

No.

IN THE SUPREME COURT OF THE UNITED STATES

SILAS PETERSON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHANIE ADRAKTAS
Attorney for Petitioner
2625 Alcatraz Avenue, #233
Berkeley, CA 94705
(415) 699-1507
stephanieadraktas@att.net
CJA Appointed Counsel for Petitioner

Question Presented

In *Descamps v. United States*, 570 U.S. 254 (2013), this Court held that when a federal sentencing statute (the Armed Career Criminal Act) referred to a prior “conviction” district courts should use a categorical analysis to determine if a state conviction is a qualifying offense. Here, the federal sex registration statute, SORNA, refers to “convictions” and offenses involving “conduct that by its nature is a sex offense.” The district court decided that it could use a non-categorical, circumstance specific analysis to determine if the petitioner’s state court conviction subjected him to sex offender registration requirements under SORNA.

The question presented is: did the district court err when it used a circumstance specific analysis to determine that the petitioner’s state conviction subjected him to sex registration requirements under SORNA?

Table of Contents

Question presented	i
Opinions Below	4
Jurisdiction	5
Statutes and Constitutional Provisions Involved	5
Statement of the Case	6
Statement of Facts	6
A. Peterson's state court convictions.....	6
B. The enactment of SORNA and its application to pre-act offenders	7
C. The federal indictment and guilty plea	8
D. Peterson's motion to vacate his conviction.....	9
Reasons for granting the petition	11
This Court should grant certiorari to decide whether the federal district courts should use a categorical or circumstance specific analysis to decide whether state court convictions require federal sex offender registration	11
Argument	16
I. Defense counsel was prejudicially ineffective because she failed to move to dismiss the charge of failure to register as a sex offender on grounds that Peterson was not required to register.....	16
A. Pursuant to 28 U.S.C. § 2255, a court may vacate a conviction on grounds of ineffective assistance of trial counsel during the plea bargaining process	16
B. Trial counsel unreasonably failed to move to dismiss the charge of failing to register as a sex offender because Peterson had not been convicted of an offense that required SORNA registration	17
1. An offender is only required to register under SORNA if he has been convicted of a qualifying sex offense	17
2. Penal Code 288(a) has been construed broadly to include conduct that is	

not a sex offense under SORNA	19
C. The district court erroneously held that Peterson's convictions were sex offenses.....	21
1. The district court should have used a categorical analysis and looked only to the elements of the underlying offenses to determine whether they were sex offenses.....	21
a. The categorical, modified categorical and circumstance-specific methods for comparing state and federal crimes	22
b. The categorical approach is required by SORNA's plain text ..	23
c. The circumstance specific approach is unfair and impractical because it will create uncertainty as to who is required to register under SORNA.....	26
d. The rule of lenity also requires a categorical analysis.....	28
e. The cases cited by the district court do not support its conclusion that that circumstance-specific approach should be used to analyze all elements of a prior offense.....	29
D. Under a straightforward categorical analysis, Peterson's offenses were not sex offenses requiring SORNA registration	31
E. Even under a circumstance-specific analysis, there was insufficient reliable evidence that Peterson was convicted of sex offenses that required SORNA registration	32
1. Peterson did not admit to the charges alleged in the complaint	33
2. The complaint was unreliable because it was not supported by a finding of probable cause and because it could not have been the operative charging instrument at the time of Peterson's guilty plea	35
II. Trial counsel's failure to move to dismiss the charge of failing to register as a sex offender was prejudicially ineffective.....	35
Conclusion	37

TABLE OF AUTHORITIES

CASES

<i>Chickasaw Nation v. United States</i> , 534 U.S. 84 (2001).....	26
<i>Descamps v. United States</i> , 570 U.S. 254 (2013).....	12, 13, 14, 15, 16, 17, 23, 24, 28
<i>Lafler v. Cooper</i> , 566 U.S. 156 (2012).....	18
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004).....	25
<i>Missouri v. Frye</i> , 566 U.S. 134 (2012).....	18
<i>Nijhawan v. Holder</i> , 557 U.S. 29, 129 S.Ct. 2294 (2009).....	24
<i>People v. Campbell</i> , 80 Cal.App.2d 798 (1947)	21
<i>People v. Dontanville</i> , 10 Cal.App.3d 783 (1970)	21
<i>People v. Hobbs</i> , 109 Cal.App.2d 189 (1952).....	21
<i>People v. Martinez</i> , 11 Cal.4th 434 (1995)	20, 21, 32, 33
<i>People v. McCurdy</i> , 60 Cal.App. 499 (1923).....	21
<i>People v. Meacham</i> , 152 Cal.App.3d 142 (1984)	15, 21
<i>People v. Mickle</i> , 54 Cal.3d 140 (1991).....	21
<i>People v. Pitts</i> , 223 Cal.App.3d 606 (1990).....	15, 21
<i>People v. Shockley</i> , 58 Cal.4th 400 (1998).....	20, 21
<i>People v. Wallace</i> , 176 Cal.App.4th 1088 (2009).....	9
<i>People v. Whitman</i> , 38 Cal.App.4th 1282 (1995)	20

<i>United States v. Becker</i> , 682 F.3d 1210 (9th Cir. 2012).....	30
<i>United States v. Byun</i> , 539 F.3d 982 (9th Cir. 2008)	15, 25, 29, 30, 31
<i>United States v. Dailey</i> , 941 F.3d 1183 (9th Cir. 2019).....	29, 30, 31
<i>United States v. Dass</i> , 198 F.3d 1167 (9th Cir. 1999).....	33
<i>United States v. Davis</i> , 139 Southern Ct. 2319 (2019).....	24, 25
<i>United States v. Dodge</i> , 597 F.3d 1347 (11th Cir. 2010).....	14, 15, 31, 32
<i>United States v. Felts</i> , 674 F.3d 599 (6th Cir. 2012).....	12, 13
<i>United States v. Gonzalez-Medina</i> , 757 F.3d 425 (5th Cir. 2014)	16
<i>James v. United States</i> , 550 U.S. 192 (2007).....	32
<i>United States v. Jensen</i> , 93 F.3d 667 (9th Cir.1996).....	18
<i>United States v. Johnson</i> , 576 U.S. 591 (2015).....	32
<i>United States v. Kaplan</i> , 836 F.3d 1199 (9th Cir. 2016).....	33
<i>United States v. Martinez</i> , 756 F.3d 1092 (8th Cir. 2014)	34, 36
<i>United States v. Palomba</i> , 31 F.3d 1456 (9th Cir. 1994)	37
<i>United States v. Rocha-Alvarado</i> , 843 F.3d 802 (9th Cir. 2016)	23
<i>United States v. Schopp</i> , 938 F.3d 1053 (9th Cir. 2019).....	10, 31
<i>United States v. Shabani</i> , 513 U.S. 10 (1994).....	29
<i>United States v. Shumate</i> , 329 F.3d 1026 (9th Cir.2003).....	33
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	14, 23, 24, 35
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	18

