No. _____

IN THE
Supreme Court of the United States

KT BURGEE,
a/k/a Kape Teal Burgee,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 19-3034

United States of America

Plaintiff - Appellee

v.

KT Burgee, also known as Kape Teal Burgee

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Pierre

Submitted: October 20, 2020
Filed: February 24, 2021

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

SMITH, Chief Judge.

KT Burgee pleaded guilty to sexual exploitation of a minor under South Dakota law. For two years, he regularly registered as a sex offender as required by the federal Sex Offender Registration and Notification Act (SORNA). Then, he stopped. Burgee was charged and found guilty of failing to register under SORNA in federal district

court.[1] Burgee's SORNA obligation arose because he had been convicted of an offense that involved "conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). On appeal, he urges us to overrule our decision in *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016); reverse the district court for relying on unreliable evidence; and hold § 20911(7)(I) void for vagueness. We deny each of these claims for relief and affirm the district court.

I. *Background*

In June 2014, Burgee pleaded guilty to violating a South Dakota statute titled "Sexual exploitation of a minor."[2] The factual basis for the plea was this: He "had contact with a minor," and "his DNA was found on her neck and . . . in her underwear." Mem. in Supp. of Def.'s Mot. to Dismiss Indictment, Ex. C, at 7:5–8, *United States v. Burgee*, No. 3:18-cr-30164-RAL-1 (D.S.D. 2019), ECF No. 27-3. At the plea hearing, Burgee acknowledged that his plea would require him to register as a sex offender and undergo a psychosexual evaluation.

As required, Burgee registered as a sex offender pursuant to both SORNA and South Dakota law. But in September 2016, he stopped registering. Two years later, Burgee was arrested and indicted by a federal grand jury for failing to register under SORNA, in violation of 18 U.S.C. § 2250(a).

During the federal proceedings, Burgee filed a motion to dismiss the indictment, arguing three grounds for relief. First, he contended that the district court

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[1]The Honorable Roberto A. Lange, Chief Judge, United States District Court for the District of South Dakota.

[2]In relevant part, the statute provides, "A person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that: (1) Is harmful to minors . . . ." S.D. Codified Laws § 22-22-24.3.

should apply the categorical approach to determine whether his state-law conviction qualified as a sex offense under § 20911(7)(I). Second, he averred that even if the district court could properly apply the alternative circumstance-specific approach, it should look only to evidence used for the plea hearing. Lastly, he argued § 20911(7)(I) should be declared void for vagueness. The district court denied his motion as to each of these grounds. The case proceeded to a bench trial where Burgee renewed his motion to dismiss. It was again denied.

During the trial, the district court heard evidence additional to that relied on by the state court in Burgee's plea hearing. Specifically, the government submitted video of the minor victim's forensic interview, which was recorded three days after Burgee committed the offending acts.[3] In her interview, the 14-year-old girl recounted how Burgee attended her mother's party. During the party, she was sleeping in bed with her little sister. She awakened with Burgee beside her and kissing her face. Burgee took off her clothes and raped her. She recalled feeling fluid coming out of her vagina afterwards. The district court also heard evidence from a nurse practitioner who evaluated the 14-year-old girl twice within two and a half weeks of the underlying conduct. The nurse practitioner found that the girl's injuries were consistent with rape and took swabs to collect DNA foreign to the girl. And the government presented a forensic scientist who analyzed semen found on the girl's underwear. It matched Burgee's DNA. The district court also admitted Burgee's state sex-offender registration materials in which Burgee acknowledged his duty to register under South Dakota law.

The district court found that Burgee had been convicted of a qualifying SORNA sex offense—i.e., "an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). Because

[3]Burgee waived hearsay and foundation objections to the video interview.

the qualifying-offense element was the only element of his conviction that Burgee challenged, the district court found him guilty of failing to register as a sex offender.

II. *Discussion*

Burgee argues that the district court should be reversed for three reasons. First, he argues that the district court should have employed the categorical approach, not the circumstance-specific approach, to determine whether his conviction qualified as a sex offense under § 20911(7)(I). Next, he contends that, even under the circumstance-specific approach, the district court should have limited its review to evidence used at his plea hearing because it was the only reliable evidence. Finally, Burgee urges us to find § 20911(7)(I) void for vagueness.

SORNA obligates those identified as sex offenders to register and maintain current information with the appropriate authorities. As relevant here, it defines a *sex offender* as a person "convicted of" "a criminal offense that is a specified offense against a minor." 34 U.S.C. § 20911(1) & (5)(A)(ii). And a "specified offense against a minor" includes "an offense against a minor that involves . . . [a]ny conduct that by its nature is a sex offense against a minor." *Id.* § 20911(7)(I). Put simply, a sex offender under § 20911(7)(I) is a person who was convicted of an offense against a minor that involved conduct that by its nature is a sex offense against a minor.

A. *Circumstance-Specific Approach*

When determining whether a defendant's prior conviction falls within the ambit of a federal statute, courts apply different approaches depending on the statutory language.[4] This court employs the circumstance-specific approach under

[4]For example, in *Nijhawan v. Holder*, the Supreme Court held that a statutory provision, which read "an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000*," required the circumstance-specific approach because "the italicized language" "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a

§ 20911(7)(I). Under this approach, we examine the specific conduct the defendant engaged in while committing the underlying crime. *Hill*, 820 F.3d at 1005. Burgee urges us to use the categorical approach. Under that approach, courts must determine if the ordinary case, or generic commission, of the underlying crime falls within the statute. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018).

In *Hill*, we held that § 20911(7)(I) "manifestly invites" application of the circumstance-specific approach. 820 F.3d at 1005. Here, the district court followed the circumstance-specific approach to determine that Burgee's underlying conduct was "conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I). But Burgee asks us to overrule *Hill* and instead apply the categorical approach. According to Burgee, *Hill*'s holding is suspect because of the subsequent Supreme Court decisions in *Dimaya* and *Davis*. *See Gresham v. Swanson*, 866 F.3d 853, 855 (8th Cir. 2017) (explaining that a prior panel decision controls "unless an intervening Supreme Court decision has superseded it").

Dimaya and *Davis*, however, are distinguishable. In *Dimaya* and *Davis*, the Supreme Court interpreted 18 U.S.C. §§ 16(b) and 924(c)(3)(B), respectively. Both statutes define, in relevant part, "crime of violence" as an "offense 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." 18 U.S.C. §§ 16(b) & 924(c)(3)(B). In both cases, the Court applied the categorical approach, relying heavily on the term *offense*, which meant "a generic crime," not "the specific acts in

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particular occasion." 557 U.S. 29, 32 (2009) (alteration in original) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)). And, as discussed below, the Supreme Court in *United States v. Davis* addressed a statutory provision defining a qualifying offense as one "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" and stated that "the statutory text commands the categorical approach." 139 S. Ct. 2319, 2324, 2328 (2019) (quoting 18 U.S.C. § 924(c)(3)(B)).

which an offender engaged on a specific occasion." *Davis*, 139 S. Ct. at 2328 (quoting *Nijhawan*, 557 U.S. at 33–34); *see also Dimaya*, 138 S. Ct. at 1217 (explaining that the statutory "text creates no draw: Best read, it demands a categorical approach"). Thus, it was the statutory text in *Davis* and *Dimaya* that required the Court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Davis*, 139 S. Ct. at 2328 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004)); *see also Dimaya*, 138 S. Ct. at 1218 (stating that "the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit").

Hill survives the decisions in *Davis* and *Dimaya*. Just as *Davis*'s and *Dimaya*'s holdings are based on statutory text, so too is *Hill*'s holding. The *Hill* court held that because § 20911(7)(I) explicitly references the offense *conduct*, the statutory "text evidently commands . . . a circumstance-specific approach." *Hill*, 820 F.3d at 1006. *Conduct*, after all, is "[t]he way a person acts." *Conduct*, *The American Heritage Dictionary of the English Language* (5th ed. 2011). Thus, *Hill* explained that arguments for a categorical approach "simply founder[] on the plain words of the statute." *Hill*, 820 F.3d at 1005. In fact, the *Hill* court found the text so clear that it declined to give deference to the Attorney General's regulation that indicated the categorical approach should apply to the statute. *Id.* at 1006. *Hill*'s precedential value has not been altered, and it forecloses Burgee's argument.

