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

REPLY BRIEF OF DEFENDANT-APPELLANT, RICHARD WALKER

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SUMMARY OF ARGUMENT

The ultimate issue in this case is whether Walker was required to register during the indicted timeframe, not whether he is a sex offender. The length of Walker's registration requirement is a function of his tier category under Title 34 U.S.C. § 20911[1], so to answer this question the Court must determine Walker's tier. Since Walker's tier determines not only his compulsory registration term, but also his sentencing guideline range and punishment for failure to register, it implicates the Sixth Amendment. The Supreme Court has therefore mandated a purely elements-based test for these inquiries.

Broken down, the government's arguments against a purely elements-based test for SORNA tier determination are seemingly twofold:

1) Tier determination under §§ 20911(2)-(4) calls for a circumstance-specific analysis,

or

2) the text calls for a categorical approach, but an exception may be made because it's "easy" to find out the age of an alleged victim, and because not doing so would limit tier III's reach to include only those whose statutes of conviction had the same (or more narrow) age modifier.

Not only are these arguments inconsistent, they rest on totally incompatible rationales. The text of § 20911(4) does not simultaneously call for both a categorical

[1] Throughout this brief Walker will reference Title 34 U.S.C. § 20911, previously Title 42 U.S.C. § 16911.

and factual analysis. Either the categorical approach applies, or it doesn't. If it does, there is no room or Supreme Court precedent for exceptions in criminal cases.

As will be discussed, the text of SORNA's tier classification under §§ 20911(2)-(4) calls for a purely categorical approach. And since the categorical approach applies, there can be no exceptions for facts that were never found by a jury or admitted by a defendant. The rationales offered for looking beyond Walker's statute of conviction are unpersuasive, and do not override the important practical and constitutional considerations the Supreme Court has voiced when implementing a purely elements-based test for penalty enhancement purposes. The district court's failure to employ a purely elements-based test to determine Walker's tier level was error.

Likewise, the district court's unfounded assumption that Congress intended to include minors within the category of those incapable of appraising the nature of sexual conduct was error. The government has offered no authority or precedent for such a finding, and such an inference is inconsistent with Congress' express distinction among the different classes of victims.

Walker's conviction must be vacated because he's a tier I offender whose registration period lapsed before the dates indicted, and his indictment therefore failed to state a crime. Alternatively, if Walker's a tier II offender, his case must be remanded for resentencing because his miscalculated guidelines affected his substantial rights.

ARGUMENT

I. Tier determination requires a purely categorical approach

The government points out that different SORNA provisions call for different means of statutory comparison, and spends substantial time discussing how courts have employed a circumstance-specific approach to provisions of SORNA not at issue in this case: the definition of "sex offense" under §§ 20911(5)(C) and (7)(I). By extrapolation, the government then urges this Court to follow the same approach: "Absent a compelling reason to diverge from the approach adopted by other circuits, the circumstance-specific approach similarly applies here." Appellee brief at 13. But there is a compelling reason to diverge: those cases deal with entirely different statutory provisions, with different purposes, and different language.

The circumstance-specific approach is generally not used to determine tiering.[2] Rather, it is applied to determine whether an individual meets SORNA's definition of "sex offender." As an initial matter, this is an important distinction, because identifying offenders is one thing; enhancing their penalties is another thing entirely and implicates the Sixth Amendment. But aside from the constitutional considerations, the language is different too.

The definition provisions (§§ 20911(5)(C) and (7)(I)), some courts have held, require looking at specific instances of conduct because the text itself directs such an

[2] With the sole exceptions being *United States v. White*, 782 F.3d 1118 (10th Cir. 2015), and *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016).

inquiry: "Offenses involving consensual sexual *conduct*" (§ 20911(5)(C)); "Any *conduct* that by its nature is a sex offense against a minor" (§ 20911(7)(I)) (emphasis added). Use of the word conduct is crucial to the decision to look beyond a statute's requirements.

Tier determination under §§ 20911(2)-(4), on the other hand, refers explicitly, and solely, to "offenses." Notably, the word "conduct" is absent from these provisions. A tier II or III offender is an offender "whose *offense* [not conduct] is punishable by imprisonment for more than one year and—is comparable to or more severe than the following *offenses* [not conduct]…" *Id*. (emphasis and parentheticals added). In other words, the text expressly calls for a comparison of a prior offense to a series of federally-defined offenses. Nowhere do these provisions direct an inquiry into a person's conduct—the text explicitly references offenses. The language is therefore expressly distinct from that in §§ 20911(5)(C) and (7)(I).