Taylor v. United States, 495 U.S. 575 (2008) 27, 28, 29, 32

STATUTES

18 U.S.C. § 2255	7, 10, 17
18 U.S.C. §2250	9, 12, 18, 28
18 U.S.C., § 924	14
34 U.S.C. § 20911	10, <i>passim</i>
28 C.F.R. §72.3	9
28 C.F.R. §2250	10
28 U.S.C. § 1254	6
28 U.S.C. § 2255	6, 17
42 U.S.C§ 16911	25, 33
72 Fed. Reg. 8894.....	9
75 Fed. Reg. 81849.....	9
National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38050-51 (July 2, 2008)	26

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SILAS PETERSON

Petitioner,

v.

UNITED STATES,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Silas Peterson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, which affirmed the district court order denying his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The Ninth Circuit Court of Appeals issued an unpublished decision affirming the district court's order denying the petition. App. 1.¹ The district court order denying the petition is unreported. App. 6.

¹ “App” refers to the Appendix attached to this petition. “ER” refers to the Appellant’s Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. “RT” refers to the reporter’s transcript of the state Court of Appeal proceedings and “CT” refers to the Clerk’s Transcript.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals affirming dismissal of the petition was entered on December 12, 2024. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: “No state shall . . . deprive any person of life, liberty or property without due process of law.”

The Sixth Amendment to the United States Constitution provides, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

28 U.S.C. § 2255 (a) provides: “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

18 U.S.C. §2250(a) provides criminal penalties for those who fail register if they are required to register under the Sex Offender Registration and Notification Act.

STATEMENT OF THE CASE

On September 17, 1993, appellant, Silas Peterson, ("Peterson") was convicted in San Diego County Superior Court of three counts of lewd and lascivious acts with a child under the age of 14, under California Penal Code § 288(a). ER-71.

On January 26, 2018, an indictment was filed in the federal district court for the Central District of California, charging Peterson with one count of failing to register as a sex offender under 34 U.S.C. 20901 et seq., the Sex Offender Registration and Notification Act ("SORNA"). ER-66. On December 14, 2018, Peterson entered a conditional guilty plea as charged. He was placed on a three year term of probation. ER-47, ER-52.

On October 1, 2021, Peterson filed a motion to vacate, alter, or amend the judgment under 28 U.S.C. § 2255. ER-16. On May 13, 2022, the federal district court denied the motion. ER-6. On August 30, 2023, the Ninth Circuit Court of Appeals granted a certificate of appealability. ER-3.

Peterson timely filed a petition for a writ of habeas corpus in the federal district court CR 1. On August 11, 2023, the petition was denied. 1-ER-1. On December 12, 2024, the Ninth Circuit Court of Appeals affirmed the district court judgment. App. 1.

Statement of Facts

A. Peterson's state court convictions

On July 16, 1993, Peterson was charged by a complaint filed in San Diego County Superior Court with thirteen counts of committing a forcible lewd act on a child under the age of 14, pursuant to California Penal Code § 288(b). ER-84. Count 1 alleged that he had engaged

in sexual intercourse with the victim and Counts 8 and 9 alleged that he had engaged in digital penetration. ER-85-88

There is no indication in the record that Peterson was convicted of the originally charged offenses. On September 1, 1993, Peterson entered a guilty plea to three lesser charges of lewd acts with a child, under California Penal Code § 288 (a).² ER-78.

Peterson's September 1, 1993, guilty plea form states that he admitted that he "touched [his] daughter who was under 12 in a lewd manner on three occasions," in violation of California Penal Code § 288(a). ER-79. Accordingly, Peterson did not admit to the use of force or to any of the allegations of specific sexual acts charged in the original complaint. On September 17, 1993, Peterson was sentenced to a term of 12 years in prison. ER-71.

B. The enactment of SORNA and its application to pre-act offenders

In 2006, about 13 years after Peterson's state court conviction, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, Title I, 120 Stat. 587 (2006). Among other things, SORNA created a new federal crime for failing to register, as required by the Act, after traveling in interstate commerce. 18 U.S.C. §2250(a).

By rules published in 2007 and 2010, the Attorney General announced that SORNA applies to offenders like Peterson, whose convictions were entered prior to the passage of SORNA. 72 Fed. Reg. 8894-97 (Feb. 28, 2007); 75 Fed. Reg. 81849-53 (Dec. 29, 2010); 28 C.F.R. §72.3.

² The record does not include a copy of an amended complaint or information. Accordingly, it is unclear whether the charges initially filed against Peterson were amended orally or by an amended information.

Pursuant to California law, Peterson had registered as a sex offender, last doing so (prior to the indictment in this case) in December, 2005. ER-57. Thereafter, Peterson traveled interstate, including between California and Georgia, without updating his registration as required by SORNA. ER-57. 3

C. The federal indictment and guilty plea

In 2018, Peterson was indicted for one count of failing to register under SORNA, §2250(a). ER-66. During the course of plea negotiations, Peterson’s counsel sent a letter to the Assistant United States Attorney, arguing that Peterson’s state court convictions did not make him a “Tier III sex offender” under SORNA. ER-92. Defense counsel pointed out that Peterson’s state court convictions were not a “categorical match” with the generic federal sex offenses requiring “Tier III” SORNA registration. 4 ER-92. However, defense counsel did not argue that Peterson’s convictions were not a categorical match with *any* offense requiring SORNA registration. *Id.*

On December 14, 2018, Peterson entered a conditional guilty plea. ER-52. This Court summarily dismissed Peterson’s appeal. *United States v. Silas Peterson*, Case No. 19-50156.

3 Under state law, Peterson was required to register as a sex offender pursuant to California Penal Code § 290. Unlike SORNA, which requires registration when an offender travels or relocates interstate, California law requires offenders to re-register when they change their residence or remain in a new location for five days *within* California. *People v. Wallace*, 176 Cal.App.4th 1088, 1102-1103 (2009). Accordingly, Peterson’s travel to Georgia in this case did not require him to re-register under California law.