B. *Reliable Evidence*

Burgee also challenges the district court's reliance on evidence that was not used during his plea hearing. According to Burgee, district courts employing the circumstance-specific approach should only consider the "facts the defendant admitted or was convicted of as shown by the prior judicial record." Appellant's Br. at 15–16. The relevant documents under his approach would be "the statutory subdivision of conviction, the charging instrument (insofar as it tracks the actual

conviction, as here), the judgment of conviction, and—most crucial—the plea colloquy and factual basis." Appellant's Reply Br. at 7 n.6.

Again, *Hill* resolves Burgee's issue. In *Hill* we explicitly declined to limit district courts' review under § 20911(7)(I) to specific documents, like those the Supreme Court had laid out in *Shepard v. United States*, 544 U.S. 13 (2005). 820 F.3d at 1005. In *Shepard*, the Supreme Court held that when sentencing courts apply the categorical approach, they are "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16. The *Shepard* Court explained that a sentencing court could not delve beyond the facts the defendant was convicted of to "make a disputed finding of fact" because the Constitution "guarantee[s] a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence." *Id.* at 25.

In *Hill*, because we did not apply the categorical approach, our course tacked differently. Instead of limiting district courts to specific documents, we held that they may "consider any reliable evidence." 820 F.3d at 1005. This does not run afoul of *Shepard* because the constitutional evidentiary concerns that arise during factfinding at *sentencing* are not present at the guilt phase of a trial. Under *Shepard*, a sentencing court cannot engage in factfinding because there is no jury present to determine the facts. *Shepard*, 544 U.S. at 25 (stating that "the Sixth and Fourteenth Amendments . . . guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence"). Under *Hill*, defendants get a trial and thus have the right to a jury. This is just what the Sixth Amendment contemplates: "[A] jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *Descamps v. United States*, 570 U.S. 254, 269 (2013). Burgee got just such a trial. The court conducted a trial to determine the facts of Burgee's offense conduct. The government had to prove the facts beyond a reasonable doubt, and Burgee had the option to exercise his right to a jury trial. He chose not to.

When determining whether a defendant's prior offense involves "conduct that by its nature is a sex offense against a minor," a district court may admit any reliable evidence. *Hill*, 820 F.3d at 1005. Reliable evidence is simply evidence that is trustworthy enough to be admissible under the rules of evidence. *Cf. Kuhn v. Wyeth, Inc.*, 686 F.3d 618, 625 (8th Cir. 2012) ("The Supreme Court explained that evidentiary reliability means trustworthiness."); *see also United States v. Sutton*, 916 F.3d 1134, 1140 (8th Cir. 2019) (holding that the challenged hearsay was "not reliable" because the "witnesses were at times admittedly untruthful, had accounts that were internally inconsistent and inconsistent with one another, and demonstrated motives to minimize their own involvement in the assault"). District courts regularly perform factfinding and are well equipped to assess evidence admissibility. The district court did so here. Burgee does not challenge the district court's inclusion of any specific piece of evidence, so our inquiry is at an end.

C. *Vagueness*

Finally, Burgee challenges § 20911(7)(I) as void for vagueness. We review void-for-vagueness challenges de novo. *United States v. Buie*, 946 F.3d 443, 445 (8th Cir. 2019).

When reviewing for vagueness, we first determine if a statute is vague as applied to the defendant's conduct, and only if it is will we consider whether a statute is facially unconstitutional. *United States v. Bramer*, 832 F.3d 908, 909–10 (8th Cir. 2016). This is because "a 'plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)). Thus, if "the statute gave adequate warning, under [the defendant's] specific set of facts, that the defendant's behavior was a criminal offense," then the statute is not vague. *United States v. Palmer*, 917 F.3d 1035, 1038–39 (8th Cir. 2019) (quoting *United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002)).

As we have explained, the district court's factual findings were proper. Burgee's actions with the 14-year-old victim of his offense constituted "conduct that by its nature is a sex offense against a minor" under § 20911(7)(I). Burgee failed to register as a sex offender under SORNA and South Dakota law for two years. His conduct was clearly proscribed. Section 20911(7)(I) is thus not void for vagueness as applied to Burgee.

III. *Conclusion*

We follow the precedent established in *Hill* and employ the circumstance-specific approach to the application of § 20911(7)(I). The district court used reliable evidence in finding the requisite facts by putting the government's proof through the rigors of the admissibility standards of the rules of evidence in a contested hearing. We also conclude that § 20911(7)(I) is not void for vagueness as applied to Burgee. Accordingly, we affirm.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KT BURGEE, a/k/a Kape Teal Burgee, Defendant.	3:18-CR-30164-RAL OPINION AND ORDER DENYING MOTION TO DISMISS INDICTMENT

The Sex Offender Registration and Notification Act (SORNA) requires people who have been convicted of certain "sex offenses" to periodically register in the jurisdiction where they reside. 34 U.S.C. §§ 20911(1), 20913–20914. Defendant KT Burgee pleaded guilty in state court to sexual exploitation of a minor and received a suspended sentence. Docs. 27-1, 27-3. Burgee allegedly failed to register as a sex offender and was later indicted by a federal grand jury for failing to register as a sex offender in violation of 18 U.S.C. § 2250. Doc. 1. Burgee moved to dismiss the indictment, arguing that his state conviction does not qualify as a "sex offense" under SORNA and that the relevant definition of a "sex offense" is void for vagueness. Doc. 26. This Court denies Burgee's motion because a jury must determine whether his prior conviction is a "sex offense" and a decision on Burgee's vagueness argument would be premature.

I. Background

Burgee was charged in state court with sexual exploitation of a minor under South Dakota Codified Law (SDCL) § 22-22-24.3. That statute reads in relevant part:

> A person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that:
> (1) Is harmful to minors;
> (2) Involves nudity; or
> (3) Is obscene.
> Consent to performing these proscribed acts by a minor or a minor's parent, guardian, or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

SDCL § 22-22-24.3. Burgee's information cited to SDCL § 22-22-24.3(2) but seemed to concern § 22-22-24.3(1), alleging that Burgee "did cause or knowingly permit a minor to engage in an activity or the simulation of an activity that is harmful to minors." Doc. 27-2.

Burgee pleaded guilty to the offense in June 2014. Doc. 27-3. He had the following exchange with the state judge about the factual basis for his plea:

> THE COURT: Mr. Burgee, back on March 17th, did you have contact with an individual who was under the age of 16?
> [BURGEE]: Yes, Your honor.
> THE COURT: And was that contact without the permission of that individual?
> ([Burgee] conferred with counsel.)
> [BURGEE]: No, Your Honor.
> THE COURT: It was not without the consent of the individual?
> [BURGEE]: Yes.
> THE COURT: But you knew this individual was not of age; is that correct?
> [BURGEE]: At the time I didn't.
> THE COURT: Ms. Kloeppner.[1]
> MS. KLOEPPNER: I can fill in some blanks, Your Honor.
> THE COURT: Please.
> MS. KLOEPPNER: The Information in this case alleges that he permitted a minor to engage in an activity or the simulation of an activity that is harmful to minors. In this case Mr. Burgee had contact with a minor. The evidence in this case, the forensic evidence showed that his DNA was found on her neck and his DNA was found in her underwear. I think that would provide the factual basis.
> THE COURT: Do you deny that?
> [BURGEE]: No, your honor.

[1]Ms. Kloeppner was the prosecutor in state court.

Doc. 27-3 at 3. In August 2014, the state judge gave Burgee a suspended sentence of two years' imprisonment and ordered that he register as a sex offender "pursuant to South Dakota law." Doc. 27-1.

