No. 23-1690

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL RYAN COULSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Iowa
Honorable Leonard T. Strand, Chief Judge

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Defendant Michael Ryan Coulson appeals the district court's ruling that his prior conviction for forcible pandering under 10 U.S.C. § 920c(b) was comparable to the crime of sex abuse under 18 U.S.C. § 2242(1).

Oral argument is unnecessary, but if it is granted, 10 minutes would be sufficient.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. On April 10, 2023, the district court entered final judgment, and on April 11, 2023, defendant filed a timely notice of appeal. This Court has jurisdiction over this criminal appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the District Court Erred in Finding That Defendant's Prior Conviction for Forcible Pandering Under 10 U.S.C. § 920c(b) was Comparable to Sexual Abuse Under 18 U.S.C. § 2242(1)?

United States v. Forster, 549 F. App'x 757 (10th Cir. 2013)
United States v. Coleman, 681 F. App'x 413 (5th Cir. 2017)
United States v. Church, 461 F. Supp. 3d 875 (S.D. Iowa 2020)

STATEMENT OF THE CASE

Relevant Procedural History

On July 13, 2022, defendant was indicted for failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). (R. Doc. 3).[1] On November 9, 2022, defendant pled guilty to the indictment without a plea agreement. (R. Doc. 19). The district court accepted defendant's guilty plea. (R. Doc. 22).

The United States Probation Office (USPO) determined that defendant was a Tier III sex offender with a base offense level of 16, pursuant to USSG §2A3.5(a)(1). (PSR, at 5). His resulting guidelines range was 24 to 30 months' imprisonment. (PSR, at 23). Defendant's predicate offense was a conviction from 2012 for forcible pandering under the Uniform Code of Military Justice (UCMJ), while he was serving in the United States Air Force.[2] (PSR, at 9). Defendant objected to the PSR's base offense level finding because, he argued, his

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[1] "R. Doc." refers to the district court docket in case number CR-22-03023-LTS-KEM, and each reference is followed by the docket entry number. "TR" refers to the transcript of the sentencing hearing (R. Doc. 39), "Def. Brief" refers to the defendant's brief, and "PSR" refers to defendant's presentence investigation report (PSR) (R. Doc. 26). Each reference is followed by the appropriate page number.

[2] This offense is codified under federal law as 10 U.S.C. § 920c(b).

conviction for forcible pandering was "not comparable, or more severe, than . . . sexual abuse" under 18 U.S.C. § 2242(1). (R. Doc. 25, at 1-2).

At the sentencing hearing, the court ruled that defendant was a Tier III sex offender, that his base offense level was 16, and his guidelines range was 24 to 30 months' imprisonment. (TR, at 13). The court denied defendant's request for downward variance, and it imposed a sentence of 24 months' imprisonment. (TR, at 23). The court stated: "And I will say that my sentence could be different if I'm wrong about the base offense level. So this is not one of those cases where I'm willing to say that I would still be imposing a 24-month sentence if I got that issue wrong." (TR, at 25).

Rulings Presented for Review

Defendant appeals the district court's ruling that his prior conviction for forcible pandering qualified him as a Tier III sex offender.[3]

[3] Defendant devotes a portion of his brief to the applicability of the categorical approach. (Def. Brief at 10-14). The district court applied the categorical approach, but defendant disagrees with its determination of what constitutes a comparable offense. The government is addressing the comparable offense issue.

Statement of the Facts

Between October 2019 and June 16, 2021, defendant knowingly failed to register under the Sex Offender Registration and Notification Act (SORNA) as required. (PSR, at 3). Defendant's predicate offense was a conviction for forcible pandering. (PSR, at 9).

At the sentencing hearing, the government submitted as exhibits a report of results of trial and a United States Air Force Court of Criminal Appeals opinion, both stemming from defendant's underlying conviction. (TR, at 3). The victim of defendant's prior offense was an adult female. (PSR, at 9-12).

The court compared the elements of the two crimes under the categorical approach to determine if "forcible pandering under the Code of Military Justice, is broader in any meaningful sense than the definition of sexual abuse under 18 U.S.C. 2242." (TR, at 11). It found that forcible pandering "is comparable to sexual assault under 18 U.S.C. 2242." (TR, at 11-12). The court further stated:

> There are some arguments that perhaps 920c could cover conduct that's not covered by the definition of sexual abuse under section 2242. I find that those are hypothetical and speculative at this point.
>
> . . .

> And I guess in theory overwhelming pressure might be something that's broader than what is talked about in 2242 which talks about threats or placing that person in fear. I find the distinction to be pretty much without a difference. So it is different, but I find it's not meaningfully different.
>
> The other issues as well such as sexual conduct versus sexual act, in my opinion and my finding is that the conviction that Mr. Coulson received under the Code of Military Justice, specifically 920c, subparagraph (B), forcible pandering, is a conviction that falls under the tier III definition because it at minimum constitutes sexual abuse under 18 U.S.C. section 2242, and it was punishable by more than one year in prison.

(TR, at 12-13).

