

Sex Offender Registration in Indian Country: SORNA Implementation and 18 U.S.C. § 2250

Lori McPherson
Senior Policy Advisor
United States Marshals Service
Sex Offender Investigations Branch

I. Introduction¹

Practitioners working in Indian country face a host of unique issues surrounding the registration of sex offenders and the prosecution of federal failure-to-register cases under 18 U.S.C. § 2250. In addition, the case law interpreting section 2250 is often confusing and complicated. This article breaks down the process of sex offender registration and notification into easily understandable terms and describes the case law interpreting 18 U.S.C. § 2250 in an approachable way. Let's begin by taking a look at how the sex offender registration process works in practice.

The registration process begins when a person is convicted of a sex offense. Federal law, as well as the laws of every jurisdiction, requires that a person convicted of a sex offense be subject to sex offender registration and notification.² As discussed below, the definition of

¹ Special thanks go out to Alexandra Gelber and Nancy Healey of the Child Exploitation and Obscenity Section (CEOS); Marcia Good of the Office of Tribal Justice (OTJ); Sarah Blazucki, Stephanie Carrigg, and Dawn Doran of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office); and Kevin Forder of the US Marshals Service for their helpful editorial and content review of this article. In addition, some of the information in this article previously appeared in the SMART Office Annual Overview of Current Sex Offender Registration Case Law and Issues: *Case Law*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.smart.gov/caselaw.htm>.

² Defined for the purposes of this article as a state, principal U.S. territory, the District of Columbia, and over 150 federally recognized Indian tribes who

“sex offense” and the registration and notification provisions imposed on a sex offender vary by jurisdiction, as do the mechanisms for providing notice to a sex offender of their registration obligations.

Persons convicted of a sex offense are generally notified by the court of their requirement to register at the time they are convicted and sentenced.³ This notification often happens through a plea agreement and colloquy, a sentencing order, or another court order or form advising offenders of their registration responsibilities.

If a convicted sex offender is incarcerated, he may receive additional notice of his registration responsibilities before his release. In addition, probation officers will most likely advise sex offenders placed on probation supervision of their responsibility to register.

Sex offenders’ actual registration responsibilities generally begin upon their release, regardless of whether they serve a period of incarceration for the underlying sex offense. Within a few days of release, a sex offender is generally required to present themselves for registration at the offices of their local police, sheriff, state troopers, or other designated registration official. If offenders work or attend school in jurisdictions different from where they live, they are required to present themselves for registration in that other jurisdiction.

While at the local registration office, sex offenders provide information to registry officials about themselves and their underlying sex offense. Photographs, fingerprints, palm prints, and a DNA sample may also be collected by the registry official.

During or soon after this initial visit, information is entered into the jurisdiction’s administrative sex offender registration database and submitted to various Federal Bureau of Investigation (FBI) databases as appropriate. If necessary, a sex offender’s registration and conviction information might be sent to the registering agency’s legal counsel to determine whether the offender is required to register in the jurisdiction and, if so, how frequently and for how long.

Depending on the crime of conviction (or in some jurisdictions a risk assessment), certain information about offenders and their convictions is made available to the public on the jurisdiction’s public sex offender

operate their own sex offender registration and notification systems.
See 34 U.S.C. § 20911(10).

³ The processes described in this introduction will, as a matter of course, vary by jurisdiction.

registry website. Every jurisdiction has a public sex offender registry website, but not every jurisdiction posts information about *all* of their offenders on it. By way of example, Oregon posts fewer than 4% of its registered offenders on its public registry website.⁴

At the initial registration (or if the jurisdiction requires a separate risk assessment and classification, after the completion of that process), sex offenders are formally advised of how often and how long they are required to register in the jurisdiction. They are also advised of how and when they are required to update any registration information if it changes. This notification is generally done by way of a form generated by the jurisdiction's sex offender registry that is signed by the sex offender.

When sex offenders fail to appear for an initial registration appearance or subsequent check-in, they might be subject to criminal prosecution for failing to register. In addition, a sex offender might face criminal liability for providing false or incomplete information in the sex offender registration process.

Compliance with sex offender registration requirements is monitored by various law enforcement agencies across the country. As discussed in section XIV below, the United States Marshals Service (USMS) is the primary federal law enforcement agency responsible for investigating failure-to-register cases with a federal nexus. In addition, every jurisdiction investigates and prosecutes failure-to-register cases under their own criminal laws.

Some jurisdictions allow sex offenders to be relieved of their registration responsibilities early. There is usually a court or administrative process for such relief, and it generally requires offenders comply with their registration responsibilities and demonstrate good behavior for a significant period.

Once sex offenders register for the period required by the law of their jurisdiction, they are released from any further registration obligations with that jurisdiction. If a sex offender is registered in multiple jurisdictions, *each* jurisdiction determines whether and when a sex offender's registration requirements should be discharged.

⁴ As of February 4, 2021, Oregon posts 1,007 registered sex offenders on its public registry website, while its remaining 30,437 registered sex offenders are not posted. *Oregon State Police, Sex Offender Registry Section*, OSP.OREGON.GOV, <https://sexoffenders.oregon.gov/> (last visited Feb. 4, 2021) (3.2% of offenders posted).

With this summary in mind, we turn to the current federal standards for sex offender registration and notification as a starting point for discussing sex offender registration and notification systems across the country.

II. The Adam Walsh Child Protection and Safety Act

On July 27, 1981, Adam Walsh was abducted at a department store in Hollywood, Florida, where his mother was shopping.⁵ On August 10th, two weeks after his abduction, a local fisherman discovered Adam's decapitated head in a drainage canal in Vero Beach, Florida, approximately 100 miles from Hollywood. Adam was asphyxiated, but because his body was never found, further investigation was stymied. After his son's tragic death, John Walsh became a national advocate for victims of violent crime and was the host of a television program geared to finding fugitives.⁶

Twenty-five years to the day after Adam's abduction, the Adam Walsh Child Protection and Safety Act was signed into law. Title I of the Act is the Sex Offender Registration and Notification Act (SORNA). The majority of SORNA's provisions are now codified at 34 U.S.C. §§ 20901–20945.

SORNA has been supplemented by certain administrative actions and amended in part by certain pieces of legislation as follows (listed by the language commonly used to reference them):

- The Interim Rule—governing SORNA's retroactive application;⁷

⁵ John Padgett, *The Adam Walsh Child Protection and Safety Act*, in THE SAGE ENCYCLOPEDIA OF CRIMINAL PSYCHOLOGY, at 12 (ed. Robert D. Morgan).

⁶ Mary Helen Moore, 'America's Most Wanted' Host John Walsh Filming for New TV Show in Downtown Vero Beach, TCPALM. (Nov. 13, 2018), <https://www.tcpalm.com/story/news/local/indian-river-county/2018/11/13/john-walsh-filming-new-investigation-discovery-tv-show-vero-beach-pursuit-john-walsh-americas-mos/1986826002/>.

⁷ Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

- The Final Guidelines—interpreting SORNA’s provisions and providing detailed guidance to jurisdictions regarding implementation of its terms;⁸
- The KIDS Act—codifying the Final Guidelines’ requirements governing the collection of internet identifiers;⁹
- The Final Rule—governing SORNA’s retroactive application;¹⁰
- The Supplemental Guidelines—addressing additional issues in SORNA implementation;¹¹
- The Military Sex Offender Reporting Act—requiring the Department of Defense to transmit information about convicted sex offenders to the FBI and the Dru Sjodin National Sex Offender Public Website (NSOPW);¹²
- International Megan’s Law—requiring offenders to provide advance notice of any intended international travel;¹³ and
- The Juvenile Supplemental Guidelines—addressing different ways jurisdictions can implement SORNA’s juvenile registration requirements.¹⁴

⁸ [The National Guidelines for Sex Offender Registration and Notification](#), 73 Fed. Reg. 38030 (July 2, 2008) [hereinafter Final Guidelines].

⁹ [Keeping the Internet Devoid of Sexual Predators Act of 2008](#), Pub. L. No. 110-400, 122 Stat. 4224.

¹⁰ [Applicability of the Sex Offender Registration and Notification Act](#), 75 Fed. Reg. 81849 (Dec. 29, 2010) (codified at 28 C.F.R. pt. 72).

¹¹ [Supplemental Guidelines for Sex Offender Registration and Notification](#), 76 Fed. Reg. 1630 (Jan. 11, 2011) [hereinafter Supplemental Guidelines].

¹² [Military Sex Offender Reporting Act of 2015](#), Pub. L. No. 114-22, § 502, 129 Stat. 227, 258 (codified at 34 U.S.C. § 20931).

