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Balancing SORNA and the Sixth Amendment: The Case for a "Restricted Circumstance-Specific Approach"

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BALANCING SORNA AND THE SIXTH AMENDMENT: THE CASE FOR A “RESTRICTED CIRCUMSTANCE-SPECIFIC” APPROACH

The Sex Offender Registration and Notification Act (SORNA) is in place to protect the public, children especially, from sex offenders. Under SORNA, anyone and everyone convicted of what the law defines as a “sex offense” is required to register as a “sex offender,” providing accurate and up-to-date information on where they live, work, and go to school. Failure to do so constitutes a federal crime punishable by up to ten years imprisonment. But how do federal courts determine whether a particular state-level criminal offense constitutes a “sex offense” under SORNA? Oftentimes when doing comparisons between state and federal law for sentencing purposes, federal courts apply what is known as the “categorical approach,” which involves the courts comparing the elements of the prior state-level offense to those of a generic federal offense to determine whether there is a categorical match between the two. But in the context of SORNA, more and more federal courts are looking beyond the bare elements of a prior state-level conviction to the facts underlying the conviction and using that information to determine whether the defendant before them is indeed a “sex offender” under SORNA. This Comment argues that, while federal sentencing courts may indeed be entitled to look past the bare elements of the prior offense in certain SORNA cases, looking to anything beyond facts that were already admitted by the defendant in a prior proceeding could raise Sixth Amendment concerns. Therefore, this Comment recommends the adoption of new approach to statutory comparison, a “restricted circumstance-specific approach,” that would appropriately balance those Sixth Amendment concerns with Congress’s intent that SORNA protect the public from sex offenders.

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I. INTRODUCTION

On October 22, 1989, an eleven-year-old boy named Jacob Wetterling was riding his bike along a country road in St. Joseph, Minnesota with his best friend and younger brother when a masked man pulled up alongside them, took Jacob at gunpoint, and ordered the other two boys to leave and not look back.¹ Jacob

1. See Pam Louwagie & Jennifer Brooks, *Danny Heinrich Confesses to Abducting and Killing Jacob Wetterling*, STAR TRIBUNE (Sept. 7, 2016), <http://www.startribune.com/danny-heinrich-confesses-to-abducting-and-killing-jacob-wetterling/392438361/> [https://perma.cc/67HD-UK2A]; Erik Ortiz, *Man Admits to Abducting, Killing Jacob Wetterling, Missing Minnesota Boy in 1989*, NBC NEWS (Sept. 6, 2016), <https://www.nbcnews.com/news/us-news/man-admits-abducting-killing-jacob-wetterling-missing-minnesota-boy-1989-n643506> [https://perma.cc/VN8T-FG5A]; William Plummer & Margaret Nelson, *A Town Prays for a Missing Son*, PEOPLE (Nov. 20, 1989), <https://people.com/archive/a-town-prays-for-a-missing-son-vol-32-no-21/> [https://perma.cc/XN69-BFH4].

was never seen alive again, and his case remained unsolved for twenty-seven years.² In 1994, in response to several high profile attacks on children like Jacob by individuals with prior sex offenses, Congress enacted the first national legislation targeting sex offenders specifically, which it named the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act (the Wetterling Act).³ This law mandated that states create their own sex offender registries or else risk losing 10% of their federal funding.⁴

The Wetterling Act was followed by “Megan’s Law”⁵ in 1996, which required community notification about registered sex offenders in addition to the Wetterling Act’s registration requirements.⁶ Megan’s Law’s namesake was a seven-year-old girl named Megan Kanka who was sexually assaulted and murdered by a neighbor with two prior convictions for sex offenses.⁷

Concerned that too many sex offenders were falling through the cracks when they crossed state lines, Congress ultimately passed the Adam Walsh Child Protection and Safety Act of 2006 (the AWA) to create “a comprehensive national system for the registration of [sex] offenders”⁸ The AWA, like its predecessors, was named for a child victim of a violent crime—Adam Walsh, a six-year-old boy abducted and murdered in 1981.⁹ This law was enacted with

2. In 2016, a long-time suspect in Jacob’s disappearance confessed to murdering Jacob and led the police to Jacob’s grave as part of a plea deal for unrelated child pornography charges. *See, e.g.,* Louwagie & Brooks, *supra* note 1.

3. Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. No. 103–322, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2000), *repealed* by Pub. L. No. 109–248, Title I, § 129(a), 120 Stat. 600 (July 27, 2006)); *see also* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5–6 (2008).

4. 42 U.S.C. § 14071 (repealed July 27, 2006).

5. *Id.*

6. Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORNA Laws*, 21 NEW CRIM. L. REV. 426, 434 (2018). This law also threatened states with a loss of 10% of federal funding for noncompliance. *Id.*

7. *See* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 92 (1996); *see also* John G. Malcolm, *The Sex Offender Registration and Notification Act: A Sensible and Workable Law that Helps Keep Us Safe*, 13 ENGAGE 53, 53 (2012) (noting that the fact that Megan’s neighbor had prior convictions for sex offenses “was known to law enforcement but not by the community”).

8. 34 U.S.C. § 20901 (2017).

9. *See* Malcolm, *supra* note 7, at 53. Adam’s father, John, later became famous for hosting the television series *America’s Most Wanted*. *See* Olivia B. Waxman, *The U.S. Is Still Dealing with the Murder of Adam Walsh*, TIME (Aug. 10, 2016), <https://time.com/4437205/adam-walsh-murder/> [<https://perma.cc/2PNZ-W5AR>].

the express purpose of “protect[ing] the public from sex offenders and offenders against children.”¹⁰

To help effectuate the AWA’s purposes, Congress passed the Sex Offender Registration and Notification Act (SORNA) as Title I of the Adam Walsh Act,¹¹ which created requirements for sex offenders to register where they live, work, and go to school.¹² Furthermore, it created a mechanism to enforce SORNA’s registration requirements—18 U.S.C. § 2250—which makes it a crime punishable up to ten years imprisonment for any “sex offender” to “travel[] in interstate or foreign commerce” but “knowingly fail[] to register or update” his SORNA registration.¹³

When determining whether a criminal defendant’s prior state conviction constitutes a “sex offense” under SORNA, thus requiring registration, courts look to the elements of the prior crime and compare them to the elements of generic crimes covered by the federal statute.¹⁴ Under this “categorical” approach, if the statute of conviction shares the same elements or defines the crime more narrowly than the generic federal statute, there exists a categorical match between the two.¹⁵ The underlying offense then constitutes a sex offense and triggers the SORNA registration requirements (as well as the penalties that follow should the defendant have failed to satisfy those requirements).¹⁶ But if the statute of conviction covered is broader than its generic counterpart, then it will not serve as a SORNA predicate.¹⁷ The categorical approach is not only applied to determine *whether* the underlying offense constituted a sex offense under SORNA but also, if it did, *how long* the defendant is required to register under SORNA and what the defendant’s *base offense level* for sentencing purposes is.¹⁸

10. 34 U.S.C. § 20901.

11. Lori McPherson, *Practitioner’s Guide to the Adam Walsh Act*, 20 UPDATE 1, 1 (2007); *see* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 590 (July 27, 2006) (codified as amended in 42 U.S.C. § 16901).

12. 34 U.S.C. § 20913(a).

13. 18 U.S.C. § 2250 (2016).

14. Bonnie Kane, *SORNA: A Primer*, 59 U.S. ATT’YS BULL. 43, 44 (2011).

15. *See* *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Taylor v. United States*, 495 U.S. 575, 600 (1990).

16. *See* *Descamps*, 570 U.S. at 257; *Taylor*, 495 U.S. at 599.

17. *See* *Descamps*, 570 U.S. at 260–61.

18. *See, e.g.,* *United States v. Walker*, 2018 WL 3325909, *6, *9 (E.D. Wis. 2018).

A key rule for sentencing courts applying the categorical approach is that they may only look to the *elements* of the prior conviction to determine if it constitutes a SORNA predicate; the categorical approach precludes any inquiry into the *facts* underlying the prior conviction.¹⁹

Despite this restriction, several U.S. Courts of Appeals have held that, when sentencing a defendant for failing to comply with SORNA, sentencing courts may sometimes employ a “circumstance-specific approach,” which permits them to look beyond the prior offense’s elements to the facts underlying that offense.²⁰ However, as the Supreme Court has cautioned, allowing sentencing courts to make “findings of fact that properly belong to juries” poses “practical difficulties and potential unfairness” as well as Sixth Amendment concerns.²¹

The Supreme Court has developed the rules governing the categorical approach and its alternatives, but it has not yet applied any of these approaches in a SORNA case.²² However, the Court’s precedent indicates that a court should apply three factors to determine if it must apply a strict categorical approach or is free to pursue a circumstance-specific inquiry when sentencing a sex offender for violating SORNA.²³ First, courts should examine the statutory text and legislative history of SORNA to determine whether Congress intended for courts to stick to a strict element-to-element analysis (i.e., the categorical approach) or whether it intended for courts to consider the defendant’s actual conduct underlying any prior convictions.²⁴ Second, courts should take into account the practical difficulties with a circumstance-specific approach.²⁵ Finally, courts should determine whether the Sixth Amendment is implicated by the proceeding,²⁶ which would prevent courts from considering

19. *Descamps*, 570 U.S. at 261.

20. *See generally* *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015) (holding that courts may conduct a fact-based inquiry to determine whether the defendant’s conduct met a sentencing enhancement exception); *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015) (holding that courts may look at the facts underlying the prior conviction “for the limited purpose of determining the victim’s age”); *United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir. 2010) (holding that courts may examine the “underlying facts of a defendant’s offense, to determine whether a defendant has committed a ‘specified offense against a minor’”); *United States v. Mi Kyung Byun*, 539 F.3d 982, 993–94 (9th Cir. 2008) (finding that SORNA’s legislative history permits courts to consider the age of the victim, even if that is not an element of the underlying offense).

21. *Descamps*, 570 U.S. at 267.

22. *See infra* Part III. At the same time, these approaches have been applied by several U.S. Courts of Appeals in SORNA cases in the years since Congress enacted SORNA. *See infra* Part IV.

23. *Descamps*, 570 U.S. at 267–70; *Taylor v. United States*, 495 U.S. 575, 600–01 (1990).

24. *Descamps*, 570 U.S. at 267–70; *Taylor*, 495 U.S. at 600–01.

25. *Descamps*, 570 U.S. at 267.

26. *Id.*

any facts other than that of a prior conviction or those admitted by the defendant to increase the maximum statutory penalty the defendant faces.²⁷

After reviewing these three factors, this Comment will argue that Congress in some instances intended for courts to consider the facts underlying a sex offender's prior conviction when sentencing them for violating SORNA's requirements.²⁸ However, this Comment also argues that Sixth Amendment concerns and practical considerations suggest that sentencing courts should only be able to consult a limited class of documents, such as a plea deal or plea colloquy, under this analysis.²⁹ And, furthermore, the only facts that the court will be able to use from those documents must be those admitted by the defendant.³⁰

Part II of this Comment provides additional background information on SORNA, including the three different "tiers" used to classify sex offenders and the sentencing consequences faced by tier I, II, and III offenders.³¹ Part III discusses (1) the categorical approach and its two alternatives; (2) the modified categorical approach and the circumstance-specific approach; and (3) the rules governing the application of each approach.³² Part IV surveys the decisions by several U.S. Courts of Appeals to permit the use of the circumstance-specific approach to discover certain facts for the purposes of tier classification and sentencing of sex offenders under SORNA.³³ Finally, Part V analyzes SORNA's text and legislative history, the practical concerns with employing a circumstance-specific in this context, and whether the Sixth Amendment is implicated in SORNA prosecutions.³⁴

This Comment suggests that none of the three current approaches for statutory comparison effectively reconcile Congress's intent that the law "cast a wide net to ensnare as many offenders against children as possible"³⁵ with the Sixth Amendment concerns at issue here.³⁶ As a result, this Comment

27. *See* *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

28. *See infra* Section V.A.

29. *See infra* Section V.D.

30. *See infra* Section V.D.

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See infra* Part V.

35. *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010).

36. *See infra* Section V.C.

recommends that a new, unique approach to statutory comparison should be applied in this context, which this Comment dubs a “restricted circumstance-specific approach.”³⁷ Such an approach would permit sentencing courts to examine the facts underlying the defendant’s prior conviction but only those that were admitted by the defendant in certain “*Shepard* documents” making up the formal record of conviction.³⁸

II. BACKGROUND OF SORNA

SORNA serves to assist federal and local authorities in “monitoring and tracking sex offenders following their release into the community.”³⁹ To do so, it requires sex offenders to provide personal information to the authorities regarding their identification and where they can be found at all times. The law requires the following information to be included in the registry: the sex offender’s name; their Social Security number; their home address; the name and address of their workplace; the name and address of where they will be a student; their license plate number and a description of any vehicle they owns or operates; information about any planned trips abroad; and “[a]ny other information required by the Attorney General.”⁴⁰

On top of all that, the following additional information on a sex offender must be included in the registry: their physical description; “[t]he text of the provision of law defining the criminal offense for which the sex offender is registered”; their criminal history; a current photograph of the sex offender; a set of their fingerprints and palm prints; a DNA sample; a copy of their driver license or ID card; and, again, “[a]ny other information required by the Attorney General.”⁴¹ A sex offender’s failure to register or update his registration when traveling across state lines or abroad is a federal crime, punishable by up to ten years imprisonment.⁴²

37. *See infra* Section V.D.

