **Mental Health** 🔑 Offenses and prosecutions
States 🔑 Criminal justice

Sex Offender Registration and Notification Act (SORNA) did not commandeer West Virginia officers to register sex offenders, like defendant, contrary to state law, and thus, SORNA did not violate the Tenth Amendment as applied to defendant, who was convicted of traveling in interstate commerce to West Virginia and knowingly failing to update his registration

as a sex offender in violation of SORNA; SORNA gave the States the choice of complying with its directives, though a State that did not substantially implement SORNA would not receive 10% of the funds that it would otherwise be allocated, and only West Virginia, and not defendant, would have been aggrieved had SORNA unconstitutionally commandeered its officers. U.S. Const. Amend. 10; 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913.

[16] **Sentencing and Punishment** 🔑 Sex offenses, incest, and prostitution

An eight-level enhancement under Sentencing Guidelines to base offense level of defendant convicted of failing to update his registration as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA) was warranted on ground he committed the West Virginia offense of third degree sexual abuse against a minor while he was in failure to register status; witness testified she saw defendant grab buttocks of minor girl while pushing her on playground swing, that testimony was consistent with statement minor gave to police officers the day of the incident, and the touching was intended for defendant's sexual gratification, as he frequented the playground, befriended underage girls, asked to shower with the minor and her friend while he filmed, and messaged the minor on social media asking for nude images. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(5), 20911(7)(G); W. Va. Code Ann. §§ 61-8B-1(6), 61-8B-9; U.S.S.G. § 2A3.5(b)(1)(C).

[17] **Sentencing and Punishment** 🔑 Sex offenses, incest, and prostitution

For a defendant to qualify for the eight-level sentencing enhancement to his base offense level under the Sentencing Guidelines for committing a sex offense against a minor while in failure to register status under the Sex Offender Registration and Notification Act (SORNA), the Guidelines only require commission of a sex offense, not a conviction. 18 U.S.C.A. § 2250(a); U.S.S.G. § 2A3.5(b)(1)(C).

[18] **Sentencing and Punishment** ↗ Factors enhancing sentence

The United States bears the burden of proving, by the preponderance of the evidence, that a sex offense was committed, in order to apply eight-level sentencing enhancement to his base offense level under the Sentencing Guidelines for committing a sex offense against a minor while in failure to register status under the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. § 2250(a); U.S.S.G. § 2A3.5(b)(1)(C).

[19] **Criminal Law** ↗ Sentencing
Sentencing and
Punishment ↗ Admissibility in General

At sentencing, a district court may consider sufficiently reliable information, and its determination that evidence is sufficiently reliable is reviewed for an abuse of discretion.

[20] **Criminal Law** ↗ Sentencing
A district court's factual findings at sentencing are reviewed for clear error.

[21] **Sentencing and Punishment** ↗ Other offenses, misconduct, or charges

Officer's testimony at sentencing hearing supported district court's imposition of eight-level enhancement under Sentencing Guidelines to base offense level of defendant convicted of failing to update his registration as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA), on ground defendant knowingly possessed child pornography while he was in failure to register status; officer testified that photographs retrieved from defendant's phone depicted minors engaged in sexually explicit conduct, that the photographs were similar to the child pornography in defendant's prior child pornography conviction, and that there was a file on the phone created on a date he owned it containing child pornography

search terms such as "My little girl nude," "Kiddy CP," and "Preteen incest." 18 U.S.C.A. §§ 2250(a), 2252A; U.S.S.G. § 2A3.5(b)(1)(C).

[22] **Infants** ↗ Exhibition or use of child in indecent material or performance

To prove the knowledge element of a child pornography offense, a defendant must have knowledge of the sexually explicit nature of the materials as well as the involvement of minors in the materials' production. 18 U.S.C.A. § 2252A.

[23] **Mental Health** ↗ Offenses and prosecutions
Sentencing and Punishment ↗ Duration

Lifetime term of supervised release was warranted for defendant convicted of failing to update his registration as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA), based on the need to protect the community, where defendant repeatedly and intentionally evaded registering as a sex offender, violated conditions of pretrial release, and continued to victimize children. 18 U.S.C.A. §§ 2250(a), 3553(a).

1 Case that cites this headnote

On Remand from the Supreme Court of the United States. (S. Ct. No. 24-5006)

Attorneys and Law Firms

ON BRIEF: David W. Frame, LAW OFFICE OF DAVID W. FRAME, Clarksburg, West Virginia, for Appellant. William Ihlenfeld, United States Attorney, Randolph J. Bernard, Acting United States Attorney, Wheeling, West Virginia, Eleanor F. Hurney, Assistant United States Attorney, Martinsburg, West Virginia, Brandon S. Flower, Assistant United States Attorney, Sarah E. Wagner, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

Before AGEE, THACKER, and RUSHING, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Thacker wrote the opinion in which Judge Agee and Judge Rushing joined.

THACKER, Circuit Judge:

***409** Jason Steven Kokinda (“Appellant”), a convicted sex offender required to register pursuant to the Sex Offender Registration and Notification Act (“SORNA”), attempted to evade his registration requirements while staying at campgrounds in West Virginia.

A federal grand jury indicted Appellant on one count of traveling in interstate commerce and knowingly failing to update his registration as a sex offender in violation of 18 U.S.C. § 2250. The case proceeded to trial and Appellant stipulated that his prior sex offense required him to register. But Appellant argued that, by staying mobile without a fixed abode, SORNA did not require him to register anywhere. When the district court instructed the jury on SORNA’s definition of “resides,” it supplemented the term “habitually lives” with guidance from The National Guidelines for Sex Offender Registration and Notification (“SMART Guidelines”). After the jury found Appellant guilty, he moved for judgment of acquittal or a new trial, arguing that the district court’s jury instruction improperly expanded SORNA’s definition of “resides.” The district court denied the motion.

Appellant makes the same argument on appeal -- that the district court’s jury instruction was an incorrect recitation of the law. He also argues that SORNA, as applied to him, violates the Tenth Amendment. And Appellant challenges two facets of his sentence: (1) the eight-level enhancement for his third degree sexual abuse of a minor and possession of child pornography and (2) his lifetime term of supervised release.

We previously concluded that the district court correctly instructed the jury on what the terms “resides” and “habitually lives” mean for purposes of SORNA. *United States v. Kokinda*, 93 F.4th 635 (4th Cir. 2024), vacated, — U.S. —, 145 S. Ct. 124, — L.Ed.2d — (2024). In making this determination, we deferred to the SMART Guidelines pursuant to *Chevron*.¹ *410 We also concluded that SORNA, as applied to Appellant, does not violate the Tenth Amendment. And we affirmed the district court’s sentence as

it was procedurally and substantively reasonable. After we issued our prior opinion in this case, the Supreme Court of the United States decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), and overturned *Chevron*. The Court then vacated our prior opinion in this case and remanded for reconsideration in light of *Loper Bright*.

Upon reconsideration, we conclude that although *Loper Bright* changes the analysis, it does not alter the result here. *Loper Bright* impacts our analysis only on the question of whether the district court properly instructed the jury as to the meaning of the terms “resides” and “habitually lives.” While the SMART Guidelines are no longer entitled to *Chevron* deference, they are nonetheless persuasive, and we conclude that they provide an accurate construction of the law. Therefore, we hold that the district court did not err in relying on the SMART Guidelines’ definitions of “resides” and “habitually lives” in instructing the jury. We also continue to hold that SORNA, as applied to Appellant, does not violate the Tenth Amendment, and that Appellant’s sentence was both procedurally and substantively reasonable.

I.

A.

In 2007, Appellant was arrested in New Jersey and charged with one count of endangering the welfare of a child and one count of distribution of child pornography. He pled guilty to both charges in 2009 and was sentenced to three years of imprisonment. Following his New Jersey sentence, Appellant served a separate Pennsylvania sentence for unlawful contact with a minor. Based on the New Jersey child pornography conviction, Appellant was required to register as a sex offender pursuant to SORNA. See 34 U.S.C. § 20913; 18 U.S.C. § 2250(a). Appellant was registered in Delaware in 2015, Vermont in 2016, and New York in 2017. In 2018, Appellant left the country without notification and was later deported from Israel back to the United States based on a Vermont arrest warrant. He was released on bond in February 2019 and remained unregistered throughout 2019. While unregistered, Appellant traveled to several states in the Northeast and Midwest, evading detection by law enforcement.

That evasion ended on September 28, 2019, when Rosanna Bell (“Bell”) called the police on Appellant. Bell observed

Appellant talking to two pre-teen girls on the swings at the city park in Elkins, West Virginia. Then, Bell saw Appellant grab the buttocks of one of the girls while pushing her on the swing. Bell approached the girls and asked if they knew Appellant. P.M. -- the girl whom Appellant had grabbed -- asked if Bell “could please make [Appellant] leave.” J.A. 599.² Bell called the police and waited with the girls until law enforcement arrived. By the time law enforcement officers arrived, Appellant had left the park. The next day, officers noticed a man near the park matching Appellant's description and approached him. When asked his identity, Appellant gave the name “Representative Jason Stevens.” *Id.* at 122. Officers arrested him and *411 charged him with sexual abuse in the third degree in violation of W. Va. Code § 61-8B-9 (2019).³

During the month prior to his arrest, Appellant left a paper trail of his stay in West Virginia. Financial records placed Appellant shopping in and near Elkins, West Virginia on an almost daily basis from August 24 until September 27. And receipts and witnesses established that Appellant rented two different campsites in West Virginia for most of September. At one of those campsites, Appellant used the alias “Jason Smoke.” J.A. 183. Additionally, an Elkins, West Virginia YMCA employee provided records demonstrating that a “Jason Stevens” purchased day passes on five occasions between September 10 and 24. *Id.* at 201. Only four of Appellant's transactions during the August 24 to September 27 time period occurred outside West Virginia, indicating brief visits to Winchester, Virginia, and Erie, Pennsylvania. The Winchester trip occurred on September 17, with Appellant making a purchase back in Elkins, West Virginia later that same day. And the Erie trip included transactions on September 23, with a transaction back in Elkins the following day. Appellant did not dispute these transactions when he testified at trial.

When Appellant was arrested, his two cell phones were seized. Later examination of one of the cell phones revealed thirty images depicting child pornography, along with a PDF file containing child pornography search terms such as “My little girl nude,” “Kiddy CP,” and “Preteen incest.” J.A. 653. The cell phone also contained indicia of Appellant's ownership and use of the phone, including photographs of himself, his passport, and documents and receipts containing his name.

B.

Appellant was indicted by a federal grand jury on one count of failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a). The case proceeded to trial. Appellant stipulated that his New Jersey conviction required him to register as a sex offender pursuant to SORNA. But Appellant argued that he never “resided” in West Virginia, so SORNA's registration requirement was not triggered.

1.

At trial, Appellant testified in his own defense. He admitted that he had not registered as a sex offender in West Virginia, or any state after leaving Vermont in February 2019. But he denied that he had a home or regularly lived in West Virginia during the month preceding his arrest. Appellant explained that he “fully studied” SORNA's registration requirements and “tried to move around as much as possible” so he would not need to register. J.A. 441–42. And he admitted frequenting Elkins from August 24 to September 19, to go to the gym, to shop, and to charge his laptop at the library and city park. But he asserted that he was “staying somewhere very far away, as [his] home base of operations, [as his] constructive type of temporary lodging.” *Id.* at 459. And he explained that he used false identities to conceal the fact that he is a sex offender, and stayed in campgrounds that did not require an identification.

2.

SORNA requires sex offenders to register “and keep the registration current, in *412 each jurisdiction where the offender resides.” 34 U.S.C. § 20913. “Resides” is defined as “the location of the individual's home or other place where the individual habitually lives.” *Id.* § 20911(13). As discussed below, the SMART Guidelines define SORNA's term “habitually lives.” 73 Fed. Reg. 38,030, 38,061 (July 2, 2008).

Both Appellant and the United States proposed jury instructions to clarify SORNA's registration requirement. Appellant's proposed instruction included SORNA's definition of “resides” along with a portion of the SMART Guidelines' definition of “habitually lives.” Specifically, Appellant's instruction defined “habitually lives” to “include[] places in which the sex offender lives with some regularity. A sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days.” S.A. 5.⁴ The United States' proposed

instruction also included SORNA's definition of "resides," but included a longer excerpt from the SMART Guidelines defining "habitually lives." That longer excerpt stated:

"Habitually lives" accordingly should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of "residence" these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for the purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. Jurisdictions may specify in the manner of their choosing the application of the 30-day standard to sex offenders whose presence in the jurisdiction for 30 days is intermittent but who live in the jurisdiction for 30 days in the aggregate over some longer period of time.

S.A. 27.

The district court declined to give either party's proposed instruction in total, opting to give an instruction incorporating SORNA's definition of "resides" and the SMART Guidelines' definition of "habitually lives":

[T]he place where a person "resides" is the location of an individual's home or other place where the individual habitually lives. "Habitually lives" includes places in which the sex offender lives with some regularity. "Habitually lives," accordingly, should be understood to include where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons.

The specific interpretation of this element of "residence" is that a sex offender habitually lives in the relevant sense in any place in which the offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for the purposes of SORNA, if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. As to the timing of registration, based on changes of residence, the understanding of "habitually lives" to mean living in a place for at least 30 days does not mean that the registration of a sex offender who enters a jurisdiction to reside may be delayed until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction, in order to make his home or habitually *413 live in the jurisdiction, is required to register within three business days.

A sex offender who lacks a fixed abode or permanent residence is still required to register in the jurisdiction in which they reside. Such a sex offender cannot provide the residence address required because they have no definitive address at which they live. Even a transient or homeless sex offender is still required to provide a description of the place they habitually live. Some more or less specific description should normally be attainable concerning the place or places where such a sex offender habitually lives, including where the sex offender might station himself during the day or sleep at night.

J.A. 512–13. After deliberations, the jury rendered a guilty verdict.

Appellant filed a pro se motion for judgment of acquittal or a new trial, arguing that the district court's jury instruction "broaden[ed] the scope of [the] 'resides' element beyond its ordinary English usage by using the guidelines to override the limits imposed by the statutory text." Pro Se Mot. for Acquittal at 15, *United States v. Kokinda*, No. 2:21-cr-00020 (N.D. W. Va. Sept. 8, 2021; filed Nov. 8, 2021) ECF 70-1. The district court denied the motion, noting that the SMART Guidelines had the force and effect of law and explaining that the jury instruction correctly stated the law and did not confuse or mislead the jury.

3.

In advance of sentencing, the probation officer prepared a Presentence Investigation Report ("PSR"). The PSR identified two bases for imposing an eight-level enhancement for committing a sex offense against a minor while in a

failure to register status pursuant to section 2A3.5(b)(1)(C) of the United States Sentencing Guidelines (the “Guidelines”). *See U.S.S.G. § 2A3.5(b)(1)(C)* (2018). The first basis was Appellant’s third degree sexual abuse of P.M. when he grabbed her buttocks at the city park in Elkins. The second basis was Appellant’s possession of child pornography on his cell phone. The United States called witnesses at the sentencing hearing to support both bases.

First, Bell testified about the specifics of what she saw at the park when she called the police. She explained that she saw Appellant put his hands on P.M.’s rear end and squeeze her buttocks while pushing her on the swing. Bell also relayed that P.M. told her that Appellant had offered her money if she showered while Appellant filmed her. The United States also admitted P.M.’s written statement, which verified that Appellant had touched her buttocks while pushing her on the swing. P.M.’s statement confirmed that Appellant “kept asking [P.M.] and [the other girl] if he could get in the shower with [them] when no one was home.” J.A. 614. The statement also indicated that Appellant had communicated with P.M. on social media to ask for nude images.

Second, Police Chief Joseph Corkrean testified that he extracted data from Appellant’s phone. Because the phone was broken, Chief Corkrean extracted the raw data from the phone’s internal chip. This form of data extraction did not retrieve the metadata from the files, which would have revealed when the files were downloaded and accessed, but the files themselves could be analyzed. Then, Gary Weaver, an FBI Crimes Against Children Task Force Officer, testified that he reviewed the extracted data and identified thirty images that depicted prepubescent females with their genitalia fully exposed. Officer Weaver compared the images to the images that supported Appellant’s New Jersey child pornography conviction and testified that *414 they were similar. Officer Weaver also located a file on Appellant’s phone that was created during the period Appellant owned the phone that contained search terms relating to child pornography.

Appellant objected to the eight-level sentencing enhancement, arguing that he did not grab P.M.’s buttocks at the park in Elkins and that he did not knowingly possess child pornography on his cell phone. Regarding the child pornography, Appellant argued that because the photographs lacked metadata, the United States could not prove Appellant was the one to download the images on his phone.

The district court overruled Appellant’s objection to the eight-level sentencing enhancement pursuant to Guidelines section 2A3.5(b)(1)(c). The court found by a preponderance of the evidence that Appellant committed third degree sexual abuse against a minor while in failure to register status, which supported the enhancement. Additionally, the court found that Appellant possessed child pornography, which it explained was a separate and independent basis for the enhancement. Application of the enhancement resulted in a Guidelines sentencing range of 51 to 63 months. The district court sentenced Appellant to 63 months of imprisonment to be followed by lifetime supervised release. The court emphasized that the lifetime term of supervised release was appropriate in order to protect the community, considering Appellant’s history of sex offenses and evasion of SORNA’s registration requirement.

II.

[1] [2] [3] “We review a district court’s decision to give a particular jury instruction for abuse of discretion, and review whether a jury instruction incorrectly stated the law de novo.” *United States v. Hassler*, 992 F.3d 243, 246 (4th Cir. 2021) (quoting *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018)). “In reviewing the adequacy of jury instructions, we determine whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *Hassler*, 992 F.3d at 246 (quoting *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013)). Even if a jury was erroneously instructed, we will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party’s case. *Hassler*, 992 F.3d at 246 (quoting *Miltier*, 882 F.3d at 89).

[4] [5] Generally, we review constitutional claims de novo. *United States v. Claybrooks*, 90 F.4th 248, 255 (4th Cir. 2024). But unpreserved constitutional claims are reviewed for plain error. *United States v. Hager*, 721 F.3d 167, 182 (4th Cir. 2013).

[6] [7] [8] After *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), we review a sentence for reasonableness, whether inside, just outside, or significantly outside the Guidelines range, and we apply a “deferential abuse-of-discretion standard.” *United States v. Roy*, 88 F.4th 525, 530 (4th Cir. 2023) (quoting *United*

States v. McCain, 974 F.3d 506, 515 (4th Cir. 2020)). We first must “ensure that the district court did not commit a ‘significant procedural error.’” *Roy*, 88 F.4th at 530 (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Only if the sentence is procedurally reasonable can we evaluate the substantive reasonableness of the sentence, again using the abuse of discretion standard of review. *Gall*, 552 U.S. at 51, 128 S.Ct. 586.

*415 III.

Appellant raises four issues on appeal. First, he argues that the district court erred in instructing the jury on the definition of “habitually lives,” which he alleges expanded the definition of “resides.” Second, Appellant argues that SORNA, as applied to him, violates the Tenth Amendment to the United States Constitution. Third, he argues the district court erred in imposing the eight-level sentencing enhancement, which he alleges was not supported by either third degree sexual abuse of a minor or possession of child pornography. And fourth, Appellant argues that the district court erred in imposing lifetime supervised release.

A.

Jury Instruction

Appellant initially raised two arguments to challenge the district court's jury instruction. First, he argued that after the Supreme Court's decision in *Nichols v. United States*, 578 U.S. 104, 136 S.Ct. 1113, 194 L.Ed.2d 324 (2016), SORNA's registration requirement does not apply to transient sex offenders who have no fixed abode. Second, he argued that the SMART Guidelines should not be afforded *Chevron* deference because neither “resides” nor “habitually lives” is ambiguous and even if they were, *Chevron* deference should not apply in criminal contexts. In his supplemental brief following *Loper Bright*, Appellant changes course and argues that the terms “resides” and “habitually lives” are, in fact, ambiguous. And because he considers them to be ambiguous, Appellant now argues that the rule of lenity should apply, such that we should construe the criminal statute in his favor. We conclude that the district court's jury instruction, which relied on the SMART Guidelines' definitions of “resides” and “habitually lives,” was a correct statement of the law and that the rule of lenity is inapplicable. We also conclude that

Appellant's proposed construction of SORNA is contrary to its purpose. Therefore, the jury instruction was proper.

1.

We begin with an overview of SORNA's registration requirement. In 2006, Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. Among its civil provisions, SORNA requires sex offenders 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.” 34 U.S.C. § 20913.⁵ SORNA also establishes a federal criminal offense covering 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.” Adam Walsh Child Protection and Safety Act of 2006 § 141, 120 Stat. at 601–02 (codified at 18 U.S.C. § 2250(a)).

SORNA defines “resides” to mean “the location of the individual's home or other place where the individual habitually lives.” 34 U.S.C. § 20911(13). To keep the registration current, “[a] sex offender shall, not later than 3 business days after each change of ... residence, ... appear in person in at least 1 jurisdiction ... and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.” *Id.* § 20913(c). That information includes the *416 “address of each residence at which the sex offender resides or will reside.” *Id.* § 20914(a)(3).

Congress specifically authorized the Attorney General to “issue guidelines and regulations to interpret and implement” SORNA. 34 U.S.C. § 20912(b). Pursuant to that delegation of authority, the Attorney General issued the SMART Guidelines. 73 Fed. Reg. 38,030 (July 2, 2008). Section VIII of the SMART Guidelines recognizes that “[r]equiring registration only where a sex offender has a residence or home in the sense of a fixed abode would be too narrow to achieve SORNA's objective of ‘comprehensive’ registration of sex offenders, ... because some sex offenders have no fixed abodes.” *Id.* at 38,061. The section then explains that, pursuant to SORNA, a sex offender must register “[i]n any jurisdiction in which he has his home; and [i]n any jurisdiction in which he habitually lives (even if he has no home or fixed address in the jurisdiction, or no home anywhere).” *Id.* at 38,061.

Section VIII also addresses the meaning of “habitually lives.” It explains that the term “is not self-explanatory and requires further definition” and that an “overly narrow definition would undermine the objectives of sex offender registration and notification under SORNA.” 73 Fed. Reg. at 38,061. Therefore, per the SMART Guidelines, the term “should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons.” *Id.* at 38,062. Ultimately, the SMART Guidelines define “resides” to mean where “a sex offender habitually lives in the relevant sense ... for at least 30 days.” *Id.* And when sex offenders register, those “who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside” and provide “some more or less specific description ... concerning the place or places where such a sex offender habitually lives —e.g., information about a certain part of a city that is the sex offender’s habitual locale, a park or spot on the street (or number of such places) where the sex offender stations himself during the day or sleeps at night.” *Id.* at 38,055.

2.

Appellant argues that the SMART Guidelines’ definitions of “resides” and “habitually lives” -- and, therefore, the district court’s jury instruction -- conflict with *Nichols v. United States*, 578 U.S. 104, 136 S.Ct. 1113, 194 L.Ed.2d 324. In *Nichols*, the Supreme Court analyzed whether a sex offender, Nichols, needed to update his registration in Kansas before he moved to the Philippines. 578 U.S. at 105, 136 S.Ct. 1113. *Nichols* clarified that sex offenders who moved out of the country were not required to notify the jurisdiction they had left after they changed their residence. *Id.* at 110, 136 S.Ct. 1113. The Court explained that SORNA “requires a sex offender who changes his residence to appear, within three business days of the change, in person in at least one jurisdiction (but not a foreign country) where he resides, works, or studies, and to inform that jurisdiction of the address change.” *Id.* at 109, 136 S.Ct. 1113. But SORNA “uses only the present tense [of] ‘resides,’ ” meaning that once Nichols moved to the Philippines, “he was no longer required to appear in person in Kansas to update his registration.” *Id.*

Appellant argues that *Nichols* held that a sex offender may depart from a jurisdiction where he was previously registered, without being required to “update” or “de-register” and

that he may not need to register somewhere else because he does *417 not “reside” anywhere yet. Appellant relies on a hypothetical from *Nichols* wherein the Court opined, “[W]hat if [a sex offender] were to move from Kansas to California and spend several nights in hotels along the way? Such ponderings cannot be the basis for imposing criminal punishment.” *Id.* at 111, 136 S.Ct. 1113. Appellant would have us extend that hypothetical to hold that sex offenders can travel indefinitely to evade registration requirements, never reaching the hypothetical’s California. We decline the invitation to construe *Nichols*’ hypothetical so broadly. Appellant’s interpretation is at odds with the reasoning in *Nichols* as well as the purpose of SORNA. Instead, the hypothetical underscores that the act of leaving a residence does not count as a change of residence. “Nichols changed his residence just once: from Kansas to the Philippines.” *Id.* Similarly, here, Appellant’s course of conduct for the month before his arrest indicates that he changed his residence just once -- from Vermont to West Virginia.

Thus, we reject Appellant’s argument that the SMART Guidelines conflict with *Nichols*.

3.

[9] [10] Next, Appellant argues that the district court erred in relying on the SMART Guidelines and that, because the terms “reside” and “habitually live” are ambiguous, the rule of lenity compels us to construe the statute in his favor. Prior to *Loper Bright Enterprises v. Raimondo*, we considered whether the SMART Guidelines were entitled to *Chevron* deference. 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024). But, as noted above, *Loper Bright* changed the landscape. Now, the Supreme Court has made clear that “courts, not agencies, will decide all relevant questions of law ... and set aside any [agency] action inconsistent with the law as they interpret it.” *Id.* at 392, 144 S.Ct. 2244 (cleaned up). Nevertheless, the Court also recognized that “[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court ... is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits.” *Id.* at 395, 144 S.Ct. 2244. Courts “fulfill[] that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries.” *Id.* (cleaned up).

As we have explained, Congress specifically left the term “habitually lives” undefined and delegated the Attorney General specific authority to promulgate regulations for the interpretation and implementation of SORNA. 34 U.S.C. § 20912(b); *see United States v. Bridges*, 741 F.3d 464, 468 n.5 (4th Cir. 2014) (“By leaving the operative statutory term undefined and delegating broad rulemaking authority to the Attorney General, Congress has implicitly left a gap in SORNA’s statutory scheme that the Attorney General may fill.” (citing *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778)). In exercising that specifically delegated authority, the Attorney General acknowledged that “[SORNA’s objective [was the] ‘comprehensive’ registration of sex offenders, ... because some sex offenders have no fixed abodes.]” 73 Fed. Reg. at 38,061. With that in mind, the Attorney General explained that an “overly narrow definition [of ‘habitually lives’] would undermine the objectives of sex offender registration and notification under SORNA.” *Id.* at 38,061. Thus, as we have explained, the SMART Guidelines defined “habitually lives” to include more than simply a fixed abode. Instead, pursuant to the SMART Guidelines, the term should “be understood to include places in which the sex offender ***418** lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons.” *Id.* at 38,062.

[11] We think this interpretation of the term “habitually lives” evidences reasoned decision making on the part of the Attorney General and is a reasonable exercise of Congress’s specific delegation of authority. In enacting SORNA, “Congress noted that the earlier federal efforts to create sex offender registries state-by-state had left gaps in the system, resulting in an estimated 100,000 unaccounted for sex offenders.” *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013) (citing H.R.Rep. No. 109–218, pt. 1, at 14 (2005), 2005 WL 2210642). “With SORNA, Congress sought to fill those gaps and put in place a national sex offender registration system for the protection of the public.” *Id.* Taking into account SORNA’s broad purpose, we conclude that the SMART Guidelines retain the power to persuade and provide useful guidance on the correct definition of “habitually lives.” *See Loper Bright*, 603 U.S. at 388, 144 S.Ct. 2244 (explaining that the extent to which a court may look to an agency for guidance depends upon “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade”). Because we conclude that the SMART Guidelines

provide the proper definition of the term habitually lives, we conclude that the district court’s jury instruction which relied on them was a correct statement of law.

[12] [13] Further, we reject Appellant’s invitation to apply the rule of lenity to the issue before us. “That rule applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended.” *Ocasio v. United States*, 578 U.S. 282, 295 n.8, 136 S.Ct. 1423, 194 L.Ed.2d 520 (2016) (cleaned up). As we have consistently recognized, “SORNA is a non-punitive, civil regulatory scheme, both in purpose and effect.” *Under Seal*, 709 F.3d at 263. The SMART Guidelines provide a clear and reasonable interpretation of that civil statute by clarifying that “habitually lives” includes where the sex offender actually lives -- such as the place he “stations himself during the day or sleeps at night” -- not just where he could characterize his place of residence for self-interested reasons. 73 Fed. Reg at 38,055.

While it is true that Congress enacted criminal penalties for violating SORNA, that criminal statute is not ambiguous. It provides that “whoever is required to register under [SORNA]” and, *inter alia*, “knowingly fails to register or update a registration as required” is guilty of a crime. 18 U.S.C. § 2250. Thus, there is no ambiguity that requires lenity in SORNA’s criminal penalty statute. And even considering SORNA’s civil provisions, including the registration requirement, we are not left with the determination that there is any “grievous ambiguity” after considering “everything from which aid can be derived,” including SORNA’s legislative history and the SMART Guidelines. *Ocasio*, 578 U.S. at 295 n.8, 136 S.Ct. 1423.

4.

Thus, we are satisfied that the jury instructions, “construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party.” *Hassler*, 992 F.3d at 246 (quoting ***419** *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013)). Therefore, the district court did not err when it used the SMART Guidelines in fashioning its jury instructions.

B.

Tenth Amendment

[14] Appellant argues that SORNA, as applied to him, violates the Tenth Amendment. He raises two arguments. First, Appellant asserts that SORNA's registration requirement conflicts with West Virginia's Sex Offender Registry Act, which he argues did not require him to register in the state. Next, Appellant argues that SORNA would commandeer West Virginia officers to register sex offenders, like himself, contrary to state law. These arguments are foreclosed by our precedent.

In *Kennedy v. Allera*, we addressed whether SORNA violates the Tenth Amendment. 612 F.3d 261, 268 (4th Cir. 2010). Appellant's arguments largely mirror those we rejected in *Kennedy*. His first argument -- that conflicting federal and state registration requirements violate the Tenth Amendment -- "rests on the faulty premise that only those who are *required* to register are lawfully *able* to register." *Id.* And like the offender in *Kennedy*, Appellant cannot cite a provision of West Virginia law that prohibits him from registering. *See id.* Instead, West Virginia law required Appellant to register after visiting the state "for a period of more than fifteen continuous days" or once he changed his residence to West Virginia. *See W. Va. Code § 15-12-9(b)(2), (c).*

[15] *Kennedy* also forecloses Appellant's second argument, that SORNA commandeers state officers to register offenders contrary to state law. In *Kennedy*, we held that SORNA does not "*require* that the States comply with its directives. Rather, SORNA gives the States a choice, indicating that 'a jurisdiction that fails ... to substantially implement [SORNA] shall not receive 10 percent of the funds that would otherwise be allocated.'" 612 F.3d at 269 at 269 (alterations in original) (quoting 34 U.S.C. § 20913(a)). And in *Kennedy*, we further noted that even if a defendant could "demonstrate facts or circumstances raising the specter of an unconstitutional commandeering, it would be the State, not [the defendant], that would be aggrieved" and a defendant "undoubtedly would face a serious standing question." 612 F.3d at 269. Appellant does not address this pitfall in his argument, and we find no reason to depart from our binding precedent in *Kennedy*.

C.

Sentencing Enhancement

Appellant argues that the district court erred in imposing an eight-level sentencing enhancement to his base offense level for commission of a sex offense against a minor while in failure to register status. *See U.S.S.G. § 2A3.5(b)(1)(C) (2018).* The Guidelines incorporate the definition of "sex offense" found in 34 U.S.C. § 20911(5), which defines "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." *Id. § 2A3.5 cmt. n.1; 34 U.S.C. § 20911(5).* And "sex offense" also includes "a criminal offense that is a specified offense," which is defined to include "possession, production, or distribution of child pornography." 34 U.S.C. § 20911(5), (7)(G).

The district court determined that Appellant committed two offenses while unregistered: commission of third degree sexual abuse against P.M. and possession of child pornography; both of which provided independent bases for the application *420 of the eight-level sentencing enhancement. Appellant challenges both grounds.

1.

[16] Appellant first argues that the district court erred in imposing the eight-level sentencing enhancement for committing sexual abuse in the third degree against P.M. He argues that the district court should not have believed Bell's testimony and that even if Bell should be believed, the touching of P.M.'s buttocks was not for Appellant's sexual gratification.

[17] [18] For a defendant to qualify for the enhancement, the Guidelines only require commission of a sex offense, not a conviction. *United States v. Lott*, 750 F.3d 214, 220–21 (2d Cir. 2014). And the United States bears the burden of proving, by the preponderance of the evidence, that a sex offense was committed. *United States v. Shivers*, 56 F.4th 320, 325 (4th Cir. 2022). Sexual abuse in the third degree is defined as subjecting a person who is less than sixteen years old to sexual contact without their consent. W. Va. Code § 61-8B-9. "Sexual contact" includes touching, either directly or through clothing, of the buttocks of another person, where

the touching is done to gratify the sexual desire of either party. *Id.* § 61-8B-1(6).

[19] [20] At sentencing, the district court may consider sufficiently reliable information, and its determination that evidence is sufficiently reliable is reviewed for an abuse of discretion. *United States v. Pineda*, 770 F.3d 313, 318 (4th Cir. 2014). Its factual findings are reviewed for clear error. *Id.* The district court found Bell to be credible after she testified that she saw Appellant grab P.M.'s buttocks while pushing her on the swing. And Bell's testimony was consistent with P.M.'s own statement that she gave to police officers the day of the incident. Although Appellant argues that Bell was not reliable, he does not argue that P.M. was not credible. And nothing in the record suggests that the district court's credibility determinations were erroneous.

Appellant also argues that touching P.M. was not for his "sexual gratification." See W. Va. Code § 61-8B-1(6) (defining "sexual contact" to require the touching be done to gratify the sexual desire of either party). In context, the record is clear that Appellant touching P.M. was intended for his sexual gratification. The record demonstrates that Appellant frequented the Elkins playground, befriended underage girls, asked to shower with P.M. and her friend while he filmed, and messaged P.M. on social media asking for nude images. Thus, the district court did not abuse its discretion by imposing the eight-level enhancement for this offense.

2.

[21] Next, Appellant argues that testimony at sentencing did not establish that he knowingly possessed child pornography on his phone. He argues that because metadata of the child pornography files could not be gathered and he bought the phone from someone else, it remains unknown when the files were downloaded, accessed, and viewed and therefore whether he was the one to download, access, or view them.

[22] To prove the knowledge element of a violation of 18 U.S.C. § 2252A, a defendant must have knowledge of "the sexually explicit nature of the materials as well as ... the involvement of minors in the materials' production." *United States v. Miltier*, 882 F.3d 81, 86 (4th Cir. 2018) (quoting *United States v. Matthews*, 209 F.3d 338, 351 (4th Cir. 2000)).

Officer Weaver testified at sentencing that the photographs retrieved from Appellant's phone depicted minors engaged

in *421 sexually explicit conduct, *i.e.*, lascivious exhibition of the genitals. And to prove Appellant knowingly possessed the photographs, Officer Weaver testified that the phone was Appellant's, the photographs were similar to the child pornography in Appellant's prior New Jersey child pornography conviction, and there was a file on Appellant's phone -- created on a date Appellant owned the phone -- containing child pornography search terms such as "My little girl nude," "Kiddy CP," and "Preteen incest." J.A. 653. Based on this record, we conclude the district court did not clearly err when it concluded that Appellant knowingly possessed child pornography in violation of 18 U.S.C. § 2252A.

D.

Lifetime Supervised Release

[23] Appellant's final argument is that his lifetime term of supervised release is both procedurally and substantively unreasonable. But Appellant merely states in a conclusory fashion that lifetime supervision is not reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a), involves a greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553, and conflicts with any pertinent policy statements issued by the Sentencing Commission.

In support of the imposition of lifetime supervised release, the district court focused on the need to protect the community and Appellant's general belief that he was "above the law." J.A. 802. The court specifically explained that it "believed that the lifetime term of supervised [release] ... is the appropriate manner in which to ensure the protection of the community in this case without constituting excessive punishment." *Id.* at 807. The record amply demonstrates that Appellant repeatedly and intentionally evaded registering as a sex offender, violated conditions of pretrial release, and continued to victimize children. Therefore, we have no trouble affirming lifetime supervised release in this case.

IV.

For these reasons, the judgment of the district court is

AFFIRMED.

All Citations

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Footnotes

- 1 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (requiring courts to defer to an agency's interpretation of an ambiguous statute if that interpretation was based on a permissible construction of the statute).
- 2 Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.
- 3 "A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to incapacity to consent by reason of being less than sixteen years old." W. Va. Code § 61-8B-9.
- 4 S.A. refers to the Supplemental Appendix filed by the United States in this appeal.
- 5 34 U.S.C. § 20913 was formerly codified at 42 U.S.C. § 16913. Its language did not change when it was recodified.

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809 Fed.Appx. 750

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.

Garnett James LLOYD, Jr., Defendant-Appellant.

No. 19-13115

|

Non-Argument Calendar

|

FILED April 2, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Alabama, No. 1:18-cr-00287-WS-N-1, [William H. Steele](#), Senior District Judge, of cyberstalking, sentenced to 60 months' imprisonment, and required to register as a sex offender pursuant to Sex Offender Registration and Notification Act (SONRA). Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant's offense was a sex offense that required him to register as a sex offender under SONRA;

[2] application of two-level enhancement to defendant's sentence was procedurally reasonable;

[3] any error in application of two-level enhancement to defendant's sentence was; and

[4] defendant's sentence was substantively reasonable.

Affirmed.

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

West Headnotes (4)

[1] **Mental Health** ↗ Persons and offenses included

Defendant's cyberstalking offense constituted a sex offense that required him to register as a sex offender pursuant to Sex Offender Registration and Notification Act (SONRA) upon his conviction; defendant, an adult, began internet communications with someone he believed to be a 15-year old girl, and threatened to email certain pictures of minor to her parents and people at her school in order to ruin her reputation if she did not provide defendant with more pictures that he requested. [18 U.S.C.A. § 2261A\(2\)\(B\); 34 U.S.C.A. § 20913\(a\)](#).

[2] **Sentencing and Punishment** ↗ Extortion and threats

Defendant engaged in a pattern of activity involving stalking, threatening, harassing, or assaulting same victim, and therefore application of two-level enhancement to defendant's 60-month sentence for cyberstalking was procedurally reasonable; on two separate occasions, defendant threatened to ruin victim's good reputation by emailing certain pictures of victim to victim's friends and family unless victim complied with defendant's request to send him topless pictures of herself. [18 U.S.C.A. § 2261A\(2\)\(B\); U.S.S.G. § 2A6.2\(b\)\(1\)\(E\)](#).

[3] **Criminal Law** ↗ Sentencing and Punishment

Any error in district court's application of two-level enhancement to defendant's 60-month sentence for cyberstalking was harmless, although it was above guideline sentencing range; guideline sentencing range, even with application of enhancement, did not adequately reflect defendant's criminal history and defendant's offense, which district court concluded was more than mere cyberstalking, and thus district court made it clear that above-guideline statutory maximum sentence

it imposed was based on sentencing factors, not guidelines, that defendant had committed a serious offense that did not fully capture his conduct, and that guidelines did not fully account for his criminal conduct. [18 U.S.C.A. § 2261A\(2\)\(B\)](#); [U.S.S.G. § 2A6.2\(b\)\(1\)\(E\)](#).

- [4] **Sentencing and Punishment** ↗ Nature, degree or seriousness of offense
- Sentencing and Punishment** ↗ Nature, degree, or seriousness of other misconduct
- Sentencing and Punishment** ↗ Existing social ties and responsibilities
- Threats, Stalking, and Harassment** ↗ Stalking

Defendant's 60-month sentence for cyberstalking was substantively reasonable; in concluding that a 60-month statutory-maximum sentence was fair and reasonable and sufficient, but not more than necessary to satisfy sentencing objectives, district court specifically weighed fact that defendant had a family and was able to produce income and support himself in a productive way, but nonetheless concluded that these factors were outweighed by others in record, including defendant's prior convictions for sexual battery and breaking and entering into a sorority house, and severity of instant offense, which district court determined rose to level of a sexual and predatory nature that was both dangerous and concerning, as well as impact offense had on victims. [18 U.S.C.A. §§ 2261A\(2\)\(B\), 3553\(a\)](#).

Attorneys and Law Firms

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Appeal from the United States District Court for the Southern District of Alabama, D.C. Docket No. 1:18-cr-00287-WS-N-1

Before [WILSON](#), [LAGOA](#) and [MARCUS](#), Circuit Judges.

Opinion

PER CURIAM:

Garnett James Lloyd, Jr. appeals following his conviction and sentence for one count of cyberstalking, in violation of [18 U.S.C. § 2261A\(2\)\(B\)](#). His conviction arose out of internet communications he'd begun with someone he believed to be 15 years old, and whom he had threatened with emailing pictures of her to her parents and people at her school to ruin her "good girl" image, unless she sent other requested photos. On appeal, he argues that: (1) the district court erred in requiring him to register as a sex offender pursuant to the Sex Offender Registration and Notification Act ("SORNA"),¹ because his offense was not a sex offense that required registration under SORNA, even though he recognizes that our en banc opinion in [United States v. Dodge](#), 597 F.3d 1347 (11th Cir. 2010), forecloses his argument; (2) the district court imposed a procedurally unreasonable sentence because his offense was one continuous offense and the district court improperly added two points to his offense level for engaging in a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, under [U.S.S.G. § 2A6.2\(b\)\(1\)\(E\)](#); and (3) his 60-month sentence is substantively unreasonable because it is double the high end of the guideline sentencing range and the district court failed to weigh certain factors. After thorough review, affirm.

"We review for abuse of discretion the imposition of a special condition of supervised release." [United States v. Pilati](#), 627 F.3d 1360, 1365 (11th Cir. 2010). We review *de novo* the trial court's interpretation of a statute. *Id.* We generally review the sentence a district court imposes for "reasonableness," which "merely asks whether the trial court abused its discretion." [United States v. Pugh](#), 515 F.3d 1179, 1189 (11th Cir. 2008) (quotation omitted). "A district court abuses its discretion if it applies the incorrect legal standard." [Dodge](#), 597 F.3d at 1350. When a defendant challenges the application of an enhancement under the Sentencing Guidelines, we review a district court's factual findings for clear error and its interpretation of the Sentencing Guidelines *de novo*. [United States v. Perez](#), 366 F.3d 1178, 1181 (11th Cir. 2004). We will not find clear error unless our review of the record leaves us with the definite and firm conviction that a mistake has been committed. [United States v. White](#), 335 F.3d 1314, 1319 (11th Cir. 2003). The district court must interpret the Guidelines and calculate the sentence correctly; an error in the

district court's calculation of the advisory Guidelines range warrants vacating the sentence, unless the error is harmless. See [United States v. Scott](#), 441 F.3d 1322, 1329-30 (11th Cir. 2006). A defendant's argument *753 for a specific sentence will preserve a substantive unreasonableness claim on appeal. [Holguin-Hernandez v. United States](#), — U.S. —, 140 S. Ct. 762, 764, 206 L.Ed.2d 95 (2020).

Under our prior-panel-precedent rule, a panel of this Court is bound by a prior panel's decision until overruled by the Supreme Court or by this Court en banc. [United States v. Steele](#), 147 F.3d 1316, 1317-18 (11th Cir. 1998). There is no exception to this rule based upon an overlooked reason or a perceived defect in the prior panel's reasoning or analysis of the law in existence at the time. [United States v. Kaley](#), 579 F.3d 1246, 1255, 1259-60 (11th Cir. 2009).

[1] First, we are unpersuaded by Lloyd's claim that the district court erred in requiring him to register as a sex offender under SORNA. Under federal law it is unlawful for whoever with the intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person by placing that person in reasonable fear of death of, or serious bodily injury to that person. [18 U.S.C. § 2261A\(2\)\(B\)](#).

The SORNA requires a "sex offender" to register and keep his registration current in each jurisdiction where he lives, works, or studies. [34 U.S.C. § 20913\(a\)](#). "Sex offender" is defined under the Act as "an individual who was convicted of a sex offense." [Id. § 20911\(1\)](#). Barring two exceptions that are not relevant to this appeal, a "sex offense" is defined as follows:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of [Public Law 105-119](#) (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Id. § 20911(5)(A)(i)-(v) (emphasis added). The term "specified offense against a minor" means an offense against a minor that involves:

- (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 section 1801 of Title 18.
- (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.

Id. § 20911(7)(A)-(I). The SORNA defines a "criminal offense" as "a State, local, tribal, foreign, or military offense ... or other criminal offense." [Id. § 20911\(6\)](#).

*754 In [Dodge](#), our en banc Court set out to determine whether the defendant was a sex offender who was required to register as such for his conviction for knowingly attempting to transfer obscene material to a minor. [597 F.3d at 1349](#). In order to do so, the Court had to determine whether the defendant's conviction was a "sex offense," and more specifically, whether it was a sex offense that was defined as a "criminal offense that is a specified offense against a minor," pursuant to [34 U.S.C. § 20911\(5\)\(A\)\(ii\)](#). [Id. at 1351](#).

Our Court, sitting en banc in [Dodge](#), began by rejecting the defendant's narrow reading of the SORNA and concluded that "[n]othing in the plain language of the statute suggests

that other criminal offense' of [§ 20911(6)] cannot encompass federal offenses not specifically enumerated in [§ 20911(5)(A)(iii)]." *Id.* at 1352. It added that "Congress did not intend [§ 20911(5)(A)(iii)] to constitute an exclusive list of federal crimes requiring SORNA registration." *Id.* As for whether the defendant's conviction was a "specified offense against a minor," the Court reasoned that the answer to this question depended on "whether SORNA requires a 'categorical' approach that restricts our analysis to the elements of the crime, or whether SORNA permits examination of 'the particular facts disclosed by the record of conviction.'" *Id.* at 1353 (quotations omitted). The en banc Court relied on Ninth Circuit reasoning to conclude that the definitions at § 20911(5)(A)(ii) and § 20911(7) do not require the categorical approach, but, instead, "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 1353-55. Applying this approach, the en banc Court once again agreed with the Ninth Circuit that § 20911(5)(A)(ii) included a catchall category -- "any conduct that by its nature is a sex offense against a minor" -- and that, because the defendant's conduct paralleled an "undoubtedly registerable offense," his offense fell within the "specified offense against a minor" category. *Id.* at 1356.

Here, the district court did not abuse its discretion by requiring Lloyd to register as a sex offender pursuant to SORNA. Lloyd's argument hinges on his claim that our en banc decision in *Dodge* was wrongly decided and that it overlooked certain aspects of the relevant statute and relevant Attorney General guidelines when determining to apply the conduct-based approach to the definitions of § 20911(5)(A)(ii) and § 20911(7). However, a panel of this Court is not at liberty to disregard *Dodge*; our prior-panel-precedent rule requires us to abide by *Dodge* until overruled by the Supreme Court or by this Court en banc. There is no exception to this rule based upon an overlooked reason or a perceived defect in the prior decision's reasoning or analysis of the law in existence at the time. Accordingly, we affirm as to this issue.

We also find no merit to Lloyd's claim that the district court imposed an unreasonable sentence. In reviewing sentences for reasonableness, we perform two steps. *Pugh*, 515 F.3d at 1190. First, we "ensure that the district court committed no significant procedural error, such as 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.'" *Id.* (quoting *755 *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)).² The district court need not explicitly say that it considered the § 3553(a) factors, as long as the court's comments show it considered them when imposing sentence. *United States v. Dorman*, 488 F.3d 936, 944 (11th Cir. 2007).

If we conclude that the district court did not procedurally err, we consider the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard," based on the "totality of the circumstances." *Pugh*, 515 F.3d at 1190 (quotation omitted). We may vacate a sentence only if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors to arrive at an unreasonable sentence based on the facts of the case. *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc). "[W]e will not second guess the weight (or lack thereof) that the [court] accorded to a given [§ 3553(a)] factor ... as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States v. Snipes*, 611 F.3d 855, 872 (11th Cir. 2010) (quotation, alteration and emphasis omitted). The district court may base its findings of fact on, among other things, undisputed statements in the PSI or evidence presented at the sentencing hearing. *United States v. Smith*, 480 F.3d 1277, 1281 (11th Cir. 2007). However, a court may abuse its discretion if it (1) fails to consider relevant factors that are due significant weight, (2) gives an improper or irrelevant factor significant weight, or (3) commits a clear error of judgment by balancing a proper factor unreasonably. *Irey*, 612 F.3d at 1189.

Where the district court has chosen to vary upward, we must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. *Id.* at 1196. The district court can rely on factors already considered in calculating the guideline range when imposing a variance. See *United States v. Amedeo*, 487 F.3d 823, 833-34 (11th Cir. 2007). We may not presume that a sentence outside the guideline range is unreasonable and must give due deference to the district court that the § 3553(a) factors, on a whole, justify the extent of the variance. *United States v. Rosales-Bruno*, 789 F.3d 1249, 1254-55 (11th Cir. 2015). The party challenging the sentence bears the burden to show it is unreasonable. *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010).

The guidelines provide that a two-level increase to an offense level calculation for a stalking offense is warranted when the offense involved “a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim.” U.S.S.G. § 2A6.2(b)(1)(E). The commentary to the Guidelines provides that:

Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim whether or not such conduct resulted in a conviction. For example, a single instance of stalking *756 accompanied by a separate instance of threatening, harassing, or assault the same victim constitutes a pattern of activity for purposes of this guideline.

U.S.S.G. § 2A6.2, cmt. (n. (1)). Moreover,

[i]n determining whether subsection (b)(1)(E) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(E) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.

Id. § 2A6.2, cmt. (n. (3)). The guidelines also provide that, if an enhancement under § 2A6.2(b)(1) “does not adequately

reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.” *Id.* § 2A6.2, cmt. (n. (5)).

[2] [3] As for procedural unreasonableness, the court did not clearly err in finding that Lloyd had engaged in a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, and thus, warranted adding two points to his offense level under § 2A6.2(b)(1)(E). As the record reflects, on two separate occasions, Lloyd threatened to ruin his victim’s “good girl reputation” by sharing photos that he had received with her friends and parents, unless he received topless pictures of the victim. Threats like these are sufficient to warrant the application of § 2A6.2(b)(1)(E). But even if the district court erred in applying § 2A6.2(b)(1)(E), any error was harmless. As the court explained, the guideline sentencing range -- even with the application of § 2A6.2(b)(1)(E) -- did not adequately reflect Lloyd’s criminal history and Lloyd’s offense, which the court concluded was more than mere cyberstalking. Thus, the district court made clear that the above-guideline statutory maximum sentence it imposed was based on the sentencing factors, not the guidelines, that Lloyd had committed a serious offense that did not fully capture his conduct, and that the guidelines did not fully account for his criminal conduct. On this record, even if the district court somehow erred in applying § 2A6.2(b)(1)(E), any error was harmless.

[4] Nor has Lloyd shown that his sentence is substantively unreasonable. In concluding that a 60-month statutory-maximum sentence was fair and reasonable and sufficient but not more than necessary to satisfy the sentencing objectives, the district court specifically weighed the fact that Lloyd had a family and was able to produce income and support himself in a productive way. Nonetheless, the court determined that these factors were outweighed by others in the record. These included Lloyd’s prior convictions, which were not accounted for by the guidelines and included a misdemeanor sexual battery charge, a sexual battery charge, and breaking and entering into a sorority house. They also included the severity of the instant offense -- which the district court determined rose to the level of “a sexual and predatory nature that [was] both dangerous and concerning” -- as well as the impact his offense had on the victims. The district court’s weighing of all of these factors was well within its discretion. Accordingly, we affirm.

AFFIRMED.

All Citations

809 Fed.Appx. 750

Footnotes

- 1 [34 U.S.C. § 20901, *et seq.*](#)
- 2 The § 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. [18 U.S.C. § 3553\(a\)](#).

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2025 WL 1951890

Only the Westlaw citation is currently available.

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

UNITED STATES of America, Plaintiff,
v.
David MARROWBONE, Defendant.

4:24-CR-40106-RAL
|
Signed July 16, 2025

Attorneys and Law Firms

Connie Larson, Paige Petersen, U.S. Attorney's Office, Sioux Falls, SD, for Plaintiff.

Katherine Landis-True, Federal Public Defender's Office, Pierre, SD, for Defendant.

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

ROBERTO A. LANGE, CHIEF JUDGE

*1 The United States charged David Marrowbone with one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). Doc. 1. Marrowbone moved to dismiss the Indictment for failure to state an offense, arguing that his 1982 conviction for assault with intent to commit rape does not qualify as a “sex offense” triggering the registration requirement. Docs. 29, 30. The United States opposed the motion and filed a brief supporting its position, Doc. 36, after which Marrowbone filed a reply brief, Doc. 39.

In a prior case, 14-CR-30071, Marrowbone presented a similar challenge to his indictment for failure to register as a sex offender. This Court denied the motion, finding that Marrowbone's 1982 conviction was a sex offense. See United States v. Marrowbone, 3:14-CR-30071, 2014 WL 6694781 (D.S.D. Nov. 26, 2014). Thereafter, the United States Supreme Court issued its decision in Mathis v. United States, 579 U.S. 500 (2016), which Marrowbone now relies on in his present challenge to the Indictment. This Court will revisit Marrowbone's argument in light of Mathis. For the reasons set forth below, Marrowbone's motion to dismiss is denied.

I. Legal Standard on Motion to Dismiss and Validity of Indictment

Marrowbone argues that the Indictment fails to state an offense and therefore must be dismissed under Rule 12(b)(3) (B)(v). Doc. 30. “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). However, under Federal Rule of Criminal Procedure 12(b) (3)(B)(v), a defendant “must” challenge an indictment for failing to state an offense before trial. “An indictment survives a motion to dismiss for failure to state an offense if the indictment contains a facially sufficient allegation.” United States v. Sholley-Gonzalez, 996 F.3d 887, 893 (8th Cir. 2021) (cleaned up and citation omitted). “An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.” United States v. Steffen, 687 F.3d 1104, 1109 (8th Cir. 2012) (citation omitted). This is a low bar, and an indictment normally will be found valid unless it is “so defective” that no reasonable construction of it properly charges the offense for which the defendant is being tried. United States v. Sewell, 513 F.3d 820, 821 (8th Cir. 2008) (citation omitted). Normally, an indictment that tracks the statutory language is sufficient. *Id.* When ruling on a motion to dismiss, a court must accept all factual allegations in the indictment as true. See United States v. Hansmeier, 988 F.3d 428, 436 (8th Cir. 2021).

The United States alleges that Marrowbone failed to register or update his registration in violation of 18 U.S.C. § 2250(a). Section 2250(a) states that:

*2 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 ...;

... 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.

18 U.S.C. § 2250(a).

The Indictment charges:

Between on or about May 24, 2024, and continuing through on or about July 15, 2024, in the District of South Dakota, the defendant, David Marrowbone, a person required to register under the Sex Offender Registration and Notification Act, and a sex offender by reason of a conviction under federal law, did knowingly fail to register and update a registration, all in violation of 18 U.S.C. § 2250(a).

Doc. 1. The wording of the Indictment tracks the three elements of the offense. First, it charges that Marrowbone is required to “register under the Sex Offender Registration and Notification Act.” Second, it charges that Marrowbone is a “sex offender by reason of a conviction under federal law.” Third, it charges that Marrowbone “knowingly fail[ed] to register and update a registration.” On its face, the Indictment is valid.

A valid indictment ordinarily will survive a motion to dismiss for failure to state an offense without further inquiry. “An indictment should be tested solely on the basis of the allegations made on its face,” and no evidence outside the four corners of the indictment should be considered. United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994). In a criminal proceeding based on a grand jury indictment, there is no further procedure to test the sufficiency of the evidence before trial. United States v. Ferro, 252 F.3d 964, 968 (8th Cir. 2001). A court cannot dismiss an indictment based on “predictions as to what the trial evidence will be,” instead it must give the United States the opportunity to present its evidence. Id. (citation omitted). But “[i]f a question of law is involved, then consideration of the motion [to dismiss indictment] is generally proper.” United States v. Fontenot, 665 F.3d 640, 644 (5th Cir. 2011) (citation omitted). Moreover, “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. Church, 461 F. Supp. 3d 875, 881 (S.D. Iowa 2020) (collecting cases).

Here, Marrowbone’s motion presents a legal rather than a factual issue appropriate to be decided before trial. Both parties agree that the underlying criminal offense alleged to trigger Marrowbone’s responsibility to register as a sex offender is a 1982 federal conviction for assault with intent to commit rape in violation of 18 U.S.C. § 113(a) that was in force at the time.¹ Doc. 30 at 1, Doc. 36 at 1. Marrowbone argues that his 1982 conviction for assault with intent to commit rape does not qualify as a sex offense for which he must register as a sex offender. Specifically, Marrowbone argues that § 113(a) is an indivisible statute that, when assessed under the categorical approach, sweeps too broadly to qualify as a sex offense.

II. Discussion

*3 Only a “sex offender” who “is required to register under the [SORNA],” but fails to so register is subject to criminal punishment under § 2250. A sex offender is an individual who has been convicted of a “sex offense.” 34 U.S.C. § 20911(1). Federal law defines a sex offense:

[T]he term “sex offense” means—

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. § 20911(5)(A). Marrowbone’s 1982 conviction is neither a specified offense against a minor victim nor one of the enumerated federal offenses or a specified military

offense. Therefore, the 1982 offense is a sex offense only if it falls under clause (i) or clause (v) of the definition of sex offense under § 20911(5)(A).

In deciding whether a prior conviction qualifies as a sex offense under § 20911(5)(A)(i), and in turn, under § 20911(5)(A)(v), courts utilize the “categorical approach.” See United States v. Faulls, 821 F.3d 502, 512 (4th Cir. 2016); United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015); United States v. Vineyard, 945 F.3d 1164, 1170 (11th Cir. 2019). The categorical approach looks only to the statutory definition of the offense—not the facts underlying the conviction—to determine whether an element involving a sexual act or sexual contact with another is present. Descamps v. United States, 570 U.S. 254, 261 (2013). If the offense has an element involving a sexual act or sexual contact with another, the prior conviction qualifies as a sex offense. But if the offense covers conduct that would not necessarily involve a sexual act or sexual contact with another, the offense is not a sex offense, even if the underlying facts involve a sexual act or sexual contact with another.

The categorical approach works well enough when a statute “sets out a single (or ‘indivisible’) set of elements to define a single crime.” Mathis, 579 U.S. at 504–05. Things become more complicated, however, when confronting an alternatively phrased statute. Courts in that situation must start by determining whether the statute lists “elements in the alternative, and thereby define[s] multiple crimes,” or whether the statute creates only a single crime and specifies “various factual means” of committing an element of that crime. Id. at 505–06, 517. If the statute lists alternative elements and creates multiple crimes, it is “divisible” and courts may use the “modified categorical approach” to determine which of the alternative elements formed the basis of the defendant’s conviction. Id. at 505–06, 517; United States v. Horse Looking, 828 F.3d 744, 747 (8th Cir. 2016). Under the modified categorical approach, courts may consult the defendant’s indictment, the plea agreement, a transcript of the 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 (2005). If the statute merely lists alternative means of “committing some component of the offense,” the statute is indivisible and subject only to the categorical approach. Mathis, 579 U.S. at 506.

*4 Mathis provides some guidance on distinguishing elements from means in alternatively phrased statutes. “Elements,” the Court explained, “are the constituent parts

of a crime’s legal definition—the things the prosecution must prove to sustain a conviction.” Id. at 504 (cleaned up and citation omitted). “At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty.” Id. (cleaned up and internal citation omitted). Means, “by contrast, are mere real-world things—extraneous to the crime’s legal requirements.” Id. “They are circumstances or events having no legal effect or consequence: In particular, they need neither be found by a jury nor admitted by a defendant.” Id. (cleaned up and citation omitted).

Mathis directs judges to look to state law, including state court decisions interpreting a state statute, to determine whether statutory alternatives constitute elements or means. Id. at 517–18. And sometimes the statute itself will answer the question. Id. at 518; see also United States v. McConnell, 65 F.4th 398, 403 (8th Cir. 2023) (explaining that, among other things, courts should look to a “statute’s text and structure” when analyzing divisibility). “If statutory alternatives carry different punishments,” for instance, then “they must be elements.” Mathis, 579 U.S. at 518. By contrast, “if a statutory list is drafted to offer illustrative examples, then it includes only a crime’s means of commission.” Id. “And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means).” Id.

When state law “fails to provide clear answers,” Mathis allows courts to “peek” at the “record of a prior conviction” to determine whether the listed items are elements or means. Id. An indictment and correlative jury instruction charging the defendant with all the terms of an alternatively phrased statute would clearly indicate 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 519. “Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.” Id. The Court in Mathis recognized, however, that the record materials might not “speak plainly” enough to satisfy the categorical approach’s “demand for certainty.” Id. (cleaned up and citation omitted); see also United States v. Naylor, 887 F.3d 397, 401 (8th Cir. 2018) (en banc) (“If the record materials do not speak plainly on the means-elements issue, we will be unable to meet the demand for certainty required of any determination that a conviction qualifies as a violent felony under the ACCA.”) (cleaned up and citation omitted)).

Thus, “[w]hen neither the statute nor state law shows that the statute’s alternatives are elements, and the record materials do not speak plainly, [courts] must treat the statute as indivisible and proceed under the standard categorical approach.” United States v. Winrow, 49 F.4th 1372, 1380 (10th Cir. 2022) (cleaned up and citation omitted).

Marrowbone’s prior conviction alleged to trigger his responsibility to register as a sex offender is for assault with intent to commit rape in violation of the version of 18 U.S.C. § 113(a) in effect at the time of his 1981 crime. At that time, § 113(a) stated:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

- (a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.

18 U.S.C. § 113(a) (1976). Section 113(a) in 1981 used disjunctive, alternative phrasing—intent to commit murder *or* rape—and thus, this Court must determine whether the disjunctive phrases were means or elements. The answer to that question dictates which approach—categorical or modified categorical—properly determines whether Marrowbone’s prior conviction is a sex offense. This Court previously employed the modified categorical approach after recognizing that § 113(a) “charged alternate versions of assault.” Marrowbone, 2014 WL 6694781, at *3. But that decision did not expressly conclude that the alternatively phrased items in the statute were elements and predicated the guidance set out in Mathis.

*5 Mathis directs judges to look to state law, including state court decisions interpreting a state statute, to determine whether statutory alternatives constitute elements or means. 579 U.S. at 517–18. Marrowbone’s statute of conviction was a federal offense, so state law offers no assistance here. However, federal court decisions help in interpreting § 113(a) as it existed in 1981. See United States v. Devereaux, 91 F.4th 1361, 1368 (10th Cir. 2024) (reviewing federal case law in performing a means-elements analysis under Mathis). In United States v. Iron Shell, the Eighth Circuit identified as *elements* of assault with intent to commit rape under § 113(a) “(1) that the defendant assaulted the prosecutrix, and (2) that the defendant committed the assault with the specific intent to commit rape.” 633 F.2d 77, 88 (8th Cir. 1980). Notably excluded from the court’s recitation of the elements is an intent to commit murder. Indeed, the Eighth Circuit treated

assault with intent to commit rape as a distinct crime from assault with intent to commit murder. *Id.* at 88; see also United States v. Warbonnet, 750 F.2d 698 (8th Cir. 1984) (per curiam); United States v. Joe, 831 F.2d 218, 220 (10th Cir. 1987) (“Assault with intent to commit rape has the essential elements that the defendant assaulted the victim and that the defendant committed the assault with the specific intent to commit rape.”); United States v. Jones, 681 F.2d 610 (9th Cir. 1982). The United States Court of Appeals for the Ninth Circuit in Jones stated that a requisite element of conviction for assault with intent to commit murder was “the specific intent to kill.” 681 F.2d at 611. The Ninth Circuit did not state that proving either an intent to kill or an intent to commit rape was sufficient for a conviction. Although these decisions significantly predate any decisions demarcating elements and means and the categorical approach regime entirely, they suggest § 113(a)’s alternative phrasing sets forth alternative elements.

Next, this Court looks to the statute itself, Mathis, 579 U.S. at 518, including the “statute’s text and structure,” McConnell, 65 F.4th at 403. “If statutory alternatives carry different punishments,” then “they must be elements.” Mathis, 579 U.S. at 518. But “if a statutory list is drafted to offer illustrative examples, then it includes only a crime’s means of commission.” *Id.* Here, § 113(a) as it existed in 1981, both for assault with intent to commit murder and with an intent to commit rape, carried a punishment of imprisonment for not more than twenty years. However, the statute’s text and structure strongly suggest the alternative phrasing sets forth alternative mens rea elements of two distinct offenses. In deciphering what the elements are, “[t]he language of the statute [is] the starting place.” Staples v. United States, 511 U.S. 600, 605 (1994). “In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur.” United States v. Apfelbaum, 445 U.S. 115, 131 (1980). “[A] crime’s elements serve to give notice of both the *actus reus* proscribed by a particular crime and the *mens rea* required for culpability.” United States v. Ojeda, 951 F.3d 66, 75 (2d Cir. 2020). Section 113(a)’s text provided an *actus reus*—assault—and two alternative *mentes reae*—specific intent to commit a murder and specific intent to commit rape. When the *actus reus* is committed with one of the alternatively provided *mentes reae*, one of two distinct crimes is committed. Despite the alternative *mentes reae* carrying the same punishment, the statute’s text indicates 113(a) sets forth alternative elements of two distinct offenses.

Finally, a court may look at “the record of a prior conviction itself.” Mathis, 579 U.S. at 518. An indictment setting forth all of the alternatives is “as clear an indication as any that each alternative is only a possible means of commission.” Id. at 519. But an indictment referencing one alternative to the exclusion of the other indicates that the alternatives are elements. Id. Here, Count I of the indictment in 81-CR-30073 charged Marrowbone with assault with intent to commit rape as follows:

That on or about November 4, 1981, David Marrowbone, an Indian, near Cherry Creek, Ziebach County, South Dakota, in Indian Country in the District of South Dakota, did unlawfully assault [R.C.M.] with intent to commit rape upon the said [R.C.M.], in violation of 18 U.S.C. § 1153 and § 113(a).

