



## Is the Underlying Conviction a “Sex Offense” under SORNA?

The method for determining whether a conviction is a *sex offense* under SORNA depends on the court where a person received that underlying conviction.<sup>1</sup>

### Federal Convictions

A prior conviction is a sex offense under SORNA if it is “a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18.”<sup>2</sup> Under the current iteration of the United States Code, this specifically includes convictions for the following federal crimes:

- 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud, or Coercion)
- 18 U.S.C. § 2241 (Aggravated Sexual Abuse)
- 18 U.S.C. § 2242 (Sexual Abuse)
- 18 U.S.C. § 2243 (Sexual Abuse of a Minor or Ward)
- 18 U.S.C. § 2244 (Abusive Sexual Contact)
- 18 U.S.C. § 2245 (Offenses Resulting in Death)
- 18 U.S.C. § 2251 (Sexual Exploitation of Children)
- 18 U.S.C. § 2251A (Selling or Buying of Children)
- 18 U.S.C. § 2252 (Relating to Material Involving the Sexual Exploitation of Minors)
- 18 U.S.C. § 2252A (Certain Activities Relating to Material Constituting or Containing Child Pornography)
- 18 U.S.C. § 2252B (Misleading Domain Names on the Internet)
- 18 U.S.C. § 2252C (Misleading Words or Digital Images on the Internet)
- 18 U.S.C. § 2260 (Production of Sexually Explicit Depictions of a Minor for Importation into the United States)
- 18 U.S.C. § 2421 (Transportation of a Minor for Illegal Sexual Activity)
- 18 U.S.C. § 2421A (Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking)
- 18 U.S.C. § 2422 (Coercion and Enticement of a Minor for Illegal Sexual Activity)
- 18 U.S.C. § 2423 (Transportation of Minors)
- 18 U.S.C. § 2424 (Failure to File Factual Statement about an Alien Individual)
- 18 U.S.C. § 2425 (Use of Interstate Facilities to Transmit Information About a Minor)

*Juvenile Adjudications of Delinquency.* Practitioners are likely to encounter federal juvenile adjudications of delinquency for serious sex offenses committed in Indian Country. So long as the underlying adjudication was for a violation of 18 U.S.C. § 2241, it will qualify as a sex offense under SORNA and the juvenile will be subject to liability for a prosecution under 18 U.S.C. § 2250.<sup>3</sup>

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<sup>1</sup> Attempts and conspiracies to commit any included sex offense are also included in SORNA’s definition of “sex offense”. 34 U.S.C. § 20911(5)(A)(v). In addition, SORNA provides one broad exception to its definition of “sex offense”: any offense involving consensual sexual conduct where the defendant is less than four years older than the victim, so long as the victim is 13 years of age or older, is specifically excluded from the definition of “sex offense.” 34 U.S.C. § 20911(6).

<sup>2</sup> 34 U.S.C. § 20911(5)(A)(iii).

<sup>3</sup> 34 U.S.C. § 20911(8). Additional considerations apply in determining whether a juvenile adjudication for a sex offense under state, territory, or tribal law is a sex offense under SORNA.

*Additional Included Federal Offenses.* Even if a prior federal conviction is not specifically listed in the provisions above, it could still be a sex offense under SORNA if it either (1) has an element involving a sexual act or sexual contact with another; or (2) is a specified offense against a minor.<sup>4</sup>

**Prior Conviction with an Adult Victim.** 34 U.S.C. § 20911(5)(A)(i) expands the definition of ‘sex offense’ under SORNA to include any offense “***that has an element involving a sexual act or sexual contact with another.***”

Thus, an underlying conviction might not be in the list of federal offenses above but could still be captured by this expanded catch-all provision. Courts considering these cases utilize the *Categorical Approach*,<sup>5</sup> i.e., they examine the elements, not the facts, of the underlying conviction.<sup>6</sup>

**Prior Conviction with a Minor Victim.** A different approach is used when a prior conviction involved a victim who was a minor. In these cases, courts examine the underlying circumstances of an offense to determine if it meets SORNA’s definition of “specified offense against a minor”, which means an offense against a minor involving 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 18 U.S.C. §1801;
- (G) Possession, production, or distribution of child pornography;
- (H) Criminal sexual conduct involving a minor, or the use of the internet to facilitate or attempt such conduct; or
- (I) Any conduct that by its nature is a sex offense against a minor.<sup>7</sup>

<sup>4</sup> See *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013).