Over four years later, a federal grand jury indicted Burgee in this case for failing to register as a sex offender. Doc. 1. The indictment alleges that Burgee was required to register under SORNA "by reason of a conviction under state law." Doc. 1. The parties agree that Burgee's 2014 conviction for sexual exploitation of a minor is the conviction referenced in the indictment, and both parties have filed documents concerning this conviction. Burgee filed the information, the transcript from his change of plea hearing, and the judgment of conviction. The government filed police and lab reports as well as sex offender registration forms Burgee completed. According to the police report, the victim of Burgee's conviction was a fourteen-year-old girl who said that Burgee had raped her during a party at her mother's house. Doc. 28-3 at 1, 4. The girl told a forensic interviewer that Burgee had entered the bedroom where she was sleeping, stripped off her clothes, and forced his penis into her vagina. Doc. 28-2 at 4. The lab reports the government submitted state that semen was detected on the victim's panties as well as her vaginal and anal/perineum swabs. Doc. 28-3 at 1. DNA obtained from the sperm in the victim's panties matched the DNA profile obtained from Burgee.[2] Doc. 28-3. The sex-offender registration forms the government submitted show that Burgee registered eleven times between August 27, 2014 and August 5, 2016. Docs. 28-5 through 28-15.

II. Analysis

[2]The lab report stated that the "probability of selecting an unrelated individual at random having a DNA profile that would match the partial DNA profile obtained from the sperm cell fraction [obtained from the panties] is approximately 1 in 70 million." Doc. 28-3 at 4.

A. Burgee's Argument That He is Not Required to Register Under SORNA

Congress enacted SORNA to protect the public from child predators and sexually violent criminals by ensuring that these individuals register as sex offenders. 34 U.S.C. § 20901; Reynolds v. United States, 565 U.S. 432, 435 (2012). To this end, § 2250 makes it a crime for a person who "is required to register under [SORNA]" and resides in Indian country to "knowingly" fail to register as a sex offender or update certain information. 18 U.S.C. § 2250. Burgee argues that the indictment should be dismissed because his state conviction does not trigger SORNA's registration requirement. This argument turns in large part on SORNA's definition of a "sex offense."

SORNA requires Burgee to register only if he is a "sex offender." 34 U.S.C. § 20913(a). A "sex offender," in turn, is defined as "an individual who was convicted of a sex offense." Id. § 20911(1). The issue here, then, is whether Burgee's state court conviction qualifies as a "sex offense" under SORNA. SORNA defines "sex offense" broadly. Section 20911(5), which is entitled "Amie Zyla expansion of sex offense definition," states that the term "sex offense" means, among other things, "(ii) a criminal offense that is a specified offense against a minor." Id. § 20911(5)(A)(ii). SORNA further defines the phrase "specified offense against a minor" in § 20911(7), which is aptly entitled "Expansion of definition of 'specified offense against a minor' to include all offenses by child predators." Id. § 20911(7). Section 20911(7) states:

> 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.

Id. Burgee argues that subsection (I) is the only potentially applicable definition while the government contends that Burgee's prior conviction falls within subsection (H) and (I). Because Burgee's motion can be resolved under § 20911(7)(I), this Court focuses on the definition in that subsection.

The parties disagree over how to decide whether Burgee's state conviction involved "conduct that by its nature is a sex offense against a minor." Burgee advocates for the "categorical approach," under which courts consider the statutory definition of the crime of conviction but ignore the underlying facts.[3] See United States v. Hill, 820 F.3d 1003, 1005 (8th Cir. 2016). The government, on the other hand, argues that this Court must apply a "circumstance-specific approach." Under that approach, courts may "examine the 'particular circumstances in which an offender committed the crime on a particular occasion.'" Id. (quoting Moncrieffe v. Holder, 569 U.S. 184, 202 (2013)).

The Eighth Circuit in Hill held that the circumstance-specific approach governs whether a prior offense constitutes "conduct that by its nature is a sex offense against a minor." Id. Looking to the text of § 20911(7)(I), the Eighth Circuit concluded that this subsection "manifestly invites an examination of the specific conduct in which the defendant engaged." Hill, 820 F.3d at 1005. This conclusion was supported, the Eighth Circuit reasoned, by SORNA's purpose. Id. After all,

[3]This Court uses "categorical approach" here to refer to both the categorical and modified categorical approach. After all, the modified approach "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute." Descamps v. United States, 570 U.S. 254, 263 (2013). The modified categorical approach allows courts to consult a limited universe of documents to determine which of the predicate offense's alternative elements formed the basis of the defendant's conviction. Id. at 261–63.

Congress passed SORNA to protect children from sex offenders, and it used broad terms to encompass "as many offenses against children as possible." Id. at 1005–06 (quoting United States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc)). SORNA's "intended breadth," the Eighth Circuit explained, was illustrated by the headings for the subsection defining a "sex offense"—"Amie Zyla expansion of sex offense definition"—and the subsection defining the term "specified offense against a minor"— "Expansion of definition of 'specified offense against a minor' to include all offenses by child predators." Id. at 1006.

Other circuits have also concluded that § 20911(7)(I) calls for a circumstance-specific approach. United States v. Price, 777 F.3d 700, 708–09 (4th Cir. 2015) (holding that the circumstance-specific approach applies to § 20911(7)(I)); Dodge, 597 F.3d at 1353–56 (same); United States v. Mi Kyung Byun, 539 F.3d 982, 991–92 (9th Cir. 2008) (concluding that the noncategorical approach applies to determine the age of the victim under § 20911(7)(I)). The Eighth Circuit in Hill cited Price, Dodge, and Byun with approval when deciding that the circumstance-specific approach governs whether a prior offense involved "conduct that by its nature is a sex offense against a minor." Hill, 820 F.3d at 1005.

Burgee acknowledges that the Eighth Circuit has applied the circumstance-specific approach, but argues that the Supreme Court's recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), "casts doubt" on Hill. Decisions by the Eighth Circuit, however, are binding on district courts within its territory "until overruled by [the] court en banc, by the Supreme Court, or by Congress." M.M. ex rel. L.R. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 (8th Cir. 2008); see also Eulitt ex rel. Eulitt v. Maine, Dep't of Educ., 386 F.3d 344, 349 (1st Cir. 2004) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority.");

Hood v. United States, 342 F.3d 861, 864 (8th Cir. 2003) (explaining that the district court was bound to apply Eighth Circuit precedent). The case on which Burgee relies, Dimaya, did not concern SORNA, but rather involved the definition of a "crime of violence" in 18 U.S.C. § 16. That provision states in relevant part that a "crime of violence" means: "(b) 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." 18 U.S.C. § 16(b). In Dimaya, a plurality of the Supreme Court cited to the phrase "by its nature" in § 16(b) when concluding that this subsection requires a categorical approach. Dimaya, 138 S. Ct. at 1217. The Court stated:

> Our decisions have consistently understood language in the residual clauses of both [the Armed Career Criminal Act] and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." Simple references to a "conviction," "felony," or "offense," we have stated, are "read naturally" to denote the "crime as *generally* committed." And the words "by its nature" in § 16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." So § 16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion.

Dimaya, 138 S. Ct. at 1217–18 (plurality opinion) (internal citations omitted). This discussion in Dimaya cannot be read as overruling Hill. Indeed, the text of § 16(b) is different from the text of § 20911(7)(I); § 16(b) focuses on the nature of the "offense" whereas § 20911(7)(I) focuses on the nature of the "conduct." It was § 20911(7)(I)'s reference to the "conduct" underlying a prior conviction, along with SORNA's purpose and the titles of the relevant subsections, that drove the Eighth Circuit's decision in Hill. Dimaya does not undermine this rationale to such a degree that this Court can ignore Hill's holding.

