No. 18-3529

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RICHARD WALKER,

Defendant-Appellant.

Appeal From The United States District Court
For The Eastern District of Wisconsin,
Case No. 17-CR-184
The Honorable Judge Pamela Pepper Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT, RICHARD WALKER

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DISLCOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1 (7th Cir.), counsel informs the Court that only Federal Defender Services of Eastern Wisconsin, Inc., appeared for the defendant-appellant Richard Walker, who is a natural person, in the district court. On appeal, Ronnie V. Murray, Federal Defender Services of Eastern Wisconsin, Inc., 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4500, represents Richard Walker in this Court.

Dated: February 7, 2019

s/ Ronnie V. Murray
Ronnie V. Murray

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JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Wisconsin had jurisdiction to hear this federal criminal case under 18 U.S.C. § 3231. This Court enjoys jurisdiction on appeal. 28 U.S.C. § 1291; Fed. R. App. P. 4(b). The appeal challenges the district court's judgment, which that court entered on November 19, 2018. After sentencing, Richard Walker filed no motion for a new trial or alteration of the judgment, nor any other motion that tolled the time within which to appeal. He filed a timely notice of appeal on November 28, 2018. No parties or issues remain before the district court.

STATEMENT OF THE ISSUES

This case presents two issues:

1. The categorical approach is used to determine a sex offender's tier classification under SORNA. Here, the district court applied a circumstance-specific "exception" to the categorical approach to make a factual finding, and on that basis concluded that Walker was in tier III. May courts look beyond statutory requirements to determine an offender's tier level?

2. Congress created separate statutes that distinguish between sexual assault victims who are 1) minors, and 2) incapable of appraising the nature of sexual conduct, regardless of age. The district court held that minors under 15 are categorically incapable of appraising the nature of sexual conduct, and on that basis concluded that Walker's conviction was comparable to a tier II offense. Are minors categorically incapable of appraising the nature of sexual conduct?

STATEMENT OF THE CASE

Introduction

The Sex Offender Registration and Notification Act (SORNA) categorizes sex offenders into three tiers (I, II and III) based on the type of prior conviction sustained. 34 U.S.C. § 20911. A sex offender's tier classification determines both the length of his federal registry requirement (34 U.S.C. § 20915(a)), and his sentencing guideline base offense level (U.S.S.G. §2A3.5(a)). This case involves determining Walker's tier level for both purposes. This is a question of law, which this Court reviews de novo. *See, e.g., United States v. Lockett*, 782 F.3d 349, 352 (7th Cir. 2015) (de novo review of categorical analysis of ACCA predicate).

Background

In 1998, Richard Walker pleaded guilty to sexual assault of a child under Colorado law (C.R.S.A. § 18-3-405(1) (1990)), which prohibited sexual contact with a minor under 15 years old, provided the offender was at least four years older than the victim. Ex. A at 7. He was sentenced to four years of probation, which was later revoked, and he received a four-year prison sentence. *Id*.

On October 24, 2017, Walker was indicted with failing to register in the Eastern District of Wisconsin from June 16, 2016 to July 31, 2017. R. 1. Before trial, Walker moved to dismiss his indictment on the grounds that, as a tier I offender, his 15-year registry requirement had expired before the indicted time frame, and the indictment therefore failed to state a crime. R. 11. Walker argued that the categorical approach determines tier

level, and under that analysis Walker's offense was not comparable to the offenses enumerated in tiers II and III because his statute of conviction encompassed conduct that the tier II and III offenses did not. *Id*. Accordingly, Walker argued that he is a tier I offender whose registration period had expired. *Id*.

The district court denied that motion, concluding that Walker is at least a tier II offender whose 25-year registry requirement remains active. R. 34. The court found that Walker's child sexual contact conviction was categorically comparable to 18 U.S.C. § 2244(a)(2), which, by reference to § 2242(1)(A), proscribes sexual contact with a victim incapable of appraising the nature of the conduct (regardless of age). *Id*. The district court found that since Walker's conviction required a victim under the age of 15, and since (the district court assumed) minors are categorically incapable of appraising the nature of sexual conduct, his conviction is a categorical match with § 2244(a)(2). *Id*.

On, July 24, 2018, Walker entered a conditional guilty plea under Rule 11(a)(2) of the Federal Rules of Criminal Procedure, preserving his right to challenge the district court's denial of his pretrial motion to dismiss. R. 35 at ¶29.

At sentencing, Walker objected to the presentence report's finding that he was a tier III offender with a base offense level of 16. (R. 39; Sent. Tr. 8-14). Walker reiterated those arguments made in support of his motion to dismiss, arguing that, under the categorical approach, Walker was a tier I offender. *Id*. The district court overruled Walker's objection and adopted the PSR's tier III classification, relying on the alleged ages of victims identified in Walker's 1997 arrest warrant affidavit, instead of focusing solely

on the elements of Walker's statute of conviction. (Sent. Tr. 8-14). On November 1, 2018, the district court sentenced Walker to 26 months in prison, followed by five years of supervised release. R. 45. He now appeals.