81-CR-30073, Doc. 1-2 at 2. Count I, the count of conviction, does not reference the alternative crime of intent to commit murder. Accordingly, the indictment for Marrowbone's 1982 conviction indicates that § 113(a)'s alternative phrasing sets forth alternative elements.

***6** Utilizing the guidance set out in Mathis, this Court concludes that § 113(a) sets forth elements in the alternative thereby defining two different crimes—assault with intent to commit murder and assault with intent to commit rape. Thus, this Court may use the modified categorical approach to determine which of the alternative elements formed the basis of Marrowbone's conviction. The 1981 indictment and 1982 judgment state that Marrowbone was charged with and convicted of the crime of assault with intent to commit rape. 81-CR-30073, Doc. 1-2 at 2, 19. The elements of assault with intent to commit rape then determine whether that crime is a qualifying sex offense.

Using the modified categorical approach, this Court previously concluded that assault with intent to commit rape was a sex offense. See Marrowbone, 2014 WL 6694781, at *4. This Court first held that an assault to commit rape in violation of 18 U.S.C. § 113 as it existed in 1981 “cannot

be considered a sex offense under clause (i) of 42 U.S.C. § 16911(5)(A),² which requires ‘a criminal offense that has an element involving a sexual act or sexual contact with another.’” Id. at *3. The terms “sexual act” and “sexual contact” both require actual physical contact between the offender and the victim. 18 U.S.C. § 2246(2)–(3). The elements of assault to commit rape were: (1) an assault (2) perpetrated with the specific intent to commit rape. Iron Shell, 633 F.2d at 88. Although an assault with intent to commit rape could have involved a sexual act or sexual contact, neither is a necessary element for a conviction. Rather, this Court held that “[a] conviction of assault with intent to commit rape necessarily requires proving an attempted rape.” Marrowbone, 2014 WL 6694781, at *4. Accordingly, this Court concluded assault with intent to commit rape was an attempt or conspiracy to commit an offense described in clause (i), which is a sex offense under 34 U.S.C. § 20911(5)(A)(v). Id. This Court noted:

At the time of Marrowbone's conviction in 1982, rape was a federal offense that necessarily included a sexual act. A conviction for the federal offense of rape required proving sexual intercourse obtained through the “use of force by the offender and an absence of consent by the victim.” Williams v. United States, 327 U.S. 711, 715 (1946). Sexual intercourse is a sexual act as defined by federal law. 18 U.S.C. § 2246(2)(A) (defining “sexual act” in part as “contact between the penis and the vulva or the penis and the anus”). Rape unquestionably is a sex offense and was so in 1982.

Id. (footnote omitted). This Court stands by its previous ruling and again concludes that assault with intent to commit rape is a sex offense under § 20911(5)(A)(v). Therefore, the Indictment in the present case states an offense.

IV. Conclusion

For the reasons explained above, it is hereby:

ORDERED that Defendant's Motion to Dismiss Indictment, Doc. 29, is denied.

All Citations

Slip Copy, 2025 WL 1951890

Footnotes

1 Assault with intent to commit rape is no longer included in 18 U.S.C. § 113.

2 Section 16911 has since been recodified at 34 U.S.C. § 20911.

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806 Fed.Appx. 180

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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 Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,
v.

Christopher James MIXELL, Defendant - Appellant.

No. 18-4563

|

Argued: February 18, 2020

|

Decided: April 1, 2020

Synopsis

Background: Following conditional guilty plea after denial of defendant's motions to dismiss by the United States District Court for the Western District of Virginia, [Norman K. Moon](#), Senior District Judge, [313 F.Supp.3d 697](#) and [2018 WL 2423001](#), defendant was convicted in the District Court, [Moon](#), Senior District Judge, of failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant's conviction in Oregon for encouraging child sexual abuse in the second degree qualified as sex offense under SORNA's residual clause;

[2] stipulated facts supported district court's finding that defendant was not homeless to substantial degree during period charged in indictment and thus supported denial of motion to dismiss on ground that SORNA's registration requirements as applied to him, an allegedly homeless or transient individual, constituted cruel and unusual punishment; and

[3] special condition of supervised release that defendant's computer and Internet use would be monitored did not violate defendant's rights under Fourth Amendment or right to free speech under First Amendment.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (4)

[1] Mental Health ↗ Persons and offenses included

Defendant's conviction in Oregon for encouraging child sexual abuse in the second degree qualified as "sex offense" under Sex Offender Registration and Notification Act's (SORNA's) residual clause, which applied to any conduct that by its nature was sex offense against minor, and thus defendant was subject to SORNA's registration requirements, although defendant was not depicted in video that defendant possessed as the sexual abuser of the minor, and although defendant did not attempt to contact or otherwise engage with a minor; video depicted child abuse and child engaged in sex act. [34 U.S.C.A. § 20911\(7\)\(I\); Or. Rev. Stat. § 163.686](#).

**[2] Mental Health ↗ Offenses and prosecutions
Sentencing and Punishment ↗ Particular offenses**

Stipulated facts that defendant resided at property where he worked during portion of period charged in indictment and at time of his arrest supported district court's finding that defendant was not homeless to substantial degree during period charged in indictment and thus supported court's denial of motion to dismiss indictment charging defendant with failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA) on ground that SORNA's registration requirements as applied to him, an allegedly homeless or transient individual, constituted cruel and unusual punishment under Eighth Amendment. [U.S. Const. Amend. 8; 18 U.S.C.A. § 2250; 34 U.S.C.A. § 20913\(a\)](#).

[3] **Criminal Law** ↗ Amendments and rulings as to indictment or pleas

Court of Appeals would review for clear error district court's factual finding regarding defendant's allegation of homelessness when Court of Appeals reviewed district court's denial of defendant's motion to dismiss indictment charging defendant with failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA) on ground that SORNA's registration requirements as applied to him, an allegedly homeless or transient individual, constituted cruel and unusual punishment under Eighth Amendment. [U.S. Const. Amend. 8; 18 U.S.C.A. § 2250; 34 U.S.C.A. §§ 20913\(a\), 20913\(c\).](#)

[4] **Constitutional Law** ↗ Sex offenders

Sentencing and Punishment ↗ Validity

Sentencing and Punishment ↗ Particular cases

Special condition of supervised release requiring monitoring of defendant's computer and Internet use did not violate defendant's rights under the Fourth Amendment or defendant's right to free speech under First Amendment in prosecution for failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA); special condition did not prevent defendant from using computer or electronic device to access Internet or to communicate on it, defendant used computer to commit his crime, and monitoring would occur during discrete five-year period. [U.S. Const. Amends. 1, 4; 18 U.S.C.A. §§ 2250, 3553\(a\)\(2\)\(B\), 3553\(a\)\(2\)\(C\), 3583\(d\); 34 U.S.C.A. § 20913\(a\).](#)

5 Cases that cite this headnote

West Codenotes

Prior Version Recognized as Unconstitutional

N.C. Gen. Stat. Ann. § 14-202.5(a, e).

***181** Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. [Norman K. Moon](#), Senior District Judge. (3:17-cr-00016-NKM-1)

Attorneys and Law Firms

ARGUED: Astrid Stuth Cevallos, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. [Jean Barrett Hudson](#), OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee. ON BRIEF: [Frederick T. Heblich, Jr.](#), Interim Federal Public Defender, [Lisa Marie Lorish](#), Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charlottesville, Virginia, for Appellant. [Thomas T. Cullen](#), United States Attorney, Roanoke, Virginia, [Jennifer R. Bockhorst](#), Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.

Before [GREGORY](#), Chief Judge, and [AGEE](#) and [KEENAN](#), Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

***182** Christopher Mixell entered a conditional guilty plea to failing to register as a sex offender as required by the Sex Offender Registration and Notification Act (SORNA), [18 U.S.C. § 2250](#). The district court sentenced Mixell to a term of 31 months' imprisonment and five years of supervised release. As permitted by his conditional guilty plea, Mixell advances two primary arguments on appeal related to the district court's denial of his two motions to dismiss the indictment. Mixell contends that: (1) his underlying Oregon offense of "encouraging child sexual abuse in the second degree" did not qualify as a "sex offense" under SORNA and, thus, he was not required to register; and (2) SORNA's registration requirements as applied to him, a homeless or transient individual, constitute cruel and unusual punishment under the Eighth Amendment. Additionally, Mixell contends that the district court imposed an unlawful condition of supervised release, namely, requiring that he participate for five years in a program monitoring his computer and Internet

use. We disagree with Mixell’s arguments, and we affirm his conviction and sentence.

I.

A.

[1] We first address Mixell’s argument that the district court erred in denying his motion to dismiss the indictment because his Oregon offense did not qualify as a “sex offense” for purposes of activating the registration requirements of SORNA. We review this question of law de novo. *See United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015).

Under SORNA, sex offenders must register, and maintain a current registration, in each jurisdiction where they reside, work, or attend school. 34 U.S.C. § 20913(a). Sex offenders also must update their registration when they change residences, *id.* § 20913(c), and face criminal penalties if they “knowingly fail[] to register or update a registration,” 18 U.S.C. § 2250(a)(3).

A “sex offender” is “an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). As relevant here, a “sex offense” is “a criminal offense that is a specified offense against a minor.” *Id.* § 20911(5)(A)(ii). SORNA further defines a “specified offense against a minor” as

an offense against a minor that *involves* any of the following:

- *183 (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 section 1801 of title 18.
- (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.

Id. § 20911(7) (emphasis added).

The district court concluded that Mixell’s underlying Oregon conviction qualified as a “specified offense against a minor” under subsections (G), (H), and (I). We conclude that Mixell’s offense qualifies under subsection (I), known as the SORNA residual clause, because his Oregon criminal conviction “involve[d]” “conduct that by its nature is a sex offense against a minor.” *Id.* § 20911(7)(I). Therefore, we need not, and do not, address whether subsections (G) and (H) also are applicable.

In 2010, Mixell pleaded guilty to, and was convicted of, “encouraging child sexual abuse in the second degree” in violation of *Oregon Revised Statute* § 163.686. The Oregon charging information accused Mixell of possessing “a motion picture of sexually explicit conduct involving a child for the purpose of arousing or satisfying … sexual desires” with knowledge or conscious disregard that the visual recording “involved child abuse.” J.A. 30. In his plea agreement, Mixell admitted that he “possessed (by computer) a photograph depicting [a] child engaged in [a] sexual act.” J.A. 33. This conduct, the possession of materials depicting child abuse and a child engaged in a sex act, plainly “involves … conduct that by its nature is a sex offense against a minor” under SORNA’s residual clause. 34 U.S.C. § 20911(7)(I); *see United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015) (explaining that courts analyzing a sex offense for purposes of the SORNA residual clause do not use an elements-based categorical approach, but instead compare the residual clause language with the conduct involved in the underlying offense).

We reject Mixell’s assertion that his conduct was not “against a minor,” because he did not interact with a minor or otherwise engage in conduct directed toward such a minor. Under the law, minors depicted in sexually explicit photographs or video recordings qualify as the victims of crimes involving the possession of such materials. *See Paroline v. United States*, 572 U.S. 434, 457-58, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014). And, specifically, the SORNA residual clause does not impose any requirement that a defendant interact with a minor. *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc). In fact, most of the “listed ‘specified

offense[s] against a minor’ ” in [Section 20911\(7\)](#) do not require that the sex offender himself “engage in a sexual act” with a minor. *Id.* (citing [United States v. Byun](#), 539 F.3d 982, 987 n.8 (9th Cir. 2008)). Instead, the phrase “against a minor” simply requires a determination that the victim of the offense was a minor. *Id.* Therefore, although Mixell was not depicted in the video as the sexual abuser, and did not attempt to contact or otherwise engage with a minor, his possession of materials depicting a child involved in a sex act is “conduct that by its nature is a sex offense against a minor” under SORNA’s [*184](#) residual clause.¹ [34 U.S.C. § 20911\(7\)\(I\).](#)

“Congress left courts with broad discretion to determine what conduct is ‘by its nature’ a sex offense” in order to ensure that SORNA’s residual clause “ensnare[d] as many offenses against children as possible.” [Dodge](#), 597 F.3d at 1355. Accordingly, Mixell was subject to SORNA’s registration requirements, and the district court did not err in denying Mixell’s motion to dismiss the indictment on this basis.

B.

[2] Mixell next argues that the district court erred in denying his motion to dismiss the indictment because SORNA’s registration requirements constitute cruel and unusual punishment in violation of the Eighth Amendment as applied to him, a homeless or transient individual. The district court determined that Mixell’s as-applied challenge failed as a factual matter, because he was not homeless during “a meaningful portion of time” covered by the indictment.²

[3] We review for clear error the district court’s factual finding regarding Mixell’s allegation of homelessness. [Span](#), 789 F.3d at 325. We conclude that the district court did not clearly err in finding that Mixell was not homeless to a substantial degree during the period charged in the indictment, namely, from early 2017 through his arrest on April 24, 2017. According to the parties’ stipulated facts, Mixell resided at a property where he worked during a portion of the period charged in the indictment and at the time of his arrest on April 24, 2017. While Mixell had been “transient” and “homeless for periods of time” during 2017, he failed to specify the duration of such periods of time. Thus, the district court did not clearly err in concluding that Mixell’s as-applied challenge failed because he was not “homeless to the extent that his constitutional argument[] would have any force.”³ Accordingly, we affirm the district court’s decision

denying Mixell’s motion to dismiss the indictment on Eighth Amendment grounds.

II.

[4] Finally, Mixell challenges the district court’s imposition of computer and Internet monitoring as a special condition of his supervised release. He asserts that the condition unlawfully infringes on his rights under the First and Fourth Amendments. According to Mixell, any condition that requires real-time monitoring of an individual’s computer and Internet use is *per se* unlawful. We disagree and decline to adopt such a broad rule.

Because the district court is “afforded broad latitude to impose conditions on supervised release,” we review such conditions only for an abuse of discretion. [*185](#) [United States v. Douglas](#), 850 F.3d 660, 663 (4th Cir. 2017) (internal quotation marks and citation omitted). The Supreme Court has upheld the use of warrantless searches in certain circumstances involving individuals who have been placed on supervised release. See [Griffin v. Wisconsin](#), 483 U.S. 868, 872-73, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Such searches are permitted without probable cause when reasonable in light of the “special need” to ensure compliance with supervised release conditions designed to rehabilitate the defendant and to protect the community. *Id.* at 875, 107 S.Ct. 3164.

Courts may impose special conditions of supervised release when they are “reasonably related” to the sentencing factors set forth in [18 U.S.C. § 3583\(d\)\(1\)](#). [Douglas](#), 850 F.3d at 663 (citation omitted). Those factors include: “the nature and circumstances of the offense and the history and characteristics of the defendant;” the need for adequate deterrence; the protection of the public from further crimes; and providing the defendant training or treatment. [18 U.S.C. § 3583\(d\)\(1\)](#) (citing *id.* § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D)). The special conditions imposed also must be consistent with policy statements issued by the Sentencing Commission and must involve “no greater deprivation of liberty than is reasonably necessary” to achieve the goals of supervised release. [Douglas](#), 850 F.3d at 663 (citing [18 U.S.C. § 3583\(d\)\(2\), \(d\)\(3\)](#)).

Special conditions involving limitations on computer use or required computer monitoring have been upheld when the defendant has a history of using a computer or the Internet to commit present or prior crimes. See, e.g., [United States](#)

v. *LaCoste*, 821 F.3d 1187, 1191 (9th Cir. 2016) (collecting cases). Moreover, the Sentencing Guidelines recommend the imposition of special conditions of supervised release limiting computer use by defendants convicted of sex offenses or requiring such defendants to submit to warrantless searches of their computers. U.S.S.G. § 5D1.3(d)(7)(B), (d)(7)(C). Although failing to register under SORNA is not a “sex offense” for purposes of the Guidelines, *Price*, 777 F.3d at 711, “[s]ex offender conditions of supervised release may be imposed, even at sentencing for crimes which are not sex crimes, if supported” by the sentencing factors in 18 U.S.C. § 3583(d), *Douglas*, 850 F.3d at 663 (citation omitted).

We acknowledge “the centrality of the [I]nternet to modern life,” *United States v. Wroblewski*, 781 F. App'x 158, 163 (4th Cir. 2019), but in this case, the district court imposed a special condition of supervised release that does not prevent Mixell from using a computer or electronic device to access the Internet or to communicate on it. Instead, the special condition at issue requires that, for a limited five-year period of supervised release, Mixell’s use of his computer or devices with access to the Internet will be monitored. The district court explained that this condition was appropriate in Mixell’s case because: (1) “[he] used the computer in his original crime,” and (2) the condition was sufficiently tailored because the monitoring program “does not prevent him from speaking” online. J.A. 153. This special condition of monitoring Mixell’s use of the Internet is supported by the sentencing factors providing for “adequate deterrence,” 18 U.S.C. § 3553(a)(2)(B), and the protection of the public from further crimes, *id.* § 3553(a)(2)(C), as included under the terms of 18 U.S.C. § 3583(d).

Our conclusion is not affected by the Supreme Court’s decision in *Packingham v. North Carolina*, — U.S. —,

137 S. Ct. 1730, 198 L.Ed.2d 273 (2017). There, the Court invalidated a North Carolina law generally prohibiting a registered sex offender *186 from accessing “a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” *Id.* at 1733 (quoting N.C. Gen. Stat. § 14-202.5(a), (e)). The Court held that the “sweeping” terms of the statute violated the defendant’s rights of speech protected under the First Amendment. *Id.* at 1737-38. Unlike that North Carolina statute broadly prohibiting access to social networking sites, the special conditions imposed in the present case do not prevent Mixell from having access to such social networking sites. Rather, his use of the Internet merely will be monitored for a discrete time period to ensure compliance with his terms of supervised release.⁴

We therefore conclude that the challenged condition of supervised release is reasonably related to Mixell’s present circumstances and his prior offense, as well as to the need to protect the public. See 18 U.S.C. § 3583(d) (citing *id.* § 3553(a)). Therefore, we hold that the district court did not abuse its discretion in imposing this special monitoring condition as part of Mixell’s supervised release.

III.

For these reasons, we affirm the judgment of the district court.

AFFIRMED

All Citations

806 Fed.Appx. 180

Footnotes

- 1 We also reject as meritless Mixell’s arguments that the definition of “sex offense” in the SORNA residual clause is circular and void on vagueness grounds.
- 2 The district court also determined that Mixell’s as-applied challenge failed because SORNA’s registration requirements are not punitive in nature. Based on our analysis, we need not reach this alternative basis for the court’s decision denying the motion to dismiss the indictment on Eighth Amendment grounds.
- 3 Although Mixell suggests in his brief that SORNA also violates his due process rights under the Fifth Amendment, Mixell fails to present any argument to support such a claim. Thus, we do not address that issue.

See [Fed. R. App. P. 28\(a\)\(8\)\(A\)](#); *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 383 n.3 (4th Cir. 2018) (holding that appellants' "passing reference [to an issue was] insufficient to preserve the issue for our review because [of failure] to include reasons and citations as required" by the federal appellate rules).

- 4 We reject Mixell's claim that his First Amendment rights are infringed by the special condition of computer and Internet monitoring that requires him to provide his supervising officer with his usernames and passwords for email accounts and group messaging accounts, arguably preventing him from communicating online anonymously. We are not aware of any cases supporting a right of this nature for a sex offender who has failed to register under SORNA, and we decline to recognize such a right here.

2025 WL 1466781

Only the Westlaw citation is currently available.
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.

NATHAN FIRST IN TROUBLE, also known as
Nathaniel First In Trouble, Defendant - Appellant

No. 24-2290

|

Submitted: February 14, 2025

|

Filed: May 22, 2025

Appeal from United States District Court for the District of
South Dakota - Central

Attorneys and Law Firms

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Cash Eric Anderson, May & Adam, Pierre, SD, for Defendant
- Appellant.

Nathan First In Trouble, Thomson, IL, Pro Se.

Before SMITH, KELLY, and KOBES, Circuit Judges.

[Unpublished]

PER CURIAM.

*1 Nathan First In Trouble pleaded guilty to failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). The district court classified him as a Tier III sex offender and sentenced him to 13 months in prison and five years of supervised release. First In Trouble says he is actually a Tier II sex offender, and the Government admits he is right. He asks us to vacate his sentence and remand so the district court can correct the mistake.

We first consider whether we have jurisdiction. First In Trouble argues that his tier classification led to the wrong guideline range. See U.S.S.G. § 2A3.5(a)(1)–(3) (base offense

levels for Tier I, Tier II, and Tier III sex offenders). Even if that is true, he is out of custody, and his challenge to his prison term is moot. See *Owen v. United States*, 930 F.3d 989, 990 (8th Cir. 2019).

First In Trouble insists that his erroneous Tier III classification brings with it a stigma and has ongoing collateral consequences for his future sex offender registration. But any stigma from sentencing cannot sustain this case. See *United States v. Juv. Male*, 564 U.S. 932, 936–39 (2011) (per curiam) (holding case challenging SORNA registration imposed at supervised release revocation as moot despite lower court discussing stigma of ongoing registration).

Nor are there ongoing collateral consequences for First In Trouble's future sex offender registration. In South Dakota, where First In Trouble lives, tier classification at sentencing for a failure to register conviction does not affect his registration requirements. See S.D. Codified Laws §§ 22-24B-19–19.2.

First In Trouble suggests there may be collateral consequences if he moves to another state. E.g., Neb. Rev. Stat. § 29-4005(1)(b)(iii) (requiring lifetime registration if, among other reasons, the offender “has been determined to be a lifetime registrant in another, state, territory, commonwealth, or other jurisdiction of the United States, [or] by the United States Government.”); Mo. Rev. Stat. § 589.400.1(7) (requiring registration for “any person who ... has been or is required to register under tribal, federal, or military law”). We are not convinced. First In Trouble's tier classification at sentencing does not determine his registration requirements. See 34 U.S.C. § 20911(2)–(5) (sex offender's tier determined by underlying sex offense, which does not include a failure to register); see also *Juv. Male*, 564 U.S. at 938 (“[T]he duty to register under SORNA is not a consequence—collateral or otherwise—of the District Court's [sentence]. The statutory duty to register is ... an obligation that exists ‘independent’ of those conditions.”). And because First In Trouble is a lifetime registrant in South Dakota, his duty to register in other states “is not contingent upon the validity” of his tier classification at sentencing. *Juv. Male*, 564 U.S. at 937 (citation omitted).

Correcting any error here “cannot save *this* case from mootness.” Id. But see *United States v. Coleman*, 681 Fed. Appx. 413, 415–16 (5th Cir. 2017) (per curiam). Dismissed as moot.

All Citations

Not Reported in Fed. Rptr., 2025 WL 1466781

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73 F.4th 341

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellant,
v.

Nima NAZERZADEH, Defendant—Appellee.

No. 22-20238

|

FILED July 11, 2023

Synopsis

Background: Person who had been convicted for distribution of child pornography and possession of child pornography involving sexual exploitation of minors requested termination of his obligation to register as sex offender under Sex Offender Registration Notification Act (SORNA). The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., granted convict's request. Government appealed.

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

[1] each category of conduct listed under SORNA that related to length of registration was independently sufficient for Tier II classification, and

[2] convict was Tier II sex offender who had to register for 25 years from date of his release from prison, and he was not entitled to any reduction of required registration period.

Reversed.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (8)

[1] **Federal Courts** Questions of Law in General

Federal Courts "Clearly erroneous" standard of review in general

In general, findings of fact are reviewed for clear error and conclusions of law are reviewed de novo.

[2]

Mental Health Appeal

Sex Offender Registration and Notification Act's (SORNA) registration requirement is reviewed de novo. 34 U.S.C.A. § 20915.

[3]

Mental Health Sex offenders

Each category of conduct listed under Sex Offender Registration Notification Act (SORNA) that related to length of registration was independently sufficient for Tier II classification, since word "or" in statute indicated alternatives, and Congress cast wide net to ensnare as many offenses against children as possible and lengthened registration period for repeat sex offenders. 34 U.S.C.A. § 20911.

[4]

Statutes Conjunctive and disjunctive words

The word "or" in a statute indicates alternatives and requires those alternatives to be treated separately.

1 Case that cites this headnote

[5]

Statutes Plain, literal, or clear meaning; ambiguity

The Court of Appeals is reluctant to rely on legislative history for the simple reason that it is not law; when the Court does consider legislative history, it is only because the text at issue is ambiguous.

3 Cases that cite this headnote

[6]

Statutes Language

A court may depart from the general presumption that the word "or" in a statute indicates alternatives and requires those alternatives to be treated separately only when context dictates otherwise.

2 Cases that cite this headnote

[7] **Administrative Law and**

Procedure ➔ Plain, literal, or clear meaning; ambiguity or silence

Agency deference does not apply when a statute is unambiguous.

[8] **Mental Health** ➔ Scores and risk levels

Person who had been convicted for distribution of child pornography and possession of child pornography involving sexual exploitation of minors was Tier II sex offender who had to register for 25 years from date of his release from prison, and he was not entitled to any reduction of required registration period under Sex Offender Registration Notification Act (SORNA). 34 U.S.C.A. §§ 20911(3)(B)(iii), 20915(a)(2), 20915(b).

*342 Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:06-CR-30-1, Lynn N. Hughes, U.S. District Judge

Attorneys and Law Firms

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Shaun Khojayan, Esq., Trial Attorney, Law Offices of Shaun Khojayan & Associates, P.L.C., Los Angeles, CA, for Defendant—Appellee.

Before King, Smith, and Elrod, Circuit Judges.

Opinion

Jennifer Walker Elrod, Circuit Judge:

The government appeals the district court's order granting Nima Nazerzadeh's request to terminate his obligation to register as a sex offender. Because the unambiguous language of the Sex Offender Registration and Notification Act deems Nazerzadeh a tier II sex offender, and because that status demands that his registration continues, we REVERSE.

I

Nazerzadeh pleaded guilty to two counts of distribution of child pornography and one count of possession of child pornography *343 involving the sexual exploitation of minors. He was sentenced to 60 months in prison on each count, to run concurrently. The district court also imposed a life term of supervised release.

After serving his sentence, Nazerzadeh was released from prison in August 2010. And he successfully completed his sex offender treatment. Since his release, he has maintained a clean record and complied with his registration requirement.

In March 2022, Nazerzadeh moved to terminate his federal obligation to register as a sex offender. As legal authority, he cited 34 U.S.C. § 20915(b), which allows “a tier I sex offender” to obtain reduction of the registration period if the offender maintained a “clean record” for 10 years. The government opposed the motion, arguing that Nazerzadeh’s conviction for distribution of child pornography makes him a tier II sex offender, and tier II sex offenders are required to register for 25 years. Accordingly, the government asserted that: (1) SORNA did not provide a private cause of action to seek a reduction in the term of registration; and (2) in the alternative, SORNA did not provide for a reduction for tier II sex offenders.

Without explanation, the district court granted Nazerzadeh’s motion and relieved him of his federal obligation to register as a sex offender. The government timely appealed. On appeal, the government re-urged only its second argument, that § 20915 does not provide for a reduction for tier II sex offenders. Accordingly, we address only that argument.

II

[1] [2] In general, we review findings of fact for clear error and conclusions of law *de novo*. *United States v. Huerta*, 994 F.3d 711, 714 (5th Cir. 2021). We review SORNA’s registration requirement *de novo*. *United States v. Schofield*, 802 F.3d 722, 725 (5th Cir. 2015).

III

As to tier I sex offenders, SORNA provides for a 5-year reduction of the registration period if the registrant maintained “a clean record” for 10 years. 34 U.S.C. § 20915(b). As to tier II sex offenders, however, SORNA does not allow for any reduction. § 20915(b)(3). The government does not dispute that Nazerzadeh has maintained a clean record for the prescribed period. It contends, however, that Nazerzadeh is a tier II offender, and so he is not entitled to a reduction. But if Nazerzadeh is correct that he is properly classified as a tier I offender, then a 5-year reduction (which SORNA authorizes for tier I offenders) would terminate his obligation because he has fulfilled more than 11 years of the 15-year mandatory registration.

[3] Given this background, the determinative question is whether Nazerzadeh is a tier I or tier II sex offender. As to tier I and tier II classifications, SORNA provides as follows:

(2) Tier I sex offender

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, 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);

*344 (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.

34 U.S.C. § 20911.

In interpreting § 20911(3) (tier II classification), the government argues for a disjunctive reading of the statute, whereas Nazerzadeh argues for a conjunctive reading. Under the government's reading, conditions (3)(A), (3)(B), and (3)(C) are each independently sufficient for tier II classification. In contrast, under the Nazerzadeh's reading, none of the conditions are independently sufficient, and (3)(A) is necessary. Or, as he put it, “to be a Tier II offender, the offense must be one listed in (3)(A) that *involves* (3)(B) or (3)(C); not an offense listed in (3)(A) *or* (3)(B) or (3)(C)” (emphasis in original).

Here, the parties' briefs indicate that condition (3)(B)(iii)—and only that condition—is satisfied. And so, the choice between a disjunctive or conjunctive reading is outcome determinative. If we adopt the disjunctive reading, then Nazerzadeh is a tier II offender. But under the conjunctive reading, he would not qualify as a tier II offender because (3)(A) is not satisfied, and thus he would be considered as tier I by default.

A

[4] We hold that the disjunctive reading is the correct interpretation of the statute. The “Supreme Court has noted that ‘or’ is ‘almost always disjunctive.’ ” *Cascabel Cattle Co., L.L.C. v. U.S.*, 955 F.3d 445, 451 (5th Cir. 2020) (quoting *Encino Motorcars, LLC v. Navarro*, — U.S. —, 138 S. Ct. 1134, 1141, 200 L.Ed.2d 433 (2018)). The word “indicates alternatives and requires that those alternatives be treated separately.” *Dacostagomez-Aguilar v. U.S. Atty. Gen.*, 40 F.4th 1312, 1316 (11th Cir. 2022) (citation and quotation marks omitted). Thus, as a matter of ordinary English, when a provision requires “A, B, or C” it expresses a “disjunctive list, [where] at least one of the three is required, but any one (or more) of the three satisfies the requirement.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012); see 73 Am. Jur. 2d Statutes § 139 (observing that when a “conjunction is placed immediately before the last of the series, the same connective is understood between the

previous members"); *see also United States v. Palomares*, 52 F.4th 640, 643 (5th Cir. 2022) ("An em dash signifies that the clause that immediately precedes the dash applies to all of the items that follow." (alterations, quotation marks, and citation omitted).).

And our precedent supports this presumption. In *Navarro*, for example, we observed that "an offender qualifies as tier II if his sex offense was [encompassed under § 20911(3)(A)(iv)]." *United States v. Navarro*, 54 F.4th 268, 278 (5th Cir. 2022) (citing 34 U.S.C. § 20911(3)(A)(iv)); *see also United States v. Walker*, 931 F.3d 576, 578 (7th Cir. 2019) (Barrett, J.) (similarly holding that "a person is a tier II sex offender if his offense [satisfies § 20911(3)(A)(iv)]"). *345 In holding so, we understood subsection (3)(A) as independently sufficient for tier II classification. That understanding is consistent with the disjunctive reading.

Our decision in *Coleman* likewise supports a disjunctive reading. *United States v. Coleman*, 681 F. App'x 413 (5th Cir. 2017). *Coleman* addressed whether a sex offender qualifies as tier III under 34 U.S.C. § 20911(4)(A) (previously 42 U.S.C. § 16911(4)(A)). Like § 20911(3) (defining tier II), the text of § 20911(4) (defining tier III) has an "(A), (B), or (C)" structure. The subsection reads as follows:

(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, 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.

34 U.S.C. § 20911(4).

The *Coleman* panel affirmed the district court's tier III categorization because the defendant satisfied (4)(A). In its reasoning, the panel never discussed either (4)(B) or (4)(C), indicating that it adopted a disjunctive interpretation by reading (4)(A) as independently sufficient. Given that § 20911(4) has the exact same structure as § 20911(3), *Coleman* supports a disjunctive reading of § 20911(3). 681 F. App'x 413; *see also Walker*, 931 F.3d at 576 n.1 (Barrett, J.) (recognizing that there are multiple "ways to qualify as a Tier II or Tier III offender").

B

Nazerzadeh contends that we should adopt a conjunctive reading because the end of subsection (3)(A) does not include the conjunction "or." In other words, he contends that, if Congress had wanted to provide three different alternatives for tier II classification, the statute would have stated "(3)(A), or (3)(B), or (3)(C)." Because the first "or" is "missing," Nazerzadeh concludes that, "to be a Tier II offender, the offense must be one listed in (3)(A) that *involves* (3)(B) or (3)(C); not an offense listed in (3)(A) *or* (3)(B) or (3)(C)" (emphasis in original).

We are unpersuaded by this argument. To be sure, some legal drafters, "through abundant caution, put a conjunction between all the enumerated items." Reading Law, at 118. For example, a provision may state:

The seller shall provide:

- (a) a survey of the property; and
- (b) the surveyor's sworn certificate that the survey is authentic and, to the best of the surveyor's knowledge, accurate; and
- (c) a policy of title insurance showing the boundaries of the property; and
- (d) a plat showing the metes and bounds of the property.

Id. But the use of multiple conjunctions there (a technique called "*polysyndeton*") "does not convey a meaning different from that of the identical phrasing minus the *ands* at the end of (a) and (b)." *Id.*; *see also* *346 *Sierra Club v. United States Env't Prot. Agency*, 964 F.3d 882, 892 n.8 (10th Cir. 2020). Moreover, this technique is disfavored because "over time, it [may] cast doubt on the meaning conveyed by the use of syndeton [*i.e.*, the use of a conjunction between the last

elements only].” Reading Law, at 118. And so, here, although the statute could have used multiple “ors” by stating “(3)(A), or (3)(B), or (3)(C),” doing so would not convey a meaning different from the current formulation. As a matter of ordinary English, when a provision requires “A, B, or C” it expresses a “disjunctive list, [where] at least one of the three is required, but any one (or more) of the three satisfies the requirement.” *Id.* at 116.

Next, Nazerzadeh contends that the Third Circuit’s decision in *Hodge* supports his position. *United States v. Hodge*, 321 F.3d 429 (3d Cir. 2003). In *Hodge*, the Third Circuit addressed whether a “wax-and-flour” mixture is a “controlled substance analogue” within the meaning of 21 U.S.C. § 802(32)(A). *Id.* at 431. The relevant provisions state:

[With certain exceptions not relevant here,] the term “controlled substance analogue” means a substance—

- (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II;
- (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or
- (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

21 U.S.C. § 802(32)(A).

The government there proposed a disjunctive interpretation, namely, that a substance is a controlled substance analogue if it satisfies any one of clauses (i), (ii), or (iii). In contrast, the defendants argued that “a controlled substance analogue must satisfy both clause (i) and either clause (ii) or (iii).” *Hodge*, 321 F.3d at 433. Under the government’s proposed reading, the mixture of candle wax and flour that the defendants sold would be a “controlled substance analogue” under subpart (iii) because the defendants “represent[ed]” their product as crack cocaine. *Id.* In contrast, under the defendants’ conjunctive interpretation, the mixture would not

be a controlled substance analogue because it does not satisfy clause (i).

Relying on the absurdity canon and legislative history, the *Hodge* panel agreed with the defendants’ conjunctive reading. The court observed that under a disjunctive reading, powdered sugar or a mixture of candle wax and flour “would be an analogue if a defendant represented that it was cocaine.” *Id.* at 434. And the court reasoned that the “treatment of candle wax and flour, no matter how it is marketed, as a schedule I controlled substance is an ‘absurd’ result of the kind our canons of construction instruct us to avoid.” *Id.* at 439. Pointing to legislative history, the panel noted that “Congress did not intend to include innocuous substances such as wax and flour within its definition of controlled substance analogues.” *Id.* at 438–39. Thus, the panel adopted a conjunctive interpretation and reversed the defendants’ convictions that were based on a disjunctive reading of the statute. *Id.* at 439.

***347** Even though *Hodge* addressed a completely different statute, Nazerzadeh contends that the structure of the statute in *Hodge* is similar to the structure of the statute at issue here. And so, he asserts that we should follow the panel in *Hodge* and adopt a conjunctive reading. We refuse to do so, however, for three reasons.

First, we have rejected *Hodge*’s conjunctive reading of 21 U.S.C. § 802(32)(A) in *United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990). See *United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004) (observing that the Fifth Circuit in *Granberry* adopted a disjunctive test as to 21 U.S.C. § 802(32)(A)).

[5] Second, we are not persuaded by *Hodge*’s reasoning because it relies on legislative history. “We are reluctant to rely on legislative history for the simple reason that [it is] not law.” *In re Ultra Petroleum Corp.*, 51 F.4th 138, 148 n.10 (5th Cir. 2022) (quoting *In re DeBerry*, 945 F.3d 943, 949 (5th Cir. 2019)). And when we do consider legislative history, it is only because the text at issue is ambiguous. *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 492 (5th Cir. 2004). Because there is no such ambiguity here, “we are not permitted to look to the legislative history.” *Id.* at 492.

But even assuming *arguendo* that we can look to the purpose of the statute, it does not support Nazerzadeh’s conjunctive reading. We have observed that “Congress enacted SORNA to ‘protect the public from sex offenders and offenders

against children' and to 'establish[] a comprehensive national system for the registration of those offenders.' " *United States v. Gonzalez-Medina*, 757 F.3d 425, 432 (5th Cir. 2014) (alteration in original) (quoting 42 U.S.C. § 16901). And "SORNA's language confirms 'that Congress cast a wide net to ensnare as many offenses against children as possible.' " *Id.* (quoting *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (*en banc*)). Thus, to the extent that purpose serves as context, it supports a disjunctive, more inclusive reading, of the statute. See *United States v. Sharp*, 62 F.4th 951, 953 (5th Cir. 2023) (observing that "words are given meaning by their context, and context includes the purpose of the text," but purpose "is to be described as concretely as possible") (quoting Reading Law, at 56–57).

And finally, unlike in *Hodge*, the absurdity canon is inapplicable here. Nazerzadeh contends that a disjunctive reading of the tier II classification would lead to an absurd result because it would mean that (3)(C) is individually sufficient for tier II categorization. If (3)(C) is individually sufficient, he contends that a tier I offender would fall into tier II if convicted of a *any offense* "punishable by imprisonment for more than 1 year," if the offense "occurs after the offender becomes a tier I sex offender." 34 U.S.C. § 20911(3)(C). But this argument relies on a misinterpretation. The relevant provision reads:

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

Given that SORNA is concerned with sex offenses, context would indicate that the term "offense" specifically refers to a sex offense, not just any offense. And so, under (3)(C), a tier I offender would be elevated into a tier II category when he commits a sex offense (not just any offense) that is "punishable by imprisonment for more than 1 year," if the offense "occurs after the offender becomes a tier I sex

offender." § 20911(3)(C). We see nothing absurd about that outcome as it merely reflects Congress's decision to lengthen *348 the registration period for repeat sex offenders.

* * *

[6] [7] As a matter of ordinary English, when a provision requires "A, B, or C" it expresses a "disjunctive list, [where] at least one of the three is required, but any one (or more) of the three satisfies the requirement." Reading Law, at 116; 73 Am. Jur. 2d Statutes § 139. We may consider departing from that general presumption only when "context dictates otherwise." *Stansell v. Revolutionary Armed Forces of Colombia*, 45 F.4th 1340, 1353 (11th Cir. 2022). Context does not dictate otherwise here. Thus, we agree with the government that 34 U.S.C. § 20911(3)(A)–(C) should be read disjunctively, whereby (3)(A), (3)(B), and (3)(C) are each independently sufficient for tier II classification.¹

[8] Because he was convicted for distribution of child pornography, Nazerzadeh's crime falls under § 20911(3)(B) (iii), and so he is a tier II sex offender. Consequently, he "shall" register for 25 years from the date of his release from prison. 34 U.S.C. § 20915(a)(2) (stating that "[a] sex offender shall keep the registration current for ... 25 years, if the offender is a tier II sex offender"); *id.* (stating that the registration period "exclud[es] any time the sex offender is in custody or civilly committed"). Furthermore, he is not entitled to any reduction of the required registration period under SORNA. 34 U.S.C. § 20915(b) (providing reduction for tier I and tier III sex offenders, but not tier II). Accordingly, the district court's grant of Nazerzadeh's motion to terminate his federal obligation to register as a sex offender is REVERSED.

All Citations

73 F.4th 341

Footnotes

¹ Agency deference does not apply here because the statute is unambiguous. See *Huntington Ingalls, Inc. v. Dir., Off. of Workers' Compen. Programs, U.S. Dept. of Lab.*, 70 F.4th 245, 253 (5th Cir. 2023). And even if the statute is ambiguous, we would have applied the rule of lenity rather than defer to the agency's interpretation. See *Cargill v. Garland*, 57 F.4th 447, 468 (5th Cir. 2023) (holding that agency deference "does not apply [when] the statutory language at issue implicates criminal penalties"); *United States v. Hoang*, 636 F.3d 677,

682 (5th Cir. 2011) (“[T]o the extent SORNA may be ambiguous, the rule of lenity requires that we interpret the statute in [the Defendant's] favor.”).

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2025 WL 2785391

Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Norfolk Division.

UNITED STATES of America

v.

Brandon L. ODOMS, Defendant.

Case No. 2:25-cr-9

|

Signed September 30, 2025

Synopsis

Background: Defendant was indicted for failure to update his registration pursuant to the Sex Offender Registration and Notification Act (SORNA), and a bench trial was held.

Holdings: The District Court, Jamar K. Walker, J., held that:

[1] deference would not be given to Attorney General's interpretation of SORNA's undefined phrase "habitually lives," and

[2] a sex offender is required to update registration when fact of offender's residence changes, and not just when offender knows or ought to know that the law requires the update.

Defendant found guilty.

West Headnotes (9)

[1] **Statutes** Undefined terms

Statutes Dictionaries

When a word is not defined in a statute, courts give the term its ordinary meaning, referring first to dictionary definitions from the time of enactment.

[2] **Administrative Law and Procedure** Sex offenders

Mental Health Effect of assessment or determination; notice and registration

Attorney General's interpretation, issued in Sentencing Monitoring, Apprehending, Registering, and Tracking Guidelines (SMART Guidelines), of SORNA's undefined phrase "habitually lives," in SORNA's definition of "resides" for purposes of requirement of registering and keeping registration current in each jurisdiction where sex offender resides, as any place in which offender lives for at least 30 days, was not best reading and therefore would not be given deference under Supreme Court's *Loper Bright* framework, 144 S.Ct. 2244, for determining whether to accord judicial deference to an agency's interpretation of a law; dictionary definition of "habitual" at time of enactment contained no specific length-of-time requirement. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20912(b), 20913(a, c).

[3] **Mental Health** Effect of assessment or determination; notice and registration

Proof of a sex offender's intent to remain in a place is not required to prove that the offender habitually lived in the place and therefore resided there, for purposes of Sex Offender Registration and Notification Act's (SORNA) requirement of registering and keeping registration current in each jurisdiction where sex offender resides, though evidence that an offender intended to remain at a particular residence may support conclusion that offender lived there habitually. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c).

[4] **Mental Health** Offenses and prosecutions

Knowledge, as mens rea requirement for conviction for failure to update registration pursuant to Sex Offender Registration and Notification Act (SORNA), applies only to the actus reus, i.e., failure to register, and not to other elements of the crime. 18 U.S.C.A. § 2250(a)(3).

[5] Mental Health 🔑 Effect of assessment or determination; notice and registration

Sex Offender Registration and Notification Act's (SORNA) provision requiring sex offenders to provide any information required by Attorney General did not imbue Attorney General with discretion to define terms in SORNA in manner that departed from best reading, and thus did not sanction Attorney General's interpretation, in Sentencing Monitoring, Apprehending, Registering, and Tracking Guidelines (SMART Guidelines), that undefined phrase "habitually lives," under SORNA's requirement that offender register in jurisdiction where offender resided, which included the place where offender habitually lived, meant any place in which offender lived for at least 30 days; provision only authorized Attorney General to prescribe information sex offenders were required to provide when they registered, which the 30-day rule did not do. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c), 20914(a)(8).

[6] Mental Health 🔑 Offenses and prosecutions

To convict a sex offender of failing to update registration under Sex Offender Registration and Notification Act (SORNA) when the place offender resides changes, the government need only prove that the offender's residence is no longer in the place where offender last registered, and need not prove the location of offender's new residence. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c).

[7] Mental Health 🔑 Effect of assessment or determination; notice and registration

Sex Offender Registration and Notification Act (SORNA) does not contain a loophole that enables a sex offender to avoid updating registration by moving from place to place so that offender never resides in the same location for long enough that the place offender lives becomes habitual. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c).

[8] Mental Health 🔑 Effect of assessment or determination; notice and registration

Sex Offender Registration and Notification Act's (SORNA) requirement that sex offenders register and keep registration current in each jurisdiction where offender resides effectively requires an unhoused offender to choose a place or places where the offender can regularly be found and to register such place or places with the jurisdiction where the offender resides. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c).

[9] Mental Health 🔑 Effect of assessment or determination; notice and registration

Sex Offender Registration and Notification Act (SORNA) requires a sex offender to update offender's registration when the fact of offender's residence changes, not just when offender knows or ought to know that the law requires the update. 18 U.S.C.A. § 2250(a)(3); 34 U.S.C.A. §§ 20911(13), 20913(a, c).

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OPINION & ORDER

Jamar K. Walker, United States District Judge

*1 Defendant Brandon L. Odoms was indicted on one count of failure to update his registration pursuant to the Sex Offender Registration and Notification Act (SORNA), in

violation of 18 U.S.C. § 2250(a)(3). ECF No. 1. The Court held a bench trial on August 18, 2025. Based on the findings of fact and conclusions of law articulated below, the Court finds the defendant **GUILTY** on Count One of the Indictment.

I. FINDINGS OF FACT

The government proved the following facts beyond a reasonable doubt:¹

1. During the period covered by the Indictment (*i.e.*, “at least in or around March 2024, and continuing until in or around April 2024”), the defendant was required to register as a sex offender under SORNA. ECF No. 1; ECF No. 29 ¶ 1.
2. At all times relevant to the Indictment, the defendant knew of this registration requirement. ECF No. 29 ¶ 1.
3. The defendant registered as a sex offender in Georgia through the Fulton County Sheriff’s Office on or about September 12, 2023. ECF No. 29 ¶ 2.
4. The defendant arrived in Virginia on or before February 13, 2024, and initially stayed in Norfolk, Virginia with a woman named Lo’Leisha Evans, who testified at trial. ECF No. 35 at 84:2–10, 87:1–7.
5. On February 13, 2024, the defendant proposed marriage to Evans at her home in Norfolk, Virginia. ECF No. 35 at 86:20–25.
6. The defendant left Evans’s house “shortly after” February 13, 2024, or “around March.” ECF No. 35 at 88:6–11; *id.* at 87:20–21.
7. The defendant committed seven burglaries in Chesapeake and Norfolk, Virginia from March 8 through April 9, 2024. ECF No. 29 ¶ 6.
8. Chesapeake and Norfolk, Virginia are contiguous cities within the Hampton Roads area of Virginia. *See* Fed. R. Evid. 201(b)(1), (c)(1).
9. After he was arrested on April 9, 2024, the defendant told police he had “been in the Hampton Roads area for 1 ½ months” and had “been doing” the same thing since the woman he had been “involved with” “kicked [him] out.” ECF No. 29 ¶ 15; *id.* ¶ 12.

10. After he was arrested the defendant told police he had planned to “sit at the park” once he completed the April 9, 2024 burglary. ECF No. 29 ¶ 12.

II. CONCLUSIONS OF LAW

Under SORNA, a sex offender must “register, and keep the registration current,² in each jurisdiction where the offender resides” 34 U.S.C. § 20913(a). A person “resides” for purposes of the statute in “the location of the individual’s home or other place where the individual habitually lives.” 34 U.S.C. § 20911(13).

A. Meaning of “Habitually Lives”

SORNA does not define ‘habitually lives.’ The Attorney General’s Sentencing Monitoring, Apprehending, Registering, and Tracking Guidelines (“SMART Guidelines”) provide that “a sex offender habitually lives ... in any place in which the sex offender lives for at least 30 days.” 73 Fed. Reg. 38030, 38062 (Jul. 2, 2008). The government contends that this definition should control, pursuant to the Fourth Circuit’s decision in *United States v. Kokinda*, 146 F.4th 405 (4th Cir. 2025). ECF No. 31 at 14. The defense argues that *Kokinda* did not say courts must apply the 30-day threshold in the SMART Guidelines, and this Court should decline to do so because the Attorney General did not read SORNA correctly. ECF No. 33 at 13–14.

i. Role of Kokinda

*2 The Court determines that the Fourth Circuit did not decide whether the 30-day threshold is included in the best reading of SORNA. *Kokinda* purports to “conclude that the SMART Guidelines provide the proper definition of the term habitually lives.” 146 F.4th at 418. And the opinion’s discussion of the defendant’s “course of conduct for the month before his arrest” suggests the court might have had the 30-day threshold in mind when it made that determination. *Id.* at 417. However, the viability of the 30-day provision was not directly presented in *Kokinda*, since both parties’ proposed jury instructions included it. *See id.* at 412. And in deciding that the Attorney General’s “interpretation of the term ‘habitually lives’ evidences reasoned decision making ... and is a reasonable exercise of Congress’s specific delegation of authority,” the Fourth Circuit referenced the more general language in the SMART Guidelines, not the day-counting mechanism. *Id.* at 416–18 (reasoning that the Guidelines

“include more than simply a fixed abode” because they define ‘habitually lives’ “‘to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons’ ”) (quoting 73 Fed. Reg. at 38,062).

So even though the *Kokinda* court stated its conclusion in terms that could capture the entire definition of ‘habitually reside’ in the SMART Guidelines, the court—appropriately—did not engage directly with the question of whether the Attorney General’s 30-day threshold is part of the correct reading of the statute. Therefore, to the extent the Fourth Circuit thought the 30-day provision—not just the portion of the Guidelines disputed in that case—“provide[d] the proper definition of the term habitually lives,” that observation is dictum. *Kokinda*, 146 F.4th at 418; see *Payne v. Taslimi*, 998 F.3d 648, 654–55 (4th Cir. 2021) (defining “dictum” as “a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it”) (quotation marks and citation omitted). Accordingly, this Court must analyze the 30-day provision for itself, to determine the meaning of ‘habitually lives’ in the context of SORNA and “whether the law means what the [Attorney General] says.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024).³

ii. Statutory Interpretation

The Fourth Circuit clearly held that “Congress specifically authorized the Attorney General to ‘issue guidelines and regulations to interpret and implement’ SORNA” and that the Attorney General promulgated the SMART Guidelines “[p]ursuant to that authority.” *Kokinda*, 146 F.4th at 416 (quoting 34 U.S.C. § 20912(b)). Both of those findings were essential to the court’s decision on the question presented in *Kokinda*, so this Court is bound to the same conclusions and will turn to the final analytical step *Loper Bright* prescribes: “ensuring the [Attorney General]⁴ has engaged in reasoned decisionmaking within th[e] boundaries” of Congress’s delegation of authority. *Loper Bright*, 603 U.S. at 395, 144 S.Ct. 2244 (quotation marks and citation omitted).

*3 SORNA “must [] have a single, best meaning,” which was “fixed at the time of enactment.” *Loper Bright*, 603 U.S.

at 400, 144 S.Ct. 2244 (quotation marks and citation omitted). The Court must “use every tool at [its] disposal to determine the best reading of the statute”—that is, “the reading the court would have reached if [the Attorney General were not] involved.” *Id.* (quotation marks and citation omitted).

[1] When a word is “not defined in the statute,” courts “give the term its ordinary meaning,” referring first to dictionary definitions from the time of enactment. *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 85, 138 S.Ct. 1134, 200 L.Ed.2d 433 (2018); see *Prudential Ins. Co. of Am. v. Shenzhen Stone Network Info. Ltd.*, 58 F.4th 785, 796 (4th Cir. 2023). When SORNA was enacted in 2017, “habitual” meant—as it does today—“commonly or constantly used; usual, accustomed,” or “regularly or repeatedly doing … something or acting in some manner.”⁵ Therefore, the “place where [an] individual habitually lives” is the place they live commonly, regularly, or repeatedly. 34 U.S.C. § 20911(13).

[2] The ordinary meaning of ‘habitual’ contains no specific length-of-time requirement, so the 30-day threshold offered in the SMART Guidelines is not part of the “best meaning” of the term. *Loper Bright*, 603 U.S. at 400, 144 S.Ct. 2244.

[3] [4] Neither, though, is the defendant’s proposed alternative, which would require proof of a sex offender’s intent to remain in a place. See ECF No. 33 at 8–9 n.2. In an unpublished case decided 12 years before *Loper Bright*, the Fourth Circuit upheld a conviction under 18 U.S.C. § 2250(a)(3) where a reasonable jury could have found the defendant formed an “intent to remain” at the location where the government contended he ought to have registered. *United States v. Bruffy*, 466 F. App’x 239, 245 (4th Cir. 2012) (unpublished). A similar standard appears in the SMART Guidelines. 73 Fed. Reg. at 38,062 (when “a sex offender [] enters a jurisdiction in order to make [their] home or habitually live in the jurisdiction,” they have to “register within three business days”). But involuntary, *unintentional* behavior can be “habitual[].” 34 U.S.C. § 20911(13).⁶ So while evidence that a defendant intended to remain at a particular residence may support the conclusion that they lived there habitually, the “best reading” of SORNA does not require proof of intent to remain.⁷ *Loper Bright*, 603 U.S. at 400, 144 S.Ct. 2244.⁸

B. Specificity of “Place”

*4 The defendant argues that the government was required to prove a specific “place” where he lived, not just “that [he]

was living somewhere in Virginia.” ECF No. 36 at 11. While it is true that SORNA defines ‘residence’ in terms of the sex offender’s “home” or the “place” where they “live” (rather than in terms of the *jurisdiction* where that place is located), 34 U.S.C. § 20911(13), that does not mean the government has to prove the ‘place’ where the defendant resides with similar specificity in order to sustain a charge under 18 U.S.C. § 2250(a)(3).

[5] SORNA expressly requires sex offenders to provide any “information required by the Attorney General.” 34 U.S.C. § 20914(a)(8).⁹ The Attorney General has described the kinds of information an unhoused person can provide in order to comply with the registration requirements:

information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations [themself] during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents

73 Fed. Reg. at 38055–56. While the sex offender must identify their residence using this kind of information when they update their registration, the government need not prove the sex offender's actual residence with similar specificity.

[6] A sex offender is required to update their registration when the ‘place’ they reside changes. 34 U.S.C. § 20913(c). But when they fail to do so, the government need only prove the defendant's *failure*—*i.e.*, that the defendant's residence is no longer in the place where they last registered—not the location of their new residence. *See* 18 U.S.C. § 2250(a) (imposing criminal liability on “[w]henever ... knowingly fails ...”).

[7] [8] This reading of the statute is consistent with the aim of SORNA to close “‘loopholes and deficiencies’” that “had allowed ... sex offenders ... to escape registration” under the earlier, state-by-state regime. *Gundy v. United States*, 588 U.S. 128, 132, 139 S.Ct. 2116, 204 L.Ed.2d 522 (2019) (quoting Rep. No. 109–218, pt. 1, pp. 20, 23–24, 26 (2005) (referring to unregistered sex offenders as “missing” or

“lost”)). SORNA does not contain a “loophole[]” that enables a sex offender to avoid updating their registration if they do not reside in the same location for long enough that the place they live becomes habitual. *Id.*; cf. *United States v. Voice*, 622 F.3d 870, 874–75 (8th Cir. 2010) (“We reject the suggestion that a savvy sex offender can move to a different city and avoid having to update his SORNA registration by sleeping in a different shelter or other location every night.”). Instead, the Act effectively requires an unhoused sex offender to choose a place or places where they can regularly be found and to register such place or places with the jurisdiction where they reside.

Sex offenders are not permitted to move from place to place such that they never habitually live anywhere, because that would make it impossible for them to comply with their obligation to keep their registration current. Cf. *United States v. Van Buren*, 599 F.3d 170, 175 (2d Cir. 2010) (“[I]t is clear that a registrant must update his registration information if he alters his residence such that it no longer conforms to the information that he earlier provided to the registry.”). Put differently, SORNA does not merely require sex offenders with residences to maintain registration—it also requires every sex offender subject to registration to maintain a ‘residence’ within the meaning of the Act. In the case of a sex offender who is unhoused, that means informing any jurisdiction where they habitually live of a place or places where they can regularly be found.

C. “Knowing” Failure

*5 [9] Finally, the defendant contends that even if he failed to update his registration as required, the government did not prove that he did so knowingly. This argument is based on the theory that a person who does not realize the law requires them to update their registration cannot knowingly fail to do so. *See* ECF No. 33 at 4 (“If the Court has any doubt about whether [the defendant's] residence changed, it should certainly have reasonable doubt about [his] knowledge of the change.”). But a defendant is required to update their registration when the fact of that residence changes—not just when they know or ought to know that the law requires the update. *See* 34 U.S.C. § 20913(c) (requiring updated registration “after each change of [] residence” by informing a relevant jurisdiction about “changes in the information required for that offender”). Allowing a sex offender's registration to lapse into inaccuracy because the individual subjectively believes their residence has not changed would effectively incorporate the ‘intent to remain’ standard that

the Court has explained is contrary to the language and the purpose of SORNA. *See supra* Part II.B.¹⁰

Even if the rule were as the defendant argues, the government still proved that the defendant knowingly failed to update his registration, because whether or not he understood the legal definition of ‘habitually lived,’ he certainly understood that he no longer commonly, regularly, or repeatedly “station[ed] himself during the day or sle[pt] at night” in Georgia.¹¹ 73 Fed. Reg. at 38055. He could have identified, for example, “information about [] certain part[s] of” Norfolk and/or Chesapeake that were his “habitual locale,” such as “a park or spot on the street … or a number of such places” where he “circulate[d]” and could typically be found. *Id.* at 38055–56. *See, e.g.*, Govt. Ex. 8A (map of burglary locations); ECF No. 29 ¶ 12 (defendant told police he had planned to “sit at the park” once he completed a burglary). But the evidence the government presented at trial demonstrates that he failed to do so.

III. CONCLUSION

The Court is persuaded beyond a reasonable doubt that the defendant failed to update his registration as required after he established a new residence in Virginia “at least in or around March 2024 … until in or around April 2024.” ECF No. 1 at 1. Accordingly, the Court finds the defendant **GUILTY** on Count One of the Indictment.

The Court will issue a sentencing procedures order contemporaneously with this Opinion and Order.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2025 WL 2785391

Footnotes

- 1 The Court does not include facts that were proved but are not incorporated into the reasoning in this opinion.
- 2 To keep their registration current, the sex offender must, “not later than [three] business days after each change of … residence, … appear in person in at least [one] jurisdiction involved … and inform that jurisdiction of all changes in the information required for that offender.” 34 U.S.C. § 20913(c).
- 3 If *Kokinda* does bind this Court with respect to analysis of the 30-day provision, then the answer here is simplified: The government proved beyond a reasonable doubt that the defendant habitually resided in the Hampton Roads area of Virginia for more than 30 days, so his failure to update his registration subjects him to criminal liability under 18 U.S.C. § 2250(a)(3). See ECF No. 35 at 87:1–4 (defendant “[w]as staying with” a woman in Norfolk, Virginia as of “February 13th”); ECF No. 29 ¶¶ 6, 8 (defendant convicted of seven burglaries in Chesapeake and Norfolk, Virginia, from March 8, 2024, through April 9, 2024); *id.* ¶ 12 (when he was arrested on April 9, 2024, defendant said he “c[a]me down here because [he] was involved with a female” but since “she kicked [him] out,” being “homeless” was “what [he had] been doing”); *id.* ¶ 15 (defendant “wrote on a questionnaire used for preparation of his state presentence investigation report that he had been in the Hampton Roads area for 1 ½ months.”).
- 4 By its express terms, *Loper Bright* deals only with delegations of authority to “agencies.” 603 U.S. at 395, 144 S.Ct. 2244. But since the Fourth Circuit has assessed the SMART Guidelines under *Loper Bright*—and neither party contends that *Loper Bright* does not apply in this context—the Court finds that at least in this case, the same framework applies to a delegation of authority to the Attorney General.
- 5 Habitual, OXFORD ENGLISH DICTIONARY (2d Ed. 1989); Habitual, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/habitual> (last accessed Sept. 30, 2025).

- 6 Compare Intent, BLACK'S LAW DICTIONARY (12th ed. 2024) ("mental resolution or determination to do [an act]") with Habit, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/habitual> (last accessed Sept. 30, 2025) ("behavior that has become nearly or completely involuntary").
- 7 The government contends that 'habitually lives' does not require intent to remain because 18 U.S.C. § 2250(a)(3) "establishes a *mens rea* of knowledge, not intent." ECF No. 31 at 12. That argument is not helpful, because the knowledge requirement applies only to the *actus reus*—"fail[ure] to register," 18 U.S.C. § 2250(a)(3)—not to other elements of the crime. See Mens Rea, BLACK'S LAW DICTIONARY (12th ed. 2024); cf. *City of Chicago v. Morales*, 527 U.S. 41, 88, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Scalia, J., dissenting) (acknowledging that *mens rea* attaches to the *actus reus*); *United States v. Jefferson*, 674 F.3d 332, 367 n.46 (4th Cir. 2012), as amended (Mar. 29, 2012) (recognizing that "the guilty act must be contemporaneous with the guilty mind") (cleaned up) (quoting *United States v. Muzii*, 676 F.2d 919, 920, 923 (2d Cir. 1982)).
- 8 If the government were required to prove the defendant intended to remain in Virginia, they did so. The defendant arrived in the Hampton Roads area no later than February 13, 2024, and proposed marriage to the woman he was staying with. ECF No. 35 at 86:20–25. Evans's testimony about the amount of time the defendant spent in her home was imprecise. But the Court can reasonably infer from her testimony that the defendant left her home "around March" and that he stayed *at least* three days. See ECF No. 35 at 87:21. Thus, the Court finds beyond a reasonable doubt that the defendant had the subjective intent to remain in Virginia when he made that proposal and that he maintained that intent, at least until he left Evans's house no fewer than three days later. See ECF No. 35 at 87:21.

The defendant said he committed the burglaries to obtain money to return to Georgia. ECF No. 29 ¶ 13; Govt. Ex. 6 at 6. Even if the Court credits that statement of intent, and even if intent to remain is the proper standard, the defendant's purported change of plans after he had resided in Virginia for three days does not change the outcome here.

- 9 This provision does not sanction the 30-day threshold in the SMART Guidelines, because it does not imbue the Attorney General with discretion to define terms in SORNA in a manner that departs from the best reading; it only authorizes the Attorney General to prescribe the information sex offenders are required to provide when they register, which the 30-day rule does not do.
- 10 This is another reason the interpretation of 'habitually lives' in the context of SORNA should comport with the term's ordinary meaning. If the 30-day rule were effective, one could more easily understand how ignorance of the law could result in failure to register that—despite being 'knowing' in the legal sense—feels like an unjust basis for imposing criminal punishment. But if sex offenders are required to update their registration whenever the place they 'habitually lives' changes, and that term means what an ordinary person thinks it means, then the statutory scheme provides fairer notice, and enforcing it is less troublesome.
- 11 If the SMART Guidelines' 30-day rule applies, the government proved the required knowledge, since the defendant knew he had "been in the Hampton Roads area for 1 ½ months." ECF No. 29 ¶ 15.

The defendant argues that if the Court were to rely on the 30-day rule, he should be acquitted because the government did not prove that his residence changed at least two days before his April 9, 2024 arrest. ECF No. 33 at 3. If the Court were convinced beyond a reasonable doubt only that the defendant lived in Virginia from the date of his first burglary to the date of his arrest—March 8, 2024 through April 9, 2024—then the defendant might be right. The defendant's residence would have changed 30 days after March 8, 2024—on April 7, 2024—and he would have had until three days later—April 10, 2024—to update his registration. But the government proved that the defendant lived in Virginia before March 8, 2024.

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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.

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2019 WL 1919164

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

UNITED STATES of America, Plaintiff
v.
Lamont Mars POPE, Defendant
Case No.: 2:18-cr-0327-JAD-GWF
|
Signed 04/30/2019

Attorneys and Law Firms

Elham Roohani, Las Vegas, NV, for Plaintiff.

Erin M. Gettel, [Monique N. Kirtley](#), Federal Public Defender, Las Vegas, NV, for Defendant.

Order Adopting Magistrate Judge's Report and Recommendation in part, Overruling Objections, and Denying Motions to Dismiss

[ECF Nos. 25–26, 42, 49]

[Jennifer A. Dorsey](#), U.S. District Judge

*1 Defendant Lamont Mars Pope stands charged with one count of violating the Sex Offender Registration and Notification Act (SORNA) for failing to register as a sex offender¹ based on his 2003 California conviction for lewd or lascivious acts upon a child under 14.² Pope filed two separate motions to dismiss the indictment, arguing that a provision of SORNA is unconstitutional and that his California conviction doesn't constitute a "sex offense" under SORNA and that he therefore wasn't required to register.³ The motions were referred to the magistrate judge, who recommends that I deny them.⁴ Because Pope has not objected to the recommendation that his constitutional challenge to SORNA be denied, and because the U.S. Supreme Court has granted certiorari in a case addressing the same issue, I adopt that portion of the report and recommendation in full and deny that motion without prejudice to the issue being re-urged after the High Court renders its decision.⁵

Pope has objected to the recommendation that I reject his sex-offense argument, so I review that portion of the decision de novo.⁶ I agree with the magistrate judge that, in line with Ninth Circuit precedent and every circuit court to address this matter, a circumstance-specific analysis (rather than the categorical approach) applies to the portion of the sex-offense definition at issue. Because a jury could find that the conduct that resulted in Pope's California conviction satisfies the catchall provision to SORNA's definition of a sex offense, and because there is no merit to his other arguments, I find that there is no basis to dismiss his indictment. I therefore do not reach the magistrate judge's alternative categorical-approach analysis and do not adopt that portion of the report and recommendation.