Consequently, those cases dealing with §§ 20911(7)(I) or (5)(C) cited as support for a factual inquiry are inapposite to the issue in this appeal—they deal with entirely different provisions, with different language, and they do not involve sentencing enhancements. *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015); *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir. 2008); *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014); *United States v. Morciglio*, 280 F. Supp. 3d 412 (S.D.N.Y. 2017); *United States v. Price*, 777 F.3d 700 (4th Cir. 2015); *Privett v. Sec'y, Dep't of Homeland Sec.*, 865

F.3d 375 (6th Cir. 2017); *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016); *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010). None of these cases apply a circumstance-specific approach to tier determination, and none of them support doing so here.

The only two cases that have done what district court has (apply a circumstance-specific approach in tier determination) are *White* and later *Berry*. Even those cases make clear that the categorical approach must be applied to tier determination. Where they tread into problems is when they created an exception.

But the rationales for creating an exception are not supported. Section 20911(4)(A)(ii) does not call for any factual inquiries. Nor is looking beyond a predicate statute's requirements necessary to "give meaning" to § 20911(4)(A)(ii). And importantly, there is no precedent for exceptions to the categorical approach in criminal cases.

a. Sections 20911(3)-(4)'s directive to compare "offenses" compels a purely elements-based test

In examining the text of § 20911, use of the word "offense" is instructive. § 20911(1) defines a sex offender as an individual who was convicted of a sex offense. Walker doesn't dispute that he is such an individual. All sex offenders, including Walker, are at least tier I. Tiers II and III, on the other hand, are reserved for those offenders whose offenses are comparable to certain generically-defined federal offenses.

To determine whether an offender is tier II or III, §§ 20911(3) and (4) specifically require the Court to compare a defendant's prior offense with specified federal

offenses. The word "offense" has been construed as a directive to reference the elements of a crime. *United States v. Morales*, 801 F.3d 1, 4-5 (1st Cir. 2015), citing *Descamps v. United States*, 570 U.S. 254 (2013). This makes sense, because a conviction is the result of an offense, which is defined by a statute. So §§ 20911(3)-(4)'s use of the word "offense" indicates that a categorical approach is to be employed.

Additional language in §§ 20911(3)-(4) strengthens this conclusion. Most of the offenses listed in §§ 20911(3)-(4) are generically defined by reference to other sections of the Federal Criminal Code. See §§ 20911(3)(A)(i)-(iv) (defining offenses "as described in" other sections of the Criminal Code); §§ 20911(4)(A)(i)-(ii) (same). The Supreme Court has said that a reference to a corresponding section of the criminal code strongly suggests generic intent indicating the categorical approach. See *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (observing that a statute whose sections "refer specifically to an 'offense described in' a particular section of the Federal Criminal Code" invokes a categorical approach).

Upon inspection, the offenses listed in §§ 20911(3)-(4) do not invoke any "conduct" or "specific circumstances." Indeed, the offenses listed in §§ 20911(3)-(4) are generically defined by reference to other sections of the Federal Criminal Code. This is precisely the language identified by the Supreme Court as indicative of generic intent implicating the categorical approach. *Nijhawan*, 557 U.S. at 37.

This generic understanding of the word "offense" mirrors similar sentencing enhancement schemes that use the term "offense." For example, this Court has held

that a strict categorical approach applies to a defendant's prior conviction to determine whether it was for a crime of violence or a controlled substance offense under the career offender guideline, §4B1.1. *United States v. Woods*, 576 F.3d 400, 406 (7th Cir. 2009). Notably, the "convictions" referenced in §4B1.1 are for "offenses," and the Guidelines define a crime of violence or controlled substance crime as certain "offense[s] under federal or state law." The word "offense" therefore connotes a conviction, and directs the inquiry to a statute's elements. The same is true for SORNA's tier determination.

Because SORNA's text reflects Congress' intent to define the tier categories through reference to generic offenses, rather than specific circumstances, this Court should apply the categorical approach to determine an offender's tier level. This much seems well-settled. See, e.g., *United States v. Taylor*, 644 F.3d 573, 576 (7th Cir. 2011) (categorical approach determines tier level). The question now is whether an "exception" for age may be applied.

b. The phrase "against a minor who has not attained the age of 13" is not an invitation to supplement the categorical approach, it's an element added to the offense it modifies

As Walker argued, § 20911(4)(A)(ii)'s age modifier does not indicate that Congress intended courts to make factual inquiries into a victim's age. Instead, the phrase "against a minor who has not attained the age of 13" adds an additional element to the federally-defined offense it modifies. When it created its tiering system, Congress no doubt knew that various states had statutes criminalizing sexual contact

with varying ages of victims. Congress' age-qualifier in § 20911(4)(A)(ii) then was certainly aimed at those convicted under statutes whose age qualifiers were comparable, or under 13. By extension then, those convicted under statutes without the same or more narrow age requirement were not meant to be included.