Burgee also argues that this Court must apply the categorical approach to avoid violating his Sixth Amendment rights. The government did not respond to this argument. The Fifth and Sixth Amendments guarantee Burgee's right to have a jury decide every element of the crime with which he is charged. United States v. Gaudin, 515 U.S. 506, 509–11 (1995). An "element" for Sixth Amendment purposes includes any fact, other than a prior conviction, that increases the statutory maximum or minimum sentence. Alleyne v. United States, 570 U.S. 99, 103, 111 n.1 (2013). The Sixth Amendment's requirement that every element of a crime be submitted to a jury is one reason the Supreme Court has used the categorical approach in the sentencing context. Descamps v. United States, 570 U.S. 254, 267, 269 (2013). The Supreme Court, for instance, has applied the categorical approach to a statute that imposes a mandatory penalty if a sentencing judge finds that the defendant has three prior convictions for a "violent felony." See 18 U.S.C. § 924(e); Descamps, 570 U.S. at 257. The categorical approach limits the judge's inquiry to the elements of the prior convictions rather than the circumstances underlying them, and thus protects a defendant's right to have a jury decide every fact or "element" that could increase his sentence. Descamps, 570 U.S. at 267, 269. As the Supreme Court recognized in Descamps, however, any judicial fact-finding that goes beyond simply identifying a prior conviction through the categorical or modified categorical approach "would (at the least) raise serious Sixth Amendment concerns." Id. at 269. These concerns, the Supreme Court explained, militate against "allowing a sentencing court to make a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea." Id. (cleaned up) (quoting Shepard v. United States, 544 U.S. 13, 25 (2005) (plurality opinion)). Burgee argues that these same Sixth Amendment concerns require this Court to apply the categorical approach to determine whether his prior conviction involved "conduct that by its nature is a sex offense against a minor."

The Fourth Circuit rejected this argument in Price. It reasoned that the circumstance-specific approach did not raise any Sixth Amendment concerns because the defendant was still "entitled to go to trial and have a jury determine beyond a reasonable doubt whether his [prior] conviction was for a sex offense under SORNA."[4] Price, 777 F.3d at 710. Had the defendant gone to trial, the Fourth Circuit reasoned, the jury would have considered the facts underlying the defendant's prior conviction "and then decided whether that evidence satisfied SORNA's definition of a 'sex offense.'" Id. The Fourth Circuit's holding finds support in the Supreme Court's approach to statutes that require more than a simple review of the elements of a prior offense. See Nijhawan v. Holder, 557 U.S. 29, 40 (2009) (dismissing Sixth Amendment concerns over a circumstance-specific approach to determining loss under a deportation statute because a jury would need to determine loss in a subsequent prosecution for illegal reentry); United States v. Hayes, 555 U.S. 415, 426 (2009) (holding that a predicate offense under 18 U.S.C. § 922(g)(9) did not need to have a domestic relationship as an element but noting that the government would need to "prove beyond a reasonable doubt" that the victim of the predicate offense had the specified domestic relationship to the defendant).

According to Burgee, however, the issue of whether a prior conviction is a "sex offense" is a question of law, at least in the Eighth Circuit. He cites Hill, the Eighth Circuit model jury instruction for § 2250, and this Court's decision in United States v. Marrowbone, 102 F. Supp. 3d 1101 (D.S.D. 2015), in support. These sources do not establish that a court must decide whether a prior conviction involved any conduct that by its nature is a sex offense against a minor.

First, the main issue in Hill was whether the categorical or the circumstance-specific approach applied to § 20911(7)(I). See Hill, 820 F.3d at 1005. Although the Eighth Circuit went

[4]The defendant in Price waived that right by pleading guilty. Price, 777 F.3d at 710.

on to consider the circumstances underlying the defendant's prior conviction, nothing indicates that the defendant disputed that his actual conduct (as opposed to the limited documents he argued the court could consider) established that he committed a sex offense. See Appellant's Br., 2015 WL 7076740; Appellant's Reply Br., 2015 WL 8732056. More importantly, the defendant in Hill had pleaded guilty,[5] thereby waiving his Sixth Amendment right to have a jury determine every element of the crime. See Price, 777 F.3d at 710 (explaining that the defendant, by pleading guilty, had forfeited his right to have a jury decide whether his prior conviction qualified as a sex offense under § 20911(7)(I)). Indeed, the plea agreement in Hill stated that the defendant understood that he was waiving the right "to have a speedy and public trial by jury." United States v. Hill, 5:15-cr-50014-TLB, Doc. 19 at 4. Thus, there was no concern that the Eighth Circuit would violate the defendant's Sixth Amendment right by considering the circumstances underlying his prior conviction. See United States v. Moreno-Morillo, 334 F.3d 819, 826 (9th Cir. 2003) (explaining that a defendant cannot waive his right to a jury trial and then complain on appeal that his right to such a trial was violated).

Second, the Eighth Circuit model instruction on § 2250 does not require this Court to decide whether Burgee's prior conviction was a sex offense. True, the "Notes on Use" to this instruction state that "[w]hether a specific prior offense qualifies as a 'sex offense' under SORNA is a legal question for the district court." Eighth Circuit Manual of Model Jury Instructions 6.18.2250. But the only support the model instruction cites for this proposition is United States v. Jenkins, 792 F.3d 931 (8th Cir. 2015), a case considering 18 U.S.C. § 922(g). See Jenkins, 792 F.3d at 935 ("Whether a particular conviction qualifies as a predicate felony for the purpose of

[5]The defendant in Hill entered a conditional plea, reserving the right to appeal the district court's denial of his motion to dismiss the indictment. 820 F.3d at 1004.

§ 922(g) is a question of law for the district court." (citation omitted)). Section 922(g) and SORNA are not comparable, and the statement in Jenkins therefore has little relevance to whether § 20911(7)(I) presents a question of law or a question for the jury. In any event, the Eighth Circuit model instructions, while often helpful, are not binding on district courts. United States v. Sparkman, 500 F.3d 678, 684 (8th Cir. 2007).

Third, this Court's decision in Marrowbone can be distinguished. In an opinion issued in the Marrowbone case, this Court stated that it was a legal issue whether assault with intent to commit rape qualified as a sex offense under SORNA. United States v. Marrowbone, No. 3:14-CR-30071-RAL, 2014 WL 6694781, at *2 (D.S.D. Nov. 26, 2014). The issue in Marrowbone, however, was whether the prior conviction, which this Court determined was essentially for attempted rape, met the definition of a sex offense in § 20911(5)(A)(v). Marrowbone, 2014 WL 6694781, at *3. This Court concluded that the relevant definitions of a sex offense required a categorical approach and did not consider the facts underlying the defendant's prior conviction. Id. at *3–4; see also United States v. Berry, 814 F.3d 192, 199 (4th Cir. 2016) (recognizing that some definitions of a "sex offense" under SORNA call for the circumstance-specific approach while others require a categorical approach). This Court never analyzed § 20911(7)(I) and the defendant never argued that a jury should decide whether he had been convicted of a sex offense. Marrowbone thus does not support Burgee's argument that whether his prior conviction meets § 20911(7)(I) presents a legal question.

To summarize, the circumstance-specific approach governs whether Burgee's prior conviction involved "any conduct that by its nature is a sex offense against a minor." Applying the circumstance-specific approach does not violate Burgee's Sixth Amendment rights because a jury will ultimately have to determine beyond a reasonable doubt whether the prior conviction falls

within § 20911(7)(I). Price, 777 F.3d at 710. This Court therefore denies Burgee's motion to dismiss to the extent Burgee asks this Court to apply the categorical approach and conclude that his prior conviction does not qualify as a "sex offense" under SORNA.

B. Vagueness Challenge to § 20911(7)(I)

Burgee also argues that § 20911(7)(I) is impermissibly vague. "A statute is void for vagueness if it: (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) it is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Paul, 885 F.3d 1099, 1105 (8th Cir.) (citation omitted), cert. denied, 139 S. Ct. 290 (2018). Although Burgee makes both an as-applied and a facial attack on § 20911(7)(I), he acknowledges that he must show that the statute is vague "as applied to his particular conduct" to succeed. United States v. Bramer, 832 F.3d 908, 909 (8th Cir. 2016) (per curiam); see also United States v. Frison, 825 F.3d 437, 442 (8th Cir. 2016) ("We consider whether a statute is vague as applied to the particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (cleaned up) (citation omitted)).