<sup>5</sup> Some cases in the attached chart reference *United States v. Mathis*, 579 U.S. 500 (2016), a Supreme Court case addressing the categorical approach.

<sup>6</sup> Where the underlying offense is divisible, the courts will sometimes employ a *Modified Categorical Approach*, examining conviction documents to determine which subsection or portion of a statute formed the basis of the offender’s underlying offense.

<sup>7</sup> **Caution: Void for Vagueness line of cases.** In cases where prosecutors use the residual provision of the ‘specified offense against a minor’ definition to argue that an underlying offense should be included as a SORNA-registerable offense, i.e., that a conviction involved “any conduct that by its nature is a sex offense against a minor”, there is a small but growing line of cases of which practitioners should be aware. In these cases, defense counsel contends that this residual clause is void for vagueness, based on recent Supreme Court precedent. See *U.S. v. Burgee*, 988 F.3d 1054 (8<sup>th</sup> Cir. 2021) (not void for vagueness as applied); *U.S. v. Pope*, 2019 U.S. Dist. LEXIS 73265 (D. Nev. April 30, 2019) (not void for vagueness); *U.S. v. Schofield*, 802 F.3d 722 (5<sup>th</sup> Cir. 2015) (not void for vagueness as applied). Cases cited for this argument include *United States v. Davis*, 139 S. Ct. 2319 (2019) (striking the residual clause in 18 U.S.C. § 924(c)(3)(B) as void for vagueness: “any other offense that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”) (emphasis added); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (striking the residual clause of 18 U.S.C. § 16 as void for vagueness, same language as in *Davis*); *Johnson v. United States*, 576 U.S. 591 (2015) (striking the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) as void for vagueness: “involves conduct that presents a serious potential risk of

### **Military Convictions**

Uniform Code of Military Justice (UCMJ) convictions are sex offenses under SORNA if they are listed in tables referenced by a newly-issued (as of November 2024) Department of Defense Instruction 1325.07.<sup>8</sup> As with federal offenses generally, an unlisted UCMJ offense might qualify as a sex offense under SORNA if it meets the definitions described above in *Additional Included Federal Offenses*.

### **State, Tribal, or Territory Convictions**

One of the most difficult issues in 18 U.S.C. § 2250 prosecutions is determining whether an underlying state sex offense conviction is a sex offense under SORNA. Underlying convictions from states, tribes, or territories are analyzed as described in the discussion of *Additional Included Federal Offenses*, above, depending on the age of the victim involved.<sup>9</sup>

### **For Additional Assistance**

USMS personnel are encouraged to contact:

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physical injury to another”). While these cases hinge at least in part on the problem of depending on a judge’s estimation of the degree of risk posed by a crime, practitioners should be aware of how these decisions may affect 18 U.S.C. § 2250 precedential decisions.

<sup>8</sup> DoD Instruction 1325.07 can be found at

<https://www.esd.whs.mil/portals/54/documents/dd/issuances/dodi/132507p.pdf>.

Although not actively linked on the page as of April 2025, the cross-referenced offense tables appear to be here:

<https://prhome.defense.gov/Portals/52/Documents/OED/DoDI%201325.07%20Sex%20Offender%20Registration%20Tables.pdf?ver=F3dgoBcnntnOdB2gYZ7Mpw%3D%3D>. The SORNA requirement for UCMJ convictions is found in 34

U.S.C. § 20911(5)(A)(iv).