38. *See infra* Section V.D. These documents are referred to as “*Shepard* documents” after *Shepard v. United States*, and they are a purposely limited class of documents that includes “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); *see also* *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009).

39. *Sex Offender Registration and Notification Act (SORNA)*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna> [<https://perma.cc/S8CG-J3UF>].

40. 34 U.S.C. § 20914(a)(1)–(8) (2017).

41. *Id.* § 20914(b)(1)–(8).

42. 18 U.S.C. § 2250(a)–(b) (2016). But the law does provide an affirmative defense for a sex offender, provided that all the following circumstances are met: the offender was prevented from complying with the registration requirements due to an “uncontrollable circumstance[]”; that

SORNA places sex offenders into three tiers,⁴³ and each offender's specific tier designation is determined based on "the seriousness of their underlying sex offense."⁴⁴ When a sex offender is being prosecuted in federal court for failing to register under SORNA, the court determines both how long that defendant was required to register and the base level of the defendant's sentencing range by looking at the defendant's tier classification.⁴⁵ Each tier classification carries with it a progressively longer registration period—tier I offenders must keep their registrations current for fifteen years, tier II offenders for twenty-five years, and tier III offenders for life.⁴⁶

The tier classifications also correlate to "base offense levels" for sentencing purposes.⁴⁷ A tier I sex offender has a base offense level of 12 when convicted under § 2250(a).⁴⁸ A tier II offender has a base offense level of 14,⁴⁹ and tier III offender has a base offense level of 16.⁵⁰ A sex offender's offense level, along with other sentencing factors, helps determine how much prison time he faces upon conviction.⁵¹ When only looking to the base offense levels that correspond to each tier—without considering any other factors that might increase or decrease the offender's ultimate criminal sentence—a tier I sex offender faces a maximum of sixteen months' imprisonment, a tier II sex offender faces a maximum of twenty-one months, and a tier III sex offender faces a maximum of twenty-seven months.⁵²

A tier III offender is 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 . . . or abusive sexual contact . . . against a minor who has not attained the age of 13 years . . . or an attempt or conspiracy to

circumstance was *not* created by the offender "in reckless disregard of the intent to comply"; and the offender "complied as soon as such circumstances ceased to exist." *Id.* § 2250(c).

43. 34 U.S.C. § 20911(2)–(4) (2017).

44. *United States v. White*, 782 F.3d 1118, 1129 (10th Cir. 2015).

45. *See* U.S.S.G. § 2A3.5 (2016).

46. 34 U.S.C. § 20915(a)(1)–(3).

47. *See* U.S.S.G. § 2A3.5(a)(1)–(3).

48. *Id.* § 2A3.5(a)(3).

49. *Id.* § 2A3.5(a)(2).

50. *Id.* § 2A3.5(a)(1).

51. *See id.* § 2A3.5.

52. *See id.* § 2A3.5. Of course, the offender's sentence can be adjusted based on other factors, but these are the consequences sex offenders face at their base offense level for each tier. 18 U.S.C. § 2250 (2016). And, again, a sex offender can be imprisoned for up to ten years for a violation of § 2250(a). *Id.* § 2250(a).

commit such an offense.”⁵³ The listed offenses—aggravated sexual abuse, sexual abuse, and abusive sexual contact against a minor under the age of thirteen—are all described in separate statutory sections, which can be consulted to determine if the underlying offense of conviction is indeed “comparable to or more severe than” any of them.⁵⁴ Also included under the tier III classification are those whose underlying offenses “involve[d] kidnapping of a minor,” so long as the offender was not the minor’s parent or guardian, or those whose offense “occur[ed] after the offender [became] a tier II sex offender.”⁵⁵ Ostensibly, Congress sought to keep individuals convicted of tier III offenses on a significantly shorter leash than tier I or II offenders, generally requiring them to keep their SORNA registrations current for the remainder of their lives once they are released into the community.⁵⁶

A sex offender is a tier II offender if his underlying offense is punishable by imprisonment for greater than a year and falls into one of three categories.⁵⁷ The first category is for those whose underlying offense is comparable to or more severe than several listed offenses committed against a minor, which include “sex trafficking,” “coercion and enticement,” “transportation with intent to engage in criminal sexual activity,” and “abusive sexual contact.”⁵⁸ The second category covers underlying offenses that involve “use of a minor in a sexual performance,” “solicitation of a minor to practice prostitution,” or “production or distribution of child pornography.”⁵⁹ The third category of tier II offenders covers those whose offense “occurs after the offender has become a tier I sex offender.”⁶⁰

As can be noted based on the above information, an underlying offense that is comparable to or more severe than “abusive sexual contact” as defined by 18 U.S.C. § 2244 can lead to a sex offender being designated either a tier III offender or a tier II offender.⁶¹ The key distinguishing factor between the “abusive sexual contact” that renders a sex offender a tier III offender versus a

53. 34 U.S.C. § 20911(4)(A) (2017).

54. *Id.*

55. *Id.* § 20911(4)(B)–(C).

56. *See id.* § 20915(a)(3).

57. *Id.* § 20911(3).

58. *Id.* § 20911(3)(A)(i)–(iv).

59. *Id.* § 20911(3)(B)(i)–(iii).

60. *Id.* § 20911(3)(C).

61. *See id.* § 20911(3)(A)(iv) (abusive sexual contact with regards to tier II offenders); § 20911(4)(A)(ii) (abusive sexual contact with regards to tier III offenders).

tier II offender is the age of the victim of the underlying offense.⁶² For one to be a tier III offender because his underlying sex offense constituted abusive sexual contact, the victim must have been under the age of thirteen.⁶³ The victim need only be a *minor* for the offender to be designated a tier II offender.⁶⁴ According to the statute, a “minor” is an “an individual who has not attained the age of 18 years.”⁶⁵ Thus, with regard to an offense that is comparable to or more severe than abusive sexual contact as described in § 2244, the offender will be a tier II offender if the victim was between the ages of thirteen and seventeen and a tier III offender if the victim was under the age of thirteen.

A tier I sex offender is defined concisely by the statute as “a sex offender other than a tier II or tier III sex offender.”⁶⁶ Additionally, the statute defines “sex offender” equally as concisely, stating that a sex offender is “an individual who was convicted of a sex offense.”⁶⁷ By “sex offense,” the statute is referring to criminal offenses that have “an element involving a sexual act or sexual contact with another,” those that are “specified offense[s] against a minor,”⁶⁸ certain types of federal offenses, certain types of military offenses, or an attempt or conspiracy to commit any of the above.⁶⁹ Criminal offenses covered by this statute include any “[s]tate, local, tribal, foreign, or military offense . . . or other criminal offense.”⁷⁰

62. See *id.* § 20911(3)(A)(iv) (abusive sexual contact with regards to tier II offenders); § 20911(4)(A)(ii) (abusive sexual contact with regards to tier III offenders).

63. *Id.* § 20911(4)(A)(ii).

64. *Id.* § 20911(3)(A)(iv).

65. *Id.* § 20911(14).

66. *Id.* § 20911(2).

67. *Id.* § 20911(1).

68. *Id.* § 20911(5)(A)(i)–(ii). Specified offenses against a minor include any that are committed against a minor and involve kidnapping, false imprisonment, “[s]olicitation to engage in sexual conduct . . . [or] to practice prostitution,” “[u]se in a sexual performance,” “[v]ideo voyeurism,” possession of child pornography, production of child pornography, distribution of child pornography, “[c]riminal sexual conduct involving a minor,” “the use of the internet to facilitate or attempt” sexual conduct involving a minor, or “[a]ny conduct that by its nature is a sex offense against a minor.” *Id.* § 20911(7)(A)–(I).

69. *Id.* § 20911(5)(A)(i)–(v). The Federal offenses described that may constitute sex offenses under this statute include certain types of offenses committed within Indian country as well as “[d]omestic assault by an habitual offender” committed “within the special maritime or territorial jurisdiction of the United States or Indian country,” pursuant to 18 U.S.C. § 117 (2014). The military offenses included under this statute are those specified in Pub. L. No. 105–119, § 115(a)(8)(C)(i), 111 Stat. 2440 (1997).

70. 34 U.S.C. § 20911(6).

III. THE CATEGORICAL APPROACH VS. ITS ALTERNATIVES

In comparing a state statute of conviction to a generic federal statute, courts will take one of three general approaches. The first approach is the narrowest and is variously referred to as the “formal categorical approach,” the “elements-centric” approach, or simply the categorical approach.⁷¹ This approach calls for an element-to-element comparison between the two statutes to determine if there is a “categorical match” between the two statutes.⁷² The second approach is known as the “modified categorical approach.”⁷³ Under this approach, courts must still look to the elements of both statutes (federal and state), but they may also consult a limited class of “extra-statutory materials” from the state-level proceedings.⁷⁴ The third approach is known as the “circumstance-specific” approach.⁷⁵ A court using this approach may look beyond both the bare elements of the state statute and the limited class of documents it would be permitted to review under the modified approach and examine “the facts and circumstances underlying an offender’s conviction.”⁷⁶ In other words, when applying the broader circumstance-specific approach, courts are less constrained by what they may review when comparing a state statute to a generic federal statute.

The Supreme Court has developed the rules governing the application of the categorical approach, often in cases involving the Armed Career Criminal Act (ACCA)⁷⁷ but also with cases regarding the Gun Control Act of 1968⁷⁸ and the Immigration and Nationality Act (INA).⁷⁹ A key distinction to be made at the outset is the difference between elements and facts:

“Elements” are the “constituent parts” of a crime’s legal

71. *See* *Descamps v. United States*, 570 U.S. 254, 261, 267 (2013).

72. *See* *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

73. *See* *Descamps*, 570 U.S. at 257, 260–63.

74. *Id.* at 263.

75. *See* *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

76. *Id.*

77. *See, e.g.,* *Mathis v. United States*, 136 S. Ct. 2243, 2247–48 (2016); *Descamps*, 570 U.S. at 254, 277–78; *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 600–01 (1990).

78. *See, e.g.,* *United States v. Hayes*, 555 U.S. 415, 418 (2009).

79. *See, e.g.,* *Nijhawan*, 557 U.S. at 29, 43. All of these contexts—ACCA, the Gun Control Act of 1968, and INA—resemble SORNA cases in that they involve comparing a defendant’s prior state offense of conviction to a generic federal offense listed in the relevant statutory scheme to determine if there exists a categorical match. *See infra* Section III.A. And ACCA in particular resembles SORNA because both schemes involve imposing federal sentence enhancements based on prior state offenses. *See infra* Section III.A. Therefore, ACCA cases provide a useful context for analyzing issues relating to statutory comparison in SORNA cases. *See infra* Part V.

definition—the things that the “prosecution must prove to sustain a conviction.” 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. Facts, by contrast, are mere real world things—extraneous to the crime’s legal requirements. . . . They are “circumstances[s]” or “event[s]” having no “legal effect [or] consequence”: In particular, they need neither be found by a jury nor admitted by a defendant.⁸⁰

This distinction—elements vs. facts—is important because it forms the line of what things a court may look at when comparing statutes under different approaches. The narrower the approach employed, the less the court may review when deciding if a defendant’s prior offense categorically matches the generic federal counterpart.

A. *The Categorical Approach*

The categorical approach has been most commonly used in the context of ACCA, which operates to enhance the sentences of certain criminal defendants in federal court based on their past state offenses.⁸¹ Similar to how SORNA operates with regard to sex offenders and certain state-level sex offenses, ACCA only applies when the defendant’s underlying state offenses are of a certain type.⁸² For example, ACCA operates to punish certain federal defendants being convicted in federal court on gun charges when they have three prior convictions for “a violent felony or a serious drug offense.”⁸³ And like SORNA, ACCA then provides specific definitions for “violent felony” and “serious drug offense.”⁸⁴

When comparing a generic federal statute to an underlying state statute of conviction, the categorical approach requires courts to look *only* to the elements of the defendant’s prior offense.⁸⁵ Then the court endeavors to compare those state elements to the elements of the generic federal offense.⁸⁶ If the two

80. *Mathis*, 136 S. Ct. at 2248 (citations omitted).

81. *See Descamps*, 570 U.S. at 257.

82. *See id.*; *see also Taylor*, 495 U.S. at 577–78.

83. 18 U.S.C. § 924(e)(1) (2006).

84. *Id.* § 924(e)(2), *amended by* First Step Act of 2018, Pub. L. No. 115–391, § 401(a)(1), 132 Stat. 5220 (2018).

85. *See Descamps*, 570 U.S. at 257, 261.