Under an as-applied challenge, courts look "to whether the statute gave adequate warning, under a specific set of facts, that the defendant's behavior was a criminal offense." United States v. Palmer, No. 18-1365, No. 18-1367, 2019 WL 1053097, at *3 (8th Cir. Mar. 6, 2019) (citation omitted). Burgee argues that the phrase "conduct that by its nature is a sex offense against a minor" is ambiguous and that it is "unclear what conduct would qualify" under § 20911(7)(I). He contends that the "evidence" is not "sufficient that [his] conviction brings him within the scope of SORNA's

residual clause or that he would know that it did." The government disagrees, arguing that Burgee's prior registration forms show that he knew he had to register under SORNA.[6]

Any ruling on Burgee's vagueness argument would be premature at this stage of the case. Burgee moved to dismiss the indictment under Rule 12(b) of the Federal Rules of Criminal Procedure, which allows parties to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Courts must decide a Rule 12(b) motion before trial unless there is "good cause to defer a ruling" and deferring the ruling will not "adversely affect a party's right to appeal." Fed. R. Crim. P. 12(d). As the Supreme Court has explained, however, Rule 12(b) authorizes pretrial resolution of a motion to dismiss only when "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." United States v. Covington, 395 U.S. 57, 60 (1969); see also United States v. Turner, 842 F.3d 602, 605 (8th Cir. 2016).

The rationale for this Rule includes preventing courts from making factual findings on issues that relate to the jury's decision on the merits, the need for a more accurate record, and concerns about judicial economy. See United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010). Thus, for instance, the Eighth Circuit found good cause to defer ruling on the motion to dismiss in Turner because the defendant's as-applied constitutional challenge required the district court to resolve factual issues related to the defendant's alleged offense. 842 F.3d at 605 (holding that the district court should have waited until trial to resolve the motion to dismiss the indictment). Similarly, the Tenth Circuit in Pope affirmed the pretrial denial of a motion to dismiss because the defendant's as-applied constitutional challenge was intertwined with the question of guilt or

[6]The only court of appeals to consider the issue held that § 20911(7)(I) is not vague. United States v. Schofield, 802 F.3d 722, 730–31 (5th Cir. 2015) (per curiam).

innocence and would have required the district court to resolve factual disputes. 613 F.3d at 1261–62.

Turner and Pope counsel against deciding Burgee's vagueness challenge before trial. First, Burgee's motion raises questions of fact that are intertwined with the merits of the § 2250 charge. See Turner, 842 F.3d at 605 (explaining that courts may not make factual findings "when an issue is inevitably bound up with evidence about the alleged offense itself" (citation and internal marks omitted)). The government must show that Burgee has been convicted of a "sex offense" to meet the first element of § 2250. See 18 U.S.C. § 2250(a); 34 U.S.C. §§ 20911(1), 20913(a).

As explained already, deciding whether Burgee has been convicted of a sex offense will require the jury to consider the facts underlying Burgee's prior conviction and then determine whether it involved "[a]ny conduct that by its nature is a sex offense against a minor." § 20911(7)(I). Burgee's as-applied challenge asks this Court to consider these same issues. After all, he argues that the "evidence" surrounding his prior conviction falls short of establishing that the conviction comes within § 20911(7)(I) or that he should have known it did. And an as-applied challenge like Burgee's asks "whether the statute gave adequate warning, *under a specific set of facts*, that the defendant's behavior was a criminal offense." Palmer, 2019 WL 1053097, at *3 (emphasis added). To rule on Burgee's motion, then, this Court would need to resolve facts that are bound up with the jury's decision on the § 2250 charge, namely what conduct Burgee actually engaged in with the victim of his prior conviction. In addition, this Court needs a "more certain framework" to analyze Burgee's vagueness argument. Pope, 613 F.3d at 1259 (citation omitted). The indictment does not contain any facts about Burgee's prior conviction and the parties have not stipulated to any such facts. Instead, the government has submitted documents concerning the prior conviction, some of which raise obvious hearsay concerns. Under these circumstances, a

trial on the "facts surrounding the commission of the alleged offense" would assist this Court in ruling on Burgee's challenge. Because good cause exists to defer ruling on Burgee's vagueness argument, this Court denies Burgee's motion to dismiss without prejudice to Burgee renewing the motion or making the argument in the context of a Federal Rule of Criminal Procedure Rule 29 motion once the government has introduced the relevant evidence at trial.[7]

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that Burgee's Motion to Dismiss Indictment, Doc. 26, is denied. This denial is without prejudice to Burgee renewing his as-applied vagueness challenge to § 20911(7)(I).

DATED this 25th day of March, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

[7]This Court recognizes that Rule 12(d) permits courts to "defer" ruling on a motion to dismiss when good cause exists. As another district court explained, however, it is preferable to deny such a motion without prejudice, "since a motion to dismiss that depends upon the resolution of facts at trial is a contradiction in terms." United States v. Poulin, 588 F. Supp. 2d 58, 61 n.2 (D. Me. 2008); see also Pope, 613 F.3d at 1257 (affirming denial of pretrial motion to dismiss where resolution of the motion before trial was not appropriate).

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KT BURGEE, a/k/a Kape Teal Burgee, Defendant.	3:18-CR-30164-RAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 18, 2019, this Court conducted a court trial in this case by consent of the Defendant, defense counsel, and Assistant United States Attorney. Defendant KT Burgee (Burgee) faced a single charge in the indictment under the Sex Offender Registration and Notification Act (SORNA), which requires people who have been convicted of certain "sex offenses" to periodically register in the jurisdiction where they reside. Doc. 1; 34 U.S.C. §§ 20911(1), 20913–20914. Burgee previously had moved to dismiss the indictment, arguing that his prior state conviction does not qualify as a "sex offense" under SORNA and that the relevant definition of a "sex offense" is void for vagueness. Doc. 26. This Court denied Burgee's motion because under Eighth Circuit precedent, a finder of fact must determine whether his prior conviction is a "sex offense."

I. Findings of Fact

1. Burgee, in 2014, was charged in Hughes County, Sixth Judicial Circuit of South Dakota with sexual exploitation of a minor under South Dakota Codified Law (SDCL) § 22-22-24.3. Tr. Ex. 1.

2. That statute reads in relevant part:

> A person is guilty of sexual exploitation of a minor if the person causes or knowingly permits a minor to engage in an activity or the simulation of an activity that:
> (1) Is harmful to minors;
> (2) Involves nudity; or
> (3) Is obscene.
> Consent to performing these proscribed acts by a minor or a minor's parent, guardian, or custodian, or mistake as to the minor's age is not a defense to a charge of violating this section.

SDCL § 22-22-24.3.

3. The State information charging Burgee cited to SDCL § 22-22-24.3(2) but seemed to concern § 22-22-24.3(1), alleging that Burgee "did cause or knowingly permit a minor to engage in an activity or the simulation of an activity that is harmful to minors." Tr. Ex. 1.

4. Burgee pleaded guilty to the offense on June 17, 2014. Tr. Ex. 3. He had the following exchange with the state judge about the factual basis for his plea:

> THE COURT: Mr. Burgee, back on March 17th, did you have contact with an individual who was under the age of 16?
> [BURGEE]: Yes, Your honor.
> THE COURT: And was that contact without the permission of that individual?
> ([Burgee] conferred with counsel.)
> [BURGEE]: No, Your Honor.
> THE COURT: It was not without the consent of the individual?
> [BURGEE]: Yes.
> THE COURT: But you knew this individual was not of age; is that correct?
> [BURGEE]: At the time I didn't.
> THE COURT: Ms. Kloeppner.[1]
> MS. KLOEPPNER: I can fill in some blanks, Your Honor.
> THE COURT: Please.
> MS. KLOEPPNER: The Information in this case alleges that he permitted a minor to engage in an activity or the simulation of an activity that is harmful to minors. In this case Mr. Burgee had

[1]Ms. Kloeppner was the prosecutor in state court.

> contact with a minor. The evidence in this case, the forensic evidence showed that his DNA was found on her neck and his DNA was found in her underwear. I think that would provide the factual basis.
> THE COURT: Do you deny that?
> [BURGEE]: No, your honor.

Tr. Ex. 3.

5. In August 2014, the state judge gave Burgee a suspended sentence of two years' imprisonment and ordered that he register as a sex offender "pursuant to South Dakota law." Tr. Ex. 4.