¹³ [International Megan’s Law to Prevent Child Sexual Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders](#), Pub. L. No. 114-119, 130 Stat. 15 (codified at 34 U.S.C. §§ 21501–21510).

¹⁴ [Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act](#), 81 Fed. Reg. 50552-01 (Aug. 1, 2016).

- The Proposed Rule Specifying SORNA's Registration Requirements¹⁵

SORNA has two broad areas of focus. First, it creates minimum standards for sex offender registration and notification systems across the country. Second, it directly imposes registration responsibilities on convicted sex offenders. While issues surrounding the implementation of SORNA's minimum standards are largely beyond the scope of this article, it is important to understand the offices and resources involved in that process when considering prosecuting a case under 18 U.S.C. § 2250.

III. The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office)

SORNA created a new office within the Department of Justice (Department) to provide training, technical assistance, and funding for the efforts to substantially implement SORNA among the states, the District of Columbia, certain federally recognized tribes, and the five principal U.S. territories. The SMART Office is tasked with a number of statutory duties, including administering the jurisdictions' standards for sex offender registration and notification under SORNA as well as providing assistance to states, localities, and tribal governments in relation to sex offender registration and notification activities.

The SMART Office has developed numerous resources to assist the practitioner, including digests of social science research regarding sex offenders, case law summaries and other legal publications, and official reviews noting the SORNA implementation status of each jurisdiction.

Of particular note to practitioners in Indian country are the robust resources developed specific to federally recognized tribes, including a Model Tribal Sex Offender Registration Code, a guide on SORNA implementation in Indian country, and ongoing projects dedicated to sex offender management in Indian country. SMART also provides

¹⁵ [Registration Requirements Under the Sex Offender Registration and Notification Act, 85 Fed. Reg. 49332-55 \(proposed Aug. 13, 2020\)](#) [hereinafter Registration Requirements].

subject-matter expertise for, and is a key funder of, the Tribal Access Program (TAP), which provides access through the Department to the FBI's Criminal Justice Information Services (CJIS) databases for both criminal and non-criminal justice purposes to participating tribes, including direct access to the National Sex Offender Registry (NSOR). Information about these resources can be found at the SMART Office's website.¹⁶

IV. The Dru Sjodin National Sex Offender Public Website

The National Sex Offender Public Website (NSOPW)¹⁷ was created by the Department in 2005 and is administered by the SMART Office. NSOPW works much like a search engine: Jurisdictions' public sex offender registry websites connect to NSOPW by way of a web service or automated upload that enables NSOPW to conduct queries against the jurisdictions' websites. Only information that is publicly disclosed on a jurisdiction's own public sex offender registry website are displayed in NSOPW's search results, and only the jurisdiction's registry website page is displayed when a user clicks on a search result. NSOPW is not a database, and SMART only ensures that the information available on jurisdictional public sex offender registry websites can be queried through NSOPW.

V. The National Sex Offender Registry

SORNA requires registration agencies to submit detailed information about their registered sex offenders to NSOR. NSOR is a law enforcement-only database that is a subfolder of the National Crime Information Center (NCIC), managed by the FBI's CJIS division. NSOR was created in the late 1990s to store data on every registered sex offender in the United States and provides access to that data to law enforcement nationwide.

¹⁶ OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, www.smart.gov.

¹⁷ NAT'L SEX OFFENDER PUB. WEBSITE, www.nsopw.gov.

VI. Biometric databases

SORNA also requires registration agencies to submit certain biometrics collected from registered sex offenders to the FBI. Fingerprints and palm prints are housed in the Next Generation Identification (NGI) system within CJIS. NGI fingerprint records are linked to the offender's corresponding NSOR record at CJIS. The National Palm Print System (NPPS) is the database for palm prints within NGI.

Jurisdictions must also ensure that any registered sex offender has a DNA sample in the Combined DNA Index System (CODIS), which is the national DNA database administered by the FBI.

VII. SORNA's requirements for jurisdictions

Each state has its own distinct sex offender registration and notification system. The District of Columbia and the five principal U.S. territories also have their own systems, as do over 150 federally recognized Indian tribes. Every jurisdiction makes its own determinations about who will be required to register, what information those offenders must provide, and which offenders will be posted on the jurisdiction's public registry website.

While every jurisdiction retains the ability to enact its own registration laws, over the last two decades, Congress has enacted various measures setting "minimum standards" for jurisdictions as they implement their sex offender registration and notification systems. The most recent set of standards can be found in SORNA, which currently governs the federal minimum standards for sex offender registration and notification systems.¹⁸

A. Substantial implementation

Title 34, section 20912(a) requires each SORNA jurisdiction to maintain a sex offender registration and notification system conforming to SORNA's standards.¹⁹ Under SORNA, *jurisdiction* is defined as:

¹⁸ While this section describes SORNA's requirements, the actual implementation of these requirements varies across jurisdictions.

¹⁹ [34 U.S.C. § 20912\(a\)](#).

- the 50 States,
- the District of Columbia,
- the five principal United States territories—the Commonwealth of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, and the United States Virgin Islands, and
- Indian tribes to the extent provided in 34 U.S.C. § 20929.
Generally speaking, federally recognized Indian tribes in non-PL 280 states were eligible to opt in as SORNA jurisdictions.²⁰

Title 34, section 20926 required jurisdictions to substantially implement SORNA's terms by July 27, 2009.²¹ The Attorney General granted two one-year extensions to this deadline, as the statute allowed, which resulted in a final implementation deadline of July 27, 2011. Non-tribal jurisdictions who did not substantially implement SORNA by this date had their Edward Byrne Memorial-Justice Assistance Grant (Byrne-JAG) funds reduced by 10%, as required by statute.²² This reduction happens on an annual basis for every non-tribal jurisdiction that has not substantially implemented SORNA by July 27 of each year, as determined by the SMART Office. The penalty for tribal non-implementation of SORNA is discussed separately in Section IX below.

B. Required registration information

Generally speaking, SORNA requires jurisdictions to collect the following information about registered sex offenders:²³

- Biographic Information: date of birth, name, photograph, physical description, and Social Security number
- Biometric Information: DNA sample, fingerprints, and palm prints
- Communications Information: internet identifiers and phone numbers
- Conviction Information: criminal history and the text of the registration offense

²⁰ 34 U.S.C. § 20911(10).

²¹ 34 U.S.C. § 20926(a).

²² 34 U.S.C. § 20927(a).

²³ 34 U.S.C. § 20914.

- **Identification Information and Documents:** driver's license or identification card, passport and immigration documents, and professional licensing information
- **Location Information:** employer's address, resident address, and school address
- **Travel Information:** notice of international travel and temporary lodging information
- **Vehicle Information:** motor vehicle, boat, and aircraft information

C. Public notification

When a sex offender initially registers or updates a registration, SORNA requires that the registration jurisdiction provide that information about the offender to any interested person. The primary method of notification is the jurisdiction's public sex offender registry website.

To fulfill its standards for community notification of local organizations and individuals, SORNA recommends that each jurisdiction also establish an email notification system through the jurisdiction's public sex offender registry website, which will automatically email an individual (who registers for the notification system) when a sex offender relocates to, begins employment in, or starts attending school within a certain geographic area or zip code. Many jurisdictions have implemented such notification systems, and tribes using the Tribe and Territory Sex Offender Registry System (described in section XI(A), below) automatically have access to this technology.

D. Information sharing between jurisdictions

SORNA requires jurisdictions immediately notify one another when a sex offender indicates they are relocating and requires that the receiving jurisdiction notify the originating jurisdiction if the offender fails to appear for registration. Jurisdictions use multiple tools to facilitate such information sharing, including private software platforms and the SMART Office-created SORNA Exchange Portal, as well as phone, fax, and email.

E. Information sharing by corrections agencies

Excluding those held in military detention, there are three federal agencies that regularly house convicted sex offenders: the Bureau of

Prisons (BOP), the Bureau of Indian Affairs (BIA), and Immigration and Customs Enforcement's (ICE) Enforcement and Removal Operations (ERO).

1. Bureau of Prisons

BOP is housed within the Department and does not register sex offenders before their release. Instead, BOP or a federal probation officer is required to notify the chief law enforcement officer and registration officials of any state, tribe, or local jurisdiction when a federal prisoner required to register under SORNA is released from custody.²⁴

2. Bureau of Indian Affairs

The Department of Interior's BIA operates a number of detention centers. There are no statutory or administrative requirements for these centers to provide notice to local or tribal law enforcement when a sex offender is released from custody. In practice, offenders in BIA facilities generally are not registered before their release from incarceration.