SUMMARY OF ARGUMENT

It is well-settled that the categorical approach must be employed to determine a sex offender's tier classification. Under a purely categorical approach, Walker is a tier I offender because his statute of conviction criminalizes conduct that the enumerated offenses in tiers II and III do not.

The district court erred in finding that Walker is a tier III offender with a base offense level of 16 because the court went beyond the categorical approach to make a factual finding, relying on allegations contained in a 21-year-old charging document, as opposed to limiting the inquiry to Walker's statute of conviction and what it required. This so-called circumstance-specific "exception" to the categorical approach is incompatible with Supreme Court precedent, which compels a purely categorical analysis of predicate convictions. The district court's factual finding improperly usurped the function of the jury and wrongfully deprived Walker of the benefit of his negotiated plea deal. The out-of-circuit cases relied upon to create an "exception" to the categorical approach misapply Supreme Court precedent, are not binding on this Court, and their reasoning should be rejected.

Likewise, the district court's conclusion that Walker is at least a tier II offender also warrants reversal, because this finding rested on the erroneous assumption that minors under 15 are included within the category of those incapable of appraising the nature of sexual conduct, as opposed to a distinct class of victims. This assumption is unfounded, is contrary to congressional intent, and finds no support in case law.

Since Walker is a tier I offender, his conviction must be vacated because his indictment failed to state a crime. Alternatively, if Walker is a tier II offender, his case must be remanded for resentencing.

ARGUMENT

I. The categorical approach determines tier level

In *United States v. Taylor,* the Seventh Circuit recognized that the categorical approach is used to determine a sex offender's tier level under SORNA. 644 F.3d 573, 576 (7th Cir. 2011); *see also United States v. Morales*, 801 F.3d 1, 5-6 (1st Cir. 2015); *United States v. Cabrera-Guitierrez*, 756 F.3d 1125, 1133-34 (9th Cir. 2014).

Under the categorical approach, courts examine the offender's statute of conviction and compare it to a federally-defined crime. *Taylor*, 644 F.3d at 575-77. In doing so, the reviewing court "presumes that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, before determining whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91, citing *Johnson v. United States*, 559 U.S. 133, 137 (2010). The predicate offense is a categorical match only if a conviction of that offense "'necessarily' involved ... facts equating to [the] generic [federal offense]." *Moncrieffe*, 569 U.S. at 190. A defendant's underlying conduct is irrelevant.

In *Morales*, the First Circuit explained why the categorical approach, as laid out by the Supreme Court in the ACCA context, must be applied to SORNA tier determination. First, SORNA, like the ACCA, "mandate[s] a comparison of a predicate state offense with the federal law" in order to enhance a sentence. *Morales*, 801 F.3d at 5; s*ee also Taylor v. United States*, 495 U.S. 575, 602 (1990); *Descamps v. United States*, 570 U.S. 254, 260-265 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). *Morales* found that the use of

the word "offense" implores a categorical approach in this context. *Id*. at 5-6. Second, the Supreme Court also "was concerned that fact-finding on the predicate offense could run afoul of the Sixth Amendment right to a jury trial." *Id*. at 5. Finally, the categorical approach avoids the need to hold "collateral trials about the factual grounding of the predicate offense," which would often be tedious and time-consuming, and which could deprive a defendant of the benefit of his or her negotiated plea bargain. *Id*. at 6. Consequently, the constitution mandates a categorical approach when analyzing predicate statutes for SORNA tier determination.

II. Under the Categorical approach, Walker is a tier I offender

In 1998, Walker pleaded guilty in Colorado to sexual assault on a child, which at the time provided:

> Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

C.R.S.A. § 18-3-405(1) (1990 Main Volume). Importantly, ignorance of the victim's age was not a defense to this charge:

> If the criminality of conduct depends on a child's being below the age of fifteen, it shall be no defense that the defendant did not know the child's age or that he reasonably believed the child to be fifteen years of age or older.

C.R.S.A. § 18-3-406(2) (1990 Main Volume). This means that even if a defendant reasonably believes his victim is 15 or older, he will still be convicted under that statute—his reasonable belief is not a defense. *People v. Hastings*, 983 P.2d 78, 81 (Colo. App. 1998).

As will be discussed below, Walker is a tier I offender because this Colorado statute is not a categorical match to any of the tier III or tier II federal comparables.