6. In 2016, Burgee was on federal supervised release after a federal larceny conviction. Burgee failed to meet with his supervisory probation officer and left where he was supposed to reside, so this Court issued a warrant for the violation of federal supervised release. Deputy U.S. Marshal Trevor Lumadue investigated Burgee's whereabouts upon receipt of the warrant for the supervised release violation and concluded that Burgee did not reside where he was registered between September 14, 2016, and his arrest on the federal warrant on October 15, 2018. Burgee then was indicted in this case for failure to register as a sex offender.

7. Because Burgee challenges whether the state conviction for sexual exploitation of a minor was a "sex offense" under SORNA, this Court, consistent with precedent from the Eighth Circuit under United States v. Hill, 820 F.3d 1003, 1005 (8th Cir. 2016), considered the reliable evidence of the circumstances underlying Burgee's state court conviction. In doing so, the Court heard testimony at trial from Jennifer Gray, the Capital Area Counseling forensic examiner who conducted the forensic examination of S.S., the fourteen-year-old victim of Burgee's state court sexual exploitation of a minor conviction; nurse practitioner Angela Lisburg, who conducted the forensic medical

examination and follow-up examination of S.S.; Derald Gross, the captain of police for the Pierre Police Department who handled the sexual assault kit; and Kristina Dreckman, a forensic scientist at the South Dakota Forensic Laboratory who conducted serology and DNA testing on portions of the rape kit.

8. The parties at trial before this Court agreed that the forensic interview of S.S. could be received in evidence in lieu of S.S.'s testimony and without any objection to hearsay or foundation.

9. S.S., in her forensic interview by forensic examiner Gray, disclosed that Burgee had raped her by inserting his penis into her vagina without her consent and against her will at a time when she was fourteen years of age. Tr. Ex. 2.

10. S.S., in her forensic interview described that her mother had a drinking party at her home on the evening of Saint Patrick's Day, March 17, 2014. Burgee was among those who attended the drinking party and was consuming alcohol. Tr. Ex. 2.

11. S.S., who was not part of the drinking, went into her mother's room with her little sister who then was in the fifth grade, so they could watch television before going to sleep. Both S.S. and her little sister fell asleep with the television off in their mother's room. Tr. Ex. 2.

12. Sometime in the night, S.S. awoke to the feeling of someone beside her and then on top of her, kissing her face and neck. S.S. described that her pants had been taken off of her, that her underwear was pushed down to her ankles, that her sweater was off, and that she felt pressure from the man on top of her. Tr. Ex. 2.

13. S.S. tried to pull her underwear up and push the man off of her, but the man responded "I'm KT; trust me." The man kept saying "trust me, trust me" as S.S. tried to get him off of her. Tr. Ex. 2.
14. S.S. described that the man kissed her on the neck. Tr. Ex. 2.
15. S.S. felt the man's penis in her vagina and described to the forensic examiner that it hurt really bad. Tr. Ex. 2.
16. S.S. recognized the man who was raping her as "KT" and believed "KT" to be drunk based on the smell of his breath and the manner in which he was acting. Tr. Ex. 2.
17. The "KT" who was in the house and room that night was defendant KT Burgee.
18. S.S.'s little sister awoke during the sexual assault and ran out of the room. S.S. ultimately got free and went into her own room, where her little sister was located. Tr. Ex. 2.
19. Burgee tried to follow S.S. into her room, got into her room, and then was following her around, to the point where S.S.'s mother's boyfriend began to argue with Burgee and eventually kicked him out. Tr. Ex. 2.
20. S.S. had never met Burgee before and did not know him previously. This was the first occasion where Burgee had been in the home of S.S. to her knowledge. Tr. Ex. 2.
21. S.S. went to the bathroom after the assault and felt some fluid come out of her vagina. S.S. was not sure whether Burgee had ejaculated. Tr. Ex. 2.
22. S.S. went to school the next day and spoke with a friend. S.S. the next evening tried to tell her mother what had happened, but her mother was drunk. S.S. later told her older sister, who in turn told her mother, resulting in S.S. being taken to Avera St. Mary's Hospital in Pierre, South Dakota. Tr. Ex. 2.

23. On March 18, 2014, S.S. presented to Avera St. Mary's Hospital where Angela Lisburg performed a sexual assault examination and collected a kit that then was provided to Captain Gross of the Pierre Police Department. Lisburg, a nurse practitioner who has sexual abuse training and works at the Central South Dakota Child Advocacy Center, did a head-to-toe physical and genital examination. The genital examination revealed redness and bruising to the opening of S.S.'s vagina.

24. As a part of the physical examination, Lisburg collected S.S.'s underwear, among other things, and swabbed her neck, chest, vagina, and anus, as well as taking a buccal swab of S.S.

25. Because Lisburg did not know whether the redness and bruising at the opening of S.S.'s vagina was a consequence of the sexual assault or something unique to S.S., Lisburg did a follow-up examination on April 3, 2014, at which time there was no redness or bruising. The existence of redness and bruising on March 18 and not on April 3, suggested to Lisburg that redness and bruising of S.S.'s vagina resulted from the sexual assault reported by S.S.

26. When interviewed on March 19, 2014, by Pierre Police Captain Derald Gross, Burgee admitted being at a party on March 17, 2014, at the residence. Burgee said that he drank two cases of beer and blanked out. Burgee was 20 years old at the time. Burgee allowed Captain Gross to take a buccal swab from him.

27. The State of South Dakota Forensic Laboratory received the sexual assault kit,[2] and forensic scientist Kristina Dreckman did serology and DNA testing on material in the

[2] After Burgee's guilty plea and sentence, evidence from the state case was destroyed. Tr. Ex. E.

kit in May of 2014. Dreckman had received, through Captain Gross, a buccal swab of Burgee, together with the rape kit as collected by Lisburg.

28. Dreckman performed serology testing, which found semen on the vaginal swab taken from S.S. and on S.S.'s underwear. There was saliva found on both S.S.'s underwear and her neck.

29. Dreckman performed short tandem repeat testing to determine whose DNA was on certain swabs. The vaginal swab matched S.S., but Dreckman could not detect male DNA on the vaginal swab. Dreckman described that the cutting from the vaginal swab used for DNA testing may not have had semen on it, while the cutting of the vaginal swab used for serology could have.

30. Dreckman found sperm cells in S.S.'s underwear, which matched Burgee's DNA, in that only one in 70 million would be expected to have the same DNA profile as found in the sperm cells in S.S.'s underwear and in that Burgee had that same DNA profile.

31. Burgee pleaded guilty to a state court information on June 17, 2014, for sexual exploitation of a minor. Tr. Ex. 3. Burgee's plea was intended to be an Alford plea based on a plea agreement described on the record of the transcript. Reliable evidence exists that Burgee's sexual exploitation of a minor conviction regarding his behavior towards S.S. was in fact "conduct that by its nature is a sex offense against a minor." Burgee received a suspended sentence that included a duty to register under state law as a sex offender. Tr. Ex. 4.

32. Following Burgee's sentencing in state court, Burgee executed with a state probation officer a form by which he certified "my duty to register as a sex offender has been explained to me." Tr. Ex. 5.

33. Burgee then registered as a sex offender under South Dakota law in 2014 and 2015. Tr. Exs. 7, 8, 9, 10, 11, 12, 13. On each of those forms Burgee certified: "I UNDERSTAND THAT I AM REQUIRED TO REGISTER **BI-ANNUALLY** WITH THE APPROPRIATE LAW ENFORCEMENT AGENCY WITHIN THE STATE OF SOUTH DAKOTA PER SDCL 22-24B-7." Tr. Exs. 7, 8, 9, 10, 11, 12, 13.

34. Each form also contained a certification that Burgee understood that he had to notify law enforcement agencies within three days of any relocation, including moving out of state. Tr. Exs. 7, 8, 9, 10, 11, 12, 13.

35. Burgee was indicted in state court for failure to provide new address for sex offender registry and was convicted of that offense in 2015. Tr. Exs. 14, 15.

36. In 2015, while in state custody, Burgee executed sex offender registration forms similar to the ones that he had signed earlier, verifying his obligation to register as a sex offender. Tr. Exs. 17, 18.

37. Burgee was released from state custody on or about July 28, 2016, and executed the parole supervision agreement, with commitments not to leave the state, to keep his probation officer apprised of his whereabouts, and not to change residence or employment without notifying the state probation officer. Tr. Ex. 18.