3. Immigration and Customs Enforcement

The Department of Homeland Security's (DHS) ICE ERO "is generally responsible for detaining and deporting undocumented individuals who are present within the United States."²⁵ In 2016, DHS issued a rule amending its Privacy Act provisions to permit the transfer of information from DHS to any sex offender registration agency about a sex offender who is released from DHS custody or removed from the United States.²⁶

F. When a sex offender absconds

SORNA also requires certain actions when a jurisdiction receives information that a sex offender might be evading his registration responsibilities. The jurisdiction is required to notify the appropriate

²⁴ 18 U.S.C. § 4042(c).

²⁵ *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* 3 (March 2019), SMART.Gov, <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/case-law-update-2019-compiled.pdf>.

²⁶ Notice of Privacy Act System of Records, 81 Fed. Reg. 72,080, 72,086 ¶(Z).

law enforcement agency and, if the offender cannot be located, the jurisdiction must:

- update its public registry website to reflect that the offender has absconded;
- update NSOR to reflect that the offender has absconded;
- seek a warrant for the offender's arrest and enter it into NCIC's Wanted Person file; and
- notify the USMS.²⁷

VIII. Utilizing sex offender registration information to investigate missing person cases

The information contained in a jurisdiction's sex offender registry can be invaluable when investigating missing person cases. In situations where an abduction or coerced disappearance is suspected, the registry can provide information about known persons previously convicted of kidnapping or other sex offenses who live, work, or attend school in the area. While of course not every person on the registry will be a suspect, investigators can benefit greatly from the information.

For example, consider a case where an elementary school aged child goes missing and an abduction is suspected. There is a general description of the suspect and their vehicle: a blue station wagon. Investigators can quickly access their jurisdiction's sex offender registry to determine if there are any registered sex offenders in the area who own or operate a vehicle matching that description.

Consider also a situation where a teenager "runs away" and investigators suspect that he might be a victim of child sex trafficking or exploitation. Investigators would be able to compare the teenager's recent phone activity with known phone numbers of registered sex offenders in the jurisdiction and quickly develop a lead in the case.

While missing person investigations are necessarily complex and far beyond the scope of this article, it is important to remember the valuable information contained in sex offender registry databases as it might assist in those cases.

²⁷ [Final Guidelines, *supra* note 8, at 38,069.](#)

IX. SORNA's requirements for sex offenders

In addition to the standards for jurisdictions described in the preceding section, SORNA also created direct registration requirements for persons convicted of a sex offense.²⁸ This direct registration requirement is enforceable by the federal failure-to-register statute²⁹ discussed below.

A. Who must register

Anyone convicted of a *sex offense*, as defined by SORNA, must register as a sex offender. An adult sex offender is *convicted* of a sex offense if they are subjected to penal consequences based on the conviction, however the conviction may be styled.³⁰ Juveniles are *convicted* under SORNA's definition if the juvenile was at least 14 years of age at the time of the offense and was adjudicated delinquent for committing (or attempting or conspiring to commit) an offense comparable to, or more severe than, aggravated sexual abuse as described in 18 U.S.C. § 2241.³¹

Title 34 of the United States Code, section 20911(5) delineates a multitude of offenses that are each classified as a *sex offense*. Generally, these include certain enumerated federal crimes and military offenses, as well as crimes in any jurisdiction involving a sexual act, some form of sexual contact, or those crimes included in SORNA's definition of a *specified offense against a minor*.³² A *specified offense against a minor* generally includes all sexual offenses against minors, as well as non-parental kidnapping of a minor.³³

²⁸ See [Registration Requirements](#), *supra* note 15.

²⁹ 18 U.S.C. § 2250.

³⁰ 34 U.S.C. § 20911(1).

³¹ 34 U.S.C. § 20911(1), (8).

³² SORNA specifically exempts from its definition of sex offense any case involving consensual sexual conduct: (1) between adults; or (2) involving any individual 13 years of age or older, so long as the other party is no more than four years older than the victim.

³³ 34 U.S.C. § 20911(7). A more extensive discussion of tiering under SORNA can be found in section XI(B)(1).

B. Tiering

Under SORNA, all sex offenders are classified in accordance with the crimes for which they are convicted. All sex offenses are classified as tier I, tier II, or tier III. Generally speaking, offenses are designated as follows:³⁴

Tier I	All sex offenders that are not classified as a tier II or III sex offender are, by default, tier I sex offenders. In addition, any person convicted of an offense punishable by not more than one year of imprisonment is a tier I offender.
Tier II	Sex offenders whose registering offense involves a victim under the age of 18 and is punishable by more than one year of imprisonment, unless said offender is classified as a tier III offender.
Tier III	Sex offenders whose registering offense involves a victim under the age of 13 or whose offense is forcible in nature, and said offense is punishable by more than one year of imprisonment.

C. Initial registration

SORNA requires that all sex offenders register in any jurisdiction in which they reside, work, or go to school. SORNA also requires jurisdictions to register offenders before their release from incarceration if they are convicted in the jurisdiction. In practice, many jurisdictions do not actually register offenders before release and rely on the offender to report for registration within a certain number of days following their sentencing or release from incarceration, whichever comes later.

D. Keeping the registration current

SORNA requires sex offenders to immediately provide updates to registry officials if certain information they initially provided later changes. Offenders must immediately report, in person, any changes

³⁴ Interpretation of SORNA's specific statutory tiering language will vary in individual cases. The practitioner should use these broad tiering descriptions as a summary and not as applicable to any particular case standing alone.

in their name, residence address (including termination of residence), employment address, or school address. Offenders also must immediately report any changes to their vehicle information, temporary lodging information, internet identifiers, or phone numbers, although the report need not be made in person.

E. Duration of registration

Under SORNA's terms, tier I offenders are required to register for 15 years, tier II offenders for 25 years, and tier III sex offenders for life.³⁵ A jurisdiction may opt to allow for a reduction in a sex offender's registration period if certain conditions are met.³⁶

F. Frequency of registration

SORNA requires tier I sex offenders to report in person once a year for verification of their information, tier II offenders every six months, and tier III offenders every three months.³⁷ During the in-person verification, the offender is to review and affirm or change any of the information previously gathered by the registration agency.

X. International Megan's Law

SORNA required the "Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, [to] establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under [SORNA]."³⁸ In 2008, the *Final Guidelines* expanded this statutory authority to require the tracking of sex offenders who are departing the United States.³⁹ The *Supplemental Guidelines* amended SORNA's standards such that jurisdictions must require their registered sex offenders to provide 21 days' notice of any international travel.⁴⁰ Utilizing these notifications and other information about registered sex offenders, USMS and DHS each

³⁵ 34 U.S.C. § 20915(a).

³⁶ 34 U.S.C. § 20915(b).

³⁷ 34 U.S.C. § 20918.

³⁸ 34 U.S.C. § 20930.

³⁹ *Final Guidelines*, *supra* note 5, at 38,066.

⁴⁰ *Supplemental Guidelines*, *supra* note 8, at 1637. It is important to note that this added a SORNA baseline requirement for registration jurisdictions and did *not* place a reporting requirement directly on sex offenders.

created administrative processes for tracking registered sex offenders traveling internationally.

International Megan's Law (IML) was enacted in 2016 and supplemented these previous statutory, regulatory, and administrative efforts by requiring and establishing the following:

- Notice of International Travel: IML specifically requires sex offenders under SORNA to provide advance notice of their international travel to their jurisdiction of residence.⁴¹ Unlike the *Supplemental Guidelines'* standards for jurisdictions, IML did *not* specify how many days in advance of international travel a registered sex offender must provide notice.
- National Sex Offender Targeting Center (NSOTC): Operated by USMS, NSOTC receives, vets, and processes such international travel notifications, and the information about intended travel is sent to any destination country via INTERPOL-Washington.⁴²
- Angel Watch Center (AWC): As part of DHS, AWC evaluates sex offender registry and passenger manifest data to detect convicted child sex offenders traveling internationally and provides notice, as appropriate, to those destination countries.⁴³ Representatives from NSOTC are stationed at AWC and the agencies work together closely to ensure accurate and timely notifications.
- Passport Marking: The State Department is authorized to place a marker on the passport of any registered sex offender who was convicted of an offense against a child.⁴⁴
- Amendment to 18 U.S.C. § 2250: The federal failure-to-register statute was amended to make it a violation when a sex offender attempts to travel internationally and has not provided the requisite advance notification.

⁴¹ 34 U.S.C. § 20914(a)(7).

⁴² 34 U.S.C. § 21504.

⁴³ 34 U.S.C. § 21503.

⁴⁴ 22 U.S.C. § 212(b).