86. *Id.* at 257; *see also* U.S. SENTENCING COMM’N, CATEGORICAL APPROACH PRIMER 1, 5–6 (2017), https://www.ussc.gov/sites/default/files/pdf/training/primers/2017_Categorical_Approach.pdf

statutes have identical elements, then there is a categorical match between them.⁸⁷ If the defendant is a sex offender in federal court due to a SORNA violation, the prior offense will then serve as a SORNA predicate.⁸⁸ Additionally, the same result will follow if the state statute defines the crime of conviction more narrowly than its federal counterpart because anyone convicted under that state law will be “guilty of all the [federal offense’s] elements.”⁸⁹

The elements remain the focus of this inquiry. Courts applying the categorical approach will not be permitted to examine any of the underlying facts of conviction.⁹⁰ Therefore, if the state statute of conviction is broader in scope than its generic federal counterpart, there will be no categorical match and the underlying state offense will not constitute a SORNA predicate.⁹¹ Without question, there may be instances where the defendant actually committed the generic federal offense and was convicted of doing so at the state level, but because the state statute is broader than its federal counterpart, a court employing a strict categorical approach will nevertheless conclude that there is not a categorical match between the two statutes.⁹² A strict categorical approach, therefore, is a purposefully limited inquiry.

When writing in the context of ACCA, the Supreme Court has provided three reasons in support of the use of a strict categorical approach.⁹³ The first reason offered was premised on ACCA’s text and legislative history.⁹⁴ The Court found that the text “generally supports the inference 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.”⁹⁵ Further, the statute’s legislative history

[<https://perma.cc/5CDT-DN5E>] (explaining that the categorical approach involves four steps: first, the court must “identify the [statutory] definition at issue;” second, the court must “determine the statute of conviction;” third, the court “list[s] the elements of the statute of conviction;” and finally, the court “[c]ompare[s] the elements in the statute of conviction to those in the definition”).

87. *Descamps*, 570 U.S. at 257.

88. A predicate offense is “[a]n earlier offense that can be used to enhance a sentence levied for a later conviction.” *Predicate Offense*, BLACK’S LAW DICTIONARY (11th ed. 2019). The earlier offense in SORNA cases is thus the state sex offense conviction.

89. *Descamps*, 570 U.S. at 261.

90. *Id.*

91. *United States v. Walker*, 2018 WL 3325909, *6–7 (E.D. Wis. 2018).

92. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

93. *See Descamps*, 570 U.S. at 267; *Taylor v. United States*, 495 U.S. 575, 600–01 (1990).

94. *Taylor*, 495 U.S. at 600–01.

95. *Id.* at 600.

“show[ed] that Congress generally took a categorical approach to predicate offenses.”⁹⁶

Another rationale that the Court articulated for the categorical approach is that “the practical difficulties and potential unfairness of a factual approach are daunting.”⁹⁷ As explained by the Court,

In case after case, sentencing courts following [a factual approach] would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling over superfluous factual allegations.⁹⁸

What’s more, federal courts are already overburdened, and requiring them to engage in factual inquiries for the purposes of statutory comparison would only serve to further pile on to their caseloads.⁹⁹

Finally, employing anything other than a strict categorical approach could raise Sixth Amendment concerns.¹⁰⁰ Chiefly, the issue would be whether an alternative approach allows a court to abridge the defendant’s right to a jury trial by allowing the court to engage in fact-finding inquiries that are squarely the province of the jury.¹⁰¹ The Supreme Court has held 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”¹⁰² or otherwise must be admitted by the

96. *Id.* at 601 (“If Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant’s prior offenses, surely this would have been mentioned somewhere in the legislative history.”).

97. *Id.*

98. *Descamps*, 570 U.S. at 270.

99. *See Mathis v. United States*, 136 S. Ct. 2243, 2263 (2016) (Breyer, J., dissenting).

100. *Descamps*, 570 U.S. at 267.

101. *Id.*

102. *Id.* at 269 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

defendant.¹⁰³ Therefore, by looking beyond the bare elements of a defendant's prior conviction and examining the facts underlying it when sentencing a defendant under 18 U.S.C. § 2250, a court may be butting up against the protections of the Sixth Amendment.

B. *The Modified Categorical Approach*

The modified categorical approach is a slight variation of the strict categorical approach. This approach should only be employed by a court when the underlying statute of conviction is *divisible*,¹⁰⁴ or lists one or more of its elements in the alternative (i.e., “comprises multiple, alternative versions of the crime”).¹⁰⁵ When a court needs to compare a defendant's divisible statute of conviction to a generic federal offense for sentencing purposes, that court will be entitled to employ the modified categorical approach to do so.¹⁰⁶ Such an approach would permit that court to review a limited set of materials to help it determine which alternative element “formed the basis of the defendant's conviction.”¹⁰⁷ The documents that the court may consult in these circumstances include so-called “*Shepard* documents”¹⁰⁸—“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.”¹⁰⁹ Without the benefit of consulting these “extra-statutory documents,” the court may be unable to determine whether the statute of conviction and the federal statute are a categorical match.¹¹⁰ But again, this

103. See *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

104. *Descamps*, 570 U.S. at 258, 278. A divisible statute can be defined as one “in which multiple types of conduct are criminal, but only some qualify for a sentence enhancement . . . [or] ‘a statute that sets out different offenses within one statute.’” Stephanie Marie Toribio, Note, *Effective Criminal Sentencing?: Analyzing the Effectiveness of the Federal Sentencing Guidelines on Career Offenders*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 377, 394 (2016) (quoting U.S. SENT’G COMM’N, 2016 ANNUAL NATIONAL SEMINAR: CATEGORICAL APPROACH (2016), http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_categorical-approach.pdf [<https://perma.cc/7T3P-WQWF>]).

105. *Descamps*, 570 U.S. at 257, 262.

106. *Id.* at 278.

107. *Id.* at 257, 263.

108. U.S. SENTENCING COMM’N, *supra* note 86, at 4.

109. *Shepard v. United States*, 544 U.S. 13, 16 (2005). Again, these documents are referred to as “*Shepard* documents” after *Shepard v. United States*, where the Supreme Court limited sentencing courts’ examinations of divisible statutes to this limited class of documents in *ACCA*. *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (citing *Shepard*, 544 U.S. at 26; *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

110. *Descamps*, 570 U.S. at 263.

approach may only be employed by courts in that “narrow range of cases” when courts are comparing statutes and confronted with a divisible statute.¹¹¹

To further illustrate that this approach should only be applied in rare situations, the Supreme Court emphasized that the modified categorical is a “tool for implementing the categorical approach,” rather than an exception to that approach.¹¹² The modified categorical approach simply allows the court to determine which elements in a divisible statute formed the basis of the defendant’s prior conviction.¹¹³ If it can identify those elements based on documents such as the indictment or the jury instructions, then from there onward the court employs a strict categorical approach, comparing those elements to the elements of the generic federal statute.¹¹⁴ Once the court identifies which of the alternative elements formed the basis of the defendant’s conviction, it cannot consult any extra-statutory materials moving forward; it must stick to the elemental approach.¹¹⁵ Any other factual inquiries would be impermissible under the modified categorical approach.¹¹⁶

C. *The Circumstance-Specific Approach*

The circumstance-specific (or non-categorical) approach permits a court to “look to the facts and circumstances underlying an offender’s conviction” in those situations where the statutory provision at issue “refer[s] to the specific way in which an offender committed the crime on a specific occasion.”¹¹⁷ In order to determine whether it may apply the circumstance-specific approach, a court should determine if the provision contains “qualifying language” that refers to the conduct or circumstances surrounding the commission of a specific offense.¹¹⁸ In other words, the key question is whether the provision contained language that invokes the specific facts underlying the prior offense, as opposed to the bare elements of the offense. For example, in *Nijhawan v. Holder*, an immigration case in which the Supreme Court approved the use of circumstance-specific approach, the Court reasoned that the statutory language at issue was “consistent with a circumstance-specific approach” because the

111. *Id.* at 261; *Taylor*, 495 U.S. at 602.

112. *Descamps*, 570 U.S. at 262–63.

113. *Id.* at 257.

114. *Id.* at 262.

115. *Id.* at 263–64.

116. *Id.*

117. *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

118. *Id.* at 38–40.

relevant language (the phrase “in which”) “refer[red] to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements of the offense.”¹¹⁹

Should a court decide that the statutory language at issue calls for a non-categorical interpretation, that court will then be able to look beyond the prior offense’s bare elements and instead examine the facts underlying the offense to determine if it constitutes a sex offense for the purposes of SORNA.¹²⁰ An important question to consider here is what, exactly, the court could consult to find these facts, i.e., what types of sentencing-related documents. This determination might be impacted by whether the court is confronted with a criminal proceeding or a civil proceeding, which involve different evidentiary burdens. *Nijhawan* involved a civil deportation proceeding, rather than a criminal proceeding, an important distinction noted by the Court.¹²¹ Because of the different burdens that must be met by the government in each proceeding (“clear and convincing” vs. “beyond a reasonable doubt”), the Court reasoned that a court in a civil proceeding would not be limited to the same class of documents as it would when employing a modified categorical approach in a criminal proceeding—i.e., the charging document, plea colloquy, plea agreement, jury instructions, or a comparable judicial record.¹²² Rather, an immigration judge could rely upon “earlier sentencing-related material” as long as the underlying fact could be shown by clear and convincing evidence.¹²³ Other federal immigration cases that followed *Nijhawan* have expounded upon what exactly constitutes this “earlier sentencing-related material,” finding that documents such as affidavits of probable cause, police reports, criminal complaints, or pre-sentencing reports fit the bill.¹²⁴

However, if a court applies the circumstance-specific approach in the SORNA context, the reasoning in *Nijhawan* suggests that the court’s factual inquiry should be limited to the *Shepard* documents making up the record of

119. *Id.* at 38–39 (emphasis in original).

120. Kane, *supra* note 14, at 44.

121. *See Nijhawan*, 557 U.S. at 42.

122. *See id.* at 35, 41.

123. *Id.* at 42–43.

124. *See Bianco v. Holder*, 624 F.3d 265, 273 (5th Cir. 2010); *Matter of H. Estrada*, 26 I&N Dec. 749, 753–54 (BIA 2016), *overruled on other grounds by Matter of Thomas*, 27 I&N Dec. 674, 2019 WL 5546810 (U.S. Atty. Gen. Oct. 25, 2019); Michael R. Devitt, *Improper Deportation of Legal Permanent Residents: The U.S. Government’s Mischaracterization of the Supreme Court’s Decision in Nijhawan v. Holder*, 15 SAN DIEGO INT’L L.J. 1, 34–36 (2013); Kelly Morgan, Comment, *Circumstances Requiring Safeguards: Limitations on the Application of the Categorical Approach in Hernandez-Zavala v. Lynch*, 58 B.C. L. REV. E. SUPP. 243, 262 (2017).

conviction.¹²⁵ This “evidentiary list” was developed in *Shepard* and other ACCA cases for the purpose of “determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction.”¹²⁶ This is the very same sort of statutory comparison that a court undertakes in SORNA cases.¹²⁷ As a result, even if a SORNA case arises where a court may be permitted to employ the circumstance-specific approach to assess the defendant’s conduct, that court should limit its analysis to any *Shepard* documents available.

IV. THE CONSENSUS DEVELOPING AT THE CIRCUIT LEVEL

While the Supreme Court has provided the general rules governing the use of the categorical approach and its alternatives, it has not yet spoken on the application of these approaches in the context of SORNA. However, several U.S. Courts of Appeals have directly addressed the applicability of the categorical approach in SORNA cases and carved out several scenarios where courts may depart from the strict categorical approach and apply the circumstance-specific approach.

Several Courts of Appeals have concluded that a court can examine the facts underlying a prior conviction for determining *the age of the victim* of that prior offense when prosecuting a sex offender for a SORNA violation.¹²⁸ Of these, the Tenth Circuit has held that the use of the circumstance-specific approach should be restricted to only determining this one fact, “a single fact that is easy to prove and, in an ordinary case, not easily disputed.”¹²⁹ But the reasoning in several other U.S. Courts of Appeals decisions does not suggest such limitations. Rather, these decisions have noted that SORNA often speaks in fact-specific language or uses fact-based qualifiers that refer to how an offense was committed, and because this textual language clearly speaks to conduct as opposed to the elements of a prior conviction, its use should signal

125. *See Nijhawan*, 557 U.S. at 41.

126. *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

127. *United States v. Taylor*, 644 F.3d 573, 576 (7th Cir. 2011) (citing U.S.S.G. § 2A3.5 (2016)) (noting that in sentencing a defendant for violating SORNA, the sentencing judge will “determine the defendant’s tier classification . . . by examining the elements of the statute under which the defendant was convicted.”).

128. *See infra* Section III.A.

129. *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015).

that Congress is calling for the use of a circumstance-specific approach in analyzing it.¹³⁰

A. *Limiting the Reach of the Circumstance-Specific Approach in SORNA Cases: The Tenth Circuit in United States v. White*

The age of the victim of a sex offender's underlying offenses in SORNA cases can be important to determine (a) whether the victim was a *minor* and (b) whether the defendant qualifies as tier II or a tier III sex offender. Recall, SORNA characterizes a "minor" as "an individual who has not attained the age of 18 years."¹³¹ Further, a sex offender will be classified as a tier II offender if he commits one of several offenses listed in the statute "against a *minor*" (i.e., against someone less than eighteen years of age)¹³² or if his crime involved either the "use of a *minor* in a sexual performance"¹³³ or the "solicitation of a *minor* to practice prostitution."¹³⁴ Therefore, whether a sex offender is either a tier I or tier II sex offender in many instances may depend on the age of the victim—i.e., whether the victim was less than eighteen years of age.