4 Under SORNA, offenders are classified by three “Tiers”, that generally correspond to the severity of the underlying offenses and the length of time and conditions that apply to an offender’s duty to register. 34 U.S.C. § 20911.

D. Peterson’s motion to vacate his conviction

On October 1, 2021, Peterson filed in the district court a motion to vacate, correct, or set aside the sentence pursuant to 18 U.S.C. § 2255. ER-16. Peterson argued that his trial counsel was prejudicially ineffective because she had failed to move to dismiss the indictment on grounds that Peterson’s state court convictions did not require registration under SORNA. He also argued that SORNA’s requirements are unconstitutionally vague. ER-19-38.

Peterson argued that the district court should look only to the elements of the underlying state court offense (a “categorical” analysis) to determine whether his convictions required SORNA registration. ER-28, *citing United States v. Schopp*, 938 F.3d 1053, 1059 (9th Cir. 2019).

Peterson also argued that using the categorical approach, his state convictions did not require SORNA registration because the elements of the crime do not include sexual acts or sexual contact. He pointed out, citing numerous California decisions, that one can commit the crime of lewd or lascivious acts against a child under the age of 14 without touching the child.

Cal. Penal Code

§ 288(a) ER- 27-30. He argued that § 288(a) is not a “sex offense” as defined by SORNA and that the residual clause, if applied in this case, was also unconstitutionally vague. ER-30-33.

The government argued that the court should look to the underlying case facts (a “circumstance specific” or “noncategorical” analysis) to determine whether Peterson’s convictions required SORNA registration. CR-8, p. 10. The government offered as exhibits certified copies of the state court complaint, guilty plea form, and abstract of judgment. ER-71-84.

The government argued that the allegations in the complaint established that Peterson had committed sex offenses requiring SORNA registration because: (1) he had admitted touching a child in a lewd manner; and (2) the 1993 complaint alleged that Peterson had engaged in sexual intercourse with and had digitally penetrated a child. CR-8, p. 15.

In summary, the government argued that Peterson's convictions required registration because they constituted "criminal sexual conduct involving a minor . . ." under 18 U.S.C. § 20911(7)(H) and also "conduct that is by its nature a sex offense against a minor" under 18 U.S.C. § 20911(7)(I)(SORNA's "residual clause."). CR-8, pp. 9, 15.

On May 13, 2022, the district court denied Peterson's motion. The district court rejected Peterson's argument that it should use a categorical analysis to determine whether Peterson's convictions required him to register as a sex offender under SORNA. The district court found that it could look to the underlying state court records (using a circumstance-specific analysis) to determine whether Peterson had committed a sex offense. The district court found that Peterson had been convicted of engaging in sexual intercourse with a child, citing to the allegations in the 1993 complaint. ER-11-14. Accordingly, the district court found that Peterson was required to register under SORNA and that trial counsel's representation of Peterson was not ineffective. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to decide whether the federal district courts should use a categorical or circumstance specific analysis to decide whether state court convictions require federal sex offender registration

Certiorari should be granted because there are conflicting decisions and a lack of clarity as to an important question of law: how federal courts should decide whether a state court conviction triggers a duty to register as a sex offender under federal law, the Sex Offender Registration and Notification Act (hereafter “SORNA”).

The confusion on this point has significant consequences for people convicted of sex offenses who are attempting in good faith to comply with the law. The law triggering a duty to register as a sex offender under SORNA should be clear because registration is a substantial burden and because failing to register when one has a duty to do so is a crime. *E.g.*, 18 U.S.C. §2250(a). However, the approach taken by the Ninth Circuit in this case requires people convicted of sex offenses in state court to guess whether they have a duty to register under SORNA.

When district courts use a categorical approach, they look only to the elements of the state court offense. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Because that approach focuses solely on the elements of the state court convictions, and because the elements of criminal offenses are generally well defined, the categorical approach provides fair notice as to whether a state conviction triggers a duty or potential liability under federal law. *Descamps*, 570 U.S. 268; *United States v. Felts*, 674 F.3d 599, 605 (6th Cir. 2012).

Certiorari should be granted in this case because the Ninth Circuit’s decision approved an unfair circumstance specific approach for determining whether petitioner’s state court

conviction triggered a duty to register as a sex offender under SORNA. Specifically, the district court judge relied on allegations in the state court record that were not proved or admitted to decide that petitioner was required to register under SORNA. Because state court records often contain allegations that are not proved or admitted and because petitioner could not predict which underlying state court records a district court could use to find that his conviction triggered a duty to register, the Ninth Circuit's non-categorical approach in this case violates the Due Process Clause. *Descamps*, 570 U.S. 268; *Felts*, 674 F.3d at 605. Certiorari should be granted to provide clarity to people convicted of state court offenses concerning their duty to register as sex offenders under federal law.

The law should be clear on this point for several critical reasons. First, many people convicted of state criminal offenses, like petitioner, are indigent and they do not have funds to obtain legal advice concerning their duty to register as a sex offender under federal law. If the law is clear as to who is required to register under SORNA, people convicted of state offenses will be able to determine on their own whether they are required to register. Accordingly, they will be more likely to understand and obey the law, thus enhancing public safety. Moreover, if the law as to who must register under SORNA is clear, it is less likely that people convicted of state offenses will be prosecuted for SORNA violations, thus conserving scarce judicial and penal resources.

This Court should also grant certiorari to bring the law in this area in alignment with that in analogous contexts, where federal courts must evaluate state convictions for the purpose of applying a federal statute. In *Taylor v. United States*, 495 U. S. 575 (1990) and *Descamps v. United States*, 570 U.S. 254 (2013), this Court addressed the proper approach for evaluating

state convictions for the purpose of determining whether a state court conviction exposed a defendant to penalties under 18 U.S.C., § 924(e), the Armed Career Criminal Act (“ACCA”). This Court held that unless the state statute is divisible (i.e., one that punishes multiple kinds of conduct) the district court must use the "categorical" approach to evaluate the state offense. Under that approach, the district court cannot look beyond the language in the statute to determine whether the conviction triggers penalties under federal law. *Descamps*, at 258. ⁵

Accordingly, under the *Taylor* and *Descamps* approach, *only* when the state criminal statute is divisible, the modified categorical approach can be used to determine *which* section of the statute the defendant had been convicted under by looking at the underlying record of the state court conviction. The record of conviction includes the charging document, the plea agreement, plea colloquy, and jury instructions. *See Shepard v. United States*, 544 U.S. 13 (2005).