XI. Tribes and SORNA

Before the passage of SORNA, federally recognized tribes had largely been excluded from the nationwide network of sex offender registration and notification systems. Persons convicted of sex offenses in tribal courts were not always subject to state sex offender registration requirements, and reservation lands often became safe havens where other convicted sex offenders could evade registration requirements.

SORNA addressed these issues by including tribal convictions in its definition of *sex offense* and by allowing certain federally recognized tribes to become SORNA jurisdictions. Generally speaking, tribes not subject to PL-280⁴⁵ state criminal jurisdiction were eligible to opt-in. Initially, there were 212 tribes eligible to elect to become SORNA jurisdictions. Of those initially eligible tribes, 198 affirmatively elected to perform sex offender registry functions. That number has decreased over time as tribes affirmatively opted out of SORNA or delegated their registration and notification responsibilities to the state(s) within which they are located. There are currently over 150 tribes operating as SORNA jurisdictions.

As described in section VII(A) above, all SORNA jurisdictions are required to substantially implement the provisions of SORNA. Unlike other SORNA jurisdictions, if a tribe does not substantially implement SORNA, the responsibility for sex offender registration, notification, and enforcement on tribal lands is delegated to the state(s) within which the tribe is located.⁴⁶ The SMART Office is responsible for making all determinations regarding substantial implementation of SORNA.

The vast majority of tribes that have substantially implemented SORNA have used the Model Tribal Code, which was developed by Indian Law experts in conjunction with the SMART Office and fully covers *all* of SORNA's requirements. There are many tribes that have *more rigorous registration requirements* than the states within which they are located, particularly for those tribes located within states that have not substantially implemented SORNA. In addition, some tribes extend their criminal sanctions for failure to register beyond

⁴⁵ *PL 280* refers to [Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588](#).

⁴⁶ [34 U.S.C. § 20929\(a\)\(2\)\(C\)](#).

finances and incarceration to include penalties such as exclusion from their lands altogether.

Thus, there are issues particular to Indian country regarding both SORNA implementation and federal failure-to-register prosecutions.⁴⁷

A. SORNA implementation in Indian country

A significant hurdle for SORNA implementation in Indian country was its lack of connectivity with federal criminal justice databases and communication systems. Before SORNA, federally recognized tribes generally did not have meaningful and full access to the federal systems described in sections IV, V, and VI. In order to substantially implement SORNA, tribes needed to develop the capacity to connect to NSOPW, as well as the relevant federal databases.

1. The National Sex Offender Public Website (NSOPW)

Most tribes did not have a public sex offender registry website before the passage of SORNA. Because many tribes that opted to become SORNA jurisdictions did not have the information technology infrastructure to develop such a website, the SMART Office created the Tribe and Territory Sex Offender Registry System (TTSORS), which is available free of charge and serves as both a jurisdiction's administrative database and public sex offender registry website. All of the tribes that have substantially implemented SORNA have their own public sex offender registry website that is linked to NSOPW.

2. The National Sex Offender Registry (NSOR)

Before SORNA, in order to submit information to NSOR, a tribe had to have a certain level of law enforcement infrastructure development (adequate to meet the audit standards of the FBI), and even then, it was required to submit information through a state conduit to NSOR. These bars were insurmountable for most SORNA tribes. To remedy this issue, the Department launched the TAP in 2015, which enables select tribes to submit NSOR data through the Department to the FBI. By the end of the current deployment cycle, TAP will have over 140 participating tribes.

⁴⁷ [18 U.S.C. § 2250](#).

3. Fingerprints, palm prints, and DNA

At the time of SORNA's passage, there was no direct conduit for submitting tribal fingerprints, palm prints, or DNA to the FBI's databases and no way to require states and tribes to work together in order to facilitate such submissions. In response, the SMART Office and its federal partners developed a series of solutions for tribal jurisdictions:

- A workaround whereby tribal jurisdictions could take DNA samples and submit them directly to the FBI for analysis and entry into CODIS; and
- Allowing tribes to take hard copy fingerprints and palm prints (whether rolled manually or printed via livenesscan) and submit them directly to the FBI for entry into NGI.

B. Indian country and prosecutions under 18 U.S.C. § 2250

There are a handful of legal issues unique to Indian country that might impact a prosecution under 18 U.S.C. § 2250.⁴⁸

1. Tiering of tribal court convictions

SORNA classifies all sex offenses that are punishable by a year or less of incarceration as tier I offenses. Tribal courts historically have not been permitted to sentence anyone convicted of a crime to more than one year of incarceration, which rendered all tribal convictions tier I offenses under SORNA—even very serious crimes such as rape and child sexual abuse. With the passage of the Tribal Law and Order Act (TLOA) in 2010, tribes are now eligible to impose sentences of more than one year, so long as certain conditions are met.⁴⁹ If a tribe implements the enhanced sentencing provisions of TLOA for its sex offenses, they might be classified as tier I, II, or III, depending on the circumstances. For the purposes of an 18 U.S.C. § 2250 prosecution involving an underlying tribal sex offense, a practitioner should review the punishment structure used by the tribe in order to determine whether the prior conviction might be eligible for classification as a tier II or tier III sex offense.

⁴⁸ It is unclear what effect the recent decision in [McGirt v. Oklahoma](#), 140 S. Ct. 2562 (2020) might have on future prosecutions under 18 U.S.C. § 2250.

⁴⁹ 25 U.S.C. § 1302.

2. Dual registration

Because SORNA's carve out of Indian country jurisdiction over sex offender registration in certain tribal lands is relatively recent, there are situations where sex offenders residing in Indian country might also be asked by state officials to register with the state. There have been a few cases addressing this situation, and practitioners should be sure to check that a person suspected of failing to register with a state was not, in fact, already registered with a SORNA-implementing tribe:

- Arizona: The Federal District Court held that persons living in Indian country are required to keep their registration current with both the state and the tribe.⁵⁰ In Arizona's state courts, however, a tribal member residing on tribal land cannot be prosecuted under state law for failing to register unless a tribe's registration responsibilities have been delegated to the state via SORNA's delegation procedure.⁵¹
- New Mexico: The state cannot impose a duty to register on enrolled tribal members living on tribal land who have been convicted of federal sex offenses.⁵²
- Washington: In a state level prosecution for failing to register, it was error for the trial court to refuse to hear evidence that the sex offender was in fact properly registered with a tribe that substantially implemented SORNA.⁵³

3. Validity of tribal court convictions

Because of the differing standards regarding the right to counsel in some tribal courts, it was sometimes argued that prosecuting a person based in part on an underlying tribal conviction violated the Sixth Amendment of the U.S. Constitution. This issue was largely resolved in *United States v. Bryant* when the Court held that prior tribal court convictions are valid for use in subsequent proceedings so long as the

⁵⁰ [United States v. Begay](#), 622 F.3d 1187, 1196 (9th Cir. 2010).

⁵¹ [State v. John](#), 308 P.3d 1208, 1212 (Ariz. Ct. App. 2013).

⁵² [State v. Atcitty](#), 215 P.3d 90, 98 (N.M. Ct. App. 2009).

⁵³ [State v. Cayenne](#), No. 49696-8-II, 2018 WL 3154379, at *2 (Wash. Ct. App. June 26, 2018).

terms of the Indian Civil Rights Act were followed in the underlying proceedings.⁵⁴

XII. 18 U.S.C. § 2250: failure to register

SORNA proactively requires a sex offender⁵⁵ to register as follows: “A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.”⁵⁶

When such a sex offender fails to comply with this statutory requirement, the federal failure-to-register statute provides in part:

(a) In general—Whoever—

(1) is required to register under [SORNA];

(2)(A) is a sex offender . . . by reason of a conviction under Federal law, . . . Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by [SORNA];

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) International Travel Reporting Violations.—
Whoever—

(1) is required to register under [SORNA];

(2) knowingly fails to provide information required by [SORNA] relating to intended travel in foreign commerce; and

(3) engages or attempts to engage in the intended travel in foreign commerce;

⁵⁴ [United States v. Bryant](#), 136 S. Ct. 1954, 1959 (2016). Although *Bryant* involved a domestic violence conviction, its rationale is applicable to failure-to-register prosecutions.

⁵⁵ [34 U.S.C. § 20911\(1\)](#) defines “sex offender” as “an individual who was convicted of a sex offense.”

⁵⁶ [34 U.S.C. § 20913\(a\)](#).

shall be fined under this title, imprisoned not more than 10 years, or both.⁵⁷

Prosecutions under 18 U.S.C. § 2250 have been vigorously pursued, and a body of case law interpreting the statute has developed as described below.