Additionally, the age of the victim can be important in determining whether a sex offender is a tier III offender as well. If the underlying sex offense involved "abusive sexual contact . . . against a minor who has not attained the age of 13 years," the sex offender should then be properly classified as a tier III offender.¹³⁵ "[A]busive sexual contact" can also constitute a tier II offense,¹³⁶ but the victim need only be a minor,¹³⁷ not a minor under thirteen years old. Therefore, one will be a tier II offender if he commits abusive sexual contact against a victim who is at least thirteen years old and under eighteen years, but the sex offender will be a tier III offender if the victim is under the age of thirteen. Because a sex offender will face different registration requirements as well as different sentencing consequences for failure to register based on his

130. See *United States v. Berry*, 814 F.3d 192, 198 (4th Cir. 2016); *United States v. Price*, 777 F.3d 700, 708–09 (4th Cir. 2015); *United States v. Rogers*, 804 F.3d 1233, 1233 (7th Cir. 2015); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430–31 (5th Cir. 2014); *United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir. 2010).

131. 34 U.S.C. § 20911(14) (2017).

132. See *id.* § 20911(3)(A) (emphasis added).

133. *Id.* § 20911(3)(B)(i) (emphasis added).

134. *Id.* § 20911(3)(B)(ii) (emphasis added).

135. *Id.* § 20911(4)(A)(ii) (emphasis added).

136. *Id.* § 20911(3)(A)(iv).

137. *Id.* § 20911(3)(A).

tier classification,¹³⁸ whether a court can look at a fact such as the victim's age for slotting the offender into a specific tier can have real consequences.

Although several U.S. Courts of Appeals have held that the age of the victim is just the sort of fact that a court may use the circumstance-specific approach to examine,¹³⁹ the Tenth Circuit expressly limited the circumstance-specific inquiry solely to the age of the victim in *United States v. White*.¹⁴⁰ In *White*, when sentencing a defendant for failing to comply with SORNA's requirements, the court examined the record of the underlying state conviction to determine the age of the victim and the nature of the offense and concluded on these facts that the defendant was a tier III sex offender because his offense involved "abusive sexual contact . . . against a minor who has not attained the age of 13 years."¹⁴¹ The court noted the importance of properly determining a defendant's tier classification, as that dictates the defendant's offense level and likely the ultimate length of the sentence as well.¹⁴²

The Tenth Circuit noted that SORNA's statutory language at issue in this case, which spoke of "abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years,"¹⁴³ referenced a statutory section (i.e., 18 U.S.C. § 2244) that does not include the age of the victim as an element of the offense.¹⁴⁴ Therefore, the court reasoned that it must apply the circumstance-specific approach to determine if the victim was less than thirteen years of age.¹⁴⁵ Otherwise, because the victim's age was not an element of the underlying offense, "a comparison based on the categorical approach will never reveal the age of the victim and therefore [the underlying offense will] never constitute a tier III offense."¹⁴⁶

At the same time, however, the Tenth Circuit held that the circumstance-specific approach should be limited to determining the age of the victim in SORNA cases, at least in those provisions where "SORNA cross-references a

138. See *supra* Part I.

139. See *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016); *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015); *United States v. Mi Kyung Byun*, 539 F.3d 982, 993–94 (9th Cir. 2008).

140. See *White*, 782 F.3d at 1135.

141. *Id.* at 1132 (quoting 34 U.S.C. § 20911(4)(A)(ii)).

142. *Id.* at 1129.

143. 34 U.S.C. § 20911(4)(A)(ii).

144. *White*, 782 F.3d at 1133.

145. *Id.*

146. *Id.*

specific section of the criminal code.”¹⁴⁷ The court stated that the factual inquiry should be limited in this manner due to “equitable and practical concerns” with the circumstance-specific approach.¹⁴⁸ The court reasoned that employing the circumstance-specific approach to simply determine the victim’s age will avoid these issues because age “is a single fact that is easy to prove and, in an ordinary case, not easily disputed.”¹⁴⁹

B. *A Broader Interpretation—Using the Circumstance-Specific Approach in SORNA Cases Whenever the Text Speaks in “Fact-Specific” Language*

While the Tenth Circuit in *White* held that the use of the circumstance-specific approach should be limited to determining a victim’s age, other U.S. Courts of Appeals have reasoned that the circumstance-specific approach should be employed in SORNA cases whenever the statutory text uses fact-specific language that speaks to the defendant’s conduct rather than the elements of any underlying conviction.¹⁵⁰ These courts have employed this reasoning to justify the use of the circumstance-specific approach not only to determine a victim’s age but also to determine whether an underlying offense of conviction constituted a “specified offense against a minor”¹⁵¹ or whether any of SORNA’s statutory exceptions applied to a defendant’s underlying offense.¹⁵²

SORNA defines what constitutes a *specified offense against a minor* by listing several offenses for comparison,¹⁵³ but the last listed is “[a]ny conduct that by its nature is a sex offense against a minor,”¹⁵⁴ a catch-all category.¹⁵⁵ And among its statutory exceptions, SORNA provides two such exceptions for

147. *Id.* at 1135.

148. *Id.*

149. *Id.*

150. See *United States v. Berry*, 814 F.3d 192, 198 (4th Cir. 2016); *United States v. Price*, 777 F.3d 700, 708–09 (4th Cir. 2015); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015); *United States v. Gonzalez-Medina*, 757 F.3d 425, 429–30 (5th Cir. 2014); *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010); *United States v. Mi Kyung Byun*, 539 F.3d 982, 992–94 (9th Cir. 2008).

151. See *Price*, 777 F.3d at 708; *Dodge*, 597 F.3d at 1355–56; *Mi Kyung Byun*, 539 F.3d at 992–94; see also U.S. SENT’G COMM’N, PRIMER ON SEX OFFENSES: SEXUAL ABUSE AND FAILURE TO REGISTER OFFENSES 1, 9 (2016), https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Sex_Offense_Register.pdf [<https://perma.cc/Q7NV-BZGS>].

152. See *Rogers*, 804 F.3d at 1236.

153. See 34 U.S.C. § 20911(7) (2017).

154. *Id.* § 20911(7)(I).

155. *Mi Kyung Byun*, 539 F.3d at 988.

“[o]ffenses involving consensual sexual conduct.”¹⁵⁶ The first applies if the victim was an adult and was not “under the custodial authority of the offender at the time of the offense.”¹⁵⁷ The second applies “if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”¹⁵⁸ If an offense satisfies either exception, then it will not be a sex offense under SORNA.¹⁵⁹

The U.S. Courts of Appeals surveyed here all base their reasoning on the Supreme Court’s instruction in *Nijhawan v. Holder*. *Nijhawan* specifies that when the statutory language at issue “refer[s] to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements of the offense,” it calls for a circumstance-specific analysis.¹⁶⁰ They mainly agree that the categorical approach applies to the “threshold definition of sex offense,”¹⁶¹ whenever the federal statute that is being compared to the underlying conviction refers to a generic offense,¹⁶² or when the federal statute “speaks in categorical or elements-based terms rather than ‘circumstance-specific’ terms.”¹⁶³ But at the same time, whenever Congress uses more fact-centric language in SORNA’s text, these courts are likely to conclude that Congress is suggesting that courts should employ a circumstance-specific approach.¹⁶⁴ The following cases illustrate this broader interpretation by other U.S. Courts of Appeals outside the Tenth Circuit.

1. The Ninth Circuit: *United States v. Mi Kyung Byun*

The Ninth Circuit held in *United States v. Mi Kyung Byun* that courts may apply the circumstance-specific approach to determine the victim’s age when evaluating whether a defendant committed a specified offense against a minor.¹⁶⁵ *Byun* involved a defendant who imported a seventeen-year-old

156. 34 U.S.C. § 20911(5)(C).

157. *Id.*

158. *Id.*

159. *Id.*

160. *See Nijhawan v. Holder*, 557 U.S. 29, 38–39 (2009) (emphasis in original).

161. *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015).

162. *See United States v. Berry*, 814 F.3d 192, 196 (4th Cir. 2016); *see also Moneriffe v. Holder*, 569 U.S. 184, 192 (2013); *Nijhawan*, 557 U.S. at 34–35; *United States v. Price*, 777 F.3d 700, 704–05 (4th Cir. 2015).

163. *Rogers*, 804 F. 3d at 1236 (citing *Nijhawan*, 557 U.S. at 36).

164. *See, e.g., id.* at 1236–37.

165. *United States v. Mi Kyung Byun*, 539 F.3d 982, 990 (9th Cir. 2008).

woman into the country to work in the defendant's club, where the seventeen-year-old was expected to engage in prostitution with some of the club's customers.¹⁶⁶ Although the defendant pled guilty to three alien smuggling offenses, she did not plead guilty to the charge of transporting a minor for purposes of prostitution.¹⁶⁷ However, she did admit in her plea agreement that she induced the seventeen-year-old woman to come to Guam to engage in prostitution and that the defendant knew at the time that this woman was seventeen years old.¹⁶⁸

The Ninth Circuit cited the defendant's admissions in concluding that the defendant committed a specified offense against a minor, reasoning that it was permitted to do so because SORNA's language,¹⁶⁹ structure, and legislative history¹⁷⁰ allow courts to consider the underlying facts of the defendant's offense to determine the age of the victim.¹⁷¹ Therefore, the court held that the defendant was required to register under SORNA: her plea agreement showed that she imported a seventeen-year-old alien into Guam to engage in prostitution, and these underlying facts were sufficient to allow the court to conclude the defendant committed a specified offense against a minor.¹⁷²

2. The Eleventh Circuit: *United States v. Dodge*

The Eleventh Circuit went even further in examining a defendant's underlying conduct to determine that he committed a specified offense against a minor. In *United States v. Dodge*, the defendant, a thirty-three-year-old man, pled guilty to transferring obscene material to a minor for emailing indecent pictures of himself to a person who he thought to be a thirteen-year-old girl.¹⁷³ While the Ninth Circuit in *Byun* limited its circumstance-specific inquiry to the age of the victim, the Eleventh Circuit in *Dodge* asserted that *Byun*'s reasoning suggested that courts may look beyond the mere elements of the prior offense to the facts underlying the conviction to determine if a defendant committed a

166. *Id.* at 983.

167. *Id.* at 983–84.

168. *Id.* at 984.

169. *Id.* at 993 (reasoning that SORNA's language "evidences Congress's intent to require all those who commit sex crimes against children to register as sex offenders").

170. *Id.* at 992–93 (finding 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 . . . [and] reveals substantial discussion of the necessity of identifying all child predators").

171. *Id.* at 993–94.

172. *Id.* at 994.

173. *United States v. Dodge*, 597 F.3d 1347, 1349 (11th Cir. 2010).

specified offense against a minor.¹⁷⁴ The Eleventh Circuit reasoned that this conclusion was supported by the definition of what constitutes a specified offense against a minor (which lacks any mention of elements), the title of the statutory section (referring to “offenses” instead of “convictions”), the use of general, non-specific language in the statutory section (“include,” “involve[],” “by its nature”), and the presence of the broad catch-all provision (“[a]ny conduct that by its nature is a sex offense against a minor”) in the list of specified offenses against a minor.¹⁷⁵

What’s more, the Eleventh Circuit asserted that the statutory language of SORNA shows that Congress sought to “cast a wide net to ensnare as many offenders against children as possible,” including those whose *underlying conduct* amounted to a sex offense against a minor but ultimate conviction was for a lesser-included offense.¹⁷⁶ The court concluded that when it comes to conduct that lines up with the catch-all provision of what constitutes a specified offense against a minor,

[d]istrict 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.”¹⁷⁷

As revealed in the plea colloquy, the defendant’s conduct in *Dodge* involved sending indecent pictures of himself to someone he believed to be a minor.¹⁷⁸ Although the offense for which *Dodge* was convicted “did not correspond neatly to any listed ‘specified offense against a minor,’” the court nevertheless concluded that the defendant’s conduct was “by its nature . . . a sex offense against a minor.”¹⁷⁹ And because the court concluded that it may look past the elements of a prior offense to a defendant’s underlying conduct when determining whether the defendant committed a specified offense against a minor, the court held that this defendant did indeed commit such an offense and was therefore a sex offender required to register under SORNA.¹⁸⁰

174. *Id.* at 1354.

175. *Id.* at 1354–55.

176. *Id.* at 1355.

177. *Id.*

178. *Id.*

179. *Id.* at 1356.