SUMMARY OF THE ARGUMENT

The district court's finding that defendant qualified as a Tier III sex offender should be affirmed. The district court did not err when it found that defendant's prior conviction for forcible pandering was comparable to sexual abuse under 18 U.S.C. § 2242(1).

ARGUMENT

The District Court Did Not Err in Finding That Defendant's Prior Conviction for Forcible Pandering Under 10 U.S.C. § 920c(b) was Comparable to Sexual Abuse Under 18 U.S.C. § 2242(1)

A. Standard of Review

Whether a predicate offense qualifies a defendant as a Tier III sex offender under the United States Sentencing Guidelines is reviewed *de novo* on appeal. *United States v. Lowry*, 595 F.3d 863, 866 (8th Cir. 2010).

B. Defendant's Prior Conviction for Forcible Pandering Qualifies Him as a Tier III Sex Offender

The district court did not err in finding defendant's conviction for forcible pandering under the UCMJ qualified him as a Tier III sex offender. In relevant part, Tier III sex offenders are those whose offense of conviction is a felony that "is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense . . . " including sexual abuse as described in section 2242 of Title 18. 34 U.S.C. § 20911(4)(A)(i).

Under the UCMJ, the forcible pandering statute stated: "Any person subject to this chapter who compels another person to engage in

an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct." 10 U.S.C. § 920c(b) (2012). The UCMJ defined an "act of prostitution" as "a sexual act or sexual contact . . . on account of which anything of value is given to, or received by, any person." 10 U.S.C. § 920c(d)(1) (2012).

> The UCMJ defined a "sexual act" as:
>
> (A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or
>
> (B) the penetration, however slight, of the vulva or anus or mouth, of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

10 U.S.C. § 920(g)(1) (2012). The UCMJ defined "sexual contact" as follows:

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or
>
> (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.
>
> Touching may be accomplished by any part of the body.

10 U.S.C. § 920(g)(2) (2012).

As relevant here, a defendant commits sexual abuse under federal law if he knowingly:

> causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping[.]

18 U.S.C. § 2242(1). A "sexual act" is defined as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

18 U.S.C. § 2246(2). An act of "sexual contact" "means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to

abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]" 18 U.S.C. § 2246(3).

Defendant argues that he is not a Tier III sex offender because the UCMJ statute under which he was convicted is categorically overbroad. (Def. Brief, at 15-20). In support of this argument, he argues "There is an unambiguous mismatch between forcible pandering under the UCMJ and sexual abuse under § 2242(1): forcible pandering encompasses compulsion to engage in *either* a sexual act *or* sexual contact; sexual abuse under § 2242(1) encompasses *only* a sexual act and *not* sexual contact." (*Id*. at 18 (emphasis in original).) Defendant argues he is entitled to relief because "touching through clothing is not a sexual act, as defined in Chapter 109A of the U.S. Code, and thus is not sexual abuse under 2242(1)." (*Id*. at 19.) He further states, "Although 'it is obvious that any sexual act will necessarily involve sexual contact,' *United States v. Two Bulls*, 940 F.2d 380, 381 (8th Cir. 1991), it is just as obvious that not all sexual contact is a sexual act." (*Id*.) Defendant argues there is a "material distinction" between the two statutes that is "clear and unambiguous[.]" (*Id*. at 20.)

SORNA serves to assist federal and local authorities in "monitoring and tracking sex offenders following their release into the community."[4] In SORNA, "Congress cast a wide net to ensnare as many offenses against children as possible." *United States v. Coleman*, 681 F. App'x 413, 416 (5th Cir. 2017) (unpublished) (citations omitted). "The purpose of SORNA was generally 'to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations.'" *Id.* (citing National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38030 (July 2, 2008)). Thus, even if the prior conviction's statute is slightly broader, a wider protective sweep is allowable under SORNA's tier regime.

Sexual abuse under 18 U.S.C. § 2242(1) is not overbroad in comparison to forcible pandering under 10 U.S.C. § 920c(b). In *United*

[4] *Sex Offender Registration and Notification Act (SORNA)*, U.S. Dept. of Justice, https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna.

States v. Forster, 549 F. App'x 757 (10th Cir. 2013) (unpublished), the court compared an Ohio gross sexual imposition statute to 18 U.S.C. § 2244. While both statutes in that case included sexual contact, there was a one-year difference in the maximum ages of the victims:

> For purposes of the comparability analysis, it is especially noteworthy that (by cross-reference) § 2244 proscribes "knowingly engag[ing]" in sexual contact "with another person who has not attained the age of 12 years," *id.* § 2241(c). Just viewing this provision alone, one might reasonably conclude that the Ohio statute at issue—which forbids a person from having "sexual contact with another . . . when . . . [t]he other person . . . is less than thirteen years of age," Ohio Rev.Code Ann. § 2907.05(A)(4)—is comparable to § 2244.
>
> To be sure, on its face, the protective sweep of the Ohio statute would appear to be slightly broader, protecting minors under thirteen—instead of just those under twelve—from unlawful sexual contact. However, SORNA's tier regime only demands that the statutes be "comparable," not that they be identical. 42 U.S.C. § 16911(3)(A). And, more importantly, SORNA effectively negates this temporal point of distinction because it expressly defines the scope of § 2244's substantive provisions, for purposes of the tier regime, to apply to only "a minor who has not attained the age of 13 years." *Id.* § 16911(4)(A)(ii). In other words, viewed through the lens of SORNA, the Ohio statute and § 2244—by cross-reference to § 2241(c)—protect the same age group of minors from unlawful sexual contact.