A. Is the offender required to register under SORNA?

Two threshold questions for any 18 U.S.C. § 2250 prosecution are (1) is the prior conviction that triggered a registration requirement a “sex offense” under SORNA; and (2) if it is a “sex offense,” in what SORNA tier should it be placed? In some cases, the answer to either or both questions is clear because the underlying conviction is a federal offense specifically listed in SORNA’s relevant definitions.⁵⁸ In other cases, courts compare an underlying conviction to SORNA’s definitions using one of two primary approaches. Broadly speaking, those are the *categorical approach* and the *circumstance-specific approach*.

1. The categorical approach

When courts use this method, they only look at the elements of the offense involved when comparing it to a statutory definition. The underlying facts of the case are *not* considered when using the categorical approach.

The modified categorical approach

When it is unclear which specific elements were proven to sustain the underlying conviction,⁵⁹ the modified categorical approach is utilized as

⁵⁷ [18 U.S.C. § 2250](#).

⁵⁸ Specifically, SORNA’s tiering and “sex offense” definitions.

⁵⁹ Such an underlying conviction is generally referred to as a “divisible” offense. For example, the New Jersey crime of Endangering Welfare of Children was held to be divisible: “Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child *who engages in sexual conduct* which would impair or debauch the morals of the child is guilty of a crime of the second degree. Any other person who engages in conduct *or who causes harm* as described in this paragraph to a child is guilty of a crime of the third degree.” [N.J. STAT. ANN. § 2C:24-4\(a\)\(1\)](#) (emphasis added); [United States v. Berry](#), 814 F.3d 192, 195 (4th Cir. 2016).

an off-shoot of the traditional categorical approach, . . . similarly focus[ing] on elements rather than facts. . . . [T]he court is entitled to refer to certain documents [(*Shepard* documents)⁶⁰] from the underlying case to discern which alternative element formed the basis of conviction. . . . The focus of the modified categorical approach remains squarely on the elements of the prior conviction[,] . . . however, and the reviewing court is not entitled to assess whether the defendant’s actual conduct matches the federal statute.⁶¹

In addition, the modified categorical approach might be used when the age of a victim is critical to determining which federal offense an underlying conviction is “comparable to” for tiering purposes under SORNA.⁶²

2. Circumstance-specific approach

When courts use this method, they examine the facts of the underlying case in making a comparison to a statutory definition.⁶³

B. Is the underlying offense a “sex offense” under SORNA?

The method for determining whether an underlying conviction is a *sex offense* under SORNA varies depending on the court where a person received that underlying conviction.⁶⁴

⁶⁰ [Shepard v. United States](#), 544 U.S. 13 (2005) (holding that, when a statute contains alternative elements, courts are entitled to refer to documents from the underlying conviction to determine which element supported the prior conviction).

⁶¹ [United States v. Price](#), 777 F.3d 700, 705 (4th Cir. 2015) (citations omitted).

⁶² [United States v. White](#), 782 F.3d 1118, 1131 (10th Cir. 2015).

⁶³ For a detailed analysis of these issues, including litigating positions, please contact CEOS.

⁶⁴ 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(5)(C).

1. Federal convictions

A prior conviction is a sex offense under SORNA if it is “a Federal offense . . . under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18.”⁶⁵ The definition of sex offense also includes these listed offenses when they occur in Indian country and are prosecuted under the Assimilative Crimes Act or Major Crimes Act.⁶⁶ Under the current iteration of the United States Code, this specifically includes convictions for the following federal crimes:

- Sex trafficking of children by force, fraud, or coercion;⁶⁷
- Aggravated sexual abuse;⁶⁸
- Sexual abuse;⁶⁹
- Sexual abuse of a minor or ward;⁷⁰
- Abusive sexual contact;⁷¹
- Offenses resulting in death;⁷²
- Sexual exploitation of children;⁷³
- Selling or buying of children;⁷⁴
- Certain activities relating to material involving the sexual exploitation of minors;⁷⁵
- Certain activities relating to material constituting or containing child pornography;⁷⁶
- Misleading domain names on the internet;⁷⁷

⁶⁵ 34 U.S.C. § 20911(5)(A)(iii).

⁶⁶ *Id.*

⁶⁷ 18 U.S.C. § 1591.

⁶⁸ 18 U.S.C. § 2241.

⁶⁹ 18 U.S.C. § 2242.

⁷⁰ 18 U.S.C. § 2243.

⁷¹ 18 U.S.C. § 2244.

⁷² 18 U.S.C. § 2245.

⁷³ 18 U.S.C. § 2251.

⁷⁴ 18 U.S.C. § 2251A.

⁷⁵ 18 U.S.C. § 2252.

⁷⁶ 18 U.S.C. § 2252A.

⁷⁷ 18 U.S.C. § 2252B.

- Misleading words or digital images on the internet;⁷⁸
- Production of sexually explicit depictions of a minor for importation into the United States;⁷⁹
- Transportation generally;⁸⁰
- Promotion or facilitation of prostitution and reckless disregard of sex trafficking;⁸¹
- Coercion and Enticement;⁸²
- Transportation of minors;⁸³
- Filing factual statement about alien individual;⁸⁴ and
- Use of interstate facilities to transmit information about a minor.⁸⁵

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. § 2250.⁸⁶

Additional included federal offenses

Even if a prior federal conviction is not listed in the provisions above, it could still be a sex offense under SORNA if the underlying conviction either (1) has an element involving a sexual act or sexual contact with another or (2) is a specified offense against a minor.⁸⁷

When a conviction involved an adult victim, section 20911(5)(A)(i) expands the definition of “sex offense” under SORNA to also include

⁷⁸ 18 U.S.C. § 2252C.

⁷⁹ 18 U.S.C. § 2260.

⁸⁰ 18 U.S.C. § 2421.

⁸¹ 18 U.S.C. § 2421A.

⁸² 18 U.S.C. § 2422.

⁸³ 18 U.S.C. § 2423.

⁸⁴ 18 U.S.C. § 2424.

⁸⁵ 18 U.S.C. § 2425.

⁸⁶ See *United States v. Under Seal*, 709 F.3d 257, 266 (4th Cir. 2013).

⁸⁷ For example, kidnapping of a minor not committed by a parent or guardian.

any “criminal offense that has an element involving a sexual act or sexual contact with another.”⁸⁸ Thus, an underlying conviction might not be listed in section 20911(5)(A)(iii) but could still be captured by this provision in section 20911(5)(A)(i). Courts considering these cases generally utilize the categorical approach in analyzing these offenses.⁸⁹ Where the underlying offense is divisible, courts employ the modified categorical approach as described above.

A different approach is generally used when a prior conviction involved a minor victim. In these cases, the prior conviction is analyzed utilizing the circumstance-specific approach,⁹⁰ also known in some circuits as the “non-categorical approach.”

For example, utilizing the circumstance-specific approach, the following federal offenses have been deemed registerable under SORNA even though they are *not* specifically listed in SORNA:

- Importation of alien for immoral purpose;⁹¹
- Transfer of obscene materials to minors;⁹² and
- Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.⁹³

2. Military convictions

A prior Uniform Code of Military Justice (UCMJ) conviction is a sex offense under SORNA if it is listed in tables 4, 5, or 6 of Department of Defense Instruction 1325.07.⁹⁴ Table 6 applies to offenses

⁸⁸ 34 U.S.C. § 20911(5)(A)(i).

⁸⁹ See, e.g., *United States v. Faulls*, 821 F.3d 502, 512 (4th Cir. 2016); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015).

⁹⁰ See, e.g., *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016); *United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015).

⁹¹ 8 U.S.C. § 1328; *United States v. Byun*, 539 F.3d 982, 990–93 (9th Cir. 2008).

⁹² 18 U.S.C. § 1470; *United States v. Schofield*, 802 F.3d 722, 728–32 (5th Cir. 2015); *United States v. Dodge*, 597 F.3d 1347, 1353–56 (11th Cir. 2010).

⁹³ 18 U.S.C. § 1592; *United States v. Vanderhorst*, 688 F. App’x 185, 187 (4th Cir. 2017) (not precedential).

⁹⁴ U.S. DEP’T OF DEF., INSTRUCTION NO. 1325.07 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2019-02-19-075650-100>. The SORNA requirement for UCMJ convictions is found in 34 U.S.C. § 20911(5)(A)(iv).

committed on or after June 28, 2012; table 5 applies to offenses committed “on or after October 1, 2007 and before June 28, 2012”; and Table 4 applies to offenses committed before October 1, 2007. 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 section XII(B)(3).