This is the natural consequence of using the categorical approach: some offenders will not fall into tier III, even if their actual conduct satisfied tier III's requirements. This is no different than in every other domain in which the categorical approach is employed. There will always be those convicted under statutes that might not meet a penalty enhancement's requirements, but whose conduct may. But this has never been an excuse to supplement the categorical approach with factual findings.

Part of *White*'s reasoning for creating an exception was the exaggerated fear that, unless courts engage in victim-age factfinding, no one will ever meet tier III's requirements. *White*, 782 F.3d at 1133 ("a comparison based on the categorical approach will never reveal the age of the victim and therefore never constitute a tier III offense"). This is simply wrong, as Walker pointed out, because there are countless state statutes that have the same or more narrow age modifiers that would necessarily meet § 20911(4)(A)(ii)'s requirements. In fact, Walker was charged with one such offense, but it was dismissed. So *White*'s claim that no one would ever meet tier III's requirements is simply untrue. Either way, *White*'s dissatisfaction with the results that a purely categorical approach would yield is not grounds to create an exception.

Moreover, the result that *White* feared—that without a factual inquiry, tier III classification would be reserved only for those convicted under statutes requiring victims under 13—actually makes perfect sense, because it distinguishes those who have been found guilty of more serious crimes from those who have not. The former would have their penalties enhanced on that basis, including lengthened registration requirements and heightened sentencing guidelines. *White*'s reasoning, on the other hand, would render statutes of conviction meaningless and would require courts to look at *every* sex offender's prior conduct, unless the statute's age qualifier matched (or was more narrow). This is not practical.

Also troubling is *White*'s view that a victim's age is merely a "circumstantial factor" rather than a critical component of the crime, and therefore not required to be found by a jury. Quite the contrary: victim age is a specific element of the crime Walker pled to, as it is with many other sexual assault crimes. It's a critical component—so critical that it's required to be found by a jury. This is why Walker argued that *Nijhawan*'s treatment of monetary loss in a fraud case could not be similarly applied to a victim's age in a sexual assault case. The jury wasn't required to find any particular loss amount, whereas sexual assault statutes require a jury to find a victim's age beyond a reasonable doubt. So a victim's age is far more than merely a circumstantial factor.

Likewise, "the age of the victim is a critical component of the tier system." *Morales*, 801 F.3d at 9. In creating its tier system, Congress appears to have taken great

care to carve out particular age brackets of victims. Congress could have made tier III designation to include those with victims under 15, but it expressly chose 13 as the age under which sexual assault victims would trigger tier III classification. It is not for courts to later supplant Congress' intent and broaden tier III to include those convicted under incomparable statutes.

For the foregoing reasons, the text does not call for a factual inquiry into a victim's age. A sex offender's statute of conviction is all that's needed to give meaning the § 20911(4)(A)(ii)'s age threshold. The fact that some statutes don't require a victim under 13 does not license courts to look beyond the statute of conviction and wade into a decades-old factual dispute. The text of § 20911(4)(A)(ii), like the rest of §§ 20911(2)-(4), calls for an elements-based test.

II. Factual inquiries into predicate convictions for tier determination purposes violate the Sixth Amendment and Supreme Court precedent

Congress may well have, as the government argues, intended to punish defendants with child victims more severely, but that doesn't erase the constitutional requirement that juries (not judges, prosecutors or law enforcement) must find, beyond a reasonable doubt, those facts necessary to enhance that citizen's punishment. The circumstance-specific approach advanced here not only undermines the function of the jury, it unfairly places defendants in the difficult position of having to defend against old allegations that were never proven and did not establish the basis for their plea, and which they therefore had no reason to contest at the time. And

importantly, there is no Supreme Court precedent for any "exceptions" to the categorical approach in criminal cases.

a. Penalty enhancements, like tier determination under § 20911, mandate a purely categorical approach under the Sixth Amendment

Using a prior conviction to enhance a defendant's penalties raises Sixth Amendment concerns. This is what SORNA's tier determination does. Every person identified as a sex offender is at least tier I. But tiers II and III enhance that offender's penalties, both by lengthening the term during which they face criminal prosecution for failure to register, and by boosting their offense level and increasing their sentencing range. Just like the career offender guidelines, this implicates the Sixth Amendment, because citizens are entitled to have juries determine the facts for which one will be punished.