For example, in this case, the state statute for which petitioner was convicted, child molestation under California Penal Code § 288(a), is not a divisible statute. Under state court decisions interpreting § 288(a), a defendant may be convicted of child molestation under that section without personally touching a child. *People v. Meacham*, 152 Cal.App.3d 142, 152-153 (1984). Even constructive touching can violate the statute, such as where a defendant persuades a child to touch him or herself. *Id*; *People v. Pitts*, 223 Cal.App.3d 606, 889-890 (1990).

⁵ Although *Descamps* did not specifically address an elements comparison under SORNA, because the due process considerations of elements comparison are identical, the United States Courts of Appeals have looked to decisions related to the ACCA for guidance in applying SORNA. *E.g., United States v. Dodge*, 597 F.3d 1347, 1353 (11th Cir. 2010).

Even though the elements of the crime of child molesting under § 288(a) do not require proof of a sex offense under SORNA, the district court here used a modified categorical approach to find that facts alleged in the state court proceeding (but not admitted or proved at a trial) established that petitioner had a duty to register as a sex offender under SORNA. App. 13.

Ultimately, The *Descamps* categorical approach provides a clear and simple method for people convicted of state offenses to determine the extent to which their state convictions expose them to duties or consequences under federal law. Because the *Descamps* approach is fair and practical, certiorari should be granted to establish that the *Descamps* approach also applies in situations where a federal court must decide whether a state conviction triggers a duty to register as a sex offender under SORNA.

In contrast to the fair and practical *Descamps* approach, *United States v. Byun*, 539 F.3d 982, 991-992 (9th Cir. 2008) and *United States v. Dodge*, 597 F.3d 1347, 1354-1355 (11th Cir. 2010), approved a circumstances specific approach to evaluate whether a defendant was required to register under SORNA based on a state court conviction.

The circumstance specific approach endorsed in *Byun* and *Dodge* create practical questions for trial courts that do not have clear answers. For example, it is not clear which state court documents the government may rely on to establish at trial that a defendant who suffered a state court conviction had a duty to register under federal law. For example, the charging documents and police reports are hearsay and fact witnesses from long ago cases may be unavailable.

In this case, when the petitioner challenged his conviction in a post conviction proceeding, on grounds that his trial counsel was ineffective when she counseled him to enter a

guilty plea, the district court found that petitioner was not prejudiced because a trial court could have found he was convicted of a SORNA sex offense based on the allegations in the original charging document, allegations that petitioner did not entirely admit during the guilty plea proceedings. If that is the proper procedure, then any person convicted of a crime, even a conviction that does not on its face trigger a duty to register could be required to register as a sex offender based on allegations not proved or admitted in the state court proceedings. That approach is fundamentally unfair, as it does not provide adequate notice and a fair opportunity to comply with the law.

Since *Descamps*, federal appellate decisions have inconsistently and unfairly expanded the circumstances in which a circumstance specific approach may be used to include situations without a divisible statute. Those decisions, like the unpublished decision in this case, create uncertainty in the law and violate the defendant's right to due process.

For example, in *United States v. Gonzalez-Medina*, 757 F.3d 425, 432-433 (5th Cir. 2014) the Fifth Circuit concluded that the district court could look beyond the elements of the state court offense and rely on facts culled from the state court record to determine that the defendant was required to register as a sex offender under federal law. The *Gonzalez-Medina* Court sought to promote SORNA's purpose and to expand its reach. While those are laudable goals, they should not pursued at the expense of fundamental fairness and due process. Specifically, a duty to register as a sex offender should not come as a surprise to someone who is genuinely attempting to comply with the law.

In summary, this Court decided *Descamps* to resolve a split among federal circuits regarding the correct analytical approach for comparing state convictions to the elements of

federal statutes. Yet, as exemplified by this case, the lower courts still issue inconsistent decisions as to exactly how and when to apply a strict categorical or circumstance specific approach in cases where a district court must decide whether a defendant who has suffered a state conviction must register under SORNA. This case presents an ideal record to resolve this issue. The facts are settled and simple. The question presented is well preserved and the issue was the primary and most important question presented in the proceedings below. For all of these reasons, certiorari should be granted.

Argument

- I. Defense counsel was ineffective because she failed to move to dismiss the charge of failure to register as a sex offender on grounds that Peterson was not required to register**
 - A. Pursuant to 28 U.S.C. § 2255, a federal court may vacate a conviction on grounds of ineffective assistance of trial counsel during the plea bargaining process**

A federal prisoner may move the district court to vacate, set aside or correct the sentence" on constitutional grounds under 18 U.S.C. § 2255. Here, Peterson's § 2255 claim of ineffective assistance of counsel, in violation of the Sixth Amendment, is governed by the two-part standard in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must show that his attorney's performance was unreasonable under prevailing professional standards, and that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Id* at 694.

The right to effective assistance of counsel extends to representation during plea bargaining. *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To show prejudice in a case where the defendant has entered a guilty plea, he must show a

reasonable probability that he would have achieved a more favorable outcome absent counsel's error. *Lafler*, at 148-49.

B. Trial counsel unreasonably failed to move to dismiss the charge of failing to register as a sex offender because Peterson had not been convicted of an offense that required SORNA registration

Under Federal Rule of Criminal Procedure 12(b), defense counsel may move prior to trial for an order dismissing a charge on grounds that the indictment fails to state a cognizable offense. *See United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996). Here, trial counsel should have moved to dismiss the charge of failing to register as a sex offender under SORNA. ER-22.

The elements of failing to register as a sex offender under SORNA, are: (1) the defendant was required to register as a sex offender; (2) he knowingly failed to do so, and (3) he engaged in interstate travel. *Gundy v. United States*, 588 U.S. ____ 139 S. Ct. 2116, 2121 (2019); *see also, Reynolds v. United States*, 565 U.S. 432, 435 (2012) ([SORNA's] criminal penalty applies to '[w]ho[m]ever ... is required to register under [the Act].'] 18 U. S. C. §2250(a).

1. An offender is only required to register under SORNA if he has been convicted of a qualifying sex offense

A "sex offender" for purposes of SORNA registration is "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). A "sex offense," is "a criminal offense that has an element involving a sexual act or sexual contact with another," 34 U.S.C. § 20911(5)(A)(i), or "a criminal offense that is a specified offense against a minor," 34 U.S.C. § 20911(5)(A)(ii).

The term "specified offense against a minor" is an "offense against a minor that involves any of the following:"

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

34 U.S.C. § 20911(7).

Accordingly, Peterson was only required to register if he committed a state court offense that included *as an element* sexual acts or sexual contact with another or if he committed one of the specified crimes against a minor victim. 34 U.S.C. § 20911(1).