3. State, tribal, or territory convictions

A prior conviction from a state, tribe, or territory is registerable under SORNA when it is either (1) “a criminal offense that has an element involving a sexual act or sexual contact with another; [or (2)] a criminal offense that is a specified offense against a minor.”⁹⁵

The term “specified offense against a minor” means 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.⁹⁶

One of the most difficult issues in 18 U.S.C. § 2250 prosecutions is determining whether an underlying state sex conviction is a sex

⁹⁵ 34 U.S.C. § 20911(5)(A)(i)–(ii) (emphasis added).

⁹⁶ 34 U.S.C. § 20911(7).

offense under SORNA. Underlying convictions from states, tribes, or territories are analyzed as described in the discussion of Additional Included Federal Offenses, Section (XII)(B) above, depending on the age of the victim involved.⁹⁷ Courts have made varying decisions, including:

- a conviction under Oklahoma’s sexual battery statute was a sex offense under SORNA;⁹⁸
- a conviction under South Carolina’s indecent exposure statute was a sex offense under SORNA;⁹⁹ but
- a conviction under South Dakota’s statutory rape statute was *not* a sex offense under SORNA.¹⁰⁰

Practitioners investigating or prosecuting an 18 U.S.C. § 2250 case involving an underlying state, tribal, or territory sex offense should carefully analyze whether the prior conviction qualifies as a sex offense under SORNA.

C. Tiering

Once a determination is made that a prior conviction is a sex offense under SORNA, the practitioner must decide the SORNA tier in which the offense should be classified.¹⁰¹ The tier of the offense will govern two important issues in a section 2250 prosecution: (1) the duration of time a sex offender is required to register; and (2) the base level for the sentencing guidelines.¹⁰²

SORNA defines its three tiers as:

⁹⁷ In addition, certain foreign country convictions are included in SORNA’s definition of “sex offense.” 34 U.S.C. § 20911(5)(B).

⁹⁸ [United States v. Sumner](#), No. 15–CR–0037, 2015 WL 1410495, at *4 (N.D. Okla. Mar. 26, 2015).

⁹⁹ [United States v. Hill](#), 820 F.3d 1003, 1005–06 (8th Cir. 2016).

¹⁰⁰ [United States v. Sailors](#), No. CR 10–40003, 2010 WL 2574159, at *2 (D.S.D. June 23, 2010).

¹⁰¹ Practitioners should note that a *jurisdiction’s* tiering structure might vary from SORNA’s tiering structure. For the purposes of prosecutions under 18 U.S.C. § 2250, it is the SORNA tier which governs.

¹⁰² Although beyond the scope of this article, more information about how the SORNA tier of the underlying offense impacts sentencing guideline determinations in 18 U.S.C. § 2250 prosecutions can be found at § 2A3.5 of the United States Sentencing Commission Guidelines at [U.S. SENTENCING GUIDELINES MANUAL § 2A3.5](#) (U.S. SENT’G COMM’N 2018).

(2) . . . The term “tier I sex offender” means a sex offender other than a tier II or tier III sex offender.

(3) . . . The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is *comparable to or more severe than* the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a) of Title 18);

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) *involves*—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender. . . .

(4) . . . The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is *comparable to or more severe than* the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) *involves* kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.¹⁰³

If an underlying federal conviction is specifically listed in one of the tier definitions above (for example, 18 U.S.C. § 2241), it is tiered as designated in the statute. If a prior conviction is not specifically listed (which is the case for *all* military, state, tribal, territory, and foreign offenses), it might be analyzed via the categorical or the circumstance-specific approach, depending on the tiering subsection being utilized.

The approach utilized might vary depending on whether an underlying conviction is analyzed as being “comparable or more severe than” a certain federal offense (suggesting a categorical or modified categorical approach), or “involving” certain conduct (suggesting a circumstance-specific approach). Practitioners should consult circuit precedent and the most recent guidance from CEOS in adopting their litigation strategy in such cases.

D. Duration of registration requirement

The tier of an offender’s underlying sex offense determines the duration of their registration responsibilities under SORNA. As described in section (IX)(E), offenders are required to register for 15 years, 25 years, or life.¹⁰⁴ If a sex offender’s SORNA registration requirement expires, that offender cannot be prosecuted under 18 U.S.C. § 2250.

Generally speaking, the duration of a sex offender’s registration requirement is measured from the time of her sentencing or release from incarceration, whichever is later. Questions of whether a sex offender’s registration duration is tolled during intervening periods of incarceration have not yet been widely addressed, although the cases

¹⁰³ 34 U.S.C. § 20911(2)–(4) (emphasis added).

¹⁰⁴ 34 U.S.C. § 20915(a).

addressing the issue thus far have declined to hold that an offender's registration duration under SORNA was tolled during those times.¹⁰⁵

E. "Resides"

Most prosecutions under 18 U.S.C. § 2250 are based on the theory that a sex offender resided in a particular SORNA jurisdiction, thus triggering a registration responsibility under SORNA. In most cases, it is relatively easy to prove an offender resided in a particular jurisdiction for SORNA purposes; for example, she lived in a home in one jurisdiction, then moved to a permanent address in another jurisdiction.

In some instances, it is not so clear. What about cases where a sex offender is transient and moves from jurisdiction to jurisdiction in relatively short order? At what point does a sex offender's presence in a jurisdiction trigger a registration responsibility under SORNA and, thus, potential liability for failure to register under 18 U.S.C. § 2250?¹⁰⁶

SORNA defines "resides" as "the location of the individual's home or other place where the individual habitually lives."¹⁰⁷ The term "habitually lives" is defined in the SORNA Final Guidelines as follows:¹⁰⁸

¹⁰⁵ See [United States v. Walker](#), 931 F.3d 576, 578 (7th Cir. 2019) (state conviction in 1998 was a tier I SORNA offense, even though the state classified it as a tier III offense, and Walker's SORNA registration requirement ended after 15 years—before the offense date of the current failure-to-register charge); [United States v. Red Tomahawk](#), No. 1:17-CR-106, 2018 WL 3077789, at *3–*5 (D.N.D. June 20, 2018) (an underlying 1998 conviction for 18 U.S.C. § 2244(a)(1) was a Tier I offense, even though the Standing Rock Sioux tribe classified it as a Tier II offense, and Red Tomahawk's SORNA registration requirement ended after 15 years).

¹⁰⁶ Every jurisdiction has its own rules for when a registration responsibility is triggered, and those definitions will often be different from the standard utilized for determining liability for an 18 U.S.C. § 2250 prosecution.

¹⁰⁷ 34 U.S.C. § 20911(13).

¹⁰⁸ There are two issues which often are conflated when discussing SORNA: (1) when does an offender 'reside' in a jurisdiction to trigger a SORNA registration requirement? 73 Fed. Reg. 38030, 38061–38062 (July 2, 2008); and (2) how does a registration jurisdiction properly record a residence address for an offender who is homeless or transient? *Id.* at 38055–38056. While these issues may overlap in a prosecution for 18 U.S.C. § 2250, it is important to distinguish between the two.

“Habitually lives” accordingly should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of “residence” . . . is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days.¹⁰⁹

Cases discussing this issue are limited but include the following:

- *United States v. Alexander*;¹¹⁰
- *United States v. Wampler*;¹¹¹ and
- *United States v. Voice*.¹¹²

Practitioners should familiarize themselves with their relevant circuit standards for determining “residence” and when a sex offender “habitually lives” in a location so as to trigger liability under 18 U.S.C. § 2250.

F. Mens rea

By its terms, 18 U.S.C. § 2250(a) requires that an offender *knowingly* fail to register or update her registration as required. The United States is generally not required to prove that the offender had *specific knowledge* of SORNA’s requirements when meeting the *knowing* element in a prosecution under 18 U.S.C. § 2250(a). In such a case, it is usually sufficient if a sex offender is *generally* aware of her obligation to register as a sex offender under state law.¹¹³

¹⁰⁹ 73 Fed. Reg. 38030, 38062 (July 2, 2008).

¹¹⁰ 817 F.3d 1205, 1215 (10th Cir. 2016) (establishing ‘residence’).

¹¹¹ 703 F.3d 815, 820 (5th Cir. 2013) (transient offender & “habitually lives”).

¹¹² 622 F.3d 870, 874–75 (8th Cir. 2010) (transient offender & “habitually lives”).

¹¹³ *United States v. Vasquez*, 611 F.3d 325, 328–29 (7th Cir. 2010).