The categorical approach is therefore essential in the context of a sentencing enhancement in order to ensure that a defendant's punishment is not increased on the basis of facts that were not found by a jury. *Descamps*, 133 S. Ct. at 2288. And "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Id*.

Because a strict categorical approach avoids these constitutional concerns, as well as the practical difficulties and potential inequity of a "mini-trial" years after a conviction, this Court should not condone any exceptions to the categorical approach in SORNA tier classification.

b. A defendant is not required, nor is it possible, to prove or disprove the factual basis for a predicate conviction, and it's improper and unfair to shift that burden to him decades later

The government's claim that Walker never disputed the ages of his victims, and therefore the court may adopt the allegations in the charging document as true, is not accurate. Walker never agreed to the contents of the arrest warrant, he objected to its use, and he always maintained that any factual inquiry is improper and therefore does not merit dispute. Moreover, allegations contained in a 20-year-old charging document are not evidence, and it's impossible to know what formed the basis of Walker's plea. The arrest warrant relied upon does not prove anything under any standard, much less beyond a reasonable doubt.

The government's subtle attempt to shift the burden of proof to Walker is troubling. It's not Walker's burden to prove what didn't happen. Moreover, it'd be impractical to try to prove or disprove what happened over 20 years ago. This is precisely the scenario that the categorical approach seeks to avoid. Factual inquiries are unfair to defendants, and they require courts:

> 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 . . . .

Descamps, 133 S.Ct. at 2289. Thus, the elements-based categorical approach avoids the "daunting . . . practical difficulties and potential unfairness" of a facts-based approach. *Id*.

Likewise, the Supreme Court expressed concern over the manifest unfairness of imposing consequences based on unproven factual allegations where the defendant has pleaded guilty to a lesser offense. *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]"). Here, Walker was initially charged with a tier III offense, but that was dismissed and he pled to a lesser crime. Whether the more serious count was dismissed in exchange for his waiver, or because the allegations were simply untrue, doesn't matter—Walker is entitled to the benefit of his plea deal. Again, this is precisely the scenario that the Supreme Court warned against when it implemented the categorical approach.

Of course, the evisceration of Walker's negotiated plea bargain goes unmentioned in the government's response. But a citizen's waiver of important constitutional rights in exchange for a negotiated plea agreement should not be dismissed so casually. If a defendant bargains away certain charges in exchange for waiving his constitutional trial rights, it is simply unfair to attribute to that person conduct that was never proven and never admitted to. And even more unfair would be to attribute facts to him that he was charged with but were ultimately untrue,

which is what this approach risks by making factual findings based on mere hearsay allegations that were never admitted to or found by a jury.

Moreover, determining victim age may not be so simple or discrete. For example, in this case Walker's arrest warrant alleges two different victims, but Walker pled to only one count. Assuming without conceding those allegations, how does a judge later determine which victim to attribute Walker's plea to? It's impossible to know. Here as well, the alleged victims were different ages. Although in this case both are alleged to have been under 13, in other cases, there could be alleged victims above and below the threshold ages. What then? How do courts decide how to apportion those allegations to fit within the conduct pled to? As is apparent, even so-called "limited" factual inquiries will at some point prove problematic and unworkable. These are problems that a purely categorical approach avoids, and more reason why this Court should strictly adhere to it.

c. There is no Supreme Court precedent for "exceptions" to the categorical approach in criminal cases

The Supreme Court has made quite clear, in case after case, that courts should use the categorical approach to determine whether an underlying offense qualifies as a sentencing or statutory enhancement. *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13, 23 (2005); *Descamps v. United States*, 570 U.S. 54 (2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016). In none of these cases does the

Supreme Court contemplate any "exceptions" to the categorical approach, nor do they open the door for such.

What *White* and *Berry* have done is unprecedented in criminal cases, and their supposed authority is ultimately derived from a civil immigration case that expressly distinguished itself from criminal cases for precisely those evidentiary concerns Walker raises. *Nijhawan*, 557 U.S. 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). *White* and *Berry* therefore misapply Supreme Court precedent, and are the only cases known to apply any exceptions to the categorical approach in a criminal matter. This Court should not follow that lead.

III. Walker is a Tier I offender

The government argues that Walker is nonetheless a tier III offender "under a strict categorical approach." Appellee brief at 20-21. In the next breath, the government then asks the Court to apply a *relaxed* categorical approach and ignore clearly-defined age thresholds. According to the government, "under 13" and "under 15" are close enough to be categorical matches, so Walker's offense is comparable to that identified in § 20911(4)(A)(ii).