Discussion

SORNA "establishes a comprehensive national system for the registration" of "sex offenders and offenders against children...."⁷ The statutory scheme 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."⁸ Under [section 2250 to Title 18 of the United States Code](#), a person is guilty of a felony if he (1) is required to register as a sex offender under SORNA, (2) travels in interstate commerce, and (3) knowingly fails to register.⁹ The government accuses Pope of failing to register in Nevada when he traveled here from California sometime after mid-2017.¹⁰ In his objection to the report and recommendation, Pope argues—as he did in his underlying motion to dismiss—that he is not a sex offender within the meaning of the statutory scheme so he wasn't required to register as one.

*2 As discussed below, SORNA provides a multi-faceted definition to the term "sex offender." Pope argues in his objection that, in determining whether a prior conviction satisfies this definition, courts must apply the categorical approach. To buttress this contention, Pope argues that I must afford *Chevron* deference to the Department of Justice's (DOJ) SORNA guidelines, which he asserts support the application of the categorical approach. Pope also challenges the applicable part of sex-offender definition as void for vagueness. Alternatively, Pope argues that, even if the non-categorical, circumstance-specific approach applies, the government hasn't provided sufficient evidence of how he committed his crime of conviction and therefore hasn't shown

that the conviction satisfies SORNA's sex-offender definition. I address each issue in turn.

I. The circumstance-specific approach applies to this analysis.

A. In *United States v. Mi Kyung Byun*, the Ninth Circuit applied the circumstance-specific approach to the portion of the sex-offense definition at issue.

SORNA defines “[t]he term ‘sex offender’” under § 20911 as “an individual who has committed a sex offense.”¹¹ One of the subparagraphs under that section defines a “sex offense” as, among other things, “(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor....”¹² A subsequent subsection further elaborates on what constitutes a “specified offense against a minor” under part (ii), enumerating several types of offenses—e.g., those “involving kidnapping,” “[s]olicitation to practice prostitution,” etc.—and concluding in a catchall provision: “(I) Any conduct that by its nature is a sex offense against a minor.”¹³

Pope argues that, in determining whether his California conviction satisfies this catchall provision, I must apply the categorical approach, which would allow me to examine only the *elements* of that state-law crime to determine whether it proscribes more conduct—and is thus broader—than the catchall provision.¹⁴ By contrast, the circumstance-specific approach that the government advocates for permits looking at the *facts* of how Pope committed that crime.¹⁵ Relying on the Ninth Circuit's decision in *United States v. Mi Kyung Byun*, the magistrate judge determined that the circumstance-specific approach applies.¹⁶

In *Byun*, a defendant pled guilty to the federal offense of “importation into the United States of any alien for the purpose of prostitution,” which the district court determined satisfied the specified-offense-against-a-minor (specified-offense) portion of SORNA's sex-offense definition.¹⁷ Because the age of the victim is not an element of the crime the defendant pled to, the court could only determine that she committed the offense against a minor—an integral component of the sex-offense definition—by considering the facts of the case.¹⁸ Specifically, the district court relied on the defendant's plea agreement, which revealed that the victim was 17 years old.¹⁹ The defendant argued on appeal that the

district court should have applied the categorical approach and thus examined only the crime's elements. The Ninth Circuit, however, held that the court properly considered the crime's underlying facts, reasoning that, unlike other parts of the sex-offense definition, the specified-offense portion makes no reference to a crime's elements.²⁰ And pointing to that portion's catchall provision, the court concluded that, “critically, the list of specified offenses against a minor includes ‘[a]ny conduct that by its nature is a sex offense against a minor.’ ”²¹ Other circuits that have reviewed this portion of the sex-offense definition have cited to *Byun* and similarly held that the circumstance-specific approach applies.²²

*3 Pope nonetheless argues that *Byun* is not fatal to his assertion that the categorical approach should apply in determining whether his California conviction satisfies the specified-offense portion of the sex-offense definition. He contends that *Byun* approved the use of the circumstance-specific approach only for discovering whether the victim was a minor—not more broadly for determining whether a defendant's conduct in committing a predicate offense satisfies the specified-offense portion.²³ But the Ninth Circuit's analysis was not as narrow as Pope asserts. The court focused on the age of the victim because that was the fact critical to determining whether the defendant's offense satisfied the sex-offense definition and that could not be determined by reviewing the elements of that crime alone. Nothing in the court's reasoning indicates that it intended to limit the use of the circumstance-specific approach to this fact. To contrary, as demonstrated by the *Byun* passages above, the Ninth Circuit relied in large part on the fact that the specified-offense portion's catchall provision addresses whether a defendant's *conduct* during the commission of the predicate offense is “by its nature ... a sex offense against a minor.” Indeed, the en banc Eleventh Circuit subsequently held that, “[a]lthough the Ninth Circuit [in *Byun*] focused only on the age of the victim, its approach supports [the] 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.’ ”²⁴ I therefore find that *Byun* forecloses the use of the categorical approach in this analysis.

B. Subsequent decisions have not undermined or effectively overruled the Ninth Circuit's decision in *Byun*.

Pope also argues that subsequent decisions by the Supreme Court and Ninth Circuit have “severely limited” the use of the circumstance-specific approach and “clarifie[d] when statutory language describes an offense element, rather than offense circumstances.”²⁵ Using the principles he distills from these authorities, Pope contends that the “catchall provision requires a categorical analysis.”²⁶ It is evident from these arguments that Pope is implicitly asserting that *Byun* was wrongly decided and that the Ninth Circuit’s reasoning has since been undermined by subsequent decisions. Indeed, he challenges *Byun*’s reliance on the catchall provision’s use of the term “conduct,”²⁷ and despite arguing that the case limits the use of the circumstance-specific approach to determining whether the victim was a minor, he asserts that the phrase “against a minor” in the provision “refers to an element rather than a circumstance of the offense.”²⁸ But district courts are bound by published Ninth Circuit decisions unless “the reasoning or theory of [a prior decision] is clearly irreconcilable with the reasoning or theory of intervening higher authority,” and can thus be deemed as “effectively overruled.”²⁹ Neither of the cases that Pope relies upon satisfies this standard.

He first cites to *Nijhawan v. Holder*, in which the Supreme Court addressed whether the circumstance-specific approach applies to a portion of the “aggravated felony” definition under the Immigration and Nationality Act (INA).³⁰ The Court determined that some of the felonies listed under that definition, such as “murder, rape, or sexual abuse of a minor,” describe “generic crimes” that therefore call for the categorical approach.³¹ But other felonies, the Court held, include “qualifying language that … call[s] for [a] circumstance-specific application.”³² For instance, the aggravated felony at issue was “an offense that … involves fraud or deceit *in which the loss to the victim or victims exceeds \$ 10,000.*”³³ The Court found that the italicized portion of this aggravated-felony definition was qualifying language that set out the facts of how an offender committed a predicate federal or state-law crime rather than an element that the predicate crime must include.³⁴ But the Court never held that the contrast between the inclusion and absence of qualifying language in a list of generic offenses is the only means of determining whether the circumstance-specific

approach applies. And Pope points to no portion of the Court’s reasoning in *Nijhawan* that conflicts with the Ninth Circuit’s analysis in *Byun*.

*4 I am similarly unpersuaded by Pope’s citation to the Ninth Circuit’s decision in *Olivas-Motta v. Holder*, which also addressed a provision of the INA rather than SORNA’s sex-offense definition.³⁵ The court ruled that determining whether a predicate offense constitutes “a crime involving moral turpitude” requires applying the categorical rather than circumstance-specific approach.³⁶ In reaching this conclusion, the Ninth Circuit rejected the argument that the definition’s use of the word “involving” denotes a reliance on facts rather than elements.³⁷ The court further reasoned that, unlike the aggravated felonies in *Nijhawan* that consisted of a generic offense plus qualifying language, the phrase “involving moral turpitude” does not describe factual circumstances that modify the solitary word “crime.”³⁸ But again, nothing in *Olivas-Motta*’s analysis undermines the conclusion that the Ninth Circuit reached several years earlier in *Byun*. The two decisions addressed different statutes with dissimilar structures and thus naturally relied on different “textual clues”³⁹ to discern which mode of analysis applies. The crime-involving-moral-turpitude definition, for instance, does not present the contrast seen in SORNA between one part of a definition referring to elements and another part referring to conduct.⁴⁰ *Olivas-Motta* and *Byun* are thus not irreconcilable.

C. *Chevron* deference is inapplicable.

Pope also contends that the DOJ’s guidelines on SORNA⁴¹ are entitled to administrative deference under *Chevron*, *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴² and that these guidelines support the use of the categorical approach.⁴³ The three circuit courts that have considered the issue have rejected this precise argument, finding that it fails at step one of *Chevron* because the specified-offense portion of the sex-offense definition is neither “silent [n]or ambiguous with respect to” whether the circumstance-specific approach applies.⁴⁴ In arguing to the contrary, Pope points to the Ninth Circuit’s admission in *Byun* that SORNA’s language “is somewhat more ambiguous [than other parts of the statute] with regard to whether a categorical approach must be applied to all” parts of the specified-offense portion of the sex-offense definition.⁴⁵ But because the DOJ’s guidelines were in effect at the time *Byun* was issued, Pope’s reliance on

Chevron deference is another attempt to implicitly argue that the case was wrongly decided. Indeed, one of guidelines cited by Pope suggests that the age of the victim should be treated as an element rather than a circumstance of the predicate offense⁴⁶—thus conflicting with one of *Byun's* central holdings. It is the purview of the Ninth Circuit rather than this court to reassess that decision in light of *Chevron* deference.

* * *

*5 The magistrate judge correctly determined that the Ninth Circuit permits district courts to apply the circumstance-specific approach in determining whether a defendant's prior offense satisfies the specified-offense portion of SORNA's sex-offense definition and may thus examine the facts of how the defendant committed that crime. Accordingly, I need not and do not address whether Pope's California conviction would satisfy the catchall provision if the categorical approach applied, and I therefore do not adopt that portion of the magistrate judge's report and recommendation.⁴⁷

II. SORNA's catchall provision is not void for vagueness.

Before applying the circumstance-specific approach to Pope's California conviction, I first address his argument that the catchall provision is unconstitutionally vague.⁴⁸ He relies primarily on *Johnson v. United States*, in which the Supreme Court declared the residual clause of the Armed Career Criminal Act (ACCA) void for vagueness.⁴⁹ That clause instructed that a prior felony conviction is a “violent felony” under the ACCA if it “involves conduct that presents a serious potential risk of physical injury to another....”⁵⁰ Because the categorical approach is used for all portions of the ACCA, the Court prior to *Johnson* had consistently held that “[d]eciding whether the residual clause covers a crime ... requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.”⁵¹

Pope compares this ordinary-case analysis to SORNA's catchall provision, which assesses whether conduct “*by its nature* is a sex offense against a minor.”⁵² But in *Johnson*, the Supreme Court distinguished between the application of the categorical approach to the residual clause and criminal “laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct....”⁵³ Applying that reasoning here, there is a significant difference between

attempting to surmise whether a category of conduct in the abstract presents a serious potential risk of injury and, as SORNA's catchall provision requires, assessing whether the actual, specific facts underlying a prior conviction constitute a sex offense against a minor. I therefore find that the catchall provision is not void for vagueness.⁵⁴

III. A jury could find that Pope's California conviction was a sex-offense against a minor.

Finally, Pope contends that, even if the circumstance-specific approach applies, there is not enough evidence of how he violated CPC § 288(a) to conclude that his conduct “by its nature is a sex offense against a minor.”⁵⁵ In response, the government provides a copy of the criminal complaint from Pope's California state-court proceedings, which charged him under count two with lewd or lascivious acts upon a child under 14 and accused him of “put[t]ing his mouth on the victim's breasts....”⁵⁶ As the attached abstract of judgment shows, Pope pled no contest to this charge.⁵⁷ The government concedes that Pope may challenge whether his conduct satisfies SORNA's sex-offense definition at trial, asserting that it may introduce these documents as evidence of that conduct at trial.⁵⁸ The government is correct that whether Pope was required to register as a sex offender under SORNA—and incidentally whether his prior conviction constitutes a sex offense—is a jury question.⁵⁹ Thus, at the motion-to-dismiss stage, I must only determine whether a jury could find that Pope's conduct underlying his California conviction (if proven at trial) satisfies that element. Based on the facts alleged in the count that Pope pled no contest to, a jury could determine that Pope placed his mouth on a minor⁶⁰ victim's breasts and that this conduct was by its nature a sex offense against a minor. I therefore deny Pope's motion to dismiss the indictment.

Conclusion

*6 Accordingly, IT IS HEREBY ORDERED that the magistrate judge's report and recommendation [ECF No. 42] is ADOPTED in full as to Pope's constitutional challenge to SORNA and ADOPTED in part as to the circumstance-specific-approach analysis. Pope's objections [ECF No. 49] are OVERRULED. His first motion to dismiss the indictment [ECF No. 25] is DENIED without prejudice to Pope re-urging the issue after the Supreme Court renders its

decision in *Gundy v. United States*, 138 S. Ct. 1260 (2018).
His second motion to dismiss [ECF No. 26] is DENIED.

All Citations

Not Reported in Fed. Supp., 2019 WL 1919164

Footnotes

1 18 U.S.C. § 2250(a); ECF No. 15 (indictment).

2 Cal. Pen. Code § 288(a).

3 ECF Nos. 25–26 (motions to dismiss).

4 ECF No. 42 (report and recommendation).

5 Local Rule IB 3-2(b) (requiring a district judge to review de novo only the portions of a report and recommendation addressing a case-dispositive issue that a party objects to); *Gundy v. United States*, 138 S. Ct. 1260 (2018).

6 ECF No. 49 (objection to ECF No. 42, the magistrate judge's report and recommendation).

7 34 U.S.C. § 20901.

8 *Id.* § 20913.

9 18 U.S.C. § 2250.

10 ECF No. 15.

11 34 U.S.C. § 20911(1) (formerly 42 U.S.C. § 16911(1)).

12 *Id.* § 20911(5)(A).

13 *Id.* § 20911(7)(I).

14 See *United States v. Mi Kyung Byun*, 539 F.3d 982, 990 (9th Cir. 2008); see also *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (distinguishing between elements and facts).

15 See *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (coining this term).

16 ECF No. 42 at 6 (“*Byun* concluded that the best reading of the statute's structure and language is that Congress contemplated a non-categorical approach in determining whether a particular conviction is for a 'specified offense against a minor.' ”).

17 *Byun*, 539 F.3d at 983.

18 *Id.* at 983–84, 986–87.

19 *Id.* at 983–84.

20 *Id.* at 991–92 (“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.’ ... 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.’ ” (emphasis in original)).

21 *Id.* at 992 (alteration and emphasis in original) (quoting 42 U.S.C. § 16911(7)(I) (transferred to 34 U.S.C. § 20911(7)(I))).

22 *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016); *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc) (“All signs point to only one reasonable conclusion—that we may look beyond Dodge’s conviction statute to the underlying facts of his offense to determine whether his offense qualifies as a ‘sex offense against a minor.’ ”); *United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015) (“The language and structure of § 16911 underscore the proposition that an analysis of subsection (7)(I) requires use of the circumstance-specific approach.”). *But see United States v. Schofield*, 802 F.3d 722, 729 (5th Cir. 2015) (not deciding which analysis applies because the court determined that the defendant’s crime was “a sex offense under both the non-categorical and categorical approaches”).

23 ECF No. 49 at 13–14.

24 *Dodge*, 597 F.3d at 1354.

25 ECF No. 49 at 7–10.

26 *Id.* at 10.

27 *Id.* (“Under *Olivas-Motta [v. Holder*, 746 F.3d 907 (9th Cir. 2014)], however, this language is not dispositive.”).

28 *Id.* at 12.

29 *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); *id.* at 899 (“We must, therefore, now address when, if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue.”).

30 *Nijhawan*, 557 U.S. at 32.

31 *Id.* at 37.

32 *Id.*

33 *Id.* at 38 (emphasis in original).

34 *Id.* at 38–40.

35 *Olivas-Motta v. Holder*, 746 F.3d 907 (9th Cir. 2014).

36 *Id.* at 914–16.

37 *Id.* at 915.

38 *Id.* (“If one eliminates the phrase ‘involving moral turpitude’ from the phrase ‘crime involving moral turpitude,’ there is no separately defined crime. There is only the single word ‘crime,’ covering the entire universe of crime.”).

39 *Byun*, 539 F.3d at 992.

40 Compare 34 U.S.C. § 20911(5)(A)(i) (defining a sex offense as “a criminal offense that has an element involving a sexual act or sexual contact with another”), with *id.* § 20911(5)(A)(ii) (“a criminal offense that is

a specified offense against a minor"), and *id.* § 20911(7)(I) (expanding on the "specified offense against a minor" portion of the sex-offense definition: "Any conduct that by its nature is a sex offense against a minor").

41 Office of the Attorney General, The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 (July 2, 2008).

42 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

43 ECF No. 49 at 14–17.

44 *Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Hill*, 820 F.3d at 1006 ("Chevron deference is inappropriate in these circumstances because the statutory provisions at issue are unambiguous regarding the proper method of analysis."); *Schofield*, 802 F.3d at 730–31; *Price*, 777 F.3d at 709 n.9.

45 *Byun*, 539 F.3d at 991.

46 73 Fed Reg. 38031 (stating that the catchall provision "is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense").

47 ECF No. 42 at 9 ("Given the broad scope of these provisions, a conviction under Cal. Penal Code § 288(a) would categorically be a sex offense if that approach is applied.").

48 ECF No. 49 at 5–9.

49 *Johnson v. United States*, 135 S. Ct. 2551, 2562–63 (2015).

50 18 U.S.C. § 924(e)(2)(B)(ii).

51 *Johnson*, 135 S. Ct. at 2557 (citation omitted).

52 34 U.S.C. § 20911(7)(I) (emphasis added).

53 *Johnson*, 135 S. Ct. at 2561 ("[A]lmost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a *particular occasion*." (emphasis in original)).

54 *Schofield*, 802 F.3d at 731 (rejecting a vagueness challenge to the catchall provision based on this distinction made in *Johnson*).

55 ECF No. 49 at 19–24.

56 ECF No. 50-2 at 2.

57 *Id.* at 8–13.

58 ECF No. 50 at 5.

59 See *Price*, 777 F.3d at 710 ("Here, even applying the circumstance-specific approach, [the defendant] was entitled to go to trial [on his failure-to-register-under-SORNA charge] and have a jury determine beyond a reasonable doubt whether his [state-court] conviction was for a sex offense under SORNA. ... Had [the defendant] gone to trial ..., the prosecution would have borne the burden of proving, beyond a reasonable doubt, that he had been previously convicted of a sex offense—an essential element of 18 U.S.C. § 2250(a).")

The jury would thus have examined the evidence presented to it concerning the facts underlying [his prior conviction] and then decided whether that evidence satisfied SORNA's definition of a 'sex offense.'").

- 60 The government asserts that the complaint reveals that the victim was 12 years old at the time of the crime, ECF No. 35 at 5 n.5, but the unredacted portion of the complaint reveals only that she was under 14. ECF No. 50-2 at 2. Regardless, only the fact that the victim was a minor—rather than her precise age—is relevant to this analysis.

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669 Fed.Appx. 746 (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. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee

v.

Jason Paul ROBERTS, Defendant–Appellant

No. 16-10404

|

Conference Calendar

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Date Filed: 10/18/2016

Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:12-CR-267-1

Attorneys and Law Firms

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James Matthew Wright, Assistant Federal Public Defender, Federal Public Defender's Office, Northern District of Texas, Amarillo, TX, for Defendant–Appellant

Before HIGGINBOTHAM, JONES, and HIGGINSON, Circuit Judges.

Opinion

PER CURIAM: *

Appealing the judgment in a criminal case, Jason Paul Roberts raises issues that are foreclosed by *United States v. Schofield*, 802 F.3d 722 (5th Cir. 2015). In *Schofield*, 802 F.3d at 729–31, we held that a violation of 18 U.S.C. § 1470 qualified as a sex offense for purposes of the Sex Offender Registration Notification Act (SORNA) and that SORNA's residual clause is not ambiguous or unconstitutionally vague. Accordingly, Roberts's motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.

All Citations

669 Fed.Appx. 746 (Mem)

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.

2021 WL 2366086

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

UNITED STATES of America, Plaintiff,
v.
Paul Anthony SALAZAR, Defendant.

Case No. 6:10-cr-60121-AA,
Case No. 6:20-cv-01438-AA

|

Signed 06/09/2021

Attorneys and Law Firms

Paul Anthony Salazar, Pro Se.

OPINION AND ORDER

AIKEN, District Judge:

*1 In 2011, Defendant Paul Anthony Salazar pleaded guilty to and was convicted of one count of Failure to Register as a Sex Offender as required by the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, in violation of 18 U.S.C. § 2250(a). Currently, there are allegations that Salazar has violated the terms of his supervised release. On June 23, 2020, Salazar filed a motion to terminate his supervised release, dismiss the present supervised release violation, and vacate his underlying conviction. ECF No. 117. On August 24, 2020, Salazar refiled his motion as one pursuant to 28 U.S.C. § 2255.¹ ECF No. 129. The Court heard oral argument on the motion on October 14, 2020 and took the matter under advisement. ECF No. 137. Although the Court indicated at subsequent hearings that it was inclined to deny the motion, a close review of the history of the case and the relevant precedents compels a different result. And so, for the reasons set forth below, the motion is GRANTED.

BACKGROUND

In February 1989, Salazar was convicted by a jury in the State of Florida of two counts of handling and fondling a child under the age of sixteen, in violation of Florida Statutes § 800.04(1). Def. Mot. Ex. A, at 1-2. Specifically, Salazar grabbed and touched a twelve-year-old victim several times in

her vaginal area and rubbed her breast, causing her to scream. Presentence Report ("PSR") ¶ 27.

Salazar was sentenced on February 8, 1989 to three-and-a-half years in state custody along with one year of probation. Def. Mot. Ex. A, at 3. Salazar was released on April 6, 1990. PSR ¶ 27. Salazar moved to Alabama, where he was convicted of theft in 2001 and for failure to abide by state sex offender registration requirements in 2006. *Id.* at ¶ 28-29. In 2007, Salazar was convicted in Tennessee for failure to abide by state sex offender registration requirements. *Id.* at ¶ 30.

In 2008, Salazar was convicted of transporting illegal aliens into the country in the Southern District of California and was sentenced to fifteen months imprisonment with a three-year term of supervised release. PSR ¶ 31. After being released from custody Salazar absconded from supervision and was arrested in Oregon on August 13, 2009. *Id.* On December 7, 2010, Salazar's case in the Southern District of California was transferred to this Court. *Id.*

After absconding again in 2010, Salazar was apprehended in Eugene, Oregon on September 24, 2010. PSR ¶ 12. It was discovered that he had been living at the Eugene Mission under an assumed name. *Id.* Officers also found graphic written materials and electronic storage devices containing images of naked children in his possession. *Id.* at ¶ 13. On October 21, 2010, Salazar was indicted for a single count of Failure to Register as a Sex Offender in violation of 18 U.S.C. § 2250(a), based on his 1989 Florida conviction. ECF No. 8.

*2 On July 12, 2011, Salazar pleaded guilty to this charge as part of a negotiated resolution with the Government. ECF No. 26. Pursuant to that agreement, Salazar admitted that he traveled in interstate commerce and knowingly failed to register as a sex offender. He also agreed that he was a Tier III offender and required to register for life. ECF Nos. 27, 28. On September 23, 2011, this Court sentenced Salazar to twenty-four months in custody with a five-year term of supervised release. ECF No. 31.

Salazar's term of supervision commenced on June 21, 2012. ECF No. 34. Since that time, Salazar has been found in violation of the terms of his supervision on three occasions, and he has absconded multiple times. ECF Nos. 44, 63, 85. Salazar most recently self-surrendered after absconding to Mexico.

DISCUSSION

Salazar primarily argues that his 1989 Florida conviction is not a sex offense under SORNA. Alternatively, he argues that even if the conviction was a qualifying sex offense, he was not required to register under SORNA on September 12, 2010. As a preliminary matter, however, the Court must ascertain the proper procedural vehicle for Salazar's motion.

I. Salazar's Motion is Properly Considered under 28 U.S.C. § 2241

Salazar presents his motion as one brought under 28 U.S.C. § 2255. The Government argues that Salazar's § 2255 motion is untimely and so cannot be considered under that statute.

Under 28 U.S.C. § 2255, a federal prisoner in custody under sentence may move the court that imposed the sentence to vacate, set aside, or correct the sentence on the ground that:

[T]he sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack....

28 U.S.C. § 2255(a). However, motions brought under this subsection must be filed no later than one year from the date on which the judgment of conviction becomes final, 28 U.S.C. § 2255(f)(1), or the date on which the right was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, 28 U.S.C. § 2255(f)(3).

More than one year has passed since Salazar's conviction in this case became final, and he cites no qualifying intervening precedent from the Supreme Court within the last year. Accordingly, the Court concludes that, to the extent Salazar brings this motion pursuant to § 2255, the motion is time-barred.

However, § 2255 is not a defendant's only available avenue for relief. Although a federal defendant seeking to challenge his sentence generally must file a motion under 28 U.S.C. § 2255, there is an exception to that general rule under the "escape hatch" of § 2255(e), which allows the petitioner to file a petition under 28 U.S.C. § 2241 "if, and only if, the remedy under § 2255 is inadequate or ineffective to test the legality of his detention." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012) (internal quotation marks and citation omitted). A defendant may file a § 2241 petition under the escape hatch "when the prisoner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Id.* (internal quotation marks and citation omitted). In the Ninth Circuit, "[A]ctual innocence means factual innocence, not mere legal insufficiency." *Id.* at 1193 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted) (alteration in original))

*3 In this case, Salazar argues that he was innocent of failing to register because (1) his underlying conviction was not a qualifying offense under SORNA; and (2) even if it were, he was no longer required to register as a sex offender under SORNA in 2010. The parties contend, and the Court agrees, that 28 U.S.C. § 2241 provides an appropriate procedural vehicle for consideration of Salazar's motion.

II. SORNA

SORNA was enacted to create a "comprehensive national system for the registration of sex offenders and offenders against children." *United States v. Elkins*, 683 F.3d 1039, 1040 (9th Cir. 2012) (internal quotation marks and citation omitted); 34 U.S.C. § 20901. To that end, sex offenders must register as such in their relevant jurisdictions and update their registration if changes to their names, residence, employment, or student status occur. 34 U.S.C. §§ 20913(a), (c). SORNA defines the term "sex offender" as "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). SORNA separates the level of sex offenders into tiers, with a Tier I being the least severe and Tier III being the most severe. 34 U.S.C. §§ 20911(1)-(3). The tier level determines how long an offender is required to register under federal law. 34 U.S.C. § 20915(a). And 18 U.S.C. § 2250 imposes criminal penalties on persons who are required to register under SORNA, but knowingly fail to do so.

Salazar contends that his Florida conviction does not qualify as a sex offense requiring registration under SORNA and that, even if it did qualify, it would be a Tier I offense and

Salazar's obligation to register as a sex offender would have expired by the time of his offense conduct. In evaluating Salazar's claims, the Court must therefore engage in a two-step inquiry. First, the Court must determine whether the offense of conviction is one that requires registration under the Act. See 34 U.S.C. §§ 20911(1), (5), (7). And if the offense requires registration, the Court must consider how long Salazar's registration requirement lasted. 34 U.S.C. § 20915(a).

A. Offense of Conviction

On February 8, 1989, Salazar was convicted of Handling and Fondling a Child Under the Age of Sixteen Years in violation of Florida Statutes § 800.04(1). Def. Mot. Ex. A, at 1-2. The version of Florida Statutes § 800.04(1) operative in 1989 provided in relevant part that: "Any person who shall: (1) Handle, fondle or make an assault upon any child under the age of 16 years in a lewd, lascivious or indecent manner ... without committing the crime of sexual battery shall be guilty of a felony of the second degree ..." Def. Mot. Ex. B, at 5-6.

Salazar contends the application of SORNA must be subject to the "categorical approach," where the offense of conviction is compared to a generic federal offense. Salazar argues that, under the categorical approach, Florida Statutes § 800.04(1) is overbroad and so does not qualify as an offense requiring registration under SORNA.

The determination of whether someone is a "sex offender" who is required to register under SORNA is controlled by a series of statutory definitions in 34 U.S.C. § 20911. As previously noted, a "sex offender" is "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). In relevant part, a "sex offense" 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." 34 U.S.C. §§ 20911(5)(a)(i), (ii). A "specified offense against a minor" is any one of a series of listed offenses, including "Any conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). This catchall provision is known as SORNA's "residual clause." *United States v. Dailey*, 941 F.3d 1183, 1189-90 (9th Cir. 2019).

*4 Although Salazar urges the Court to apply a categorical approach analysis, the Ninth Circuit has held that a non-categorical approach applies to determine whether registration is required under the SORNA residual clause. *Dailey*, 941 F.3d at 1192-93. This Court reached a similar

conclusion in *United States v. Smith*, Case No. 6:15-cr-00301-AA, 2016 WL 1466900 (D. Or. April 13, 2016), when it found that in enacting the SORNA residual clause, "Congress clearly intended to encompass a broad category of criminal conduct, i.e., 'any conduct' that is sexual in nature and committed against a child." *Id.* at *2. Accordingly, the Court applies a non-categorical approach to determine if Salazar's conviction requires registration under SORNA without the necessity of comparing Florida Statutes § 800.04(1) against a generic federal offense.

Applying the non-categorical approach, it is clear Salazar's conviction qualifies under the SORNA residual clause. The relevant version of Florida Statutes § 800.04(1) prohibited "[h]andl[ing], fondl[ing] or mak[ing] an assault upon any child under the age of 16 years in a lewd, lascivious or indecent manner ..." On its face, this is "conduct that by its nature is a sex offense against a minor," under 34 U.S.C. § 20911(7)(I) and therefore qualifies as "a criminal offense that is a specified offense against a minor," under § 20911(5)(A)(ii). Accordingly, the Court concludes that Salazar was obliged to register as a sex offender under SORNA.

B. Length of Registration Requirement

Having determined that Salazar was required to register under SORNA, the Court must examine how long the requirement persisted. This determination depends on whether Salazar was a Tier I, II, or III sex offender.

In relevant part, a Tier III offender is "a sex offender whose offense is punishable by imprisonment for more than 1 year" and whose offense 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." 34 U.S.C. § 20911(4)(A)(ii). A Tier III offender is required to maintain a current registration for his or her entire life. 34 U.S.C. § 20915(a)(3).

A Tier II offender is, in relevant part, "a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year" and whose offense is "comparable to or more severe" than "abusive sexual contact (as described in section 2244 of Title 18)" when committed against a minor. 34 U.S.C. § 20911(3)(A)(iv). A Tier II offender is required to maintain a current registration for twenty-five years, excluding the time the offender is in custody or civilly committed. 34 U.S.C. § 20915(a)(2).

A Tier I offender is “a sex offender other than a tier II or tier III sex offender.” 34 U.S.C. § 20911(2). Tier I offenders must maintain their registration for fifteen years, excluding the time the offender is in custody or civilly committed. 34 U.S.C. § 20915(a)(1).

In this case, Salazar was released from custody following his Florida conviction in 1990. Although Salazar admitted that he was a Tier III offender in his plea petition, he now contends that he was, at most, a Tier I sex offender and so his obligation to register expired in 2005, prior to the offense conduct underlying his conviction in the present case. The Government contends that Salazar is a Tier II or III offender and that he was and remains under an obligation to register.

In determining whether a defendant is a Tier I, II, or III sex offender, courts apply the categorical approach referenced in the previous section. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014).² “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.” *Id.* 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 prior offense is broader than the generic federal crime, it cannot serve as a statutory predicate. *Id.* The key to the comparison is “elements, not facts.” *Id.* (internal quotation marks and citation omitted). The elements of the crime “are all that is relevant” and the court “may not consult extra-statutory materials, even if the materials show that the defendant actually committed the predicate offense in its generic form.” *Id.* (internal quotation marks and citation omitted, alterations normalized). To identify the elements of a state statute, courts must consider both the language of the statute itself, as well as judicial opinions interpreting it. *United States v. Dixon*, 805 F.3d 1193, 1195 (9th Cir. 2015) (citing *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 853 (9th Cir. 2013)).

*5 In applying the categorical approach, courts must presume that a defendant’s conviction rests on “the least of the acts criminalized,” although that analysis is not “an invitation to apply ‘legal imagination’ to the state offense.” *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (citations omitted). “[T]here must be 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.” *Id.* at 191 (internal quotation marks and citations omitted).

The Court must therefore assess whether Salazar’s conviction for violation of Florida Statutes § 800.04(1) is a categorical match for abusive sexual contact against a minor.³ For the federal offense, the term “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). Abusive sexual contact under 18 U.S.C. § 2244 includes sexual contact 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.” 18 U.S.C. § 2244(a)(3) (referencing 18 U.S.C. § 2243(a)).

As previously noted, the version of Florida Statutes § 800.04(1) operative in 1989 provided in relevant part that: “Any person who shall: (1) Handle, fondle or make an assault upon any child under the age of 16 years in a lewd, lascivious or indecent manner ... without committing the crime of sexual battery shall be guilty of a felony of the second degree ...” Def. Mot. Ex. B, at 5-6.

In *Altman v. State*, 852 So.2d 870 (Fl. App. 2003), the Florida Court of Appeal considered a conviction under § 800.04(1) for a defendant who had kissed and “insert[ed] his tongue into the mouth of the victim.” *Id.* at 872.⁴ The court found that “Section 800.04(1), under which appellant was convicted, prohibits a person from handling, fondling, or assaulting any child under sixteen in a lewd, lascivious, or indecent manner,” and “[t]his subsection is couched in general language and does not restrict criminal activity to touching specific body parts of a child.” *Id.* at 874. “Rather, the focus appears to be upon acts committed on a child that are sexually motivated.” *Id.*

Although the generic offense of abusive sexual contact is likewise concerned with the sexual motivation of the offender, it is specific in terms of where the contact must occur, limiting it to the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks. 18 U.S.C. § 2246(3). More specifically, the Eighth Circuit has held that kissing falls outside of the federal statutory definition of “sexual contact.” *United States v. Blue Bird*, 372 F.3d 989, 992-93 (8th Cir. 2004), overruled on other grounds *United States v. Pirani*, 406 F.3d 543, 555 (8th Cir. 2005). Florida Statutes § 800.04(1), as interpreted by the Florida appellate courts, is therefore broader than the generic offense and cannot serve as a predicate for purposes

of establishing Salazar as a Tier II or Tier III offender. The fact that the *conduct* giving rise to Salazar's 1989 conviction would unquestionably qualify as abusive sexual contact against a victim under the age of 13 cannot alter this analysis because as the Ninth Circuit has held, the categorical analysis is driven by elements, rather than facts. *Cabrera-Gutierrez*, 756 F.3d at 1133. This is so, even if consideration of extra-statutory materials would "show that the defendant actually committed the predicate offense in its generic form." *Id.* (internal quotation marks and citation omitted, alterations normalized). The Court must therefore conclude that Salazar was a Tier I sex offender for purposes of SORNA.

*6 As previously noted, a Tier I sex offender is required to keep their registration current for fifteen years, excluding any time the offender is in custody or civilly committed. 34 U.S.C. § 20915(a)(1). "The required registration period begins to run upon release from custody for a sex offender sentenced to incarceration for the registration offense, and begins to run at the time of sentencing for a sex offender who receives a nonincarcerative sentence for the offense." *Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030-01, 38068 (July 2, 2008), available at 2008 WL 2594934. Jurisdictions "are not required to 'toll' the running of the registration period during subsequent periods of confinement," and a jurisdiction may decide to toll "[b]ut that is a matter in the jurisdiction's discretion." *Id.*

Under Florida state law, sex offenders are generally required to submit to life-long registration, Florida Statutes § 943.0435(11), and the Government concedes that Florida has not had occasion to consider whether SORNA registration obligations are tolled by subsequent periods of confinement. Gov. Resp. 17 n.5. As of 2011, "Oregon ha[d] not yet implemented SORNA, let alone decided to toll the registration period for periods of confinement." *United States v. Moore*, 449 F. App'x 677, 680 (9th Cir. 2011) (Finding that, "because no tolling was in effect, the registration period for [the defendant's] 1994 conviction had run by the time of sentencing, and the district court therefore abused its discretion in requiring [the defendant] to register under SORNA as a special condition of supervised release."). Salazar's registration period therefore commenced upon his release from custody on the SORNA-qualifying offense in 1990 and the period of registration was not tolled by Salazar's subsequent periods of incarceration on other charges.

As a Tier I sex offender, Salazar was required to maintain his registration for fifteen years and, consistent with *Moore* and the Attorney General Guidelines quoted above, that period expired in 2005. Salazar was therefore not under an obligation to register as a sex offender under SORNA at the time of his plea and conviction in the present case.⁵ The Court concludes that Salazar has made a showing of actual innocence for the offense of failing to register as a sex offender under SORNA and 18 U.S.C. § 2250(a).

In addition to making a showing of actual innocence, a § 2241 petitioner must show that he has not had an unobstructed procedural shot at presenting his claim. *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006). Judgment was entered in this case on September 23, 2011 and Salazar was sentenced to a term of twenty-four months. ECF No. 31. Salazar was released from prison and commenced his term of supervised release on June 21, 2012. ECF No. 34. In the years following Salazar's release from custody, the Supreme Court and the Ninth Circuit have offered substantial clarifying guidance concerning the application of the categorical analysis in *Descamps v. United States*, 570 U.S. 254 (2013), and, for SORNA cases, in *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014). Although Salazar has repeatedly appeared before the Court for violation of his supervised release conditions, he could not challenge the validity of his underlying conviction in those proceedings. *United States v. Cate*, 971 F.3d 1054, 1058-59 (9th Cir. 2020). Nor is the validity of the underlying conviction a factor for consideration in a motion to terminate supervised release. *Id.* at 1058. Accordingly, the Court concludes that Salazar has not had an unobstructed procedural shot at presenting his claim prior to the filing of the instant motion.

*7 As Salazar has shown both actual innocence, in that he was not required to register as a sex offender under SORNA at the time of his offense of conviction, and has shown that he has not previously had an unobstructed procedural shot at challenging his conviction, the Court concludes that Salazar is entitled to relief under § 2241.

CONCLUSION

Defendant's Motion, which the Court construes as one brought under the "escape hatch" provision of 28 U.S.C. § 2255(e) and 28 U.S.C. § 2241 is GRANTED and Defendant's judgment of conviction is VACATED.

It is so ORDERED and DATED this 9th day of June 2021.

All Citations

Slip Copy, 2021 WL 2366086

Footnotes

- 1 Following the filing the initial motion in the case, the Ninth Circuit held that an underlying conviction could not be challenged in the context of a supervised release violation proceeding. *United States v. Cate*, 971 F.3d 1054 (9th Cir. 2020).
- 2 The application of the categorical approach in assessing the appropriate Tier is subject to an important exception: “The tier II sex offender provision also clearly permits a non-categorical approach in determining the age of the victim of the crime.” *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008).
- 3 In cases where the statute of conviction is “divisible,” meaning that the statute “effectively creates several different crimes pertaining to the possible combination of alternative elements,” courts are permitted to “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.” *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1134 (9th Cir. 2014) (internal quotation marks and citation omitted, alterations normalized). In this case, the parties agree that Salazar was convicted of violating the version of *Florida Statutes § 800.04(1)* operative in 1989 and neither party contends that *§ 800.04(1)* is further divisible. Accordingly, the Court must compare the 1989 version of *§ 800.04(1)* to the generic federal crime without additional inquiry into the specific facts giving rise to Salazar’s conviction.
- 4 Although, as the Government points out, the *Altman* defendant engaged in further sexual conduct with the victim, including “positioning himself on the body of the victim and touching, rubbing, or moving his body and/or pelvic area against the victim’s,” this conduct was charged separately under *Florida Statutes § 800.04(2)*. *Altman v. State*, 852 So.2d 870, 872 (Fl. App. 2003). The *Altman* defendant was convicted of violating *§ 800.04(1)* for kissing the victim and inserting his tongue into her mouth. *Id.*
- 5 Salazar may still be required to register as a sex offender under various state sex offender registration laws. Of note, the Presentence Report in this case indicates that Salazar is the subject of an outstanding warrant in the State of Florida related to his original crime of conviction, as well as outstanding warrants in the State of Alabama. PSR ¶¶ 27, 29.

2025 WL 1482787

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Windelyn Valdo SHOULDERBLADE,
Jr., Defendant-Appellant,

No. 24-3940

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Submitted May 21, 2025 * Seattle, Washington

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FILED MAY 23, 2025

On Appeal from the United States District Court for the District of Montana, Hon. Susan Watters, presiding, D.C. No. 1:23-cr-00141-SPW-1

Attorneys and Law Firms

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Steven C. Babcock, Evangelo Arvanetes, Assistant Federal Public Defenders, Federal Defenders of Montana, Billings, MT, for Defendant-Appellant.

Before: GOULD, TALLMAN, and CHRISTEN, Circuit Judges.

MEMORANDUM **

*1 Defendant-Appellant Windelyn Valdo Shoulderblade, Jr. is a convicted sex offender who was subsequently convicted by a jury for failing to register under the Sex Offender Registration and Notification Act ("SORNA") from December 2022 through November 2023 after traveling from Oklahoma to the Northern Cheyenne Reservation and then to Billings, Montana. See 18 U.S.C. § 2250(a). Appellant appeals the district court's denial of his Rule 29 motion for acquittal and the district court's sentence as substantively unreasonable. We review de novo the denial of a Rule 29 motion for acquittal. *United States v. Carranza*, 289 F.3d 634, 641 (9th Cir. 2002) (citing *United States v. Munoz*, 233 F.3d 1117, 1129 (9th Cir. 2000)). We review the reasonableness of the district court's sentence for abuse of discretion. *Gall v.*

United States, 552 U.S. 38, 51 (2007). We have jurisdiction under 28 U.S.C. § 1291, and we affirm on both grounds.

1. The district court did not err in denying Appellant's Rule 29 motion for acquittal because, considering the evidence in the light most favorable to the prosecution, the government presented sufficient evidence for a rational jury to find Appellant guilty beyond a reasonable doubt. *See United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Appellant argues that the prosecution did not establish the third element of the offense—that Appellant "knowingly" failed to register as a sex offender. 18 U.S.C. § 2250(a)(3). Appellant's defense was that he *believed he was registered* because (1) he completed some but not all of the required paperwork with a SORNA compliance officer in February 2023, at which time the officer erroneously deemed him "registered" and "compliant" in an internal log; and (2) he was fingerprinted, photographed, and had his address verified over the course of his 59 contacts with local law enforcement such that they were aware of his identity, location, and status as a sex offender. Regardless, the prosecution presented sufficient evidence for the jury to find that Appellant knowingly failed to register.

The prosecution presented testimony from a Northern Cheyenne Reservation SORNA compliance officer who described multiple encounters with Appellant beginning January 2023 through March 2023 in which the officer repeatedly notified Appellant that he was not registered and instructed him to go to the local office to complete registration paperwork and provide his fingerprints, and yet Appellant never did. Although the officer testified that he erroneously recorded Appellant as "registered" and "compliant" in an internal log after completing some paperwork in February 2023, the officer subsequently told Appellant that he needed to complete additional paperwork and provide his fingerprints to the local office in order to register.

Further, Appellant admitted on cross-examination that (1) he was aware of the requirement to register as a sex offender within three days of moving to a new jurisdiction (in part because he had previously been convicted of failing to register); and (2) he understood that even after completing some paperwork with the compliance officer, he still needed to come to the local office to provide his fingerprints and complete additional paperwork in order to register, but that he never did.

***2** The prosecution also presented evidence that, during a law enforcement encounter in Billings in July 2023, a sheriff's officer personally served Appellant with a letter notifying him that he needed to register within 10 days. The officer's testimony, the letter, and the patrol car dashboard footage were admitted into evidence. The footage showed the officer explaining that the letter was a notice requiring Appellant to register as a sex offender and that a warrant would be issued for his arrest if he failed to register as instructed. The footage also showed Appellant stating that he could read and knew where to go to register. But Appellant never registered and was subsequently arrested.

At the close of trial, the jury was instructed that "an act is done knowingly if the defendant is aware of the act and does not fail to act through ignorance or mistake or accident." (citing Model Crim. Jury Instr. 9th Cir. 4.8 (2024)). The district court did not err in denying the motion for acquittal because, viewing the evidence in the light most favorable to the prosecution, a rational jury could have concluded that Appellant knew of his requirement to register, and his failure to do so was not out of ignorance, mistake, or accident. *See Nevils*, 598 F.3d at 1163–64 (quoting *Jackson*, 443 U.S. at 319).

2. The district court's sentence of 84 months imprisonment followed by 15 years of supervised release was not substantively unreasonable under the totality of the

circumstances. *See United States v. Crowe*, 563 F.3d 969, 977–78 (9th Cir. 2009). The district court adopted the Presentence Investigation Report without objection from either party, which assigned Appellant a criminal history score of VI and an offense level of 22, yielding a guidelines range of 84–105 months imprisonment. Appellant requested a downward variance of 30 months imprisonment and five years of supervised release.

In declining to vary downward, the court properly addressed the 18 U.S.C. § 3553 factors, including: the mitigating aspects of Appellant's defense; that the purpose of SORNA was effectively met because law enforcement knew Appellant's whereabouts; the aggravating factors of Appellant's offense in that he had many opportunities to register but did not; and that Appellant had failed to register as early as 2017 and had since committed three new sex offenses while unregistered. *See id.* Under the totality of those circumstances, the district court's sentence within the guidelines range—notably, at the bottom of that range—was not substantively unreasonable. *See Rita v. United States*, 551 U.S. 338, 358 (2007).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2025 WL 1482787

Footnotes

- * The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
- ** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2019 WL 6691014

Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee,
at Knoxville.

UNITED STATES of America, Plaintiff,
v.
Champ Terry SKAGGS, Jr., Defendant.

No. 2:18-CR-51-RLJ-HBG

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Filed 11/25/2019

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

H. Bruce Guyton, United States Magistrate Judge

***1** Defendant Champ Terry Skaggs, Jr., who is alleged [Doc. 3] to be an individual required by law to register as a sex offender, is charged with failure to update his registration between December 2017 and March 2018, after traveling in interstate commerce, in violation of [18 U.S.C. § 2250\(a\)](#) and [34 U.S.C. § 20911](#). The Defendant asks the Court to dismiss this charge [Docs. 28 & 45], arguing the application of the Sex Offender Registration and Notification Act (“SORNA”), [34 U.S.C. § 20901, et seq.](#), to him violates the nondelegation doctrine, the *Ex Post Facto* Clause, and his right to the due process of law. The Defendant also argues that the Indictment fails to state an offense, because his 2002 Virginia conviction for sexual battery of a female is not a sex offense under SORNA. On June 20, 2019, the Supreme Court held that SORNA’s provision authorizing the Attorney General to state whether the Act applies to individuals convicted of sex offenses prior to SORNA’s enactment does not violate the nondelegation doctrine. *Gundy v. United States*, [139 S. Ct. 2129-30 \(2019\)](#). For the reasons discussed herein, the undersigned finds that application of SORNA’s registration requirements to Defendant Skaggs also does not violate the *Ex Post Facto* or Due Process Clauses. Finally, the Court finds that the Indictment properly charges the Defendant with a violation of [18 U.S.C. § 2250\(a\)](#). Accordingly, the Court

recommends that the Defendant’s Motion to Dismiss [Doc. 28] and supplement [Doc. 45] be denied.

I. PROCEDURAL HISTORY

On April 10, 2018, the Grand Jury charged [Doc. 3] Defendant Skaggs, who is alleged to be a previously convicted sex offender required to register under SORNA, with knowingly failing to register or update his sex offender registration.¹ On September 7, 2018, the Defendant filed a Motion to Dismiss [Doc. 28] the Indictment, arguing that Congress violated the nondelegation doctrine when it allowed the Attorney General to determine whether SORNA’s registration requirements applied to persons convicted of sex offenses prior to SORNA’s enactment.² The Government timely responded [Doc. 29] in opposition, and the Court³ heard argument on the motion on September 24, 2018. At that hearing, the Defendant clarified that he was raising issues regarding the *Ex Post Facto* and Due Process Clauses, as well as the new issue of whether the Defendant was required to register as a sex offender for his 2002 Virginia misdemeanor sexual battery conviction. The Court requested supplemental briefing on the issues raised in addition to the nondelegation clause issue. On November 8, 2018, the Defendant filed a Supplemental Motion to Dismiss [Doc. 45] and five exhibits. The Government again responded [Doc. 46] in opposition and provided a sealed exhibit [Doc. 50].

***2** On June 20, 2019, the Supreme Court issued its ruling in *Gundy v. United States*, [139 S. Ct. 2116 \(2019\)](#). The parties appeared before the Court on June 26, 2019. At that time, further argument on the Supplemental Motion was continued [Doc. 62], to allow defense counsel to review the Supreme Court’s ruling in *Gundy* and to determine whether *Gundy* resolved the remaining issues raised in the Defendant’s motions. The motions to dismiss were referred [Doc. 63] to the undersigned on August 26, 2019. See [28 U.S.C. § 636\(b\)](#).

On September 5, 2019, the parties appeared before the undersigned for a motion hearing. Assistant United States Attorney Megan Lynn Gomez appeared on behalf of the Government. Assistant Federal Defender Nikki C. Pierce represented Defendant Skaggs, who was also present. At that time, Ms. Pierce stated that while the ruling in *Gundy* answered the nondelegation argument, it did not address the *ex post facto* and due process arguments raised in the Supplemental Motion. At the conclusion of the parties’ arguments on those issues, the Court took the motions under advisement.

II. FINDINGS OF FACT

Defendant Skaggs was convicted of sexual battery of a female, a misdemeanor, in Wise County, Virginia, on November 25, 2002 [Doc. 32-1, Judgment; *see also* Doc. 45-1, Order to Amend Indictment].⁴ He was sentenced to twelve months of incarceration to be followed by twelve months of supervised probation [Doc. 32-1]. On August 25, 2003, Defendant Skaggs registered as a sex offender and signed a Virginia Sex Offender and Crimes Against Minors Registration Form, acknowledging his duty to re-register as a sex offender yearly for ten years [Docs. 45-5, 50]. On his initial registration form, Defendant Skaggs stated that he was convicted on November 25, 2002, of “Sexual Battery-Minor” in violation of [Virginia Code Annotated § 18.2-67.4](#) [Doc. 50, p. 2]. In a subsequent registration form, completed on May 5, 2006, Defendant Skaggs stated that his sexual battery victim was sixteen years old [Doc. 50, p. 5]. Congress enacted SORNA on July 27, 2006.

On April 11, 2017, Defendant Skaggs submitted a sex offender registration form to the Virginia State police, stating that his physical and mailing address had changed and listing his address in Norton, Virginia [Exh. 3 to Sept. 24, 2018 hg]. On March 7, 2018, Defendant Skaggs gave a statement to law enforcement following his arrest [Exh. 2 to Sept. 24, 2018 hg]. In that statement, the Defendant said that he is required to register as a sex offender in Virginia annually, that he knew he was required to inform Virginia officials before leaving the state for work or a change of residence, and that he knew that he would be required to register in Tennessee, if entering the state to work or reside there [Exh. 2 to Sept. 24, 2018 hg]. On April 10, 2019, Defendant Skaggs was indicted [Doc. 3] in the instant case.

III. POSITIONS OF THE PARTIES

Defendant Skaggs argues [Doc. 28] that SORNA is unconstitutional as applied to him, because Congress violated the nondelegation doctrine by permitting the Attorney General to decide whether the Act applied to persons convicted of sex offenses prior to SORNA's enactment. He also contends [Doc. 45] that SORNA is unconstitutional as applied, because it constitutes a punishment imposed well after his conviction in violation of the *Ex Post Facto* Clause and his right to due process was violated because he was not notified at the time of his conviction that he would have to register as a sex offender. Finally, Defendant argues that the Government cannot show that he is a sex offender

under SORNA as a matter of law, because his 2002 Virginia conviction for misdemeanor sexual battery is not a sex offense under SORNA.

*3 The Government responds [Docs. 29 & 46] that SORNA's registration requirements are not unconstitutional as applied to Defendant Skaggs. First, it maintains that Congress properly delegated to the Attorney General the ability to issue regulations regarding how SORNA would be applied to those already convicted of qualifying offenses. Second, it contends that the *Ex Post Facto* Clause is not implicated because compliance with a civil registration scheme like SORNA is not a punishment and the criminal provisions of SORNA only apply after the offender fails to register. The Government maintains that the Defendant's due process rights were not infringed because he had actual notice that he was required to register in Virginia's sex offender registry. Finally, the Government asserts that the Defendant's Virginia sexual battery conviction is a “sex offense” requiring registration under SORNA.

IV. ANALYSIS

The Sex Offender Registration and Notification Act, [34 U.S.C. § 20901, et seq.](#),⁵ enacted on July 27, 2006, establishes a national system for the registration of sex offenders. The Act requires 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.” [34 U.S.C. § 20913\(a\)](#). At the time of SORNA's enactment, Congress delegated to the Attorney General the “authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).”⁶ [34 U.S.C. § 20913\(d\)](#). On February 28, 2007, the Attorney General made SORNA applicable to all sex offenders, including those convicted of sex offenses prior to SORNA's enactment. [28 C.F.R. § 72.3](#).

Defendant Skaggs, whose conviction for sexual battery predates the enactment of SORNA, argues that SORNA is unconstitutional as applied to him. First, he argues that Congress's delegation of the determination of whether SORNA applies to pre-Act offenders to the Attorney General violates the nondelegation doctrine. Defendant Skaggs also argues that SORNA's application to him violates the *Ex*

Post Facto and Due Process Clauses of the Constitution. Finally, the Defendant contends that as a matter of law, the Government cannot prove the first element of 18 U.S.C. § 2250(a), that he is a sex offender required to register under SORNA. The Court examines each of these arguments in turn.

A. Nondelegation Doctrine

The Constitution assigns the power to legislate to Congress. U.S. Const. Art. I §§ 1, 8. “The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.” *Gundy v. United States*, 139 S.Ct. 2116, 2121 (2019); see also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (holding that Congress may not “abdicate or ... transfer” its “essential legislative functions”). However, the need for “flexibility and practicality” in adapting laws to the myriad details and variations of life has long been recognized, and Congress is permitted to “lay[] down policies and establish[] standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.” *Panama Refining*, 293 U.S. at 421.

The Defendant argues [Doc. 28] that in authorizing the Attorney General to determine whether SORNA applies to pre-Act offenders, Congress delegated its authority without providing any intelligible guiding principles to constrain the Attorney General’s discretion. The Defendant contends that the ability to determine a statute’s scope is a “core legislative function,” especially with regard to criminal statutes. He asserts that the Office of the Attorney General and the Department of Justice are not scientific agencies with particular expertise in criminology and sex offenders but, instead, are police agencies, tasked with the arrest and prosecution of those who violate federal law. Thus, the Defendant maintains that SORNA violates the nondelegation doctrine, because it delegates to the Attorney General unlimited discretion to determine who is required to register.

*4 The Government responds [Doc. 29] that our appellate court has held that Congress properly delegated to the Attorney General authority to determine whether SORNA applies to pre-Act offenders. 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.’” *Id.* (quoting *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 474 (2001)) (alteration in original). The Government contends that the

Court remains bound by this precedent unless and until the Supreme Court overrules it.

In *Gundy*, the Supreme Court decided this issue against the Defendant. 139 S. Ct. at 2129-30. The Court held that by requiring a “comprehensive” system of registration, defining “sex offenders” to include pre-Act offenders, and granting the Attorney General only temporary authority, Congress provided intelligible principles to guide the Attorney General in implementing SORNA. *Id.* at 2130 (observing that “the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found ...)”). At the September 5 motion hearing, defense counsel acknowledged that the Supreme Court’s decision in *Gundy* controls this issue. Accordingly, the undersigned finds that the Defendant’s request to dismiss the Indictment based upon an alleged unconstitutional delegation of legislative authority must be denied.

B. Ex Post Facto Clause

Defendant Skaggs also argues that application of SORNA’s registration requirements to him is a punishment imposed well after his conviction in violation of the *Ex Post Facto* Clause. The *Ex Post Facto* Clause in Article I, § 10, of the Constitution, prohibits laws that “‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’” *Cal. Dep’t of Corrections v. Morales*, 514 U.S. 499, 504 (1995) (quoting *Collins v. Youngblood*, 497 U.S. 37, 43 (1990)). The *Ex Post Facto* Clause precludes the punishment of a defendant “for an act which was not punishable at the time it was committed.” *Weaver v. Graham*, 450 U.S. 24, 28 (1981). “Critical to relief under the *Ex Post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint when ... punishment [is increased] beyond what was prescribed when the crime was consummated.” *Id.* at 30-31.

The Defendant argues that he was not required to register as a sex offender under either SORNA (which had yet to be enacted) or Virginia law at the time of his conviction for sexual battery on November 25, 2002. The Defendant contends that he was not told that he was required to register as a sex offender at the time of his conviction and, at that time, Virginia law only required registration for offenders with three sexual battery convictions, not one.⁷ He states that it was only upon his release from incarceration that his probation officer told him that he was required to register and had him sign the state registration form. The Defendant

surmises that his probation officer believed that he was required to register based upon changes to Virginia law in 2003, requiring registration when the victim of sexual battery is a minor. *See Va. Code Ann. § 9.1-902(A)(1) & (B)(2) (2003)*. Moreover, the Defendant asserts that his subsequent state prosecutions for failure to register as a sex offender in 2005, 2006, and 2018 (related pending charges) and his 2013 conviction for failure to register as a sex offender are also erroneous. He asserts that applying SORNA to him increases his punishment for an offense committed nearly two decades ago.

*5 The Defendant relies on the reasoning of the Eastern District of North Carolina in *United States v. Edward Jay Wass*, No. 7:18-CR-45-BO, Order (E.D. N.C. July 5, 2018) [Doc. 28-1].⁸ In *Wass*, the court dismissed the indictment charging the defendant with a violation of 18 U.S.C. § 2250(a) [Doc. 28-1, p. 10]. It held “SORNA’s registration requirement, while civil in description, to be punitive in nature” and, thus, SORNA’s “application to individuals who committed registrable offenses prior to its passage is a violation of the *Ex Post Facto* Clause of the Constitution” [Doc. 28-1, p. 10]. The North Carolina district court found SORNA’s registration requirements to be punitive, because they prevent the offender from living and working freely like other citizens [Doc. 28-1, p. 8]. The court also observed that SORNA makes the offender’s personal information available online, requires that the offender appear in person annually to register, and requires that the offender constantly update his or her information [Doc. 28-1, p. 8]. The court recognized that many states and localities restrict where sex offenders may live or work [Doc. 28-1, p.8]. Moreover, the court found that SORNA’s declaration of purpose illustrates that it is intended for deterrence and retribution, which are traditional aims of punishment [Doc. 28-1, p. 8]. *See 34 U.S.C. § 20901*. Finally, the court opined that “the public nature of the registry makes it a tool of public shame, which has been a consistent mechanism for punishment in human history” [Doc. 28-1, p. 8 (citing *Smith v. Doe*, 538 U.S. 84, 98 (2003))].

The Government points the Court to the settled precedent in this Circuit, that SORNA’s application to offenders convicted prior to its enactment does not violate the *Ex Post Facto* Clause. *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012). In *Felts*, the court relied on the Supreme Court’s holding in *Smith v. Doe*, 538 U.S. 84, 105-06 (2003), that the Alaska sex offender registration statute “is not punitive, but civil in nature” and, thus, its retroactive application did not

violate the *Ex Post Facto* Clause. *Id.* In assessing whether the Alaska statute was civil or criminal, the Supreme Court first examined the legislature’s intent as revealed in the text of the statute. 538 U.S. at 93. Like the Alaska statute in *Smith*, SORNA also states that its purpose to “establish a comprehensive national system for the registration of [sex] offenders,” “[i]n order to protect the public from sex offenders and offenders against children[.]” 34 U.S.C. § 20901; *see Gundy*, 139 S.Ct. at 2121 (observing that SORNA’s express purpose is to create a national system for the registration of sex offenders in order to protect the public); *Smith*, 538 U.S. at 94 (identifying the protection of the public against sex offenders as the main government interest in enacting the Alaska statute).

In determining whether the legislature intended the Alaska sex offender registry to be regulatory or punitive, the Supreme Court in *Smith* also examined other attributes of the statute, such as where it was codified and its enforcement procedures. *Id. at 94*. SORNA is codified in Title 34, which governs “Crime Control and Law Enforcement,” rather than in Title 18, which contains statutes relating to “Crimes and Criminal Procedure.” The Court finds that like its stated purpose, the location of SORNA reveals Congress’s intent that it be civil in nature. With regard to enforcement provisions, the Court notes that in SORNA, in order “[t]o strengthen state enforcement of registration requirements, Congress established, as a funding condition, that ‘[e]ach jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.’” *Carr v. United States*, 560 U.S. 438, 453 (2010) (quoting 34 U.S.C. § 20913). “Meanwhile, Congress in § 2250 exposed to federal criminal liability, with penalties of up to 10 years’ imprisonment, persons required to register under SORNA over whom the Federal Government has a direct supervisory interest or who threaten the efficacy of the statutory scheme by traveling in interstate commerce.” *Id.* The Court finds the locating of § 2250 in Title 18, away from the registration requirements, also supports a finding that SORNA is regulatory or civil in nature.

*6 After looking at the legislature’s intent, the Supreme Court in *Smith* also examined whether the *effects* of the Alaska sex offender registry were punitive, examining specifically whether “the regulatory scheme[] has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the

traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.” [538 U.S. at 97](#). The Supreme Court rejected the argument that the Alaska sex offender registry was the equivalent of public shaming, holding that “publicity and the resulting stigma” are not central to the “objective of the regulatory scheme,” that the purpose of the statute is to “inform the public for its own safety, not to humiliate the offender,” and the notification is passive, requiring the public to seek out the information. *Id.* at [99, 105](#). The Supreme Court also held that the Alaska act does not impose any physical restraint, nor does it limit the sex offender’s activities. *Id.* at [100](#). Instead, the sex offender “remains free to change jobs or residences.” *Id.* The Court also held that the mandatory reporting feature of the act was not punitive: “[T]he registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause.” *Id.* at [102](#). The undersigned finds that this analysis also applies to SORNA.

In the instant case, Defendant Skaggs argues that SORNA is more punitive than the Alaska sex offender registration scheme analyzed in *Smith*. Our appellate court also rejected this argument in *Felts*:

[The defendant] attempts—to little avail—to distinguish SORNA from the Alaska statute in question, but fails to address the unanimous consensus among the circuits that SORNA does not violate the *Ex Post Facto* Clause. [The defendant’s] crime of failing to update his sex offender registry after the enactment of SORNA was entirely separate from his crime of rape of a child and aggravated sexual battery.

Felts, [674 F.3d at 606](#). In other words, the crime that Congress seeks to punish in SORNA’s enforcement provision is the failure to register as required upon relocation, work, or education in a new state, not the initial sex offense. *See also Carr*, [560 U.S. at 458](#) (declining to reach the *ex post facto* issue but holding that Congress intended [18 U.S.C. § 2250\(a\)](#) to apply only to interstate travel occurring after SORNA’s enactment). Finally, the Court observes that in *Gundy*, the Supreme Court discussed at length that SORNA requires pre-Act offenders to register as sex offenders, yet made no

mention of an *ex post facto* violation. [139 S. Ct. at 2124](#). The Court finds that SORNA’s registration requirements do not violate the *Ex Post Facto* Clause, because they are not punitive but, instead, are civil in nature.

Defendant Skaggs also appears to argue that the 2003 changes in the Virginia Sex Offender and Crimes Against Minors Registry Act, [Va. Code Ann. §§ 9.1-900 to -923](#), also violate the *Ex Post Facto* Clause by requiring him to register as a sex offender even though his conviction occurred prior to their enactment. The undersigned finds that the Virginia courts have settled this issue against the Defendant. In *Kitze v. Commonwealth*, the Virginia Court of Appeals held that the Virginia Sex Offender Registry (the version existing prior to 2003) is regulatory, not punitive, and that the requirement to register as a sex offender is “*not penal[.]*” [475 S.E.2d 830, 832 \(Va. Ct. App. 1996\)](#), *cert. denied*, [522 U.S. 817 \(1997\)](#). Thus, the court held that “the sex offender registration requirement does not violate the constitutional prohibitions against *ex post facto* laws,” even though the statute was enacted after the defendant’s offenses and his first trial, which was reversed on appeal. *Id.* at [220](#) (noting that the enactment of the Sex Offender Registry became effective prior to the defendant’s guilty plea during his second trial). The Virginia Court of Appeals subsequently applied its holding in *Kitze* to subsequent amendments to the Sex Offender and Crimes Against Minors Registry Act, under which the instant Defendant was required to register in 2003. *Baugh v. Commonwealth*, [809 S.E.2d 247, 251 \(Va. Ct. App. 2018\)](#) (finding the 2007 amendments to the act did not transform the civil statute into a criminal penalty). Accordingly, like SORNA, the Virginia Sex Offender and Crimes Against Minors Registry Act is a civil regulatory scheme, and its application to Defendant Skaggs after his 2002 conviction does not violate the *Ex Post Facto* Clause.

C. Due Process Clause

*7 The Defendant also argues that at the time he entered a guilty plea to misdemeanor sexual battery in Virginia, he was not advised that he would be required to register under Virginia and federal law and would be subject to severe criminal penalties for the failure to do so. He contends that because the requirement that one register as a sex offender, potentially for the remainder of one’s life, is a particularly severe penalty that limits the individual’s residential and employment opportunities, it is a violation of due process to fail to advise the Defendant of this consequence at the time of his guilty plea. The Defendant likens his situation to that in *Padilla v. United States*, in which the Supreme Court held that

counsel provided deficient representation in failing to advise the defendant that he could be deported as a consequence of his guilty plea. [559 U.S. 356, 368-69 \(2010\)](#). The Supreme Court observed that deportation is a “particularly severe ‘penalty,’ ” even though it “is not, in a strict sense, a criminal sanction” and “removal proceedings are civil in nature[.]” *Id.* at 365. Defendant Skaggs argues that, like deportation, a lifetime registration requirement is a particularly burdensome consequence that arises automatically from the conviction for a sex offense. He also contends that the requirement to register is so closely connected to the sex offense of conviction that, like deportation, it is “difficult to classify as either a direct or collateral consequence.” *Id.* at 366.