180. *Id.*

3. The Fourth Circuit: *United States v. Price*

The Fourth Circuit followed *Dodge*'s lead in also concluding that courts may employ a circumstance-specific approach in determining whether a defendant committed a specified offense against a minor. The defendant in *United States v. Price* had a prior conviction “for the common law offense of assault and battery of a high and aggravated nature,” and he argued that this was not a sex offense for the purposes of SORNA.¹⁸¹ However, the plea colloquy for the underlying offense revealed that it involved the defendant forcing his twelve-year-old stepdaughter to perform a sex act on him.¹⁸² The court held that the language, structure, and “purpose of SORNA” required it to apply a circumstance-specific approach to determine whether the defendant committed a specified offense against a minor.¹⁸³ Therefore, it was permitted to review the facts articulated in the plea colloquy to conclude that the defendant’s conduct underlying his prior conviction constituted a specified offense against a minor.¹⁸⁴

In terms of language and structure, the Fourth Circuit distinguished two definitions of what constitutes a “sex offense” under SORNA: “a criminal offense that has an *element* involving a sexual act or sexual contact with another,”¹⁸⁵ and “a criminal offense that is a *specified offense against a minor*.”¹⁸⁶ Further, the court pointed to the catch-all provision in the list of what constitutes a specified offense against a minor— “[a]ny *conduct* that by its nature is a sex offense against a minor.”¹⁸⁷ Unlike the first definition of a sex offense provided in the statute, which speaks of a criminal offense with an *element* involving a sexual act or sexual contact, there is no mention of “elements” in the subsection providing that a specified offense against a minor will constitute a sex offense, nor is the word “element” present in the catch-all provision for what constitutes a specified offense against a minor.¹⁸⁸ The court found the different language Congress used telling because it suggests that Congress intended “to cover a broader range of [conduct]” that constitutes

181. *United States v. Price*, 777 F.3d 700, 703 (4th Cir. 2015).

182. *Id.* at 707.

183. *Id.* at 709.

184. *See id.*

185. *Id.* at 704 (citing 42 U.S.C. § 16911(5)(A)(i) (current version at 34 U.S.C. § 20911(5)(A)(i) (2017))) (emphasis added).

186. *Id.* (citing 42 U.S.C. § 16911(5)(A)(ii) (current version at 34 U.S.C. § 20911(5)(A)(ii) (2017))) (emphasis added).

187. *Id.* (citing 42 U.S.C. § 16911(5)(A)(iii) (current version at 34 U.S.C. § 20911(7)(I) (2017))) (emphasis added).

188. *Id.* at 708.

specified offenses against minors than it did when it spoke to offenses containing “an element involving a sexual act or sexual contact.”¹⁸⁹ What’s more, the court found that the statute’s use of the words “conduct” and by its “nature” in Section 20911(7)(I) was key as well—these words speak “to how an offense was committed,” requiring a court to consider the underlying facts of the offense instead of employing a bare element-to-element, categorical comparison.¹⁹⁰ The court thus concluded that “[t]he text of SORNA . . . indicates that Congress intended that the broader circumstance-specific analysis be applicable with respect to” the catch-all provision of what constitutes a specified offense against a minor.¹⁹¹

With regards to SORNA’s purpose, the Fourth Circuit in *Price* found that Congress’s intent in enacting SORNA “also support[ed] the use of the circumstance-specific approach” in this case.¹⁹² Congress enacted SORNA to “protect the public [specifically, children] from sex offenders.”¹⁹³ The provisions at issue in this case, involving specified offenses against minors, reinforced Congress’s purpose by using “broader language in defining a ‘sex offense’ for victims who are minors.”¹⁹⁴ The use of this broad language shows that Congress sought to protect all children from sex offenders and that, to effectuate this purpose, courts should apply the circumstance-specific approach when determining whether a defendant’s conduct underlying a prior conviction was “by its nature . . . a sex offense against a minor.”¹⁹⁵

4. The Fourth Circuit: *United States v. Berry*

Like the Tenth Circuit in *White*, the Fourth Circuit has held it is appropriate to depart from the categorical approach to determine the age of a sex offender’s victim. In *United States v. Berry*, a defendant who pleaded guilty to failing to register as a sex offender challenged the district court’s determination at sentencing that the defendant was a tier III offender.¹⁹⁶ The district court had made this determination after examining facts underlying the defendant’s

189. *Id.* at 704, 708.

190. *Id.* at 709 (citing *Nijhawan v. Holder*, 557 U.S. 29, 37–39 (2009)).

191. *Id.* (citing *United States v. Dodge*, 597 F.3d 1347, 1354–55 (11th Cir. 2010)).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 708 n.8; *see id.* at 709.

196. *United States v. Berry*, 814 F.3d 192, 194 (4th Cir. 2016).

original conviction.¹⁹⁷ In determining whether a categorical or circumstance-specific approach was called for in this case, the Fourth Circuit examined the statutory text and concluded that the text called for courts to consider “the specific circumstance of the victim’s age” when determining an offender’s tier classification.¹⁹⁸

At first glance, it appears that the Fourth Circuit in *Berry* is entirely in agreement with the Tenth Circuit in *White* that age is the only fact a sentencing court may consider in SORNA cases.

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.”¹⁹⁹

That being said, a close reading of the case will show that the Fourth Circuit is only limiting itself to that fact with regards to one statutory section of SORNA, Section 20911(4)(A)²⁰⁰, which lists two of four generic crimes that render one a tier III offender under SORNA.²⁰¹ Those generic crimes are “aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18)” and “abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years.”²⁰²

Elsewhere in the opinion, however, the Fourth Circuit discusses its prior opinion in *Price* and reaffirms the holding in that case, despite declining to extend the same approach to this section of SORNA. As the court explains, it examined “a different, and differently-worded, SORNA subsection” in *Price*, namely 34 U.S.C. § 20911(7)(I), defining the term “specified offense against a minor” as “[a]ny conduct that by its nature is a sex offense against a minor.”²⁰³ The court then quotes *Price* in restating that the “explicit reference to the ‘conduct’ underlying a prior offense, as well as the ‘nature’ of that conduct,

197. *Id.*

198. *Id.* at 197.

199. *Id.* at 197.

200. *See id.* While the Fourth Circuit refers to 42 U.S.C. § 16911(4)(A) in the text of the case, these provisions were transferred to 34 U.S.C. § 20911 a little over a year after the *Berry* decision came down. *See* 42 U.S.C. § 16911 (2015).

201. *See* 34 U.S.C. § 20911(4)(A) (2017).

202. *Id.* § 20911(4)(A)(i)–(ii).

203. *Berry*, 814 F.3d at 198 (quoting 34 U.S.C. § 20911(7)(I)).

refers to how an offense was committed—not a generic offense.”²⁰⁴ That reference to “conduct” thus allowed the Fourth Circuit to apply a circumstance-specific approach in *Price*.²⁰⁵

To put it another way, while some of the language used by the Fourth Circuit might suggest otherwise, the Fourth Circuit’s holding in *Berry* is distinguished from the Tenth Circuit’s holding in *White*. While the Tenth Circuit (according to *White*) would only allow deviation from the categorical approach in SORNA cases for purposes of determining a victim’s age,²⁰⁶ the decision in *Berry* only limits courts in this manner in cases involving 28 U.S.C. § 20911(4)(A), those cases where courts are trying to determine whether a defendant is a tier III offender by comparing his past offenses to generic offenses described in Section 20911(4)(A)(i) and (ii).²⁰⁷ The Fourth Circuit here simply held that the circumstance-specific approach could not be applied “wholesale” to the entirety of SORNA and that, “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.”²⁰⁸ But when the situation is similar to that found in *Price*, which deals with other SORNA subsections that contain language that “refers to how an offense was committed,” rather than a “generic offense,” the circumstance-specific approach may very well be applicable.²⁰⁹

5. The Seventh Circuit: *United States v. Rogers*

Particularly instructive for determining when to apply a circumstance-specific analysis in SORNA cases is the Seventh Circuit’s decision in *United States v. Rogers*.²¹⁰ *Rogers* involved a defendant accused of sexually abusing his fourteen-year-old stepdaughter while that defendant, already a sex offender required to register under SORNA, was in failure-to-register status.²¹¹ He was subsequently convicted of incest in Indiana for that offense.²¹² Because the trial court found that the defendant committed a sex offense as classified under

204. *Id.*

205. *Id.*

206. *See United States v. White*, 782 F.3d 1118, 1140 (10th Cir. 2015).

207. *See Berry*, 814 F.3d at 199; *see also* 34 U.S.C. § 20911(4)(A)(i)–(ii).

208. *Berry*, 814 F.3d at 198–99.

209. *Id.*

210. 804 F.3d 1233 (7th Cir. 2015).

211. *Id.* at 1234.

212. *Id.* at 1236.

SORNA while in failure-to-register status, the defendant faced an enhanced sentence of over eight years incarceration and twenty years of supervised release.²¹³ The defendant, however, argued that the “consensual sexual conduct ... [with] an adult” statutory exception should apply to prevent his Indiana conviction from constituting a sex offense committed while he was in failure-to-register status.²¹⁴ He asserted that the court should apply the categorical approach to his statute of conviction, and that, because that statute did not contain a “consenting adult” exception similar to that in SORNA, Indiana criminalized a broader swathe of conduct than did its federal counterpart.²¹⁵

The Seventh Circuit examined the statutory language of SORNA to conclude that, contrary to the defendant’s assertion that the court must apply the categorical approach to the statutory exception at issue, that exception called for a circumstance-specific approach.²¹⁶ Unlike the “threshold definition of ‘sex offense,’” which contained the word “element” and thus called for a categorical, element-to-element analysis, the statutory exception “use[d] fact-specific language, strongly suggesting that a conduct-based inquiry applie[d].”²¹⁷ This fact-specific language included “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.’”²¹⁸ The court held that these are all questions implicating the underlying facts of the offense rather than the elements.²¹⁹ Thus, the court reasoned, whether the exception applied to the defendant’s conduct depended on facts such as whether the offense involved consensual sexual conduct between adults, and the only way for the court to determine if it did would be to apply the circumstance-specific approach to examine the facts of the

213. *Id.* at 1235. Under the U.S. Sentencing Guidelines, if a defendant is required to register under SORNA, fails to do so, and then commits “a sex offense against someone other than a minor,” the sentencing court will apply a six-level sentence enhancement. U.S.S.G. § 2A3.5(b)(1)(A) (2016). With the combination of the defendant’s total offense level and his criminal history, he was facing 84–105 months’ incarceration. *Rogers*, 804 F.3d at 1235.

214. *Id.* at 1236.

215. *Id.*

216. *Id.* at 1237.

217. *Id.*

218. *Id.* (quoting 34 U.S.C. § 20911(5)(C) (2017)).

219. *Id.*

offense.²²⁰ “[T]he exception’s reference to *conduct*, rather than elements, is consistent with a circumstance-specific analysis.”²²¹

C. *The Increasing Reliance on the Circumstance-Specific Approach in SORNA Cases*

As illustrated by the cases surveyed above, federal courts are increasingly turning to the circumstance-specific approach in SORNA cases. This allows sentencing courts to go beyond a bare element-to-element comparison between the defendant’s offense of conviction and those generic federal offenses falling under SORNA and instead permits courts to look to the facts underlying the conviction.²²²

In the most narrow reading of the caselaw surveyed here, federal courts may apply the circumstance-specific approach to determine (1) the age of the victim,²²³ (2) whether the underlying offense constituted a specified offense against a minor,²²⁴ and (3) whether either of the statutory exceptions for offenses involving consensual conduct apply.²²⁵ But the reasoning in the majority of these cases suggests a broader reading: that the circumstance-specific approach should apply wherever the statutory language speaks in fact-specific language that focuses on the defendant’s *conduct* rather than the elements of the prior offense.²²⁶

In other words, there may be a circuit split emerging: the Tenth Circuit in *White* expressly concluded that it was only permitted to employ a circumstance-specific approach to determine the age of a sex offender’s victim,²²⁷ while the reasoning and holdings of other Courts of Appeals in cases such as *Dodge*, *Rogers*, and *Price* do not reflect *White*’s more restrictive conclusion.²²⁸ Of the two approaches—the restrictive minority approach suggested in *White* and the

220. *Id.*

221. *Id.* (quoting *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) (emphasis added) (citations omitted)).

222. *See supra* Section III.A–C

223. *See supra* Section IV.A.

224. *See supra* Section IV.B.

225. *See supra* Section IV.B.

226. *See United States v. Berry*, 814 F.3d 192, 198–99 (4th Cir. 2016); *United States v. Price*, 777 F.3d 700, 709 (4th Cir. 2015); *Rogers*, 804 F.3d at 1237; *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010); *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008).

227. *See United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015).

228. *See Price*, 777 F.3d at 709; *Rogers*, 804 F.3d at 1236–37; *White*, 782 F.3d at 1135; *Dodge*, 597 F.3d at 1356.

majority approach in the other cases surveyed—the majority seems more persuasive if we factor in the reasoning behind the Supreme Court’s decision in *Nijhawan v. Holder* about when to apply the circumstance-specific approach as opposed to the categorical approach.²²⁹

The key to the analysis then appears to be the use of “fact-based qualifiers,”²³⁰ or language discussing “how an offense was committed.”²³¹ But as noted earlier, *Nijhawan* involved a civil deportation proceeding, a far different scenario than those where a court would employ a circumstance-specific approach to determine whether a defendant’s prior offense meets the definition of a sex offense under SORNA.²³² That distinction—the civil deportation proceeding vs. the criminal proceedings involved in these SORNA cases—is important from a constitutional law perspective, as criminal defendants are entitled to certain constitutional protections that civil defendants are not, such as those provided by the Sixth Amendment. Therefore, an important question to ask is whether courts employing a circumstance-specific approach in SORNA cases are infringing upon the Sixth Amendment rights of the defendants in those cases.