A. Walker is not in tier III because his conviction required neither a sexual act nor a victim younger than 13

Tier III prerequisites are found in 34 U.S.C. § 20911(4). Summarized, tier III categorization requires that the predicate conviction is comparable to federal offenses requiring a sexual act under various circumstances, or alternatively, sexual contact with a victim younger than 13 years old. *Id*.

A categorical analysis quickly disposes of Tier III categorization for Walker because his Colorado conviction did not require a sexual act (merely sexual *contact*), nor did it require a victim under 13. This means that the Colorado statute encompasses conduct not covered in tier III classification. For example, sexual contact with a 14-year-old would violate the Colorado statute (provided the offender was more than four years older), but would not satisfy 34 U.S.C. § 20911(4)(A)(ii) because the victim had attained the age of 13. This means that Walker's Colorado conviction is not categorically a tier III offense because the statute sweeps more broadly than the federally-defined comparables.

Again, the categorical approach focuses solely on the statute's requirements. The underlying facts are entirely irrelevant in this inquiry.

B. Walker is not in tier II because his conviction is not categorically comparable to the federal crime requiring a victim who is incapable of appraising the nature of sexual conduct, regardless of age

Tier II requirements are found in 34 U.S.C. § 20911(3). The district court, in denying Walker's pretrial motion to dismiss, found that Walker's conviction was at least a tier II offense under 34 U.S.C. § 20911(3)(A)(iv), because it is a categorical match to 18 U.S.C. § 2244(a)(2), which, by reference to 18 U.S.C. § 2242(2)(A), criminalizes sexual contact with persons "incapable of appraising the nature of the conduct."[1] This finding was error because minors are a distinct class of victims, as opposed to a subset of those incapable of appraising sexual conduct.

1. Minors under 15 are not categorically incapable of appraising the nature of sexual conduct

The district court assumed that the category of those incapable of appraising the nature of sexual conduct necessarily includes all minors under 15. But this assumption is tenuous at best. It is not unreasonable or far-fetched to presume that there are minors under 15 who are capable of appreciating the nature of sexual conduct.

In addition, a review of the statutes suggests that Congress meant that the inability to appraise the nature of sexual conduct under § 2242(2)(A) was by virtue of cognitive limitation, not infancy. After all, Congress enacted several other statutes

[1] While finding that Walker's conviction was a categorical match to § 2244(a)(2), the district court also found that Walker's conviction was not a categorical match to § 2244(a)(3), though on different grounds than Walker originally argued. Walker is not challenging the latter finding, though he argued to the district court that the strict liability feature of Walker's conviction also rendered it categorically incomparable to § 2244(a)(3), given the availability of the federal defense of mistake contained in § 2243(c), which is unavailable to Colorado defendants convicted under Walker's statute. The district court did not reach this argument.

dealing specifically with minors, even outlining separate age brackets among them (*e.g.*, under 12 years old (§2241(c)); between the ages of 12-16 (§2243(a)(1)); or simply a minor (§20911(3)(A) ("when committed against a minor")).

It would make little sense, or be redundant, for Congress to designate crimes specific to several different age brackets of children, while also intending that all children (under 15 or otherwise) be included in the category of those incapable of appraising the nature of sexual conduct, regardless of age. Thus, the district court's assumption is incompatible with Congress' express distinction between (and among) minors and those incapable of appraising sexual conduct.

In any event, the undersigned finds no authority or precedent, nor did the district court reference any, for the proposition that minors under 15 are a subset included within the definition of those incapable of appraising sexual conduct. And since Walker's conviction did not require a victim incapable of appraising the nature of sexual conduct, it is not a categorical match to § 2244(a)(2). Walker submits that the district court's assumption is contrary to Congress' intent, and is an error warranting reversal.

III. Looking beyond statutory requirements violates the Sixth Amendment

In finding that Walker is a tier III offender, the district court relied in part on reasoning in two out-of-circuit cases to conclude that a factual inquiry into a victim's age may be made to determine a sex offender's tier level, *United States v. White*, 782 F.3d 1118 (10th Cir. 2015), and *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016). Based upon its factual investigation, the district court concluded that Walker was a tier III offender

under § 20911(4)(A)(ii) because his arrest warrant affidavit alleged victims with ages below 13 years. The court made this factual finding over Walker's objection, and used it to classify him as a tier III offender. But this supplementation of the categorical approach flies in the face of Supreme Court precedent compelling a purely elements-based analysis. Such a "circumstance-specific" inquiry is improper in this context.

A. The Supreme Court compels a purely categorical approach

In *Descamps*, the Supreme Court strongly admonished the Ninth Circuit for doing precisely what *White*, *Berry* and the district court have done: extend judicial fact finding beyond the recognition of a prior conviction, and rely on its own finding about a non-elemental fact to enhance penalties:

> The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment.