Here, Peterson’s counsel was aware that the elements of a California Penal Code § 288(a) offense do not require sexual acts or sexual contact, as demonstrated in her plea negotiation letter to the United States Attorney, arguing that Peterson was not a “Tier III” offender. ER-92. Accordingly, counsel was aware that Peterson was convicted under a state statute that is much broader than the definition of a federal sex offense under SORNA. ER-93-94. However, counsel failed to recognize that Peterson’s conviction did not qualify as a sex offense under SORNA at all. Id.

2. Penal Code 288(a) has been construed broadly to include conduct that is not a sex offense under SORNA

Peterson was convicted of three counts of lewd and lascivious acts with a child under California Penal Code §288(a), which prohibits any “lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the child[.]”

Although the statute contains the phrase “lewd or lascivious act,” a series of California decisions have held that the statute punishes even innocuous or otherwise inoffensive conduct with a child so long as it is done with a lewd or lascivious intent. *E.g., People v. Shockley*, 58 Cal.4th 400, 404 (1998); *People v. Martinez*, 11 Cal.4th 434, 444 (1995)(statute prohibits acts that “may have the outward appearance of innocence” if they were done “to arouse the lust, the passion or the sexual desire of the perpetrator or the child . . .”) 6

Martinez explained that any contact with a child can form the basis for a § 288(a) conviction so long as the act is done with a sexual motivation. *Martinez*, at p. 434. In a subsequent decision, the California Supreme Court further clarified that “[a]ny touching of a child” under the age of 14 can violate section 288(a), even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the intent to arouse or gratify the sexual desires of either the perpetrator or the victim.” *Shockley, supra*, p. 404.

6 In addition to touching a child, the elements of the offense are that the child was under 14 years of age, and that the defendant had the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of himself or the child. *People v. Whitman*, 38 Cal.App.4th 1282, 1287 (1995).

The statute prohibits conduct that would not be a crime absent the lewd intentions of the perpetrator. *Martinez*, at p. 434; *People v. Dontanville*, 10 Cal.App.3d 783, 795-96 (1970) (defendant rubbed child's stomach); *People v. Hobbs*, 109 Cal.App.2d 189, 190-93 (1952) (defendant kissed child and touched her leg); *People v. Campbell*, 80 Cal.App.2d 798, 799-800 (1947) (defendant danced with child and leaned back causing her to fall on top of him); *People v. McCurdy*, 60 Cal.App. 499, 502-03 (1923) (defendant touched and pinched child's leg).

Moreover, while "touching" a child is an essential element of a § 288 offense, there is no requirement that *the defendant* have any physical contact with the victim. *People v. Meacham*, 152 Cal.App.3d 142, 152-153 (1984). Even constructive touching can violate the statute, such as where a defendant persuades a child to touch him or herself. *Id*; *People v. Pitts*, 223 Cal.App.3d 606, 889-890 (1990).

In addition, the touching need not be of intimate areas, it can involve any part of the victim's body. *Martinez*, at 444. Moreover, a lewd or lascivious act under section 288(a) can be committed by proxy, for example, by instructing a minor to disrobe. *People v. Mickle*, 54 Cal.3d 140, 176 (1991). Accordingly, California courts have interpreted § 288(a) quite broadly such that a conviction does not require any evidence of sexual contact, sexual acts or sexual conduct.

C. The district court erroneously held that Peterson's California Penal Code 288(a) convictions were sex offenses

The district court did not conduct a complete analysis of Peterson's ineffective assistance of counsel claim because it found that Peterson had in fact been convicted of sex offenses under SORNA, and so there was no basis for a pre-trial motion to dismiss. ER-15.

As set forth in more detail below, the district court erred because Peterson’s convictions are not “sex offenses” under SORNA. First, the district court erred when it conducted a circumstance-specific analysis rather than the categorical analysis required by SORNA’s plain text. Moreover, even under a circumstance-specific analysis, Peterson’s convictions are not sex offenses because the statements in his plea agreement did not admit to any facts beyond the essential elements of the § 288(a) charges.

1. The district court should have used a categorical analysis and looked only to the elements of the underlying offenses to determine whether they were sex offenses

The district court’s holding that a circumstance-specific analysis should be used to construe all elements of a prior conviction under SORNA creates an issue of first impression in this Circuit. ER-12. Accordingly, this appeal turns on how to properly analyze whether Peterson’s state conviction falls within SORNA’s “sex offense” definition—particularly, whether, as the district court held, it qualifies as a “conviction” for “an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C. § 20911(7)(I). Before proceeding, Peterson will describe the analytical tests used to compare convictions and how courts decide which approach to use.

a. The categorical, modified categorical and circumstance specific methods for comparing state and federal crimes

Federal courts compare state and federal offenses using a categorical, modified categorical, or circumstance-specific analysis. Under a categorical approach, the court determines whether a state conviction is a qualifying offense by looking to the elements of the

prior conviction and not to the particular facts underlying the offense. *See United States v. Rocha-Alvarado*, 843 F.3d 802, 806 (9th Cir. 2016).

To qualify as a categorical “match” the state statute must criminalize the same or narrower conduct than the federal crime. *Id.* Conversely, if the state statute underlying the defendant's conviction is broader than the generic federal crime, the state offense is not a “match” that triggers application of the federal statute. *Id.*

The modified categorical approach likewise focuses on elements rather than the underlying case facts. The modified approach applies if the defendant was convicted under a divisible statute, with alternative elements. *Descamps v. United States*, 570 U.S. 254, 257 (2013). In such circumstances, the reviewing court conducts an analysis identical to the categorical approach, but with an option to refer to certain documents from the underlying case to discern which alternative element formed the basis of the pertinent conviction. *See Shepard v. United States*, 544 U.S. 13, 19–20 (2005).

The documents that may form the basis for the court's conclusions are limited, but include: the indictment or information; the plea agreement or transcript of the plea colloquy; the court's rulings and factual findings from a bench trial; and the jury instructions. *Shepard*, p. 20, 26. The focus of the modified categorical approach remains on the elements of the prior conviction, however, and the reviewing court does not assess the underlying facts to determine whether the state court conviction matches the federal statute. *Descamps* at p. 257.

Finally, the circumstance-specific approach focuses on the facts—not the elements—relating to the prior conviction. Instead of analyzing the elements of the state statute,

the federal court looks "to the specific way in which an offender committed the crime on a specific occasion." *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294 (2009).