V. ARE FEDERAL COURTS ENTITLED TO EMPLOY A CIRCUMSTANCE-SPECIFIC APPROACH IN SORNA CASES?

As provided by the Supreme Court, courts should look to three factors to determine whether they should be employing a strict categorical approach when they are engaging in statutory comparison or conversely whether they may apply a circumstance-specific approach.²³³ Although these factors were discussed with regards to ACCA,²³⁴ they translate easily to SORNA scenarios and thus should be applied to determine which approach should be used in this context. Therefore, the first factor examined is whether SORNA’s statutory text and legislative history lean in favor of employing one approach over another.²³⁵ Second, one must consider whether the “practical difficulties” of

229. See *Nijhawan v. Holder*, 557 U.S. 29, 38–39 (2009) (stating that the circumstance specific approach should be used when the statutory language “refer[s] to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements *of* the offense”) (emphasis in original).

230. *Rogers*, 804 F.3d at 1237.

231. *Price*, 777 F.3d at 709.

232. See *supra* Section III.C.

233. See *Descamps v. United States*, 570 U.S. 254, 267–71 (2013); *Taylor v. United States*, 495 U.S. 575, 600–01 (1990); see also, *supra* Section II.A.

234. See *Descamps*, 570 U.S. at 267–70; *Taylor*, 495 U.S. at 600–01.

235. See *Descamps*, 570 U.S. at 267–69; *Taylor*, 495 U.S. at 600–01.

requiring a circumstance-specific approach for certain issues would be too daunting for courts to overcome.²³⁶ Finally, and perhaps most importantly, we must ask whether allowing courts to examine a criminal defendant's conduct underlying his prior conviction, beyond the bare elements of that prior offense, infringes upon the defendant's Sixth Amendment rights.²³⁷

As is demonstrated in the analysis below, none of the current approaches used by courts for statutory comparison effectively reconcile the first factor, which leans in favor of allowing courts to employ the circumstance-specific approach in SORNA cases, with the latter two factors, which favor the categorical approach.²³⁸

A. SORNA's Text and Legislative History

Congress enacted SORNA "to protect the public from sex offenders and offenders against children, and in response to vicious attacks by violent predators."²³⁹ In its declaration of purpose, SORNA also names seventeen victims of "vicious attacks by violent predators," most of whom were under the age of 18 when their attack occurred,²⁴⁰ which seems to further suggest that the law is particularly concerned with preventing future attacks of that nature. Important to remember is that SORNA was enacted as part of the Adam Walsh Act, and the AWA was the culmination of over two decades' worth of Congressional legislation aimed at protecting the public from the threat posed by sex offenders.²⁴¹ Furthermore, to enforce its intent here, Congress also enacted 18 U.S.C. § 2250, a federal crime that could result in a sex offender's imprisonment for up to ten years if that sex offender failed to comply with SORNA's requirements.²⁴²

In enacting the AWA and SORNA, Congress appeared especially concerned with the risk of recidivism posed by sex offenders and believed that the best predictor of recidivism is, quite simply, a prior sex offense.²⁴³ It also

236. See *Descamps*, 570 U.S. at 267, 270–71; *Taylor*, 495 U.S. at 601.

237. See *Descamps*, 570 U.S. at 267, 269.

238. See *infra* Section V.D.

239. 34 U.S.C. § 20901 (2017).

240. *Id.* § 20901(1)–(17).

241. See *supra* Part I.

242. 18 U.S.C. § 2250 (2016); see also Logan, *supra* note 6, at 434–35.

243. See Logan, *supra* note 3, at 11; see also *Smith v. Doe*, U.S. 84, 103 (2003) (noting that "[t]he risk of recidivism posed by sex offenders is 'frightening and high'" (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002))).

sought to establish a national registration system that would deter sex offenders from moving to states lacking things such as sex offender registries or community notification requirements.²⁴⁴ SORNA and the AWA, in addition to their predecessors, were enacted not in a vacuum but chiefly “[i]n response to a number of high-profile cases where egregious crimes were committed by individuals with prior sex offense convictions—but who were not required to register.”²⁴⁵

As already noted, statutory language that refers to a defendant’s conduct in the commission of an offense, rather than the elements of that offense, suggests to a court that it should apply a circumstance-specific approach when engaging in statutory comparison.²⁴⁶ This conduct-based language can be indicated by presence of “fact-based qualifiers” or broader statutory language referencing *how* a crime was committed.²⁴⁷ The federal courts of appeals addressing this topic, many of which were surveyed above, appear correct then in reading several of SORNA’s provisions as requiring a circumstance-specific approach to determine some underlying fact of a criminal defendant’s conduct, whether it be the age of the defendant’s victim, whether the defendant committed a specified offense against a minor, or whether a statutory exception applies.²⁴⁸ In other words, the statutory language examined by those courts surveyed does in fact speak in that conduct-based language which the Supreme Court stated would entitle courts to review a defendant’s conduct underlying a prior offense.²⁴⁹ Therefore, the statutory language of certain provisions of SORNA appears to permit a circumstance-specific analysis.

In terms of determining Congress’s intent behind SORNA (or any other law it passes), the best indicator of that intent is the plain language that it writes into the statute.²⁵⁰ With regards to SORNA, Congress classified certain sex offenses

244. See Malcolm, *supra* note 7, at 53.

245. McPherson, *supra* note 11, at 1.

246. See Nijhawan v. Holder, 557 U.S. 29, 38–39 (2009).

247. See *supra* Section IV.C; see also United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015) (explaining that the statutory exception embodied in 34 U.S.C. § 20911 (2017) “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’ . . . [t]his language doesn’t refer to elements of the offense; it refers to specific facts of the offense”).

248. See United States v. Berry, 814 F.3d 192, 199 (4th Cir. 2016); United States v. Price, 777 F.3d 700, 709 (4th Cir. 2015); United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015); United States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010); United States v. Mi Kyung Byun, 539 F.3d 982, 992 (9th Cir. 2008).

249. See Nijhawan, 557 U.S. at 39.

250. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

as falling within certain tiers; the more severe the sex offense, the higher the tier.²⁵¹ In some instances, Congress distinguished the different tiers by distinguishing the age of the victim.²⁵² In another provision, the catch-all, Congress provided that a sex offense requiring registration under the law includes offenses involving “[a]ny conduct that by its nature is a sex offense against a minor.”²⁵³ Additionally, Congress provided statutory exceptions for SORNA’s requirements, writing that an offense is not a sex offense under SORNA if it involved “consensual sexual conduct” as long as the victim was an adult not “under the custodial authority of the offender,” or “if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”²⁵⁴

What seems quite clear from these provisions is that Congress was particularly concerned with *child predators* and sought to keep them on a shorter leash than other types of sex offenders.²⁵⁵ Seven of eight listed tier II offenses are sex offenses committed against minors or involving minors in some way.²⁵⁶ Moreover, two of the four listed tier III offenses are sex offenses committed against minors,²⁵⁷ while another cites to another statutory section that covers certain sex offenses committed against children.²⁵⁸

251. See 34 U.S.C. § 20911(2)–(4) (2017).

252. See *id.* § 20911(3)(A) (emphasis added) (classifying one as a tier II sex offender if he committed one of several listed offenses against a “minor,” i.e., a person under the age of 18); *id.* § 20911(3)(B)(i)–(ii) (classifying one as a tier II offender if his underlying offense “involves . . . use of a *minor* in a sexual performance [or] solicitation of a *minor* to practice prostitution”); see also *id.* § 20911(4)(A)(ii) (classifying one as a tier III sex offender if he committed “abusive sexual contact . . . against a minor who has not attained the age of 13 years”); *id.* § 20911(4)(B) (classifying one as a tier III sex offender if his underlying offense “involves kidnapping of a minor”).

253. *Id.* § 20911(7)(I).

254. *Id.* § 20911(5)(C).

255. Of note, the definition of a tier I sex offender is simply “a sex offender other than a tier II or tier III sex offender.” *Id.* § 20911(2).

256. See *id.* § 20911(3). These offenses run the gamut from sex trafficking of a minor to abusive sexual contact against a minor to “production or distribution of child pornography.” *Id.* The only tier II offense that does not specifically involve offenses against or involving minors is the last listed—one that “occurs after the offender becomes a tier I sex offender.” *Id.* § 20911(3)(C). This provision, like a similar one in § 20911(4)(C) which classifies one as a tier III sex offender if his offense “occurs after the offender becomes a tier II sex offender,” seems to embody Congress’s concern with sex offender recidivism.

257. See *id.* § 20911(4)(A)(ii), (B).

258. *Id.* § 20911(4)(A)(i) (as described in 18 U.S.C. § 2241(c)).

All in all, Congress articulated its intent quite clearly through its statutory language: it “cast a wide net to ensnare as many offenders against children as possible.”²⁵⁹ In several instances, Congress spoke in fact or conduct-specific language to effectuate this intent, classifying sex offender into different tiers based on things such as the age of their victims or the specific conduct underlying their convictions.²⁶⁰ Therefore, the text and purpose of SORNA lean in favor of permitting courts to engage in circumstance-specific inquiries with respect to those provisions speaking to the defendant’s underlying conduct or the facts of the conviction.

B. *Practical Considerations*

Generally, applying a categorical approach is a much simpler endeavor than applying a circumstance-specific approach (or a modified categorical approach, for that matter) because all a court needs to do for the categorical approach is perform a one-to-one comparison between the elements of the statute of conviction and the elements of a generic federal offense.²⁶¹ What’s more, the categorical approach “promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact.”²⁶² In those cases where the Supreme Court held that a categorical must apply, it did so in part on the recognition that “sentencing judges have limited time, they have limited information about prior convictions, and—within practical constraints—they must try to determine whether a prior conviction reflects the kind of behavior that Congress intended its proxy . . . to cover.”²⁶³

A circumstance-specific approach, on the other hand, can be complex. It requires courts to spend their already limited time and resources digging through sometimes inaccurate and sometimes quite old documents in search of some fact that will tell them what the defendants being sentenced *actually did*, rather than what they plead guilty to or were convicted of at an earlier date.²⁶⁴ Such a process could prove quite cumbersome for sentencing courts. And it would likely require these courts to establish some sort of process for getting a hold of a wide array of records such as guilty pleas, court transcripts, or

259. *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010).

260. *See* 34 U.S.C. § 20911(3)–(4), (7).

261. *See supra* Section III.A.

262. *Moncrieffe v. Holder*, 569 U.S. 184, 200–01 (2013).

263. *Mathis v. United States*, 136 S. Ct. 2243, 2263 (2016) (Breyer, J., dissenting).

264. *Descamps v. United States*, 570 U.S. 254, 270 (2013); *see also Mathis*, 136 S. Ct. at 2263 (Breyer, J., dissenting).

indictments to find the missing fact, some of which might only be available in paper form.²⁶⁵ This could prove difficult, for example, for a federal court in Delaware attempting to examine such records from a conviction that occurred in a Wyoming state court. Therefore, this factor favors requiring a categorical approach rather than a circumstance-specific approach with respect to statutory comparisons under SORNA.

C. Sixth Amendment Concerns

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants the right of a jury trial.²⁶⁶ What's more, as the Supreme Court has held, any fact—other than that of a prior conviction—that increases a defendant's penalty for a crime beyond the prescribed statutory maximum for a crime must be found by a jury beyond a reasonable doubt.²⁶⁷ At the same time, however, the Supreme Court has also held that a judge may apply a penalty enhancer based on facts admitted by the defendant, such as those admitted in a guilty plea.²⁶⁸ But if Sixth Amendment protections are to be triggered, the penalty at issue must be *punitive*, or criminal, in nature.²⁶⁹ A purely "civil" penalty will not trigger Sixth Amendment protections.²⁷⁰

When determining whether a penalty imposed by a statutory scheme demands Sixth Amendment protections (as well as other procedural rights afforded by the Constitution to criminal defendants), the threshold question is thus whether the penalty is civil or criminal in nature.²⁷¹ To make this determination, courts will apply what's known as an "intent-effects test."²⁷²

265. See *Chambers v. United States*, 555 U.S. 122, 125 (2009) (abrogated on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015)).

266. U.S. CONST. amend. VI.

267. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (noting that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

268. *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

269. *United States v. Ward*, 448 U.S. 242, 248 (1980) (stating that "the protections provided by the Sixth Amendment are available only in 'criminal prosecutions'").

270. *Id.* at 253–55.

271. See *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Ward*, 448 U.S. at 248–49; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

272. See *Smith*, 538 U.S. at 92; see also Eric French, Comment, *Dodging Due Process: How United States v. Dodge Pushes the Limits of Civil Regulation*, 52 B.C. L. REV. 161, 169 (2011).