Alternatively, the government argues that Walker is at least tier II because, as the district court found, minors under 15 are incapable of appraising the nature of sexual conduct. This, they conclude, makes Walker's offense comparable to the tier II offense under 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).

Neither of these arguments withstand scrutiny. Walker's offense is tier I because it is neither comparable to nor more severe than the tier II and III comparables.

a. Walker's statute of conviction is not comparable to statutes with lower or more narrow age requirements

Because age is such a critical component of sexual assault crimes and the tiering system, age thresholds must match in order to be comparable. A crime that requires victims under 13 (like § 20911(4)(A)(ii)) is not comparable to a crime that allows conviction for victims older than 13 (Walker's offense) because they do not encompass the same conduct. As the First Circuit has noted, "a state law simply does not target comparatively grave conduct when it fails to include the same age cut-off." *United States v. Morales*, 801 F.3d 1, 9 (1st Cir. 2015). "Where a distinction exists on such a foundational issue, we cannot consider the two laws comparable." *Id*.

In any event, the government offers no authority or examples of any court finding statutes with different age thresholds comparable.[3] This Court should not do so either.

[3] The government cites one unpublished case in support, *United States v. Forster*, 549 F. App'x 757 (10th Cir. 2013), but even that case employs a purely categorical approach when it analyzed an Ohio statute containing the same age threshold (under 13) as § 20911(4)(A)(ii) (under 13). So, even if that case has any persuasive value, it does not stand for the proposition that statutes with different age requirements are nonetheless comparable—the offenses in question both required a victim under 13.

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

Neither the district court nor the government in its response references any authority for the proposition that minors under 15 are universally or categorically incapable of appraising the nature of sexual conduct. Neither common sense nor Congress supports such a conclusion.

If Congress meant to include minors within the category of those incapable of appraising the nature of sexual of conduct, it would have said so. To give clarity, Congress would have defined those incapable of such appraisal to include minors. But it didn't, and that is telling.

Likewise, the fact that Congress created separate provisions specific to minors and to those incapable of appreciating the nature of sexual conduct indicates that it intended that they be treated as distinct classes of victims. If congress meant minors to be included within that category, then there would be no need to create any sexual assault statutes specific to minors.

Since Walker's conviction did not require a victim incapable of appreciating sexual conduct, his offense is not comparable to those requiring such a victim.

c. If Walker is a tier II offender, remand is necessary because a miscalculation of his guidelines affected his substantial rights

Miscalculating a defendant's sentencing guidelines has been described as "significant procedural error." *Gall v. United States*, 552 U.S. 38, 51 (2007). Even though they are no longer mandatory, the guidelines have been recognized as exerting a

"gravitational pull" on a sentencing court's discretion. *United States v. Rodriguez*, 630 F.3d 39, 43 (1st Cir. 2010). As the government acknowledges, guideline errors affect substantial rights, and typically require vacatur. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349, (2016).

The district court, as it does at every sentencing, begins its deliberations at the guidelines. The guidelines therefore act as the "starting point" from which a sentence is determined. There is no question that this district court relies on the guidelines when it sentences defendants.

Had Walker been categorized in tier II rather than tier III, his guidelines would have been about 10% lower.[4] Since the starting point from which Walker's sentence was determined was wrong, his sentence ultimately was tainted by this miscalculation. This error demands resentencing.

CONCLUSION

As has been discussed, tier determination mandates using a strict categorical approach. Under such an analysis, Walker is a tier I offender because his prior offense was neither comparable to nor more severe than the tier II and III comparables in §§ 20911(3)-(4). This means that Walker's 15-year registration period had expired before the indicted timeframe, and his indictment therefore failed to state a crime.

[4] Walker's tier III designation called for a base offense level of 16. After subtracting three for acceptance, offense level 13 at CHC VI created a range of 33-41 months. Had he been categorized in tier II, at base offense level 14, minus two for acceptance, Walker's guidelines would have been 30-37 months (offense level 12 at CHC VI).

Accordingly, his conviction must be vacated. Alternatively, if Walker is a tier II offender, his case must be remanded for resentencing.

Dated at Milwaukee, Wisconsin, this 20th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(A)(7)

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). Specifically, all portions of the brief other than the disclosure statement, table of contents, table of authorities and certificates of counsel contain 4,572 words.

Dated: May 20, 2019

s/ Ronnie V. Murray
Ronnie V. Murray
Counsel for Defendant-Appellant,
Richard Walker

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: May 20, 2019

s/ Ronnie V. Murray
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