A prosecution under 18 U.S.C. § 2250(b) *also* requires proof that the offender knowingly failed to provide notice of intended international travel. More than half of the states now include information on their registration forms about the offender's obligation to provide advance notice of travel, and sometimes an offender is advised of this particular obligation by a court or probation officer. Before pursuing a case under 18 U.S.C. § 2250(b), a prosecutor should ensure that there is sufficient evidence that the offender had notice of the requirement to provide advance notice of international travel.

G. Basis for prosecution

There are three subsections under which a person might be prosecuted for a violation of 18 U.S.C. § 2250. Depending on the nature of the underlying conviction and the nature of the failure to register, one of the following theories of prosecution might apply.

1. 18 U.S.C. § 2250(a)(2)(A): underlying federal, military, tribal, or territory conviction

If a sex offender's underlying sex offense was from a federal, military, tribal, or territory court, he can be prosecuted under section 2250 without any travel element being met if he failed to register or update his registration as required by SORNA.

2. 18 U.S.C. § 2250(a)(2)(B): underlying conviction from a state or the District of Columbia

If a sex offender's underlying sex offense was from a state or the District of Columbia, there is an additional element that must be proven: The offender must either (1) travel in interstate or foreign commerce; or (2) enter, leave, or reside in Indian country.

Travel in interstate or foreign commerce

When sex offenders are prosecuted on the theory that they traveled in interstate or foreign commerce, the sequential and temporal timing of the travel is important to determine. Sequentially, the offender's travel must occur *after* his conviction and *after* his SORNA registration requirements attached. Depending on the circuit, an offender's travel must have occurred either after February 28, 2007,¹¹⁴

¹¹⁴ [United States v. Gould](#), 568 F.3d 459, 466 (4th Cir. 2009); [United States v. Dixon](#), 551 F.3d 578, 585 (7th Cir. 2008), *rev'd on other grounds sub nom*;

March 30, 2007,¹¹⁵ August 1, 2008,¹¹⁶ or December 29, 2010.¹¹⁷ The Third and Tenth Circuits have not established such a date.

Enter, leave, or reside in Indian country

Even if a sex offender was not convicted of an underlying tribal sex offense, they could be prosecuted under 18 U.S.C. § 2250(a) if they enter, leave, or reside in Indian country without any further proof of travel.

3. 18 U.S.C. §2250(b): international travel

Regardless of the jurisdiction of the court that issued the underlying conviction, a sex offender is required to engage in, or attempt to engage in, international travel in order to trigger liability under this subsection. As discussed above, these cases will require a more detailed proof of knowledge of the obligation to provide advance notice of international travel; it is unlikely that a court would hold a sex offender who is only generally aware of their sex offender registration responsibilities to be properly “on notice” for the purposes of satisfying the *knowingly* element in 18 U.S.C. § 2250(b).

H. Venue

When a failure-to-register case only involves one district, for example, when a federally convicted sex offender moves within a district and fails to update the information about where the offender resides, there are no venue issues. That said, a number of prosecutions under 18 U.S.C. § 2250(a) involve multiple districts, as offenders with underlying state convictions move across state lines

[Carr v. United States](#), 130 S. Ct. 2229, 2239 (2010); [United States v. Dean](#), 604 F.3d 1275, 1277–80 (11th Cir. 2010).

¹¹⁵ [United States v. Johnson](#), 632 F.3d 912, 930 (5th Cir. 2011).

¹¹⁶ [United States v. Whitlow](#), 714 F.3d 41, 44–45 (1st Cir. 2013); [United States v. Trent](#), 654 F.3d 574, 582–83 (6th Cir. 2011); [United States v. Manning](#), 786 F.3d 684, 686–87 (8th Cir. 2015); [United States v. Valverde](#), 628 F.3d 1159, 1167–69 (9th Cir. 2010). In [United States v. Lott](#), 750 F.3d 214, 219–220 (2d Cir. 2014), the court used July 2, 2008 as the effective date (the date the SORNA Final Guidelines were published) but did not specifically address the issue of whether their *actual* effective date would be August 1, 2008, which is the thirty-day post-publication date utilized by other circuits.

¹¹⁷ [United States v. Ross](#), 848 F.3d 1129, 1133–34 (D.C. Cir. 2017).

and fail to register in their new jurisdiction. In those cases, which district is the appropriate venue for prosecution? Is the answer different when a person is being prosecuted for failure to provide notice of international travel under 18 U.S.C. § 2250(b)?

1. Cases involving domestic travel

For cases involving interstate travel, the best practice is to prosecute in the district of arrival rather than the district of departure. In *United States v. Haslage*, for example, a state-convicted offender travelled from Wisconsin to Minnesota and, thereafter, failed to register.¹¹⁸ This offender was charged with a section 2250 violation in Wisconsin. The court of appeals dismissed the indictment, holding that the offender could not be prosecuted in Wisconsin. The opinion was based primarily on the reasoning in *Nichols v. United States*.¹¹⁹ Although that case did not concern venue, but rather whether an offender had an obligation to notify the district of departure when moving abroad, some courts have found the case relevant when considering venue questions. Although other circuits considering the issue post-*Nichols* have upheld venue in either the originating or receiving jurisdiction, the general recommendation remains to prosecute in the district of arrival to minimize litigation risk.¹²⁰

2. Cases involving international travel

The failure-to-register provision¹²¹ in 18 U.S.C. § 2250(b) was enacted after the initiation of the *Nichols* case. By its terms, it applies when a sex offender fails to provide notice to her residence jurisdiction of any intended international travel. As such, venue is proper in the

¹¹⁸ 853 F.3d 331, 336 (11th Cir. 2017). A companion case involving an offender moving from Minnesota to Wisconsin also held that venue was only appropriate in the district of arrival. *See also United States v. Toney*, 853 F.3d 331, 336 (11th Cir. 2017).

¹¹⁹ 136 S. Ct. 1113, 1118 (2016).

¹²⁰ *United States v. Seward*, 967 F.3d 57, 67–68 (1st Cir. 2020); *United States v. Spivey*, 956 F.3d 212, 216–217 (4th Cir. 2020); *United States v. Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018); *United States v. Llewellyn*, 737 F. App'x 471, 474–75 (11th Cir. 2018) (not precedential).

¹²¹ 18 U.S.C. § 2250(b).

offender's residence jurisdiction and, arguably, any other jurisdiction involved as the offender leaves or attempts to leave the country.¹²²

I. Supreme Court cases

There have been six cases decided by the U.S. Supreme Court interpreting SORNA since its passage:

- *Carr v. United States*: This case involved a state-convicted offender who moved from Alabama to Indiana and then failed to register as required. The Court held that 18 U.S.C. § 2250 does not apply to sex offenders whose travel occurred before SORNA's enactment.¹²³
- *United States v. Juvenile Male*: This case involved a juvenile adjudicated delinquent pursuant to the Federal Juvenile Delinquency Act who then failed to register as required. The defendant challenged on *Ex Post Facto* grounds. After remanding the case to Montana for certain state-law determinations, the Court decided that the challenge was moot.¹²⁴
- *Reynolds v. United States*: This case involved a state-convicted sex offender who moved from Missouri to Pennsylvania and then failed to register as required. The Court held that SORNA's registration requirements do not apply to pre-SORNA offenders until a valid specification to that effect is made by the Attorney General, that is, no earlier than the issuance of the Interim Rule governing retroactivity.¹²⁵
- *United States v. Kebodeaux*: This case involved a court-martialed offender who moved within Texas and failed to update his registration. The Court upheld the portion of the statute permitting the prosecution of

¹²² For example, if a sex offender lives in New York and drives to Newark Airport (in New Jersey) to catch an international flight.

¹²³ 560 U.S. 438, 442 (2010).

¹²⁴ 564 U.S. 932, 938–39 (2011).

¹²⁵ 565 U.S. 432, 445 (2012).

offenders with federal predicate convictions without interstate travel.¹²⁶

- *Nichols v. United States*: This case involved a federally convicted offender who moved out of the country without notifying his registering state. The Court held that he could not be prosecuted under 18 U.S.C. § 2250. Following this decision, Congress enacted legislation that requires offenders to provide advance notice of international travel and permits prosecution for failing to do so.¹²⁷
- *Gundy v. United States*: This case involved an underlying state conviction that occurred before the passage of SORNA. The Court held that utilizing an Attorney General Rule to establish the timing for when SORNA's registration requirements applied to pre-Act offenders was constitutional.¹²⁸

J. Additional charges for recidivists

Additional federal charges are available for crimes committed while an offender is required to register as a sex offender. Under 18 U.S.C. § 2260A, the commission of certain offenses against a minor while the defendant is required to register as a sex offender under *any law* will result in a 10-year mandatory minimum sentence that runs consecutively to any other sentences imposed. The application of this provision to offenders whose requirement to register began before the passage of SORNA does not violate the Ex Post Facto Clause.¹²⁹

K. Prosecuting underlying sex offenses

When prosecuting offenders for conduct that may result in a sex offender registration requirement, prosecutors should take steps to lay the foundation for a possible future failure-to-register prosecution. To start, the prosecutor in such a case should be mindful of whether the offense of indictment or conviction will clearly require sex offender registration under state, tribal, territory, or federal law. If the offense

¹²⁶ 570 U.S. 387, 396–399 (2013).