Descamps v. United States, 570 U.S. 254, 269–70, 133 S. Ct. 2276, 2288–89, 186 L. Ed. 2d 438 (2013) (internal citations omitted). Justice Kagan's reasoning in *Descamps* is equally applicable in the SORNA context, where prior convictions are used to enhance both an offender's registry duration and his sentencing guidelines. Applying these enhancements based on facts merely alleged, but never submitted to a jury, violates the Sixth Amendment.

B. Factual findings encroach upon the function of the jury

To begin, the district court's factual finding is unreliable because it's based on nothing more than an arrest warrant affidavit submitted by the government. A pre-charging document cannot substitute for the factual basis underlying a defendant's plea. *See*, *e.g.*, *United States v. Hill*, 820 F.3d 1003, 1006 (8th Cir. 2016) (noting hesitation to "give much weight to facts contained in an arrest affidavit").

Such allegations may have supported a probable cause finding, but that's a far cry from accepting them as true without them ever having been admitted, proven or even considered by a jury. Charging documents are not subject to cross-examination. They are hearsay and would be inadmissible at trial. And the witnesses whose statements are contained therein (and whose statements, in this case, the district court relied on) are unlikely to be available 20 years later. We don't know which of the alleged facts were actually true, we don't know what was negotiated by the parties, and we don't know what facts were stipulated to when Walker entered his plea (beyond the statute's requirements). Simply looking at a police officer's affidavit for an arrest warrant doesn't answer any of these questions, and it ignores the realities of on-the-ground trial-level plea bargaining.

C. Judicial fact-finding deprives defendants of the benefit of their plea bargains

Back in 1998, Walker was charged with four separate criminal violations. *See* Ex. A at 1. Although it is impossible to know what happened during plea negotiations 20 years ago, three things are clear: 1) Walker waived his right to a trial by a jury, 2) he

admitted (by plea) to one of those counts, and 3) the remainder were dismissed (read: unproven). In this case, the "circumstance-specific" approach eviscerates any bargain Walker gained by waiving his constitutional right to a jury trial, treating him as though he'd been convicted of something merely alleged, never proven, and never even submitted to a jury.

This is especially inequitable here, as one of Walker's charges that were ultimately dismissed, either as unproven or in exchange for his trial waiver, required that the victim be under 10 years old. *See* C.R.S.A. § 18-6-302 Aggravated incest (1990). It would be improper to now enhance Walker's penalties for unproven or bargained-away charges he was never found guilty of.

Had Walker pled to or been convicted of violating that statute (requiring a victim under ten), then there would be no question that his victim was under 13, as tier III categorization requires. But the "circumstance-specific" approach, as applied in this case, treats mere allegations as proven facts, even when charges based on those allegations have been dismissed, and the defendant has pled to a separate crime with distinct statutory requirements. It renders statutes of conviction meaningless, so long as there's a mere charging document a reviewing court can later draw alleged facts from. Moreover, such an approach fails to differentiate between those who've not been convicted of more aggravated crimes from those who actually have.

In simple terms, it is unfair for a federal judge to later impute facts into the basis of a defendant's state court plea based on what was charged as opposed to what was

actually pled to. *Taylor v. United States*, 495 U.S. 575, 601–02 (1990) (if a guilty plea to a lesser offense was the result of a plea bargain, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to [a greater offense]").

Nor is it acceptable to merely afford defendants "most" of the benefits of their plea bargains, as that rationale has been offered. Whether a plea agreement is undercut wholly or partially does not matter—it violates Due Process either way. Criminal defendants waive substantial rights when they enter pleas, so affording them anything less than the entire benefit of their negotiated plea is unfair and unconstitutional. This is another compelling reason why the Supreme Court has refused to look beyond a predicate statute's requirements to enhance penalties. When discussing the ACCA, for instance, the court reasoned:

> [a circumstance-specific approach] will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. Taylor recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.

Descamps, 570 U.S. at 271 (citations omitted).

Here, the district Court did just that—rewrite Walker's plea bargain. A purely elements-based test doesn't have this problem.

D. Fact-finding of any kind creates a slippery slope

The argument that age is easy to determine, and therefore subject to factual inquiry, is merely a convenient justification leading to the slipperiest of slopes. The relative ease with which a prior fact can be ascertained doesn't erase the Due Process or Sixth Amendment concerns voiced in *Descamps*. The claim that a victim's age is easy to determine is self-serving and irrelevant. Such a rationale could apply to all sorts of facts, and would undermine all the principles behind using the categorical approach.

The Supreme Court made no distinction between facts that are easy or difficult to find when it mandated the categorical approach. And it certainly did not contemplate any "exceptions" for facts that a judge thinks are easier than others to find, but were never found by a jury.

