

United States Court of Appeals
For the Eighth Circuit

No. 25-3446

United States of America

Plaintiff - Appellee

v.

David Marrowbone

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota – Southern

Submitted: June 12, 2026

Filed: October 8, 2026

[Unpublished]

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

PER CURIAM.

David Marrowbone challenges the district court's¹ determination that his prior conviction for assault with intent to commit rape qualifies as a "sex offense" that

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

requires him to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). We affirm.

I.

In 1982, Marrowbone was convicted of assault with intent to commit rape in violation of 18 U.S.C. § 113(a). Section 113 has since been amended, but the statute at the time of his offense provided:

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

- (a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.
- (b) Assault with intent to commit any felony, except murder or rape, by fine of not more than \$3,000 or imprisonment for not more than ten years, or both.
- (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than \$1,000 or imprisonment for not more than five years, or both.
- (d) Assault by striking, beating, or wounding, by fine of not more than \$500 or imprisonment for not more than six months, or both.
- (e) Simple assault, by fine of not more than \$300 or imprisonment for no more than three months, or both.
- (f) Assault resulting in serious bodily injury, by fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

18 U.S.C. § 113 (1976). Marrowbone has three prior federal convictions for failing to register as a sex offender based on this 1982 conviction.

On September 5, 2024, Marrowbone was again charged with failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). This time, he moved to dismiss the indictment on the basis that, after Mathis v. United States, 579 U.S. 500 (2016),

his prior § 113(a) conviction does not qualify as a sex offense under SORNA, and he therefore was not required to register as a sex offender. The district court denied the motion.

Marrowbone entered a conditional guilty plea, reserving his right to appeal the denial of his motion to dismiss. The district court sentenced Marrowbone to 21 months in custody followed by 5 years of supervised release.

II.

We review *de novo* the denial of a motion to dismiss an indictment. United States v. Sitladeen, 64 F.4th 978, 983 (8th Cir. 2023). Whether a conviction meets SORNA’s definition of sex offense is a question of law that we review *de novo*. See United States v. Icker, 13 F.4th 321, 330 (3d Cir. 2021); *cf.* United States v. Meux, 918 F.3d 589, 591 (8th Cir. 2019) (“We review *de novo* whether a prior conviction is a predicate offense under the [Armed Career Criminal Act (ACCA)].”).

The district court applied the categorical approach to determine whether Marrowbone’s prior conviction qualifies as a sex offense for purposes of SORNA, and the parties do the same on appeal. See United States v. Vineyard, 945 F.3d 1164, 1170 (11th Cir. 2019) (collecting cases taking this approach). In the absence of briefing to the contrary, we assume without deciding that the categorical approach applies in this context.

III.

SORNA’s registration requirements apply only to “individual[s] who w[ere] convicted of a sex offense,” 34 U.S.C. §§ 20911, 20913. Relevant to this case, a sex offense includes:

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

...

(v) an attempt or conspiracy to commit an offense described [above].

Id. § 20911(5)(A).

Applying the categorical approach, we look to the elements of Marrowbone’s prior conviction for assault with intent to commit rape, rather than the particular facts of the case, to determine whether it sufficiently matches the elements of a sex offense—that is, whether it involved a sexual act, sexual contact, or an attempt or conspiracy to commit either. See Descamps v. United States, 570 U.S. 254, 261 (2013) (“The key, we emphasized, is elements, not facts.”).

“The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or ‘indivisible’) set of elements to define a single crime.” Mathis, 579 U.S. at 504–05. “Some statutes, however, have a more complicated (sometimes called ‘divisible’) structure, making the comparison of elements harder.” Id. at 505. Where the statute is divisible, the court can use a “modified categorical approach.” Id. Under that approach, the court “looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.” Id. at 505–06.

We first consider whether the statutory provision at issue here, § 113(a), is divisible or indivisible.² Section 113(a) is defined disjunctively as “assault with intent to commit murder *or* rape.” (emphasis added). Thus, the “first task” is “to determine whether [§ 113(a)’s] listed items are elements or means.” Id. at 517. If they are elements, then the statute is divisible; if they are means, it is indivisible. See id. “When analyzing which words or phrases of a statute form the elements of a

²Marrowbone contends that “§ 113 is divisible as to subsections (a)-(f),” but we need not reach this question to decide his appeal.

crime, courts may look to the statute of prior conviction, [] court decisions, and, as a last resort, the record of a prior conviction itself.” United States v. Harris, 950 F.3d 1015, 1018 (8th Cir. 2020) (quoting United States v. McMillan, 863 F.3d 1053, 1057 (8th Cir. 2017)) (citation modified).

In United States v. Iron Shell, addressing the same version of the statute under which Marrowbone was convicted, we identified the elements of assault with intent to commit rape under § 113(a) as: “(1) that the defendant assaulted the [victim], and (2) that the defendant committed the assault with the specific intent to commit rape.” 633 F.2d 77, 88 (8th Cir. 1980).³ Despite the statutory language “with intent to commit *murder or* rape,” we made no mention of intent to commit murder.⁴ See *id.* (emphasis added). While not conclusive, the way we addressed the statute of conviction in Iron Shell weighs in favor of finding that § 113(a) is divisible.

The record of Marrowbone’s prior conviction also supports this finding. Marrowbone’s indictment charged him as follows:

[O]n or about November 4, 1981, David Marrowbone, an Indian, near Cherry Creek, Ziebach County, South Dakota, in Indian Country in the District of South Dakota, did unlawfully assault [victim name redacted] with intent to commit rape upon the said [victim name redacted], in violation of 18 U.S.C. § 1153 and § 113(a).