38. Burgee also signed a document again certifying that he had a duty to register as a sex offender, which had been explained to him. Tr. Ex. 19.

39. Burgee registered as a sex offender on August 5, 2016, listing his residence as the Rapid City Community Work Center. Tr. Ex. 20.

40. Burgee completed no sex offender registration forms while out of custody after August 5, 2016.

41. Burgee not only was on state probation, but also on federal supervision in the District of South Dakota for a prior larceny conviction. Burgee's federal supervising probation officer met with Burgee on September 13, 2016, at the Community Transitions program building in Rapid City where the Community Work Center was located. The supervisory probation officer was scheduled to meet with Burgee a week later, but was notified on September 14 that Burgee had absconded from the Community Work Center.

42. While at the Community Work Center, Burgee had been working at D&D Truck Wash. Burgee's last date of work at the truck wash was September 10, 2016. He was scheduled to work the next week, but did not show up.

43. Burgee was released from the Community Work Center in Rapid City to go to work on September 14, 2016. He was not back at the Community Work Center that evening and thus was listed as missing on the evening of September 14, 2016. Tr. Exs. 31, 32. Burgee never did return to the Community Transitions Program or Community Work Center in Rapid City after he absconded on September 14, 2016.

44. After receiving the federal warrant to arrest Burgee on a Petition to Revoke Supervised Release, Deputy U.S. Marshal Lumadue accessed Burgee's Facebook account and saw a series of photographs indicating that Burgee was outside of the state of South Dakota, based on the appearance of coasts, beaches, and other topographical features that do not exist in the state of South Dakota. Tr. Exs. 22–29.

45. Burgee was arrested on October 15, 2018, in Pierre, South Dakota, at his mother's home. Burgee had been a fugitive since the issuance of the arrest warrant on September

14, 2016, and had not reregistered any new address between his last registration on August 5, 2016, and the time of his arrest on October 15, 2018.

46. Burgee was interviewed by Deputy U.S. Marshal Lumadue at the Hughes County Jail. Burgee was read his Miranda rights and waived those rights. During the interview, Burgee said that he had not registered as a sex offender because he did not feel that he was a sex offender, stating that the DNA came back as not his and that he got set up. Burgee conceded that his last registration was while he was in Rapid City in 2016, and that he had not registered as a sex offender for a couple of years. Burgee explained that he had been traveling everywhere, writing and performing music, and having fun. Burgee mentioned being in North Dakota and in New Mexico and traveling throughout the United States. Burgee was vague and reluctant to disclose where particularly he had been and with whom he spent time. During the interview, Burgee, notwithstanding the evidence received at trial, denied ever signing anything acknowledging his responsibility to register as a sex offender.

47. The evidence establishes that Burgee knew of his responsibility to register as a sex offender, at least under South Dakota law.

48. The evidence establishes that Burgee traveled to other states during the time when he was out of compliance with his duty to register as a sex offender under South Dakota law.

49. If any of the Conclusions of Law contained below should have been characterized as Findings of Fact, they are incorporated as findings herein.

II. Conclusions of Law

1. Congress enacted SORNA to protect the public from child predators and sexually violent criminals by ensuring that these individuals register as sex offenders. 34 U.S.C. § 20901; Reynolds v. United States, 565 U.S. 432, 435 (2012).

2. To this end, § 2250 makes it a crime for a person who "is required to register under [SORNA]" and who travels in interstate commerce to "knowingly" fail to register as a sex offender or update certain information. 18 U.S.C. § 2250.

3. Burgee argues that the indictment should be dismissed because his state conviction does not trigger SORNA's registration requirement. This argument turns in large part on SORNA's definition of a "sex offense."

4. SORNA requires Burgee to register only if he is a "sex offender." 34 U.S.C. § 20913(a). A "sex offender," in turn, is defined as "an individual who was convicted of a sex offense." Id. § 20911(1). The issue here, then, is whether Burgee's state court conviction qualifies as a "sex offense" under SORNA.

5. SORNA defines "sex offense" broadly. Section 20911(5), which is entitled "Amie Zyla expansion of sex offense definition," states that the term "sex offense" means, among other things, "(ii) a criminal offense that is a specified offense against a minor." Id. § 20911(5)(A)(ii).

6. SORNA further defines the phrase "specified offense against a minor" in § 20911(7), which is aptly entitled "Expansion of definition of 'specified offense against a minor' to include all offenses by child predators." Id. § 20911(7). Section 20911(7) states:

> 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.

Id.

7. Burgee argues that subsection (I) is the only potentially applicable definition while the government contends that Burgee's prior conviction falls within subsections (H) and (I). Because this case can be resolved under § 20911(7)(I), this Court focuses on the definition in that subsection.

8. The parties disagree over how to decide whether Burgee's state conviction involved "conduct that by its nature is a sex offense against a minor." Burgee advocates for the "categorical approach," under which courts consider the statutory definition of the crime of conviction but ignore the underlying facts.[3] See Hill, 820 F.3d at 1005. The government, on the other hand, argues that this Court must apply a "circumstance-specific approach." Under that approach, courts may "examine the 'particular circumstances in which an offender committed the crime on a particular occasion.'" Id. (quoting Moncrieffe v. Holder, 569 U.S. 184, 202 (2013)).

[3]This Court uses "categorical approach" here to refer to both the categorical and modified categorical approach. After all, the modified approach "merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute." Descamps v. United States, 570 U.S. 254, 263 (2013). The modified categorical approach allows courts to consult a limited universe of documents to determine which of the predicate offense's alternative elements formed the basis of the defendant's conviction. Id. at 261–63.

9. The Eighth Circuit in Hill held that the circumstance-specific approach governs whether a prior offense constitutes "conduct that by its nature is a sex offense against a minor." Id. Looking to the text of § 20911(7)(I), the Eighth Circuit concluded that this subsection "manifestly invites an examination of the specific conduct in which the defendant engaged." Hill, 820 F.3d at 1005. This conclusion was supported, the Eighth Circuit reasoned, by SORNA's purpose. Id. After all, Congress passed SORNA to protect children from sex offenders, and it used broad terms to encompass "as many offenses against children as possible." Id. at 1005–06 (quoting United States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc)). SORNA's "intended breadth," the Eighth Circuit explained, was illustrated by the headings for the subsection defining a "sex offense"—"Amie Zyla expansion of sex offense definition"—and the subsection defining the term "specified offense against a minor"— "Expansion of definition of 'specified offense against a minor' to include all offenses by child predators." Id. at 1006.

10. Other circuits have also concluded that § 20911(7)(I) calls for a circumstance-specific approach. United States v. Price, 777 F.3d 700, 708–09 (4th Cir. 2015) (holding that the circumstance-specific approach applies to § 20911(7)(I)); Dodge, 597 F.3d at 1353–56 (same); United States v. Mi Kyung Byun, 539 F.3d 982, 991–92 (9th Cir. 2008) (concluding that the noncategorical approach applies to determine the age of the victim under § 20911(7)(I)). The Eighth Circuit in Hill cited Price, Dodge, and Byun with approval when deciding that the circumstance-specific approach governs whether a prior offense involved "conduct that by its nature is a sex offense against a minor." Hill, 820 F.3d at 1005.

11. Burgee acknowledges that the Eighth Circuit has applied the circumstance-specific approach, but argues that the Supreme Court's recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), "casts doubt" on Hill. Decisions by the Eighth Circuit, however, are binding on district courts within its territory "until overruled by [the] court en banc, by the Supreme Court, or by Congress." M.M. ex rel. L.R. v. Special Sch. Dist. No. 1, 512 F.3d 455, 459 (8th Cir. 2008); see also Eulitt ex rel. Eulitt v. Maine, Dep't of Educ., 386 F.3d 344, 349 (1st Cir. 2004) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority."); Hood v. United States, 342 F.3d 861, 864 (8th Cir. 2003) (explaining that the district court was bound to apply Eighth Circuit precedent).