For example, when discussing whether a state burglary crime is categorically comparable to generic burglary, the Supreme Court did not look to the record to determine whether the defendant did in fact break and enter—a fact that may be as easily ascertainable as a victim's age. *Descamps*, 570 U.S. at 277. Instead, the court insisted that the categorical approach precludes *any* factual inquiries. *Id*. at 277 (such a "circumstance-specific review is just what the categorical approach precludes"). This reaffirms that any circumstance-specific "exceptions" to the categorical approach are wholly incompatible. It doesn't matter how easy it is for a judge to find a particular fact. What matters, as far as the Sixth Amendment is concerned, is what a jury would have been required to find. All else is extraneous.

E. Reliance on *Nijhawan* is misplaced

The fact-driven "age-exception" employed by the district court ultimately derives from *Nijhawan v. Holder*, 557 U.S. 29 (2009), which employed a circumstance-specific exception to the categorical approach to determine loss amount in an immigration case. *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015), relied on *Nijhawan* to create an "age-exception" to the widely-accepted categorical analyses to correct what it deemed a potential injustice: the purported under-inclusiveness of 34 U.S.C. § 20911(4)(A)(ii) consequent to a purely categorical analysis. The fear in *White* is that, under a purely categorical approach, there will be defendants convicted under statutes without an age element (or with an age element higher than 13) who won't meet the requirements of tiers II and III, even if their victims were that young. This, *White* concludes, calls for a factual inquiry.

So, *White* found that the categorical approach determines an offender's tier level, with the exception that the court must look to the actual age of the victim. *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016), largely follows *White's* reasoning to conclude the same. The rationale in *White*: since 18 U.S.C § 2244 lacks an age element, to give § 20911(4)(A)(ii) meaning, the court "must consider the specific circumstances to determine the victim's age." *Id*. at 1133. "Otherwise, a comparison based on the categorical approach will never reveal the age of the victim and therefore never constitute this tier III offense." *Id*. *Berry* echoes *White*, concluding that Congress' decision to reference a victim who has not attained the age of 13 "must therefore be read as an

instruction to courts to consider the specific circumstance of a victim's age, rather than simply applying the categorical approach." *Id*. at 197.

But despite *White*'s attempt to support this conclusion with an analysis of § 20911's language, the phrases "when committed against a minor" and "against a minor who has not attained the age of 13" don't permit courts to engage in fact finding. Instead, they add another *element* to the federal crimes referenced: an age requirement.[2] So contrary to *White's* reasoning, SORNA's age qualifiers do not compel a circumstance-specific analysis.

Moreover, the fear in *White* that no one would ever qualify as a tier III offender unless courts engage in victim-age fact-finding is exaggerated. There are countless state statutes with age elements that would necessarily meet § 20911's age requirements, so factual inquiries are not required to "give meaning" to § 20911.[3] That some statutes *don't* require proof that a victim is younger than 13, thereby falling outside of tier III designation, doesn't license courts to ignore the judicially-mandated categorical approach and make evidentiary findings beyond a statute's requirements. Section 20911(4)(A)(ii)'s purported under-inclusiveness consequent to using a purely categorical approach is not grounds to supplement it. Under *White*'s logic, *every* predicate sex offense

[2] To the extent that there is any ambiguity regarding whether the text calls for a factual or categorical inquiry, the rule of lenity tips the scale toward exclusion. *See*, *e.g*, *Moncrieffe v. Holder*, 569 U.S. 184, 205 (2013) (erring on the side of under inclusiveness because ambiguity in criminal statutes must be construed in the noncitizen's favor.)

[3] *See, e.g., United States v. Roebuck*, 2015 WL 13667427 (D.N.M. Jan. 26, 2015) at 5 (government's "age-gap technicality fears are not convincing given the broad wording in SORNA's tier regime").

would require the court to look at the underlying facts to determine the victim's age, unless the statute of conviction contained an element requiring a victim under 13. Such an approach essentially renders statutes of conviction meaningless.

Also troubling is *White*'s reasoning that age is merely a "circumstantial factor" of sexual assault crimes, and therefore subject to post-hoc factual inquiry. This premise is undermined by the fact that many state statutes actually *do* require a victim under 13 as an element of the offense, making a victim's age far more than simply a circumstantial factor, rather an essential component of criminal sexual assault statutes. For this reason, a victim's age is one of those factors that must be found by a jury. Moreover, *White*'s extrapolation of *Nijhawan*'s circumstance-specific inquiry from a civil immigration case into the criminal context goes too far because the government carries a higher burden of proof in the criminal realm. Accordingly, *Nijhawan*'s categorical approach "supplementation" does not belong in the tier determination context.