In utilizing the "circumstance specific" approach, the reviewing court may consider reliable evidence to determine whether the prior offense conduct satisfied the federal statute. *See Shepard*, at 16 (approving review of the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

b. The categorical approach is required by SORNA's plain text

To determine whether a categorical or circumstance-specific approach is appropriate, the court must first look to the text of the federal statute. *Descamps*, 570 U.S. at 267-68; *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019). After analyzing the text, the court should consider the constitutional and practical implications. *Descamps*, 570 U.S. at 267-68.

Here, the key provision is SORNA's definition of the term sex offender, which means: "an individual who was convicted of a sex offense."

§ 20911(1). Under SORNA, the definition of a "sex offense" is a "criminal offense that has an element involving a sexual act or sexual contact." 42 U.S.C.

§ 16911(5)(A)(i). Another crucial term is "specified offense against a minor," which means an offense against a minor that involves any of the following" and that list includes "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7).

The use of the term "element" in the statute strongly suggests that a categorical approach should be used to determine when a prior conviction requires registration. *United States v. Byun*, 539 F.3d 982, 991-992 (9th Cir. 2008).

Moreover, the statutory phrase “by its nature” also requires a categorical inquiry. *See Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 2329 (2019). In *Leocal*, the Court held that the “by its nature” language “requires us to look to ... the nature of the offense of conviction, rather than to the particular facts relating to petitioner’s crime.” *Leocal*, p. 7. Likewise, in *Davis*, the Supreme Court observed that when interpreting statutes, just as when speaking “plain English, when we speak of the nature of an offense, we’re talking about what an offense normally—or, as we have repeatedly said, ordinarily—entails, not what happened to occur on one occasion.” *Davis*, p. 2329.

Administrative regulations interpreting SORNA also support the categorical approach. The Department of Justice, after analyzing the statutory language, released regulations recommending a categorical analysis. *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030, 38050-51 (July 2, 2008) [“SMART Guidelines”].⁷ Accordingly, a plain reading of the text requires a categorical approach.

In addition, courts should not construe a statute so that some of its provisions are surplusage. *Chickasaw Nation v. United States*, 534 U.S. 84, 92 (2001). Here, SORNA identifies several specific offenses that require registration if committed against a minor. § 20911(7). Reading § 20911(7)(I), (SORNA’s “residual clause”) to allow the court to look at the

⁷ In 2008, the Attorney General issued guidelines for the implementation of SORNA that recommended a categorical approach for determining whether offenders are required to register. The regulations were clear that “the term ‘sex offense’ is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of ‘sex offense’ appearing in SORNA.” SMART Guidelines at 38045. And that’s because “SORNA registration requirements are predicated on convictions,” not the individual’s behavior. *Id* at 38050.

underlying offense conduct to identify any acts that constitute sex offenses would deprive most of SORNA's definitions of sex offenses of independent effect.

In other words, why would Congress define "sex offenses" in separate sections when the same acts would always be "conduct that by its nature is a sex offense against a minor" under a circumstance-specific analysis?

In sum, the plain text controls. The statute's references to "element[s]," "conviction" and "conduct that by its nature is a sex offense against a minor" demonstrates that Congress did not want courts to look at the record supporting a state court conviction to attempt to discern the underlying facts. Instead, the text of the statute signals that courts must use a categorical analysis to determine whether a conviction requires registration under § 20911(7)(I).

3. The circumstance specific approach is unfair and impractical because it will create uncertainty as to who is required to register under SORNA

Adopting the categorical approach for §20911(7)(I) is not only consistent with the text of the statute, it also avoids constitutional and practical problems that will arise if this Circuit adopts a circumstance-specific analysis as to all of the elements of SORNA eligible offenses.

See Taylor v. United States, 495 U.S. 575, 601 (2008).

The status of a sex offender subject to registration exposes individuals to severe penalties for regulatory non-compliance, and those affected by the law should be on notice as to whether they must register. *Johnson*, 576 U.S. at 595, 135 S.Ct. 2551. A criminal law that "fails to give ordinary people fair notice of the conduct it punishes" is "standardless." *Id.*

A circumstance-specific approach is also unfair because it creates confusion about who is required to register. When, as here, the defendant's offense is a thirty year old state court

conviction, the “practical difficulties and potential unfairness of a factual approach are daunting” *See Taylor*, p. 601. If this Court adopts a noncategorical approach as to all elements of potentially qualifying offenses, courts and offenders must determine whether the offender must register based on state case records that may be incomplete, unavailable or unclear.

A circumstance specific analysis of qualifying offenses under SORNA’s “residual clause” is particularly abstract. The average person would not know from reading the phrase “any conduct that by its nature is a sex offense against a minor” whether he has to register—especially not an offender convicted, as here, of an indivisible and overly broad statute that prohibits sexual and non-sexual behavior.

In many cases, as here, the government is likely to rely on plea agreements to establish the underlying conduct of a conviction. But statements at a plea hearing may not accurately reflect the facts concerning conduct outside the elements of conviction. That is particularly true in instances where a defendant faces a long sentence and he “may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.” *Descamps v. United States*, 570 U.S. 254, 270, 133 S.Ct. 2276 (2013). And for defendants who entered a negotiated plea, it is unfair to saddle them with a duty to register after they thought they had pled to a conviction that did not carry a registration requirement. *See Taylor*, 495 U.S. at 602.

The consequences of the confusion created by a circumstance-specific approach as to all elements of offenses requiring SORNA registraton are also severe. A defendant (who may realize only after he has been indicted for failing to register that he was required to register under federal law) faces a penalty of up to ten years in prison and a \$250,000 fine. 18 U.S.C. § 2250(a).

Moreover, the fact that the government is required to prove that a defendant was required to register to secure a SORNA conviction does not correct the constitutional difficulties. Going to trial after being charged with failing to register as a sex offender doesn't provide notice that the defendant had a duty to register in the first place.

Apart from the constitutional concerns, there are also practical problems that arise when Courts apply a circumstance-specific approach. The Supreme Court first articulated why courts should employ a categorical approach in *Taylor*, where it pointed out that a fact-based inquiry is impractical:

Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary?

Taylor, p. 601.

Taylor also pointed out that a defendant who has bargained away his trial rights is cheated if he can later be punished as though he were convicted of a greater offense: "Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary 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 burglary." *Taylor*, pp. 601-602.