12. The case on which Burgee relies, Dimaya, did not concern SORNA, but rather involved the definition of a "crime of violence" in 18 U.S.C. § 16. That provision states in relevant part that a "crime of violence" means: "(b) 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." 18 U.S.C. § 16(b). In Dimaya, a plurality of the Supreme Court cited to the phrase "by its nature" in § 16(b) when concluding that this subsection requires a categorical approach. Dimaya, 138 S. Ct. at 1217. The Court stated:

> Our decisions have consistently understood language in the residual clauses of both [the Armed Career Criminal Act] and § 16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." Simple references to a "conviction," "felony," or "offense," we have stated, are "read naturally" to denote the "crime as *generally* committed." And the words "by its nature" in § 16(b) make that meaning all the clearer. The statute, recall, directs

> courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." So § 16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion.

Dimaya, 138 S. Ct. at 1217–18 (plurality opinion) (internal citations omitted). This discussion in Dimaya cannot be read as overruling Hill. Indeed, the text of § 16(b) is different from the text of § 20911(7)(I); § 16(b) focuses on the nature of the "offense" whereas § 20911(7)(I) focuses on the nature of the "conduct." It was § 20911(7)(I)'s reference to the "conduct" underlying a prior conviction, along with SORNA's purpose and the titles of the relevant subsections, that drove the Eighth Circuit's decision in Hill. Dimaya does not undermine this rationale to such a degree that this Court can ignore Hill's holding.[4]

13. Burgee also argues that this Court must apply the categorical approach to avoid violating his Sixth Amendment rights. The Fifth and Sixth Amendments guarantee Burgee's right to have a jury decide every element of the crime with which he is charged. United States v. Gaudin, 515 U.S. 506, 509–11 (1995). An "element" for Sixth Amendment purposes includes any fact, other than a prior conviction, that increases the statutory maximum or minimum sentence. Alleyne v. United States, 570 U.S. 99, 103, 111 n.1 (2013). The Sixth Amendment's requirement that every element of a crime be submitted to a jury is one reason the Supreme Court has used the categorical approach in the sentencing context. Descamps v. United States, 570 U.S.

[4]The Supreme Court's recent decision in United States v. Davis, 139 S. Ct. 2319 (2019), involved 18 U.S.C. § 924(c)(3), a statute which, like § 16(b), focuses on the nature of the "offense." As such, Davis cannot be read as overruling Hill.

254, 267, 269 (2013). The Supreme Court, for instance, has applied the categorical approach to a statute that imposes a mandatory penalty if a sentencing judge finds that the defendant has three prior convictions for a "violent felony." See 18 U.S.C. § 924(e); Descamps, 570 U.S. at 257. The categorical approach limits the judge's inquiry to the elements of the prior convictions rather than the circumstances underlying them, and thus protects a defendant's right to have a jury decide every fact or "element" that could increase his sentence. Descamps, 570 U.S. at 267, 269. As the Supreme Court recognized in Descamps, however, any judicial fact-finding that goes beyond simply identifying a prior conviction through the categorical or modified categorical approach "would (at the least) raise serious Sixth Amendment concerns." Id. at 269. These concerns, the Supreme Court explained, militate against "allowing a sentencing court to make a disputed determination about what the defendant and state judge must have understood as the factual basis of the prior plea." Id. (cleaned up) (quoting Shepard v. United States, 544 U.S. 13, 25 (2005) (plurality opinion)). Burgee argues that these same Sixth Amendment concerns require this Court to apply the categorical approach to determine whether his prior conviction involved "conduct that by its nature is a sex offense against a minor."

14. The Fourth Circuit rejected this argument in Price. It reasoned that the circumstance-specific approach did not raise any Sixth Amendment concerns because the defendant was still "entitled to go to trial and have a jury determine beyond a reasonable doubt whether his [prior] conviction was for a sex offense under SORNA."[5] Price, 777 F.3d at 710. Had the defendant gone to trial, the Fourth Circuit reasoned, the jury would

[5]The defendant in Price waived that right by pleading guilty. Price, 777 F.3d at 710.

have considered the facts underlying the defendant's prior conviction "and then decided whether that evidence satisfied SORNA's definition of a 'sex offense.'" Id. The Fourth Circuit's holding finds support in the Supreme Court's approach to statutes that require more than a simple review of the elements of a prior offense. See Nijhawan v. Holder, 557 U.S. 29, 40 (2009) (dismissing Sixth Amendment concerns over a circumstance-specific approach to determining loss under a deportation statute because a jury would need to determine loss in a subsequent prosecution for illegal reentry); United States v. Hayes, 555 U.S. 415, 426 (2009) (holding that a predicate offense under 18 U.S.C. § 922(g)(9) did not need to have a domestic relationship as an element but noting that the government would need to "prove beyond a reasonable doubt" that the victim of the predicate offense had the specified domestic relationship to the defendant).

15. Burgee also has argued that § 20911(7)(I) is impermissibly vague. "A statute is void for vagueness if it: (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) it is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Paul, 885 F.3d 1099, 1105 (8th Cir.) (citation omitted), cert. denied, 139 S. Ct. 290 (2018). Although Burgee makes both an as-applied and facial attack on § 20911(7)(I), he acknowledges that he must show that the statute is vague "as applied to his particular conduct" to succeed. United States v. Bramer, 832 F.3d 908, 909 (8th Cir. 2016) (per curiam); see also United States v. Frison, 825 F.3d 437, 442 (8th Cir. 2016) ("We consider whether a statute is vague as applied to the particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (cleaned up) (citation omitted)).

16. Under an as-applied challenge, courts look "to whether the statute gave adequate warning, under a specific set of facts, that the defendant's behavior was a criminal offense." United States v. Palmer, 917 F.3d 1035, 1038–39 (8th Cir. 2019) (citation omitted). Burgee has argued that the phrase "conduct that by its nature is a sex offense against a minor" is ambiguous and that it is "unclear what conduct would qualify" under § 20911(7)(I). He has contended that the "evidence" is not "sufficient that [his] conviction brings him within the scope of SORNA's residual clause or that he could know that it did."

17. The only court of appeals to consider the issue held that § 20911(7)(I) is not vague. United States v. Schofield, 802 F.3d 722, 730–31 (5th Cir. 2015) (per curiam).

18. Section 20911(7)(I) is not vague when applied to the particular conduct in which Burgee engaged. Burgee's criminal conviction qualifies as a sex offense, and Burgee's decision not to update his sex offender registration within three days of absconding from supervision is conduct clearly proscribed by SORNA.

19. Ultimately, the elements of the crime of failure to register as a sex offender, as charged in the indictment are the following: 1) that Burgee was convicted of a sex offense; 2) that Burgee traveled in interstate commerce; and 3) that Burgee knowingly failed to register as a sex offender and update his registration as a sex offender during the time frame of September 18, 2016, through October 11, 2018, covered by the indictment.

20. For the reasons explained above, Burgee had been convicted of a sex offense within the meaning of SORNA, and his sexual exploitation of a minor conviction in state court qualifies as a sex offense under SORNA.

21. Burgee did not contest either the second or the third elements of the crime charged, that Burgee traveled in interstate commerce during the time frame alleged in the indictment, and that Burgee failed to register or update his registration as a sex offender during that time.

22. The Government has established beyond a reasonable doubt that Burgee is guilty of failure to register as a sex offender as alleged in the indictment.

23. If any of these Conclusions of Law should have been characterized as Findings of Fact, they are incorporated in the Findings of Fact above.

III. Conclusion

Based on the Findings of Fact and Conclusions of Law as stated above, it is hereby ORDERED, ADJUGED AND DECREED that KT Burgee, a/k/a Kape Teal Burgee, is found guilty of failure to register as a sex offender as set forth in the indictment in this case.

DATED this 10th day of July, 2019.

BY THE COURT:

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3034

United States of America

Appellee

v.

KT Burgee, also known as Kape Teal Burgee

Appellant

Appeal from U.S. District Court for the District of South Dakota - Pierre
(3:18-cr-30164-RAL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 26, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

34 U.S.C. § 20911

§ 20911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

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))1 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) Tier III sex offender

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.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) 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;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

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.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.

(11) Student

The term “student” means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term “employee” includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term “resides” means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term “minor” means an individual who has not attained the age of 18 years.