1. A victim's age is not a "circumstantial factor" subject to fact-finding, it's an essential component of sexual assault crimes

Relying on *Nijhawan*, *White* improperly treats a victim's age in a criminal proceeding like loss amount in a civil proceeding: not as a necessary element of the underlying crime requiring proof beyond a reasonable doubt, but as a circumstantial factor subject to post-conviction inquiry to determine an enhancement's applicability. But this ignores the reality that a victim's age often *is* an element of the underlying crime itself (*see, e.g.*, Colorado statutes above), not simply a circumstantial factor (like loss amount).

And the Supreme Court in *Moncrieffe v. Holder* confirmed that courts must use a purely categorical approach when comparing state convictions to generic or federally-defined crimes. 569 U.S. 184 (2013). SORNA requires that analysis: courts are to compare a state predicate conviction with federally-defined crimes to determine an offender's tier level. This means that tier determination also mandates a purely categorical approach. For this reason, the Supreme Court declined to extend *Nijhawan's* "circumstance-specific" application beyond loss amount in the immigration context. *Moncrieffe*, 569 U.S. at 201-02.

In *Moncrieffe*, the government argued that *Nijhawan*'s circumstance-specific inquiry should be applied to an alien's drug trafficking conviction to determine whether the offense involved a small amount of drugs for no remuneration. *Moncrieffe*, 569 U.S. at 200. The government was again inviting the court to apply another circumstance-specific exception to the categorical approach when analyzing a predicate conviction. But even remaining within the immigration context, the Supreme Court expressly declined the invitation, rejecting the proposed expansion of the circumstance-specific inquiry beyond loss amount:

> We explained in *Nijhawan*, however, that unlike the provision there, "illicit trafficking in a controlled substance" is a "generic crim[e]" to which the categorical approach applies, not a circumstance-specific provision. That distinction is evident in the structure of the INA. The monetary threshold is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved 'in' the commission of the offense of conviction." Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings. But where, as here, the INA

> incorporates other criminal statutes wholesale, we have held it "must refer to generic crimes," to which the categorical approach applies.

Moncrieffe v. Holder, 569 U.S. 184, 201–02, (2013) (internal citations omitted).

Similarly here, § 20911 "incorporates other criminal statutes wholesale," referring to federally-defined, generic crimes and thereby necessitating a categorical approach. Whereas the monetary loss figure in *Nijhawan* was subject to a factual inquiry because it was not a "required component of a generic offense," a victim's age, on the other hand, requires a factual finding by the jury because it's often an *element* of the crime and it's a prerequisite for tier III classification. Applying an "age-exception" to the categorical approach is therefore improper.

2. The circumstance-specific approach in *Nijhawan* is limited to the civil context, where the government's burden is lower than in criminal cases

Perhaps most importantly, *Nijhawan* distinguishes itself and its holding from cases involving criminal statutes like the ACCA (or SORNA): "a deportation proceeding is a civil proceeding in which the government does not have to prove its claim 'beyond a reasonable doubt,'" but merely by clear and convincing evidence. *Id*. at 41-42 (questioning whether the evidentiary limitations in *Taylor v. United States*, 495 U.S. 575 (1990), or *Shepard v. United States*, 544 U.S. 13 (2005), applied to the immigration court). Therefore, the unfairness that the categorical approach seeks to avoid by limiting the inquiry to only those elements requiring proof beyond a reasonable doubt is less pertinent in the immigration setting, where the government carries a lesser burden. The constitutional foundation is different. This is even more reason why this Court should

reject *White's* extension of *Nijhawan's* circumstance-specific inquiry into *Walker's* tier determination.

Even if *Nijhawan's* circumstance-specific exception could be applied elsewhere, it could not apply in criminal matters, because the higher burden of proof in our criminal jurisprudence forbids sentencing enhancements for findings that don't require proof beyond a reasonable doubt. So relying on pretrial charging documents, instead of elements requiring proof beyond a reasonable doubt, undermines the function of the jury and offends the Sixth Amendment.

This wasn't an issue in *Nijhawan* because there is no right to a jury in an immigration case, and the burden is merely clear and convincing evidence. So the Sixth Amendment did not stand in *Nijhawan's* way. But it does here, because this case deals with criminal sentencing enhancement provisions, not civil removal proceedings.