³Although Iron Shell applied the 1970 version of the U.S. Code, 633 F.2d at 80, 88, § 113(a) was unchanged between the 1970 and 1976 versions. Compare 18 U.S.C. § 113(a) (1970) with 18 U.S.C. § 113(a) (1976).

⁴Likewise, our discussion of assault with intent to commit murder under § 113(a) in United States v. Warbonnet made no mention of intent to commit rape as an element. 750 F.2d 698, 699–700 (8th Cir. 1984) (per curiam).

The indictment did not cite murder.⁵ Likewise, the judgment stated that he had been convicted of “Assault With Intent to Commit Rape in violation of 18 U.S.C. [§§] 1153 and 113(a) as charged in Count I of the Indictment.”

We turn next to the model jury instructions under the current version of § 113,⁶ which, in the absence of other on-point authority, provide the strongest evidence that the statute is divisible. The instructions explain that the jury should be instructed on only the applicable felony the defendant allegedly had the intent to commit:

The crime of assault with intent to commit [murder] [aggravated sexual abuse] [sexual abuse] [(specify other felony)], as charged in count [1] of the Indictment, has [two] elements:

One, on or about (insert date alleged in the indictment) (insert name of defendant) assaulted (insert name of alleged victim) with the specific intent to commit [murder] [aggravated sexual abuse] [sexual abuse] [(specify other felony)];

....

The model instruction then directs the court to:

⁵We note that this fact alone is not dispositive, as “means do not become elements simply because a prosecutor selects only one.” United States v. Naylor, 887 F.3d 397, 406 n.13 (8th Cir. 2018) (en banc).

⁶We do not have a record of the jury instructions used at the time of Marrowbone’s conviction, but the current model instructions remain instructive, as the structure of 18 U.S.C. § 113(a) is largely unchanged, setting out in a single provision the punishments for: “Assault with intent to commit murder or a violation of section 2241 [aggravated sexual abuse] or 2242 [sexual abuse], by a fine under this title, imprisonment for not more than 20 years, or both.” 18 U.S.C. § 113(a)(1) (2013). The second provision now provides the punishment for: “Assault with intent to commit any felony, except murder or a violation of section 2241 [aggravated sexual abuse] or 2242 [sexual abuse], by a fine under this title or imprisonment for not more than ten years, or both.” 18 U.S.C. § 113(a)(2) (2013).

(Insert paragraph[s] describing [first degree] [second degree] murder, as applicable. . . .)

(Insert paragraph[s] describing [aggravated sexual abuse] [sexual abuse], as applicable.[.])

(Insert paragraph[s] describing [any felony or felonies other than murder or sexual abuse], as applicable.)

8th Circuit Manual of Model Jury Instructions (Criminal) 6.18.113(1)–(2) (2022). The same instruction applies to § 113(a)(1)—which pertains to “[a]ssault with intent to commit murder or a violation of section 2241 [aggravated sexual abuse] or 2242 [sexual abuse],” and to § 113(a)(2)—which pertains to “[a]ssault with intent to commit any felony, except murder or a violation of section 2241 or 2242.” But the instruction does not group together “murder or a violation of section 2241 or 2242.” Instead, the instruction advises the court to include only the “applicable” felony description—murder, sexual abuse, or another felony—indicating that § 113(a)(1) sets out multiple discrete offenses with separate elements, rather than alternative means for proving a single offense. Cf. Mathis, 579 U.S. at 504 (“‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’ At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant. . . .”) (quoting Elements of Crime, Black’s Law Dictionary (10th ed. 2014)). This same logic applies to the version of the statute under which Marrowbone was convicted.

Marrowbone counters by pointing out that both alternatives included in § 113(a) at the time of his conviction—intent to commit murder and intent to commit rape—carry the same penalties. Indeed, Mathis provides that “[i]f statutory alternatives carry different punishments, then under Appendi they must be elements.” 579 U.S. at 518 (citing Appendi v. New Jersey, 530 U.S. 466, 490 (2000)). But Mathis does not state that carrying the same punishment, on its own, means a statute is indivisible. See id.; see also United States v. Juv. B., 147 F.4th 837, 842 (8th Cir. 2025) (finding that a single penalty range supported the conclusion that 18 U.S.C. § 2241(a) is indivisible but noting that this fact was “not dispositive”).

Marrowbone also relies on the fact that intent to commit “murder” or “rape” are jointly listed in the first of six subsections in § 113, and each of the remaining five subsections define separate offenses. But it is also true that § 113(a) pairs together the two most serious assaults when compared to § 113(b)–(e)—and the subsections are listed in decreasing severity with progressively lower sentences.⁷ Any structural anomaly of the grouping within the first subsection of the statute does not outweigh the construction of the statute as a whole, which supports a finding that § 113(a) includes two separate crimes.

We agree with the district court that the version of 18 U.S.C. § 113(a) in effect at the time of Marrowbone’s conviction is divisible. See Harris, 950 F.3d at 1018–19. We acknowledge Marrowbone’s arguments to the contrary, but here, the two disjunctives—murder or rape—are distinct crimes with distinct elements. This reinforces our conclusion that the statute is divisible.

IV.

Consistent with Mathis, once we determine that the statute of conviction is divisible, we look at the records of the underlying conviction to determine whether Marrowbone’s actual conviction was for a sex offense. 579 U.S. at 505–06. Here, the parties agree—and the record supports—that Marrowbone was convicted of assault with intent to commit rape, which meets the definition of a sex offense.

V.

We affirm the denial of Marrowbone’s motion to dismiss.⁸

⁷Subsections (a)–(e) follow a pattern of decreasing severity. Subsection (f), “Assault resulting in serious bodily injury,” is the exception. 18 U.S.C. § 113(f).

⁸We grant Marrowbone’s motion, filed during the pendency of this appeal, to take judicial notice of the record of his underlying conviction.