Here, the unfairness of the circumstance-specific approach was particularly acute because there was no judicial finding that the Peterson suffered an offense requiring registration until *after* he had been charged with failing to register. Accordingly, the practical and constitutional considerations support a categorical approach.

d. The rule of lenity also requires a categorical analysis.

If this Court were to find the text ambiguous, even “after consulting traditional canons of statutory construction,” then the rule of lenity requires a narrow categorical approach. *See United States v. Shabani*, 513 U.S. 10, 17 (1994). In a choice between interpreting § 20911(7)(I) broadly or limiting its reach, the rule of lenity tips the scale in favor of the latter because, “[w]hen the government means to punish, its commands must be reasonably clear.”

e. The cases cited by the district court do not support its conclusion that that circumstance-specific approach should be used to analyze all elements of a prior offense

The district court relied on *United States v. Byun*, 539 F.3d 982, 990-994 (9th Cir. 2008), and *United States v. Dailey*, 941 F.3d 1183, 1192 (9th Cir. 2019), where the offenders entered a guilty pleas to federal offenses and appealed the district court's orders requiring them to register under SORNA. Because they were only required to register if their offenses were committed against a minor and because the age of the victim was not an element of their offenses, the district courts looked to the record of conviction to determine if the defendants were required to register. In *Dailey* and *Byun*, this Court found that a non-categorical approach was appropriate to determine the age of the victim. *Id.*

However, the *Byun* Court limited its holding and specified that it was not applying the circumstance-specific approach to the elements of the conviction, just the victim's age: “As it is not necessary to our holding, we draw no conclusion as to whether a non-categorical approach is permitted with regard to any facts other than the age of the victim.” *Byun*, at p. 993, fn 15. Accordingly, *Byun* and *Dailey* did not support the district court's conclusion that it could look to the state court record of conviction as to all of the elements of the offense.

The district court also relied on *United States v. Becker*, 682 F.3d 1210, 1212 (9th Cir. 2012), where, likewise, this Court approved a modified categorical analysis to determine whether a defendant should be required to register under SORNA as a condition of supervised release. As in *Byun*, *Becker* did not endorse a circumstance-specific approach to all elements of the underlying crime.

Byun, *Dailey*, and *Becker* should not control in this case because they concern defendants litigating objections to SORNA registration imposed as a condition of sentence or supervised release. In that context, the circumstance specific approach does not present the same due process concerns as with retroactive adjudications because the defendant, at sentencing, can litigate the issue based on a fresh record and obtain a ruling *before* he or she has a duty to register.

Byun's holding is also inapplicable because it concerns SORNA eligible offenses that by their nature require an inquiry into the victim's age. For example, in cases where a defendant has been convicted of kidnapping, he is only required to register under SORNA if the victim of the kidnapping offense was under the age of 16. *See Byun*, p. 987; 34 U.S.C. § 20911(7). Because the generic crime of kidnapping and the other listed offenses in § 20911(7) do not generally require proof of the victim's age as an element, this Circuit permits district courts to look to the underlying case records to determine the victim's age. *See Dailey*, p. 1192. Absent that rule, the statute arguably could not operate as intended.

The holding in *Byun* can also be reconciled with a categorical approach, because the age of the victim is an objective and readily discernable fact. In other words, because SORNA clearly and specifically requires defendants who are convicted of certain offenses against a

minor to register, it is not unfair to permit the district court to look at the record of conviction to determine the age of the victim and to use a categorical approach as to the remaining elements. *Johnson v. United States*, p. 597. (contrasting abstract concepts concerning an “ordinary case” with “real-world facts or statutory elements”).

. The district court cited to *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010). which derived a broad rule from this Court’s limited holding in *Byun*. *Dodge* relied heavily on *Byun* to find that “SORNA permits examination of the defendant’s underlying conduct—and not just the elements of the conviction statute—in determining what constitutes a specified offense against a minor.”*Dodge*, p. 1354.

Dodge held that the terms “includes,” and “conduct” implied that Congress intended a circumstance-specific approach. However, *Dodge* does not acknowledge the Supreme Court’s decisions in *Taylor* and *Johnson* or the practical and constitutional implications of adopting a circumstance- specific approach as to all elements of an underlying offenses.

Most important, the analysis in *Dodge* relies heavily on the Supreme Court’s decision in *James v. United States*, 550 U.S. 192 (2007), which was overruled in 2015 by *United States v. Johnson*, 576 U.S. 591 (2015). Accordingly, the analytical foundation for the holding in *Dodge* has collapsed and it should not have formed the basis for the district court’s decision in this case.

D. Under a straightforward categorical analysis, Peterson’s offenses were not sex offenses requiring SORNA registration

The district court found that Peterson’s convictions were included within SORNA’s residual clause, “an offense against a minor that is by its nature a sexual offense.” 34 U.S.C. §

20911(7)(I), so that is the portion of the statute that Peterson will address. ER 12-13. Because a “sex offense,” under SORNA requires sexual conduct or a sexual act, Peterson’s offense was only a sexual offense against a minor if it involved sexual conduct or sexual acts. 34 U.S.C. § 20911(5)(A)(i).

As set forth in more detail at pages 20 to 22 of this brief, a conviction under § 288(a) does not require a sexual act. *E.g., People v. Martinez*, 11 Cal.4th 434, 444 (1995). Specifically because a person may be convicted under the statute based on otherwise innocuous or innocent conduct done with lewd intent, § 288(a) does not require as an element proof of a sexual act.

Moreover, § 288(a) does not require as an essential element proof of “sexual contact.”⁸ The statute’s text prohibits “touching of the victim with intent to arouse or satisfy the sexual desire of the offender or another.” However, as set forth in more detail above, the California courts have held that a conviction does not require any proof that the defendant engage in physical contact with the victim. *Martinez, supra*.

Finally, a § 288(a) offense is not one that by its nature is a “sexual offense against a minor” under SORNA’s residual clause. Although § 288(a) is defined as an offense against a minor victim, it does not require, *as an element*, proof of sexual contact or sexual acts. *E.g., People v. Martinez, supra*, at 444. Accordingly, because the elements of § 288(a) do not require proof of a sexual act or sexual contact, it is not a sex offense that requires SORNA registration.

⁸ Neither § 16911 nor any part of SORNA defines “sexual contact.” This Court should therefore construe that phrase using its “ordinary, contemporary, [and] common meaning.” *United States v. Kaplan*, 836 F.3d 1199, 1208 (9th Cir. 2016) (citation omitted); *accord United States v. Dass*, 198 F.3d 1167, 1174 (9th Cir. 1999) (“If [a] statute uses a term which it does not define, the court gives that term its ordinary meaning.”) (citation omitted).