¹²⁷ 136 S. Ct. 1113, 1118–19 (2016).

¹²⁸ 139 S. Ct. 2116, 2129–30 (2019).

¹²⁹ *United States v. Hardeman*, 704 F.3d 1266, 1268–69 (9th Cir. 2013) (ex post facto challenge to the application of 18 U.S.C. § 2260A and California's sex offender registration laws).

is specifically listed or fits cleanly within the definitions in section (XI)(B) above, then a prosecutor can be relatively confident that the offender would be subject to 18 U.S.C. § 2250 liability should they ever fail to register in the future.

Conversely, if the offense is not specifically listed as a registrable offense, the offender may not have an obligation to register with any given jurisdiction or be liable for a prosecution for a failing to do so. *This result is so even if the defendant agrees in a plea agreement to register as a sex offender.* For example, consider a case where a defendant conspired to sex traffic minors and use the minors to distribute cocaine. If the defendant pleads to a 18 U.S.C. § 371 conspiracy or a drug offense, then she likely will not have to register in any jurisdiction where she resides, goes to school, or works because those offenses are not recognized under state law as registerable offenses despite the court order.

There are a number of points in the judicial process where an offender can, and ideally should, be provided with notice of her requirement to register as a sex offender. Although the omission of notice in plea agreements, colloquies, sentencing orders, or other process *does not relieve a sex offender of her requirement to register*, it, nonetheless, is best practice to provide such notice whenever possible.¹³⁰

1. Plea agreements

In drafting plea agreements, prosecutors should specifically include language where offenders indicate that they understand they have registration responsibilities under federal law and that they can be prosecuted for failing to do so. Model language can be obtained from CEOS.

2. Plea colloquy

Whether or not a plea agreement is involved, prosecutors should ensure that an acknowledgement of the offender's sex offender registration responsibilities is specifically included in the plea colloquy with the judge.

¹³⁰ Because sex offender registration is generally considered a collateral consequence of conviction—not a direct consequence—it applies administratively even in the absence of a court order.

3. Sentencing orders

Notice of a sex offender's registration responsibilities under SORNA should be included in the sentencing order for any sex offense conviction.

4. Bureau of Prisons

When a sex offender is sentenced to a period of federal incarceration, the BOP should provide a notice of registration responsibilities upon release.¹³¹

5. United States probation

Convicted sex offenders released to federal probation are required, as a condition of their probation, to register as sex offenders, and that registration requirement is generally monitored by their probation officers.

XIII. Case law

While the litigation surrounding sex offender registration and notification cases is voluminous and largely beyond the scope of this article, there are two constitutional issues about which practitioners should be particularly aware.

A. Ex post facto

Offenders may be prosecuted for a violation of 18 U.S.C. § 2250 if the conviction triggering their registration responsibilities occurred before the enactment of SORNA, so long as the elements of the offense are otherwise met. By its terms and via the administrative rule published in 2010, SORNA's registration responsibilities apply retroactively to all offenders. Because of the increasing success of ex post facto challenges at the state level, however, a general discussion of the issue is included here.

In 2003, the Supreme Court seemingly settled any ex post facto questions regarding sex offender registration in *Smith v. Doe*,¹³² a challenge from a sex offender in Alaska who argued that the imposition of registration requirements violated the ex post facto

¹³¹ See BUREAU OF PRISONS, SEX OFFENDER REGISTRATION AND TREATMENT NOTIFICATION, BP-A0648 (2014), https://www.bop.gov/policy/forms/BP_A0648.pdf.

¹³² 538 U.S. 84 (2003).

clause of the Constitution. The Court held that sex offender registration and notification—under the specific facts of that case—were not punitive, and could, therefore, be retroactively imposed as regulatory actions.¹³³

Nevertheless, seven state supreme courts have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions since the *Smith v. Doe* decision.¹³⁴

At the federal level, there has been one notable successful ex post facto challenge to a state's sex offender registration laws. In *Doe v. Snyder*,¹³⁵ the court held that Michigan's sex offender registration and notification laws were punitive and, therefore, could not be applied retroactively to the plaintiffs in the case.¹³⁶

For the purposes of 18 U.S.C. § 2250 cases, practitioners should be mindful of the applicable ex post facto case law in the circuit and state within which they practice. Depending on the governing state or federal precedent, a sex offender may not have the ability or requirement to register at the jurisdictional level, even if there clearly is a federal obligation to register under SORNA.

B. Eighth Amendment

Other challenges gaining some traction are those arguing that certain sex offender registration requirements violate the Eighth Amendment's protection against cruel and unusual punishment. Most

¹³³ *Id.* at 105–06.

¹³⁴ *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Maine v. Letalien*, 985 A.2d 4 (Me. 2009); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). One additional case, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006), was rendered moot by *Doe v. Keathley*, No. ED90404, 2009 Mo. App. LEXIS 4 (Mo. Ct. App. Jan. 6, 2009). In addition, the New Hampshire Supreme Court held that requiring lifetime registration without the opportunity for review violates the ex post facto provisions of the state's constitution. *Doe v. State*, 111 A.3d 1077, 1101 (N.H. 2015).

¹³⁵ 834 F.3d 696 (6th Cir. 2016).

¹³⁶ *Id.* at 705–06.

notably, the decision in *Millard v. Rankin*¹³⁷ held that Colorado's sex offender registration and notification requirements violated this provision of the Eighth Amendment. On appeal from the district court to the Tenth Circuit, however, that decision was overturned.¹³⁸

XIV. United States Marshals Service

The United States Marshals Service (USMS) is the federal agency designated to enforce federal sex offender registration requirements and is available to provide assistance to state and local registration agencies in ensuring that their offenders are compliant with relevant registration requirements.

Following the enactment of the Adam Walsh Act, USMS established the Sex Offender Investigations Branch (SOIB) to direct and coordinate such enforcement and assistance efforts across the agency. As a component of SOIB, the National Sex Offender Targeting Center (NSOTC) was established in 2011 as an interagency intelligence and operations center supporting law enforcement in identifying, investigating, locating, apprehending, and prosecuting noncompliant sex offenders. Through the combined efforts of the SOIB and USMS District Offices to date, the USMS has closed, by arrest, over 62,000 warrants for non-compliant sex offenders; initiated over 34,000 federal failure-to-register investigations; and assisted with over 3,500 state, local, tribal, and territorial sex offender operations.

XV. Additional resources

There have been countless challenges to sex offender registration requirements and to prosecutions for failure to register that are beyond the scope of this article. For specific issues relevant to 18 U.S.C. § 2250 prosecutions and a more detailed overview of the entirety of the case law governing sex offender registration, please see the additional resources listed below.

- [Bonnie Kane, *SORNA: A Primer*, 59 U.S. ATTY'S BULL., no. 5, 2011, 42.](#)

¹³⁷ 265 F. Supp. 3d 1211, 1231–32 (D. Colo. 2017). An Eighth Amendment argument was also successful in a case involving juvenile sex offender registration. *In re C.P.*, 967 N.E. 2d 729, 750 (Ohio 2012).

¹³⁸ *Millard v. Camper*, 971 F.3d 1174, 1181–84 (10th Cir. 2020).

- Lori McPherson, *SORNA at 10 Years*, 64 DRAKE L. REV. 741 (2016).
- SMART Office Annual Overview of Current Sex Offender Registration Case Law and Issues: *Case Law*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.smart.gov/caselaw.htm>.
- SMART Office Publications, available on <https://www.smart.gov/indiancountry.htm> and <http://www.smart.gov/newsletters.htm>:
 - *A Guide to SORNA Implementation in Indian country*
 - *Model Tribal Sex Offender Registration Code*
 - *SMART Summary: Prosecution, Transfer, and Registration of Serious Juvenile Sex Offenders*
 - *SMART Watch Dispatches*

About the Author

Lori McPherson is a Senior Policy Advisor with the United States Marshals Service, Investigative Operations Division, Sex Offender Investigations Branch. She holds her JD, *cum laude*, from the TC Williams School of Law at the University of Richmond and has been licensed to practice law in the Commonwealth of Virginia since 1996.