<sup>9</sup> In addition, certain foreign country convictions are included in SORNA’s definition of “sex offense.” 34 U.S.C. § 20911(5)(B).

**Case Law by Circuit: Prior Conviction with a Minor Victim**

All courts to consider the issue (in the context of a § 2250 case) have held that a circumstance-specific approach applies.

- **Second Circuit**
  - U.S. v. Piper, 2013 WL 4052897 (D. Vt. 8/12/13)
- **Fourth Circuit**
  - U.S. v. Mixell, 806 Fed. Appx. 180 (4th Cir. 2020)
  - U.S. v. Vanderhost, 688 Fed. Appx. 185 (4th Cir. 2017)
  - U.S. v. Price, 777 F.3d 700 (4th Cir. 2015)
- **Fifth Circuit**
  - U.S. v. Roberts, 669 Fed. Appx. 746 (5th Cir. 2016)
  - U.S. v. Schofield, 802 F.3d 722 (5th Cir. 2015)
  - U.S. v. Baptiste, 34 F. Supp. 3d 662 (W.D. Tex. 2014)
- **Seventh Circuit**
  - U.S. v. Thayer, 40 F.4th 797 (7th Cir. 2022)
  - Harder v. U.S., 2021 WL 3418958 (W.D. Wisc. 8/5/21)
  - U.S. v. Ellickson, Case No. 2:20-cr-00227 (E.D. Wisc. 2/12/21) (R & R)
- **Eighth Circuit**
  - U.S. v. Burgee, 988 F.3d 1054 (8th Cir. 2021)
  - U.S. v. Mulverhill, 833 F.3d 925 (8th Cir. 2016)
  - U.S. v. Hill, 820 F.3d 1003 (8th Cir. 2016)
  - Barker v. U.S., 2022 WL 1749252 (W.D. Mo. 5/31/22)
- **Ninth Circuit**
  - U.S. v. Dailey, 941 F.3d 1183 (9th Cir. 2019)
  - U.S. v. Byun, 539 F.3d 982 (9th Cir. 2008)
  - U.S. v. Salazar, 2021 WL 2366086 (D. Or. 6/9/21)
  - U.S. v. Forte, 2019 WL 6137445 (D. Alaska 11/19/19)
  - U.S. v. Pope, 2019 WL 1919164 (D. Nev. 4/30/19)
  - U.S. v. Smith, 2016 WL 1466900 (D. Or. 4/13/16)
- **Eleventh Circuit**
  - U.S. v. Lloyd, 809 Fed. Appx. 750 (11th Cir. 2020)
  - U.S. v. Dodge, 597 F.3d 1347 (11th Cir. 2010)

**Prior Conviction with an Adult Victim**

All courts to consider the issue (in the context of a § 2250 case) have held that a categorical (or modified categorical) approach applies.

- **Second Circuit**
  - U.S. v. George, 223 F. Supp.3d 159 (S.D.N.Y. 2016)
- **Third Circuit**
  - U.S. v. Icker, 13 F.4th 321 (3d. Cir. 2021)
- **Fourth Circuit**
  - U.S. v. Helton, 944 F.3d 198 (4th Cir. 2019)
  - U.S. v. Faulls, 821 F.3d 502 (4th Cir. 2016)
- **Fifth Circuit**
  - U.S. v. Gonzalez-Medina, 757 F.3d 425 (5th Cir. 2014)
- **Eighth Circuit**
  - U.S. v. Marrowbone, 2014 WL 6694781 (D.S.D. 11/26/2014)
- **Ninth Circuit**
  - U.S. v. Westerman, 705 Fed. Appx. 651 (9th Cir. 2017)
- **Tenth Circuit**
  - U.S. v. Sumner, 2015 WL 1410495 (N.D. Okla. 3/26/15)
- **Eleventh Circuit**
  - U.S. v. Vineyard, 945 F.3d 1164 (11th Cir. 2019)
  - U.S. v. Bemis, 2020 WL 1046827 (M.D. Fla. 3/4/20)