D. Even under a circumstance-specific analysis, there was insufficient reliable evidence that Peterson was convicted of sex offenses that required SORNA registration

The district court agreed with the government that it could review the state court record of conviction (the circumstance-specific approach) to determine whether Peterson was required to register under SORNA. ER-12-13. When the district court applies a circumstance-specific approach, the court may “consider whether other documentation and judicially noticeable facts demonstrate whether the conviction comes within the pertinent statutory definition.” *United States v. Shumate*, 329 F.3d 1026, 1029 (9th Cir.2003), *as amended by* 341 F.3d 852 (9th Cir.2003).

However, the district court may not rely on the content of a charging document that was not proved at trial (or admitted by the defendant) to conclude that the prosecution has proved the elements of a prior offense. To the extent that the prosecutor may rely on a charging document in a guilty plea case, it must be the one asserting the allegation to which the defendant pled guilty. *United States v. Martinez*, 756 F.3d 1092, 1093 (8th Cir. 2014) (concluding a district court may not “rely upon allegations in a superseded indictment to which the defendant did not plead guilty.”)

After identifying the pertinent facts, the reviewing court must determine if the record unequivocally establishes that the defendant was convicted of the federal generically defined crime, even if the state statute defining the crime is overly inclusive. *United States v. Byun*, 539 F.3d 982, (9th Cir. 2008); *United States v. Corona-Sanchez*, 291 F.3d at 1211.

1. Peterson did not admit the charges alleged in the complaint

Here, the state court conviction records do not unequivocally establish that Peterson was convicted of an offense that includes sexual acts or sexual contact. Peterson admitted in his plea agreement that he touched his daughter, age 12, three times with lewd intent. ER-79. As set forth in more detail on pages 20 to 22 of this brief, those admissions were insufficient to establish that the crimes involved sexual acts or sexual contacts because “touching” for the purpose of a § 288(a) conviction can be non-sexual and innocuous. *E.g., People v. Martinez, supra*, p. 444.

The district court relied on the factual allegations in the 1993 complaint to find that Peterson’s acts were sex offenses. ER-13. However, the specific allegations in the complaint were surplusage as they were unnecessary to establish the elements of the charged offenses. ER-85-88. Moreover, the complaint does not include the charges to which Peterson entered his guilty plea because it alleges different, more serious crimes than the ones that Peterson ultimately admitted. ER-78-79, ER-85-88.

The complaint alleged in count 1 that Peterson engaged in sexual intercourse with the victim. In counts 8 and 9 it alleged that he engaged in digital penetration. The complaint also charged him with *forcible* lewd and lascivious acts with a child under § 288(b), which is a more serious charge than the one he plead guilty to, which was non-forcible lewd and lascivious acts with a child under § 288(a). ER-85-87-88..

Because Peterson did not admit to the allegations in the complaint that he violated California Penal Code § 288(b)(i.e, that he committed § 288(a) offenses with force), engaged in sexual intercourse with or digitally penetrated a child, the district court erred when it found that

he was required to register under SORNA based on those unproved allegations. *Shepard*, p. 20 (in plea cases, the factual basis can be shown by the defendant's admissions made as part of the plea.)

2. The 1993 California complaint was unreliable because it was not supported by a finding of probable cause and because it could not have been the operative charging instrument at the time of Peterson's plea

The district court also failed to weigh the fact that the 1993 allegations of sexual assault of a child were derived from a complaint and not an information. In California state courts, a complaint is filed prior to the preliminary hearing and does not require a judicial finding of probable cause. *E.g. People v. Superior Court of Los Angeles County*, 59 Cal.App.5th 923, 939 (2021). Accordingly, unlike charges filed by an information, the allegations in the complaint were not subjected to judicial scrutiny.

Finally, because Peterson entered his guilty pleas to *amended* charges, the complaint offered as an exhibit to the prosecutor's declaration must have been superceded, either by an oral amendment or a paper filing. Because Peterson's conviction is so old, perhaps the amended complaint not available. In any event, Peterson could not be found to have committed a sex offense that required registration under federal law based on a document that was not the operative charging instrument for the purpose of his guilty plea. *United States v. Martinez*, *supra*, p. 1093. For all of these reasons, there was not sufficient reliable evidence to conclusively establish that Peterson had committed sex offenses even under a circumstance-specific analysis. Accordingly, the district court's conclusion that Peterson was guilty of sex offenses and required to register under SORNA should be reversed.

II. Trial counsel's failure to move to dismiss the charge of failing to register as a sex offender was prejudicially ineffective

As set forth in more detail above, Peterson's convictions should have been evaluated categorically. Under an objective categorical analysis of the elements of his 288(a) convictions, he was not convicted of sex offenses that required registration under SORNA. Moreover, even under a circumstance-specific analysis, the record of conviction did not unequivocally establish that he was required to register.

Peterson's trial counsel was apparently aware of the fact that Peterson's § 288(a) convictions were not a categorical match with SORNA's defined crimes requiring registration. Counsel's letter to the AUSA arguing that Peterson was not a "Tier III" offender plainly contends that his convictions were not equivalent to federal offenses triggering Tier III registration. ER-92. Because counsel should have recognized that Peterson's convictions did not require SORNA registration at all, her failure to move to dismiss the charge on that ground was professionally unreasonable. *See United States v. Palomba*, 31 F.3d 1456, 1466 (9th Cir. 1994)(trial counsel prejudicially ineffective for failing to move to dismiss two counts prior to trial).

There is a reasonable likelihood of a different result because if counsel had made a motion to dismiss, it should have been granted. *See, Palomba*, p. 1463. For the reasons set forth above, the district court should have held that Peterson's convictions do not categorically or noncategorically align with the federal definition of a sex offense, because the elements of the crime do not require sexual acts or sexual contact and because the record of conviction does not conclusively establish that the crimes were sex offenses under federal law.

Therefore, although Peterson is required to register as a sex offender under state law, he is not required to do so under SORNA. Accordingly, he was prejudiced by counsel's error and this Court should grant certiorari, reverse the judgment of the district court and grant his motion to vacate his conviction.

Conclusion

For the reasons set forth above, this Court should grant certiorari, reverse the judgment of the district court and remand this case to the district court for further proceedings.

Dated: March 7, 2025.

Respectfully submitted,

/s/ Stephanie M. Adraktas

Stephanie M. Adraktas, #215323
Attorney for Silas Peterson