Id. at 769.

While the passage above includes two arguments, the first argument is relevant to the argument here. Even though "the protective sweep of the Ohio statute would appear to be slightly broader, protecting minors under thirteen—instead of just those under twelve," the statutes did not need to be identical. Rather, they needed to be comparable.

Here, 10 U.S.C. § 920c, which includes sexual contact in its definition of prostitution, is not identical to 18 U.S.C. § 2242(1), which does not include sexual contact. Defendant argues:

> Indeed, abusive sexual contact that falls short of a sexual act is a separate crime under 18 U.S.C. § 2244. That separate crime carries lesser penalties than § 2242—a recognition that abusive sexual contact is generally not as grave as sexual abuse involving an illegal sexual act.

(Def. Brief, at 19.) However, the issue here is not whether sexual contact covers a larger amount of conduct than sexual acts. Rather, the overbreadth analysis here is in the context of compelled prostitution.

In theory, a defendant could commit a forcible pandering offense without compelling a victim to engage in the conduct described in § 2242(1): (1) a defendant could compel another person to engage in an act of prostitution; and (2) the compelled act of prostitution could

involve sexual contact only—not a sexual act. Under this scenario, a defendant could violate the forcible pandering statute, without causing the victim to engage in a sexual act, if the act of compelled prostitution did not go beyond: (1) the touching of the groin (not the genitalia), breast, inner thigh, or buttocks; or (2) the touching of the genitalia or anus over the clothing.

It is exceedingly unlikely that an act of forced prostitution would be limited to touching that constituted sexual contact and not a sexual act. The district court did not err when it stated that such conduct would be "hypothetical and speculative." (TR, at 12).

In *United States v. Church*, 461 F. Supp. 3d 875, 888 (S.D. Iowa 2020), the district court determined that a Nebraska state statute criminalizing first-degree sexual assault was not comparable to the offenses in 18 U.S.C. §§ 2241 and 2242. The court noted that two provisions in the Nebraska statute had no apparent counterparts in section 2242, one being where the victim withheld consent and the other being where consent was obtained by deception. *Id*. at 889.

The UCMJ statute at issue here proscribes compelling another to commit sexual acts or sexual contact in exchange for anything of value.

The two situations that the court noted in *Church* are not at issue in this case. Contrary to the result in *Church*, 10 U.S.C. § 920c(b) is comparable to 18 U.S.C. § 2242(1). Because the statutes need not be identical and some additional breadth is permissible in the UCMJ statute under the comparable standard, the defendant's offense is comparable to section 2242(1).

The First Circuit Court of Appeals also found a state statute was not comparable to any Tier III sex offenses. *United States v. Morales*, 801 F.3d 1, 7-10 (1st Cir. 2015). Unlike Rhode Island's first degree child molestation statute, which was at issue in *Morales*, the UCMJ statute at issue here does not "penalize[ ] significantly broader behavior" than that proscribed by 18 U.S.C. § 2242(1). *Id.* at 7. The lack of comparability between the statutes in *Morales* was largely due to the age requirements in the respective statutes; observing the distinction between the age limitations was deemed important, lest "an entire section of Tier II [sex offenders] could thus be left without any purpose." *Id.* at 8-9.

Here, the distinction between the comparable statutes does not stem from a critical component of the tier system. There is significant overlap between the statutes, indicating "an attempt to regulate equivalent harm." *Id.* at 9. Combined with the flexibility permitted under the comparable approach, defendant's offense is comparable to section 2242(1). Thus, defendant was properly sentenced as a Tier III offender.

Defendant's UCMJ conviction qualifies him as a Tier III sex offender under SORNA because it is comparable to sexual abuse under 18 U.S.C. § 2242(1). Therefore, defendant qualifies as a Tier III sex offender and the district court's ruling should be affirmed.

CONCLUSION

For the above reasons, defendant's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that, on August 11, 2023, I electronically filed the foregoing brief with the Clerk for the Eighth Circuit Court of Appeals by using the CM/ECF system. The electronic brief and the addendum attached to the brief, if any, have been scanned for viruses using McAfee and the scan showed no virus.

I further certify that, on August ___, 2023, I submitted ten paper copies of the brief to the Clerk of Court and one paper copy to each party separately represented or proceeding pro se.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that the foregoing brief complies with the type-volume limit of Fed R. App. P. 32(a)(7)(B). The brief uses a proportional-spaced typeface, fourteen-point Century Schoolbook font. Based on a count under Microsoft Word Version 2016 for Windows, the brief contains 2,973 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f).

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