Moreover, decisions employing the age-exception deal with SORNA's civil provisions (*i.e.*, whether an offense was by its nature a sex offense and therefore within SORNA's reach), not determining an offender's tier level (a sentencing provision) once SORNA's applicability has already been decided. *See*, *e.g.*, *Unites States v. Gonzalez-Medina*, 757 f.3d 425 (5th Cir. 2014).[4]

A district court in New Mexico discussed the distinction between SORNA's civil provisions, which may be susceptible to a circumstance-specific inquiry, and its criminal

[4] Other courts still have maintained a purely categorical approach in this context. *United States v. George*, 223 F. Supp. 3d 159, 162 S.D. NY 2016 (categorical approach must be utilized "even if the actual conduct that led to the predicate conviction would otherwise be covered by SORNA").

provisions, which are not. *United States v. Roebuck*, 2015 WL 13667427 (D.N.M. Jan. 26, 2015). In *Roebuck*, the government asked the court to apply a circumstance-specific approach to determine the defendant's tier level. *Id*. at 1. The authority relied upon by the government in *Roebuck* ultimately related back to "situations where a court was considering the civil provisions of [SORNA], namely whether a defendant is required to register as a sex offender," not an offender's tier classification. *See Roebuck*, 2015 WL 13667427 at *2 (referencing *United States v. Gonzalez-Medina*, 757 F.3d 425, 429 (5th Cir. 2014); *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010); *United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008)). Criminal provisions, such as tier classification, however, require a purely categorical approach:

> When applying SORNA's civil provisions, courts reason that the circumstance-specific approach helps effect Congress' broad purposes in enacting SORNA… Given the congressional command, it is understandable that multiple courts have felt compelled to apply a circumstance-specific approach when determining if a defendant is required to register under SORNA. …
>
> The posture of courts sentencing registered sex offenders is different. When a defendant admits to being a sex offender under SORNA, the sentencing court metes a punishment for the failure to update registration, not for the predicate sex offense. In so doing, the court must "impose a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a). Sentencing courts have deferred to the utility of the categorical approach for analyzing a predicate sex offense. *Cabrera-Gutierrez*, 756 F.3d at 1133 (("[W]e follow the categorical approach established in *Taylor v. United States*."). Across a variety of statutes, sentencing courts employ the categorical approach.

Roebuck, 2015 WL 13667427, at *2.

The rationale in those cases was to apply SORNA as broadly as possible to encompass as many offenses as possible. But that rationale is inapplicable here because this is not a question of whether Walker's prior conviction was a sex offense and therefore covered by SORNA (it has been), the question here is: for how long? Maintaining a purely categorical approach here does not allow Walker to "escape" his registry requirement, which courts seemed concerned about—it persisted for 15 years under SORNA.

United States v. Rogers, 804 F.3d 1233, 1236-37 (7th Cir. 2015), is likewise distinguishable from the issue here. *Rogers* addressed whether the exception to the federal "sex offense" definition in 34 U.S.C. § 20911(5)(C) called for a factual inquiry, given its language. *Id*. After acknowledging that a purely categorical approach applies to the definition of "sex offense" given its use of the word "element," the exception, on the other hand, used what the court called "fact-specific" language and called for a factual inquiry. *Id*. at 1237.

But, again, the issue here is not whether Walker's conviction qualifies as a sex offense, nor whether an exception to that definition applies to his conviction. Instead, the question is what tier walker's conviction falls into, which directly enhances the length of his registration requirements and determines his sentencing guideline range.

Because Walker's tier classification determines both his sentencing guideline range and the length of his registry requirement, subjecting him to further criminal penalties for failure to comply, the Sixth Amendment, by way of the Supreme Court in *Descamps, Mathis, Taylor, and Moncrieffe*, compels a purely elements-based test. This is

why *Roebuck* found that "[t]he reasoning of *Descamps* holds true for categorizing underlying offenses under SORNA." *Roebuck*, 2015 WL 13667427, at *3.

Accordingly, applying a purely categorical approach in determining tier classification is the only way to avoid the pitfalls that fact-finding creates, it is consistent with the Supreme Court in *Descamps*, *et al*, and it should be used here.

CONCLUSION

The district court erred in two respects. It was error to find that minors are categorically incapable of appraising the nature of sexual conduct, as that assumption is inconsistent with congressional intent. And second, it was error to look beyond the requirements of Walker's statute of conviction to determine his tier level. Tier determination mandates a categorical approach, and factual inquiries are incompatible with this analysis. For these reasons, Walker's conviction must be vacated.

Dated at Milwaukee, Wisconsin this 7th day of February, 2019.

Respectfully submitted,

Richard Walker, Defendant-Appellant

*s/ **Ronnie V. Murray***
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), counsel for defendant-appellant certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains no more than 14,000 words. Specifically, all portions of the brief other than the disclosure statement, table of contents, table of authorities and certificates of counsel contain 6,202 words.

Dated: February 7, 2019

s/ Ronnie V. Murray
Ronnie V. Murray

Counsel for Defendant-Appellant,
Richard Walker

CIRCUIT RULE 31(E) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format.

s/ Ronnie V. Murray
Ronnie V. Murray

PROOF OF SERVICE

Counsel for defendant-appellant hereby certifies that on today's date a digital version of this brief was delivered via the Court's CM/ECF system to opposing counsel for the government in this action.