This requires first an examination of the legislature’s intent in enacting the statute—if it clearly intended for the penalty “to impose punishment,” then the statute is criminal.²⁷³ “If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is ‘so punitive either in purpose or effect as to negate [the legislature’s] intention’ to deem it ‘civil.’”²⁷⁴

Second, in assessing whether a regulatory scheme is so punitive as to render it criminal in nature, courts will apply a set of factors provided by the Supreme Court (the *Mendoza-Martinez* factors). These factors include:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment[,] whether it comes into play only on a finding of a scienter, whether its operation will promote traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and it appears excessive in relation to the alternative purpose assigned.²⁷⁵

The *Mendoza-Martinez* factors are simply a “list of considerations,” and they are not intended to be either “exhaustive []or dispositive.”²⁷⁶ In other words, not all need be applied for court to find a law punitive or non-punitive.

While the Supreme Court has not applied the intent-effects test to SORNA specifically, it has done so to a similar statutory scheme enacted in Alaska in *Smith v. Doe*.²⁷⁷

1. *Smith v. Doe*

In *Smith v. Doe*, the Supreme Court ruled that a *statewide* sex offender registration system was non-punitive.²⁷⁸ *Smith* involved a pair of sex offenders who—although convicted of their respective crimes, released from prison, and having completed rehabilitative programs before the passage of the law at issue—were nevertheless required to register as sex offenders by an Alaska sex offender registration and notification law.²⁷⁹ They challenged the law on *Ex Post Facto* grounds, arguing that the law constituted retroactive punishment,

273. *Smith*, 538 U.S. at 92.

274. *Id.* (quoting *Ward*, 448 U.S. at 248-49).

275. *Mendoza-Martinez*, 372 U.S. at 168-69.

276. *Ward*, 448 U.S. at 249.

277. *Smith*, 538 U.S. at 92-93.

278. *Id.* at 96.

279. *Id.* at 91.

and the Court therefore confronted the issue of whether this law was civil or criminal in nature.²⁸⁰

After applying five of the *Mendoza-Martinez* factors,²⁸¹ the Court concluded that the registration requirements of the Alaska law were not punitive and thus did not violate the Ex Post Facto Clause of the Constitution.²⁸² While this was an influential decision by the Supreme Court, it should be noted that the Court in *Smith* was only addressing whether that statewide law's registration requirements were punitive; the Court openly stated that it was not addressing whether prosecuting a sex offender for failure to comply with those requirements was punitive.²⁸³ Since deciding *Smith*, and in the few instances where the Supreme Court has addressed the constitutionality of sex offender registration laws, the Court has not addressed the constitutionality of either SORNA's registration requirements or the federal criminal offense under Section 2250(a), which enforces those requirements.²⁸⁴ What's more, over the years the Supreme Court's reasoning in *Smith* has come under some criticism.²⁸⁵

280. *Id.* at 91–92.

281. *See id.* at 97–105 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). The *Mendoza-Martinez* factors applied in the Court's analysis were whether the sanction at issue (mandatory registration of sex offenders) (1) had been historically regarded as punishment, (2) constituted an affirmative disability or restraint, (3) promoted the traditional aims of punishment, retribution or deterrence, (4) was rationally related to the law's non-punitive purpose, and (5) was excessive compared to its non-punitive purpose. *Id.* The Court found that the registration requirements did not resemble any historical forms of punishment enough to render it punitive, that it did not cause those subject to it to experience any more of a disability or restraint than they would have otherwise due to their criminal records, that any deterrent effects of the law were mere consequences of its stated purpose of protecting the public, that it was rationally related to that non-punitive goal of protecting the public, and that forcing sex offenders to register was not excessive in relation to its non-punitive goal. *Id.*

282. *Id.* at 105–06.

283. *See id.* at 101–02 (noting that although “[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure . . . any prosecution is a proceeding separate from the individual's original offense. Whether other constitutional objections can be raised, and how those questions might be resolved, are concerns beyond the scope of this opinion.”).

284. *See generally* *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (holding that North Carolina's registration law, which prohibited sex offenders from accessing social media, violated the First Amendment); *Connecticut DPS v. Doe*, 538 U.S. 1 (2003) (dismissing a Fourteenth Amendment due process challenge to a Connecticut registration law).

285. *See* Logan, *supra* note 6, at 427–28; *see also id.* at 428, n.10 (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002) (“The characterization [that the rate of recidivism for sex offenders is ‘frightening

2. Assessing the Punitiveness of the AWA

Does prosecuting and imprisoning a sex offender under Section 2250 for failing to comply with SORNA constitute “punishment” and thus trigger the protections of the Sixth Amendment for that sex offender? Recall that the Sixth Amendment will *not* be implicated if the statute at issue is civil rather than punitive, or criminal, in nature.²⁸⁶ Therefore, to properly determine whether the sanction imposed is civil or criminal, we must apply the intent-effects test.²⁸⁷ Again, the first step is to determine whether Congress clearly intended the statute at issue to be punitive.²⁸⁸ If so, then no further analysis is required—it’s punishment, and Sixth Amendment protections are triggered.²⁸⁹ But if Congress’s intent was to enact a civil statute, we must determine whether the law’s effects are so punitive to render it effectively criminal.²⁹⁰ The *Mendoza-Martinez* factors provide a “useful framework” for analyzing the law’s effects.²⁹¹

But an important issue crops up before these tests can be applied: What, exactly, is the law that must be analyzed under these tests? SORNA probably should not be analyzed alone because the defendant’s sentencing will be for a violation of 18 U.S.C. § 2250(a), a separate statutory section.²⁹² The question thus becomes whether the statute to be examined is simply § 2250(a) (i.e., the provision which makes a sex offender’s failure to register a federal crime), or if it is the *entirety* of AWA, including both SORNA (which provides the registration and notification requirements under the law²⁹³) and § 2250(a), in this circumstance.

and high’], which has long served as a staple basis to justify SORN laws, was based on a 1986 article published in *Psychology Today*, in which the authors claimed that the recidivism rate of sex offenders was as high as 80%. The assertion has since been abandoned by the article’s authors, and belied by social science research showing that while certain subgroups of sex offenders do recidivate at relatively higher rates, as a group sex offenders recidivate at considerably lower rates than many other criminal offenders.”); Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015).

286. See *supra* Section V.C.

287. See *Smith*, 538 U.S. at 92–93.

288. See *id.* at 92.

289. See *id.*

290. See *id.*

291. *Id.* at 97.

292. 18 U.S.C. § 2250 (2016).

293. See *SORNA*, OFFICE OF SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <https://www.smart.gov/sorna.htm> [<https://perma.cc/9HWN-U7HU>].

While § 2250(a) is a criminal statute in the U.S. criminal code that carries with it the penalty of imprisonment,²⁹⁴ that statutory section remains one part of a broader statutory scheme—the AWA.²⁹⁵ Therefore, § 2250(a) should not be considered alone for the purposes of this analysis. Importantly, § 2250(a) relies upon definitions provided by SORNA to give its elements effect.²⁹⁶ For example, an individual cannot be convicted under § 2250 unless he was first a sex offender required to register under SORNA, and to determine whether a defendant fits SORNA’s definition of a “sex offender,” one must consult another provision of the AWA, 34 U.S.C. § 20911, which defines a “sex offender” and the separate tiers of sex offenders for the purposes of SORNA’s registration requirements.²⁹⁷ Therefore, because § 2250(a) was enacted as Section 141(a)(1) of the AWA and is clearly part and parcel of a larger statutory scheme, it should be considered in light of the entirety of the AWA.²⁹⁸

To reiterate, the Supreme Court’s decision in *Smith v. Doe* is *not* controlling on the issue of whether this statutory scheme is punitive. First, *Smith* was only concerned with Alaska’s sex offender registry, not a national registration system like SORNA, and it came down three years before the AWA’s enactment.²⁹⁹ But more importantly, the *Smith* court only addressed the issue of whether the law’s *registration requirements* were punitive, specifically with respect to individuals whose sex offenses occurred before its enactment.³⁰⁰ It did not address whether *prosecuting someone* for failing to register under such

294. See Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 392 (2009).

295. See Adam Walsh Child Protection and Safety Act of 2006 (AWA), Pub. L. 109–248, § 141(a)(1), 120 Stat. 587, 602 (2006).

296. An individual will violate 18 U.S.C. § 2250 if he meets three elements: (1) he is required to register as a sex offender under SORNA; (2) he travels across state lines or in foreign commerce “or enters or leaves, or resides in, Indian country”; and (3) after doing so, he knowingly fails to register or update his sex offender registration. 18 U.S.C. § 2250(a)(1)–(3); see also Kane, *supra* note 14, at 49.

297. See generally 34 U.S.C. § 20911 (2017).

298. See AWA, §141(a), 120 Stat. at 602. This is an important point to make because, were 18 U.S.C. § 2250(a) to be analyzed standing alone, it would unquestionably be punitive in both intent and effect. Because that statute imposes the penalty of imprisonment upon anyone convicted of violating it and because it is situated in the U.S. criminal code, it is punitive on its face. See Yung, *supra* note 294, at 392–96 (arguing, contrary to my point, that § 2250(a) should be analyzed alone for punitive intent and effect); see also *Smith v. Doe*, 538 U.S. 84, 92 (2003) (“If the intention . . . was to impose punishment, that ends the inquiry.”).

299. See *Smith*, 538 U.S. at 89.

300. *Id.* at 92.

a law was punitive—in fact, the Court expressly said that it was *not* addressing that issue.³⁰¹ Therefore, we must apply the intent-effects test to determine whether prosecuting someone for failing to comply with SORNA’s registration requirements constitutes punishment and thus triggers Sixth Amendment protections for the defendant.³⁰²

In terms of the statutory scheme itself, Congress stated, in the law’s “Declaration of purpose,” that it created “a comprehensive national system for the registration of [sex] offenders” “[i]n order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators.”³⁰³ That purpose resembles the purpose of the law analyzed by the Supreme Court in *Smith*, which also involved “protecting the public from sex offenders.”³⁰⁴ And like the law at issue in *Smith*, the AWA established a registration system to further its stated purpose of protecting the public.³⁰⁵ Furthermore, like the AWA, the Alaska law in *Smith* had some of its provisions contained within the state’s criminal code, but the Court concluded that that did not “support a conclusion that the legislative intent was punitive.”³⁰⁶ It follows, then, that Congress’s intent behind enacting the AWA cannot be punitive simply because it placed provisions such as § 2250(a) in the U.S. criminal code. As a result, it appears that Congress intended the AWA to be regulatory rather than punitive, but that does not end the inquiry; we must next consider whether the AWA, although regulatory in intent, is punitive in effect.³⁰⁷

If one were examining simply the registration requirement imposed upon sex offenders by the AWA through SORNA, then one might reach a similar conclusion as the Court did in *Smith v. Doe*. But if a statutory scheme operates to prosecute someone for a federal crime and sentences them to imprisonment, it looks significantly more criminal in nature than civil. Three of the *Mendoza-Martinez* factors clearly illustrate this.

301. *See id.* at 101–02 (noting that although “[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, . . . any prosecution is a proceeding separate from the individual’s original offense. Whether other constitutional objections can be raised, and how those questions might be resolved, are concerns beyond the scope of this opinion.”).

302. *See French, supra* note 272, at 168–71.

303. 34 U.S.C. § 20901 (2017).

304. *Smith*, 538 U.S. at 93 (quoting 1994 ALASKA SESS. LAWS ch. 41, § 1).

305. 34 U.S.C. § 20901 (stating that “[i]n order to protect the public from sex offenders and offenders against children,” Congress “establishe[d] a comprehensive national system for the registration of those offenders”).

306. *Smith*, 538 U.S. at 95.

307. *See id.* at 92.

First, the AWA imposes an affirmative disability or restraint upon sex offenders when it imprisons them for failing to comply with its registration requirements. As the Court noted in *Smith*, when analyzing whether a law imposes an affirmative disability or restraint one looks to “how the effects of the [law] are felt by those subject to it,” and further, it stated that “the punishment of imprisonment . . . is the paradigmatic affirmative disability or restraint.”³⁰⁸ And if a sex offender is convicted under § 2250(a) of failing to register under SORNA, then he faces at minimum one year³⁰⁹ and up to ten years imprisonment.³¹⁰ So thus far, this law looks like it imposes an affirmative disability or restraint when sex offenders are criminally prosecuted for failing to comply with it.

But on top of imprisonment, sex offenders undoubtedly face other affirmative disabilities or restraints due to their status. While the Court in *Smith* found that there was “no evidence that the [Alaska law] has led to substantial occupational or housing disadvantages for former sex offenders that would not otherwise have occurred,”³¹¹ there today exists plenty of evidence that sex offenders experience high rates of homelessness, housing instability, and problems finding employment as a collateral consequence of being a registered sex offender.³¹² Furthermore, registered sex offenders often are at increased risk of being targeted by vigilantism once their community is notified of their registration status.³¹³ Although the Court in *Smith* argued that the consequences

308. *Id.* at 99–100.

309. 34 U.S.C. § 20913(e).

310. 18 U.S.C. § 2250 (2016).

311. *Smith*, 538 U.S. at 100.

312. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1810–12 (2012); French, *supra* note 272, at 169–70; Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 350–55 (2007); Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 17–22 (2006); Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 222 (2015); Mary Helen McNeal & Patricia Warth, *Barred Forever: Seniors, Housing, and Sex Offense Registration*, 22 KAN. J.L. & PUB. POL’Y 317, 320 (2013); Stephanie N. K. Robbins, Comment, *Homelessness Among Sex Offenders: A Case for Restricted Sex Offender Registration and Notification*, 20 TEMP. POL. & CIV. RTS. L. REV. 205, 222 (2010); Richard Tewskbury & Matthew B. Lees, *Sex Offenders on Campus: University-Based Sex Offender Registries and the Collateral Consequences of Registration*, 70 FED. PROBATION 50, 54 (2006).

313. See Alex B. Eyssen, Comment, *Does Community Notification for Sex Offenders Violate the Eight Amendment’s Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from Megan’s Law*, 33 ST. MARY’S L. J. 101, 103–05, 115–17 (2001); Lara Geer Farley,

such as these stem “from the fact of conviction” rather than that law’s “registration and dissemination provisions,”³¹⁴ it is clear that registration itself at least magnifies some of these difficulties.³¹⁵ Thus, even without being imprisoned for failing to register, sex offenders face many negative collateral consequences as a result of the AWA’s requirements. Overall, however, when the AWA operates through § 2250(a) to imprison a sex offender for up to ten years for his non-compliance with SORNA, it clearly constitutes an affirmative disability or restraint.

Second, the sanction imposed on sex offenders who run afoul of SORNA’s registration requirements has historically been regarded as punishment. As noted in *Smith*, “a State that decides to punish an individual is likely to select a means deemed punitive in our tradition.”³¹⁶ The means selected by Congress when enforcing the AWA’s requirements against sex offenders is imprisonment, a sanction that our history and traditions have long considered punishment.³¹⁷ As a result, when the AWA’s provisions result in the imprisonment of a sex offender who failed to comply with SORNA’s requirements, it is punishing that sex offender by traditional means of punishment.

Third, the sanction imposed promotes the traditional aims of punishment—retribution and deterrence. Unlike in *Smith*, where the Court found that deterrence was merely a byproduct of the registration requirement at issue rather than its focus, retribution and deterrence are clearly the purpose behind the penalties attached to the AWA for a sex offender’s failure to comply with SORNA. A key purpose behind Congress’s creation of the failure to register crime in § 2250(a) was its concern over the risk posed by transient sex

Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 493 (2008); French, *supra* note 272, at 170; Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J.L. & POL’Y 313, 352 (2008).

314. *Smith*, 538 U.S. at 101.

315. See, e.g., Farley, *supra* note 313, at 491–94 (noting that the AWA’s registration requirements lead to sex offenders having difficulties finding housing and employment, and the community notification requirements results in offenders receiving threats, having their homes vandalized, being ostracized from their communities, and facing harassment and violence. All of this can lead to sex offenders becoming homeless and transient, which may result in them failing to update their registration on time.).

316. *Smith*, 538 U.S. at 97.

317. *Mackin v. United States*, 117 U.S. 348, 352 (1886) (“[W]e cannot doubt that at the present day imprisonment . . . is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the [s]tates and [t]erritories, as well as of Congress.”); Yung, *supra* note 294, at 397 (“In reviewing § 2250(a), . . . a court should recognize the rather obvious point that a sentence of up to ten years in prison is historically, traditionally, and currently regarded as punishment.”).

offenders, who could move freely from a state where they might be required to register to another with less stringent (or non-existent) registration requirements.³¹⁸ Congress thus sought to *deter* this practice by punishing those sex offenders who engaged in it with imprisonment.³¹⁹ Furthermore, the prison sentence an individual sex offender faces for a violation of § 2250(a) depends upon his tier classification, which is retributive in that it takes into account his prior sex offense(s) in sentencing them.³²⁰ And the sex offender's tier classification will merely constitute his base offense level under the Federal Sentencing Guidelines³²¹—he can have his sentence enhanced based on additional retributive sentencing factors such as his criminal history category.³²² As a result, enforcing the failure to register provision of the AWA against a sex offender promotes both deterrence and retribution.

These three *Mendoza-Martinez* factors clearly indicate that while Congress may have intended to create a regulatory statutory scheme when it enacted the AWA, the law is effectively punitive when it is used to prosecute and imprison non-compliant sex offenders. Therefore, sex offenders should be afforded Sixth Amendment protections when being prosecuted and sentenced to imprisonment under § 2250(a). What's more, different tiered sex offenders face different maximum penalties, with the maximum penalty increasing for each tier a sex offender moves up.³²³ This all suggests that courts, when determining sex offender tier levels for sentencing purposes, should refrain from making their determinations based any facts that have not been found by a jury or admitted by the defendant.³²⁴ As a result, Sixth Amendment concerns lean in favor of requiring courts to apply a categorical approach, rather than a

318. See *supra* Section V.A.

319. See 18 U.S.C. § 2250 (2016).

320. See *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”).

321. See U.S.S.G. § 2A3.5 (2016).

322. See *id.* § 4A1.1.

323. See *id.* § 2A3.5(a)(1)–(3). Recall that when considering base offense levels alone, a tier I sex offender faces a maximum of 16 months' imprisonment, a tier II sex offender faces a maximum of 21 months, and a tier III sex offender faces a maximum of 27 months. 34 U.S.C. § 20915(a)(1)–(3) (2016). Thus, the finding that a defendant is tier II or tier III sex offender, as opposed to a tier I sex offender, “indisputably increases the maximum penalty.” See *Descamps v. United States*, 570 U.S. 254, 269 (2013) (noting that such a finding “would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction”).

324. See *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

circumstance-specific approach, when a court is sentencing a sex offender to imprisonment for a violation of § 2250(a).

D. Courts Should Apply a Restricted, Circumstance-Specific Approach in SORNA Cases

Of the three factors examined above, the one that most strongly favors a circumstance-specific approach is Congress's intent in enacting the law, as evidenced by SORNA's text, structure, and legislative history.³²⁵ The practical concerns with the circumstance-specific approach, however, favor a categorical approach, which promotes judicial efficiency by limiting the time and resources sentencing courts expend on examining documents for missing facts.³²⁶ And generally speaking, employing a circumstance-specific approach to find facts that will ostensibly affect a sex offender's ultimate sentence by slotting them into a particular tier raises Sixth Amendment concerns, which counsels against the use of such an approach in that scenario.³²⁷

To address this divide, courts should employ a novel approach, a "restricted circumstance-specific approach." This approach would allow sentencing courts to examine certain facts underlying a defendant's prior offense of conviction but in a way that respects the defendant's Sixth Amendment rights and acknowledges the practical difficulties with requiring sentencing courts to engage in unrestricted fact-finding.

In other words, even though two of the three factors examined here favor a categorical approach (or at least lean against an unrestricted circumstance-specific approach), sentencing courts should *not* be required to employ a strict categorical approach when determining a sex offender's tier classification. Doing so would run counter to Congress's clear intent that sex offenders who committed crimes against minors face more stringent requirements under SORNA and more severe penalties when they violate these requirements.³²⁸ This intent is evidenced both in Congress's declaration of purpose that it sought, through this law, to protect the public, and minors especially, from sex offenders,³²⁹ and in its use of fact-specific language in distinguishing what crimes fall under what tier of sex offenses.³³⁰ From the language it employed in SORNA, Congress clearly intended to subject sex offenders whose criminal

325. *See supra* Section V.A.

326. *See supra* Section V.B.

327. *See supra* Section V.C.

328. *See supra* Section V.A.

329. 34 U.S.C. § 20901 (2017).

330. *See supra* Section V.A.

history involved certain conduct committed against minors to higher scrutiny under this law, and it illustrated this intent by differentiating sex offenders tiers by reference to underlying facts such as their victims' age.³³¹

What's more, the Supreme Court's jurisprudence expressly allows a criminal defendant's maximum penalty to be increased based on facts admitted by the defendant.³³² Such facts, if they exist, can likely be found in any *Shepard* documents available from the prior conviction, such as a plea agreement, a plea colloquy, or "some comparable judicial record of this information."³³³

But an issue crops up here—these documents can generally only be consulted under the modified categorical approach, i.e., for the purpose of determining which of several "crimes" listed in a divisible statute the defendant actually committed.³³⁴ At the same time, however, the Supreme Court came to that conclusion in the context of ACCA after analyzing the same three factors addressed in this Section—the statute at issue's text and legislative history, practical concerns with employing a circumstance-specific approach, and Sixth Amendment issues raised by the circumstance-specific approach.³³⁵ Importantly, the statutory text and legislative history of ACCA is not the same as that of SORNA. The Court even contrasted ACCA's text with that other statutes where Congress had indicated its intent "to increase a sentence based on the facts of a prior offense."³³⁶ SORNA is just that sort of statute, where Congress clearly sought to slot sex offenders into certain tiers—each with its own sentencing consequences—based on facts such as whether the offenders' victims were under the age of thirteen or whether offenders' crimes involved any conduct that was by its nature a sex offense against the minor.³³⁷ Unlike with ACCA, where Congress used language which suggested that it "intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories,"³³⁸ Congress used language in drafting SORNA that suggests it wanted courts to consider certain

331. *See supra* Section V.A.

332. *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004).

333. *Shepard v. United States*, 544 U.S. 13, 26 (2005); *see supra* Section III.B.

334. *Descamps v. United States*, 570 U.S. 254, 263–64 (2013).

335. *Id.* at 267.

336. *Id.* at 267–68 (citing *Nijhawan v. Holder* 557 U.S. 29, 36 (2009)) ("If Congress had wanted to increase a sentence based on the facts of the prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way.").

337. *See supra* Section V.A.

338. *Taylor v. United States*, 495 U.S. 575, 600 (1990).

facts underlying prior convictions when determining sex offender tier classifications and subjecting those sex offenders to the sentencing consequences of their respective tiers.

All the same, because the Sixth Amendment demands that courts cannot consider facts other than those found by a jury or admitted by the defendant when sentencing a sex offender under § 2250(a),³³⁹ sentencing courts should be restricted in what documents they may examine for making tier determinations. Unlike in the immigration context, sentencing courts here should not be permitted to examine documents such as police reports, pre-sentencing reports, and affidavits when trying to discover whether a sex offender's victim was under the age of thirteen, for example. Instead, they should be required to examine more reliable *Shepard* documents to try to find these facts. If, for instance, a sex offender admitted in a plea deal or plea colloquy that his victim was twelve-years-old, then that is a factual admission within the bounds of the Sixth Amendment,³⁴⁰ and a sentencing court should be permitted to use that admission to declare the defendant a tier III sex offender and sentence them accordingly. This unique, restricted circumstance-specific approach will thus give effect to Congress's intent, as expressed through the statutory text and legislative history of SORNA, while at the same time respecting a defendant's rights under the Sixth Amendment that no facts other than that of a prior conviction or those admitted by them will be used to increase the maximum penalty he would otherwise face for failing to comply with SORNA's requirements.

VI. CONCLUSION

Congress created SORNA to establish a national sex offender registration and notification system in the hopes that such a system would protect the public, and children in particular, from sex offenders.³⁴¹ While courts should generally employ a categorical approach when engaging in statutory comparison, Congress's use of fact-specific and conduct-focused language throughout SORNA indicates its intent that, for the purposes of determining a sex offender's tier classification and sentencing them based on that classification, courts should employ a circumstance-specific approach that will allow them to examine the conduct underlying the sex offender's prior conviction.³⁴² Without such an approach, courts in many cases would not be able to examine such facts

339. *See supra* Section V.C.

340. *See* *Blakey v. Washington*, 542 U.S. 296, 303–04 (2004).

341. *See supra* Section V.A.

342. *See supra* Section V.A.

as the victim's age or whether the underlying offense involved "any conduct that by its nature is a sex offense against a minor."³⁴³ This may result in someone who would otherwise be classified as an upper tier sex offender to instead be classified as a tier I offender or, worse, not subject to SORNA's registration requirements at all.³⁴⁴ This result would be counter to Congress's intention that the law cover "as many offenders against children as possible."³⁴⁵

At the same time, prosecuting a sex offender in federal court under § 2250(a) for failing to comply with SORNA's registration requirements clearly constitutes punishment, and such a prosecution would therefore trigger Sixth Amendment protections for the defendant sex offender.³⁴⁶ A sentencing court, therefore, should not be allowed to engage in an unrestricted fact-finding effort to determine which tier properly fits the conduct underlying the defendant's prior offense.³⁴⁷ Rather, if the statutory language at issue suggests to a court that it may look beyond the bare elements of the prior offense to the conduct underlying that offense, Sixth Amendment concerns suggest that the court should look no further than those facts admitted by the defendant in the prior proceeding.³⁴⁸ This new approach, a *restricted circumstance-specific approach*, would thus serve to both acknowledge Congress's intent behind the law and uphold the Sixth Amendment rights that all criminal defendants are guaranteed.

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343. *See supra* Section IV.B.

344. *See supra* Section IV.B.

345. *See supra* Section V.A.

346. *See supra* Section V.C.

347. *See supra* Section V.D.

348. *See supra* Section V.D.

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