The Defendant notes that two state courts have extended the reasoning in *Padilla* to sex offender registration requirements. See *People v. Fonville*, 804 N.W.2d 878, 894 (Mich. Ct. App. 2011); *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010). The Defendant argues that his 2002 guilty plea to sexual battery of a female was not knowingly and voluntarily entered, because he did not know that he would be required to register as a sex offender at some point in the future. Accordingly, he contends that the application of SORNA to him imposes the requirement that he register as a sex offender without notice at the time of conviction in violation of due process.

The Government argues that the Supreme Court's ruling in *Padilla* cannot be extended to a duty to advise of the requirement to register as a sex offender, because deportation and a civil registration requirement are two different things. It asserts that SORNA is a civil registration scheme, not a punishment, and as such, it is not a consequence of which the Defendant must have been advised at his guilty plea. Moreover, the Government contends that regardless of whether the Defendant was informed of a registration requirement at the time of his guilty plea in 2002, he was unquestionably informed that he was required to register under Virginia law in 2003. It maintains that the Defendant cannot argue lack of notice when he was informed and registered for more than a decade, prior to the instant offense.

First, the Court observes that our Court of Appeals has held that “sex offender registration is a collateral consequence of a guilty plea,” and that the failure to advise a defendant of the duty to so register is not a basis to withdraw the guilty plea. *Blumenthal v. Curley*, No. 12-1221, 2013 WL 7141279, *2 (6th Cir. Apr. 1, 2013); see also *Leslie v. Randle*, 296 F.3d 518, 523 (6th Cir. 2002) (concluding that “that the classification,

registration, and community notification provisions [of the Ohio sex offender registration statute] are more analogous to collateral consequences such as the loss of the right to vote than to severe restraints on freedom of movement such as parole”); *Rose v. Bauman*, No. 2:17-cv-10836, 2018 WL 534490, *5 (E.D. Mich. Jan. 24, 2018) (observing that the “Sixth Circuit has concluded on several occasions that the requirement to register as a sex offender is a collateral one that need not be disclosed to the defendant in order for a plea to be valid”). *Blumenthal* was decided well after *Padilla*. Indeed, despite the passing of nearly a decade since the *Padilla* decision, the Defendant points to no federal case holding that a failure to advise a defendant of his duty to register as a sex offender prior to his guilty plea is a violation of due process.⁹

*8 Second, the Court finds that Defendant Skaggs situation is distinguishable from the defendant in *Padilla*. In *Padilla*, the Supreme Court examined whether the defendant received the ineffective assistance of counsel, because his attorney did not advise him that his guilty plea would subject him to automatic deportation. [559 U.S. at 360](#). The Court found defendant's counsel's representation was deficient because “counsel could have easily determined that [defendant's] plea would make him eligible for deportation simply from reading the text of the statute[.]” *Id.* at 368. However, the Court recognized that in some cases, “the deportation consequences of a particular plea are unclear or uncertain,” and in those cases, the attorney need only advise the defendant that the “pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 369. In the instant case, no one could have advised Defendant Skaggs at the time of his guilty plea in 2002 that he would be required to register as a sex offender under SORNA, which was not enacted for nearly four more years.¹⁰ See *Jackson v. United States*, No. 18-15028, 2019 WL 6114434, *1 (11th Cir. Nov. 18, 2019) (Mem. Opn) (affirming Northern District of Georgia's holding that counsel could not have advised defendant of SORNA, which had not been enacted at time defendant pled guilty). In other words, the failure to advise a defendant of a consequence that does not exist is not a violation of due process.

Additionally, as argued by the Government, at the time of SORNA's enactment, Defendant Skaggs had actual notice that he was required to register as a sex offender under Virginia law. In *Felts*, our appellate court reasoned that where the registration requirements under a state sex offender registry are congruent with or exceed that of SORNA, a defendant required to register under a state registry has “sufficient

fair notice to satisfy due process” of SORNA. 674 F.3d at 604; *see also United States v. Stock*, 685 F.3d 621, 627 (6th Cir. 2012) (holding that defendant cannot claim a due process violation in SORNA’s retroactive application to him, when he “admitted in his plea agreement that he knew about SORNA’s registration requirement”). In the instant case, the Defendant states his probation officer advised him of his duty to register in the Virginia sex offender registry upon his release from prison in 2003. The registration forms filed in the record advise the Defendant of his continuing duty to register. Finally, in a statement given on March 7, 2018, the Defendant admitted to law enforcement that he knew he was required to register as a sex offender each year in Virginia, that he knew he was required to inform Virginia officials before leaving the state for work or a change of residence, and that he knew he would be required to register as a sex offender in Tennessee, if he entered that state to work or live there. Accordingly, the Court finds that Defendant Skaggs had actual knowledge of his duty to register as a sex offender and, thus, his instant prosecution under § 2250(a) does not violate his right to due process.

D. Failure to State an Offense

At the September 5, 2019 motion hearing,¹¹ defense counsel asserted a fourth basis for dismissal of the Indictment, arguing that the Government assumes but cannot prove Defendant Skaggs is a “sex offender” under SORNA, because his 2002 Virginia sexual battery conviction did not require a showing of a sexual act or sexual contact. In order to show a violation of 18 U.S.C. § 2250(a), the Government must prove that the individual (1) is required to register under SORNA, (2) traveled in interstate or foreign commerce, and (3) knowingly failed to register or update his or her registration as required by SORNA. *Carr*, 560 U.S. at 445-46 (observing that the elements must be read sequentially). An offender qualifies as a sex offender if he or she is convicted of a “sex offense,” which SORNA defines, in pertinent part, 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 undersigned takes the Defendant to be arguing that the Government cannot show that he violated 18 U.S.C. § 2250(a) as a matter of law, because it cannot show that he is a sex offender required to register under SORNA. Before addressing the issue, the Court considers two preliminary issues: (1) whether the Court may determine pretrial that the Defendant does or does not qualify as a sex offender and (2) if yes, what facts may the Court consider.

(1) Pretrial determination

*9 Whether the Government can prove an element of the offense is generally a matter for the trier of fact to determine at trial. *Federal Rule Criminal Procedure 12(b)(3)(B)(v)* provides that “a defect in the indictment,” specifically the failure to state an offense, “must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits[.]” Moreover, the Court “may make preliminary findings of fact necessary to decide the questions of law presented by pretrial motion so long as the court’s findings on the motion do not invade the province of the ultimate finder of fact.” *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976).

From the case law and *Rule 12(b)(3)(B)(v)*, the Court distills two requirements for addressing a motion to dismiss the indictment alleging that the government cannot establish the offense charged as a matter of law: (1) the issue raised must be a question of law and (2) the relevant facts must be undisputed. *Jones*, 542 F.2d at 665; *see also United States v. Fitzgerald*, No. 1:16-cr-178, 2017 WL 74074, *2 (6th Cir. Jan. 9, 2017) (examining whether undisputed facts in the criminal complaint constituted operating an airplane while under the influence of alcohol as a matter of law); *see also United States v. Vertz*, 40 F. App’x 69, 71 (6th Cir. 2002) (stating that “where the defendant is arguing that as a matter of law the undisputed facts do not constitute the offense charged in the indictment, the [c]ourt is reviewing a question of law, not fact”). In the instant case, the relevant facts—that the Defendant was convicted of sexual battery of a female in violation of Va. Code Ann. § 18.2-67.4 in November 2002 and that the victim was a minor—are not in dispute.¹² Accordingly, the Court finds the Defendant has raised an issue of law and undisputed fact that may be determined pursuant to a pretrial motion to dismiss the Indictment.

(2) Analytical framework

In order to determine whether the Defendant’s 2002 Virginia conviction for sexual battery is a “sex offense” under SORNA, the Court must analyze whether that conviction meets the statutory definition of a “sex offense.” “The Supreme Court has developed three analytical frameworks that potentially control the scope of materials that a court may consider [and] the focus of the court’s inquiry[:] ... the ‘categorical approach,’ the ‘modified categorical approach,’ and ... the ‘circumstance-specific approach’ (also known as the ‘non-categorical approach’).” *United States v. Price*, 777

F.3d 700, 704 (4th Cir.) (examining which analytical approach is appropriate for a motion to dismiss the indictment for failure to allege the Defendant was a sex offender required to register under SORNA), cert. denied, 135 S. Ct. 2911 (2015). The “categorical approach,” examines the elements of the statute of conviction to determine whether a defendant committed a qualifying offense. *Id.* at 704 (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990) (requiring the court “to look only to the fact of conviction and the statutory definition of the prior offense”)). The “modified categorical approach” also examines the elements but it is used when the statute of conviction is “divisible” (i.e., the statute contains alternative ways to commit the offense). *Id.* at 705. The modified categorical approach permits the court to look to a limited number of documents from the underlying case (the “Shepherd documents,”¹³ which are the indictment, the plea agreement or change-of-plea transcript, the ruling and factual findings at a bench trial, and the jury instructions) in order to “discern which alternative element formed the basis of conviction.” *Id.* The “circumstance-specific approach” looks at the facts, not the elements, of the underlying offense. *Id.*

***10** Defendant Skaggs argues that the Court must use the modified categorical approach¹⁴ (and not look to the fact that the victim was a minor) to determine whether sexual battery of a female in violation of Va. Code Ann. § 18.2-67.4 is a sex offense for which one must register under SORNA. He contends that at trial, the Government would be limited to the *Shepherd* documents, which in this case consist only of the Virginia amended indictment and judgment, in order to prove he is a sex offender required to register under SORNA. The Government responds that the categorical approach only applies to punishment and, thus, is correctly employed at sentencing. It argues that SORNA is a civil registry, not punishment, and that the categorical approach does not apply.

Our appellate Court has not addressed which analytical framework is appropriate to use when assessing whether a defendant's prior conviction qualifies as a sex offense under SORNA, in the context of trial or a pretrial motion to dismiss the indictment. At the September 5 motion hearing, defense counsel referred the Court to *United States v. Barcus*, in which our appellate court used the categorical approach to determine whether a Tennessee conviction for attempted aggravated sexual battery of a victim under age thirteen renders the defendant a Tier III sex offender under SORNA for the purpose of determining the defendant's guidelines at sentencing. 892 F.3d 228, 231-32 (6th Cir. 2018). However, the three circuit courts to consider which analytical approach

applies at the trial or pretrial phase, rather than the sentencing phase, have all chosen the circumstance-specific approach. *Price*, 777 F.3d at 710; *United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir.) (en banc), cert. denied, 562 U.S. 961 (2010); *United States v. Mi Kyung Byun*, 539 F.3d 990-94 (9th Cir.), cert. denied, 555 U.S. 1088 (2008).

In *Price*, the Court of Appeals for the Fourth Circuit found that the “text, structure, and purpose of the relevant SORNA provisions show that Congress intended for the circumstance-specific approach to apply[.]” 777 F.3d at 708. The court found that the language used in the definition of “sex offense,” specifically the parts relating to minor victims, reveals that Congress intended the court to look to the nature of the conduct involved. *Id.* at 708-09. But see *United States v. Berry*, 814 F.3d 192, 199 (4th Cir. 2016) (indicating that a categorical approach may be appropriate in determining whether an offense involves sexual conduct or contact under § 20911(5)(i)). The Fourth Circuit also reasoned that the Sixth Amendment concerns motivating the use of the categorical approach at sentencing are not present at the trial or pretrial stage. *Price*, 777 F.3d at 710 (citing *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009) (holding that the categorical approach is not required in determining whether an offense involves sexual conduct contact a deportation loss amount, because the jury in the subsequent illegal reentry trial would determine the loss amount beyond a reasonable doubt)). Like in *Price*, Defendant Skaggs is entitled to proceed to trial and have a jury determine beyond a reasonable doubt whether his 2002 Virginia sexual battery conviction is a sex offense under SORNA. See *id.* (finding that the jury would have examined the facts underlying the defendant's prior conviction to determine whether it met the definition of a sex offense under SORNA). Finally, the Court notes that in determining whether a charge constitutes an offense as a matter of law, the court may consider both the elements of the offense *and* any undisputed facts. See *Jones*, 542 F.2d at 665. This supports a finding that the circumstance-specific approach applies to the instant determination.

***11** Although the weight of persuasive authority supports using the circumstances-specific approach, the Court need not make a definitive determination in this case. As discussed in the next two sections, the Court finds Defendant Skaggs's 2002 Virginia sexual battery conviction qualifies as a sex offense under SORNA under either the categorical or the circumstances-specific approach.

(3) The Categorical Approach

As discussed above, the categorical approach looks to the elements of the statute of conviction. “The elements comprising the statute of conviction must be the same as, or narrower than, those of the generic offense in order to find a categorical match.” *Price*, 777 F.3d at 704 (citing *Taylor*, 495 U.S. at 599). SORNA defines a “sex offender” as one “convicted of a sex offense.” 34 U.S.C. § 20911(1). A “sex offense,” in turn, is defined generally as “a criminal offense that has as an element involving a sexual act or contact with another[.]” 34 U.S.C. § 20911(5)(A)(i). In 2002, Virginia law proscribed sexual battery under § 18.2-67.4(A) as follows: “An accused is guilty of sexual battery if he sexually abuses, as defined in § 18.2-67.10, ... the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse[.]” “Sexual abuse” is defined in Virginia law as “an act committed with the intent to sexually molest, arouse, or gratify any person, where ... [t]he accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts” or “forces the complaining witness to touch the accused's intimate parts or material directly covering such intimate parts[.]” Va. Code Ann. § 18.2-67.10(6)(a)-(b). Defense counsel contends that the Defendant's 2002 Virginia sexual battery conviction is not a sex offense under SORNA, because touching the material covering the victim's intimate parts is not a sexual act or contact.

In the instant case, the Court finds that Virginia sexual battery is a “sex offense” under SORNA. Under federal law,

“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).

Barcus, 892 F.3d at 232 (emphasis added). Sexual battery under the Virginia statute involves touching the victim's intimate parts or the material covering the intimate parts with the intent to “sexually ... gratify any person[.]” Va. Code Ann. § 18.2-67(6). “ ‘Intimate parts’ means the genitalia, anus, groin, breast, or buttocks of any person.” Va. Code Ann. § 18.2-67.10(2). Thus, the Court finds that Virginia sexual battery involves “sexual contact,” as that term is defined

under federal law. The Indictment does not fail to state an offense as a matter of law.

(4) The Circumstance-Specific Approach

In the circumstance-specific approach, the Court “may consider reliable evidence concerning whether the prior offense involved conduct or circumstances that are required by the federal statute.” *Price*, 777 F.3d at 705. SORNA also defines a sex offense as “a criminal offense that is a specified offense against a minor.” 34 U.S.C. § 20911(5)(A)(ii). Specified offenses against minors are further defined as offenses such as kidnapping or false imprisonment by someone other than a parent or guardian; solicitation to use in sexual conduct or for prostitution; use in a sexual performance; possession, production, or distribution of child pornography or video voyeurism; “[c]riminal sexual conduct involving a minor”; or the catch-all category of “[a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. § 20911(7)(A)-(I).

*12 In the instant case, Defendant Skaggs's offense involved a minor victim. The Government argues that the Defendant was arrested for carnal knowledge of a child thirteen to fifteen years of age. Additionally, the Defendant's Virginia sex offender registration form from August 27, 2003, lists his conviction as “Sexual Battery-Minor” [Doc. 50, p. 2]. Defendant's Virginia sex offender registration form from May 5, 2006, states the victim was sixteen years old [Doc. 50, p. 5]. The Court finds that sexual battery of a minor comes within both “criminal sexual conduct involving a minor,” § 20911(7)(H), and the catchall category of “conduct that by its nature is a sex offense against a minor,” § 20911(7)(I). Under the circumstance-specific approach, the Court finds that the Defendant's 2002 Virginia sexual battery offense is a sex offense for which he would be required to register under SORNA.

V. CONCLUSION

The Court finds that the Indictment does not violate the Defendant's constitutional rights. Specifically, SORNA's requirement that he register as a sex offender, although his sexual battery conviction pre-dates SORNA's enactment, does not run afoul of the nondelegation doctrine, the *Ex Post Facto* Clause, or the Due Process Clause. Moreover, the Defendant's 2002 Virginia sexual battery conviction qualifies as a “sex offense” under SORNA. Accordingly, the undersigned respectfully **RECOMMENDS** that the Motion

to Dismiss Indictment [Doc. 28] and the Supplemental Motion to Dismiss [Doc. 45] be denied.¹⁵

All Citations

Not Reported in Fed. Supp., 2019 WL 6691014

Footnotes

- 1 Although the Court initially released the Defendant on an unsecured bond [Doc. 12] and conditions [Docs. 13, 16 & 17], it revoked Defendant Skaggs's release on July 23, 2018 [Docs. 24 & 27]. The Defendant's renewed requests for release were denied on November 6 [Doc. 44] and December 4 [Doc. 52], 2018.
- 2 As oral argument at a motion hearing on September 24, 2018 later revealed, the Defendant also sought to raise issues relating to the *Ex Post Facto* and Due Process Clauses by referencing and attaching an unpublished opinion from the Eastern District of North Carolina, *United States v. Edward Jay Wass*, No. 7:18-CR-45-BO, Order (E.D. N.C. July 5, 2018) [Doc. 28-1].
- 3 Judge Clifton L. Corker was initially the assigned United States Magistrate Judge in this case. On July 26, 2019, Judge Corker was sworn in as United States District Judge. The instant motions were referred [Doc. 63] to the undersigned on August 26, 2019.
- 4 The Government contends [Doc. 46, p. 1] that Defendant was originally charged with carnal knowledge of a child thirteen (13) to fifteen (15) years of age in violation of [Va. Code Ann. § 18.2-63](#). The Government has not produced the original charging instrument in the 2002 case.
- 5 Congress originally codified SORNA at [42 U.S.C. § 16901, et seq.](#), and re-codified it, without amendment or alteration, at [34 U.S.C. § 20901, et seq.](#)
- 6 Subsection (b) of § 20913 requires a sex offender to register before completing a sentence of incarceration or, if not sentenced to incarceration, within three days of being sentenced for a sex offense.
- 7 In support of this contention, the Defendant relates that defense counsel contacted the Virginia attorney who prosecuted his misdemeanor sexual battery case, and that attorney opined that misdemeanor sexual battery of a female did not require sex offender registration in November 2002 [Doc. 45, p. 3].
- 8 The Defendant attached a copy of this unpublished Order as an exhibit to his Motion to Dismiss [Doc. 28]. Citation to this Order will be to the page numbers in the attached exhibit.
- 9 The Court notes that the Court of Appeals for the Armed Forces, an Article I court with appellate jurisdiction over active members of the armed forces, relied on the Supreme Court's decision in *Padilla* to hold that "in the context of a guilty plea inquiry [in a court-martial], sex offender registration consequences can no longer be deemed a collateral consequence of the plea." *United States v. Riley*, 72 M.J. 115, 121 (C.A.A.F. 2013).
- 10 In contrast, in the two cases cited by Defendant Skaggs, the defendants were subject to the state sex offender statutes at the time of their guilty pleas and could have been so advised. See *Fonville*, 804 N.W.2d at 894 (observing that "when, as here, the sex-offender-registration statute is 'succinct, clear, and explicit' in defining the registration requirement for the defendant's conviction, defense counsel's duty to give correct advice is likewise clear"); *Taylor*, 698 S.E.2d at 389 (finding "no dispute" that the defendant "was subject to the sex offender registration requirements at the time that he entered into his plea").

- 11 At the September 24, 2018 motion hearing, Judge Corker invited the Defendant to brief the issue of whether the offense to which he entered a guilty plea in 2002 is a sex offense under SORNA. In his subsequent Supplemental Motion to Dismiss, the Defendant only alluded to this issue as a part of his *ex post facto* and due process arguments. However, at the September 5, 2019 motion hearing, the Defendant argued that the Court must determine whether he was convicted of an offense that qualifies as a sex offense under SORNA by using the categorical approach. Thus, the Court treats this as a separate, fourth issue.
- 12 The Court finds that the Defendant disputes whether the Court can consider the fact that the victim was a minor, not whether she was, in fact, a minor.
- 13 The term “Shepherd documents” comes from *United States v. Shepherd*, 544 U.S. 13, 19-20 (2005).
- 14 Although defense counsel stated the categorical approach applies, her argument relates to the modified categorical approach, because she referenced the “Shepherd documents” and argued that the Virginia sexual battery statute is divisible.
- 15 Any objections to this report and recommendation must be served and filed within fourteen (14) days after service of a copy of this recommended disposition on the objecting party. Fed. R. Crim. P. 59(b)(2) (as amended). Failure to file objections within the time specified waives the right to review by the District Court. Fed. R. Crim. P. 59(b)(2); see *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008); see also *Thomas v. Arn*, 474 U.S. 140, 155 (1985) (providing that failure to file objections in compliance with the required time period waives the right to appeal the District Court’s order). The District Court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive, or general. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370, 1373 (6th Cir. 1987).

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2016 WL 1466900

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

UNITED STATES of America, Plaintiff
v.
Christopher Alan SMITH, Defendant.

Case No. 6:15-cr-00301-AA
|
Signed April 13, 2016

Attorneys and Law Firms

Amy E. Potter, United States Attorney's Office, Eugene, OR, for Plaintiff.

Craig E. Weinerman, Office of the Federal Public Defender, Eugene, OR, for Defendant.

OPINION AND ORDER

AIKEN, Judge:

*1 Defendant is charged with failing to register as a sex offender in violation of 18 U.S.C. § 2250(a). Defendant moves to dismiss the indictment on grounds that the Sex Offender Registration and Notification Act (SORNA) does not apply to him, and, as a result, the indictment fails to allege a violation of a criminal offense. The government opposes the motion. On April 12, 2016, the court heard oral argument from both parties. The motion is denied.

DISCUSSION

SORNA was enacted to create a “comprehensive national system for the registration’ of sex offenders and offenders against children.” *United States v. Elkins*, 683 F.3d 1039, 1040 (9th Cir. 2012); 42 U.S.C. § 16901. To that end, “sex offenders” must register as such in their relevant jurisdictions and update their registration if changes to their names, residence, employment, or student status occur. See 42 U.S.C. § 16913(a),(c). SORNA defines the term “sex offender” as “an individual who was convicted of a sex offense.” *Id.* § 16911(1).

In this case, defendant has a prior State of Vermont conviction for committing lewd and lascivious conduct with a child under the age of sixteen. 13 V.S.A. § 2602(b)(1). The government alleges that defendant traveled from Tennessee to Oregon without registering or updating his sex-offender status as required by SORNA. 18 U.S.C. § 2250(a). Defendant moves to dismiss the indictment on grounds that his prior Vermont conviction does not meet the definition of “sex offense” under SORNA and the registration requirement does not apply to him. Specifically, defendant maintains that the court must employ the “categorical approach” to determine whether his prior conviction constitutes a “sex offense.” Under the categorical approach, defendant contends that the Vermont statute underlying his prior conviction is “overbroad” and does not categorically match the elements of a “sex offense,” because it criminalizes conduct that is neither “sexual contact” nor a “sexual act” as defined by federal law. See § 18 U.S.C. 2246(2),(3) (providing definitions for sexual contact and sexual act under the “Sexual Abuse” subchapter). I disagree with defendant’s analysis and argument.

Defendant is correct that SORNA defines the term “sex offense” as an offense that has “an element involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(i). However, a “sex offense” also includes “a criminal offense that is a specified offense against a minor,” which is the relevant type of sex offense in this case. *Id.* § 16911(5)(A)(ii). Importantly, the definition of “specified offense against a minor” does not include the terms “sexual contact” or “sexual act.” Instead, Congress defined the term “specified offense against a minor” as “an offense against a minor that involves ... criminal sexual conduct involving a minor” or “any conduct that by its nature is a sex offense against a minor.” *Id.* § 16911(7)(H),(I). I find no authority that imports the meanings of “sexual contact” and “sexual act” into the definition of “specified offense against a minor.”

*2 Granted, SORNA does not define “sexual conduct” or conduct that “by its nature” is a sex offense. However, the fact that these terms are not defined does not mean that Congress intended to import the more limiting definitions of “sexual contact” or “sexual act” into the meaning of “specific offense against a minor.” If Congress had so intended, it would not have enacted another definition of “sex offense” pertaining to offenses against children. In fact, through the expansive definition of “specific offense against a minor,” Congress clearly intended to encompass a broad category of criminal conduct, i.e., “any conduct,” that is sexual in nature and committed against a child. *Id.*

§ 16911(7)(expanding definition to include “all offenses by child predators”). Consequently, I will not import the terms and definitions of “sexual contact” and “sexual act” into the meaning of “specified offense against a minor” when doing so would render statutory language superfluous and contradict clear congressional intent. Accordingly, I find that the terms “sexual contact” and “sexual act” have no relevance to and no bearing on whether defendant’s prior conviction constitutes a “specified offense against a minor.”

Given the broad definition of “specific offense against a minor” as an offense that “involves” sexual conduct, the government argues that the categorical approach does not apply, and the court may look to defendant’s conduct underlying his prior conviction to determine if it involved “criminal sexual conduct involving a minor.” 42 U.S.C. § 16911(7); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) (explaining that the language of an “offense involving” certain types of conduct is “fact-specific language, strongly suggesting that a conduct-based inquiry applies”); *see also United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) (stating that SORNA’s “reference to conduct, rather than elements, is consistent with a circumstance-specific analysis”); *United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008) (accord). Courts agree that interpreting “‘specified offense against a minor’ to allow circumstance-specific inquiry into the age of the victim and conduct underlying the offense is both reasonable and in line with Congress’s statement that the term should ‘include *all* offenses by child predators.’” *Suhail v. U.S. Atty. Gen.*, 2015 WL 7016340, at *8 (E.D. Mich. Nov. 12, 2015) (quoting 42 U.S.C. § 16911(7)); *see also id.*, at *7 (citing cases); *United States v. Piper*, 2012 WL 4757696, at *4 (D. Vt. Oct. 5, 2012). In his Vermont case, defendant admitted to inserting his penis inside the mouth of a minor under the age of sixteen; this conduct is clearly “criminal sexual conduct” and conduct that, “by its nature,” is a sex offense against a child.

Defendant nonetheless maintains that the Ninth Circuit’s opinion in *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2013), requires application of the categorical approach to determine whether his prior conviction qualifies as a “sex offense.” However, *Cabrera-Gutierrez* involved

a different statutory provision and a different definition of the relevant sex offense. *See id.* at 1132 (relevant SORNA provision defined sex offender as “a sex offender whose offense ... is comparable or more severe than ... aggravated sexual abuse or sexual abuse” as defined by federal law). Therefore, I do not find *Cabrera-Gutierrez* controlling.

Regardless, even if the elements of the Vermont statute prohibiting lewd and lascivious conduct against a minor must “categorically” match a “specified offense against a minor,” I find that they do. Again, SORNA defines a “specified offense against a minor” as an offense that “involves ... criminal sexual conduct involving a minor” or “any conduct that by its nature is a sex offense against a minor.” *Id.* § 16911(7)(H), (I). The elements of defendant’s prior offense of conviction are 1) the willful and lewd, 2) commission of a lewd and lascivious act, 3) upon or with the body of a child under the age of sixteen, 4) “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of such person or such child.” 13 V.S.A. § 2602(a); *State v. Beaudoin*, 970 A.2d 39, 48 (Vt. 2008).

*3 Certainly, a willful act committed “upon or with the body of a child” to “arouse, appeal to, or gratify” the person’s or the child’s “sexual desires” categorically qualifies as “criminal sexual conduct involving a minor” and an offense that “by its nature is a sex offense against a minor.” Even without looking to the conduct underlying defendant’s prior conviction, he was convicted of an offense that categorically qualifies as a “specified offense against a minor” under SORNA.

CONCLUSION

Accordingly, defendant’s motion to dismiss (doc. 21) is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 1466900

2021 WL 2169484

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.

UNITED STATES of America,

v.

Luciano TORCHIA, Defendant.

CASE NO. 1:20-CR-00464-MHC-LTW

|

Signed 05/07/2021

Attorneys and Law Firms

Rebeca Maria Ojeda, DOJ-USAO, Atlanta, GA, for United States of America.

FINAL REPORT AND RECOMMENDATION

LINDA T. WALKER, UNITED STATES MAGISTRATE JUDGE

*1 This case is before the Court on Defendant Luciano Torchia's Motion to Dismiss Based on an Insufficient Indictment and Motion to Dismiss Indictment for Failure to State an Offense. [Docs. 22, 23]. For the reasons outlined below, the Court **RECOMMENDS** that Defendant's Motion to Dismiss Based on an Insufficient Indictment ([Doc. 22]) be **DENIED**. But the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss Indictment for Failure to State an Offense ([Doc. 23]) be **GRANTED**.

I. BACKGROUND

Defendant is charged with one count of failure to register under the Sex Offender Registration and Notification Act ("SORNA"), in violation of 18 U.S.C. § 2250(a). [Doc. 1]. The Indictment contains the following allegations: Defendant is an individual who is required to register under SORNA, and while in the Northern District of Georgia between March and May 2020 after traveling in interstate commerce, knowingly failed to register and update registration as required under the Act. [Id.]. Defendant moves to dismiss the indictment as insufficient and as failing to state an offense. [Docs. 22, 23].

A. Motion to Dismiss Based on an Insufficient Indictment

Defendant first argues the Indictment fails to offer specific facts regarding his obligation to register under SORNA and the dates he entered and left the state of Georgia. [Doc. 22 at 4–5]. The lack of specificity as to those facts, Defendant argues, renders him unable to rely upon any judgment under the Indictment for double jeopardy purposes. [Id. at 6].

In response, the Government contends that the Indictment is sufficient because it tracks the language of the failure to register statute and presents the essential elements constituting the charged offense. [Doc. 29 at 2]. The Government argues the Indictment includes sufficient facts to prove the essential elements of the offense and to protect Defendant from future double jeopardy concerns. [Id. at 4–6]. Further, the Government asserts that providing facts as to specific instances over a period of three months when Defendant was required to register or update registration is not required under the statute or by any binding precedent. [Id. at 4].

B. Motion to Dismiss for Failure to State an Offense

Defendant also moves to dismiss the Indictment for failing to state an offense. [Doc. 23 at 1]. Defendant contends that the facts in the Indictment, even if true, do not indicate that he is a sex offender under SORNA, and was thus under no obligation to register, because the Indictment does not include any facts to support why he is required to register. [Id. at 3]. Defendant also contends that the Indictment fails because his prior offense—Criminal Sexual Conduct in the Second Degree in violation of Minnesota Criminal Code § 609.343.1(a)—is not comparable to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241. [Id.]. In response, the Government argues Defendant's prior offense was under a substantially similar law to the relevant federal statute, and consequently, Defendant is a sex offender with an obligation to register under SORNA. [Doc. 33].

II. LEGAL STANDARD

*2 Rule 7(c) of the Federal Rules of Criminal Procedure states that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged ..." Fed. R. Crim. P. 7(c). Defendant may file a motion alleging a defect in the indictment or information, including a defect accounting to "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). "An indictment is considered legally sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the

accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense.” [United States v. Schmitz](#), 634 F.3d 1247, 1259 (11th Cir. 2011) (quoting [United States v. Jordan](#), 582 F.3d 1239, 1245 (11th Cir. 2009)). “It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.” [United States v. Garrett](#), 467 F. App’x 864, 867 (11th Cir. 2012) (citing [Hamling v. United States](#), 418 U.S. 87, 117 (1974)); *see also* [United States v. Critzer](#), 951 F.2d 306, 307-08 (11th Cir. 1992) (“The indictment is sufficient if it charges in the language of the statute.”); [United States v. Malone](#), No. 804CR348T24TGW, 2005 WL 1243762, at *3 (M.D. Fla. 2005) (denying a motion to dismiss an indictment because it tracked the language of the statute setting forth the essential elements of the crime).

An indictment that tracks the language of the statute must be accompanied by a statement of “facts and circumstances that will inform the accused of the specific offense, coming under the general description, with which he is charged.” [Russell v. United States](#), 369 U.S. 749, 765 (1962) (citations omitted). But an indictment does not have to “detail the factual proof that will be relied upon to support the charges.” [United States v. Sharpe](#), 438 F.3d 1257, 1263 n.3 (11th Cir. 2006) (quoting [United States v. Crippen](#), 579 F.2d 340, 342 (5th Cir. 1978)).

In ruling on the present motions, the Court must accept the facts in the indictment as true and may not rely on outside facts. *See Sharpe*, 438 F.3d at 1257-59; [United States v. Plummer](#), 221 F.3d 1298, 1302 n.3 (11th Cir. 2000) (reversing the dismissal of an indictment because the district court relied on facts not in the indictment). In the context of a motion to dismiss an indictment for failure to state an offense, the Court is limited to “reviewing the *face* of the indictment and, more specifically, the *language used* to charge the crimes.” *Sharpe* at 1263 (quoting [United States v. Critzer](#), 951 F.2d 306, 307 (11th Cir. 1992)). A court must read the indictment “as a whole and give it a ‘common sense construction.’” [United States v. Jordan](#), 582 F.3d 1239, 1245 (11th Cir. 2009) (citation omitted). The Court must ultimately determine whether “the factual allegations in the indictment, when viewed in the light most favorable to the government, [are] sufficient to charge the offense[s] as a matter of law.” [United States v. deVegter](#), 198 F.3d 1324, 1327 (11th Cir. 1999) (quoting [United States v. Torkington](#), 812 F.2d 1347, 1354 (11th Cir. 1987)).

III. ANALYSIS

A. Sufficiency of the Indictment

Defendant argues the Indictment is insufficient because it only tracks the basic language of the statute without offering specific facts to support the charge, creating unconstitutional vagueness. [Doc. 22 at 1–2]. Further, Defendant suggests that because the Indictment omits any discussion of 34 U.S.C. § 20913 and does not identify why Defendant is obligated to register, the essential elements of the charge are not provided in the Indictment. [Doc. 22 at 4]. The undersigned finds the Indictment sufficient because it tracks the language of the failure to register statute and alleges the essential elements of the offense. *See United States v. Parker*, No. 1:05-CR-45-ODE, 2006 WL 8443230, at *3 (N.D. Ga. 2006) (denying a motion to dismiss an indictment because the indictment adequately outlined the essential elements of the charge and the sufficiency of the supporting evidence should be decided at trial), *report and recommendation adopted*, No. 1:05-CR-045, 2007 WL 9734884 (N.D. Ga. 2007).

*3 In relevant part, a violation of 18 U.S.C. § 2250(a) occurs when: (1) the person charged was “required to register under [SORNA],” (2) the person “travel[ed] in interstate or foreign commerce,” and (3) the person “knowingly fail[ed] to register or update a registration as required by [SORNA].” 18 U.S.C. § 2250(a). In this case, the Indictment alleges that Defendant was “required to register under [SORNA],” “traveled in interstate commerce,” and “knowingly fail[ed] to register [or] update registration as required by [SORNA].” [Doc. 1]. The Indictment is sufficient insofar as it “sets forth the offense in the words of the statute itself.” *Garrett*, 467 F. App’x at 867.

Defendant’s real argument is that the indictment fails to contain the necessary “facts and circumstances that will inform [Defendant] of the specific offense, coming under the general description, with which he is charged.” *See Russell*, 369 U.S. at 765. Specifically, Defendant contends that the Indictment fails to notify him of the specific instance or instances between March and May 2020 when he was required to register or update his registration. [Doc. 22 at 4]. Defendant also argues the Indictment is insufficient because it does not outline the reasons behind his obligation to register under SORNA. [Id.]. The undersigned disagrees.

Defendant relies heavily on [United States v. Sumner](#) for the proposition that the Indictment’s lack of specificity as to when the alleged violation occurred is cause for dismissal.

89 F. Supp. 3d 1161(N.D. Okla. 2015). Defendant argues the Indictment's timeframe of March to May 2020 requires him “to guess when or how he was allegedly in violation of SORNA's registration requirements.” [Doc. 22 at 5]. But Sumner is readily distinguishable from the case at bar. In Sumner, the defendant allegedly “entered and left Indian Country” at some unspecified point during a period of over a year. 89 F. Supp. 3d at 1166.¹ The entering and leaving of “Indian Country” was “the federal hook that trigger[ed] the SORNA registration requirement,” but the indictment failed to contain any “specific allegation as to the time or place” when it allegedly occurred. *Id.* Because of “the unique prevalence of Indian country throughout [the Northern District of Oklahoma],” the defendant was “left to guess where and when within the Northern District of Oklahoma he could have crossed into Indian Country.” *Id.*

Here, by contrast, the timeframe described in the indictment is three months, not more than a year. [Doc. 1]. While the indictment does not specify the exact date on which Defendant allegedly “traveled in interstate commerce,” this case does not present a “unique” situation like Sumner where it was difficult to ascertain where and when the defendant “could have crossed into Indian Country” while traveling within the Northern District of Oklahoma itself. Compare [Doc. 1] with Sumner, 89 F. Supp. 3d at 1166. This is not a case where a defendant's travels could unknowingly trigger a registration requirement under SORNA. State lines are much more clearly defined, and as the Government points out Defendant allegedly traveled over 1,000 miles from Minnesota to Georgia. [Doc. 29 at 5]. It is easily ascertainable when the alleged violation occurred, and the Government has only charged one violation of SORNA, putting the Defendant on notice about the charge he faces. As for Defendant's other argument, the Government correctly notes that it has no obligation to inform Defendant that he was required to register under SORNA. United States v. Griffey, 589 F.3d 1363, 1367 (11th Cir. 2009) (explaining that “knowingly” modifies “fails to register,” and does not impute any obligation on the government to inform a defendant of a duty to register before an 18 U.S.C. § 2250(a) prosecution). Section 2250(a) only requires the Government to allege that Defendant was “required to register under [SORNA],” not why Defendant was required to register under SORNA. See 18 U.S.C. § 2250(a). Because the Government did so, the Indictment is sufficient on this point as well. See [Doc. 1]. Accordingly, the Court **RECOMMENDS** that Defendant's Motion to Dismiss Based on an Insufficient Indictment ([Doc. 22]) be **DENIED**.

B. Failure to State an Offense

*4 Defendant also argues his Minnesota conviction does not make him a sex offender required to register under SORNA, and consequently, the Indictment fails to state an offense. [Doc 23 at 1]. The Court notes that Defendant was a minor at the time of his sexual offense, and SORNA provides a special framework for determining whether minors are required to register. [*Id.*]. Defendant's prior state offense must be “comparable to or more severe than aggravated sexual abuse (as described in Section 2241 of Title 18).” 34 U.S.C. § 20911(8). In determining whether Defendant's state offense is “comparable to or more severe than aggravated sexual abuse,” the Court applies the categorical approach. See United States v. Vineyard, 945 F.3d 1164, 1170 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 2700, 206 L. Ed. 2d 840 (2020).

1. Standard for Deciding if the Offenses are “Comparable”

While the parties agree *that* the categorical approach applies, they disagree on *how* it is to be applied. [Docs. 33, 34].² Relying on a line of cases beginning with Descamps v. United States, 570 U.S. 254 (2013), Defendant argues the elements of the state offense must be “the same as, or narrower than, those of” the federal offense in question. [Doc. 34 at 4–10] (quoting Descamps, 570 U.S. at 257). But the Government points to persuasive authority holding that the elements of the state offense can be “slightly broader” than the federal offense and still trigger SORNA's registration requirements. [Doc. 33 at 10–12] (quoting United States v. Forster, 549 Fed. App'x 757, 769 (10th Cir. 2013)). The Government has the better of this argument.

The crucial flaw in Defendant's argument is that the Supreme Court cases he relies on deal with the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e). See [Doc. 34 at 4].³ The ACCA lacks any of the flexibility of the SORNA provision at issue. The ACCA requires, for example, that a defendant's previous conviction “is burglary, arson, or extortion.” 18 U.S.C. § 924(e)(2)(b)(ii) (emphasis added). Thus, it is readily apparent that a “prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.” Descamps, 570 U.S. at 257. But SORNA provides that a state offense triggers the registration requirement if it is “comparable to or more severe than aggravated sexual abuse.” 34 U.S.C. § 20911(8)

(emphasis added). That is, instead of requiring that the state offense *is* aggravated sexual abuse, SORNA only requires that the state offense be *comparable to* the federal offense of aggravated sexual abuse. Thus, state offenses may qualify under SORNA even if they apply “to a slightly broader range of conduct than the federal statute.” [United States v. Coleman](#), 681 F. App’x 413, 418 (5th Cir. 2017); *see also* [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 in examining the offenses”); [United States v. Forster](#), 549 F. App’x 757, 769 (10th Cir. 2013) (holding that a state statute was comparable for purposes of SORNA even though the “statute would appear to be slightly broader”).

*5 To be sure, the Sixth Circuit held that “[Mathis] [4] shuts the door on this argument,” and rejected [Morales](#) and [Forster](#) as being “being “decided before [Mathis](#).” [United States v. Barcus](#), 892 F.3d 228, 233 (6th Cir. 2018). This Court is not persuaded. First, [Mathis](#) dealt with the ACCA, which as discussed above is distinguishable because it does not include the crucial “comparable to” language. Second, [Mathis](#) did not create the requirement that a state “statute’s elements are the same as, or narrower than, those of the generic [ACCA predicate] offense”; that language is from [Descamps](#). [Descamps](#), 570 U.S. at 257. Both [Morales](#) and [Forster](#) were decided after [Descamps](#), and thus the Sixth Circuit’s decision to dismiss those cases for being “decided before [Mathis](#)” is unconvincing. *See* [Barcus](#), 892 F.3d at 233. And third, the Sixth Circuit’s characterization of the holding in [Mathis](#) is, in this Court’s opinion, imprecise. In [Mathis](#), the Supreme Court reversed lower court for “applying the modified categorical approach to determine the means by which Mathis committed his prior crimes.” 136 S. Ct. at 2253. While the [Mathis](#) Court mentioned that courts are to “compare” state and federal offenses when applying the categorical approach, the [Mathis](#) opinion never uses the word “comparable” and does not purport to explain when statutes are or are not “comparable.” *See* 136 S. Ct. at 2247–57.

The other cases relied on by Defendant are unconvincing. The Court in [United States v. Livestock](#) relied on [Barcus](#)’s reasoning to support its holding that “an identity of elements, at the very least, is required for a state statute to be ‘comparable.’” No. 19-CR-182-GKF, 2020 WL 2044728, at *4 (N.D. Okla. Apr. 28, 2020). Also, in [United States v. Escalante](#), the Fifth Circuit suggested it was “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.’” 933 F.3d 395, 402 n.9 (5th

Cir. 2019).⁵ But the Fifth Circuit’s reasoning is based on the fact that the “Supreme Court has had many opportunities to articulate how lower courts should conduct the categorical approach,” and the Supreme Court has never “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.’” *Id.* As discussed above, the Supreme Court has not yet applied the categorical approach to any statute where the state offense merely needs to be “comparable” to a specified federal offense. *See, e.g., Esquivel-Quintana*, 137 S. Ct. 1562; [Mathis](#), 136 S. Ct. 2243; [Johnson v. United States](#), 576 U.S. 591 (2015); [Descamps](#), 570 U.S. 254.

The Eleventh Circuit has not explicitly decided this issue, though [Vineyard](#) bears further discussion. In [Vineyard](#), the Eleventh Circuit relied on [Descamps](#) for the proposition that a state “conviction cannot qualify as a sex offense under the sexual contact provision of SORNA” if the state’s definition of the conduct at issue “sweeps more broadly.” [Vineyard](#), 945 F.3d at 1170–71 (quoting [Descamps](#), 570 U.S. at 261). But the SORNA provision at issue in [Vineyard](#) requires that the state offense have “an element involving a sexual act or sexual contact.” 945 F.3d at 1170; *see also* 34 U.S.C. § 20911(5)(A)(i). The [Vineyard](#) Court did not have occasion to address what it means for two statutes to be “comparable” because it was not addressing a portion of SORNA that allows for “comparable” state offenses. Instead, the Eleventh Circuit held “Tennessee’s definition is narrower than the [defendant’s preferred federal] definition.” [Vineyard](#), 945 F.3d at 1174.

In the absence of binding authority, the Court looks to the statutory text. [BedRoc Ltd., LLC v. United States](#), 541 U.S. 176, 183 (2004) (holding that statutory interpretation “begins with the statutory text and ends there as well if the text is unambiguous”). An offense falls within the scope of § 20911(8) if it is “comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.” Because the word “comparable” is not defined in the statute, it must be given its ordinary meaning. [United States v. Gilbert](#), 198 F.3d 1293, 1298 (11th Cir. 1999); *see also* [Consolidated Bank, N.A. v. United States Dep’t of Treasury](#), 118 F.3d 1461, 1464 (11th Cir. 1997) (“In the absence of a statutory definition of a term, we look to the common usage of words for their meaning.”).

*6 The most apposite dictionary definition of “comparable” is “suitable for comparison” or

“similar, like.” *Comparable*, Merriam-Webster Dictionary (available at <https://www.merriam-webster.com/dictionary/comparable>) (last accessed May 5, 2021). “Similar,” in turn, means “having characteristics in common” or “alike in substance or essentials.” *Similar*, Merriam-Webster Dictionary (available at <https://www.merriam-webster.com/dictionary/similar>) (last accessed May 5, 2021). And the relevant definition of “like” is “the same or nearly the same.” *Like*, Merriam-Webster Dictionary, Definition of *like* Entry 3 of 9 (available at <https://www.merriam-webster.com/dictionary/like>) (last accessed May 5, 2021). The term “comparable” thus includes instances where the two things being compared are merely “alike in substance” or “nearly the same.”

The question then becomes: What does it mean to be “alike in substance” or “nearly the same”? The word “comparable” clearly does not require a strict identity between the things being compared; in terms of statutes, it allows for one or the other to be slightly broader or slightly narrower. See Coleman, 681 F. App’x at 418. But the term is still quite vague.⁶ The undersigned is persuaded by the reasoning of the First Circuit, which decided that “comparable” may “provide [courts] some flexibility in examining the offenses” but that “a congressional judgment that lies at the core” of the federal statute “is so essential to the framework that the congressional cut-off must be strictly construed.” Morales, 801 F.3d at 7–8. That is, the “essentials” of the two statutes must be “nearly the same” for the statutes to be similar, like, or comparable. Having decided what standard to apply, the Court now turns to comparing the two offenses at issue.

2. Analysis of whether the Offenses are “Comparable”

The relevant definition of “aggravated sexual abuse” is “knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years.” 18 U.S.C. § 2241(c). A sexual act, in turn, is defined 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;
- (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; or

(D) 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).

Defendant was convicted of violating Minnesota’s criminal statute § 609.343 Subd. 1(a). This offense includes “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. Ann. § 609.343 Subd. 1(a). Minnesota law further defines “sexual contact” as any of the following acts “committed with sexual or aggressive intent”:

- *7 (i) the intentional touching by the actor of the complainant’s intimate parts, or
- (ii) the touching by the complainant of the actor’s, the complainant’s, or another’s intimate parts effected by a person in a current or recent position of authority, or by coercion, or by inducement if the complainant is under 13 years of age or mentally impaired, or
- (iii) the touching by another of the complainant’s intimate parts effected by coercion or by a person in a current or recent position of authority, or
- (iv) in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts, or
- (v) the intentional touching with seminal fluid or sperm by the actor of the complainant’s body or the clothing covering the complainant’s body.

Minn. Stat. Ann. § 609.341 Subd. 11(a). Minnesota law further defines “intimate parts” as “the primary genital area, groin, inner thigh, buttocks, or breast.” Id. Subd. 5.

The Government concedes that “the Minnesota offense is slightly broader than its federal counterpart.” [Doc. 33 at 12]. But, the Government argues, the “statutes share elements of an offender touching a child-victim’s intimate parts, and the differences in the Minnesota law are insufficient to overcome comparability with the federal statute.” [Id.]. Defendant simply rejects the idea “that a state statute can be ‘slightly broader’ than its federal counterpart and still be

‘comparable’ under SORNA.” [Doc. 34 at 10]. As discussed above, the Court agrees with the Government that a state statute can be slightly broader and still be “comparable.” But the Court concludes that—even under the Government’s more expansive definition—the Minnesota statute at issue is not “comparable to” the federal statute in question.

Defendant argues the intent requirement of the Minnesota statute is broader than the federal equivalent. [Doc. 34 at 11–12]. But this argument was persuasively rejected in Coleman, 681 F. App’x at 417–18. Defendant asserts Coleman should be rejected because it “held that the intent elements were comparable because a comparable statute may be ‘slightly broader’ than the federal statute.” [Doc. 34 at 12]. Contrary to Defendant’s argument, this was merely an *alternative holding* in Coleman. The Coleman Court held that the term “abuse” used “in 18 U.S.C. § 2246(3) is analogous to the aggressive intent required by the Minnesota statute.” 681 F. App’x at 417.⁷ The Coleman Court also discussed the defendant’s arguments about how the two statutes are applied *in practice*—which is not part of the categorical approach—and held that “even if the Minnesota statute has been applied to a slightly broader range of conduct” the statutes were still “comparable.” 681 F. App’x at 418 (emphasis added). Defendant cites no authority to support his argument that Minnesota’s aggressive-intent requirement is “more broad” than the abusive-intent requirement found in § 2246(2)(C), (D). See [Doc. 34 at 11]; see also [Doc. 31 at 7]. Even if it were, as Coleman held, there is nothing to suggest that Minnesota’s intent requirement is so broad as to render the statute incomparable. 681 F. App’x at 417–18.

*8 But Coleman’s holding “is limited to the intent element,” and crucially the defendant in Coleman was not convicted as a minor. See 681 F. App’x at 416–17. Defendant argues the Minnesota statute at issue is “far broader than the federal statute” in other respects, and the undersigned agrees that the Minnesota statute is materially different in at least one essential respect. [Doc. 34 at 7]. The Minnesota definition explicitly includes “touching *of the clothing* covering the immediate area of the intimate parts.” Minn. Stat. Ann. § 609.341 Subd. 11(a)(iv) (emphasis added).⁸ The federal definition of “sexual act,” by contrast, explicitly includes only “intentional touching, *not through the clothing*, of the genitalia.” 18 U.S.C. § 2246(2)(D) (emphasis added).

The decision to only include touching “not through the clothing” is “a congressional judgment that lies at the core of the” aggravated sexual abuse statute. See Morales, 801 F.3d

at 7. Congress fully understood how to criminalize abusive sexual contact “either directly or *through the clothing*” and did so. See 18 U.S.C. § 2246(3) (emphasis added). Abusive sexual *contact* is penalized under 18 U.S.C. § 2244. That statute explicitly cross-references § 2241 and penalizes conduct that is only “sexual contact” if it would have “been a sexual act” under § 2241(c). 18 U.S.C. § 2244(a)(5). Congress clearly decided that “sexual contact” in violation of § 2244(a)(5) is less severe than a “sexual act” under § 2241(c), because a violation of § 2241(c) carries a minimum sentence of 30 years while a violation of § 2244(a)(5) is punishable by imprisonment “for any term of years.” Compare 18 U.S.C. § 2241(c) with 18 U.S.C. § 2244(a)(5).

If Defendant had been an adult,⁹ his conviction would likely have made him a Tier III sex offender under SORNA. See 34 U.S.C. § 20911(4)(A)(ii); see also Coleman, 681 F. App’x at 416–18. But because Defendant was “adjudicated delinquent as a juvenile,” his offense qualifies “only if” it is “comparable to” a violation of § 2241. 34 U.S.C. § 20911(8). Furthermore, because Defendant’s conviction apparently only included the lesser of the offenses he was charged with, his conviction is comparable to abusive sexual contact, in violation of § 2244, not aggravated sexual abuse in violation of § 2241, as discussed above. Congress drew a clear line between the two offenses that “is so essential to the framework that the congressional cut-off must be strictly construed.” See Morales, 801 F.3d at 7–8.

The Government also argues “as long as the Minnesota statute criminalizes conduct comparable to an *attempt* to commit federal aggravated sexual abuse, it would meet the requirements for a proper SORNA predicate.” [Doc. 33 at 8] (emphasis in original). But this argument misconstrues the language at issue. SORNA provides that a juvenile’s conviction qualifies if it “was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.” 34 U.S.C. 20911(8). Thus, while the SORNA provision at issue includes convictions for “an attempt or conspiracy,” the offense that the individual attempted or conspired to commit must itself be “comparable to or more severe than aggravated sexual abuse.” Id. Defendant was not convicted of an attempt or conspiracy to commit anything. He was convicted of actually violating Minn. Stat. Ann. § 609.343 Subd. 1(a). [Doc. 30-3]. As discussed above, that offense is not “comparable to or more severe than aggravated sexual abuse” in violation of § 2241, and thus Defendant was

not convicted of an attempt to commit “such an offense.” See 34 U.S.C. 20911(8).

*9 In short, the Government has not shown that Defendant's conviction qualifies as an offense that triggered the requirement for him to register under SORNA. Therefore, if Defendant was not “required to register under [SORNA],” he could not have violated 18 U.S.C. § 2250(a) as charged. See 18 U.S.C. § 2250(a)(1); see also [Doc. 1]. Accordingly, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss Indictment for Failure to State an Offense ([Doc. 23]) be **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss Based on an Insufficient Indictment ([Doc. 22]) be **DENIED** and that Defendant's Motion to Dismiss Indictment for Failure to State an Offense ([Doc. 23]) be **GRANTED**.

SO REPORTED AND RECOMMENDED, this 7th day of May, 2021.

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and N.D. Ga. Cr. R. 59(2)(a). Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties. Pursuant to 28 U.S.C. § 636(b)(1), within fourteen (14) days of the receipt of this Order, each party may file written objections, if any, to the Report and Recommendation. Pursuant to Title 18, United States Code, Section 3161(h)(1)(D), (H), **the above-**

referenced fourteen (14) days allowed for objections is EXCLUDED from the computation of time under the Speedy Trial Act, whether or not the objections are actually filed.

If objections to this Report and Recommendation are filed, the Clerk is **DIRECTED** to **EXCLUDE** from the computation of time all time between the filing of the Report and Recommendation and the submission of the Report and Recommendation, along with any objections, responses and replies thereto, to the District Judge. 18 U.S.C. § 3161(h)(1)(D), (H); Henderson v. United States, 476 U.S. 321, 331 (1986); United States v. Mers, 701 F.2d 1321, 1337 (11th Cir. 1983).

Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 7th day of May, 2021.

All Citations

Slip Copy, 2021 WL 2169484

Footnotes

- 1 In response to Sumner's motion to dismiss the indictment, the government pointed to “at least seven different alleged instances of [Sumner] entering Indian country,” but those instances were not mentioned in the indictment and Sumner was only “charged with a single count.” See Sumner, 89 F. Supp. 3d at 1166.
- 2 Defendant objects to the additional briefing filed regarding this motion. [Doc. 34 at 2]. The undersigned allowed additional briefing because Defendant raised new arguments in his reply brief. Defendant's initial brief simply says his Minnesota conviction “is not comparable to or more severe than aggravated sexual

abuse" with no explanation. [Doc. 23 at 3]. Defendant did not provide any arguments explaining *why* his Minnesota conviction "is not comparable to or more severe than aggravated sexual abuse." See [id.]. After the Government responded to his assertion, Defendant for the first time argued that the categorical approach applies and made arguments regarding the application of the categorical approach. See [Doc. 31 at 2–7]. The Court gave the Government an opportunity to respond to these never-before-raised arguments, and Defendant has not been prejudiced because he had an opportunity to reply. See [Doc. 34].

- 3 Although not mentioned by Defendant, the Supreme Court has also held—in the context of the Immigration and Nationality Act ("INA")—that a prior state conviction qualifies as a predicate offense "only if the least of the acts criminalized by the state statute falls within the generic federal definition of sexual abuse of a minor." Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1568, 198 L. Ed. 2d 22 (2017). But the INA definition at issue in Esquivel-Quintana does not allow for state offenses to qualify when they are merely "comparable." See 8 U.S.C. § 1101(a)(43)(A). As will be discussed below in the context of the ACCA, this lack of flexibility in the INA definition renders Esquivel-Quintana readily distinguishable.

- 4 Mathis v. United States, 136 S. Ct. 2243 (2016)

- 5 The Escalante Court correctly noted that Coleman is not binding. Escalante, 933 F.3d at 402 n.9. But the Escalante Court did not address the Fifth Circuit's holding in United States v. Young that two statutes are "comparable" when they "contain comparable elements," even if the state statute includes body parts that are not part of the federal definition. Young, 872 F.3d 742, 747 (5th Cir. 2017).

- 6 Although not mentioned by Defendant, the rule of lenity does not apply to the SORNA provision at issue because the word "comparable" is *vague*, not *ambiguous*, and certainly not grievously ambiguous. See United States v. Lanier, 520 U.S. 259, 266 (1997) (explaining the difference between "the vagueness doctrine" and "the canon of strict construction of criminal statutes, or rule of lenity"). Defendant has not argued the word "comparable" is unconstitutionally vague. See [Docs. 23, 31, 34].

- 7 Coleman dealt with "sexual contact" defined by 18 U.S.C. § 2246(3), but the term "sexual act" also involves conduct done "with an intent to abuse." See 18 U.S.C. § 2246(2)(C), (D).

- 8 In applying the categorical approach, the Court must "look only to the fact that the defendant had been convicted of crimes falling within certain categories" and cannot consider the abhorrent facts of the defendant's conduct. Taylor v. United States, 495 U.S. 575, 600–01 (1990). And when comparing the state and federal statutes, the Court must compare the outer limits of each statute, even when conducting a more flexible "comparable" analysis.

- 9 The Government only argues that Defendant's conviction qualifies under 34 U.S.C. § 20911(8). See [Docs. 30, 33]; 34 U.S.C. § 20911(8).

688 Fed.Appx. 185 (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 Appeals 4th Cir. Rule 32.1. United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Booker T. VANDERHORST, Defendant-Appellant.

No. 16-4442

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Submitted: April 5, 2017

|

Decided: May 3, 2017

Appeal from the United States District Court for the District of South Carolina, at Charleston. Patrick Michael Duffy, Senior District Judge. (2:13-cr-00294-PMD-1)

Attorneys and Law Firms

John M. Apicella, North Charleston, South Carolina, for Appellant. Beth Drake, Acting United States Attorney, [Robert Frank Daley, Jr.](#), [Alyssa Richardson](#), Assistant *186 United States Attorneys, Columbia, South Carolina, for Appellee.

Before [NIEMEYER](#), [TRAXLER](#), and [FLOYD](#), Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Booker T. Vanderhorst appeals his sentence imposed following conviction for use of a facility in interstate commerce to carry on an unlawful activity (Count 2), in violation of [18 U.S.C. § 1952\(a\)\(3\) \(2012\)](#) (Travel Act), and being a felon in possession of a firearm (Count 3), in violation of [18 U.S.C. §§ 922\(g\)\(1\), 924\(a\)\(2\) \(2012\)](#). He contends that Count 2, the Travel Act conviction, was not a sex offense that required registration under the Sex Offender Registration and Notification Act (SORNA), [42 U.S.C. §§ 16901-16962](#) (2012), because it categorically does not have an element involving a sexual act or sexual contact with another. We affirm.

Because Vanderhorst did not challenge in the district court whether his conviction under the Travel Act requires registration under SORNA, we review this issue for plain error. [United States v. Price](#), 777 F.3d 700, 711 (4th Cir. 2015).

Under SORNA, a person convicted of a sex offense must register in any state in which he resides, is employed, or is a student. [42 U.S.C. § 16913](#). A “sex offense” is defined, in relevant 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....

Id. § 16911(5)(A). A “specified offense against a minor” is defined as “an offense against a minor that involves any of the following”:

(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 section 1801 of title 18.

(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.

Id. § 16911(7).

Vanderhorst concedes that his case implicates the residual clause of this list, § 16911(7)(I). He nonetheless contends that he does not need to register as a sex offender under SORNA

because Count 2, the Travel Act violation, is categorically not a sex offense under SORNA. In particular, he argues that § 16911(7)(I) is ambiguous. Thus, the Department of Justice's regulations regarding SORNA, known as the SMART Guidelines, are entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). According to Vanderhorst's interpretation of the SMART Guidelines, determining whether an offense qualifies as a "sex offense" under § 16911(7)(I) requires application of the categorical approach. See *187 National Guidelines for Sex Offender Registration and Notification ["SMART Guidelines"], 73 Fed. Reg. 38,030, 38,031 (July 2, 2008). Because violation of the Travel Act does not categorically have "an element involving a sexual act or sexual contact with another," § 16911(5)(A)(i), Vanderhorst contends, it does not qualify as a "sex offense" under SORNA, and he is not required to register as a sex offender. Furthermore, he argues, the modified categorical approach is inapplicable because 18 U.S.C. § 1952(a)(3) is not divisible.

We conclude Vanderhorst's argument is directly foreclosed by our decision in *Price*, 777 F.3d at 707. In *Price*, we considered whether the categorical approach or the circumstance-specific approach, also known as the noncategorical approach, applies to determine whether an offense falls under § 16911(7)(I). *Id.* at 707-08. Looking to the text of § 16911(7)(I), we ruled that the circumstance-specific approach was appropriate. *Id.* at 708. While § 16911(5)(A)(i) refers to "elements," neither § 16911(5)(A)(ii) nor § 16911(7)(I) make such a reference.

Instead, § 16911(7)(I) refers to "conduct" and the "nature" of that conduct, indicating that Congress intended § 16911(5)(A)(ii) and § 16911(7)(I) "to cover a broader range of prior offenses than those reached by subsection (5)(A)(i)." *Id.* at 708-09. Furthermore, we rejected the same argument that Vanderhorst raises—that the SMART Guidelines, "which could indicate a preference for the categorical approach," *id.* at 709 n.9, were entitled to *Chevron* deference—noting that § 16911(7)(I) is not ambiguous, and a plain reading of § 16911(7)(I) establishes that Congress intended to apply the circumstance-specific approach, *id.* at 709 & n.9.*

Vanderhorst concedes that under the circumstance-specific approach, he would be required to register. Thus, because *Price* requires application of the circumstance-specific approach, we conclude the district court did not err in requiring Vanderhorst to register as a sex offender under SORNA.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

All Citations

688 Fed.Appx. 185 (Mem)

Footnotes

* Vanderhorst argues that *Price* conflicts with *United States v. Bridges*, 741 F.3d 464, 468 (4th Cir. 2014). *Bridges* is simply inapplicable to Vanderhorst's case.

124 F.4th 373

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff—Appellee,

v.

Lorenzo VAZQUEZ-ALBA, Defendant—Appellant.

No. 23-11135

|

FILED December 30, 2024

Synopsis

Background: Defendant, a Mexican citizen, pleaded guilty in the United States District Court for the Northern District of Texas, Jane J. Boyle, J., to unlawful reentry after removal and failure to register as a sex offender, and he was sentenced to 45 months' imprisonment. Defendant appealed.

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

[1] defendant's Texas conviction for aggravated sexual assault of a child under age of 14 was an aggravated felony that supported 20-year statutory maximum sentence for unlawful reentry;

[2] defendant's crimes were not subject to grouping under the Sentencing Guidelines; and

[3] defendant's concurrent sentences for prior state offenses did not constitute a single sentence that would lower his advisory Sentencing Guidelines range.

Affirmed.

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

West Headnotes (10)

[1] **Aliens, Immigration, and Citizenship** Sentencing and punishment
Sentencing and Punishment Nature, degree, or seriousness of other misconduct

Texas statute under which defendant, a Mexican citizen, was convicted of aggravated sexual assault of a child under age of 14 categorically matched generic definition of sexual abuse of a minor, and thus, the conviction was for "aggravated felony" of sexual abuse of a minor and supported 20-year statutory maximum sentence for defendant's conviction for unlawful reentry after removal, on basis that it was subsequent to a conviction for an aggravated felony; Texas statute prohibited intentionally or knowingly causing penetration by any means of anus or sexual organ of a victim who was younger than 14, that crime was inherently sexual and involved gratification of sexual desires in presence of a child, and neither generic offense nor Texas offense required an age differential between victim and perpetrator. Immigration and Nationality Act §§ 101, 276, 8 U.S.C.A. §§ 1101(a)(43)(A), 1326(b)(2); Tex. Penal Code Ann. §§ 22.021(a)(1)(B)(i), 22.021(a)(2)(B).

[2] **Criminal Law** Necessity of Objections in General

On plain-error review, a defendant must show that the district court (1) committed an error, (2) that is plain, and (3) that affects his substantial rights.

[3] **Criminal Law** Necessity of Objections in General

On plain-error review, if a defendant shows that the district court committed an error, that is plain, and that affects his substantial rights, the Court of Appeals may exercise its discretion to correct the error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

[4] **Aliens, Immigration, and Citizenship** Sentencing and punishment
Sentencing and Punishment Nature, degree, or seriousness of other misconduct

Courts employs the categorical approach to answer the question of whether a defendant's prior conviction was for the aggravated felony of sexual abuse of a minor under the INA, and thus supported a 20-year statutory maximum sentence for unlawful reentry after removal that was subsequent to a conviction for commission of an aggravated felony, and under that approach, courts focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic sexual abuse of a minor, while ignoring the particular facts of the case. Immigration and Nationality Act §§ 101, 276, 8 U.S.C.A. §§ 1101(a)(43)(A), 1326(b)(2).

[5] **Aliens, Immigration, and Citizenship** ↗ Sentencing and punishment

Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

Under the categorical approach for determining whether a defendant's prior state conviction was for the aggravated felony of sexual abuse of a minor under the INA, and thus supported a 20-year statutory maximum sentence for unlawful reentry after removal that was subsequent to a conviction for commission of an aggravated felony, if the state statute of conviction covers any more conduct than the generic offense of sexual abuse of a minor, the state statute is not a categorical match, even if the defendant's actual conduct fits within the generic offense's boundaries. Immigration and Nationality Act §§ 101, 276, 8 U.S.C.A. §§ 1101(a)(43)(A), 1326(b)(2).

[6] **Aliens, Immigration, and Citizenship** ↗ Sentencing and punishment

Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

The generic definition of sexual abuse of a minor, for purposes of applying the categorical approach to determine whether a defendant's prior state conviction was for the aggravated felony of sexual abuse of a minor under the INA, and thus supported a 20-year statutory maximum sentence for unlawful reentry after removal that

was subsequent to a conviction for commission of an aggravated felony, is conduct that (1) involves a child, (2) is sexual in nature, and (3) is abusive. Immigration and Nationality Act §§ 101, 276, 8 U.S.C.A. §§ 1101(a)(43)(A), 1326(b)(2).

[7] **Sentencing and Punishment** ↗ Other particular problems

The crimes to which defendant pleaded guilty, unlawful reentry after removal and failure to register as a sex offender pursuant to Sex Offender Registration and Notification Act (SORNA), served distinct societal interests that did not support grouping these offenses under the Sentencing Guidelines on the ground they involved substantially the same harm; the societal interest of illegal reentry statute was to enforce immigration laws, while Congress passed SORNA to protect the public from sex offenders and offenders against children. Immigration and Nationality Act §§ 276, 276, 8 U.S.C.A. §§ 1326(a), 1326(b)(2); 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20901; U.S.S.G. § 3D1.2.

[8] **Criminal Law** ↗ Review De Novo

Court of Appeals' reviews a preserved argument challenging the district court's determination not to group offenses under the Sentencing Guidelines de novo. U.S.S.G. § 3D1.2.

[9] **Sentencing and Punishment** ↗ Other particular problems

Defendant's crimes of unlawful reentry after removal and failure to register as a sex offender did not qualify for grouping under subsection of Sentencing Guideline allowing grouping of offenses that were of the same general type, had their offense levels determined by some measure of aggregate harm, or involved ongoing or continuous offense behavior; although Guideline that applied to failure-to-register count was in the "to be grouped" list under grouping Guideline, Guideline applicable to illegal-reentry count was not listed, and under that provision, defendant's

offense level was established the moment that he unlawfully reentered the United States because the offense level was based solely on his pre-removal conduct. U.S.S.G. §§ 2A3.5, 2L1.2, 3D1.2(d).

[10] Sentencing and Punishment  Other particular problems

Defendant's sentences for his Texas state convictions for aggravated assault causing seriously bodily injury and for aggravated sexual assault of a child under the age of 14 did not constitute a single sentence under Sentencing Guidelines, for purposes of determining his criminal history category and thus his advisory Guidelines range for unlawful reentry after removal and failure to register as a sex offender, even though concurrent terms of eight years' imprisonment were imposed for each state offense on same day; defendant was sentenced for aggravated assault when he pleaded guilty and was placed on probation, and it was of no moment that three years later a state court revoked his probation, sentenced him again for that crime, and also sentenced him for aggravated sexual assault, all on same day. U.S.S.G. § 4A1.2(a)(2).

***375** Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:22-CR-356-1, Jane J. Boyle, U.S. District Judge

Attorneys and Law Firms

Gail A. Hayworth (argued), Stephen S. Gilstrap, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff—Appellee.

James Matthew Wright (argued), Assistant Federal Public Defender, Federal Public Defender's Office, Northern District of Texas, Amarillo, TX, for Defendant—Appellant.

Before Elrod, Chief Judge, and Higginbotham and Southwick, Circuit Judges.

Opinion

Jennifer Walker Elrod, Chief Judge:

Lorenzo Vazquez-Alba pleaded guilty to unlawful reentry after removal, in violation of 8 U.S.C. § 1326(a) and (b) (2), and failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). He now appeals his conviction and sentence. Because the district court did not err, we AFFIRM.

I

Lorenzo Vazquez-Alba is a Mexican citizen who lawfully entered the United States in 1986 and became a legal permanent resident the following year.

In 2008, Vazquez-Alba was arrested in Dallas, Texas, after a juvenile accused him of using her as a paid prostitute. According to the victim, Vazquez-Alba had sexual intercourse with her at least twice and supplied her with marijuana and cocaine. Vazquez-Alba pleaded guilty in Texas state court to aggravated assault causing seriously bodily injury for this offense, and was placed in a diversionary program and sentenced to five years of community supervision (*i.e.*, probation).

***376** Also in 2008, Vazquez-Alba's wife accused him of having sexual intercourse with a close family member. The family member alleged that Vazquez-Alba would "make her have sexual intercourse with the defendant since she was 5 years old." Following an investigation and state criminal charges, Vazquez-Alba pleaded guilty in 2011 to aggravated sexual assault of a child under the age of 14 for these allegations.

Later in 2011, a Texas state court revoked Vazquez-Alba's probation for the 2008 offense and sentenced him to concurrent terms of eight years' imprisonment for each of the 2008 and 2011 crimes. Vazquez-Alba subsequently lost his permanent resident status while serving his sentence and was deported to Mexico in 2017.

Sometime later, Vazquez-Alba unlawfully reentered the United States. In August 2022, police officers at the Methodist Hospital in Dallas, Texas, arrested him for driving a stolen vehicle.¹ The officers discovered that Vazquez-Alba had an expired driver's license and an immigration hold, and that he

had failed to register as a sex offender as he was required to do following his 2011 conviction.

Vazquez-Alba was later indicted in federal court for: (1) illegal reentry after removal in violation of 8 U.S.C. § 1326(a) and (b)(2) and (2) failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). Vazquez-Alba pleaded guilty to both counts without a written plea agreement. For his illegal reentry count, Vazquez-Alba faced a 20-year statutory maximum under 8 U.S.C. § 1326(b)(2), which applies where the defendant reentered the United States after removal following an “aggravated felony.”

Before sentencing, probation officers prepared Vazquez-Alba's presentence investigation report, or “PSR.” The PSR declined to group the illegal-reentry and failure-to-register counts under U.S.S.G. § 3D1.2 because they did not involve substantially the same harm. The PSR then calculated an adjusted Guidelines offense level of 18 for the illegal-reentry offense and an adjusted Guidelines offense of 14 for the failure-to-register offense. After applying the multi-count adjustment, grouping rules, and a three-level reduction for acceptance of responsibility, Vazquez-Alba's total offense level was 17. The PSR assigned three criminal history points to each of Vazquez-Alba's two prior Texas convictions, which resulted in a criminal history score of six and a criminal history category of III. These calculations produced an advisory guideline range of 30 to 37 months' imprisonment.

Vazquez-Alba made two objections to the PSR. He first argued that the indictment was flawed because it did not allege a prior aggravated felony. He acknowledged that his argument was foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and that he raised it only to seek further review. He also objected to the PSR's grouping determination, arguing that the illegal-reentry and failure-to-register counts should be grouped together under U.S.S.G. § 3D1.2.

At sentencing, the district court overruled Vazquez-Alba's objections and sentenced *377 him to an above-Guidelines sentence of 45 months' imprisonment.

Vazquez-Alba timely appealed.

II

On appeal, Vazquez-Alba argues that the district court erred in entering judgment for his illegal-reentry count under 8 U.S.C. § 1326(b)(2) for two reasons. First, he contends that the indictment failed to plead his aggravated offense. As he did before the district court, he acknowledges that this argument is foreclosed. See *Almendarez-Torres*, 523 U.S. at 226–27, 118 S.Ct. 1219; *United States v. Garza-De La Cruz*, 16 F.4th 1213, 1213 (5th Cir. 2021). Second, he argues that his 2011 conviction for aggravated sexual assault of a child under 14 is not an “aggravated felony” for purposes of § 1326(b)(2), which would mean that the 20-year statutory maximum does not apply.

Vazquez-Alba also appeals his sentence, again raising two arguments. First, he contends that his reentry and failure to register are “closely related” under U.S.S.G. § 3D1.2 and thus should have been grouped. Second, he argues that his two state court convictions should be treated as a “single sentence” under U.S.S.G. § 4A1.2(a)(2).

A

[1] [2] [3] We first address Vazquez-Alba's argument that his 2011 conviction is not an aggravated felony. He concedes that he did not raise this argument below, and thus it is reviewed for plain error. On plain-error review, Vazquez-Alba must show that “the district court (1) committed an error, (2) that is plain, and (3) that affects [his] substantial rights.” *United States v. Parra*, 111 F.4th 651, 656 (5th Cir. 2024) (citations and internal quotation marks omitted). If he does so, we may exercise our “discretion to correct the error only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.*

Generally, an alien who has been previously removed faces a 2-year statutory maximum for the crime of unlawful reentry. 8 U.S.C. § 1326(a). However, an alien “whose removal was subsequent to a conviction for commission of an aggravated felony” faces a 20-year statutory maximum. *Id.* § 1326(b)(2). The term “aggravated felony” is defined to include, *inter alia*, “sexual abuse of a minor.” 8 U.S.C. § 1101(a)(43)(A).

The parties agree that Vazquez-Alba's 2008 crime for aggravated assault does not qualify as an aggravated felony.² So, we must determine whether Vazquez-Alba's 2011 conviction for aggravated sexual assault of his close family member constitutes the aggravated felony of “sexual abuse of a minor.”

[4] [5] We employ the “categorical approach” to answer that question. *Shroff v. Sessions*, 890 F.3d 542, 544 (5th Cir. 2018). Under the categorical approach, courts “focus solely on whether the elements of the crime of conviction sufficiently match the elements of generic [sexual abuse of a minor], while ignoring the particular facts of the case.” *378 *Mathis v. United States*, 579 U.S. 500, 504, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). If the state statute of conviction “covers any more conduct than the generic offense,” the state statute is not a categorical match, “even if the defendant’s actual conduct … fits within the generic offense’s boundaries.” *Id.*

[6] The generic definition of “sexual abuse of a minor” is conduct that (1) involves a child, (2) is sexual in nature, and (3) is abusive. *Shroff*, 890 F.3d at 544. The Supreme Court has defined the generic meaning of “minor” as requiring “that the victim be younger than 16.”³ *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 390–91, 396–97, 137 S.Ct. 1562, 198 L.Ed.2d 22 (2017). Further, the Fifth Circuit has adopted a “per se rule that gratifying or arousing one’s sexual desires in the presence of a child is abusive because it involves taking undue or unfair advantage of the minor.” *Contreras v. Holder*, 754 F.3d 286, 294–95 (5th Cir. 2014) (citations omitted).

Here, the relevant Texas criminal statute, Texas Penal Code § 22.021(a)(1)(B)(i) & (2)(B), prohibits (1) intentionally or knowingly “caus[ing] the penetration of the anus or sexual organ of a child by any means” when (2) “the victim is younger than 14 years of age.” The 14-year age requirement falls within *Esquivel-Quintana*’s definition of a “minor.” Further, the statute of conviction meets the requirements of the generic definition because Vazquez-Alba’s crime is inherently sexual and involves the gratification of sexual desires in the presence of a child. *See, e.g., Contreras*, 754 F.3d at 294–95 (holding that a state statute criminalizing carnal knowledge of a child constitutes “sexual abuse of a minor”); *United States v. Rivas*, 836 F.3d 514, 515 (5th Cir. 2016) (same for state statute prohibiting “sexual conduct” when victim is between thirteen and sixteen years of age).

Vazquez-Alba, however, contends that the Texas statute is not a categorical match to the generic sexual abuse of a minor because the generic offense requires an “age differential” between the victim and the perpetrator, and the Texas offense does not. He cites several national surveys of state criminal statutes, which reveal that many states require that the victim be younger than the defendant by some statutorily

prescribed number of years. *See, e.g.*, La. Rev. Stat. § 14:80 (criminalizing “carnal knowledge of a juvenile” when the victim is between 13 and 17 years of age and the defendant is at least four years older than the victim).

But in *United States v. Rodriguez*, we unequivocally stated that the generic offense does not contain an age differential “because the definitions of ‘sexual abuse of a minor’ in legal and other well-accepted dictionaries do not include such an age-differential requirement.”⁴ *379 711 F.3d 541, 562 n.28 (5th Cir. 2013) (en banc). Although the Supreme Court later abrogated one of *Rodriguez*’s holdings, it declined to reach the age-differential question. *Esquivel-Quintana*, 581 U.S. at 397, 137 S.Ct. 1562 (“We leave for another day whether the generic offense requires a particular age differential between the victim and the perpetrator”). Indeed, after *Esquivel-Quintana*, we explained that the Supreme Court “did not abrogate *Rodriguez*’s holding that the generic crime of ‘sexual abuse of a minor’ does not require an age differential. That holding remains the law of this circuit.” *United States v. Escalante*, 933 F.3d 395, 404–05 & n.13 (5th Cir. 2019); *see also United States v. Montanez-Trejo*, 708 F. App’x 161, 170–71 (5th Cir. 2017) (finding no plain error post-*Esquivel-Quintana* because the Supreme Court declined to decide the age-differential question); *United States v. Hernandez-Vasquez*, 699 F. App’x 404, 405 (5th Cir. 2017) (same). Accordingly, Vazquez-Alba’s age-differential argument fails.

Because Vazquez-Alba’s statute of conviction matches the generic definition of “sexual abuse of a minor,” the district court properly entered judgment under 8 U.S.C. § 1326(b)(2) and applied that statute’s 20-year statutory maximum. He therefore cannot show any error, much less plain error, in his conviction. Further, as he concedes, his remaining argument on the validity of his indictment is foreclosed. *See Almendarez-Torres*, 523 U.S. at 226–27, 118 S.Ct. 1219. Accordingly, the district court did not err in applying the 20-year statutory maximum found in 8 U.S.C. § 1326(b)(2).

B

[7] [8] Vazquez-Alba also contends that the district court should have grouped together his unlawful-reentry and failure-to-register counts because they involve “closely related” conduct under U.S.S.G. § 3D1.2. Both parties agree that Vazquez-Alba properly preserved this argument. Accordingly, we review the district court’s grouping

determination *de novo*. *United States v. Garcia-Figueroa*, 753 F.3d 179, 190 (5th Cir. 2014).

When a defendant is convicted of multiple counts, the sentencing court must follow prescribed rules in the Guidelines to ascertain the appropriate offense level. First, the court determines whether the counts may be grouped. U.S.S.G. § 3D1.2. If counts are grouped, the court then determines the applicable offense level for the group(s). *Id.* §§ 3D1.3, 4.

Under § 3D1.2, counts shall be grouped if they involve “substantially the same harm,” which is defined in four separate subsections *Id.* § 3D1.2. Vazquez-Alba argues that his two counts should be grouped under subsections (a), (b), and (d).

Subsections (a) and (b) are similar, and allow for grouping:

- (a) When counts involve the same victim and the same act or transaction.
- (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

Id. When there is not an identifiable “victim” for purposes of these subsections, “the ‘victim’ ... is the societal interest that is harmed.” *Id.* cmt. n.2. If the societal interests are “closely related,” the counts may be grouped.⁵

***380** Vazquez-Alba contends that the crimes to which he pleaded guilty serve the same societal interests: “identifying and excluding aliens convicted of felony sex offenses and punishing those who evade detection.”

We have previously explained, however, that the societal interest of illegal reentry statutes is to “enforce[] immigration laws.” *United States v. McLauling*, 753 F.3d 557, 559 (5th Cir. 2014). The same cannot be said of Vazquez-Alba’s failure-to-register count. Congress passed the Sex Offender Registration and Notification Act, which established the sex-offender registration regime, in order “to protect the public from sex offenders and offenders against children.” See 34 U.S.C. § 20901. Because the crimes to which Vazquez-Alba pleaded guilty serve distinct societal interests, the district court did not err in declining to group them under subsections (a) and (b). See *McLauling*, 753 F.3d at 559; *United States v. Yerena-Magana*, 478 F.3d 683, 689 (5th Cir. 2007) (concluding that

drug offenses and illegal-reentry offenses served different societal interests).

[9] Further, the district court did not err in declining to group under subsection (d). Subsection (d) permits grouping:

- (d) When the offense level 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.

U.S.S.G. § 3D1.2(d). Subsection (d) also specifically enumerates several Guidelines provisions that are “to be grouped,” which we have interpreted to mean that these provisions are “susceptible to grouping” with other provisions if the requirements of the subsection are met. *United States v. Goncalves*, 613 F.3d 601, 605–06 (5th Cir. 2010) (citation omitted). Subsection (d) also lists several provisions that are specifically excluded from grouping. U.S.S.G. § 3D1.2(d). Provisions not enumerated in either list may or may not be grouped following a “case-by-case determination.” *Id.*

Subsection (d) lists § 2A3.5, which applies to Vazquez-Alba’s failure-to-register count, in the “to be grouped” list. *Id.* Because § 2L1.2, which applies to his illegal-reentry count, is not listed in either list, we must determine whether it otherwise qualifies for grouping with § 2A3.5.

Application Note 6 of § 3D1.2 explains that subsection (d) allows for grouping of multiple offenses if they “are of the same general type and otherwise meet the criteria for grouping under this subsection.” U.S.S.G. § 3D1.2 cmt. n.6. “The ‘same general type’ of offense is to be construed broadly.” *Id.* Vazquez-Alba contends that his offenses are of the “same general type” because they are both “continuing crimes based on status and concealment.”

While doubtful of his categorization, we need not decide whether these offenses are of the same general type because Vazquez-Alba fails to explain how § 2L1.2 meets subsection (d)’s grouping criteria. For example, he does not argue that § 2L1.2 determines base offense levels by examining aggregate

harm. *See id.* § 3D1.2(d) (allowing for grouping if offense levels are based on a “measure of aggregate harm”).

***381** Nor does he explain how “the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.” *Id.* He suggests that both crimes are “continuing,” but that is insufficient. Rather, the relevant Guidelines provision must be “written” to cover the continuing conduct. *See United States v. Solis*, 299 F.3d 420, 461 (5th Cir. 2002); *see also United States v. Ketcham*, 80 F.3d 789, 796 (3d Cir. 1996) (explaining that subsection (d) applies when the applicable Guidelines provision accounts for a “course of harmful conduct”). For example, § 2Q1.2(b)(1)(A) (“Misconduct of Hazardous or Toxic Substances”) is written to cover continuing conduct because it allows for additional offense levels if the offense was “ongoing, continuous, or repetitive.” *See Ketcham*, 80 F.3d at 796.

The same cannot be said of § 2L1.2. Under that provision, a defendant’s offense level is established the moment that he unlawfully reenters the United States because the offense level is based solely on his pre-removal conduct. *Id.* § 2L1.2(b). The Guideline does not allow for additional offense levels based on any “ongoing, continuous, or repetitive” conduct, or any conduct that occurs after reentry. *Compare U.S.S.G. § 2L1.2(b), with § 2Q1.2(b)(1)(A).* Accordingly, § 2L1.2 does not qualify for grouping under subsection (d). *See United States v. Jimenez-Cardenas*, 684 F.3d 1237, 1241 (11th Cir. 2012) (holding that § 2L1.2 “does not fall within the purview of, or list of covered offenses in, § 3D1.2(d)”)).

Vazquez-Alba has not shown that each of his two counts are eligible for grouping under § 3D1.2. Thus, the district court correctly declined to group them.

C

[10] Finally, Vazquez-Alba maintains that the sentences for his 2008 and 2011 convictions should be treated as a “single sentence” under U.S.S.G. § 4A1.2(a)(2) because he was sentenced for them simultaneously. If treated as a single sentence, his convictions would qualify Vazquez-Alba for criminal history category II, rather than III, lowering his advisory Guidelines range. Vazquez-Alba concedes that, because he did not raise this issue in the district court, it is reviewed for plain error.

The Guidelines require that when a defendant has “multiple prior sentences,” the court must “determine whether those sentences are counted separately or treated as a single sentence.” U.S.S.G. § 4A1.2(a)(2). Relevant here, sentences should be treated separately unless “the sentences were imposed on the same day.” *Id.*

Vazquez-Alba argues the sentences for his two convictions constitute a single sentence because the Texas state court imposed concurrent 8-year sentences, one for each conviction, on the same day at a consolidated hearing in 2011. We disagree.

For § 4A1.2 purposes, Vazquez-Alba was sentenced for his 2008 aggravated assault conviction in 2008, not 2011, when he pleaded guilty and was placed on five years of probation under a diversionary program. U.S.S.G. § 4A1.2(f) (“A diversionary disposition resulting from a finding or admission of guilt … is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered”). It is of no moment that a state court later revoked his probation for the 2008 crime, sentenced him again for that crime, and also sentenced him for the 2011 crime, all on the same day in 2011. *See United States v. Castro-Perpia*, 932 F.2d 364, 365–66 (5th Cir. 1991) (treating sentence imposed pursuant to revocation and sentence imposed for new criminal conduct as separate sentences, even though they ran concurrently *382 and were imposed at the same time); *United States v. Lopez-Gonzalez*, 275 F. App’x 297, 297–98 (5th Cir. 2008).

Vazquez-Alba cannot show that the district court erred in failing to treat his sentences as a single sentence under U.S.S.G. § 4A1.2(a)(2). He therefore fails on prong one of plain-error review. *See Parra*, 111 F.4th at 656.

* * *

Because Vazquez-Alba’s 2011 conviction is a categorical match to the generic offense of “sexual abuse of a minor” and because his remaining argument is foreclosed, the district court did not err in applying the 20-year statutory maximum found in 8 U.S.C. § 1326(b)(2). Further, the district court did not err in sentencing Vazquez-Alba because his two federal counts are not eligible for grouping and his two state-court sentences are properly treated separately under the Guidelines.

Accordingly, we AFFIRM.

All Citations

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Footnotes

- 1 According to Vazquez-Alba's presentence investigation report, there are no allegations that Vazquez-Alba stole the vehicle. Rather, a customer at Vazquez-Alba's tire-repair shop gave it to him to pay an outstanding debt. License-plate readers at the hospital alerted local police officers that the car had been reported stolen after Vazquez-Alba parked there.
- 2 The district court did not specify whether it applied the penalty provision found in § 1326(b)(2) because of the 2008 aggravated assault, the 2011 aggravated sexual assault of a child under 14, or both. Vazquez-Alba correctly argues, and the government does not dispute, that his 2008 aggravated assault does not constitute an "aggravated felony" for purposes of § 1326(b)(2) under this court's precedent. See *United States v. Gomez Gomez*, 23 F.4th 575, 577–78 (5th Cir. 2022) (determining that Texas aggravated assault does not qualify as an aggravated felony for convictions under § 1326(b)(2)).
- 3 In *Esquivel-Quintana*, the Supreme Court stated that the age of consent may be different under statutes criminalizing sexual intercourse with a minor by someone who occupies a special relationship of trust. 581 U.S. at 396–97, 137 S.Ct. 1562. Although Vazquez-Alba undoubtedly maintained a special relationship of trust with his family member, his statute of conviction does not rely upon that relationship, and thus the 16-year age of consent applies here.
- 4 Vazquez-Alba suggests that, although *Rodriguez* rejected a four-year age differential in the generic offense, it left open the possibility for other, shorter age differentials. True, the defendant in *Rodriguez* argued that the generic offense contained a four-year age differential. 711 F.3d at 562 n.28. But in rejecting that argument, we explained that the generic offense does not contain *any* age differential because "legal and other well-accepted dictionaries" do not include them. *Id.*; see also *United States v. Escalante*, 933 F.3d 395, 404–05 (5th Cir. 2019) (explaining that the "generic crime of 'sexual abuse of a minor' does not require an age differential"). This argument therefore fails.
- 5 Application Note 2 provides two examples. The crimes of unlawfully entering the United States and possession of fraudulent evidence of citizenship should be grouped because they serve similar societal interests: "the interests protected by laws governing immigration." U.S.S.G. § 3D1.2 cmt. n.2. By contrast, the sale of controlled substances and immigration offenses "are not grouped together because different societal interests are harmed." *Id.*

128 F.4th 999

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Donald Kills WARRIOR, Defendant - Appellant

No. 23-3425

|

Submitted: October 22, 2024

|

Filed: February 18, 2025

Synopsis

Background: Defendant moved to dismiss indictment charging him with failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). The United States District Court for the District of South Dakota, Jeffrey L. Viken, J., 2023 WL 4541115, adopted the opinion of Daneta Wollmann, United States Magistrate Judge, 2023 WL 5018567, and denied the motion. Defendant subsequently pled guilty to the charge while preserving his right to appeal the denial of his motion to dismiss. Defendant then appealed.

[Holding:] The Court of Appeals, Grasz, Circuit Judge, held that defendant's underlying federal conviction for which he was required to register as a sex offender did not violate double jeopardy even though he had been convicted previously in tribal court for the same conduct.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (3)

[1] Double Jeopardy Offenses Against Different Sovereignties or Governmental Units
Because tribal court exercised its inherent tribal authority when it prosecuted defendant, an enrolled member of the tribe, for the sexual assault of a child under 12 within the boundaries of Indian reservation, the federal

government's later prosecution of defendant for the same conduct did not violate the Double Jeopardy Clause, pursuant to the dual-sovereignty principle. U.S. Const. Amend. 5.

[2] **Double Jeopardy** Offenses Against Different Sovereignties or Governmental Units
The dual-sovereignty principle, under which a defendant can be prosecuted by separate sovereigns for the same conduct without violating double jeopardy, applies where two entities derive their power to punish from wholly independent sources. U.S. Const. Amend. 5.

[3] **Double Jeopardy** Offenses Against Different Sovereignties or Governmental Units
Indian tribes count as separate sovereigns under the Double Jeopardy Clause, when their power to prosecute is not attributable to any delegation of federal authority; as such, a tribal member can be prosecuted by both the tribe and the federal government for the same conduct. U.S. Const. Amend. 5.

Appeal from United States District Court for the District of South Dakota

Attorneys and Law Firms

Counsel who represented the appellant was John R. Murphy, of Rapid City, SD.

Counsel who represented the appellee was Heather Colleen Knox, AUSA, of Rapid City, SD.

Before LOKEN, SMITH, and GRASZ, Circuit Judges.

Opinion

GRASZ, Circuit Judge.

A grand jury indicted Donald Kills Warrior for failing to register as a sex offender. *See* 18 U.S.C. § 2250(a). Kills Warrior *1000 moved for his case to be dismissed, arguing his successive prosecutions in tribal and federal court put him

in double jeopardy in violation of the Fifth Amendment. The district court¹ denied his motion. In this appeal, Kills Warrior challenges the district court's denial of his motion to dismiss on the same double jeopardy issue. We affirm.

I. Background

Donald Kills Warrior is an enrolled member of the Oglala Sioux Tribe. In 2007, Kills Warrior engaged in sexual contact with a child under twelve years old within the exterior boundaries of the Pine Ridge Reservation and was convicted in Oglala Sioux Tribal Court for sexual assault. In 2008, Kills Warrior was prosecuted for the same conduct in federal court. He pled guilty and entered into a plea agreement, waiving all defenses and the right to appeal any non-jurisdictional issues, and preserving his right to appeal any district court decision to impose a sentence above the United States Sentencing Guidelines Manual (Guidelines) range. As a result of his federal conviction, Kills Warrior was required to register as a sex offender under the Sex Offense Registration and Notification Act (SORNA).

In 2022, a grand jury indicted Kills Warrior for failing to register as a sex offender. Kills Warrior moved for dismissal, arguing that his initial federal conviction for sexual assault was invalid and he therefore had no obligation to register as a sex offender. He alleged his initial conviction violated his right against double jeopardy because his tribal court conviction and federal court conviction were based on the same conduct. *See U.S. Const. amend. V.* The district court denied Kills Warrior's motion to dismiss, concluding no double jeopardy violation existed. In its denial, the district court relied on the dual-sovereignty doctrine and the Oglala Sioux Tribe's inherent authority to prosecute for crimes committed on the reservation. Kills Warrior pled guilty to failing to register as a sex offender and entered into a plea agreement, preserving his right to appeal the district court's decision on his motion to dismiss. Kills Warrior now appeals and asks this court to reverse and instruct the district court to vacate his failure to register conviction.

II. Analysis

[1] The government argues that Kills Warrior's appeal of his failure to register conviction is not properly before us

because he is attempting to vacate his underlying sexual assault conviction through an improper collateral attack. Kills Warrior's brief focuses on his initial sexual assault convictions, not the failure to register as a sex offender conviction that he now appeals. His main objective on appeal appears to be to vacating his initial sexual assault conviction. At least one circuit has explained that "SORNA is similar in structure to the statutes that the Supreme Court has held do not authorize collateral attacks of predicate convictions ..." *United States v. Diaz*, 967 F.3d 107, 109–10 (2d Cir. 2020). However, we need not decide whether SORNA permits a collateral attack² because, as the government further *1001 argues, Kills Warrior's jeopardy claim fails under the dual sovereignty principle.

[2] [3] The "dual-sovereignty principle applies where 'two entities derive their power to punish from wholly independent sources.' " *Denezpi v. United States*, 596 U.S. 591, 598, 142 S.Ct. 1838, 213 L.Ed.2d 141 (2022) (quoting *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 68, 136 S.Ct. 1863, 195 L.Ed.2d 179 (2016)). "Indian tribes ... count as separate sovereigns under the Double Jeopardy Clause," when their power to prosecute is not attributable to any delegation of federal authority. *Sanchez Valle*, 579 U.S. at 70, 136 S.Ct. 1863. As such, a tribal member can be prosecuted by both the tribe and the federal government for the same conduct. *See id. See also United States v. Wheeler*, 435 U.S. 313, 329–30, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) ("Since tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence,' and the Double Jeopardy Clause thus does not bar one when the other has occurred."). Because the Oglala Sioux Tribal Court exercised its inherent tribal authority when it prosecuted Kills Warrior, the federal government's later prosecution for the same conduct did not violate the double jeopardy clause.

III. Conclusion

For the foregoing reasons, we affirm the district court's denial of Kills Warrior's motion to dismiss.

All Citations

128 F.4th 999

Footnotes

- 1 The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota, now retired.
- 2 Neither do we resolve whether Kills Warrior waived his double jeopardy challenge when he pled guilty to the federal offense. *Compare United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981) (“Cases from our circuit hold generally that a guilty plea waives all nonjurisdictional defects ... and that double jeopardy is a personal defense and not jurisdictional.”), *with United States v. Vaughan*, 13 F.3d 1186, 1187–88 (8th Cir. 1994) (explaining Supreme Court precedent dictates a guilty plea may foreclose a double jeopardy claim *unless* it is clear from the face of the record that the court had no power to enter conviction or impose a sentence).

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705 Fed.Appx. 651 (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. 9th Cir. Rule 36-3.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

James Anthony Andrew
WESTERMAN, Defendant-Appellant.

No. 16-30288

|

Submitted December 6, 2017 * Seattle, Washington
|

Filed December 08, 2017

Attorneys and Law Firms

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Michael Donahoe, Esquire, Assistant Federal Public Defender, FDMT-Federal Defenders of Montana (Helena), Helena, MT, for Defendant-Appellant

Appeal from the United States District Court for the District of Montana, **Charles C. Lovell**, District Judge, Presiding, D.C. No. 6:15-cr-00014-CCL-1

Before: **O'SCANNLAIN**, **TALLMAN**, and **WATFORD**, Circuit Judges.

***652** MEMORANDUM **

The district court properly denied James Westerman's motion to dismiss his indictment for failure to register under the Sex Offender Registration and Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a).

Westerman's predicate offense—sexual battery in violation of Kan. Stat. Ann. § 21-5505(a)—is a sex offense for purposes of SORNA. See 34 U.S.C. § 20911(1), (5)(A)(i). A sex offense is “a criminal offense that has an element involving a sexual act or sexual contact with another.” § 20911(5)(A)(i). “Sexual act” and “sexual contact” are undefined, so we use the “ordinary, contemporary, and common meaning of the statutory words.” *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007) (quotation omitted). We are not persuaded that Congress intended “to import the elements of offenses delineated elsewhere in the U.S. Code,” *id.* at 743, and therefore decline to import the definitions of “sexual act” and “sexual contact” found in 18 U.S.C. § 2246(2), (3).

Sexual contact is an element of the Kansas sexual battery statute. See Kan. Stat. Ann. § 21-5505(a). The statute does not limit the “character of the touching” required to commit the offense, but it does require that the touching be conducted with sexual intent, therefore criminalizing sexual contact. See *United States v. Rocha-Alvarado*, 843 F.3d 802, 808 (9th Cir. 2016) (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999)). The statute’s requirement that the offense be committed with sexual intent also defeats Westerman’s argument that it is impossible to know whether his conviction “was entered on a plea of reckless or intentional *mens rea*.” Conduct committed “with the intent to arouse or satisfy the sexual desires of the offender or another,” Kan. Stat. Ann. § 21-5505(a), cannot be committed recklessly.

AFFIRMED.

All Citations

705 Fed.Appx. 651 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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United States v. Buddi

United States District Court, E.D. Tennessee, Greeneville Division. • September 26, 2024 • Slip Copy • 2024 WL 4304791 (Approx. 6 pages)

 1 of 2,459 results Original terms Go

2024 WL 4304791

Only the Westlaw citation is currently available.

United States District Court, E.D. Tennessee,
Greeneville Division.

UNITED STATES of America, Plaintiff,
v.
Rihanna BUDDI, Defendant.

2:24-CR-00018-DCLC-CRW
 Filed September 26, 2024

Attorneys and Law Firms

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Lesley A. Tiller, Public Defender, Federal Defender Services of Eastern Tennessee, Inc., Greeneville, TN, for Defendant.

MEMORANDUM OPINION AND ORDER

[Clifton L. Corker](#), United States District Judge

*1 This matter is currently set for a sentencing hearing on September 26, 2024. Defendant filed Objections to the Presentence Investigation Report (“PSR”) [Doc. 22], which the United States Probation Office (“USPO”) addressed in an Addendum to the PSR [Doc. 24] and to which the United States (“the Government”) responded [Doc. 33]. The Court heard oral argument on the objections and requested additional briefing. Thus, Defendant filed a supplemental brief [Do. 40] and the Government responded [Doc. 41]. For the reasons stated herein, Defendant's objections are **OVERRULED**.

I. BACKGROUND

On March 27, 2024, Defendant pleaded guilty to the sole count contained in the Indictment: failure to register as a sex offender in violation of [18 U.S.C. § 2250\(a\)](#) [See Docs. 1, 11, 13]. In support of her guilty plea, Defendant agreed and stipulated to the following: she “is a sex offender who is required to register in compliance with [the Sex Offender Registration and Notification Act (‘SORNA’)], following a conviction for Lewd or Lascivious Battery and Transmission of Material Harmful to a Minor, in Clay County, Florida on February 6, 2017”; she moved to Bulls Gap, Tennessee on December 17, 2023; and she “knowingly failed to register as a sex offender in Tennessee and knowingly failed to properly notify Florida of her move to Tennessee in accordance with SORNA” [Doc. 12, ¶¶ (a), (g) (i)].

On June 17, 2024, the USPO prepared and disclosed a PSR [Doc. 16] which, among other things, classified Defendant as a Tier II sex offender based on her Florida convictions [*Id.* at ¶ 19] and proposed various special conditions of supervision specific to sex offenders [*Id.* at ¶ 69]. Defendant objects to the Tier II classification and the resultant offense levels, arguing that she should be classified as a Tier I offender with a base offense level of 12 [Doc. 22, pg. 1]. Defendant also objects to the proposed special condition of supervision requiring submission to a psychosexual assessment [*Id.* at pg. 10]. Finally, Defendant objects to various facts contained in the PSR, including the date she was taken into custody, name misspellings, and pending charges, none of which impact the Guideline range [*Id.* at pgs. 10–13]. Each of Defendant's objections are examined in turn.

II. ANALYSIS

Defendant's foremost objection is that she should be classified as a Tier I offender under SORNA [Doc. 22, pg. 1]. A Tier I offender means a sex offender other than a Tier II or Tier III. [34 U.S.C. § 20911\(2\)](#). Neither party asserts Defendant is a Tier III sex offender. Thus, the analysis focuses on whether Defendant is properly classified at Tier II. If not, she must be Tier I.

Defendant is properly classified as a Tier II offender if she has been convicted of a felony sex offense that is "comparable to or more severe than ... coercion and enticement (as described in section 2422(b) of Title 18)." [34 U.S.C. § 20911\(3\)\(A\)](#).¹ To determine whether the offenses are comparable, the Court must apply the categorical approach. See [United States v. Barcus](#), 892 F.3d 228, 231–32 (6th Cir. 2018). That is, "if the crime of conviction ... covers *any* more conduct" than the federal offense, the two crimes are not comparable under SORNA. [United States v. Barcus](#), 892 F.3d 228, 233 (6th Cir. 2018). In making this determination, the Court must "focus on the minimum conduct criminalized by the state statute." [⚠️ United States v. Southers](#), 866 F.3d 364, 367 (6th Cir. 2017) (quoting [Moncrieffe v. Holder](#), 569 U.S. 184, 191 (2013)). If the state statute "sweep[s] more broadly" than the federal statute, the offenses are not comparable. [Barcus](#), 892 F.3d at 232 (quoting [Descamps v. United States](#), 570 U.S. 254, 261 (2013)).

*2 Under Florida law, a person commits the offense of lewd or lascivious behavior by (1) "[e]ngaging in sexual activity with a person 12 years of age or older but less than 16 years of age"; or (2) "[e]ncouraging, forcing, or enticing any person less than 16 years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity." [Fla. Stat. Ann. § 800.04\(a\)](#). The purportedly comparable federal analogue provides "[w]hoever 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 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." [18 U.S.C. § 2422\(b\)](#).

Applying the categorical approach, [Fla. Stat. Ann. § 800.04\(a\)](#) is unquestionably comparable to coercion and enticement under [§ 2422\(b\)](#). That is, [§ 800.04\(a\)](#) does not cover any more conduct than [18 U.S.C. § 2422\(b\)](#). Defendant argues that the category of sexual activity that can be coerced or enticed under [§ 800.04\(a\)](#) is broader than that which can be coerced or enticed under [§ 2422\(b\)](#). Specifically, she asserts that, at the time of her Florida convictions, the federal definition of "sexual activity" was narrower than [Fla. Stat. Ann. § 800.04\(a\)](#) because the term "sexual activity for which any person can be charged with a criminal offense" required interpersonal contact and, in contrast, [§ 800.04\(a\)](#) included criminal behavior that did not include touching.

Here, the federal coercion and enticement statute [18 U.S.C. § 2422\(b\)](#) is contained in criminal chapter 117. At the time of Defendant's Florida convictions, [18 U.S.C. § 2427](#) provided that in chapter 117, "the term 'sexual activity for which any person can be charged with a criminal offense' includes the production of child pornography, as defined in section 2256(8)[.]" [18 U.S.C. § 2427 \(1998\)](#). In 2023, Congress amended [§ 2427](#) to clarify that "the term 'sexual activity for which any person can be charged with a criminal offense' *does not require interpersonal physical contact[.]*" [18 U.S.C. § 2427 \(2023\)](#); see [169 Cong. Rec. H6213-01](#), at Sec. 5102, [2023 WL 8490257 \(Dec. 6, 2023\)](#). "Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. Thus, an amendment to a statute does not necessarily indicate that the unamended statute meant the opposite." [United States v. Breeding](#), 109 F.3d 308, 311 (6th Cir. 1997) (quoting [Hawkins v. United States](#), 30 F.3d 1077, 1082 (9th Cir. 1994)). Here, the Court finds that Congress was indeed clarifying that [§ 2422\(b\)](#), both before and after the December 2023 amendment, does not require interpersonal, physical contact. See [Breeding](#), 109 F.3d at 311. Thus, [§ 2422\(b\)](#) is not narrower than [§ 800.04\(a\)](#) with respect to the particular sexual activity covered by each statute.

Defendant also asserts that [§ 800.04\(a\)](#) is broader [§ 2422\(b\)](#) because the Florida statute lacks a *mens rea* and the federal statute requires a knowing intent. However, lewd or lascivious battery is a "general intent" crime. See [United States v. Ettinger](#), 344 F.3d 1149, 1158 (11th Cir. 2003) ("Where no specific intent element is apparent on the face of the statute, the crime is one of general intent."). "[A] defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes." [United States v. Phillips](#), 19 F.3d 1565, 1576–77 (11th Cir. 1994). Because [18 U.S.C. § 2422\(b\)](#) has a "knowing" *mens rea*, [Fla. Stat. § 800.04\(4\)\(a\)](#) requires a comparable intent. In sum, Defendant is properly classified as a Tier II offender and her objections to the relevant paragraphs contained in the PSR are **OVERRULED**.

*3 Turning to Defendant's remaining objections, she asserts that the recommendation that she be required to submit to a psychosexual assessment as a condition of supervision is not warranted and should not be imposed [Doc. 22, pgs. 10, 11]. In support, she states that she had a psychosexual assessment in 2016 and that her failure to register is not a sex offense [*Id.*].

Pursuant to Standing Order 15-06, however, this Court may include submission to a psychosexual assessment as a condition of supervision “for a defendant who (1) is convicted of a sex offense as defined under [SORNA]; or (2) is otherwise required to register with any local, state, or federal sex offender registry; or (3) has a history that may otherwise justify the need for additional conditions.” E.D. Tenn. SO-15-06.

Here, although the instant offense of conviction is not a sex offense, Defendant is required to register under SORNA and failed to do so after she moved to her boyfriend's residence where, of particular importance, she lived with two minor children [See Doc. 24, pg. 4]. Given Defendant's history and characteristics, including the prior revocation of her probation at the state level, and the nature and circumstances of the instant offense, the Court agrees with the USPO that the condition is necessary to assist Defendant with rehabilitation and to protect the public. Accordingly, Defendant's objection to ¶ 69(h) of the PSR is **OVERRULED**. As for Defendant's factual objections, the USPO adequately addressed each of them in the Addendum to the PSR and they do not affect Defendant's guideline range. Thus, they are considered **MOOT**.

III. CONCLUSION

Accordingly, the Court shall **OVERRULE** Defendant's objection [Doc. 22, pgs. 1-10] to the PSR and find she is a Tier II offender. The PSR's calculations are correct and shall be adopted by the Court [Doc. 16; ¶ 19]. The Court shall **OVERRULE** Defendant's objection [Doc. 22, pgs. 10-11] to completing the psychosexual assessment as recommended in paragraph 69(h) of the PSR. Defendant's factual information objections [Doc. 22, pgs. 11-13] are adequately addressed in the PSR Addendum. See Doc. 24, pgs. 5-6.

SO ORDERED.

All Citations

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Footnotes

- ¹ There are three additional ways a sex offender could be classified as a Tier II offender, but the Court will focus only on this one as this is the comparable offense the Government argues makes Defendant a Tier II sex offender.
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United States v. Karsten

United States District Court, D. Nebraska. • September 18, 2024 • Slip Copy • 2024 WL 4225893 (Approx. 3 pages)

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2024 WL 4225893

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 September 18, 2024

Attorneys and Law Firms

Matthew R. Molsen, Assistant U.S. Attorney, U.S. Attorney's Office, Lincoln, NE, for Plaintiff.

MEMORANDUM AND ORDER

John M. Gerrard, Senior United States District Judge

*1 The defendant was charged by indictment with a single count of failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a). Filing 1. He moves to dismiss the indictment, arguing in effect that it fails to state an offense. Filing 62. The Court will grant the motion and dismiss the indictment.

In reviewing a motion to dismiss an indictment for failure to state an offense, the Court accepts the allegations stated in the indictment as true, and asks whether they can form the basis of the charged offense. *United States v. Hansmeier*, 988 F.3d 428, 436 (8th Cir. 2021). An indictment survives a motion to dismiss for failure to state an offense if it contains a facially sufficient allegation. *United States v. Sholley-Gonzalez*, 996 F.3d 887, 893 (8th Cir. 2021). An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. *Id.* An indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted. *United States v. Sewell*, 513 F.3d 820, 821 (8th Cir. 2008); accord *Hansmeier*, 988 F.3d at 436.

But here, the key allegations in the indictment are that the defendant was obliged to register as a sex offender “[b]etween, on, or about October 10, 2022, and November 1, 2022 ... as a result of his conviction in the District Court of Hall County, Nebraska for Attempted First Degree Sexual Assault on July 3, 2001.” Filing 1. The sufficiency of those allegations rests upon the answer to a question of law: If the defendant was convicted of that offense on July 3, 2001—and he doesn’t deny it—then did that actually oblige him to register as a sex offender between October 10 and November 1, 2022? The Court concludes it did not.

The Court’s detailed reasoning on that point is found in the Court’s Memorandum and Order of June 6, 2024 (filing 62) and need not be recapitulated here.¹ The government’s argument, to the extent not addressed there, focuses on consent: The government contends that none of the cases relied on by the Court “refute the point that lack of consent is a necessary element of subsections (a) and (b), and under subsection (c), whether the victim consented is irrelevant.” Filing 71 at 9.

*2 The Court isn’t persuaded that matters, for two reasons. The first is that, as the Court previously explained, a lack of valid consent is central to all three subsections of the statute. See filing 46 at 9. To prove a violation of subsection (a), the

prosecution must prove the victim actually didn't consent, and to prove a violation of subsection (b) or (c), the prosecution must prove the victim was legally incapable of consenting. See § 28-319.

That conclusion regarding subsections (b) and (c), the government responds, "ignores the elements of the two different offenses." Filing 71 at 11. The government points out that subsection (b) requires the prosecution to prove that the defendant knew the victim was incapable of consenting, but subsection (c) does not. See filing 71 at 11 (citing § 28-319). "Here again," the government claims, "we see that subsection (c) is a different offense with different elements compared to subsections (a) and (b)." Filing 71 at 11.

Different elements, yes. Different offenses, not so much. The underlying assertion there—that "different elements = different offenses"—is simply inconsistent with the premise of the categorical approach. After all, if the only way for a statute to be indivisible was for all its subsections to have the exact same elements, we wouldn't be in this mess to begin with. The government doesn't deny—and really can't deny—that subsections (a) and (b) are indivisible. See filing 46 at 8-9 (citing *State v. Npimnee*, 2 N.W.3d 620, 627 (Neb. 2024)). And while the government reminds the Court of its obligation to parse the statute, filing 71 at 12, the government hasn't provided the Court with any authority suggesting it can answer the question posed by *Mathis v. United States*, 579 U.S. 500, 517 (2016)—"determine whether [the statute's] listed items are elements or means"—by somehow saying "both."

In the end, the Court's parsing of the statute and the relevant Nebraska caselaw leaves it with the conclusion most concisely summarized by the Nebraska Supreme Court in *State v. McCurdy*, 918 N.W.2d 292, 298-99 (Neb. 2018): That § 28-319(a)-(c) "sets forth three ways in which one could be found guilty of the offense." That means the statute is indivisible, hence overbroad, hence a Tier I offense. Accordingly,

IT IS ORDERED:

1. The defendant's motion to dismiss (filing 62) is granted.
2. The indictment (filing 1) is dismissed.

All Citations

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Footnotes

- ¹ The defendant also seems to suggest, in his reply brief, that § 28-319(c) is overbroad even if the statute is divisible. Filing 77 at 3. But it's not the Court's practice to consider new arguments raised only in reply briefs. See *Freeman v. Clay Cnty. Bd. of Cnty. Comm'rs*, 706 F. Supp. 3d 873, 886 (D.S.D. 2023); *ProMove, Inc. v. Siepmann*, 355 F. Supp. 3d 816, 823 (D. Minn. 2019); *Hanjy v. Arvest Bank*, 94 F. Supp. 3d 1012, 1020 (E.D. Ark. 2015); *Torgeson v. Unum Life Ins. Co. of Am.*, 466 F. Supp. 2d 1096, 1121-22 (N.D. Iowa 2006).
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United States v. McGee

United States Court of Appeals, Eleventh Circuit. • September 9, 2024 • Not Reported in Fed. Rptr. • 2024 WL 4117012 (Approx. 6 pages)

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2024 WL 4117012

Only the Westlaw citation is currently available.

United States Court of Appeals, Eleventh Circuit.

**UNITED STATES of America, Plaintiff-Appellee,
v.
Anthony MCGEE, Defendant-Appellant.**

No. 23-11525
Non-Argument Calendar
Filed: 09/09/2024

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:22-cr-20543-DPG-1

Attorneys and Law Firms

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[Christian Scott Dunham](#), [Ta'Ronce Stowes](#), [Michael Caruso](#), Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before [Wilson](#), [Luck](#), and [Lagoa](#), Circuit Judges.

Opinion

PER CURIAM:

*1 Anthony McGee appeals his conviction for failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), in violation of [18 U.S.C. § 2250\(a\)](#). McGee argues that there is insufficient evidence to support his conviction because the government did not prove that he knowingly failed to register after he relocated to Florida. For the following reasons, we affirm his conviction.

I. BACKGROUND

In November 2022, a grand jury indicted McGee, charging that he knowingly failed to register as a sex offender in Florida "[f]rom on or about May 3, 2022, and continuing up to the date of this Indictment" as required by SORNA, in violation of [18 U.S.C. § 2250\(a\)](#). McGee entered a plea of not guilty.

McGee proceeded to a jury trial that lasted two days. The government first called Amanda Carder, a federal law enforcement officer who investigates whether sex offenders are in violation of the Florida registration laws. Offenders are required to register in Florida after they have resided for three consecutive days in Florida and they have 48 hours to notify the state. McGee first applied for a Florida identification card in May 2022. All applicants for a driver's license or Florida identification card are run through the National Sex Offender Registry, so McGee's application for an identification card triggered an investigation into his sex offender status. The investigation revealed that McGee began working in Florida as early as December 2018. It also revealed that McGee was convicted of sexual abuse in the third degree and false imprisonment in Iowa in 2004. McGee's conviction for sexual abuse in the third degree is a conviction in Florida for which he was required to register for life. But McGee had no registration on file in Florida.

Janese Milam, a compliance administrator at the Iowa Sex Offender Registry Unit, testified that an offender who leaves the state of Iowa is required to register as a sex offender with their new jurisdiction. McGee's sentencing order for his Iowa

conviction did not reference his obligation to register, because the registry is an administrative, rather than a criminal, matter. Nevertheless, a section of the Iowa Code requires convicted offenders to register. The registration requirement for an offender convicted of sexual abuse in the third degree is lifetime.

The duty to register begins when the offender is released from custody. Offenders are generally registered upon release from prison or subsequently registered by a probation officer. If that does not happen, an administrator from the Iowa Sex Offender Registry Unit will follow up about compliance. Upon registration, an offender receives a DCI-144 form, which outlines the requirements of registration duties in the state of Iowa. If an offender has questions, the Iowa Sex Offender Registry Unit has a determination process in which the offender fills out a specific form and provides certain documentation. The Iowa Sex Offender Registry Unit then answers the offender's questions. When an offender leaves Iowa, he is required to go to a local sheriff's office to let the authorities know that he is moving out of state, and the registry office will then notify the state to which the offender is relocating about the change in jurisdiction.

*2 Milam further testified that a document, known as a notice of status of registration requirement, is sent out to an offender once he is registered with the Sex Offender Registry. That document informs the offender about his registration requirement. The state of Iowa sent that document to McGee at the correctional facility where he was being held, and his requirement was marked as lifetime registration. McGee also received a tier notification, which listed his convictions. McGee signed the document and handwrote, "Questions in regards to lifetime registration was not listed in the sentencing order on court compliance."

McGee received a DCI-144 registration requirement form. The form stated that, if the offender relocates, the offender must register at the local sheriff's office in Iowa within five business days. It also stated, "Additionally, federal law requires the sex offender to comply with the sex offender registration requirements of the other jurisdiction within three days of establishing a new residence, employment, or attendance at a school in that jurisdiction." McGee signed the DCI-144 form. The DCI-144 form also noted that the length of registration was lifetime for those convicted of an aggravated offense, which includes sexual abuse in the third degree. The form noted that failure to comply may result in criminal prosecution. McGee signed to the following statement:

I acknowledge that I have been notified of my duty to register with the Iowa Sex Offender Registry. This duty has been explained, and I understand my duty to comply with all of the requirements of Iowa Code, Chapter 692A, and [Title 18 U.S.C., Section 2250](#), including those listed on this form.

On the DCI-144 form, McGee handwrote, "Question, lifetime parole or reg was not in sentencing order, no lifetime due to date." Above McGee's handwritten statement was a bullet that appeared in bold and all caps, stating:

Requesting a review of registration requirement: Persons who have registered and who feel they are not required to register may file an application for determination, accompanied by required court documents, with the Iowa Department of Public Safety. An application for determination form is available from any Iowa Sheriff's Office or Department of Corrections Institution.

By handwriting his question on the DCI-144 form, McGee did not follow the proper procedure for requesting a review of his registration requirement. McGee never filed an application for determination, which was the appropriate method for McGee to inquire about his registration requirement. McGee did correctly register in Iowa as required.

On cross-examination, Milam testified that there was no evidence of receipt for the notice of status of registration and McGee did not sign the indicated signature line. Milam further testified that she was not present when McGee signed his DCI-144 form and therefore could not confirm what was explained to McGee about his registration requirements before he left the correctional facility. The state received McGee's handwritten questions but did not respond, because it did not come through the proper channels.

Tracie Newton, an administrator at Illinois's Sex Offender Registration Unit, testified that an offender who is convicted of a qualifying sex crime outside of Illinois is required to register in Illinois once the offender moves to Illinois. The offender must register in person with the local police department, and police officers review the registration form with the offender. After the registration form is read to the offender, the offender signs off on all the stipulations on the registration form.

*3 The government introduced evidence that McGee initialed his Illinois registration form in 2011. The form stated, “If you move to another state, you must register with that state within three days. You must notify the agency with whom you last registered in person of your new address at least three days before moving.” It also stated that failure to register is a criminal offense. Lastly, the form stated, “I have read and/or had read to me the above requirements. It has been explained to me, and I understand my duty to register.... All ending registration dates will be determined by the Illinois State Police.”

The government also offered evidence that McGee had signed 30 other registration forms in Illinois, dating from 2011 to 2018. On each form, McGee initialed next to the requirement that, if an offender moves to another state, he must register with that state within three days. Each form provided the next date by which McGee must register and informed McGee of how to verify his ending registration date. McGee's last signed registration form stated that McGee had a duty to register next by September 2018. McGee did not inform the state of Illinois that he moved to Florida, and McGee did not register on or after September 2018. McGee did not submit a request to verify his sex offender registration ending dates. The state required McGee to register in Illinois ten years from his release date from incarceration, but he did not do so.

After the government rested its case, McGee moved for judgment of acquittal, arguing, in relevant part, that the government had not shown a knowing failure to register. The district court denied the motion. McGee did not testify and did not present a defense. He renewed his motion for judgment of acquittal, which the court denied. The jury found McGee guilty.

The district court sentenced McGee to six months of imprisonment followed by five years of supervised release. This timely appeal followed.

II. STANDARDS OF REVIEW

We review a preserved challenge to the sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the verdict. *United States v. Wilson*, 788 F.3d 1298, 1308 (11th Cir. 2015). We will affirm the verdict “if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt.” *Id.* (quoting *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013)).

III. ANALYSIS

On appeal, McGee argues that the government failed to prove that he knew of his obligation to register as a sex offender upon his relocation to Florida. To contest knowledge, he argues that: (1) registration was not part of his sentence for his underlying Iowa sex offense; (2) Iowa officials ignored his objection to the duration of his registration obligation; (3) Illinois's registry confirmed his belief about the limited duration of his obligation; and (4) he made no effort to conceal his identity or evade criminal prosecution in Florida.

In a prosecution for a SORNA violation, the government must prove that the defendant (1) was required to register under SORNA; (2) traveled in interstate commerce; and (3) knowingly failed to register in his new state. *United States v. Beasley*, 636 F.3d 1327, 1329 (11th Cir. 2011). The government need not prove that a defendant knew that he was violating SORNA, but it must prove that he knowingly “violated a legal registration requirement upon relocating.”  *United States v. Griffey*, 589 F.3d 1363, 1367 (11th Cir. 2009).

Knowingly means “that an act was done voluntarily and intentionally and not because of a mistake or by accident.” *United States v. Mosquera*, 886 F.3d 1032, 1051 (11th Cir. 2018). “We have recognized that guilty knowledge can rarely be established directly, and have therefore held that a jury may infer knowledge and criminal intent from circumstantial evidence alone.” *United States v. Duenas*, 891 F.3d 1330, 1334 (11th Cir. 2018). And in evaluating evidence, jurors may “apply their common knowledge, observations and experiences in the affairs of life.” *United States v. Cruz-Valdez*, 773 F.2d 1541, 1546 (11th Cir. 1985) (en banc). Here, the evidence was sufficient to support that McGee violated SORNA because he knowingly failed to register in Florida from May 2022 to November 2022.

*4 First, McGee argues that he lacked notice of his registration requirements because it was not part of his sentence for his Iowa state conviction and Iowa state officials failed to inform him of his registration requirements. McGee, however, provides no authority explaining why Iowa's treatment of registration as an administrative matter, rather than a sentencing matter, would alter a defendant's knowledge of the requirement itself.¹ In any event, Iowa authorities repeatedly instructed McGee on his registration requirements, including that if he left Iowa for a new jurisdiction, he had to comply with the sex offender registration requirements of that new jurisdiction. McGee signed two forms in Iowa acknowledging his registration requirements. Ultimately, he registered in Iowa at the correct time after being released from incarceration, and he also

correctly registered in Illinois upon moving there. McGee's first argument is therefore unavailing because his actions showed that he knew of his duty to register, even though it was not a part of his criminal sentence.

Second, McGee argues that he lacked knowledge of his registration requirements because Iowa officials ignored his objections to the duration of his registration obligation in Iowa. But McGee did not follow the proper channels for contesting his registration requirements, and even if he had, he subsequently moved jurisdictions, so he was no longer subject to Iowa's durational requirements. More importantly, the evidence showed that McGee knew that he was no longer subject to Iowa's requirements. After McGee moved from Iowa to Illinois, he correctly registered in Illinois and he also signed numerous documents that informed him that, if he again moved states, he had a duty to inform authorities and register in his new state. It was therefore reasonable for the jury to conclude that, upon moving, McGee knew that he was subject to Illinois's, and subsequently Florida's, registration requirements, rather than Iowa's. See [Cruz-Valdez, 773 F.2d at 1546](#). And because the jury could have inferred that McGee knew that he was no longer subject to Iowa's durational requirements, the fact that he unsuccessfully contested those requirements is immaterial to his knowledge under SORNA.

Third, with respect to McGee's relocation from Illinois to Florida, he contends that Illinois's registry confirmed his belief that he had no obligation to register in Florida. Specifically, McGee argues that he believed he did not have to register for life in Florida because his previous home state of Illinois required only ten years of registration. But this matters not because McGee failed to comply with Illinois's ten-year registration requirement too. McGee's duty to register in Illinois lasted until 2021, ten years after his incarceration, but he stopped registering in 2018. And McGee failed to comply with an additional registration requirement because he did not inform authorities in either Illinois or Florida that he was moving states. When McGee moved to Illinois, he initialed and signed 30 forms acknowledging that, if he left Illinois to move to another state, he had to register with that new state. From this, the jury could have reasonably inferred that McGee demonstrated that he understood his registration requirements if he again moved states. McGee was therefore on notice of his duties to register in Florida when he moved there, but he neither registered nor informed authorities in either Illinois or Florida about his move, thereby violating SORNA.

Fourth, McGee argues that he did not knowingly fail to register because he made no effort to conceal his identity or evade prosecution in Florida. He points to evidence that he provided his legal name and documentation of his identity to employers, the Department of Motor Vehicles, and in his application for an apartment. But the jury was entitled to "apply their common knowledge, observations and experiences in the affairs of life" and ultimately conclude that such evidence was outweighed by the evidence that showed that McGee knew of his registration obligations upon relocating and failed to meet them. See [Cruz-Valdez, 773 F.2d at 1546](#). Similarly, although McGee argues that the government only presented witnesses who had personal knowledge about the nuances of registration, the jury was entitled to conclude that someone in McGee's position was in fact knowledgeable about these nuances given the abundance of documentation and information he received. See [Griffey, 589 F.3d at 1367](#).

*5 Finally, in his reply brief, McGee argues for the first time that the government relied on an impermissible variance between the indictment and the trial evidence because the indictment charged him with violating SORNA from May 2022 to November 2022, but the government presented evidence at trial of McGee's failure to knowingly register as early as 2018. He contends that this variance is impermissible because it exposes him to the possibility of a second prosecution for the same offense and created undue surprise. However, an issue not raised in an appellant's initial brief, but subsequently raised in his reply brief, is deemed abandoned. See [United States v. Moran, 778 F.3d 942, 985 \(11th Cir. 2015\)](#). Because McGee failed to raise the impermissible variance issue in his initial brief, we will not consider that argument on appeal. See [United States v. Evans, 473 F.3d 1115, 1120 \(11th Cir. 2006\)](#) (noting that arguments raised for the first time in a reply brief are not properly before us).

IV. CONCLUSION

Sufficient evidence supports the jury's finding that, upon relocating to Florida, McGee knowingly failed to register as a sex offender under SORNA, in violation of [18 U.S.C. § 2250\(a\)](#). Before moving to Florida, McGee correctly registered on several occasions and signed numerous forms indicating that he knew of his registration obligations, including his obligations if he moved states. For these reasons, we affirm McGee's conviction.

AFFIRMED.

All Citations

Footnotes

- ¹ As referenced in the facts, although Iowa treats registration as an administrative matter, offenders are still required by state law to register.
-

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2009 WL 2005308

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

UNITED STATES of America

v.

Christopher D. BRUMETT, Defendant.

No. 1:09-CR-37.

|

July 7, 2009.

Attorneys and Law Firms

Wendy L. Fuller, AUSA, United States Attorney's Office, Burlington, VT, for Plaintiff.

RULING ON MOTION TO DISMISS THE INDICTMENT (Paper 16)

J. GARVAN MURTHA, District Judge.

*1 On March 26, 2009, a federal grand jury in Vermont indicted Defendant Christopher D. Brumett with one count of traveling in interstate commerce and knowingly failing to update his registration as a sex offender as required under the Sex Offender Registration and Notification Act ("SORNA") in violation of 18 U.S.C. § 2250(a). Brumett moves to dismiss the indictment, arguing he has not been convicted of a "sex offense" as defined under SORNA. The Government asserts Defendant is required to register as a sex offender due to his 2005 conviction in California for "annoying or molesting a child under 18" in violation of California Penal Code § 647.6(a).

SORNA defines a "sex offender" as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). A "sex offense" is defined, in relevant part, as "(i) a criminal offense that has an element involving a sexual act or sexual contact with another" and "(ii) a criminal offense that is a specified offense against a minor". *Id.* § 16911(5)(A)(i),(ii). A "specified offense" against a minor is defined as "(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct" and "(I) Any conduct that by its nature is a sex offense against a minor." *Id.* § 16911(7)(H), (I).

Brumett argues the offense of "annoying or molesting a child under 18" in violation of California Penal Code § 647.6(a)(1) is not a "sex offense" under SORNA because it does not include an essential element involving a sexual act or sexual contact. Section 647.6(a)(1) states, "Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars (\$5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment." Brumett argues "to annoy" under § 647.6(a)(1) means only "to disturb or irritate, especially by continued or repeated acts" and "molest" is "in general, a synonym for annoy." *People v. Lopez*, 19 Cal.4th 282, 289–90, 965 P.2d 713, 717 (1998) (citing *People v. Pallares*, 112 Cal.App.2d Supp. 895, 901, 246 P.2d 173, 176 (1952)). Based on this language, Brumett argues his conviction under § 647.6(a)(1) is, by definition, not a "sex offense" under SORNA. The Court disagrees.

The California Supreme Court went on to explain in *Lopez* that with respect to the California Penal Code, the terms "'[a]nnoy' and 'molest' ordinarily relate to offenses against children, with a connotation of abnormal sexual motivation." 19 Cal.4th at 290. Accordingly, a defendant violates § 647.6(a) only where his actions constitute "(1) conduct a normal person would unhesitatingly be irritated by, and (2) conduct *motivated by an unnatural or abnormal sexual interest* in the victim." *Id.* at 289 (emphasis added) (internal citations and quotation marks omitted). Brumett's conviction therefore qualifies as a "specified offense" against a minor under 42 U.S.C. § 16911(7)(I) because the offense involves "conduct that by its nature is a sex offense against a minor." Accordingly, the Court finds Brumett committed a "sex offense" under SORNA and was required to abide by the statute's registration requirements. This finding is supported by the fact that Defendant's plea to the offense required him to register as a sex offender under California law. See Cal.Penal Code § 290(c) (requiring persons convicted of violating § 647.6 to register as a sex offender).

*2 Defendant Brumett's Motion to Dismiss the Indictment is DENIED.

SO ORDERED.

All Citations

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 KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [United States v. Thayer](#), W.D.Wis., June 29, 2021

 KeyCite Overruling Risk - Negative Treatment

Overruling Risk [Johnson v. U.S.](#), U.S., June 26, 2015

597 F.3d 1347

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.

Matthew Mason DODGE, a.k.a.
flow_matt, Defendant–Appellant.

No. 08–10802.

|

March 5, 2010.

Synopsis

Background: Defendant pled guilty and was convicted by the United States District Court for the Southern District of Alabama, No. 07-00282-CR-CG, Callie V.S. Grande, Chief Judge, of transferring obscene material to minor and was required to register under Sex Offender Registration and Notification Act (SORNA). Defendant appealed as to registration requirement. The Court of Appeals, [554 F.3d 1357](#), reversed, and, [566 F.3d 976](#), vacated previous panel opinion and ordered rehearing en banc.

Holdings: On rehearing, the Court of Appeals, [Wilson](#), Circuit Judge, held that:

[1] violation of statute prohibiting transfer of obscene materials to minors was a “criminal offense” as defined by SORNA;

[2] defendant’s particular conviction for knowingly attempting to transfer obscene material to a minor was a “specified offense against a minor” within meaning of SORNA; and

[3] as matter of first impression, because defendant’s conviction was a “specified offense against a minor,” defendant committed a “sex offense” and was therefore a “sex offender” subject to SORNA’s registration requirement.

Affirmed.

[Barkett](#), Circuit Judge, concurred in result.

West Headnotes (10)

[1] **Criminal Law**  Grant of probation or supervised release

Court of Appeals reviews district court’s imposition of special condition of supervised release for abuse of discretion, so long as the objection was preserved for appeal.

[3 Cases that cite this headnote](#)

[2] **Criminal Law**  Review De Novo

Court of Appeals reviews district court’s interpretation of statute *de novo*.

[4 Cases that cite this headnote](#)

[3] **Criminal Law**  Discretion of Lower Court

District court abuses its discretion if it applies the incorrect legal standard.

[4] **Mental Health**  Persons and offenses included

Violation of statute prohibiting transfer of obscene materials to minors is a “criminal offense” as defined by Sex Offender Registration and Notification Act (SORNA); exclusion of that offense from enumerated list of federal offenses in SORNA does not categorically exclude violation of statute from SORNA’s entire definition of “sex offense.” [18 U.S.C.A. § 1470](#); Sex Offender Registration and Notification Act, § 111(5)(A), (6), [42 U.S.C.A. § 16911\(5\)\(A\), \(6\)](#).

[13 Cases that cite this headnote](#)

[5] **Statutes**  Language

Statutes ↗ Giving effect to statute or language; construction as written

To determine meaning of statute, court looks first to text of statute itself; if statutory text is unambiguous, statute should be enforced as written, and no need exists for further inquiry.

5 Cases that cite this headnote

[6] **Aliens, Immigration, and Citizenship** ↗ Constitutional and Statutory Provisions

Sentencing and Punishment ↗ Construction

Court of Appeals generally applies categorical or modified categorical approach to statutory construction in context of immigration law or enhancement of criminal sentences.

11 Cases that cite this headnote

[7] **Mental Health** ↗ Persons and offenses included

Violation of statute prohibiting transfer of obscene materials to minors is a “specified offense against a minor” within meaning of Sex Offender Registration and Notification Act (SORNA). [18 U.S.C.A. § 1470](#); Sex Offender Registration and Notification Act, § 111(5)(A) (ii), (7), [42 U.S.C.A. § 16911\(5\)\(A\)\(ii\), \(7\)](#).

6 Cases that cite this headnote

[8] **Mental Health** ↗ Persons and offenses included

Sex Offender Registration and Notification Act (SORNA) permits examination of defendant's underlying conduct, and not just elements of the conviction statute, in determining what constitutes a “specified offense against a minor.” Sex Offender Registration and Notification Act, § 111(7), [42 U.S.C.A. § 16911\(7\)](#).

26 Cases that cite this headnote

[9] **Mental Health** ↗ Persons and offenses included

Courts may employ noncategorical approach to examine underlying facts of defendant's offense, to determine whether defendant has committed a “specified offense against a minor” and is thus a “sex offender” subject to Sex Offender Registration and Notification Act (SORNA) registration requirement. Sex Offender Registration and Notification Act, § 111(1), (5)(A)(ii), (7), [42 U.S.C.A. § 16911\(1\), \(5\)\(A\)\(ii\), \(7\)](#).

28 Cases that cite this headnote

[10] **Mental Health** ↗ Persons and offenses included

Because defendant's conviction for transfer of obscene materials to minors was a “specified offense against a minor,” defendant committed a “sex offense” and was therefore a “sex offender” subject to Sex Offender Registration and Notification Act (SORNA) registration requirement. [18 U.S.C.A. § 1470](#); Sex Offender Registration and Notification Act, § 111(1), (5)(A)(ii), (7), [42 U.S.C.A. § 16911\(1\), \(5\)\(A\)\(ii\), \(7\)](#).

30 Cases that cite this headnote

***1349** Appeal from the United States District Court for the Southern District of Alabama.

Attorneys and Law Firms

Kristen Gartman Rogers, [Peter J. Madden](#), [Carlos Alfredo Williams](#), Fed. Pub. Defenders, Mobile, AL, for Dodge.

Steven E. Butler, [Richard H. Loftin](#), [Deidre L. Colson](#), United States Attorney's Office, Mobile, AL, for U.S.

Before [DUBINA](#), Chief Judge, and [TJOFLAT](#), [EDMONDSON](#), [BIRCH](#), [BLACK](#), [CARNES](#), [BARKETT](#), [HULL](#), [MARCUS](#), [WILSON](#) and [PRYOR](#), Circuit Judges. *

Opinion

[WILSON](#), Circuit Judge:

In this appeal we interpret the Sex Offender Registration and Notification Act (“SORNA”), [42 U.S.C. § 16901 et seq.](#),

which requires that a sex offender register in each jurisdiction in which the offender resides, works, or studies. A “sex offender” is one who has been convicted of a “sex offense.” We conclude that SORNA’s broad definition of “sex offense” encompasses the conduct that underlies Dodge’s conviction, and we therefore affirm the judgment of the district court that requires Dodge to register.

I.

Dodge was indicted on three counts of transferring obscene material to a minor in violation of 18 U.S.C. § 1470.¹ With no plea agreement, Dodge pleaded guilty to Count I,² which charged that between December 1–13, 2006, the then-thirty-three-year-old Dodge knowingly transferred obscene matter over the Internet to an individual, less than sixteen years old, who used the screen name “heyshuddp.” Specifically, Dodge e-mailed someone he believed to be a thirteen-year-old girl, but who was actually an undercover agent, pictures and links to websites containing pictures of himself fully nude and masturbating. Counts II and III charged similar offenses between October 2006 and January 2007 involving two purportedly underage girls using the screen names “hope_in_bama” and “hello_kitten.” Prosecutors *1350 stated that Counts II and III also encompassed the allegation that Dodge used a web camera to broadcast to the girls live images of himself masturbating.

Dodge’s pre-sentence investigation report suggested that the court impose SORNA registration as a condition of supervised release. Dodge objected, arguing that he was not a “sex offender” because his offense was not a “sex offense” as defined by 42 U.S.C. § 16911(5)(A) and –(7). Overruling Dodge’s objection at sentencing, the district court found that the statute’s expanded definition of “sex offense” encompassed Dodge’s conduct underlying the conviction. Specifically, the court stated that Dodge’s “sitting in front of a computer with a camera pointed at [his] private parts,” while thinking he was talking to a thirteen-year-old girl, must be a “sex offense against a minor” as contemplated by SORNA. (R. at 89.) Accordingly, the court sentenced Dodge to eighteen months of imprisonment followed by a three-year supervised release term, and imposed sex offender registration as a condition of release. Dodge appeals only the portion of his sentence requiring him to register as a Tier I sex offender under SORNA.

[1] [2] [3] “We review the district court’s imposition of a special condition of supervised release for abuse of discretion, so long as the objection was preserved for appeal.” *United States v. Taylor*, 338 F.3d 1280, 1283 (11th Cir.2003) (per curiam). We review a district court’s interpretation of a statute *de novo*. *United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir.2000). A district court abuses its discretion if it applies the incorrect legal standard. *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996), superseded by statute on other grounds as recognized in *United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir.2004).

II.

The Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109–248, 120 Stat. 587 (“Walsh Act”) was enacted on July 27, 2006. Title I of the Act, SORNA, 42 U.S.C. §§ 16901–16962, establishes a national sex offender registry law, the purpose of which is “to protect the public from sex offenders and offenders against children.” *Id.* § 16901. SORNA defines a “sex offender” as an “individual who was convicted of a sex offense.” *Id.* § 16911(1). Apart from exceptions not applicable here, “sex offense,” in turn, is either:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Id. § 16911(5)(A). The parties agree that only subsection (ii) could provide a basis to require Dodge to register as a sex offender under SORNA, i.e. only because he was convicted of “a criminal offense that is a specified offense against a minor.” *Id.* Neither the list of federal offenses in (iii) nor any other subpart of subsection (5)(A) encompasses a violation of

*1351 18 U.S.C. § 1470, the charge to which Dodge pleaded guilty.

The question before us is whether Dodge's conviction under 18 U.S.C. § 1470 for knowingly transferring obscene material to a person less than sixteen years old makes him a "sex offender" subject to SORNA's registration requirement. This issue is one of first impression. Our analysis proceeds in two parts, and is guided by the applicable provision at 42 U.S.C. § 16911(5)(A)(ii), "a criminal offense that is a specified offense against a minor." First, we will consider whether a violation of 18 U.S.C. § 1470 is "a criminal offense" as defined by SORNA. Second, we will decide whether Dodge's particular conviction for knowingly attempting to transfer obscene material to a minor was "a specified offense against a minor." We conclude that because Dodge's conviction was a "specified offense against a minor," Dodge committed a "sex offense" and is therefore a "sex offender" for SORNA purposes, subject to its registration requirement.

A.

[4] A conviction under 18 U.S.C. § 1470 requires proof that the defendant knowingly transferred or attempted to transfer obscene matter to an individual who has not attained the age of sixteen, with the knowledge that the individual has not attained the age of sixteen. As discussed, Dodge qualifies as a "sex offender" under SORNA if he was convicted of "a criminal offense that is a specified offense against a minor." 42 U.S.C. § 16911(5)(A)(ii). SORNA's subsequent subsections 16911(6) and -(7),³ respectively, define the phrases "criminal offense" and "specified offense against a minor." Section 16911(6) defines a "criminal offense" as a "[s]tate, local, tribal, foreign, ... military, ... or other criminal offense." *Id.* § 16911(6) (emphasis added). Section 16911(7) expands the definition of "specified offense against a minor" to include an offense against a minor that "involves any of the following," including "[c]riminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct," and "[a]ny conduct that *by its nature* is a sex offense against a minor." *Id.* § 16911(7)(H)-(I) (emphases added).

According to Dodge, a finding that the "other criminal offense" category of § 16911(6) includes a § 1470 violation would have the effect of making surplusage *1352 out of the "[s]tate, local, tribal, foreign, or military offense" language of § 16911(6), as well as the list of federal offenses at § 16911(5)(A)(iii).⁴ Therefore, Dodge contends, the exclusion of 18

U.S.C. § 1470 from the enumerated list of federal offenses in subsection (5)(A)(iii) must categorically exclude a violation of 18 U.S.C. § 1470 from SORNA's entire definition of "sex offense." We disagree.

[5] To determine the meaning of a statute, we look first to the text of the statute itself. *United States v. Silva*, 443 F.3d 795, 797–98 (11th Cir.2006) (per curiam). If the statutory text is unambiguous, the statute should be enforced as written, and no need exists for further inquiry. *Id.* at 798. "[W]e should not interpret a statute in a manner inconsistent with the plain language of the statute, unless doing so would lead to an absurd result." *Id.* If language is ambiguous, legislative history can be helpful to determine congressional intent. See *Shotz v. City of Plantation*, 344 F.3d 1161, 1167 (11th Cir.2003). "Statutory construction ... is a holistic endeavor," and we cannot read a single word or provision of the statute in isolation. *Smith v. United States*, 508 U.S. 223, 233, 113 S.Ct. 2050, 2056, 124 L.Ed.2d 138 (1993) (internal quotation marks omitted); see also *Silva*, 443 F.3d at 798.

Dodge's reading of the definition of sex offense in SORNA is unduly narrow. Taken as a whole, the statute does not suggest an intent to exclude certain offenses but rather to expand the scope of offenses that meet the statutory criteria.⁵ Nothing in the plain language of the statute suggests that the "other criminal offense" provision of 42 U.S.C. § 16911(6) cannot encompass federal offenses not specifically enumerated in § 16911(5)(A)(iii). Further support for this conclusion appears in the way Congress classifies crimes against minors, as seen in other parts of the criminal code. Dodge's conviction statute, 18 U.S.C. § 1470, is an "obscenity statute" included in Chapter 71, "Obscenity," of Title 18. While Congress does not include Chapter 71 in SORNA's list of federal offenses at 42 U.S.C. § 16911(5)(A)(iii), in the sentencing statute 18 U.S.C. § 3553(b)(2), Congress does include Chapter 71 under the designation "Child crimes and sexual offenses," which largely tracks SORNA's list of federal offenses. To exclude entirely the obscenity statutes from SORNA's reach would be inconsistent with the broad purpose and scope of SORNA, as well as the sentencing statutes.

Most importantly, the expansive language of 42 U.S.C. § 16911(7) suggests that Congress did not intend § 16911(5)(A)(iii) to constitute an exclusive list of federal crimes requiring SORNA registration. Notably, § 16911(7) includes as a "specified offense against a minor" video voyeurism as described in 18 U.S.C. § 1801. If Congress intended that *1353 42 U.S.C. § 16911(5)(A)(iii) represent a closed

universe of federal crimes requiring SORNA registration, Congress would not have listed another specific federal crime in defining “specified offense against a minor.” Indeed, the “expansive phrasing” of 42 U.S.C. § 16911(5)(A)(ii) and –(7) “points directly away from the sort of exclusive specification” that Dodge would read into § 16911(5)(A)(iii) and –(6). *James v. United States*, 550 U.S. 192, 198, 127 S.Ct. 1586, 1592, 167 L.Ed.2d 532 (2007) (internal quotation marks omitted) (construing whether attempted burglary, as defined by Florida law, is a “violent felony” under a residual provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e)). Nothing in the plain language of 42 U.S.C. § 16911(5)(A)(iii), when read together with the rest of the statute, prohibits an unenumerated federal offense such as 18 U.S.C. § 1470 from qualifying as a “specified offense against a minor.”⁶ Therefore, Dodge’s invocation of the canon of *expressio unius est exclusio alterius* fails to sway us. The statute’s legislative history also supports our conclusion.

B.

[6] Next, we consider whether a violation of 18 U.S.C. § 1470 is “a specified offense against a minor.” The answer depends on whether SORNA requires a “categorical” approach that restricts our analysis to the elements of the crime, or whether SORNA permits examination of “the particular facts disclosed by the record of conviction.” *James*, 550 U.S. at 202, 127 S.Ct. at 1594. Compare *id.* at 202, 127 S.Ct. at 1593–94 (applying a categorical approach to an offense under the Armed Career Criminal Act), with *United States v. Byun*, 539 F.3d 982, 992 (9th Cir.) (applying a noncategorical approach to SORNA with respect to the victim’s age), cert. denied, 555 U.S. 1088, 129 S.Ct. 771, 172 L.Ed.2d 761 (2008). We generally apply a categorical or modified categorical approach to statutory construction in the context of immigration law or the enhancement of criminal sentences. See, e.g., *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 1258, 161 L.Ed.2d 205 (2005); *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (per curiam).

[7] If we apply a categorical approach here, we consider whether the elements of 18 U.S.C. § 1470 are the type that would justify its inclusion as a specified offense against a minor “without inquiring into the specific conduct of this particular offender.” *James*, 550 U.S. at 202, 127 S.Ct. at 1594. Dodge argues that 18 U.S.C. § 1470 captures conduct that is not “criminal sexual conduct” under either a common

sense understanding of the term or the explicit terms of SORNA, but we find no authority that compels a categorical approach here.

Moreover, the Ninth Circuit recently applied a noncategorical approach to SORNA’s definitions at 42 U.S.C. § 16911(5)(A)(ii) and –(7), in determining whether a minor victim’s age triggered the SORNA registration requirement. *Byun*, 539 F.3d at 992. Although *Byun* involved a different underlying conviction statute, the Ninth Circuit’s reasoning is persuasive *1354 and instructive for our construction of SORNA.

In *Byun*, the Ninth Circuit affirmed the district court’s imposition of sex offender registration as a condition of release on the defendant Byun, who pleaded guilty to three counts of alien smuggling in violation of 8 U.S.C. §§ 1324 and 1328. *Id.* at 983. Byun and her husband owned and operated a Guam night club in which Byun maintained two rooms for female employees to engage in sexual acts with the club’s clients. Although Byun admitted in her plea agreement that she induced a seventeen-year-old Korean girl to come to Guam for prostitution, Byun did not plead guilty to transporting a minor for purposes of prostitution. After Congress passed the Walsh Act during Byun’s supervised release term, her probation officer determined that she was required to register as a Tier II sex offender. Byun registered, but moved the district court to vacate the determination because she had “never been convicted of a sex offense.” *Id.* at 984. After the district court denied Byun’s motion and she appealed, the Ninth Circuit had to determine whether Byun’s conviction under 8 U.S.C. § 1328 for importation of an alien for purposes of prostitution made her a “sex offender” under SORNA. Because Byun’s conviction statute did not include the victim’s age as an element, this analysis required that the court decide whether the underlying facts of Byun’s conduct could be considered in determining whether she was a “sex offender.”

Importantly, the Ninth Circuit concluded that SORNA preferred a noncategorical approach with regard to the age of the victim, when analyzing a “specified offense against a minor.” *Id.* at 992. In doing so, the court contrasted the language of § 16911(5)(A)(i), which requires a sex offense to have “an element involving a sexual act or sexual contact with another,” with the language of § 16911(5)(A)(ii), in which the definition of “specified offense against a minor” contains no reference to the crime’s elements. Most critically, one statutory definition of “specified offense against a minor” is “[a]ny conduct that by its nature is a sex offense against a

minor.” 42 U.S.C. § 16911(7)(I) (emphasis added). Thus, the court concluded that for SORNA purposes, it is the underlying conduct that matters and not the elements of the conviction statute. Although the court noted the “modicum of ambiguity” SORNA creates through its use of the word “convicted” in its first definition at § 16911(1), instead of a reference to “conduct,” the court determined 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.’” 539 F.3d at 992. The court also noted that SORNA’s legislative history “fully support[ed] this conclusion.”⁷ *Id.*

[8] Although the Ninth Circuit focused only on the age of the victim, 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.” First, the definition of “specified offense against a minor” at § 16911(7) contains no reference to an “element” of a crime. The title of § 16911(7), “Expansion of definition of ‘specified offense against a minor’ to include all offenses by child predators,” refers *1355 to “offenses” rather than “convictions.” Moreover, § 16911(7) uses the general terms “include,” “involves,” “involving,” and “by its nature.” The list of specified offenses includes one that could not be any broader—“[a]ny conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(7)(I) (emphasis added). All signs point to only one reasonable conclusion—that we may look beyond Dodge’s conviction statute to the underlying facts of his offense to determine whether his offense qualifies as a “sex offense against a minor.”

The transcript of Dodge’s plea colloquy⁸ recounts the facts underlying his conviction. Dodge transmitted nude photos of himself, including some of him masturbating, to a girl he thought was thirteen years old. In our view, a thirty-three-year-old man using the Internet to send obscene photographs to a thirteen-year-old girl clearly constitutes “criminal sexual conduct involving a minor” or “conduct that by its nature is a sex offense against a minor.”⁹ Thus, the noncategorical approach requires the classification of Dodge’s crime as a “sex offense” under SORNA. Moreover, we reject the argument that the phrase “against a minor” requires contact with or opposition by the minor. The language of the statute imposes no such requirement. And as the Ninth Circuit noted, hardly any of the listed “specified offense[s] against a minor” require that a person engage in a sexual act. *Byun*, 539 F.3d at 987

n. 8. In our view, the word “against” in the phrase “against a minor” simply means the conduct as applied to the age of the victim (i.e., “against a minor” as opposed to “against an adult”). The inquiry goes no further than determining whether the victim was a minor. Here, because no question exists that Dodge believed the victim was a minor, the word “against” is a non-issue. Rather, the issue is whether Dodge’s conduct was a “sex offense.”

In passing SORNA, Congress left courts with broad discretion to determine what conduct is “by its nature” a sex offense. Indeed, Congress’s stated purpose was to capture a wider range of conduct in its definition of a “sex offense,” and specifically *all offenses*—not just convictions—of child predators. The language of SORNA discloses that in some situations a sexual act might not even be the prerequisite to a registerable “sex offense.” The key is conduct that contains a “sexual component” toward a minor. Our review of the language of SORNA confirms our conclusion that Congress cast a wide net to ensnare as many offenses against children as possible. Here, Dodge’s conduct evinced his intent that a thirteen-year-old girl view him in a sexual state. District judges do not need a statute to spell out every instance of conduct that is a sexual offense against a minor. They are capable of examining the underlying conduct of an offense and determining whether a defendant has engaged in conduct that “by its nature is a sex offense against a minor.”

Moreover, there is little difference between Dodge’s conduct as charged under 18 U.S.C. § 1470 and conduct that would *1356 undoubtedly be registerable under 18 U.S.C. § 2252B(b), which criminalizes the use of a “misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors.” In that statute, which is enumerated under Chapter 110 in 42 U.S.C. § 16911(5)(A)(iii) as one of the “federal” offenses constituting a sex offense, “material that is harmful to minors” is defined as depictions of acts of masturbation or the condition of the male genitalia in a state of arousal—exactly the images that Dodge presented here. Notably, 18 U.S.C. § 2252B(b) requires no sexual act, no assault, no offense, and no violation that opposes a minor’s rights. So had Dodge sought to deceive the thirteen-year-old into viewing the images, SORNA clearly would have compelled his registration. It would be a bizarre result not to compel his registration simply because he is a truthful predator.

In *Byun*, the defendant’s underlying conviction did not correspond neatly to any listed “specified offense against a

minor.” But as the Ninth Circuit explained, the “specified offense against a minor” includes a catchall category—“any conduct that by its nature is a sex offense against a minor.” *Byun*, 539 F.3d at 988. The court concluded that Byun’s conduct “likely [fell] within this category” because (1) Byun’s offense had a “strong similarity” to at least one of SORNA’s listed offenses, and (2) Byun’s offense appeared to be a “Tier II” offense, which would imply that an individual must be a sex offender before she can be a “Tier II” sex offender. *Id.* at 988–89. Similarly, Dodge’s conduct parallels the undoubtedly registerable offense conduct proscribed by 18 U.S.C. § 2252B(b), which does not require that a person invade the private space of a minor, or engage in a sexual act, unwanted sexual assault or offense, or other violation that contacts or opposes a minor’s rights. As a common sense matter, deceiving a minor into viewing obscene pictures is no different from what Dodge did. Dodge’s conduct is also strikingly similar to “[c]riminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.” 42 U.S.C. § 16911(7)(H). The catchall “specified offense against a minor” category clearly includes conduct like Dodge’s.

III.

[9] [10] For the foregoing reasons, we hold that courts may employ a noncategorical approach to examine the underlying facts of a defendant’s offense, to determine whether a defendant has committed a “specified offense against a minor” and is thus a “sex offender” subject to SORNA’s registration requirement. Dodge’s plea revealed that he engaged in conduct that “by its nature is a sex offense against a minor.” Therefore, we conclude that he is a sex offender under SORNA and that the district court did not abuse its discretion in requiring him to register as one. The judgment of the district court is AFFIRMED.

BARKETT, Circuit Judge, concurs in the result.

All Citations

597 F.3d 1347, 22 Fla. L. Weekly Fed. C 592

Footnotes

* Judge **Beverly B. Martin** was appointed and became an active member of this Court after the en banc oral argument in this case. She has elected not to participate in this decision.

1 18 U.S.C. § 1470 provides: “Whoever, using the mail or any facility or means of interstate or foreign commerce, knowingly transfers obscene matter to another individual who has not attained the age of 16 years, knowing that such other individual has not attained the age of 16 years, or attempts to do so, shall be fined under this title, imprisoned not more than 10 years, or both.”

2 Dodge pleaded guilty to all three counts, but at sentencing the district court dismissed Counts II and III on the government’s motion.

3 The full text of § 16911(6)-(7) reads as follows:

(6) Criminal offense The term “criminal offense” means 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)) or other criminal offense.

(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:

(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 section 1801 of Title 18.
- (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.

[42 U.S.C. § 16911\(6\)-\(7\).](#)

- 4 Accepting this conclusion raises a separate problem: if the “other criminal offense” language of § 16911(6) cannot include an offense proscribed by the federal government, then which sovereign could qualify to supply one? The list of “[s]tate, local, tribal, foreign, or military” sources of law seems all-encompassing. Dodge maintains that this phrase would still capture offenses committed in the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands. However, SORNA’s listing of these jurisdictions at § 16911(10) arguably refers to the jurisdictions required to maintain a registry pursuant to § 16912(a).
- 5 The § 16911(5)(A) definition of “sex offense” is limited only by subsections 16911(5)(B)-(C), which apply to foreign convictions and consensual acts. In contrast, the statute subsection titles refer twice to the “expansion” of definitions. See [42 U.S.C. § 16911\(5\), –\(7\).](#)
- 6 In its recent analysis of SORNA, the Ninth Circuit did not discuss the exclusivity of [42 U.S.C. § 16911\(5\)\(A\) \(iii\)](#) and –(6); nor does it appear that the issue was raised. Yet it is clear that the statute under which the defendant was charged was not enumerated in subsection (5)(A)(iii)’s list of federal offenses. See [United States v. Byun](#), 539 F.3d 982, 986 (9th Cir.) (concluding that the defendant’s conviction under 8 U.S.C. § 1328 was a “specified offense against a minor” and therefore constituted a sex offense requiring registration), cert. denied, 555 U.S. 1088, 129 S.Ct. 771, 172 L.Ed.2d 761 (2008).
- 7 The [Byun](#) court however was careful to note that it drew “no conclusion as to whether a non-categorical approach is permitted with regard to any facts other than the age of the victim.” 539 F.3d at 994 n. 15.
- 8 Unlike Dodge, the defendant in [Byun](#) executed a plea agreement.
- 9 Indeed, [18 U.S.C. § 2252B\(b\)](#), which criminalizes the act of using misleading domain names on the Internet with the intent to deceive a minor into viewing harmful material (and which, notably, is one of the enumerated “federal offenses” that constitutes a sex offense under SORNA), defines “harmful material” in part as any communication consisting of sex. [18 U.S.C. § 2252B\(d\)](#). In turn, the definition of “sex” includes masturbation or “the condition of human male … genitals when in a state of sexual stimulation or arousal.” [Id. § 2252B\(e\).](#)

2010 WL 3325611

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

UNITED STATES of America, Plaintiff,

v.

Eddie Lee JACKSON, Defendants.

No. CR-09-1115 JF.

|

Aug. 23, 2010.

West KeySummary

1 Mental Health  Persons and Offenses Included

The Sex Offender Registration and Notification Act(SONRA) applied to defendant's indecent exposure conviction. Therefore, the defendant's motion to dismiss his indictment for failing to register and update his registration following his conviction was denied. The California indecent exposure statute met the definition of "sex offense" as laid out in SONRA since the phrase "with another" only applied to sexual contact, not to sexual acts. Therefore, SONRA applied to convictions for sexual crimes which did not involve another person. Cal.Penal Code § 314.1; 18 U.S.C.A. § 2250.

Attorneys and Law Firms

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ORDER 1 DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

JEREMY FOGEL, District Judge.

*1 Defendant moves to dismiss the indictment. The Court has read and considered the moving, responding, and reply papers, Defendant's supplemental memorandum, and the oral argument presented by counsel at the hearing on July 22, 2010. For the reasons discussed below, the motion will be denied.

I. FACTS

The following factual summary consists largely of excerpts from Defendant's motion (Dkt. No. 12) that are not disputed by the Government.

A. Jackson's Conviction of a Registrable Sex Offense Under California Law

On July 29, 2003, Defendant was convicted of indecent exposure with prior convictions, in violation of Cal.Penal Code § 314.1. It appears that he initially was placed on probation for that offense, but that on October 14, 2004, he received a two-year prison sentence following probation violations. Under California law, § 314.1 is a registrable sex offense. [Cal.Penal Code § 290\(c\)](#). On April 9, 2006, following his release from custody, Defendant was served with a Sex Offender Registration Form. *See* Def.'s Mot. Ex. C. Defendant initialed numerous conditions on the form with respect to his status as a sex offender under California law. The form identifies Defendant's conviction under § 314.1 as the basis for his required registration.

B. The Sex Offender Registration and Notification Act ("SORNA")

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006, [Pub.L. No. 109-248](#). Title I of that Act, entitled the Sex Offender Registration and Notification Act (SORNA), created a national sex offender registry. The legislation requires every jurisdiction in the United States to maintain a conforming registry. *See id.* § 16912. In addition, SORNA delineates how and when a sex offender should register under the Act. *See id.* § 16913. Specifically, the statute authorizes the United States Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction." *Id.* § 16913(d).

C. Defendant's Arrest on the Instant Charge

In 2007, following the passage of Proposition 83 (“Jessica’s Law”) in California, Defendant received a notice advising him that he could not live within 2,000 feet of a school. *See* Def.’s Mot. Ex. D (Jessica’s Law Notice to Comply). His prior housing arrangement was determined to be unacceptable because it was too close to a school. He also was required to wear an electronic monitor, which contained a battery that he was required to charge every morning at 6 a.m. and every night at 6 p.m. *See* Def.’s Mot. Ex. E (Special Condition Addendum).

On June 6, 2008, Defendant’s parole officer received a tamper alert. *See* Def.’s Mot. Ex. F (GPS Report). On June 7, 2008, the bracelet’s battery stopped working. *Id.* In November 2009, Defendant was arrested in Georgia while attempting to pay a traffic citation at a police station.

D. The Indictment

*2 The instant federal indictment was filed on November 18, 2009. The indictment, in its entirety, reads as follows:

The Grand Jury charges:

Between June 2008 and November 2009, in the Northern District of California, and elsewhere, the defendant

EDDIE LEE JACKSON

a person required to register under the Sex Offender Registration and Notification Act, traveled in interstate commerce, and did knowingly fail to register and update registration.

All in violation of [Title 18, United States Code, Section 2250](#).

Dkt. No. 1. Although the indictment does not specify the conviction for which Defendant allegedly was required to register, discovery indicates that the basis for prosecution is Defendant’s conviction under Cal. Pen.Code § 314.1.

II. DISCUSSION

Defendant moves to dismiss the indictment on the grounds that “(1) the indictment is deficient under the Fifth and Sixth Amendments; (2) SORNA does not apply to indecent exposure convictions; and (3) the interim rule

rendering SORNA retroactive was issued in violation of the Administrative Procedures Act.” Def.’s Mot. 4.

A. Whether the Indictment is Deficient

As it relates to grand juries, the Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” [U.S. Const. amend. V.](#) “[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” [Hamling v. United States](#), 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The Supreme Court recently has acknowledged that “while an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity [such as] the statute making it a crime for a witness summoned before a congressional committee to refuse to answer any question ‘pertinent to the question under inquiry.’ [2 U.S.C. § 192.](#)” [United States v. Resendiz-Ponce](#), 549 U.S. 102, 109, 127 S.Ct. 782, 166 L.Ed.2d 591 (2007).

The three elements of [18 U.S.C. 2250\(a\)](#) are:

- (1) that the defendant is required to register under SORNA;
- (2) that the defendant *either* is a sex offender for purposes of SORNA by reason of a conviction under federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States, *or* traveled in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
- (3) that the defendant knowingly failed to register or update a registration as required by SORNA.

[United States v. Dean](#), 606 F.Supp.2d 1335, 1337–38 (M.D.Ala.2009) (emphasis in original). Defendant argues that the instant indictment is deficient both because it fails to identify the conviction that qualifies him as a sex offender under SORNA and because there is no indication in the

indictment that proof of a qualifying conviction was presented to the grand jury.

*3 The Government contends that the indictment need not “go into detail on why Mr. Jackson is subject to SORNA because there is only one factual basis for this charge, namely Mr. Jackson’s prior convictions for indecent exposure in California.” Govt.’s Opp’n 3. It argues that requiring the indictment to identify the qualifying conviction would amount to “asking the Court to bestow upon the grand jury the task of interpreting the law to decide the issue,” and therefore would “usurp the age-old separation of finders of fact from deciders of law.” *Id.* at 3–4. Finally, the Government asserts that any error in the language of the indictment was harmless. It provides excerpts of the grand jury testimony of United States Marshal Christopher Hulse to show that the grand jury “was properly told of the requirement that Mr. Jackson register under SORNA because of his 2001 felony conviction for indecent exposure with priors” and therefore that it “was aware of all facts necessary to establish the elements of the offense.” *Id.* at 4.

In his reply brief, Defendant contends that the Government misunderstands the role of the grand jury and that its opposition “raises the strong likelihood that the grand jury was not properly instructed in this case.” Def.’s Reply 2.

[I]t is the grand jury’s role to decide whether there is probable cause to believe that Mr. Jackson has been convicted of a “sex offense” which brings him within the reach of SORNA. Because the government has not provided the legal instructions that were given to the jury, and because the government believes that no such finding by the grand jury is necessary, it appears that the grand jury was not advised of the definition of “sex offense” under SORNA, or asked to determine whether Mr. Jackson met the definition of “sex offender” under SORNA.

Id. (footnote omitted). Defendant also argues that the indictment must include details with respect to why he was subject to SORNA registration requirements, not because it

provides him with notice of the charge but because it answers the question of “whether the grand jury made a finding regarding one of the elements of the offense, or was simply told by the government that Mr. Jackson is required to register under SORNA.” *Id.* at 4. He asserts that the answer to this question is crucial because it “is not merely a ‘legal question,’ but an application of a statutory term to the facts of the case, which is part of the function of both grand and petit jurors.” *Id.* at 4–5.

Defendant relies upon *United States v. Crawford*, No. CR-08-019-RAW, 2008 WL 895934 (E.D.Okla.2008). That case also involved a challenge to the sufficiency of an indictment for violation of 18 U.S.C. § 2250. The indictment, which the prosecutor conceded was “bare bones,” read in its entirety as follows:

During the period of on or about December 1, 2006 to on or about January 9, 2008, in the Eastern District of Oklahoma and elsewhere, the Defendant, ROBERT EDWARD CRAWFORD, an individual required to register under the Sex Offender Registration and Notification Act, traveled in interstate commerce and did knowingly fail to register and update registration as required by the Sex Offender Registration and Notification Act in violation of Title 18, United States Code, Section 2250.

*4 *Crawford*, 2008 WL 895934 at *1. The court dismissed the indictment as insufficient where, despite the parties’ agreement that “there are multiple instances of conduct within the alleged time frame which a trial jury might be persuaded were violative of the statute,” the indictment charged a single offense and failed to set forth any specific conduct on specific dates within the broad time frame stated. *Id.* The court concluded that “[u]nder this ‘minimalist’ indictment, and in the context of the SORNA statutory scheme, [there exists] great risk that the grand jury may have had a concept of the offenses essentially different from that which will be relied upon by the government before the trial jury.” *Id.* (citation omitted). The Government contends that *Crawford* is factually distinguishable because “(1) Mr. Jackson is alleged to have only performed one act of traveling in interstate

commerce; and (2) the grand jury transcript clearly shows that it was fully apprised of Mr. Jackson's prior conviction and registration requirement." Govt.'s Opp'n 3 n. 1.

The Court agrees that *Crawford* is distinguishable. The risk described in that case is not present here. As the excerpts of the grand jury transcript demonstrate, it does not appear that the grand jury's "concept of the offense []" is "essentially different from that which will be relied upon by the government before the trial jury." The Government's theory, which it presented to the grand jury, is that Defendant's duty to register under SORNA arose solely from his conviction under Cal. Pen.Code § 314.1. Accordingly, the indictment is sufficient.

B. Whether SORNA Applies to Indecent Exposure Convictions

Defendant contends that the indictment must be dismissed because he is not a sex offender as defined by SORNA and thus was not required to register under the statute. SORNA provides 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." [42 U.S.C. § 16911\(1\)](#). Under the statute, "sex offender" is defined as "an individual who was convicted of a sex offense." [42 U.S.C. § 16911\(1\)](#). Although the term "sex offense" has several definitions, the parties agree that the only definition potentially applicable here is:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;

[42 U.S.C. 16911\(5\)\(A\)\(i\)](#).

The parties agree that whether Defendant is a sex offender under SORNA depends on whether [Cal. Pen.Code § 314](#) "has an element involving a sexual act or sexual contact with another." [Cal. Pen.Code § 314](#) provides, in relevant part, that:

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

*5 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in [Section 635 of the Vehicle Code](#), or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

[Cal.Penal Code § 314](#). The question of whether this statute meets the definition of "sex offense" in [42 U.S.C. § 16911\(5\)\(A\)\(i\)](#) is one of first impression.

The parties' dispute centers around whether "with another" modifies both "sexual act" and "sexual contact," or only pertains to the latter. Defendant argues that "with another" necessarily modifies both "sexual act" and "sexual contact," and that, because [§ 314](#) does not contain an element involving either a sexual act with another or sexual contact with another, it does not satisfy SORNA's definition of sex offense. He contends that his interpretation is supported by a plain reading of the statute:

"Sexual act" and "sexual contact" are two forms of behavior listed in a series separated by the disjunctive "or" and are not separated by a comma, followed at the end of the series by the qualifying adverbial phrase "with another." As a matter of ordinary English usage, the adverbial phrase is read to modify each of the preceding terms.

Def.'s Reply 8–9.

Defendant relies on two state court decisions, each more than thirty years old. In *Application of Graham*, 239 Mo.App. 1036, 199 S.W.2d 68 (Missouri Ct.App.1947), superseded by statute on other grounds, three parents appealed the adoption of their children by another couple. The appellate court interpreted the following statutory language relating to exceptions to the requirement of biological parental consent in adoption actions: “If [the biological mother or father] has wilfully abandoned the child or neglected to provide proper care and maintenance for the two years last preceding such date.” *Graham*, 239 Mo.App. at 1044, 199 S.W.2d 68. The court held that the two-year requirement applied to both abandonment and neglect:

[F]rom a grammatical point of view, the word “or” preceding the word “neglect” is a disjunctive conjunction connecting two coordinate clauses of equal grammatical value. The general rule is that when a conjunction connects two coordinate clauses or phrases, a comma should precede the conjunction if it is intended to prevent following qualifying phrases from modifying the clause which precedes the conjunction. Jones Practical English Composition, 3d Ed.1941, p. 66. The part of the statute contains no punctuation next preceding the word “or,” nor thereafter, which would prevent the time provision from applying equally to both “abandon” and “neglect.”

*6 *Id.* at 1046–47, 199 S.W.2d 68.

In *North Carolina v. Thomas*, 292 N.C. 251, 232 S.E.2d 411 (N.C.1977), the defendant appealed his conviction for safecracking and felonious larceny. The safecracking statute under which the defendant had been convicted prohibited “the unlawful and forcible opening, attempt to open, or picking of a safe or vault by the use of ‘explosives, drills, or tools.’” *Thomas*, 292 N.C. at 253, 232 S.E.2d 411. The question before the North Carolina Supreme Court was whether the

defendant's conviction could stand where “there [wa]s no evidence, nor d[id] the indictment charge, that defendant used or attempted to use ‘explosives, drills, or tools’ or otherwise forced open the safe.” *Id.* The court found that it could not: “These three methods are described in an adverbial clause which clearly modifies each element of the compound predicate. Thus, each method of opening a safe must be by means of ‘explosives, drills, or tools’ in order to fall within the prohibition of the statute.” *Id.* at 253–54, 232 S.E.2d 411. The court also indicated that if its interpretation of legislative intent proved to be wrong “and it was indeed intended that G.S. 14–89.1 embrace the unlawful entry into or attempt to open a safe or vault by any manipulation of the combination, it will be a simple matter for the General Assembly to amend the section.” *Id.* at 255, 232 S.E.2d 411.

Defendant also contends that if “with another” modified “sexual contact” but not “sexual act,” the phrase “would be somewhat redundant ... because the word ‘contact’ necessarily implies the involvement of another.” Def.'s Reply 10. He points out that the dictionary definition of “contact” is “a union or junction of surfaces.” *Id.* (citing Merriam-Webster's Collegiate Dictionary (10th ed.)).

The Government argues that “with another” modifies only “sexual contact,” and that Congress would have written the statute differently if it intended the statute to be consistent with Defendant's construction. “For example, Congress could have said ‘sexual act or contact with another’ which would have meant that either the act or the contact be with another.” Govt.'s Opp'n 5. The Government also maintains that Defendant's construction would render the term “sexual contact” superfluous: “If both ‘sexual act’ and ‘sexual contact’ must be ‘with another’ as Defendant claims, then there will be no difference between the two phrases because all sexual contact is inherently an act and will therefore always be encompassed within ‘sexual act.’” *Id.*

The Government also points to other indicators of Congressional intent that support its construction. First, it argues that because the title of the section of the statute defining “sex offense” is “expansion of sex offense definition,” “the court should not seek to limit the offenses [covered by the definition] only to acts that require the intimate involvement of the victim.” *Id.* Second, it argues that under Defendant's construction “the registration requirement would not include many state crimes against minors such as those involving the distribution or printing of child pornography,” which would conflict with Congress's

inclusion of distribution of child pornography as a predicate crime under SORNA. *Id.* at 5–6, 232 S.E.2d 411. Finally, the Government cites SORNA's legislative history. Specifically, it points to a comment by then-Senator Biden concerning the inclusion of “the ‘use of the Internet to facilitate or commit a crime against a minor’ as an offense that could trigger registration,” 152 Cong. Rec. S8012, 14 (daily ed. July 20, 2006), and President's Bush emphasis on the dangers of sexual predators on the Internet in his remarks at the signing of SORNA.

*7 Defendant argues that “the fact that Congress intended SORNA to apply to Internet crimes does not mean that Congress intended the language ‘sexual act or sexual contact with another’ to be interpreted broadly, because Congress provided elsewhere for inclusion of Internet crimes.” Def.'s Reply 8. Specifically, 42 U.S.C. § 16911(5)(iii) provides the following alternative definition of “sex offense”:

- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18.

42 U.S.C. § 16911(5)(iii). Defendant contends that because this definition includes crimes such as child pornography and the use of interstate commerce to entice a minor to engage in sexual activity (including child pornography, *see* 18 U.S.C. § 2427), “there is no need to resort to the ‘sexual act’ language as a basis for including Internet crimes within SORNA.” Def.'s Reply 8.

Defendant also argues that aside from the references to the Internet and child pornography, nothing in the statute or legislative history “would evince any intent to include any form of private sexual behavior within the reach of this subsection.” *Id.* at 11, 232 S.E.2d 411. He asserts that the Government's definition would encompass “loosely worded misdemeanor and infraction statutes like California's that prohibit broad ranges of relatively minor sexually-related conduct such as ‘indecent exposure,’ ‘disorderly conduct,’ ‘public indecency,’ and ‘loitering for purposes of prostitution.’” *Id.*

Defendant also relies upon the Ninth Circuit's recent decision in *Nunez v. Holder*, 594 F.3d 1124 (9th Cir.2010). In *Nunez*, the court held that while the statute “criminalizes a range of conduct that offends the sensibilities of many, and perhaps most, people,” it does not “categorically meet the federal standard for moral turpitude” for the purposes of deportation proceedings. *Nunez*, 594 F.3d at 1133. However, as the Government observes, “*Nunez* has no implication to [sic] Jackson's defense because SORNA requires registration for those convicted of *sexual acts* and not for those convicted for [sic] crimes of moral turpitude.” Govt.'s Resp. 2 (emphasis in original).

Defendant further claims that the Government's construction would include convictions under Cal. Pen.Code § 314, but not convictions under Cal. Pen.Code § 647, an alternative charge that does not require registration under California law. Indeed, § 647 prohibits a variety of conduct under the rubric of “disorderly conduct” including “engag[ing] in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.” Cal.Penal Code § 647(a). However, as the Government argues, the two statutes are distinct from one another because § 647 prohibits acts “that are clearly not sexual in nature” such as trespassing and public intoxication and therefore would not constitute “sexual acts” under SORNA, while § 314 requires that the defendant act “lewdly.” Govt.'s Resp. 2.

*8 Finally, Defendant urges the Court to adopt the definitions of “sexual act” and “sexual contact” contained in Chapter 109A of the United States Code to aid in interpretation of SORNA, which is contained in Chapter 109B and does not contain a definitional section. Chapter 109A, entitled, “Sexual Abuse,” defines the terms as follows:

(2) the term “sexual act” means—

(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;

(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; or

(D) 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;

(3) the term “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\(2\)-\(3\)](#). Defendant asserts that “the Ninth Circuit has already adopted the definitions set forth in Chapter 109A, including [section 2246](#), as the touchstone for analyzing other criminal statutes, both state and federal, involving sexual conduct.” Def.’s Supp. Filing 3. Defendant also argues that [Cal.Penal Code § 314](#) does not contain an element of either sexual act or sexual contact that meets these definitions.

The Government contends that the definitions contained in Chapter 109A should not be applied to SORNA because

SORNA is structured in a way that does not even allow for chapter 109A to have any impact on the definition of “sexual act” under SORNA: The “Amie Zyla expansion of sex offense definition,” [§ 16911\(5\)\(A\)](#), which defines “sex offense” for the purposes of SORNA’s registration requirement, lists “sexual act[s]” separately from its inclusion of chapter 109a sexual abuse violations as sex offenses. Thus, the authors of SORNA intended the term “sexual act” to be more encompassing than sexual abuse under chapter 109A or any other listed Federal offenses such as sex trafficking, child pornography, and sexual exploitation of children.

Govt.’s Resp. 2–3.

“In interpreting the statute we look to general principles of statutory construction and begin with the language of the statute itself.” [United States v. Ron Pair Enters., Inc.](#), 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). One such principle is the “grammatical ‘rule of the last antecedent,’ according to which a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.” [Barnhart v. Thomas](#), 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003); *see also* 2A N. Singer, *Sutherland on Statutory Construction* § 47.33, p. 369 (6th rev. ed. 2000) (“Referential and qualifying words and phrases, where no contrary intention appears, refer solely

to the last antecedent.”)). The rule’s corollary provides that “where there is a comma before a modifying phrase, that phrase modifies all of the items in a series and not just the immediately preceding item.” [Stepnowski v. C.I.R.](#), 456 F.3d 320, 324 (6th Cir. 2006) (citation omitted). As the *Stepnowski* court explained:

*9 Under the last-antecedent rule of construction, therefore, the series “A or B with respect to C” contains two items: (1) “A” and (2) “B with respect to C.” On the other hand, under the rule of grammar the series “A or B, with respect to C” contains these two items: (1) “A with respect to C” and (2) “B with respect to C.” [citation omitted]

Compare the Fifth Amendment of the Constitution, which provides that no person shall “be deprived of life, liberty, or property, without due process of law.” The comma before the phrase “without due process of law” indicates that the phrase modifies “life,” “liberty,” and “property.” This obviously follows the grammatical rule.

Id. at 324 n. 7.

In *Barnhart*, the statute at issue provided that:

“An individual shall be determined to be under a disability only if his physical or [mental impairment](#) or [impairments](#) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy....” [42 U.S.C.] § 423(d)(2)(A).

Id. at 23. The Supreme Court, applying the rule of the last antecedent, held that the Third Circuit had erred in concluding that “the specifically enumerated ‘previous work’ ‘must’ be treated the same as the more general reference to ‘any other kind of substantial gainful work.’” *Id.* at 27 (citation omitted). Accordingly, the Court held that the phrase “which exists in the national economy” modified the last antecedent phrase, “any other kind of substantial gainful work,” but not the phrase “previous work.”

Like all canons of statutory construction, the rule of the last antecedent is not a mandatory one. [Chickasaw Nation v. United States](#), 534 U.S. 84, 94, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001). Rather, it is a “guide[] ‘designed to help judges determine the Legislature’s intent.’” [Xilinx, Inc. v. C.I.R.](#), 598 F.3d 1191, 1196 (9th Cir. 2010) (quoting *Chickasaw Nation*, 534 U.S. at 94). As such, the rule “is not an absolute and can assuredly be overcome by other indicia of meaning.”

Barnhart, 540 U.S. at 26; see also *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 833 (9th Cir.1996) (“[W]e are not inflexible in our application of the doctrine of last antecedent, and have recognized that the principle must yield to the most logical meaning of a statute that emerges from its plain language and legislative history.”). For example, in *United States v. Hayes*, — U.S. —, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), the Supreme Court declined to apply the rule in interpreting the meaning of “misdemeanor crime of domestic violence” as it appears in 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by any person convicted of such an offense: “Applying the rule of the last antecedent here would require us to accept two unlikely premises: that Congress employed the singular ‘element’ to encompass two distinct concepts, and that it adopted the awkward construction ‘commi[t]’ a ‘use.’ ” *Hayes*, 129 S.Ct. at 1086. The Supreme Court also held that applying the rule would render other statutory language superfluous. *Id.* at 1087. Here, applying the rule of last antecedent, the limiting clause or phrase “with another” modifies only the immediately preceding noun phrase, “sexual contact,” and not the more remote “sexual act.” The Court therefore must determine whether either the plain language or legislative history demonstrates that Defendant’s construction is more logical.

*10 With respect to the plain language of the statute, *Application of Graham* and *Thomas* are unpersuasive in light of the overwhelming weight of Ninth Circuit and Supreme Court case law adopting and applying the rule of the last antecedent and its corollary. To the extent that the relevant grammatical rules can be reconciled, the Court notes that the cases cited by Defendant involved *adverbial* phrases modifying compound predicates (verbs) while the language at issue here involves an *adjectival* phrase (“with another”) modifying the object (“sexual contact,” a noun) of the participial phrase that begins with “involving.”² To the extent that the rules conflict, the majority of federal courts have decided against Defendants’ construction. Moreover, the Court agrees with the Government that reading the statute as Defendant proposes would render the term “sexual contact” redundant, thus violating the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *City of Los Angeles v. U.S. Dep’t of Commerce*, 307 F.3d 859, 870 (9th Cir.2002) (citation and internal quotation marks omitted).

With respect to legislative history, the Court finds nothing in the record that suggests Congressional intent to limit the registration requirement to those convicted of crimes involving physical contact with another person. Moreover, Defendant’s argument that Congress could not have intended to include non-contact or “private” sexual crimes in the definition of sex offense contained in 42 U.S.C. § 16911(5)(A)(i) because of the inclusion of those crimes in Section 16911(5)(A)(iii) is only partially accurate. Section 16911(5)(A)(iii) explicitly lists only *federal offenses*. Accordingly, under Defendant’s construction, non-contact or private *state offenses* involving the same conduct as some of the federal offenses listed in Section 16911(5)(A)(iii) would not subject an offender to SORNA’s registration requirements. Given the clear Congressional purpose of targeting offenses such as the distribution of child pornography, the Court concludes that Congress did not intend this result.

C. Whether SORNA Is Void for Vagueness

As the Supreme Court recently held, the void-for-vagueness doctrine requires that “[t]o satisfy due process, ‘a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.’ ” *Skilling v. United States*, — U.S. —, —, 130 S.Ct. 2896, 2904, 177 L.Ed.2d 619, — (2010) (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). In applying the doctrine, federal courts “must, if possible, construe, not condemn, Congress’ enactments.” *Id.* (citation omitted).

Defendant contends that the indictment should be dismissed even if the Court accepts the Government’s construction of 42 U.S.C. 16911(5)(A)(i) because “the statute should be found void for vagueness and the rule of lenity must preclude its application here.” Def.’s Mot. 12. However, this argument presumes that the statute is ambiguous. For the reasons discussed above, the Court concludes that the plain meaning of “sex offense” includes Defendant’s conviction for indecent exposure under Cal. Pen.Code § 314. Accordingly, the void-for-vagueness doctrine and its corollary, the rule of lenity, do not apply. *United States v. Wyatt*, 408 F.3d 1257, 1262 (9th Cir.2005) (citing *United States v. Phillips*, 367 F.3d 846, 857 n. 39 (9th Cir.2004)) (“Under the rule of lenity, when a criminal statute is ambiguous, we interpret the statute in favor of the defendant. However, it applies only when there is grievous ambiguity or uncertainty in the statute and when, after seizing everything from which aid can be derived,

we can make no more than a guess as to what Congress intended.” (internal alterations, citations, and quotation marks omitted) (emphasis added).

D. Whether SORNA Is Impermissibly Overbroad

*11 Defendant next argues that the indictment should be dismissed because “[t]he government's application of SORNA in this case raises serious concerns regarding overbreadth.” Def.'s Reply 14. Defendants' argument is based on the fact that the conduct that served as the basis for his state felony conviction “can only be prosecuted as a felony pursuant to a recidivist sentencing scheme.” *Id.* He also contends that “even if the Court determines that indecent exposure is somehow encompassed within SORNA as a matter of statutory interpretation, the Court still should dismiss the indictment ... because the statute would be impermissibly overbroad if applied to nuisance misdemeanors involving less serious forms of sexual behavior.” Def.'s Reply 15.

“[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when ‘judged in relation to the statute's plainly legitimate sweep.’” *City of Chicago v. Morales*, 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612–15, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). However, “outside the limited First Amendment context, a criminal statute may not be attacked as overbroad.” *Schall v. Martin*, 467 U.S. 253, 268 n. 18, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). Defendant does not assert that the conduct that served as the basis of his indecent exposure convictions or the conduct prohibited by “nuisance misdemeanors involving less serious forms of sexual behavior” is protected by the First Amendment. Nor does Defendant cite any authority for disregarding the general limitation on overbreadth challenges.

E. Whether the Interim Rule Making SORNA Retroactive Was Issued in Violation of the Administrative Procedures Act

On February 28, 2007, pursuant to the authority given to him under 42 U.S.C. § 16913(d), the Attorney General issued an interim rule making SORNA retroactive to all sex offenders convicted prior to July 27, 2006, the day of the statute's enactment. See 28 C.F.R. § 72.3 (2007). The rule was made effective immediately and was issued without a pre-promulgation comment or notice period, although the

Attorney General stated that he would accept comments on the rule through April 30, 2007. 72 Fed.Reg. at 8895–97 (2007). On July 2, 2008, the Attorney General published final guidelines for interpreting and implementing SORNA. See 73 Fed.Reg. 38030 (2008).

Generally, under the Administrative Procedures Act (“APA”), 5 U.S.C. § 500 et seq., an agency must follow specific procedures before issuing a rule. “These procedures include: (1) publication of notice of the proposed rule in the Federal Register, 5 U.S.C. § 553(b); (2) a period for interested individuals to comment on the proposed rule, *id.* § 553(e); and (3) publication of the adopted rule not less than thirty days before its effective date, *id.* § 553(d).” *Mora-Meraz v. Thomas*, 601 F.3d 933, 939 (9th Cir.2010). However, the agency is relieved of these obligations “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(3)(B). In issuing the interim rule on the retroactivity of SORNA, the Attorney General invoked the public interest exception:

*12 The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements—and related means of enforcement, including criminal liability under 18 U.S.C. 2250 for sex offenders who knowingly fail to register as required—to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of “protect[ing] the public from sex offenders and offenders against children” by establishing “a comprehensive national system for the registration of those offenders,” SORNA § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.

It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

72 Fed.Reg. at 8896–97.

Defendant argues that the interim rule was issued in violation of the APA's pre-promulgation notice and publication requirements and that, because his interstate travel occurred before the promulgation of the final guidelines, the statute cannot be applied retroactively to him. As the parties recognize, this is a question that has divided the circuits that have addressed it. See *Carr v. United States*, — U.S. —, — n. 2, 130 S.Ct. 2229, 2234 n. 2, 176 L.Ed.2d 1152, — n. 2 (acknowledging, but declining to resolve, the split of authority). The Sixth Circuit, in *United States v. Cain*, 583 F.3d 408 (6th Cir.2009), vacated the defendant's conviction under 18 U.S.C. § 2250 and remanded the case with instructions to dismiss the indictment, holding that:

Because SORNA explicitly required the Attorney General to specify the applicability of the Act to persons convicted prior to the effective date of SORNA, and because the Attorney General did not promulgate a regulation making that determination in compliance with the Administrative Procedure Act, Cain was not subject to SORNA's requirements during the period indicated in the indictment.

Cain, 583 F.3d at 409. However, other courts, including the Fourth and Eleventh Circuits, have reached the opposite conclusion. See *United States v. Dean*, 604 F.3d 1275, 1282 (11th Cir.2010) (rejecting Cain's reasoning and holding that “[t]he Attorney General had good cause to bypass the Administrative Procedure Act's notice and comment requirement”); *United States v. Gould*, 568 F.3d 459, 470 (4th Cir.2009), cert. denied, — U.S. —, 130 S.Ct. 1686, 176 L.Ed.2d 186 (2010) (“In the circumstances, we conclude that the Attorney General had good cause to invoke the exception to providing the 30-day notice.”).

*13 The Government argues that the Court need not decide whether the interim rule was valid under the APA because SORNA applies to Defendant even under *Cain*. First, it points out that the indictment in *Cain* alleged that the defendant failed to register, at the latest, on March 28, 2007, which was “less than thirty days after the interim regulation was promulgated and a month before the close of the comment period.” *Cain*, 583 F.3d at 420. As a result, the Sixth Circuit limited its holding, explicitly stating that it “[took] no position” on whether the interim regulation would apply to a defendant “who failed to register during a period more than thirty days after publication of the regulation.” *Id.* at 424 n. 7. The Government contends that “if *Cain* is to be followed, the court should still apply the interim regulation to Mr. Jackson because his indictment encompasses a period beginning in June 2008, more than a year after the publication of the interim rule.” Govt.'s Opp'n 12 (emphasis in original). Defendant argues in response that “if the rule was invalid when issued, as the Sixth Circuit found in *Cain*, then it remained valid a year later.” Def.'s Reply 17.

The Government's argument is unconvincing for two reasons. First, the Sixth Circuit subsequently extended the logic of *Cain* to situations in which the dates alleged in the indictment fall outside of the thirty-day publication period. *United States v. Utesch*, 596 F.3d 302, 309–10 (6th Cir.2010); see also *Dean*, 604 F.3d at 1280 (recognizing the Sixth Circuit's extension of *Cain*). Second, as the court explained in *Utesch*, the fact that the thirty-day publication period has passed does not provide any “indication that the notice-and-comment process was actually carried out.” 596 F.3d at 310. Accordingly, if the Court were to follow the reasoning of the Sixth Circuit and reject the Attorney General's justifications for non-compliance with the APA, the interim rule is invalid and SORNA did not become effective until August 1, 2008, thirty days after the final guidelines were issued.

However, the Court may deny Defendant's motion even without deciding whether the interim rule was valid. As the Government points out, “the vast majority of the time period alleged in [the instant] indictment is after August 1, 2008, the date in [sic] which the final regulations regarding the retroactive application of the statute came into effect.” Govt.'s Opp'n 12. The Government contends that “[s]ince the indictment alleges that Defendant's acts occurred between June 2008 and November 2009, [it] may still prove ... that Mr. Jackson was subject to the registrations provisions of SORNA and hence is criminally liable for his failure to register as a sex offender.” *Id.* at 12–13. The Government

relies upon *United States v. Coleman*, No. 09-30-ART, 2009 WL 4255545 (E.D.Ky. Nov.24, 2009), for support. In that case, the indictment for violation of Section 2250 alleged that the defendant's actions occurred “[b]etween on or about a date in April, 2007, the exact date unknown, and April 28, 2009.” *Coleman*, 2009 WL 4255545, at * 1. The court concluded that even though the interim rule could not be applied to the defendant in light of *Cain*, the final guidelines “clearly” could be. *Id.* at *4.

*14 Defendant asserts that the time frame alleged in the indictment is insufficient to save it. He contends that, “[d]rawing reasonable inferences from the facts, it appears more likely than not that Mr. Jackson traveled prior to August 1, 2008” and therefore the indictment must be dismissed “[b]ecause the government cannot meet a probable cause standard to show that the travel happened after the date on which the statute became retroactive.” Def.’s Reply 17 & n. 8. He also argues that *Coleman* is distinguishable because the Government in that case “had definitive proof of travel after the promulgation of the final rule.” *Id.* at 18 (citing *Coleman*, 2009 WL 4255545 at * 2 n.1).

In ruling on a pretrial motion to dismiss, courts “must presume the truth of the allegations in the charging instruments.” *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996) (finding that the district court “erred in considering documentation provided by the defendants” in ruling upon a motion to dismiss under Fed.R.Crim.P. 12(b) (2)). Considering only the face of the indictment, it is possible

that Defendant committed the proscribed acts after August 1, 2008, the date of the adoption of the final regulations on retroactivity. Under these circumstances, dismissal of the indictment would be inappropriate, and the Court need not resolve the split in the circuit courts as to whether the interim rule was issued in accordance with the APA.³ Should the facts adduced at trial demonstrate that Defendant committed the acts alleged in the indictment after the issuance of the interim rule but before promulgation of the final guidelines, the Court will decide the legal issue at that time.

F. Whether SORNA Violates the Commerce Clause

In *United States v. George*, 579 F.3d 962 (9th Cir.2009), the Ninth Circuit held that “Congress had the power under its broad commerce clause authority to enact the SORNA.” *George*, 579 F.3d at 966. Defendant raises the issue here to preserve it for further review.⁴ It is so preserved.

III. CONCLUSION

Good cause therefor appearing, Defendant's motion to dismiss the indictment is denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3325611

Footnotes

- 1 This disposition is not appropriate for publication and may not be cited.
- 2 The Court acknowledges that the Seventh Circuit relied upon *Application of Graham* to interpret an insurance contract in *Amer. Nat. Fire Ins. Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451, 455-56 (7th Cir.1997).
- 3 Given the frequency with which SORNA violations are being litigated it is not inconceivable that the Ninth Circuit will weigh in on this issue before trial.
- 4 Defendant also submits, almost in passing, that SORNA “should be found to exceed Congress' authority under the Commerce Clause as applied in this case.” Def.’s Mot. 16 (emphasis added); see also Def.’s Reply 18. However, Defendant has pointed to no authority for his “as applied” challenge.

583 Fed.Appx. 355 (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. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee
v.

Jason Scott KLINEFELTER, Defendant–Appellant.

No. 14–40345

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Summary Calendar.

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Oct. 24, 2014.

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[Marjorie A. Meyers](#), Federal Public Defender, Federal Public Defender's Office, Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:13–CR–746–1.

Before [DAVIS](#), [CLEMENT](#), and [COSTA](#), Circuit Judges.

Opinion

PER CURIAM: *

Jason Scott Klinefelter was found guilty at a bench trial of one count of failing to register as a sex offender as required under the Sex Offender Registration and Notification Act

(SORNA), and he was sentenced to 21 months in prison and three years of supervised release. On appeal, Klinefelter contends that the Government failed to show that he was required to register under SORNA. In particular, he maintains that his Maryland conviction for second degree rape did not qualify as a “sex offense” because the state statute permits a conviction for consensual sexual conduct if the victim is at least 13 years old and the offender was not more than four years older than the victim, because such conduct is considered an exception to the definition of a “sex offense.” See [42 U.S.C. § 16911\(5\)\(C\)](#) (statutory exception). Klinefelter asserts that under the categorical approach, the Government is unable to prove that his conviction did not fall under the exception. We have rejected the argument that the categorical approach should be used in these circumstances and have instead applied a “circumstance-specific” approach. [United States v. Gonzalez–Medina](#), [757 F.3d 425, 428–32 \(5th Cir.2014\)](#). The stipulation of facts submitted at the bench trial established that Klinefelter was more than four years older than the victim. Klinefelter concedes that his argument is foreclosed by [Gonzalez–Medina](#), but he seeks to preserve the issue for further review under SORNA.

In addition, Klinefelter asserts that the SORNA intrastate registration requirement is unconstitutional because it exceeds Congress's authority under the Commerce Clause. He maintains that the Necessary and Proper Clause does not authorize the enactment of SORNA because the statute improperly expands federal power. Klinefelter concedes, however, that his arguments are foreclosed by [United States v. Whaley](#), [577 F.3d 254 \(5th Cir.2009\)](#); he wishes to raise his challenges to preserve them for further review. Accordingly, Klinefelter's unopposed motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.

All Citations

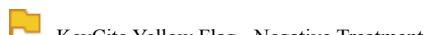
583 Fed.Appx. 355 (Mem)

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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2014 WL 6694781

Only the Westlaw citation is currently available.

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

UNITED STATES of America, Plaintiff,

v.

David MARROWBONE, Defendant.

No. 3:14-CR-30071-RAL.

|

Signed Nov. 26, 2014.

Attorneys and Law Firms

Mikal G. Hanson U.S. Attorney's Office Pierre, SD, for Plaintiff.

OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

ROBERTO A. LANGE, District Judge.

*1 The Government charged David Marrowbone with one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). Doc. 1. On October 14, 2014, Marrowbone, through counsel, filed a motion to dismiss indictment for failure to state an offense pursuant to [Federal Rule of Criminal Procedure 12\(b\)\(3\)\(B\)](#) and a brief in support of that motion. Docs. 27, 28. The Government opposed the motion and filed a brief supporting its position, Doc. 31, after which Marrowbone filed a reply brief, Doc. 32. For the reasons set forth below, Marrowbone's motion to dismiss is denied.

I. Legal Standard on Motion to Dismiss and Validity of Indictment

Marrowbone argues that the indictment fails to state an offense and therefore must be dismissed pursuant to [Rule 12\(b\)\(3\)\(B\)](#). Docs. 27, 28, 32. When ruling on a motion to dismiss, a court must accept all factual allegations in the indictment as true. See [United States v. Sampson](#), 371 U.S. 75, 78–79 (1962). A valid indictment must allege that “the defendant performed acts which, if proven, constitute the violation of law for which he is charged.” [United States v.](#)

[Polychron](#), 841 F.2d 833, 834 (8th Cir.1988). If an indictment fails to allege acts that constitute a violation of law, then it may be dismissed. *Id.* An indictment adequately states an offense if it “contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution.” [United States v. Sewell](#), 513 F.3d 820, 821 (8th Cir.2008) (quoting [United States v. Hernandez](#), 299 F.3d 984, 992 (8th Cir.2002)). This is a low bar, and an indictment normally will be found valid unless it is “so defective” that no reasonable construction of it properly charges the offense for which the defendant is being tried. See [Sewell](#), 513 F.3d at 821. Normally, an indictment that tracks the statutory language is sufficient. *Id.*

The Government alleges that Marrowbone failed to register or update his registration as required by federal law. Federal law requires that:

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 ...;

... 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.

18 U.S.C. § 2250(a). The indictment charges:

On or between the 3rd day of February, 2014, and the 14th day of March, 2014, in the District of South Dakota, the defendant, David Marrowbone, a person required to register under the Sex Offender Registration and Notification Act, and a sex offender by reason of a conviction under Federal Law, did knowingly fail to register and

update a registration, in violation of 18 U.S.C. § 2250.

*2 Doc. 1.

Although terse, the wording of the indictment tracks the three elements of the offense. First, it alleges that Marrowbone is required to “register under the Sex Offender Registration and Notification Act,” invoking § 2250(a)(1). Second, it alleges that Marrowbone is a “sex offender by reason of a conviction under federal law,” which is required by § 2250(a)(2)(A). Third, it alleges that Marrowbone “knowingly fail[ed] to register and update a registration,” which tracks the language of § 2250(a)(3). The indictment also alleges a narrow timeframe in which Marrowbone allegedly failed to register, which provides sufficient notice for him to plea a prior conviction or acquittal of the current alleged offense. On its face, the indictment is valid.

A valid indictment ordinarily will survive a motion to dismiss for failure to state an offense without further inquiry. “An indictment should be tested solely on the basis of the allegations made on its face,” *Sampson*, 371 U.S. at 78–79, and no evidence outside the four corners of the indictment should be considered, *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir.1994). In a criminal proceeding based on a grand jury indictment, there is no procedure to test the sufficiency of the Government’s evidence prior to trial. *United States v. Ferro*, 252 F.3d 964, 968 (8th Cir.2001). A court cannot dismiss an indictment based on “predictions as to what the trial evidence will be,” instead it must give the Government the opportunity to present its evidence. *Id.* (quoting *United States v. Laurentis*, 230 F.3d 659, 661 (3d Cir.2000)). However, in certain circumstances, such as when operative facts are undisputed, it is permissible for a court to consider evidence in connection with a pretrial motion to dismiss. *United States v. Lafferty*, 608 F.Supp.2d 1131 (D.S.D.2009) (citing *Hall*, 20 F.3d at 1087–88).

In this case, both parties agree that the underlying criminal offense alleged to trigger Marrowbone’s responsibility to register is a 1982 federal conviction for assault with intent to commit rape in violation of the version of 18 U.S.C. § 113(a) that was in force at the time.¹ Doc. 28 at 3; Doc. 31 at 3. Marrowbone argues that his 1982 conviction for assault with intent to commit rape does not qualify as an offense for which he must register as a sex offender. Thus, the issue raised is whether the underlying offense is a qualifying offense for

purposes of § 2250 and the Sex Offender Registration and Notification Act (SORNA). This is a legal rather than a factual issue appropriate to be decided before trial. If Marrowbone’s claim is valid, it would be unfair to Marrowbone and a waste of judicial resources to begin a trial on an indictment that would be dismissed on a legal issue.

II. Whether Assault with Intent to Rape is a Sex Offense

Only a “sex offender” who is required to register under SORNA, but fails to do so register is subject to criminal punishment under § 2250. A sex offender is an individual who has been convicted of a “sex offense.” 42 U.S.C. § 16911(1). Federal law defines a sex offense:

*3 [T]he term “sex offense” means—

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C. § 16911(5)(A). The Government does not claim Marrowbone’s 1982 conviction was a specified offense against a minor victim. Marrowbone’s 1982 conviction was a violation of 18 U.S.C. § 113 as it existed at the time and thus was not one of the enumerated federal offenses or a specified military offense. Therefore, the 1982 offense is a sex offense only if it falls under clause (i) or clause (v) of the definition of sex offense.

To decide whether an underlying conviction is a sex offense, the statute directs a court to determine whether the offense of conviction has “an element involving a sexual act or sexual contact with another.” 42 U.S.C. § 16911(5)(A)(i). The use of terms like “conviction” in § 16911(1) and “element” in § 16911(5)(A)(i) suggests a categorical approach to determine whether the prior offense qualifies as a sex offense. See

United States v. Gonzalez-Medina, 757 F.3d 425, 429 (5th Cir.2014) (citing *Taylor v. United States*, 495 U.S. 575, 600–01 (1990)). However, because the assault statute under which Marrowbone was convicted charged alternate versions of assault, this Court may consider a limited scope of facts beyond the statute to determine what elements must have been proven to secure the conviction. Cf. *Descamps v. United States*, 133 S.Ct. 2276, 2283–84 (2013) (finding that the modified categorical analysis was only to be used to enable a traditional categorical analysis of the elements of an offense that could be charged in alternate variations).

Assault with intent to commit rape is not necessarily a “criminal offense that has an element involving a sexual act or sexual contact with another.” The terms “sexual act” and “sexual contact” are defined in Title 18, Chapter 109A, of the United States Code, and both require actual physical contact between the offender and the victim. 18 U.S.C. §§ 2246(2)–(3). Assault with intent to commit rape had two elements: (1) an assault (2) perpetrated with the specific intent to commit rape. *United States v. Iron Shell*, 633 F.2d 77, 88 (8th Cir.1980). The crime of assault with intent to commit rape could be committed without any actual physical contact with the victim. *Id*; see also *Ladner v. United States*, 358 U.S. 169, 177 (1958) (“[A]n assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm.”). While a conviction of assault with intent to commit rape could have involved a sexual act or sexual contact, neither is a necessary element for a conviction. Assault with intent to rape therefore cannot be considered a sex offense under clause (i) of 42 U.S.C. § 16911(5)(A), which requires “a criminal offense that has an element involving a sexual act or sexual contact with another.”

*4 The Government posits that rape is a criminal offense that has a sexual act as an element of the offense. Doc. 31 at 4–7. The Government then argues that assault with intent to rape is, in substance, an attempted rape and a “sex offense” under 42 U.S.C. § 16911(5)(A)(v). Doc. 31 at 4–7. This Court agrees with the Government’s interpretation of the definition of sex offense.

At the time of Marrowbone’s conviction in 1982, rape was a federal offense that necessarily included a sexual act. A conviction for the federal offense² of rape required proving sexual intercourse obtained through the “use of force by the offender and an absence of consent by the victim.” *Williams*

v. *United States*, 327 U.S. 711, 715 (1946). Sexual intercourse is a sexual act as defined by federal law. 18 U.S.C. § 2246(2)(A) (defining “sexual act” in part as “contact between the penis and the vulva or the penis and the anus”). Rape unquestionably is a sex offense and was so in 1982.

A conviction of assault with intent to commit rape necessarily requires proving an attempted rape. To be found guilty of an attempted crime, a person must have the specific intent to commit the underlying offense and must have taken a substantial step toward the completion of the crime. *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir.1982). A substantial step is an overt act that goes beyond mere preparation and would ordinarily, if uninterrupted, lead to the commission of the crime. *Id* at 843. The act of committing an assault of the intended victim would necessarily require taking a substantial step toward the completion of the crime. See also *United States v. Bear Ribs*, 562 F.2d 563, 564 (8th Cir.1977) (per curiam) (“The common law offense of simple assault ... requires the showing of an offer or attempt by force or violence to do corporal injury to another.” (emphasis added)). A person who has been convicted of assault with intent to commit rape therefore has necessarily been convicted of a crime that is, in substance, an attempted rape, notwithstanding the fact that the offense was not entitled “attempted rape.” Therefore, Marrowbone’s conviction for assault with intent to commit rape falls within 42 U.S.C. § 16911(5)(A)(v), and is a sex offense for purposes of SORNA.

Marrowbone argues that Congress intended the federal offenses enumerated in 42 U.S.C. § 16911(5)(A)(iii) to be the only federal sex offenses for purposes of SORNA. Doc. 28 at 7–8; Doc. 32 at 4–5. This argument is not without some superficial merit. As opposed to clause (iii), which describes a “federal offense,” clauses (i) and (ii) of § 16911(5)(A) both describe “criminal offense[s].” 42 U.S.C. §§ 16911(5)(A)(i)–(iii). “Criminal offense” is defined later in the section: “The term ‘criminal offense’ means a State, local, tribal, foreign, or military offense ... or other criminal offense.” 42 U.S.C. § 16911(6). While the definition of criminal offense specifically includes State, local, and tribal offenses, it does not explicitly include the term “federal offense.” *Id*. However, an “other criminal offense” under § 16911(6) must include a federal offense; to hold otherwise would be to read “other criminal offense” out of the provision altogether. The United States Court of Appeals for the Fourth Circuit addressed this issue in *United States v. Dodge*, 597 F.3d 1347 (11th Cir.2010). In that case, the Fourth Circuit found that, as a whole, the SORNA definition was not intended to “exclude certain offenses but

rather to expand the scope of offenses” that meet the criteria of a sex offense. *Id.* at 1352. The Fourth Circuit in *Dodge* also reasoned that while Congress left Chapter 71 of Title 18 regulating obscenity out of the list of enumerated offenses, another provision defining sex offenses encompassed some of the offenses included in that title, showing that Congress did not intend the enumeration in clause (iii) to be exclusive. *Id.* at 1352–53. Furthermore, the stated purpose of the act to “protect the public from sex offenders and offenders against children” by creating a “comprehensive” national registration of sex offenders, 42 U.S.C. § 16901, supports the conclusion that Congress was trying to cast a wide net when defining “sex offense.”

*5 Assault with intent to commit rape and Chapter 99, which defined and criminalized rape prior to enactment of Chapter 109A,³ had both been removed from Title 18 by the time SORNA was enacted. See Sexual Abuse Act of 1986, P.L. 99–646, § 87, 100 Stat. 3592, 3623 (1986) (striking assault with intent to commit rape from 18 U.S.C. § 113 and repealing Chapter 99 of Title 18); Adam Walsh Child Protection and Safety Act of 2006, P.L. 109–248, 120 Stat. 587 (2006) (enacting SORNA). It is not surprising then that Congress did not enumerate those offenses in § 16911(5)(A)(iii). This Court agrees with the Fourth Circuit holding that 42 U.S.C. § 16911(5)(A)(iii) is not the exclusive list of the federal offenses that may be considered a sex offense.

The United States Attorney General promulgated SORNA guidelines and regulations called the National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030 (July 2, 2008) [hereinafter SMART Guidelines], pursuant to Congressional directive, 42 U.S.C. § 16912(b). These guidelines also support including a conviction of assault with intent to commit rape as triggering a registration requirement under SORNA. The SMART Guidelines state:

[A] jurisdiction may define an offense of ‘assault with intent to commit rape.’ Whether or not the word ‘attempt’ is used in the definition of the offense, this is in substance an offense that covers certain attempts to commit rapes and hence is covered under the final clause of the SORNA definition.

SMART Guidelines, 73 Fed.Reg. at 38051. Because these guidelines were passed pursuant to a delegation of authority by Congress and in compliance with standard notice and comment requirements, three circuit courts of appeal have determined that the SMART Guidelines are substantive rules to which the judiciary owes deference. *United States v. Lott*,

750 F.3d 214, 217–20 (2d Cir.), cert denied, 135 S.Ct. 253 (2014); *United States v. Bridges*, 741 F.3d 464, 468 & n. 5 (4th Cir.2014); *United States v. Stevenson*, 676 F.3d 557, 565 (6th Cir.2012). Because assault with intent to commit rape is a covered “sex offense” under SORNA as confirmed by the SMART Guidelines, Marrowbone is not entitled to dismissal of the indictment on that ground.

III. Whether Marrowbone's SORNA Registration Requirement has Expired

Marrowbone next argues that, even if the 1982 offense was a sex offense, he no longer has to register under SORNA. Sex offenders are required to register for varying periods of time depending upon their classifications as tier I, tier II, or tier III sex offenders. 42 U.S.C. § 16915. A sex offender is guilty of failing to register only if he or she is required to register. 18 U.S.C. § 2250(a)(1). Excluding time spent in custody or civil confinement, a tier III sex offender must maintain current registration for the remainder of his or her life,⁴ a tier II sex offender must maintain current registration for a period of twenty-five years, and a tier I sex offender must maintain current registration for a period of fifteen years. 42 U.S.C. § 16915.

*6 Marrowbone argues that, even if assault with intent to commit rape is a sex offense, he is not a tier III offender. Doc. 28 at 8–9. Therefore, he argues, his registration period would have ended either in 1997 or 2007, either fifteen or twenty-five years after his 1982 conviction. ML However, SORNA explicitly states that the registration periods “exclud[e] any time the sex offender is in custody or civilly committed.” 42 U.S.C. § 16915(a). Marrowbone has been incarcerated for a significant portion of the time between the 1982 offense and the alleged current offense. According to court records, since his release in 1982 Marrowbone has been sentenced in the District of South Dakota to over eight and one-half years of confinement.⁵ 3:89-CR-30061, Doc. 2 at 2 (sentencing Marrowbone to eighty-four months' custody); 5:87-CR-50088, Doc. 1 at 2 (sentencing Marrowbone to eighteen months' custody); 3:83-CR-30002, Doc. 1 at 2 (sentencing Marrowbone to an unspecified period of custody). The Government asserts that Marrowbone has been incarcerated in state prison as well, but did not come forward with records to show how much time Marrowbone has spent in prison since 1982. Even if Marrowbone's offense is less than a tier III offense, there is a question of fact whether his registration period has ended.

There also is a thorny question of whether it is for this Court or a jury to resolve the issue of which sex offender registration tier Marrowbone fits in. The SORNA statute does not specify whether it is for a court or a jury to decide in which tier an offender belongs. SORNA defines a tier III sex offender in pertinent part as:

[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 sections 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.

[42 U.S.C. § 16911\(4\)](#). A tier II offender is a sex offender who is not a tier III offender and whose offense is “punishable by imprisonment for more than 1 year” and either is “comparable to or more severe than” certain offenses against minors or occurs after the offender becomes a tier I offender. *Id. § 16911(3)*. A tier I sex offender is a “sex offender other than a tier II or tier III sex offender.” *Id. § 16911(2)*.

Generally, statutory interpretation is a question of law that is to be determined by the court, *see Bollenbach v. United States*, [326 U.S. 607, 612 \(1946\)](#), and other courts have determined an offender's tier level as a matter of law using the same categorical statutory interpretation technique as was used above to determine whether a conviction of assault with intent to rape is a sex offense, *United States v. Cabrera-Gutierrez*, [756 F.3d 1125, 1133–34 \(9th Cir., cert. denied, 135 S.Ct. 124 \(2014\)\)](#); *United States v. Backus*, [550 F. App'x 260, 262 \(6th Cir., cert. denied, 134 S.Ct. 2153 \(2014\)\)](#); *United States v. Taylor*, [644 F.3d 573, 576–77 \(7th Cir.2011\)](#); *United States v. Black*, [963 F.Supp.2d 790, 793–96 \(E.D.Tenn.2013\)](#). However, other than in *Black*, the procedural posture of those cases was different than the procedural posture of this case in a significant way. In *Cabrera-Gutierrez*, *Backus*, and *Taylor* the courts were determining the sex offender tier in order to properly apply sentencing guidelines after the defendants'

guilty pleas had been accepted. In *Black* the district court addressed on a motion to dismiss the sex offender tier in which the defendant belonged. The district court in *Black* referred to the SMART Guidelines on whether to classify a prior crime as a tier II or tier III offense: “[J]urisdictions 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.” *Black*, [963 F.Supp.2d at 795](#) (quoting SMART Guidelines, [73 Fed.Reg. at 38053](#)). The district court then determined that the defendant was a tier II offender by comparing the elements of the defendant's underlying offense with the elements of SORNA tier II sex offenses and thereby denied the motion to dismiss. *Black*, [963 F.Supp.2d at 795–96, 798](#).

*7 This Court hesitates to follow the decision in *Black*. Marrowbone has the right to demand that a jury make a determination on every element of the offense the Government claims he committed. *Apprendi v. New Jersey*, [530 U.S. 466, 476 \(2000\)](#); *United States v. Gaudin*, [515 U.S. 506, 511 \(1995\)](#). For failure to register or update a registration, one of the essential elements of the offense is that the defendant is required to register under SORNA, [18 U.S.C. § 2250\(a\)](#), which requires determining the duration of a sex offender's required registration period, [42 U.S.C. § 16915](#). The language of the statute arguably involves a fact and value judgment—whether the underlying offense is “comparable to or more severe than” the specified offenses. [42 U.S.C. §§ 16911\(3\)-\(4\)](#) (emphasis added). Such language is similar to other statutory elements of crimes requiring a jury determination. *See, e.g., Gaudin*, [515 U.S. at 522–23](#) (holding defendant has a constitutional right for a jury determination of whether a false statement was “materially false” in violation of [18 U.S.C. § 1001](#)); *United States v. Bamberg*, [478 F.3d 934, 938 \(8th Cir.2007\)](#) (finding evidence was sufficient for a jury to determine analogue drug was “substantially similar” to a controlled substance based on number of statutory considerations in [21 U.S.C. § 802\(32\)](#)); *United States v. Johnson*, [718 F.2d 1317, 1322–23 \(5th Cir.1983\)](#) (reversing a court determination that a gold certificate was a “security” under [18 U.S.C. § 2314](#) because a jury must make that determination).

Neither party briefed whether the tier classification was for the jury or the court, and this Court wants to give the parties an opportunity to brief the issue. This Court need not resolve the matter now because evidence exists that Marrowbone has been in custody for years since his 1982 conviction and thus would face the responsibility to register even if he is not a

tier III offender. This Court would like the parties to brief the question of whether the tier determination is for the court or jury.

IV. Conclusion and Order

Therefore, for the reasons explained above, it is hereby:

ORDERED that Defendant's Motion to Dismiss Indictment, Doc. 27, for failure to state an offense is DENIED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6694781

Footnotes

- 1 Assault with intent to commit rape is no longer included in [18 U.S.C. § 113](#).
- 2 While it is not clear from the record at this point what the basis for federal jurisdiction was for Marrowbone's criminal case in 1982, it must have been either federal enclave jurisdiction, Major Crimes Act jurisdiction, or Indian Country Crimes Act jurisdiction. In 1982, federal law made "rape" a crime punishable by death or up to life in prison. [18 U.S.C. § 2031, repealed by Sexual Abuse Act of 1986, P.L. 99–646 § 86, 100 Stat 3592](#), 3623 (1986); see also *Oliver v. United States*. [230 F. 971, 973–74 \(9th Cir.1916\)](#) ("[B]y giving a crime a name known ... to the common law a crime is not less clearly ascertained than it would be by using the definition as found in the treatises of the common law 'Congress ... may as well define, by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term. That is certain which is, by necessary reference, made certain.' " (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, (1820))). Thus, if the crime was committed in a federal enclave, such as Corps of Engineers property, then the federal definition would control. If the crime was committed in Indian country by a non-Indian perpetrator against an Indian victim, the federal enclave law would apply. [18 U.S.C. § 1152 \(1982\)](#). If the crime was committed in Indian country by an Indian perpetrator against an Indian or non-Indian victim, then federal law would also apply. [18 U.S.C. § 1153 \(1982\)](#) ("Any Indian who commits against the person ... of another Indian or other person any of the following offenses, namely ... rape ... [or] assault with intent to commit rape, ... within the Indian country, shall be subject to the same laws and penalties as all other persons committing ... the above offenses, within the exclusive jurisdiction of the United States.").
- 3 Congress repealed Chapter 99 of Title 18 and the crime of assault with intent to commit rape in the very same act through which it enacted Chapter 109A of Title 18, which includes the crime of Aggravated Sexual Abuse and other crimes involving various types of sexual abuse. Sexual Abuse Act of 1986, [P.L. 99–646, § 87, 100 Stat. 3592](#), 3620–23. It is self-evident that Congress, in repealing these crimes and enacting Chapter 109A, did not intend to decriminalize rape or assault with intent to commit rape. Rather, the repeal of Chapter 99 stemmed from enacting the more comprehensive statute in Chapter 109A. Offenses in Chapter 109A are considered sex offenses under SORNA. [42 U.S.C. § 16911\(5\)\(A\)\(iii\)](#).
- 4 Tier III and tier I sex offenders can earn a reduction of the period of registration, [42 U.S.C. § 16915\(b\)](#), but that provision is not at issue at this point in this case.
- 5 This Court has had the Clerk of Court retrieve these files from the archives and will have the Clerk of Court retain the records. Those records seem proper for judicial notice under [Rule 201 of the Federal Rules of Evidence](#), and notice is given under Rule 201(e) of the intention of the Court to take judicial notice.

585 Fed.Appx. 668 (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. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Scott Arthur PARENT, Defendant–Appellant.

No. 13–30349.

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Submitted Nov. 18, 2014. *

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Filed Nov. 24, 2014.

Attorneys and Law Firms

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Michael Donahoe, Esquire, Assistant Federal Public Defender, Federal Defenders Of Montana Helena, MT, for Defendant–Appellant.

Appeal from the United States District Court for the District of Montana, Donald W. Molloy, Senior District Judge, Presiding. D.C. No. 6:12-cr-00016-DWM-1.

*669 Before: CLIFTON, M. SMITH, and HURWITZ, Circuit Judges.

Scott Parent appeals his conviction for violating the Sex Offender Registration Notification Act (“SORNA”), 18 U.S.C. § 2250(a)(1)(2)(B), (3). He also challenges his classification as a Tier III sex offender for the purposes of sentencing, and the denial of a motion to certify a question to the Oregon Supreme Court. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

1. We have previously rejected Parent's argument that SORNA's delegation of authority to the Attorney General violates the separation of powers doctrine. *United States v. Richardson*, 754 F.3d 1143, 1145–46 (9th Cir.2014); *United States v. Elkins*, 683 F.3d 1039, 1045 (9th Cir.2012).

2. The district court properly determined that Parent's conviction for attempted rape in the first degree under Oregon Revised Statutes §§ 163.375, 161.405, is “comparable to” attempted sexual abuse under 18 U.S.C. § 2242, a Tier III offense under 42 U.S.C. § 16911 and the United States Sentencing Guidelines Manual § 2A3.5. See *United States v. Cabrera–Gutierrez*, 756 F.3d 1125, 1133 (9th Cir.2014) (requiring use of the categorical approach described 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) in making such determinations).

3. The district court did not abuse its discretion in denying Parent's motion to certify a question to the Oregon Supreme Court because the answer would not have been “determinative of” this SORNA case, as required by Oregon law. Or.Rev.Stat. § 28.200; *W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 311 Or. 361, 811 P.2d 627, 630 (1991).

AFFIRMED.

All Citations

585 Fed.Appx. 668 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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2015 WL 1208563

Only the Westlaw citation is currently available.
United States District Court,
W.D. Louisiana,
Shreveport Division.

UNITED STATES of America
v.
Joseph Kelly PARSON.

Criminal Action No. 14-234.

|

Signed March 17, 2015.

Attorneys and Law Firms

Brandon B. Brown, U.S. Attorneys Office, Shreveport, LA, for United States of America.

MEMORANDUM RULING

ELIZABETH ERNY FOOTE, District Judge.

*1 Before the Court is a motion to dismiss the indictment, filed by the Defendant, Joseph Kelly Parson (“Parson”). *See* Record Document 19. Parson was indicted by a federal Grand Jury for failing to register as a sex offender, in violation of Title 18, United States Code, Section 2250(a). The instant motion to dismiss centers around Parson’s criminal history and whether he was required to register as a sex offender. It is Parson’s position that his underlying Georgia conviction for two counts of statutory rape qualified as a misdemeanor that did not subject him to sex offender registration requirements. The Government opposes the motion to dismiss, arguing that Parson’s Georgia conviction qualifies as a felony, thus mandating that Parson register as a sex offender. *See* Record Document 24. For the reasons that follow, Parson’s motion is DENIED.¹

I. Parson’s Criminal Background.

On September 10, 2002, a Grand Jury in Liberty County, Georgia indicted Parson on two counts of statutory rape of a female under the age of sixteen who was not his spouse. Record Document 25, p. 2. The indictment classified both offenses as felonies under Georgia Code § 16-6-3. *Id.* On March 5, 2004, Parson pleaded guilty to both counts and received the benefit of First Offender Treatment, which

meant that no judgment of guilt was imposed at that time. Record Document 19-3, p. 3. The plea agreement specifically provided that Parson was pleading guilty to: “Count 1: Statutory Rape, a Felony” and “Count 2: Statutory Rape, a Felony.” Record Document 19-3, p. 9. Proceedings were deferred while Parson served a four year probation sentence under the condition “that upon violation of the terms of probation ..., the Court may enter an adjudication of guilt and proceed to sentence the Defendant to the maximum sentence provided by law.” *Id.* at p. 3. If Parson had abided by the terms and conditions of his First Offender Treatment and satisfactorily completed his sentence of probation, he would “stand discharged of said offense charged and ... be completely exonerated of guilt of said offense charged.” *Id.* Under the First Offender Treatment, Parson was deemed exempt from the sex offender program. *See id.* at p. 4.

Unfortunately, Parson repeatedly violated the terms of his probation, including failing to report and absconding. Accordingly, in 2007, Parson was adjudged guilty of the statutory rape violations and sentenced to serve four years on each count, to run concurrently. Record Document 25, p. 4. The “Final Disposition” document clearly reflects that these violations were considered felonies and that Parson received a felony sentence. *Id.* at p. 5 Ultimately, the court ordered Parson to serve 300–360 days in detention. *Id.* at p. 6 However, on the Final Disposition form, the box stating that Parson “shall be supervised under the Special Conditions, rules and regulations of the Sex Offender Supervision Program” was left unchecked. *Id.* The parties agree that upon Parson’s release from detention in Georgia, he signed documentation notifying him that he was required to register as a sex offender; however, the defense avers this was signed in error.

*2 In 2011, after being released from detention in Georgia, Parson was charged in the First Judicial District Court, Caddo Parish, Louisiana of being a felon in possession of a firearm. Specifically, he was charged with unlawfully possessing a firearm or carrying a concealed weapon “after having been previously convicted of Statutory Rape on May 5, 2004 in Liberty County....” Record Document 25, p. 9. On June 21, 2012, Parson pleaded guilty to attempted possession of a firearm by a convicted felon and was sentenced accordingly. *Id.* at p. 12. Subsequently, he was extradited to Texas where he had been charged with two counts of failure to register as a sex offender, with the reportable conviction being the Georgia statutory rape. *Id.* at pp. 13, 16. In 2013, Parson pleaded guilty to both counts. *Id.* at 14–15, 17–18. In December of 2014,

Parson was indicted by a federal Grand Jury in the Western District of Louisiana on the instant charge of failing to register as a sex offender. Record Document 1. This motion to dismiss followed.

II. Law and Analysis.

At the outset, the Court notes that in reviewing a motion to dismiss the indictment, when the issue presented is a legal question, a district court may look beyond the face of the indictment and rule on the merits of the charged offense in advance of trial. *See United States v. Flores*, 404 F.3d 320, 324 (5th Cir.2005). In the instant case, Parson submits that he was not required to register as a sex offender because his statutory rape conviction was considered a misdemeanor, based on his age at the time of the offense, the age of the victim, and the differential between the two.² Parson argues that had he been convicted of a felony, the court would have been required to sentence him to a mandatory minimum term of one year in prison. Because he did not receive this sentence, but rather received First Offender Treatment and then later 300–360 days in detention, he asserts that his conviction must have been for a misdemeanor; otherwise, the one year sentence would have been imposed. This argument is untenable and is belied by the Georgia court documentation that plainly states the statutory rape counts were deemed felonies. Indeed, felony language is found in the indictment itself, the plea agreement, and the Final Disposition. Further, the “Order Of Adjudication of Guilt and Imposition Of Sentence” confirms that Parson was “adjudged guilty of said offense for which he/she received First Offender probation....” Record Document 25, p. 4. That offense was felony statutory rape. That the sex offender box was left unchecked on the documentation does not convince the Court that Parson was not convicted of a felony, nor does it convince the Court that he was not required to register as a sex offender.

The Court's conclusion that Parson was required to register as a sex offender is further bolstered by a review of SORNA, the Sex Offender Registration and Notification Act. SORNA provides a criminal penalty for any sex offender who travels in interstate commerce and fails to register or update his registration. Specifically, *Title 18, United States Code, Section 2250* provides that a sex offender who travels in interstate or foreign commerce and knowingly fails to register or update his registration shall be imprisoned not more than ten years. This is the offense charged in Parson's indictment. The elements of the SORNA statute must be satisfied sequentially: an offender must (1) be required by

SORNA to register; then (2) travel in interstate commerce; and then (3) knowingly fail to register or update a registration. *See United States v. Byrd*, 419 F. App'x 485, 488 (5th Cir.2011).

*3 Parson contends that he was excepted from SORNA's reach by *42 U.S.C. § 16911(5)(C)*, which provides that an offense involving consensual sexual conduct is not a sex offense “if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.” In *United States v. Gonzalez-Medina*, 757 F.3d 425, 429–31 (5th Cir.2014), the Fifth Circuit instructed lower courts not to apply the categorical approach when examining the age differential for *§ 16911(5)(C)*. In other words, when determining the difference in ages between the victim and the offender, this Court is encouraged to look to the specific circumstances of the crime and the facts underlying the conviction. *Id.* In *Gonzalez-Medina*, the Fifth Circuit found that employment of the categorical approach, which would limit the district courts to a comparison of the underlying conviction's statute to SORNA's definition of a sex offense, and which would not allow the courts to look at the actual facts of the conviction, was inconsistent with the language of *§ 16911(5)(C)* and with SORNA's broad purpose. *Id.* Accordingly, this Court will examine the facts underlying Parson's statutory rape conviction to pinpoint the age differential and determine whether *§ 16911(5)(C)* applies.

Relying on the sentence he received, which he believes is commensurate with a misdemeanor offense, Parson claims that his statutory rape victim must have been at least fifteen years old, while he was eighteen years old. In other words, Parson argues that if the victim had been younger than fifteen, or if there were more than a three year difference in their respective ages, he could not have received a misdemeanor punishment. This argument is belied by the records. The Liberty County Sheriff's Office Incident Report states that the victim was twelve years old. Record Document 25, p. 19. This evidence is supported by the affidavit of Denise Hodges, Chief Probation Officer for the Atlantic Judicial Circuit in Georgia, who supervised Parson pursuant to his statutory rape conviction. Officer Hodges attests that on the offense date, Parson was eighteen years old, while the victim was only twelve years old. Parson has not refuted or contradicted this evidence, aside from noting that there is no further substantiation of the victim's age. The Court will not dismiss the indictment on this basis.

Finally, the Court would be remiss if it did not address Parson's own admissions to his felony statutory rape conviction. That is, he has pleaded guilty to three subsequent felony offenses, all of which were based in some way on his statutory rape conviction. In Louisiana State Court, he admitted to being a felon who attempted to possess a firearm. The underlying felony conviction was the statutory rape conviction in Georgia. In Texas, he twice admitted to failing to register as a sex offender. The only reason he would have had to register as a sex offender was because of his Georgia statutory rape conviction. Thus, prior to now, Parson has at least three times admitted under oath that his statutory rape conviction was a felony offense. Parson has failed to provide the Court with any explanation for why these admissions are not legally significant and relevant to the instant question

before the Court. To the contrary, he has wholly ignored these admissions that substantially undercut his motion to dismiss the indictment.

III. Conclusion.

*4 After careful consideration of the briefs and evidence submitted by the parties,

IT IS ORDERED that Parson's motion to dismiss the indictment [Record Document 19] be and is hereby **DENIED**.

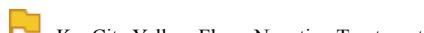
All Citations

Not Reported in F.Supp.3d, 2015 WL 1208563

Footnotes

1 Parson's request for oral argument is also hereby **DENIED**.

2 In 2002, the statute provided that if the victim was fourteen or fifteen years of age and the offender was no more than three years older, then the offense was deemed a misdemeanor.



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Disagreed With by [U.S. v. Schofield](#), 5th Cir.(Tex.), September 23, 2015

2013 WL 4052897

Only the Westlaw citation is currently available.

United States District Court, D. Vermont.

UNITED STATES of America, Plaintiff,

v.

Richard Earl PIPER, Defendant.

No. 1:12-cr-41-jgm-1.

|

Aug. 12, 2013.

Attorneys and Law Firms

[Barbara A. Masterson](#), AUSA, United States Attorney's Office, Burlington, VT, for Plaintiff.

[David L. McColgin](#), AFPD, Office of the Federal Public Defender, for Defendant.

MEMORANDUM AND ORDER FINDING THE DEFENDANT NOT GUILTY

J. GARVAN MURTHA, District Judge.

I. Introduction

*1 The Government has charged the Defendant, Richard Earl Piper, with violating the Sex Offender Registration and Notification Act. 18 U.S.C. § 2250(a). (Doc. 3.) Following a bench trial on January 30, 2013, the Defendant submitted post-trial briefing and moved for a judgment of acquittal under [Federal Rule of Criminal Procedure 29](#). (Doc. 43.) The Government responded by filing its own post-trial briefing, which also opposed the Defendant's motion for judgment of acquittal. (Doc. 53.) The Defendant filed a reply memorandum. (Doc. 56.) After reviewing these pleadings, the Court ordered the parties to submit additional memoranda addressing the applicability of *Chevron* deference in the criminal context. (Doc. 57.) The parties filed additional memoranda in response. (Docs. 60, 61.)

II. Discussion

A. Standard of Review

The Defendant has submitted post-trial briefing and moved for a judgment of acquittal under [Federal Rule of Criminal Procedure 29](#). (Doc. 43.) At the conclusion of a criminal bench trial, a court determines whether the Government has proved the defendant's guilt beyond a reasonable doubt. [United States v. Varga](#), No. 2:10-cr-77-1, 2011 WL 573391, at *1 (D.Vt. Feb. 15, 2011). A court applies a more deferential standard in considering a motion for acquittal based on the sufficiency of the evidence at trial. A court deciding a motion to acquit must "view the evidence 'in the light most favorable to the government' and ... uphold a conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" "[United States v. Jones](#), 531 F.3d 163, 168 (2d Cir.2008) (quoting [Jackson v. Virginia](#), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The Court is acting as the trier of fact in this case, making separate consideration of the motion for acquittal unnecessary. [Varga](#), 2011 WL at *1. The Court will therefore determine only whether the evidence at trial proved the Defendant's guilt beyond a reasonable doubt.¹

[Federal Rule of Criminal Procedure 23\(c\)](#) requires a court to "find the defendant guilty or not guilty" following a bench trial. A court must only make "specific findings of fact" if requested by a party. *Id.* Although neither party has made such a request, the Court sets forth its findings in the interest of completeness.

B. Factual Findings

In July 2007, the Vermont State Police twice charged the Defendant with lewd and lascivious conduct. The first charge stemmed from an incident at the Rutland Area Field House on July 13th. (Doc. 41-3 at 1.) At the bench trial, the Government submitted a probable cause affidavit from a state trooper that describes the incident. (Doc. 41 at ¶ 2.) Neither party introduced additional evidence regarding it. Both parties stipulated to the admissibility of the affidavit.

The probable cause affidavit establishes that the Defendant masturbated in his car while parked in the field house's parking lot. (Doc. 41-3 at 1-2.) During a subsequent interview at the police barracks, the Defendant admitted to having done so. *Id.* at 2. The affidavit also contains vague, hearsay statements from a forty-two year-old woman who observed him masturbating. *Id.* at 1-2. The statements suggest he may have masturbated in the presence of children. *Id.* The statements do not establish the age of these children. *Id.* Nor is it clear from the affidavit whether the statements fall within

an exception to the hearsay rule. *Id.* The Government has not shown the Defendant victimized children on July 13th. *Id.*

*2 The Defendant again masturbated in public on July 16th. (Doc. 41 at ¶ 1.) This second incident occurred at the Clarendon Gorge, a swimming area in Clarendon, Vermont. (Doc. 41–1 at ¶ 1.) In addition to a probable cause affidavit from a state trooper, the Government offered the testimony of twin sisters, “TAB” and “TRB,” at trial. These sisters arrived at the gorge’s parking lot in the early evening. The twins arrived with their older sister, ALB, and their aunt, who had driven them there. TAB and TRB had just turned twelve in June 2007. ALB was sixteen. Their aunt parked on the right side of the gorge’s parking lot. Another car was parked to the left and nose-to-nose with her car. Both cars faced a line of large rocks, which mark the start of the trail towards the gorge. Another trail head is on the left side of the lot.

At trial, TAB and TRB had different recollections as to what happened next. TAB testified that she observed the Defendant—naked and masturbating—emerge from the trail head on the left side of the lot, walk past the first car in the lot and alongside her aunt’s car, and peer in at her in the backseat. She testified that he made eye contact, coming within six to eight inches of her window. TRB was seated to the right of her sister in the car. She recalled observing a naked man standing next to the driver’s side door of the first car in the lot. He was naked, looking towards their car, and masturbating. TRB could not recall whether the Defendant walked around the lot.

The Defendant’s admission in the state trooper’s probable cause affidavit provides a third account. *Id.* at ¶ 7. The Defendant told the troopers that he touched himself in the parking lot while completely naked and looking at a small group of people. *Id.* TAB identified the Defendant in the courtroom at trial. *Id.*

Based on the testimony of TAB and TRB, as well as the Defendant’s admissions in the affidavit, the Court finds that the Defendant observed the twelve-year-old sisters in the parking lot as they departed for the gorge. The Court further finds that he masturbated in the lot in their presence. Although the Court doubts neither twin’s candor, a nearly six-year gap between the events at the gorge and the bench trial has created discrepancies. The testimony of TAB and TRB diverged too much for the Court to make more specific findings, such as whether he peered into their aunt’s car while masturbating.

At the gorge, TAB and TRB again observed the Defendant masturbating. Their accounts of this second incident do not differ significantly. The twins’ testimony established that they observed the Defendant masturbating as they swam in the gorge. He was in a different section of the gorge, about twenty-five to thirty yards away. He was naked and staring at them. In response, TAB and TRB left the gorge with their aunt and sister. The women reported the incident to the state police, who investigated it. Following an interview with the Defendant, the state police arrested him on lewd and lascivious conduct charges. *Id.* at ¶¶ 8–9.

*3 On April 8, 2009, the Defendant pled guilty in Vermont Superior Court to two counts of lewd and lascivious conduct, 13 V.S.A. § 2601, as well as a violation of his conditions of release. (Docs. 41–2 at 3; 41–5 at 4.) A state court judge sentenced him on July 23, 2009. (Doc. 41 at ¶¶ 1–2.) As part of his sentence, the judge required him to register as a sex offender with the State of Vermont. *Id.* The Defendant completed a “Vermont Sex Offender Registry Notification of Requirement to Register” form following his sentencing. *Id.* at ¶ 3. He signed the form and wrote his initials next to various registration requirements, including: (1) his obligation to notify the Vermont Department of Corrections of any change of address while under its supervision; (2) his obligation to notify the Vermont Criminal Information Center of his intent to move to another state and to contact local law enforcement in that new state; and (3) his obligation to continue to comply with his registry requirements for ten years following his discharge from supervision. (Doc. 41–6 at 3.)

The Defendant used change of address forms to update his address in January 2010 and again in December 2010. (Doc. 41 at ¶¶ 4–5.) His new addresses were both located in Vermont. *Id.* The forms make the Defendant’s continuing obligation to report changes to his address clear. See Doc. 41–7 at 1 (“any changes to the above information must be reported within 3 days”); Doc. 41–8 at 1 (“[r]egistrants must report any change to information below to their [probation officer] within 24 hours of the change”).

The Defendant moved from Vermont to Punta Gorda, Florida in July 2011. (Doc. 41 at ¶ 6.) He entered an eleven-month lease of a residence there on July 21, 2011. *Id.* He was arrested in Florida on September 17, 2011. *Id.* at ¶ 8. Following his move, the Defendant neither updated his registration with Vermont nor filed a new registration with the State of Florida. *Id.*

C. Section 2250

The Government has charged the Defendant with violating the criminal enforcement provision of the Sex Offender Registration and Notification Act (“SORNA”). The provision states that “[w]hoever—(1) is required to register under [SORNA]; (2) ... 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.” [18 U.S.C. § 2250\(a\)](#). There is no dispute the Government has proved the last two elements. After moving from Vermont to Florida, the Defendant neither updated his registration in Vermont nor registered in Florida. At issue in this case is whether SORNA required the Defendant to register. (Doc. 43 at 2.) The Government contends the Defendant's state convictions for lewd and lasciviousness involved “conduct that by its nature is a sex offense against a minor,” [42 U.S.C. § 16911\(1\)\(I\)](#), and he therefore constitutes a “sex offender” under SORNA. (Doc. 53 at 3.) The Defendant responds that: (1) the evidence at trial failed to establish that he committed such an offense; and, alternatively, (2) the elements of his underlying convictions should determine whether he committed an offense against a minor. (Doc. 43 at 1–2.)

*⁴ [18 U.S.C. § 2250](#) provides criminal penalties for sex offenders who move interstate and violate its registration requirements. [Section 2250](#) only applies to whomever “is required to register under [SORNA].” [18 U.S.C. § 2250\(a\)\(1\)](#). The applicability of [section 2250](#) thus depends on [42 U.S.C. § 16913](#), which provides that “[a] sex offender shall register” and lists specific registration requirements. [42 U.S.C. § 16911](#) defines “sex offender,” as used in [section 16913](#), as “an individual who was convicted of a sex offense.” The section contains a comprehensive definition of “sex offense,” a term that includes a “specified offense against a minor.”

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

- (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 section 1801 of Title 18.

(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.

[42 U.S.C. § 16911\(7\)](#).

The Government proved beyond a reasonable doubt that the Defendant's conduct at the Clarendon Gorge on July 16, 2007 constituted “conduct that by its nature is a sex offense against a minor.” [42 U.S.C. 16911\(7\)\(I\)](#). The Defendant—naked and masturbating—observed the twins in the parking lot as they prepared to go swimming. He later masturbated at the gorge, staring at the twins from across the water. As “individual[s] who ha[ve] not attained the age of 18 years,” [42 U.S.C. § 16911\(14\)](#), the twin sisters constitute minors for SORNA purposes. The sisters twice witnessed the Defendant masturbating in public view. Despite having observed them in the parking lot, the Defendant again masturbated and exposed himself at the gorge's swimming area. The Defendant's “conduct contains a ‘sexual component’ toward a minor.” [United States v. Dodge](#), 597 F.3d 1347, 1355 (11th Cir.2010) (transmitting nude photographs to thirteen-year-old girl meets definition). At trial, through the specific facts underlying his lewd and lasciviousness conviction for masturbating at the gorge, the Government proved beyond a reasonable doubt that the Defendant committed a sex offense against a minor.² The Court finds the Government met its burden of proof as to all of [section 2250](#)'s elements.

D. SMART Guidelines

The Court has examined the facts underlying the Defendant's lewd and lascivious conduct conviction and finds he committed a sex offense against a minor. The Defendant contends such a factual examination is irrelevant to whether he falls within SORNA's coverage. (Doc. 43 at 1–2.) According to him, the Court should limit its examination to the elements of lewd and lasciviousness under Vermont law. He thus argues for an “elemental approach,” as opposed to a “factual examination.” The Defendant was convicted of violating [13 V.S.A. § 2601](#), which does not require proof of the age of his victims. Notwithstanding its factual findings

otherwise, the Court must find the Defendant not guilty of violating SORNA if an elemental approach is applied.

*5 Relying on the text of SORNA, as well as case law on sentencing enhancements, the Defendant argued for an elemental approach in moving to dismiss the indictment before trial. (Doc. 30 at 5.) At the time, the Court rejected his argument. *Id.* The Court reasoned the applicability of SORNA raised a factual question—whether he committed his state offenses against minors—which must be decided at trial. *Id.* at 6–7. Moreover, had its applicability raised a pure question of law, the Court explained it would have nevertheless declined to address the question before trial. *Id.* at 9.

In his post-trial briefing, the Defendant contends an elemental approach should apply based on a different legal argument. The Defendant now argues the Attorney General adopted an elemental approach in guidelines it issued interpreting SORNA. (Doc. 43 at 1.) Known as the “SMART Guidelines,” the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART Office”) within the Department of Justice issued them in 2008. [Office of the Attorney General, The National Guidelines for Sex Offender Registration and Notification, 73 FR 38030 \(July 2, 2008\)](#). The SMART Guidelines provide for an elemental approach in interpreting “any conduct that by its nature is a sex offense against a minor.”

Conduct by Its Nature a Sex Offense Against a Minor (§ 111(7)(I)): The final clause [of [section 16911](#)] covers ‘[a]ny conduct that by its nature is a sex offense against a minor.’ It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

Id. at 38053. Relying on [Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 842–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (“*Chevron*”), the Defendant argues the Court should defer to this interpretation. *Id.* The Government responds that *Chevron* deference is unwarranted because: (1) the doctrine is inapplicable in the criminal context; and (2) SORNA is unambiguous. (Docs. 53 at 5–6, 60 at 1).

1. Applicability of *Chevron* framework to the SMART Guidelines

Chevron deference generally requires a court “to defer to an agency’s interpretation of the statute it administers when the intent of Congress is unclear and the agency’s determination is reasonable.” [Higgins v. Holder](#), 677 F.3d 97, 102–03 (2d Cir.2012) (internal quotations omitted). As a threshold question in this criminal prosecution, however, the Court first must determine whether *Chevron* is applicable here. The Second Circuit has stated that “courts owe no deference to an agency’s interpretations of state or federal criminal laws, because the agency is not charged with the administration of such laws.” [Michel v. I.N.S.](#), 206 F.3d 253, 262 (2d Cir.2000). See also [Sash v. Zenk](#), 428 F.3d 132, 135–36 (2d Cir.2005). The Court declines to extend this proposition to the SMART Guidelines. The Court will instead apply *Chevron* to these guidelines for two reasons. First, Congress specifically charged the Attorney General with promulgating the SMART Guidelines. Second, SORNA is a hybrid regulatory statute. It regulates both state sex offender registries and, through its criminal enforcement provision, sex offenders.

*6 The authority of the Attorney General to interpret SORNA is explicit. 42 U.S.C. § 16912(b) provides that “[t]he Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.” The applicable subchapter is “Subchapter I—Sex Offender Registration and Notification,” 42 U.S.C. §§ 16901–16962. See [United States v. Stevenson](#), 676 F.3d 557, 564 (6th Cir.2012). SORNA thus authorizes the Attorney General to interpret [section 16911](#), which contains the term “any conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(7)(I). SORNA does not authorize the Attorney General to interpret its criminal enforcement provision, 18 U.S.C. § 2250, which is found in the criminal code. Following publication in the federal register and a public comment period, the Attorney General issued the SMART Guidelines in July 2008. SMART Guidelines, 73 FR at 38030.

The proposition that *Chevron* deference is inapplicable in the criminal context derives largely from Justice Scalia’s concurrence in [Crandon v. United States](#), 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990). In interpreting a federal conflicts of interest law, 18 U.S.C. § 209(a), Justice Scalia declined to defer to a body of advisory opinions that various federal agencies had developed.

The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron*. The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

Crandon, 494 U.S. at 177. Yet Congress has charged the Attorney General with “specific responsibility for administering” SORNA, including sections that define the scope of its criminal enforcement provision. The SMART Guidelines contrast with the advisory opinions in *Crandon*, which served an “advice-giving” function. *Id.* See also *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir.1994) (quoting with approval the ruling in *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir.1990) that “the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party”).

SORNA also introduces a hybrid regulatory scheme, with criminal and noncriminal applications. SORNA “establishes a comprehensive national system for the registration” of sex offenders, 42 U.S.C. § 16901, and makes federal funding contingent on state registries meeting minimal national standards. 42 U.S.C. § 16925. The baseline set by these standards covers “[t]he classes of persons who will be required to register; the means by, and frequency with which,

registration information will be verified; the duration of registration; the time for reporting of changes in registration information; and the classes of registrants and the information about them that will be included on public sex offender [w]eb sites.” SMART Guidelines, 73 FR at 38032. SORNA also requires sex offenders to maintain current information with state registries. 42 U.S.C. § 16913. This “federal duty” is enforced through criminal penalties. *United States v. Guzman*, 591 F.3d 83, 93 (2d Cir.2010).

*7 As a consequence of this hybrid scheme, the definition of “sex offense” in SORNA serves both criminal and noncriminal functions. The definition helps determine the applicability of its national standards, including what offenses state registries must cover. In addition, whether a criminal defendant committed a “sex offense” determines whether he or she may face federal charges under section 2250. In fact, the Second Circuit has described section 2250 and section 16913’s registry requirements as “clearly complementary: without § 2250, § 16913 lacks federal criminal enforcement, and without § 16913, § 2250 has no substance.” *Id.* at 90 (quoting *United States v. Whaley*, 577 F.3d 254, 259 (5th Cir.2009)).

Applying *Chevron* ensures that the definition of “sex offense” remains consistent in both the criminal and noncriminal context. The Supreme Court has expressed a preference for interpreting statutes with criminal and noncriminal applications consistently.³ *Thompson/Ctr. Arms Co.*, 504 U.S. at 518. See also Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 Va. Tax Rev. 905, 921–24 (2007). Allowing for different interpretations of the same statutory term in the criminal and noncriminal context risks undercutting the fair warning that must underlie criminal law. See *Lanier*, 520 U.S. at 266. Such a bifurcation would also be at odds with SORNA, which attempts to unify sex offender registries throughout the United States. *Reynolds v. United States*, — U.S. —, —, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012).

Based on the foregoing, the Court concludes the *Chevron* framework is applicable here. Congress explicitly authorized the Attorney General to issue guidelines interpreting SORNA, including its definitions section, and that section serves criminal and noncriminal functions.

2. Application of *Chevron* deference to the SMART Guidelines

To determine whether deference is appropriate, a court must engage in a two-step analysis under *Chevron*. *Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007). At *Chevron* step one, a court considers “whether Congress has clearly spoken to the question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* (internal quotations omitted). If Congress has “not directly addressed the precise question at issue,” a court must then proceed to *Chevron* step two. *Id.* (internal quotations omitted). This step instructs a court “to defer to an agency’s interpretation of the statute, so long as it is ‘reasonable.’” *Id.* (quoting *Chevron*, 467 U.S. at 844).

a. *Chevron* Step One

Congress has not “directly spoken to the precise question at issue;” whether paragraph 16911(7)(I) requires an elemental approach or a factual examination. The Court previously addressed this question in denying the Defendant’s motion to dismiss the indictment. (Doc. 30.) Relying on the text of section 16911 and SORNA’s statutory framework, the Court concluded SORNA invited analysis of the underlying facts in that decision. *Id.* at 6–7. The decision did not address the SMART Guidelines. Nor do the appellate court decisions it relied on address them. See *Dodge*, 597 F.3d at 1354–56; *United States v. Byun*, 539 F.3d 982, 991–93 (9th Cir. 2008). Because the Defendant has now raised the guidelines, a different analysis is required. Indeed, “the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *United States v. Eurodif S.A.*, 555 U.S. 305, 316, 129 S.Ct. 878, 172 L.Ed.2d 679 (2009) (internal quotations omitted). As a consequence, the first step of *Chevron* does not ask whether a better interpretation exists. See *id.* Rather, the critical question is whether Congress left room for agency discretion through silence or ambiguity in the statute. A court should ascertain Congress’s intent as follows:

*8 [W]e begin with the statutory text because if its language is unambiguous, no further inquiry is necessary. We presume that Congress says in a statute what it means and means in a statute what it says. If the statutory language is ambiguous, however, we resort first to canons of statutory construction,

and, if the [statutory] meaning remains ambiguous, to legislative history, to see if these interpretative clues clearly reveal Congress’s intent.

Mizrahi, 492 F.3d at 158 (internal quotations and citations omitted).

The text of SORNA is not entirely clear. At the outset, its definition of “sex offender” suggests an elemental approach is required. Subsection 16911(1) defines “sex offender” as “an individual who was *convicted* of a sex offense,” 42 U.S.C. § 16911(1) (emphasis added), rather than “an individual who committed, or engaged in conduct constituting, such an offense.” *Byun*, 539 F.3d at 991. The use of “convicted” in defining “sex offender” contrasts with some of SORNA’s other definitions, which use “committed.” 42 U.S.C. §§ 16911(3)(A) (classifying certain offenses as “tier II offenses” when “committed against a minor”), 16911(3)(B) (excluding kidnappings “committed by a parent or guardian” from tier III classification). This contrast is not inconsequential. The Supreme Court interpreted a sentencing enhancement for “a person who ... has three previous convictions” for violent felonies and drug offenses in *United States v. Taylor*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (quoting 18 U.S.C. § 924(e)(1)). *Taylor* reasoned the statute directed sentencing courts 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,” through its use of the term “convictions.” *Id.* Had the statute instead referred to “a person who has committed” such offenses, *Taylor* suggested an examination of the underlying facts might be warranted. See *id.* at 600–01.

As laid out in this Court’s prior decision, however, SORNA’s more specific definition of “sex offense” supports an examination of the underlying facts. SORNA defines “sex offense” as, inter alia, “(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.” 42 U.S.C. § 16911(5)(A)(I)(i)-(ii) (emphasis added). The contrast between these clauses—the first contains “element” while the second does not—suggests analysis under the second clause is not elemental. *Byun*, 539 F.3d at 991–92. The subsection defining “specified offense against a minor” lends further support for an examination of the underlying facts. The subsection does not refer to the elements of particular crimes. 42 U.S.C. § 16911(7). It instead

applies to “an offense against a minor that *involves*” various enumerated offenses. *Id.* (emphasis added). The Government relies on the last such offense, which covers “[a]ny conduct that by its nature is a sex offense against a minor.” *Id.* at § 16911(7)(I). Through its use of the term “any conduct,” paragraph 16911(7)(I) suggests the courts should examine the facts underlying a particular offense. *Id.*

*9 The text of SORNA is thus inconsistent. By referencing “convicted” in its definition of “sex offender,” SORNA initially suggests an elemental approach is appropriate. But an analysis of the more specific definitions implementing that broad definition lends support for a non-elemental approach. The Ninth Circuit in *United States v. Byun* recognized that this inconsistency “creates a modicum of ambiguity” about the required approach. *Byun*, 539 F.3d at 992. *Byun* nevertheless concluded “the 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 in determining whether a particular conviction is for a specified offense against a minor.” *Id.* (internal quotations omitted). This Court previously reached a similar conclusion. As noted above, however, the “best reading” is not conclusive for *Chevron* purposes. Ambiguity or silence instead controls. SORNA creates some ambiguity by using “convicted” in its definition of “sex offender.” 42 U.S.C. § 16911(1).

Furthermore, paragraph 16911(7)(I) also suggests Congress intended the Attorney General to exercise discretion in implementing SORNA. The Eleventh Circuit in *United States v. Dodge* described the paragraph as a catch-all that “could not be any broader.” *Dodge*, 597 F.3d at 1355. The Court is mindful that the paragraph’s use of the term “any conduct,” not elements, suggests an elemental approach is not required. *Id.* Yet paragraph 16911(7)(I)’s text also makes it clear that its scope is open to interpretation. *See id.* (“In passing SORNA, Congress left courts with broad discretion to determine what conduct is ‘by its nature’ a sex offense”). A vague, expansive term, “by its nature,” follows “conduct.” It is a “settled principle of administrative law that an open-ended and potentially vague term is highly susceptible to administrative interpretation subject to judicial deference.” *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003).

Having identified ambiguities in SORNA’s text, the Court next turns to canons of statutory interpretation. *Mizrahi*, 492 F.3d at 158. Neither party has addressed this interpretative

step in their briefing.⁴ Nor has the Court uncovered one that is conclusive. To the contrary, at least one canon highlights the statute’s ambiguity. “[O]ne of the most basic interpretive canons [states] that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004)). The overarching definition of “sex offender” in SORNA only applies to convictions. 42 U.S.C. 16911(1). The specific definition at issue applies more broadly to “any conduct.” 42 U.S.C. 16911(7)(I). Depending on whether a factual or elemental approach is applied, either “convicted” in subsection 16911(1) or “any conduct” in paragraph 16911(7)(I) is rendered superfluous. The antisuperfluosity canon thus fails to clarify whether SORNA requires a factual or elemental approach.

*10 The legislative history of SORNA is also inconclusive. An intent to expand the reach of sex offender registries “to ensnare as many offenses against children as possible” is apparent throughout the Congressional record. *Dodge*, 597 F.3d at 1355. Numerous legislators noted SORNA’s expansive reach in passing the statute. *See e.g.*, 152 Cong. Rec. H5705–01 (2006) (statement by Representative Green that SORNA “gives law enforcement … vital tools for keeping our children safer” by, *inter alia*, “expand[ing] the sex offender registry”). *See also Byun*, 539 F.3d at 993 (citing additional portions of the record). Congress reflected this intent in the title to subsection 16911(7), “Expansion of definition of ‘specified offense against a minor’ to include all offenses by child predators.” *Dodge* and *Byun* both determined the legislative history supports a factual examination because Congress intended SORNA to apply broadly. *Dodge*, 597 F.3d at 1355; *Byun*, 539 F.3d at 993. For *Chevron* purposes, however, it is not clear the legislators made the general remarks about its broad application with the narrow issue before this Court in mind. *See Chevron*, 467 U.S. at 862. Furthermore, SORNA anchors its definition of “criminal offense” in statutory law. *See* 42 U.S.C. § 16911(6) (“[t]he term ‘criminal offense’ means a State, local, tribal, foreign, or military offense … or other criminal offense”). Notwithstanding the reference in subsection 16911(7)’s title to “all offenses,” not just convictions, the Court is not persuaded Congress necessarily intended the courts to look beyond the elements of the predicate offense. But *see Dodge*, 597 F.3d at 1355; *Byun*, 539 F.3d at 993.

Another purpose of SORNA—to unify state registration systems—creates further ambiguity. The statute “reflects Congress’ awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems.” *Reynolds*, 132 S.Ct. at 978. It “seeks to make those systems more uniform and effective.” *Id.* See also H.R. Rep. No. 109–218(I) (2005) (recognizing “wide disparity among State registration requirements and notification obligations for sex offenders”). In contrast to a factual examination, which requires a case-by-case determination, an elemental approach makes paragraph 16911(7)(I) applicable to categories of state and local crimes. An elemental approach thus better serves uniformity. SORNA’s legislative history does not clearly reveal that Congress intended the courts to examine the facts underlying each offense.

Based on its analysis of SORNA’s text and legislative history, as well as relevant canons of statutory interpretation, the Court concludes Congress has not directly addressed whether paragraph 16911(7)(I) requires a factual examination. SORNA thus invites the Attorney General to exercise its discretion in deciding whether a factual examination or an elemental approach is appropriate.

b. *Chevron* Step Two

*11 A court must defer to an agency’s interpretation under *Chevron* step two “so long as it is reasonable.” *Mizrahi*, 492 F.3d at 158 (internal quotations omitted). The Government has not challenged the reasonableness of the SMART Guidelines here. See Doc. 53 at 6. Through its reference to convictions, the general definition of “sex offender” supports an elemental approach. Although it regards a factual examination as the better approach, this Court cannot conclude the Attorney General resolved the statutory ambiguity here unreasonably. “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question

initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n. 11. *Chevron* step two instead evaluates the reasonableness of the administrative interpretation. *Mizrahi*, 492 F.3d at 158.

The Court concludes that it must defer to the SMART Guidelines under *Chevron*. The guidelines interpret paragraph 16911(7)(I) to cover “convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense.” The Defendant’s state conviction for lewd and lascivious conduct did not require proof of his victim’s age. See 13 V.S.A. § 2601 (only requiring proof of “open and gross lewdness and lascivious behavior”). His conviction therefore falls beyond the scope of paragraph 16911(7)(I), as implemented by the SMART Guidelines. The Defendant was not “required to register under [SORNA].” 18 U.S.C. § 2250(a)(1). He is not guilty of violating its criminal enforcement provision.

E. Due Process Violation

The Defendant also asserts his prosecution violates the Due Process Clause’s notice requirement. (Doc. 43 at 5–6.) In light of its not guilty finding, the Court does not need to resolve this question.

III. Conclusion

As a matter of law, the Court finds the Defendant NOT GUILTY of violating 18 U.S.C. § 2250. The Court reaches this conclusion notwithstanding its factual finding that his underlying conduct constituted a sex offense against a minor under paragraph 16911(7)(I).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4052897

Footnotes

¹ The Court recognizes the Defendant may have moved to acquit in order to preserve his sufficiency challenge on appeal. The Court expresses no opinion about whether such an approach is necessary in the Second Circuit. But see *United States v. Grace*, 367 F.3d 29, 34 (1st Cir. 2004) (“a defendant does not have to make a Rule 29 motion in a bench trial to preserve the usual standard of review for a sufficiency of the evidence

claim on appeal"); *United States v. Atkinson*, 990 F.2d 501, 503 (9th Cir.1993) ("no motion for acquittal is necessary in a bench trial in order to preserve for appeal a challenge to the sufficiency of the evidence").

- 2 The Government no longer appears to contend the Defendant's lewd and lasciviousness conviction for masturbating at the Rutland Area Field House also constituted a sex offense against a minor. See Doc. 53 at 7–9. To prevent any confusion, however, the Court finds the Government failed to meet its burden of proof as to this separate incident. The evidence at trial did not establish that any minors witnessed him masturbating at the field house.
- 3 Several Supreme Court cases rely on this principle to apply the "rule of lenity" when interpreting statutory definitions with both criminal and noncriminal applications. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8, 125 S.Ct. 377, 160 L.Ed.2d 271 (applying rule of lenity to interpret term "crime of violence," as found in criminal code, in deportation case); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992) (applying rule of lenity in tax case under National Firearm Act because disputed terms, "make" and "firearm," also had criminal applications). The rule of lenity "ensures fair warning by so resolving ambiguity in criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). As an alternative ground for acquittal, the Defendant proposes the Court apply this rule. (Doc. 61 at 5.) But the Court has not required the rule of lenity's application when faced with an unambiguous regulation interpreting a hybrid criminal-noncriminal statute. To the contrary, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n. 18, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) applied *Chevron* rather than the rule of lenity under these circumstances. The *Babbitt* court noted that the regulation in question provided adequate notice of potential criminal liability, rendering the rule of lenity inapplicable. *Id.* See also *Sash*, 439 F.3d at 67 ("an administrative regulation may give adequate notice of criminal consequences for rule of lenity purposes"). The SMART Guidelines likewise provide "fair warning" of criminal liability. There is no need to resort to the rule of lenity here.
- 4 More generally, the Defendant has argued that the rule of lenity supports an elemental approach. (Doc. 61 at 5.) As noted in footnote 3, the rule of lenity resolves statutory ambiguities in favor of criminal defendants. *Lanier*, 520 U.S. at 266. It is not particularly useful in identifying those ambiguities. See *id.*

2012 WL 5603631

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

UNITED STATES of America, Plaintiff,
v.

QUAN TU, Defendant.

No. 03:12-cr-00339-HZ.

|

Nov. 15, 2012.

Attorneys and Law Firms

S. Amanda Marshall, United States Attorney, District of Oregon, Stacie F. Beckerman, Assistant United States Attorney, Portland, OR, for Plaintiff.

Alison M. Clark, Office of the Federal Public Defender, Portland, OR, for Defendant.

OPINION & ORDER

HERNANDEZ, District Judge.

*1 On June 26, 2012, a federal grand jury indicted defendant on one count of failing to update his registration as a “sex offender,” as required by the Sex Offender Registration and Notification Act (“SORNA”). Defendant moves to dismiss the indictment for lack of jurisdiction, contending that he is not required to register as a sex offender under SORNA.

Defendant also moves to strike the presentence report (“PSR”), which the government filed under seal as an exhibit to its response to the motion to dismiss. I deny defendant’s motion to strike, and grant defendant’s motion to dismiss the indictment.

BACKGROUND

On November 13, 2002, defendant pleaded guilty to the charges of (1) Conspiracy to Transport Individuals in Furtherance of Prostitution, 18 U.S.C. § 371, and (2) Interstate Transportation in Furtherance of Prostitution, 18 U.S.C. § 2421. On March 7, 2003, a judgment was entered against him on these offenses in the United States District Court of the Western District of Washington. The current indictment

is based on the government’s contention that these 2003 convictions require defendant to register as a sex offender under SORNA.

I. DEFENDANT’S 2003 WASHINGTON CONVICTIONS

Defendant pleaded guilty to the following specific elements of the Conspiracy to Transport Individuals in Furtherance of Prostitution charge:

[1] ... defendant agreed with at least one other person to transport individuals in interstate commerce with the intent that such individuals engage in prostitution;

[2] ... defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and

[3] ... one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

Ex. B to Def.’s Mem. in Supp. Mot. Dismiss (“Def.’s Ex.”) at ¶ 2a.

As for the Interstate Transportation in Furtherance of Prostitution charge, defendant pleaded guilty to the following elements: “[1] knowingly and intentionally transported, or aided or abetted the transportation of, a person in interstate or foreign commerce; and ... [2] intended that such person engage in prostitution.” *Id.* at ¶ 2b.

Defendant’s plea agreement details his involvement in a prostitution ring as a brothel owner. Prior to and continuing through September 17, 2002, defendant entered into an agreement with others to “transport individuals in furtherance of prostitution.” *Id.* at ¶ 7a. The object of the conspiracy of this prostitution ring was to make money through the recruitment and employment of women. *Id.* at ¶ 7b. Defendant’s role within this prostitution ring was to “transport, exchange, and rotate” young women from Asian countries to engage in prostitution throughout the United States. *Id.*

Beginning in or before 2001, and continuing until defendant’s arrest on September 17, 2002, defendant operated a brothel in Portland, Oregon. *Id.* at ¶ 7c. The Asian women who stayed at defendant’s brothel worked as prostitutes. *Id.* Defendant also discussed the travel arrangements with the women and transported them to the airport so they could travel to brothels in other cities to work as prostitutes. *Id.*

*2 Defendant and the other brothel operators referred the women to each other's brothels. *Id.* at ¶¶ 7d-e. They also talked about the women, including discussing the women's future arrival dates, their physical descriptions, and their relationships with an "agent of prostitutes" who "supplied" defendant and the others with women. *Id.* at ¶ 7e, g, h. Defendant himself visited the brothels of other ring members as a client. *Id.* at ¶ 7d, f.

DISCUSSION

I. STATUTORY SCHEME

SORNA seeks to protect the public from sex offenders generally. [42 U.S.C. § 16901](#). SORNA requires sex offenders to register, and to keep their registrations current, in each jurisdiction where they reside, work, and attend school. [42 U.S.C. § 16913\(a\)](#). A "sex offender" under SORNA is an "individual who was convicted of a sex offense." [42 U.S.C. § 16911\(1\)](#). SORNA's definition of a "sex offense" includes: a criminal offense that has an element involving a sexual act or sexual contact with another, a federal offense under chapter 117 of Title 18, or an attempt or conspiracy to commit any sex offense as defined by SORNA.¹ [42 U.S.C. § 16911\(5\)\(A\)\(i\), \(iii\), \(v\)](#). Importantly for the purposes of this motion, SORNA excludes from its definition of a sex offense those offenses "involving consensual sexual conduct" if the victim was an adult. [42 U.S.C. § 16911\(5\)\(C\)](#).

II. DISCUSSION

Defendant's criminal convictions are "sex offenses" as defined under SORNA because the convictions include the element of prostitution. His conviction of Interstate Transportation in Furtherance of Prostitution, [18 U.S.C. § 2421](#), is a federal offense under chapter 117 of Title 18. And his criminal conviction of Conspiracy to Transport Individuals in Furtherance of Prostitution, [18 U.S.C. § 371](#), was a conspiracy to commit a federal offense under chapter 117 of Title 18.

The issue in this case is whether defendant's convictions were offenses involving "consensual sexual conduct," thereby exempting his convictions from SORNA's "sex offense" definition and exempting him from the registration requirement. In order to address this exemption issue, this court must determine whether defendant's guilty plea to the criminal offenses necessarily admits certain elements that meet the exemption under section 16911(5)(C). The first

question is whether this court must limit the evidentiary review strictly to defendant's convictions (the "categorical approach," and its extension, the "modified categorical approach"), or whether the federal statute allows review of the underlying facts of his convictions (the "circumstance-specific approach"). *United States v. Mi Kyung Byun*, [539 F.3d 982, 990 \(9th Cir.2008\)](#). The second question is whether each approach allows consideration of the plea agreement or the PSR. And third, if each type of document may be considered, the question is whether the document shows or proves an element of consensual sexual conduct by an adult or, conversely, an element of lack of consent.

A. Categorical Approach and Modified Categorical Approach

1. Categorical Approach

*3 Under the categorical approach, a court reviews only the fact of conviction and the statutory definition of the prior offense in order to compare the elements of the crime of conviction with a "federal definition of the crime to determine whether conduct proscribed by the statute is broader than the generic federal definition." *United States v. Gonzalez-Aparicio*, [663 F.3d 419, 425 \(9th Cir.2011\)](#) (internal quotation marks omitted). The court may not review the particular facts underlying the defendant's conviction in a plea context. *Taylor v. United States*, [495 U.S. 575, 600–02 \(1990\)](#). In *Taylor*, the Supreme Court recognized the dangers in looking beyond the charging document and the judgment, noting in particular the unfairness this would cause in a plea context. *Id.* at 601–02. Here, there is no dispute that the categorical approach is inappropriate because the statutes of conviction include elements broader than the exemption to SORNA's definition of a sex offense.

2. Modified Categorical Approach

In the event the statute of the conviction is overly inclusive, a court may go beyond the mere fact of conviction and apply the extended analysis known as the modified categorical approach. *Gonzalez-Aparicio*, [663 F.3d at 425](#) (citing *United States v. Rodriguez-Guzman*, [506 F.3d 738, 746–47 \(9th Cir.2007\)](#)) (modified categorical approach was applied when the court found the state statute's age of consent at eighteen years was overly inclusive of the federal statute's age of consent at sixteen years)). The purpose of the modified categorical approach is to "determine if the record unequivocally establishes that the defendant was convicted of the generally defined crime, even if the statute defining the

crime is overly inclusive.” *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1153 (9th Cir.2003) (internal quotation marks omitted).

Under this modified categorical approach, a court may “determine, in light of the facts in the judicially noticeable documents, (1) what facts the conviction necessarily rested on ...; and (2) whether these facts satisfy the elements of the generic offense.” *Gonzalez-Aparicio*, 663 F.3d at 425 (quoting *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir.2011) (en banc)). The court may rely on 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 (2005).

It is clear that under the modified categorical approach, this court may review the plea agreement to determine whether defendant's convictions contain an element of “consensual sexual conduct.” However, contrary to the government's argument, the plea agreement does not provide facts to support an element of “lack of consent.” The facts detailed in the plea agreement show that, as a brothel owner, defendant arranged for the transportation, exchange, and rotation of the women, employed the women in his brothel, and discussed with other brothel owners the women scheduled to arrive or depart. These facts do not establish that defendant's convictions involved an element of lack of consensual sexual conduct.

B. Circumstance-Specific Approach

***4** When a federal statute refers to “the *specific way* in which an offender committed the crime on a specific occasion,” a circumstance-specific approach is applied. *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009) (emphasis added). Under this approach, the court looks to the “facts and circumstances underlying an offender's conviction.” *Id.*

In *Nijhawan*, the Court applied a circumstance-specific approach based on the statute's reference to the “particular circumstances” under which a crime was committed. *Id.* at 32. The *Nijhawan* petitioner was convicted by a jury of money laundering and of conspiring to commit fraud. *Id.* The government argued that the petitioner's fraud conviction fell within the federal immigration law's definition of “aggravated felony” and sought his removal. *Id.* at 32–33. The term “aggravated felony” is defined by a list of offenses, which includes the federal offense of fraud or deceit “in which the loss to the victim or victims exceeds \$10,000.” *Id.* at 32. The question turned to whether the monetary threshold

was an element of fraud or deceit that required a categorical approach, or whether the threshold referred to a “specific way in which an offender committed the crime on a specific occasion.” *Id.* at 34. The Court in *Nijhawan* held that the monetary threshold element of fraud or deceit called for a circumstance-specific approach because it referred to the “particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.” *Id.* at 32.

Under this circumstance-specific approach, the Court in *Nijhawan* did not limit its review to the evidentiary limits applied in the modified categorical approach. *Id.* at 42. The Court agreed with the petitioner that the “[immigration] statute foresees the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim” about a prior conviction. *Id.* at 41. However, the Court rejected the petitioner's argument that such fairness required the evidentiary limits of the modified categorical approach. *Id.* The Court did not specify just how far a court may go in reviewing the circumstances surrounding a conviction. The Court simply concluded that there was “nothing unfair” about the immigration judge's reliance on “earlier sentencing-related material,” mainly the petitioner's stipulations at the sentencing hearing. *Id.* at 42.

In the instant case, the government argues that the relevant SORNA language calls for a circumstance-specific approach based on the statute's reference to a specific way a prior sex offense was committed. The government further contends that the court may consider the PSR. The government asserts that the underlying circumstances of defendant's conviction, as revealed in the PSR, include instances of violence and threats to some of the women.² The government also asserts that based on the general nature of the prostitution ring, the court may find an inherent lack of consent by the women. Although the violence and threats made to the women were not perpetrated by defendant, the government attempts to draw an inference that defendant must have known of the threats against the women, and therefore his criminal convictions did not involve consensual sexual conduct.

***5** I agree with the government that the statutory language of the exemption to the “sex offense” definition under section 16911(5)(C), referring to “consensual sexual conduct,” appears consistent with a circumstance-specific approach allowing consideration of the specific facts and circumstances underlying defendant's convictions. However, the government's argument fails to address the propriety

of examining conduct revealed in a circumstance-specific approach as the basis for an entirely new conviction. *Nijhawan* itself suggested that its circumstance-specific approach was appropriate in immigration cases only because the Court could find “othing in prior law that [] limit[ed] the immigration court[]” from reviewing additional evidence as to facts and circumstances. *Nijhawan*, 557 U.S. at 41. *Nijhawan* expressly acknowledged that “a deportation proceeding is a civil proceeding in which the Government does not have to prove its claim ‘beyond a reasonable doubt.’” *Id.* at 42. Therefore, I am reluctant to adopt the *Nijhawan* circumstance-specific evidentiary review here.

However, I need not resolve the issue in the instant case. Even if I conclude that the circumstance-specific approach is appropriate in this context and that I may consider the PSR under a circumstance-specific inquiry, the PSR does not show that defendant's convictions involved a lack of consensual sexual conduct. First, the existence of a conspiracy to transport individuals in furtherance of prostitution does not by itself establish coercive conduct. Second, the PSR does not show that defendant himself was aware of threats against any victim or that he himself threatened the women. Although the PSR refers to threats of violence regarding debts to the agents and regarding working at a different brothel without notifying the brokers, the PSR does not reveal that defendant himself knew of, or carried out, any of these actions. Thus, the PSR does not help the government in the present case.

In summary, the parties agree the categorical approach is not appropriate here. Under the modified categorical approach, the plea agreement does not establish that the defendant acted coercively. Although the circumstance-specific approach may be warranted given the “conduct” language in section 16911(5)(C), it should not be applied in the context of a

new criminal conviction which carries a high standard of proof. However, even if the circumstance-specific approach is applied here and the PSR is considered, the PSR does not show a lack of consent.

Defendant's prior criminal convictions constitute “sex offenses” as defined under SORNA. See 42 U.S.C. § 16911(5)(A)(i), (iii), (v). Nonetheless, the convictions are exempted from the definition of “sex offense,” and therefore defendant is exempt from SORNA's registration requirement.

III. DEFENDANT'S MOTION TO STRIKE THE PSR

Defendant also moves to strike the PSR from the record or, alternatively, to disregard the PSR from the court's review. In support of the motion, defendant argues that because consideration of the PSR is inappropriate under the categorical, modified categorical, and circumstance-specific approaches, the PSR should not be part of this record. While defendant may be correct about the relevance of the PSR, that does not require its exclusion from the record. I deny the motion to strike.

CONCLUSION

*6 Defendant's motion to strike [# 25] is DENIED. Defendant's motion to dismiss the indictment [# 13] is GRANTED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5603631

Footnotes

¹ SORNA includes in its definition of “sex offense” other offenses not relevant to this case.

² Specifically, the government seeks judicial notice of the victim statements contained in the PSR.

2010 WL 2574159

Only the Westlaw citation is currently available.
United States District Court, D.
South Dakota, Southern Division.

UNITED STATES of America, Plaintiff,
v.
Ryan Patrick SAILORS, Defendant.

No. CR 10-40003.
I
June 23, 2010.

Attorneys and Law Firms

Jeffrey C. Clapper U.S. Attorney's Office Sioux Falls, SD, for Plaintiff.

ORDER

LAWRENCE L. PIERSOL, District Judge.

*1 Defendant moves to withdraw his guilty plea, which was accepted by the Court, and the Defendant also moves to dismiss the Superseding Indictment.

The Court can consider the Motion to Withdraw the Guilty Plea pursuant to FED.R.CRIM.P. 11(d)(2)(B) as the Court has not yet sentenced the Defendant. In addition, the Defendant has shown a fair and just reason for the withdrawal. Counsel for the Defendant alleges that he was in error in recommending that the Defendant plead guilty, as counsel for the Defendant now believes that one of the three elements necessary to state an offense under 18 U.S.C. § 2250(a) was missing, that being that the Defendant is required to register under the Sex Offender Registration and Notification Act. The Defendant points out that he pled guilty to statutory rape in violation of SDCL 22-22-1(5). The Defendant claims that the conviction does not constitute a sex offense under the provisions of 42 U.S.C. § 16911(5)(c) which provides that it is not a sex offense if the Defendant was not more than four years older than the victim and it was consensual sexual conduct. The Defendant and the United States agree that the Defendant was less than four years older than the victim.

The United States urges that this Court should look beyond the offense of conviction in State Court and consider the different offenses that the Defendant was charged with. In addition,

the United States urges that this Court consider the Turner County Sheriff's Office narrative reports and that as a result of these documents this Court should conclude that the offense of conviction involved a lack of consent even though the offense of conviction does not allege lack of consent and the Defendant did not admit any lack of consent.

The United States urges the Court to follow *United States v. Medicine Eagle*, 266 F.Supp.2d 1039 (D.S.D.2003) (Report and Recommendation of United States Magistrate Judge Moreno adopted by Judge Kornmann.) The *Medicine Eagle* case recognized that the United States Supreme Court in *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) held that, in determining whether a prior offense is a felony for enhancement purposes, the sentencing court should ordinarily limit itself to the fact of conviction and the statutory definition of the prior offense, and that the Supreme Court allowed the sentencing court to look to the indictment or information and jury instructions to ascertain whether the defendant was convicted of a violent felony or some other type of offense. In *Medicine Eagle* the court relied upon the factual basis statement that the defendant gave the state court following his guilty plea. As a result, the holding in *Medicine Eagle* is consistent with *Taylor v. United States*. This was confirmed by *Shepard v. United States*, 544 U.S. 13, 16 (2005) and *United States v. Vasquez-Garcia*, 449 F.3d 870 (8th Cir.2006). *Shepard* limited the inquiry regarding the prior conviction "to examining the statutory definition, charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

*2 The previous conviction is a far cry from what the United States urges here. The narrative reports from the Turner County Sheriff's Office are not court documents in the sense of *Taylor v. United States* and not among the documents which may be considered pursuant to *Shepard, supra* and *Vasquez-Garcia, supra*. In addition, in *Medicine Eagle* the facts relied upon were not in dispute. In the present case, what happened with regard to consent was in dispute according to the Sheriff's reports and that dispute could well have been the reason that the Defendant pled to a lesser offense where consent was not at issue.

Accordingly, this Court will not find from the charging document that there was lack of consent where a lesser offense not involving a consent issue was that to which the Defendant pled guilty. In addition, the Court will not consider either law enforcement investigative reports nor will the Court consider

other charges which were not the subject of Defendant's guilty plea. There is no Court finding nor is there any finding by a jury or even a submission to a jury or a Court on the question of consent. As a result, the Defendant will be allowed to withdraw his guilty plea and the Motion to Dismiss the Superseding Indictment will be granted. Accordingly,

IT IS ORDERED:

2. That the Defendant's Motion to Dismiss Superseding Indictment, Doc. 25, is granted.

All Citations

Not Reported in F.Supp.2d, 2010 WL 2574159

End of Document

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2015 WL 1410495

Only the Westlaw citation is currently available.
United States District Court,
N.D. Oklahoma.

UNITED STATES of America, Plaintiff,
v.
Timothy Jason SUMNER, Defendant.
No. 15-CR-0037-CVE.
I
Signed March 26, 2015.

Attorneys and Law Firms

Robert Trent Shores, United States Attorney's Office, Tulsa, OK, for Plaintiff.

OPINION AND ORDER

CLAIRE V. EAGAN, District Judge.

*1 Now before the Court are Defendant's Motion to Dismiss the Indictment for Failure to Allege an Offense (Dkt.# 15) and Defendant's Motion to Dismiss the Indictment on Constitutional Grounds (Dkt.# 16). Defendant argues that the indictment fails to allege an offense under [18 U.S.C. § 2250](#), because defendant had not previously committed an offense that required him to register under the Sex Offender Registration and Notification Act, [42 U.S.C. § 16911 et seq.](#) (SORNA). Dkt. # 15. He also argues that the indictment is unconstitutionally vague and that [§ 2250](#) is unconstitutional as applied to him. Dkt. # 16.

I.

On February 4, 2015, a grand jury returned an indictment charging defendant with a violation of [§ 2250](#), as follows:

From between May 27, 2013, and continuing through in or about April 25, 2014, in the Northern District of Oklahoma, the defendant, TIMOTHY JASON SUMNER, an individual required to register under [SORNA], and a sex offender by reason of

a conviction under Oklahoma state law ... knowingly failed to register and update his registration and while unregistered, entered and left Indian Country....

Dkt. # 2, at 1. The indictment identifies defendant's prior conviction as a February 2011 conviction for sexual battery from the District Court of Rogers County, Oklahoma. The indictment also lists seven specific occasions on which defendant allegedly entered an Indian casino on tribal land.

Defendant was charged with the same offense in a prior case. *United States of America v. Timothy Jason Sumner*, 14-CR-180-JHP (N.D.Okla.). That case was dismissed when the presiding judge found that the indictment failed to state an offense against defendant, because the indictment did not give defendant sufficient notice of the offense charged against him. *United States v. Sumner*, — F.Supp.3d —, 2015 WL 427822 (N.D.Okla. Feb. 2, 2015). In particular, the prior indictment failed to notify defendant of the dates he allegedly entered and left Indian Country and, “[g]iven the unique prevalence of Indian Country throughout this district,” a defendant should not be required to speculate as to when and how he entered Indian County for the purpose of the charged offense. *Id.* at *4.

II.

Defendant argues that his prior conviction for sexual battery under Oklahoma law is not a “sex offense” as that term is defined under SORNA, and he claims that he is not subject to the registration requirements of SORNA. Dkt. # 15, at 1–3. The government responds that the crime of sexual battery is a predicate offense requiring registration under SORNA, and the indictment adequately alleges an offense under [§ 2250](#).

Under [Fed.R.Crim.P. 12\(b\)\(3\)](#), a defendant may file a motion “alleging a defect in the indictment” at any time while the case is still pending. In ruling on a motion to dismiss for failure to state an offense, the Court must consider only if the allegations of the indictment, if accepted as true, state an offense against the defendant. *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir.2006). “[A]n indictment is considered sufficient ‘if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert

a double jeopardy challenge.” *United States v. Barrett*, 496 F.3d 1079, 1092 (10th Cir.2007). “It is generally sufficient that an indictment set forth an offense in the words of the statute itself, as long as those words themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.” *United States v. Doe*, 572 F.3d 1162, 1173 (10th Cir.2009) (quoting *United States v. Redcorn*, 528 F.3d. 727, 733 (10th Cir.2008)). “The test of the validity of the indictment is not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to the minimal constitutional standards.” *United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir.2000) (quoting *United States v. Fitzgerald*, 89 F.3d 218, 222 (5th Cir.1996)).

*2 SORNA was enacted to create a “comprehensive national system for the registration of ‘sex offenders.’” *United States v. Black*, 773 F.3d 1113, 1114 (10th Cir.2014). SORNA defines “sex offender” as “an individual who was convicted of a sex offense.” 42 U.S.C. § 16911(1). A “sex offense” is any “criminal offense that has an element involving a sexual act or sexual contact with another....” 42 U.S.C. § 16911(5)(i). SORNA does not define “sexual act” or “sexual contact,” but those terms are defined under 18 U.S.C. § 2246. The parties agree that defendant’s conviction does not involve a “sexual act” as that term is defined in § 2246(2), but they dispute whether his conviction has an element of “sexual contact.” “Sexual contact” is defined as “the intentional touching, either directly or indirectly 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). Under SORNA, a sex offender is required 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). If a sex offender changes his name, residence, employment, or student status, he must appear in at least one jurisdiction involved and inform that jurisdiction of all changes that must be documented in the sex offender registry within three days of the change. 42 U.S.C. § 16913(c).

In February 2011, defendant was convicted of sexual battery in violation of OKLA. STAT. tit. 21, § 1123.B. The statute provides that:

No person shall commit sexual battery on any other person. “Sexual battery” shall mean the intentional touching, mauling or feeling of the body or private parts of any person sixteen (16) years of age or older, in a lewd and lascivious manner:

1. Without the consent of that person;
2. When committed by a state, county, municipal or political subdivision employee or a contractor or an employee of a contractor of the state, a county, a municipality or political subdivision of this state upon a person who is under the legal custody, supervision or authority of a state agency, a county, a municipality or a political subdivision of this state; or
3. When committed upon a person who is at least sixteen (16) years of age and is less than twenty (20) years of age and is a student, or in the legal custody or supervision of any public or private elementary or secondary school, or technology center school, by a person who is eighteen (18) years of age or older and is an employee of the same school system that the victim attends.

OKLA. STAT. tit. 21, § 1123.B. Oklahoma courts have defined “lewd and lascivious” to mean “an unlawful indulgence or eagerness for sexual indulgence.” *Reeves v. State*, 818 P.2d 495, 504 (Okla.Crim.App.1991). There is no statutory definition of “private parts” as that term is used in § 1223(B), but the Oklahoma Uniform Jury Instructions define “private parts” as the “genitals or sex organs.” OUJI-CR 4-139.

*3 Defendant argues that sexual battery is not a predicate offense under SORNA for two reasons. First, he claims the crime of sexual battery under Oklahoma law lacks the required intent element to bring the crime within the definition of “sexual contact.” Dkt. # 15, at 7. Second, he argues that the crime of sexual battery does not require the contact or touching of any of the body parts mentioned in the definition of “sexual contact,” and the Oklahoma statute is so broadly worded that sexual battery under § 1123.B cannot be treated as a predicate offense under SORNA. The Court must initially determine whether to apply the categorical approach or the modified categorical approach in considering if a conviction for sexual battery under § 1123.B is a predicate offense requiring a person to register under SORNA. Under the categorical approach, the court must “look only to the fact of conviction and the statutory definition of the prior offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990). The court “consider[s] the offense generically, that is to say, we examine it 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.” *United States v. Charles*, 576 F.3d 1060, 1067 (10th Cir.2009) (quoting *Begay v. United States*, 524 U.S. 442, 452 (1998)).

States, 553 U.S. 137, 141 (2008)). However, if a state statute is divisible and it encompasses multiple or alternative means of committing an offense, the court may consider a limited class of documents to determine which of the alternative offenses formed the basis for the defendant's prior conviction. *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013). The documents that a court may consider are limited to "charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category, as in giving instruction to the jury." *Shepard v. United States*, 544 U.S. 13, 20 (2005). A court may also consider a plea agreement or plea colloquy under the modified categorical approach. *Ibarra v. Holder*, 736 F.3d 903, 907 (10th Cir.2013).

Defendant argues that it is unnecessary to apply the modified categorical approach, because the intent element applicable to all offenses under § 1123.B is not substantially equivalent to the intent required for an offense involving "sexual contact" under SORNA. Dkt. # 15, at 7. The government responds that the definition of "lewd and lascivious" is the functional equivalent of the SORNA standard. Under § 2243(3), prohibited sexual contact must be committed with "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." Conduct is "lewd and lascivious" as a matter of Oklahoma law if the actor had "an unlawful indulgence or eagerness for sexual indulgence." This standard is substantially similar to the "arouse or gratify the sexual desire of any person" component of the intent standard under SORNA. Under the categorical approach, the intent requirement under § 1123.B is equivalent to definition of "sexual contact" under federal law, and the Court rejects defendant's argument that all offenses under § 1123.B fail to qualify as generic offenses involving "sexual contact" under SORNA.

*4 Defendant also argues that the physical contact element of § 1123 .B does not require proof of the same severity of contact as the definition of "sexual contact," and he asks the Court to apply a categorical approach to find § 1123.B criminalizes a wide range of conduct that would not constitute a predicate offense under SORNA. Dkt. # 15, at 8. The government asks the Court to apply a modified categorical approach in comparing the physical contact elements of each statute, because § 1123.B creates multiple offenses and it will be necessary for the Court to review the charging documents from the underlying state court case to determine to what offense defendant pled guilty. Dkt. # 17, at 12. The Court agrees that it is necessary to use the modified

categorical approach to determine which subsection of § 1123.B defendant was accused of violating, because § 1123.B sets forth alternative means of committing the offense of sexual battery and at least one of those alternatives could constitute a predicate offense requiring registration under SORNA. The charging document in state court alleges that defendant committed sexual battery "by intentionally groping the victim by touching the leg and crotch of Molly Thoumire, who was 18 years old at the time, in a lewd and lascivious manner and without the consent of Molly Thoumire." Dkt. # 23-1, at 1. Defendant was plainly charged with an offense under § 1123.B.1. He argues that the language of § 1123.B.1 broadly references the touching of the "the body or private parts," and this lacks the specificity of the body parts listed in the federal definition of "sexual contact." The Court may review the charging document, a plea agreement, or a plea colloquy to determine the elements of the charged offense when the underlying statute provides alternate means of committing the offense. In *Descamps*, the Supreme Court found that it would be permissible for a district court to consider certain documents to determine if a defendant burglarized an automobile or a house, but the modified categorical approach could not be used when the state statute necessarily included conduct that was more broad than the generic definition of burglary. The definition of "sexual contact" under SORNA applies to "the intentional touching, either directly or indirectly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person." In this case, the Oklahoma statute at issue provides that sexual battery may be committed by the unconsented touching of "the body or private parts" of another person. In other words, a person may be convicted under § 1123.B.1 by touching the "body," which might not include body parts listed in the definition of "sexual contact," but a person may also commit the offense by touching "private parts" that are included in the definition of sexual contact. The Court finds that it can review the charging document and plea agreement to determine if defendant was convicted of a generic offense involving "sexual contact," because § 1123.B.1 creates alternate means of committing an offense and one of those possible means falls within a generic offense that would require registration under SORNA. The charging document states that defendant was accused of "intentionally groping the victim by touching the leg and crotch of" the victim. The term "crotch" reasonably includes at least the groin or inner thigh of the victim, and this would fall within the definition of "sexual contact." At the change of plea hearing, defendant also admitted that he "rubbed her private area" to commit the offense. Dkt. # 17-10, at 4. This

shows that defendant pled guilty to a sexual battery offense requiring the unconsented touching of the victim's "private parts" and this does constitute a generic "sex offense" under SORNA. The indictment sufficiently alleges that defendant was convicted of an offense that required him to register and update that registration under SORNA, and defendant's motion to dismiss (Dkt.# 15) should be denied.

III.

***5** Defendant argues that the indictment is unconstitutionally vague, because it fails to give him sufficient notice of the charge against him. In particular, he claims that the indictment does not give him notice of when he allegedly failed to update his registration under SORNA and the lack of specificity "creates the risk that the grand jury may have conceptualized the offense differently from the way the government will assert at trial." Dkt. # 16, at 4. Defendant also alleges that § 2250 is unconstitutional as applied to him, because it appears that he is being charged with engaging in purely intrastate activity. *Id.* at 10. The government responds that the indictment clearly alleges that defendant failed to register or update his sex offender registration and then moved in Indian commerce, and its theory of the case is adequately set forth in the indictment. Dkt. # 18, at 10–13. The government also argues that defendant misunderstands the jurisdictional element of the offense alleged in the indictment, because anyone who "enters or leaves" Indian Country moves in Indian commerce and this is an independent jurisdictional basis for an offense under § 2250. *Id.* at 14–17.

Although defendant's argument is framed in terms of the United States Constitution, he essentially argues that the indictment fails to meet the minimum requirements of Fed.R.Crim.P. 7(c). Dkt. # 16, at 4. As defendant argues, "an indictment is considered sufficient 'if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy challenge.'" *Barrett*, 496 F.3d at 1092. Defendant acknowledges that it is often sufficient for the indictment to allege an offense by reciting the relevant statutory language, but he argues that more is required in this case. See *Russell v. United States*, 369 U.S. 749, 764 (1962) ("Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.'").

Defendant argues that the indictment fails to allege a connection between his visits to Indian Country and his failure to register or update his sex offender registration. He claims that the indictment is so vague on this key issue that he is unable to prepare a defense and the indictment does not give sufficient notice of what crime the grand jury believed that defendant committed. Dkt. # 16, at 7. Under § 2250(a), the government must prove the following three elements to convict defendant of the offense of failing to register or update his sex offender registration:

- (1) [defendant] is required to register under [SORNA]; ...
- (2)(B) [defendant] travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
- (3) [defendant] knowingly fails to register or update a registration as required by [SORNA]....

***6** Defendant argues that the indictment is insufficient because it fails to notify him of the specific instances of travel giving rise to a duty to update his sex offender registration. Dkt. # 16, at 6. However, the indictment alleges that defendant "knowingly failed to register and update his registration" and that he entered Indian Country while unregistered. Dkt. # 2, at 1. This aspect of defendant's argument is not premised on a legal defect in the government's theory of the case but, instead, on the alleged failure to give defendant adequate notice of the factual basis for the charge against him. Dkt. # 16, at 6. The Court has reviewed the indictment and finds that it provides sufficient notice of the charge against him, and the government's theory of the case is clear from the indictment. The indictment alleges that defendant had a duty to register and update his registration, that he failed to do so, and that he traveled in Indian commerce during a time period in which he was unregistered. The Court rejects defendant's argument that the indictment is so vague that it fails to comply with the constitutional right to indictment by a grand jury.

Finally, defendant argues that § 2250 is unconstitutional as applied to him, because he is accused of visiting Indian casinos within the boundaries of Oklahoma and there is no allegation that he engaged in interstate commerce. Dkt # 16, at 7–11. Defendant cites *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), and he argues that the federal government is seeking to punish him based on purely intrastate conduct. However, the jurisdictional basis for the offense is not interstate conduct but, instead, that defendant entered, left, or resided in Indian

Country. The indictment alleges that defendant entered Indian Country and this is the jurisdictional hook for defendant's alleged violation of § 2250. Implicit in defendant's argument is an assumption that there must be a nexus between the travel and the failure to register, and he seems to be arguing that the failure to allege such a nexus renders his travel to Indian Country irrelevant for the purpose of an offense under § 2250. Dkt. # 16, at 6 ("there is no indication that Sumner's entry on any of these occasions triggered a reporting requirement in Indian Country); *id.* at 11 (citing *United States v. Carr*, 560 U.S. 438 (2010), to support the proposition that a defendant's travel must give rise to a duty to register or update sex offender registration). In *Carr*, the Supreme Court determined that the elements of a § 2250 offense must be committed in the order listed in the statute. *Carr*, 560 U.S. at 447. There is at least some authority suggesting that there does not have to be a nexus between the travel and the duty to register. *United States v. Vasquez*, 611 F.3d 325 (7th Cir.2010) (post-*Carr* decision upholding § 2250 against Commerce Clause challenge and finding that "[s]ection 2250(a)'s failure to require a connection between the jurisdictional element of travel and criminal act of failing to register is not fatal ..."). There is also authority supporting defendant's argument that the travel providing the jurisdictional hook for a § 2250 offense must trigger a duty to register or update his

registration. *United States v. Byrd*, 419 F. App'x 485 (5th Cir. Mar. 22, 2011). The Court will not assume that § 2250 requires a nexus between the travel and duty to register because, as defendant notes, SORNA is a complex regulatory scheme and he should be required to squarely present any constitutional challenge to the Court. This will provide the government a fair chance to respond to defendant's argument, and it will enable defendant to present all authority to the Court in the event that the issue is eventually presented to the Tenth Circuit. Defendant's motion to dismiss on constitutional grounds is denied without prejudice should he choose to renew this argument with all relevant authority on the issue of whether the government is required to allege a nexus between the defendant's travel and duty to register or update sex offender registration.

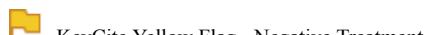
*7 **IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss the Indictment for Failure to Allege an Offense (Dkt.# 15) is **denied**, and Defendant's Motion to Dismiss the Indictment on Constitutional Grounds (Dkt. # 16) is **denied**.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1410495

End of Document

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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

Attorneys and Law Firms

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[Edward Snow](#), Assistant United States Attorney ([Mark F. Green](#), United States Attorney, and [Linda A. Epperley](#), Assistant United States Attorney, with him on the brief), Muskogee, Oklahoma, for Appellee.

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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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. SCOTT ARTHUR PARENT, Defendant.	CR-12-16-H-DLC UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS
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Comes now, Marcia Hurd, Assistant U.S. Attorney, and hereby responds to the Defendant's Motion for Bill of Particulars.

Parent correctly notes that when a defendant travels in interstate commerce is an issue for a SORNA case, and the date varies depending upon the law of the Circuit in question, at least until the Supreme Court issues a definitive ruling resolving the Circuit split. In the Ninth Circuit, the government must prove that the defendant traveled in interstate commerce after August 1, 2008, when the SMART guidelines became final. See, *United States v. Valverde*, 628 F.3d 1159 (9th Cir. 2010).

In reviewing the discovery in this case for preparation of answer to the motion, the undersigned realized that the witness statements taken by the United States Marshal's Service had not been included in the report of prosecution sent to the U.S. Attorney's Office. They have been obtained and were sent directly to the defendant's attorney for his review shortly after the motion was filed. The discovery provided now to defense supports the fact that defendant Parent actually traveled in interstate commerce after August 1, 2008, and thus his SORNA prosecution can move forward. Since that discovery has now been provided, there is no further need for a bill of particulars.

DATED this 21st day of December, 2012.

MICHAEL W. COTTER
United States Attorney

/s/ Marcia Hurd
Assistant U.S. Attorney
Attorney for United States

CERTIFICATE OF COMPLIANCE

I hereby certify that the United States' Response to Defendant's Motion for Bill of Particulars is in compliance with Local Rule 7.1(d)(2) (as amended) and CR 12.1(e). The response's line spacing is double spaced, with a 14 point font size and contains less than 6,500 words.

DATED this 21st day of December, 2012.

/s/ Marcia Hurd
Assistant U.S. Attorney
Attorney for Plaintiff

CERTIFICATE OF SERVICE

L.R. 5.2(b)

* * *

I hereby certify that on December 21, 2012 a copy of the foregoing document was served on the following persons by the following means:

1, 2 CM/ECF
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____ Fax
____ E-Mail

1. Clerk, U.S. District Court
2. Michael Donahoe
Federal Defenders of Montana
50 West 14th, Suite 300
Helena, MT 59601-3332

/s/ Marcia Hurd
Assistant U.S. Attorney
Attorney for Appellee

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nathan Richard VINEYARD,
Defendant-Appellant.

No. 18-11690

United States Court of Appeals,
Eleventh Circuit.

(December 20, 2019)

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Alabama, R. David Proctor, J., to failing to register as sex offender under Sex Offender Registration and Notification Act (SORNA) after his motion to dismiss was denied, 2017 WL 6367891. Defendant appealed.

Holdings: The Court of Appeals, Julie E. Carnes, Senior Circuit Judge, held that:

- (1) categorical approach applied to determine whether defendant's Tennessee sexual battery conviction was qualifying sex offense under sexual contact provision of SORNA;
- (2) on issue of first impression, term "sexual contact" as used in SORNA meant touching or meeting of body surfaces where touching or meeting was related to or for purpose of sexual gratification; and
- (3) on issue of first impression, Tennessee's sexual battery statute categorically required sexual contact as that term was used in SORNA.

Affirmed.

1. Criminal Law \Leftrightarrow 1149

A district court's denial of a motion to dismiss an indictment generally is reviewed under the abuse of discretion standard.

2. Criminal Law \Leftrightarrow 1139

De novo review applied to district court's determination, in denying motion to dismiss indictment on failure to register charge, that defendant's Tennessee sexual battery conviction categorically qualified as sex offense under Sex Offender Registration Notification Act (SORNA), since it was issue of statutory interpretation. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i), 20913; 42 U.S.C.A. § 16901; Tenn. Code Ann. §§ 39-13-501(2), 39-13-505.

3. Mental Health \Leftrightarrow 469(2)

Categorical approach applied to determine whether defendant's Tennessee sexual battery conviction was qualifying sex offense under sexual contact provision of Sex Offender Registration Notification Act (SORNA), and therefore court could consider fact of defendant's conviction and elements of Tennessee's sexual battery statute only. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i), 20913; 42 U.S.C.A. § 16901; Tenn. Code Ann. §§ 39-13-501(2), 39-13-505.

4. Mental Health \Leftrightarrow 469(2)

Congress intended courts to apply a categorical approach to determine whether a conviction qualifies as a sex offense under the sexual contact provision of Sex Offender Registration Notification Act (SORNA); the statutory focus on an individual having been convicted of an offense with a specified element made 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. 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i).

5. Mental Health \Leftrightarrow 469(2)

Under the categorical approach, a conviction under a sexual battery statute

will qualify as a sex offense under Sex Offender Registration Notification Act (SORNA) only if the statute covers the same conduct as, or a narrower range of conduct than, SORNA; if the definition of sexual contact sweeps more broadly than SORNA's, the sexual battery conviction cannot qualify as a sex offense under the sexual contact provision of SORNA regardless of a defendant's actual conduct in committing the offense. 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i).

6. Mental Health ☞469(2)

The modified categorical approach applies as an exception to the categorical approach to determine whether a conviction qualifies as a sex offense under the sexual contact provision of Sex Offender Registration Notification Act (SORNA) when the statute that defines the offense is overbroad and "divisible," meaning that it sets out different offenses with alternative elements, some of which are qualifying offenses and some which are not. 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i).

7. Statutes ☞1123

Normal tools of statutory interpretation are used to interpret a phrase that is not defined in a statute.

8. Statutes ☞1368

When interpreting a phrase that is not defined in a statute, a court presumes that Congress intended the words used in the text to be given their common, ordinary meaning.

9. Statutes ☞1123, 1405

When interpreting a phrase that is not defined in a statute, the plain meaning of the text controls unless the language is ambiguous or leads to absurd results.

* Honorable Paul J. Kelly, Jr., United States Circuit Judge for the Tenth Circuit, sitting by

10. Mental Health ☞469(2)

Term "sexual contact" as used in Sex Offender Registration Notification Act (SORNA) meant touching or meeting of body surfaces where touching or meeting was related to or for purpose of sexual gratification. 34 U.S.C.A. § 20911.

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

11. Mental Health ☞469(2)

Tennessee's sexual battery statute categorically required sexual contact as that term was used in Sex Offender Registration Notification Act (SORNA), thus satisfying SORNA's definition of sex offense to include offense that had element involving sexual contact. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911(1), 20911(5)(A)(i), 20913; 42 U.S.C.A. § 16901; Tenn. Code Ann. §§ 39-13-501(2), 39-13-501(6), 39-13-505.

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 5:17-cr-00383-RDP-JHE-1

Michael B. Billingsley, Elizabeth Holt, U.S. Attorney Service - Northern District of Alabama, U.S. Attorney's Office, Birmingham, AL, for Plaintiff-Appellee.

Allison Case, Kevin L. Butler, Glennon Fletcher Threatt, Jr., Federal Public Defender, Birmingham, AL, Deanna Lee Oswald, Alexandria Darby, Alexander Peter Vlisides, Federal Public Defender - NAL, Huntsville, AL, for Defendant-Appellant.

Before MARCUS, JULIE CARNES, and KELLY,* Circuit Judges.

designation.

JULIE CARNES, Circuit Judge:

Defendant Nathan Vineyard appeals from the district court's denial of his motion to dismiss an indictment charging him with failing to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA") in violation of 18 U.S.C. § 2250(a). The charge is predicated on Vineyard's prior conviction for sexual battery in violation of Tennessee Code Annotated § 39-13-505. Vineyard argues he is not required to register as a sex offender because his Tennessee sexual battery conviction is not a qualifying sex offense as defined by SORNA. After a careful review of the record and with the benefit of oral argument, we conclude that sexual battery, as defined by the Tennessee statute under which Vineyard was convicted, qualifies as a sex offense under SORNA. Accordingly, we affirm.

BACKGROUND

In March 2012, Vineyard was charged with rape and false imprisonment in Campbell County, Tennessee. The charges were related to Vineyard's rape of an adult female victim at a Caryville, Tennessee motel after holding the victim in a motel room for several hours against her will. Vineyard ultimately pled guilty to sexual battery in violation of Tennessee Code Annotated § 39-13-505 and aggravated assault in violation of Tennessee Code Annotated § 39-13-102(a). He was sentenced to two years for the sexual battery and six years for the aggravated assault, to be served consecutively.

Upon being paroled from prison in September 2016, Vineyard signed an instruction form acknowledging that he was subject to the federal sex offender registration requirements of SORNA. The form instructed Vineyard that, pursuant to SORNA, he was required to register as a sex offender in the jurisdiction of his residence

and in any jurisdiction in which he was employed. The form also advised Vineyard that SORNA required him to notify any jurisdiction in which he was required to register within three business days after a change of residence, and that Tennessee law required him to register with the appropriate law enforcement agency within 48 hours of his release from any subsequent incarcerations. Pursuant to the instructions he received, Vineyard registered as a sex offender with a residence in Harriman, Tennessee.

On April 11, 2017, Vineyard was released from the Anderson County, Tennessee jail after being charged with public intoxication and evading arrest. The charges were filed after an incident in March 2017, during which Vineyard failed to stop for police officers who had been notified that Vineyard was driving his vehicle at a speed close to 100 miles per hour. The officers lost track of Vineyard but eventually located him at his girlfriend's house, at which time Vineyard fled on foot. When the officers finally apprehended Vineyard, they discovered he was intoxicated.

When he was released from jail on the evading and intoxication charges, Vineyard was advised to report to the Tennessee Department of Corrections and to update his sex offender registration within 48 hours as required by state law. Arrest warrants were issued for Vineyard about a week later when he failed to report and register. Vineyard's whereabouts were unknown at the time, but he was arrested on August 9, 2017 at a residence in Jackson County, Alabama. Vineyard admits that he began living at the Alabama residence on or about July 8, 2017, and that he did not register as a sex offender in Alabama or otherwise update his SORNA registration to indicate his change of address.

In September 2017, Vineyard was indicted on a charge of failing to register as a sex offender under SORNA, in violation of 18 U.S.C. § 2250(a).¹ The indictment alleged that Vineyard, a person required to register under SORNA because of his Tennessee sexual battery conviction, failed to update his sex offender registration and failed to register as a sex offender in the jurisdiction in which he resided from July 8, 2017 through August 9, 2017.

Vineyard moved to dismiss the indictment, arguing that he was not required to register under SORNA because his Tennessee sexual battery conviction was not a qualifying sex offense under the Act. As will be discussed in more detail below, SORNA imposes certain registration requirements on individuals “who [have been] convicted of a sex offense.” 34 U.S.C. §§ 20911(1), 20913. In relevant part, SORNA defines “sex offense” to include “a criminal offense that has an element involving . . . sexual contact with another[.]” *Id.* § 20911(5)(A)(i). The parties agreed that the categorical approach applies to determine if a state conviction satisfies SORNA’s definition of a sex offense. Vineyard argued that Tennessee sexual battery did not categorically qualify as a SORNA sex offense because Tennessee’s sexual battery statute defines sexual contact to encompass more conduct than the generic definition of sexual contact that applies under SORNA.

The district court denied Vineyard’s motion. Defining the term sexual contact by its plain meaning, the court determined that SORNA’s sexual contact provision encompasses offenses that have as an ele-

1. Section 2250(a) “provides criminal penalties for anyone subject to the registration requirements” of SORNA “who travels in interstate commerce and then knowingly fails to register or update [his] registration as required by the Act.” *United States v. Kopp*, 778 F.3d 986, 988 (11th Cir. 2015) (internal quo-

ment “a touching or meeting of a sexual nature.” The court concluded that Vineyard’s Tennessee sexual battery conviction fell squarely—and categorically—within that definition because his conviction required that there be an “intentional touching” of a person’s “primary genital area, groin, inner thigh, buttock or breast” specifically “for the purpose of sexual arousal or gratification.” *See* Tenn. Code Ann. § 39-13-501 (2), (6) (2012).

Vineyard subsequently pled guilty to one count of failing to register as a sex offender under SORNA in violation of 18 U.S.C. § 2250(a). He was convicted and sentenced to serve 24 months, followed by 360 months of supervised release. Vineyard’s plea agreement included an appeal waiver, but it preserved his right to appeal the district court’s adverse ruling on his motion to dismiss the indictment against him. Pursuant to the agreement, Vineyard has filed an appeal limited to the sole issue argued in the motion to dismiss: whether his Tennessee sexual battery conviction is a qualifying sex offense under SORNA, such that he was required to register as a sex offender under SORNA and violated 18 U.S.C. § 2250(a) by failing to do so.

DISCUSSION

I. Standard of Review

[1, 2] We generally review the district court’s denial of a motion to dismiss an indictment under the abuse of discretion standard. *United States v. Farias*, 836 F.3d 1315, 1323 (11th Cir. 2016). However, the district court’s determination that

tation marks omitted and alterations adopted). “To keep his registration current, a sex offender must” notify the relevant jurisdiction within three days after a “change of name, residence, employment, or student status[.]” *Id.* (internal quotation marks omitted).

Vineyard's Tennessee sexual battery conviction categorically qualifies as a sex offense under SORNA is an issue of statutory interpretation that we review *de novo*. See *United States v. Ambert*, 561 F.3d 1202, 1205 (11th Cir. 2009) (noting that a district court's denial of a motion to dismiss an indictment ordinarily is reviewed under the abuse of discretion standard, but that the defendant's appeal of his conviction for failing to register as a sex offender under SORNA raised "a number of issues concerning statutory interpretation and constitutional law, which we review *de novo*").

II. Legal Background

A. SORNA

Vineyard's appeal raises several issues of first impression in this Circuit regarding the interpretation of SORNA, a federal statute enacted in 2006 "to protect the public from sex offenders . . . by establishing a comprehensive national system for the registration of those offenders." *Id.* (citing 42 U.S.C. § 16901² (internal quotation marks omitted)). Before SORNA, sex offenders registered under "a patchwork" of federal and state registration systems "with loopholes and deficiencies that had resulted in an estimated 100,000 sex offenders becoming missing or lost." *United States v. Kebodeaux*, 570 U.S. 387, 399, 133 S.Ct. 2496, 186 L.Ed.2d 540 (2013) (internal quotation marks omitted). SORNA was intended to correct that problem by creating a "more uniform and effective" national sex-offender registration system. *Reynolds v. United States*, 565 U.S. 432, 435, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012). Criminal penalties for individuals who violate SORNA's registration requirements

2. When *Ambert* was decided, SORNA was codified at 42 U.S.C. § 16901. See *Ambert*, 561 F.3d at 1205. Effective September 1, 2017,

are set out in 18 U.S.C. § 2250(a) (stating that an individual who is required to register as a sex offender under SORNA and "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").

Consistent with the goals of the Act, SORNA's registration requirements apply to state and federal "sex offender[s]." See 34 U.S.C. §§ 20911, 20913. SORNA defines "sex offender" to mean "an individual who [has been] convicted of a sex offense." *Id.* § 20911(1). With certain exceptions not applicable here, SORNA defines "sex offense" to include:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;
- (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
- (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

34 U.S.C. § 20911(5)(A). Only the first provision is relevant to this case, and only to the extent it defines a qualifying sex offense to include an offense that has an element involving "sexual contact with another." *Id.* § 20911(5)(A)(i).³

SORNA was moved to 34 U.S.C. § 20901, without substantive change.

3. The parties agree that none of the other provisions apply, and that Tennessee sexual

B. Tennessee's Sexual Battery Statute

The ultimate question presented by Vineyard's appeal is whether his Tennessee sexual battery conviction "has an element involving . . . sexual contact with another" and thus qualifies as a sex offense under SORNA. *See id.* In relevant part, the Tennessee statute under which Vineyard was convicted defines sexual battery as "unlawful sexual contact with a victim" under any of the following circumstances:

- (1) Force or coercion is used to accomplish the act;
- (2) The sexual contact is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the contact that the victim did not consent;
- (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
- (4) The sexual contact is accomplished by fraud.

Tenn. Code Ann. § 39-13-505(a). For purposes of the statute, Tennessee law defines "sexual contact" to mean:

the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification[.]

battery does not have "an element involving a sexual act." *See* 34 U.S.C. § 20911(5)(A)(i).

4. Tennessee expanded its definition of intimate parts in 2013 to include contact with "semen" and "vaginal fluid." *See* Tenn. Code Ann. § 39-13-501(2) (2013). Vineyard initially argued that Tennessee's definition of sexual

Tenn. Code Ann. § 39-13-501(6). At the time of Vineyard's conviction in 2012, "intimate parts" was defined to include "the primary genital area, groin, inner thigh, buttock, or breast of a human being." Tenn. Code Ann. § 39-13-501(2) (2012).⁴

III. Analysis

A. The categorical approach applies to determine whether Vineyard's Tennessee sexual battery conviction is a qualifying sex offense under SORNA's sexual contact provision.

[3] To resolve the substantive issue raised by Vineyard's appeal, we must first decide whether our analysis is governed by a categorical or a circumstance-specific approach. *See United States v. Dodge*, 597 F.3d 1347, 1353 (11th Cir. 2010) (describing the difference between the categorical approach and the circumstance-specific approach in the context of SORNA). The parties agree that the categorical approach applies. If that is true, then we may only consider the fact of Vineyard's conviction and the elements of Tennessee's sexual battery statute to determine whether Vineyard's conviction qualifies as a sex offense under SORNA's sexual contact provision. *See id.* On the other hand, if we are not restricted by the categorical approach, then we may consider whether the conduct underlying Vineyard's conviction satisfies SORNA's definition of "sexual contact with another." *See id.* at 1354.

[4] As noted, SORNA defines a sex offender as "an individual who [has been] convicted of a sex offense." 34 U.S.C.

contact was overbroad because it included contact with semen and vaginal fluid, but he abandoned that argument when the Government pointed out that the words semen and vaginal fluid were not added to the statute until after Vineyard was convicted.

§ 20911(1) (emphasis added). Further, the specific provision of SORNA at issue in this case requires an offense to have “an element involving . . . sexual contact with another” to qualify as a sex offense. *Id.* § 20911(5)(A)(i) (emphasis added). 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.” *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 2562, 192 L.Ed.2d 569 (2015) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (internal quotation marks omitted)). 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. Compare *Dodge*, 597 F.3d at 1354–55 (holding that a non-categorical approach applies to SORNA’s definition of a “specified offense against a minor” because the definition does not refer to the elements of an offense and emphasizes instead the conduct underlying the offense).

Thus, based on SORNA’s plain language, we hold that a categorical approach must be applied to determine whether Vineyard’s sexual battery conviction “has an element involving . . . sexual contact with another” such that it qualifies as a SORNA sex offense. See *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) (“Based on the statutory language, it’s clear that a categorical approach applies to the threshold definition of the term ‘sex offense’ in [34 U.S.C. § 20911] (5)(A)(i); the use of the word ‘element’ suggests as much.”); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) (“The definition’s focus on the ‘element[s]’ of the predicate offense strongly suggests that a

categorical approach applies to [34 U.S.C. § 20911](5)(A)(i).”); *United States v. Mi Kyung Byun*, 539 F.3d 982, 991 (9th Cir. 2008) (“The specific reference to an ‘element’ requires an analysis of the statutory elements, rather than an examination of the underlying facts.”).

B. The Tennessee sexual battery statute under which Vineyard was convicted categorically satisfies SORNA’s sexual contact provision.

[5, 6] Under the categorical approach, Vineyard’s conviction will only qualify as a sex offense under SORNA if the Tennessee sexual battery statute under which he was convicted covers the same conduct as—or a narrower range of conduct than—SORNA. See *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) (explaining how the categorical approach works in the context of the Armed Career Criminal Act (“ACCA”)); *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.” (internal quotation marks omitted)). More specifically, as the issue has been framed in this case, Vineyard’s conviction will only qualify as a sex offense under SORNA if the sexual contact required by Tennessee’s sexual battery statute is materially the same as—or less encompassing than—the definition of the term sexual contact as used in SORNA. If Tennessee’s definition of sexual contact “sweeps more broadly” than SORNA’s, Vineyard’s sexual battery conviction cannot qualify as a sex offense under the sexual contact provision of SORNA regardless of Vineyard’s actual conduct in

committing the offense.⁵ See *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276.

1. The term sexual contact as used in SORNA means a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification.

As is evident from the above discussion, the meaning of the term sexual contact as used in SORNA is essential to our analysis under the categorical approach. SORNA's definition of a sex offense to include an offense that has sexual contact as an element potentially encompasses Tennessee sexual battery, which prohibits "unlawful sexual contact" under certain circumstances. See Tenn. Code Ann. § 39-13-505(a). But to determine whether the Tennessee sexual battery statute categorically satisfies SORNA's sexual contact provision, we must compare the definition of sexual contact as used in SORNA to the definition of that term as used in the Tennessee statute.

[7–9] SORNA does not define sexual contact. See 34 U.S.C. § 20911 (expressly defining certain terms for purposes of SORNA, but not sexual contact). Thus, "we interpret that phrase using the normal tools of statutory interpretation." *Esquivel-Quintana v. Sessions*, — U.S. —, 137 S. Ct. 1562, 1569, 198 L.Ed.2d 22 (2017) (defining the term "sexual abuse of a minor" as used in the Immigration and Nationality Act ("INA")). We begin our analysis with the text of SORNA, and with a presumption that Congress intended the words used in the text to be given their

5. There is an exception to the categorical approach that applies when the statute that defines the offense is overbroad and "divisible"—meaning that it sets out different offenses with alternative elements, some of which are qualifying offenses and some which are not. See *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2249, 195 L.Ed.2d 604

common, ordinary meaning. See *id.* (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 8, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) and citing additional authority for the principle that the "everyday understanding" and "regular usage" of an undefined statutory term is important in determining "what Congress probably meant" when it used the term (internal quotation marks omitted)). The plain meaning of the text "controls unless the language is ambiguous or leads to absurd results." *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001) (internal quotation marks omitted); see also *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, — U.S. —, 137 S. Ct. 1002, 1010, 197 L.Ed.2d 354 (2017) ("We ... begin and end our inquiry with the text [of the statute], giving each word its ordinary, contemporary, common meaning." (internal quotation marks omitted)).

Relying on a dictionary definition of the word contact and on a general understanding of the word sexual, the district court determined that the ordinary meaning of the term sexual contact as used in SORNA is "a touching or meeting of a sexual nature." We agree with the district court's essential analysis—that is, that the plain meaning of the term sexual contact is easily derived from common definitions of the words sexual and contact, and that this plain meaning is controlling here because it is not "ambiguous" and does not lead to "absurd results." See *Carrell*, 252 F.3d at 1198. Further, we define sexual contact similarly to the district court, with a slight refinement to the sexual component of the definition.

(2016) (describing the modified categorical approach and clarifying when it is applicable). As will be discussed *infra*, we conclude that Tennessee's sexual battery statute categorically satisfies SORNA's definition of a qualifying sex offense. Accordingly, we have no occasion to consider whether the modified categorical approach applies here.

[10] As the district court pointed out, the word contact is generally understood to mean the “union or junction of body surfaces: a touching or meeting.” *See Webster’s Third New International Dictionary* 490 (1986); *see also Webster’s II New Riverside University Dictionary* 303 (1988) (defining contact to mean “[t]he touching of two objects or surfaces”). This Court has defined the word sexual to mean “of or relating to the sphere of behavior associated with libidinal gratification.” *See United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001) (quoting Webster’s Third New International Dictionary 2082 (1981)).⁶ Combining these two definitions, we conclude that the term sexual contact as used in SORNA means: a touching or meeting of body surfaces where the touching or meeting is related to or for the purpose of sexual gratification.

2. Tennessee’s sexual battery statute categorically requires sexual contact as that term is used in SORNA, thus satisfying SORNA’s definition of a sex offense to include an offense that has an element involving sexual contact.

[11] Applying the common meaning of sexual contact set out above, there is no question that Tennessee’s sexual battery statute “has an element involving . . . sexual contact with another” person, such that Vineyard’s conviction under the statute qualifies as a sex offense under SORNA. *See 34 U.S.C. § 20911(5)(A)(i).* The Tennessee sexual battery statute prohibits “unlawful sexual contact” with a victim under several circumstances, including the use of force, coercion, or fraud to accomplish the contact, lack of the victim’s consent to the

6. Other circuit courts likewise have defined the word sexual to mean “of or relating to the sphere of behavior associated with libidinal gratification.” *See United States v. Diaz-Ibarra*, 522 F.3d 343, 349 (4th Cir. 2008) (defining the term sexual as used in the phrase sexual

contact, or incapacitation of the victim. Tenn. Code Ann. § 39-13-505(a). As used in the Tennessee statute, the term sexual contact requires an “intentional touching” of the victim’s or another’s person’s “intimate parts” (or the “clothing covering the immediate area” of those parts) “for the purpose of sexual arousal or gratification.” *Id.* § 39-13-501(6). When Vineyard was convicted in 2012, “intimate parts” was defined to include “the primary genital area, groin, inner thigh, buttock, or breast of a human being.” *Id.* § 39-13-501(2) (2012). Thus, at the time of Vineyard’s conviction, Tennessee’s sexual battery statute required that there be an unlawful and intentional touching of one of five specified body parts (or the clothing immediately covering those parts) for the specific purpose of sexual gratification. Considered together, those requirements categorically match the plain meaning of the term sexual contact as used in SORNA.

Indeed, Vineyard does not dispute that Tennessee’s sexual battery statute categorically requires sexual contact as that term is commonly understood. Nevertheless, Vineyard argues that his conviction does not qualify as a sex offense under SORNA because Tennessee law defines sexual contact more broadly than that term is defined in an entirely separate federal statute: 18 U.S.C. § 2246. According to Vineyard, sexual contact is a legal term of art that must be defined by a special, technical meaning rather than by its plain meaning. But Vineyard cites no authority to support this argument, and we are unpersuaded by it. *See Med. Transp. Mgmt. Corp. v. Comm’r*, 506 F.3d 1364,

abuse of a minor); *United States v. Mateen*, 806 F.3d 857, 861 (6th Cir. 2015) (“Sexual is commonly understood to mean of or relating to the sphere of behavior associated with libidinal gratification.” (internal quotation marks omitted)).

1368 (11th Cir. 2007) (describing a legal term of art as a term “in which [is] accumulated the legal tradition and meaning of centuries of practice” (citation omitted)); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1246 (11th Cir. 2008) (“When statutory terms are undefined, we typically infer that Congress intended them to have their common and ordinary meaning, unless it is apparent from [the] context that the disputed term is a term of art.” (emphasis added)).

Furthermore, Vineyard’s argument that the definition of sexual contact used in 18 U.S.C. § 2246 should be imported into SORNA conflicts with the language and structure of both statutes. Section 2246 defines certain terms for purposes of the federal sexual crimes set out in Chapter 109A of Title 18, including, for example, sexual crimes that occur in the special maritime jurisdiction of the United States or in a federal prison, or when a perpetrator crosses state lines with the intent to engage in a sexual act with a child. *See* 18 U.S.C. §§ 2241–2246. Section 2246 expressly limits its application to terms used “in this chapter”—that is, in Chapter 109A. *See* 18 U.S.C. § 2246. SORNA is not codified in the same chapter—or indeed, even in the same Title—of the United States Code as § 2246. Neither does § 2246 cross-reference SORNA or otherwise indicate that its definitions should be used when interpreting SORNA. *See id.*

In fact, SORNA has its own definitions, which are set out in language suggesting that Congress did not intend for other definitions to be incorporated into SORNA without a clear reference. *See* 34 U.S.C. § 20911 (stating that “[i]n this subchapter the following definitions apply”). Many of SORNA’s definitions cross-reference and expressly incorporate specific definitions from Title 18, including certain definitions used in Chapter 109A. *See* 34 U.S.C.

§ 20911(3)(A), (4)(A), (5)(A)(iii), (7)(F), (8). These references show that Congress was aware of the definitions contained in Title 18—and more specifically, it was aware of the definitions related to federal sexual crimes set out in Chapter 109A—and that it was capable of incorporating those definitions into SORNA but chose not to incorporate § 2246(3)’s definition of sexual contact.

Neither does the Supreme Court’s analysis in *Esquivel-Quintana* require us to discard the plain meaning of sexual contact in favor of § 2246(3)’s definition of that term, as Vineyard suggests. On the contrary, the Court in *Esquivel-Quintana* cited authority suggesting that the “everyday understanding” of an undefined statutory term often provides the most important guidepost in determining what Congress intended the term to mean. *See Esquivel-Quintana*, 137 S. Ct. at 1569 (citing *Lopez v. Gonzales*, 549 U.S. 47, 53, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006)). The undefined term at issue in *Esquivel-Quintana* was “sexual abuse of a minor” as used in a provision of the INA listing the “aggravated felon[ies]” that permit removal of an alien after admission to the United States, and the question presented by the case was whether the petitioner’s conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old qualified as sexual abuse of a minor. *See id.* at 1567 (citing 8 U.S.C. § 1101(a)(43)(A)). The Court held that the conviction did not qualify, explaining that “in the context of statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.” *Id.* at 1568.

The Court in *Esquivel-Quintana* consulted multiple sources to arrive at a generic definition of the term sexual abuse of

a minor, including dictionary definitions, the surrounding provisions of the INA, and state criminal codes. *See id.* at 1569–72. Among those sources was the “federal definition of sexual abuse of a minor” set out in a “closely related federal statute, 18 U.S.C. § 2243.” *See id.* at 1570. Noting that § 2243’s definition of the term sexual abuse of a minor implies an age of consent of 16, the Court explained that the definition was enacted as part of “the same omnibus law that added [the] sexual abuse of a minor [provision] to the INA, which suggests that Congress understood” the phrase sexual abuse of a minor as used in the INA “to cover victims under age 16.” *Esquivel-Quintana*, 137 S. Ct. at 1570–71. Even so, the Court declined to import § 2243’s definition “wholesale into the INA.” *Id.* at 1571. Here, there is no reason to import any part of § 2246(3)’s definition of sexual contact into SORNA because there is no legislative relationship between SORNA and § 2246, as there was between the INA and § 2243.

Finally, even if the Court were to use § 2246(3)’s definition of sexual contact, Vineyard’s Tennessee sexual battery conviction still would categorically qualify as a sex offense under SORNA. Section § 2246(3) defines sexual contact to mean:

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). There is no material difference between this definition of sexual contact and Tennessee’s definition of sexual contact to require the intentional touching of a person’s “primary genital area, groin, inner thigh, buttock, or breast” where the touching is “for the purpose of sexual gratification.” *See* Tenn. Code Ann.

§ 39-13-501(6), (2) (2012). Both definitions prohibit the intentional touching of the same areas of the body with the intent of arousing or gratifying sexual desire. If anything, Tennessee’s definition is narrower than the definition set out in § 2246(3) because the Tennessee definition does not include touching for purposes other than sexual gratification, such as abusing, humiliating, harassing, or degrading a person. *See* 18 U.S.C. § 2246(3).

Vineyard’s primary argument with respect to § 2246(3) is that Tennessee’s definition of sexual contact is overbroad because it includes contact with the “primary genital area” rather than just the genitals. This argument borders on the absurd. The plain meaning of the term “primary” suggests that the “primary genital area” covers essentially the same area of the body as the genitals. *See* Webster’s II New Riverside University Dictionary 934 (1988) (defining primary, in relevant part, to mean “[b]eing a basic or fundamental part of . . . [a] whole”). But in any event, the definition of sexual contact set out in § 2246(3) goes beyond the genitals to include the “anus, groin, breast, inner thigh, [and] buttocks.” 18 U.S.C. § 2246(3). We agree with the district court that, to the extent the primary genital area is broader than the genitals, it is encompassed by § 2246(3)’s inclusion of the groin as an area of the body with which contact may be deemed sexual contact. *See* Webster’s II New Riverside University Dictionary 549 (1988) (defining groin to mean “[t]he crease at the junction of the thigh and the trunk, together with the adjacent region”).

Vineyard also argues that Tennessee has judicially expanded its definition of intimate parts to include the lower back and abdomen, citing *State v. Graham*, 1992 WL 300889 (Tenn. Crim. App. 1992) and *State v. Williams*, 2001 WL 741935 (Tenn. Crim. App. 2001). A fair reading of *Gra-*

ham and *Williams* shows that neither case expanded Tennessee's definition of intimate parts. In *Graham*, the court upheld the defendant's conviction for sexual battery based on the victim's testimony that the defendant had put his hands inside the bikini-type panties the victim was wearing and "rubb[ed] up and down right at where it starts." See *Graham*, 1992 WL 300889, at *5 (internal quotation marks omitted). The record showed that "it" referred to the victim's "private area" and that the victim had demonstrated to the jury the area the defendant had touched. See *id.* at *2, 5. The court concluded that the evidence was sufficient to support the jury's finding that the defendant had touched the victim's intimate parts, as defined by the Tennessee statute and without the need for an expansion of the terms used in the statute. *Id.* at *4–5.

Likewise, in *Williams*, victim testimony established that the defendant had put his hands underneath the victim's shorts and panties on one occasion, pulled her shorts below her buttocks and placed his hands under her shorts and panties on another occasion, and rubbed the victim's legs above the knee in an area she demonstrated to the jury on a third occasion. See *Williams*, 2001 WL 741935, at *4, 7. Based on the victim's testimony and demonstration, the court upheld three sexual battery convictions against the defendant, concluding that there was enough evidence to support the jury's finding that the defendant had touched the victim's "primary genital area, groin, inner thigh, or buttock" on these three occasions. See *id.* at *7. But the court did not indicate that it was expanding Tennessee's definition of intimate parts. And in fact, the court vacated one of the defendant's convictions based on the victim's testimony that, as relevant to that conviction, the defendant had only "rubbed her legs to about the knee." See *id.* Although the victim had demonstrated to the

jury where the defendant had touched her, the court concluded that it was unclear from the record whether the defendant had touched the victim's "thigh, or any of her other intimate parts" as required by the Tennessee statute. See *id.*

In short, the case law cited by Vineyard does not support his argument that Tennessee has expanded its definition of sexual contact to include contact with the back or abdomen. Furthermore, the term sexual contact as defined in Tennessee's sexual battery statute categorically matches the plain meaning of sexual contact as used in SORNA. And finally, although it is clear to us that the definition of sexual contact used in 18 U.S.C. § 2246(3) is inapplicable here, it is equally clear that Tennessee's statutory definition of sexual contact categorically matches § 2246(3) as well.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of Vineyard's motion to dismiss the indictment filed against him in this case.



Sean Anthony BLAKE, Petitioner,

v.

U.S. ATTORNEY GENERAL,
Respondent.

No. 19-14316

United States Court of Appeals,
Eleventh Circuit.

(December 23, 2019)

Background: Alien, a Jamaican citizen and convicted drug trafficker, petitioned

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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2017 WL 7102896

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.

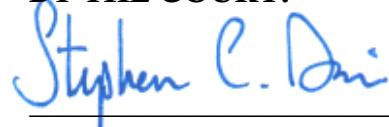
CONCLUSION

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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[Marjorie A. Meyers](#), Federal Public Defender, Kathryn Shephard, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

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. Bruguiер*, 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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2021 WL 3037404

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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

Not Reported in Fed. Supp., 2021 WL 3037404

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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2018 WL 473427

Only the Westlaw citation is currently available.
United States District Court, W.D. Louisiana,
Shreveport Division.

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

Slip Copy, 2024 WL 3360514

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.

2021 WL 808753

Only the Westlaw citation is currently available.
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).

2017 WL 395053

Only the Westlaw citation is currently available.

United States District Court, M.D.
Tennessee, Nashville Division.

UNITED STATES of America

v.

Lemar Jordan GREENE

No. 3:16-00075-1

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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).

2024 WL 1703159

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

Slip Copy, 2024 WL 1703159

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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2021 WL 1821188

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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

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Signed 05/06/2021

Attorneys and Law Firms

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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

Not Reported in Fed. Supp., 2021 WL 1821188

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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2020 WL 2044728

Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

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.

2017 WL 987447

Only the Westlaw citation is currently available.
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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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

|

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.

ORDER AND JUDGMENT *

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.

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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641 Fed.Appx. 782

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

[3] **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.

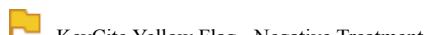
We also observe that the Seventh Circuit has authorized the use of the "modified categorical approach" in exactly this situation, see *United States v. Taylor*, 644 F.3d 573, 576–77 (7th Cir.2011), though we question

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