Dated: February 7, 2019

s/ Ronnie V. Murray
Ronnie V. Murray

Counsel for Defendant-Appellant,
Richard Walker

CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d) (7th Cir.), counsel for defendant-appellant Richard Walker states that he has bound all of the materials that Circuit Rules 30(a) and (b) require in the separate appendix to this brief.

s/ Ronnie V. Murray
Ronnie V. Murray

INDEX TO SHORT APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

Richard Walker

JUDGMENT IN A CRIMINAL CASE

Case Number: 2017-cr-184-PP
USM Number: 21292-041

Ronnie V. Murray
Defendant's Attorney

Benjamin W. Proctor
Assistant United States Attorney

THE DEFENDANT pled guilty to Count One of the indictment. The court adjudicates him guilty of this offense:

Title & Section	Nature of Offense	Date Concluded	Count(s)
18, U.S.C. §2250(a)	Failure to register as a sex offender	10/27/2017	1

The court sentences the defendant as provided in this judgment. The court imposes the sentence under the Sentencing Reform Act of 1984.

The court ORDERS the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and the United States Attorney of material changes in economic circumstances.

Date Sentence Imposed: November 1, 2018

Hon. Pamela Pepper
Judge, United States District Court

Date Judgment Entered: November 19, 2018

DEFENDANT: Richard Walker
CASE NUMBER: 2017-cr-184-PP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **twenty-six (26) months**.

☒ The court makes the following recommendations to the Bureau of Prisons:
The Bureau of Prisons give the defendant credit for any time served in federal custody prior to the date of sentencing.
The defendant be placed in a facility as close to California as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
with a certified copy of this judgment.

_____
United States Marshal

_____
By: Deputy United States Marshal

DEFENDANT: Richard Walker
CASE NUMBER: 2017-cr-184-PP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons and shall report to the probation officer in a manner and frequency as reasonably directed by the Court or probation officer. The defendant shall not commit another federal, state or local crime. The defendant shall not unlawfully possess a controlled substance and shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
☒ The defendant shall not own, possess, or control a firearm, ammunition, explosive devices, etc.
☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

CONDITIONS OF SUPERVISION

1. The defendant shall not knowingly leave the Eastern District of Wisconsin without permission of the court or his probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer subject to his Fifth Amendment right against self-incrimination and follow the instructions of the probation officer;
4. the defendant shall either participate in job training as directed by his supervising officer, attend school (verified by his supervising officer), or maintain a full-time job. Whether the defendant is working, training, going to school, or some combination of the three, the defendant shall participate in that activity/those activities to the extent that his benefits allow;
5. the defendant shall notify the probation officer at least ten days prior to any change in employment (changing from one job to another, obtaining a new job, or losing a job); When such notification is not possible, the defendant shall notify the probation officer within 72 hours of the change;
6. the defendant shall not reside at any address which has not been approved by the defendant's supervising officer;
7. the defendant shall notify the probation officer at least ten days prior to any change in residence (moving from one address to another); When such notification is not possible, the defendant shall notify the probation officer within 72 hours of the change;

8. the defendant shall not knowingly associate with (socialize with, travel with, reside with or communicate with) any people whom he knows to be engaged in, discussing or planning criminal activity;
9. the defendant shall permit a probation officer to visit him at reasonable times at home or elsewhere, and shall permit the probation officer to confiscate any items that violate the conditions of his supervised release that the officer observes in plain view;
10. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
11. the defendant shall not enter into any agreement to act as an informant or agent of a law enforcement agency without the permission of the court; and,
12. the defendant shall submit to a mental health evaluation and shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation(s) and counseling as approved by his supervising probation officer. The defendant shall pay the cost of such treatment under the guidance and supervision of his supervising probation officer.

DEFENDANT: Richard Walker
CASE NUMBER: 2017-cr-184-PP

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached page.

Total Special Assessment	Total Fine	Total Restitution
$100.00	$0.00	$0.00

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

PAYEE	AMOUNT
TOTAL:	

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ Restitution amount ordered pursuant to plea agreement: $_____.

☐ The defendant must pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that the interest requirement is waived for the ☐ fine ☐ restitution.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: Richard Walker
CASE NUMBER: 2017-cr-184-PP

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $**100.00** due immediately

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ E, or ☐ F below; or

C ☐ Payment in equal monthly installments of not less than $_____ or 10% of the defendant's net earnings, whichever is greater, until paid in full, to commence 30 days after the date of this judgment; or

D ☐ Payment in equal monthly installments of not less than $_____ or 10% of the defendant's net earnings, whichever is greater, until paid in full, to commence 30 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within 30 days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties: _____

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several (Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate): _____

☐ The defendant shall pay the cost of prosecution; or ☐ The defendant shall pay the following court costs:

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs