

Before: POOLER, PARKER, and WESLEY, *Circuit Judges*.

1           Appeal from a judgment of the United States District Court  
2 for the Northern District of New York (Mordue, J.) imposing a  
3 sentencing enhancement to defendant's child pornography  
4 conviction pursuant to 18 U.S.C. § 2252A(b)(1) and (b)(2) based on  
5 his prior state conviction for sexual abuse in the second degree  
6 under N.Y. Penal Law § 130.60(2). AFFIRMED.

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9                               James P. Egan and James F. Greenwald, Assistant  
10                              Public Defenders, *for* Lisa A. Peebles, Federal  
11                              Public Defender, Northern District of New York,  
12                              Syracuse, NY, *for Defendant-Appellant*

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14                             Lisa M. Fletcher and Paul D. Silver, Assistant  
15                             United States Attorneys, *for* Richard Hartunian,  
16                             United States Attorney, Northern District of New  
17                             York, Syracuse, NY, *for Appellee*

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21       BARRINGTON D. PARKER, CIRCUIT JUDGE:

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23           Defendant-Appellant Leonard J. Allen appeals from a  
24 judgment of conviction in the United States District Court for the  
25 Northern District of New York (Mordue, J.), following his plea of  
26 guilty to charges of transporting, receiving, and possessing child  
27 pornography in violation of 18 U.S.C. § 2252A(a)(1), (a)(2)(A) and  
28 (a)(5)(B). In sentencing Allen, the court determined that Allen's  
29 prior state court conviction for Sexual Abuse in the Second Degree in  
30 violation of N.Y. Penal Law § 130.60(2) subjected him to increased  
31 penalties pursuant to § 2252A(b)(1) and (b)(2) because it constituted  
32 a prior conviction under a State law "relating to aggravated sexual

1 abuse, sexual abuse, or abusive sexual conduct involving a minor or  
2 ward." We agree and, consequently, affirm.

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4 I.  
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6 In July 2010, law enforcement officials in New Hampshire  
7 began to investigate an individual with the screen name  
8 CHRHYA2008 who was engaged in the posting, trading, and  
9 collecting of child pornography and child erotica over various  
10 internet fora. After the user sent email attachments containing  
11 videos of child pornography to undercover officers, they were able  
12 to trace the IP address to Allen in Fulton, New York. In November  
13 2010, the officers executed a search at Allen's residence and seized  
14 images of child pornography. During the execution of the warrant,  
15 Allen admitted that he used the screen name in question and, during  
16 subsequent questioning, he acknowledged receiving and possessing  
17 child pornography. An examination of computers and storage  
18 devices seized during the search revealed over 1,000 image and  
19 video files of child pornography and erotica.

20 In January 2012, the Government filed an information  
21 charging Allen with transporting child pornography in violation of  
22 18 U.S.C. § 2252A(a)(1), receiving child pornography in violation of  
23 18 U.S.C. § 2252A(a)(2)(A), and possessing child pornography in  
24 violation of 18 U.S.C. § 2252A(a)(5)(B). In addition, the government  
25 filed, pursuant to 18 U.S.C. § 2252A(b), a special information  
26 regarding a prior state court conviction. Section 2252A(b) provides  
27 for substantially enhanced penalties if a person convicted under  
28 certain child pornography provisions "has a prior conviction . . .  
29 under the laws of any State relating to aggravated sexual abuse,  
30 sexual abuse, or abusive sexual conduct involving a minor or ward."

1           The special information alleged that Allen was convicted in  
2   2000 of Sexual Abuse in the Second Degree, in violation of New  
3   York Penal Law § 130.60, which provides that “[a] person is guilty  
4   of sexual abuse in the second degree when he . . . subjects another  
5   person to sexual contact and when such other person is: . . . 2. Less  
6   than fourteen years old.” N.Y. Penal Law § 130.60. The conviction  
7   resulted from Allen’s touching the genitalia of a thirteen-year-old  
8   boy through the boy’s clothing. For this offense, Allen was  
9   sentenced to nine months’ imprisonment. The special information  
10   had the effect of raising his mandatory minimum term of  
11   imprisonment from five years to fifteen years on the transportation  
12   and receipt counts, and from no minimum to a mandatory  
13   minimum of ten years for the possession count.

14           Allen subsequently pled guilty to the charges in the  
15   information but objected to the application of the enhancements.  
16   Allen argued that the terms “aggravated sexual abuse,” “sexual  
17   abuse,” and “abusive sexual conduct involving a minor or ward”  
18   should be defined by reference to the definitions of those terms  
19   under federal law. *See* 18 U.S.C. §§ 2241-43. Specifically, he  
20   contended that the New York statute under which he had been  
21   convicted should not form the basis for enhancement because it  
22   applied to a greater range of prohibited conduct than the federal  
23   statute because it criminalized touching through clothing, while the  
24   term “sexual act” has been defined under federal law as “intentional  
25   touching, not through the clothing.” *See* 18 U.S.C. § 2246(2)(D).  
26   Accordingly, Allen contended, his prior conviction was not under a  
27   law “relating to” the offenses specified in 18 U.S.C. §§ 2241-43.

28           The district court rejected Allen’s arguments. The court noted  
29   that both parties agreed that the court should take a categorical  
30   approach in determining whether the prior conviction could serve as  
31   a predicate offense for the federal enhancement and the court

1 concluded that Allen's state conviction qualified as a conviction  
2 under a law relating to sexual abuse. The district court found the  
3 conduct enumerated in New York's definition of "[s]exual  
4 contact[,]" which includes "any touching of the sexual or other  
5 intimate parts of a person for the purpose of gratifying sexual desire  
6 of either party" including "through clothing," N.Y. Penal Law  
7 § 130.00(3) was conduct that fell within the "ordinary, contemporary  
8 common meaning" of the term "sexual abuse . . . of a minor" and  
9 was consistent with Congress's intention to define the offense of  
10 sexual abuse expansively. Accordingly, the court found that Allen's  
11 prior conviction subjected him to enhanced penalties and  
12 subsequently, sentenced him principally to a term of 240 months'  
13 imprisonment.

14 This appeal followed. We review *de novo* all questions of law  
15 relating to the district court's application of a sentencing  
16 enhancement. *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir.  
17 2012).

## 18 II.

21 The issue on appeal is whether Allen's state court conviction  
22 triggers the enhanced federal penalties. As noted, Allen's principal  
23 argument is that to determine whether his state conviction is under a  
24 law "relating to aggravated sexual abuse, sexual abuse, or abusive  
25 sexual conduct involving a minor," as required by 18 U.S.C.  
26 § 2252A(b), we look to how those terms are defined under federal  
27 law. And under federal law, he contends, touching through clothing  
28 is not covered by 18 U.S.C. § 2252A(b). *See* 18 U.S.C. § 2243.

29 As the parties acknowledge, in deciding whether Allen's prior  
30 conviction triggers a sentencing enhancement we apply the  
31 categorical approach. *See Descamps v. United States*, — U.S. —, 133

1 S.Ct. 2276, 2283–86 (2013); *United States v. Simard*, 731 F.3d 156 (2d  
2 Cir. 2013); *United States v. Barker*, 723 F.3d 315, 319–20 (2d Cir. 2013);  
3 *Beardsley*, 691 F.3d at 259. In so doing, we

4 consider [the defendant’s state] offense generically, that is to  
5 say, . . . [to] examine it in terms of how the law defines the  
6 offense and not in terms of how an individual offender might  
7 have committed it on a particular occasion . . . . We then  
8 consider whether [the defendant]’s state conviction meets the  
9 elements of the applicable generic offense in section  
10 2252(b)(2).

11 *Barker*, 723 F.3d at 321 (internal quotation marks and citations  
12 omitted). Specifically, “our task is to determine whether [New  
13 York]’s . . . statute, by its elements and nature, ‘relat[es] to  
14 aggravated sexual abuse, sexual abuse, or abusive sexual conduct  
15 involving a minor.’” *Id.*

16 The conduct enumerated in New York’s definition of “sexual  
17 contact,” includes “any touching of the sexual or other intimate  
18 parts of a person for the purpose of gratifying sexual desire of either  
19 party” including “through clothing,” N.Y. Penal Law § 130.00(3).  
20 This is conduct that we conclude falls within the ordinary meaning  
21 of the term sexual abuse of a minor. *See Barker*, 723 F.3d at 324  
22 (defining “abusive sexual conduct involving a minor” as the  
23 “misuse or maltreatment of a minor for a purpose associated with  
24 sexual gratification”). Accordingly, we have little trouble  
25 concluding that Allen’s prior conviction subjects him to enhanced  
26 sentencing.

27 Allen argues that the terms aggravated sexual abuse, sexual  
28 abuse, and abusive sexual conduct involving a minor or ward refer  
29 to several specified federal offenses listed in 18 U.S.C. §§ 2241-43. In  
30 doing so, he relies principally on the Seventh Circuit’s decision in

1 *United States v. Osborne*, 551 F.3d 718 (7th Cir. 2009). There the  
2 Seventh Circuit concluded that “sexual behavior is ‘abusive’ only if  
3 it is similar to one of the crimes denominated as a form of ‘abuse’  
4 elsewhere in Title 18.” *Id.* at 721. However, we recently rejected that  
5 reasoning in *Barker*. See *Barker*, 723 F.3d at 322–23.

6 In *Barker*, the defendant pleaded guilty to a charge of  
7 possessing child pornography under 18 U.S.C. § 2252(a)(4)(B). He  
8 had a previous state conviction for statutory rape for engaging in  
9 sexual conduct with a boy under the age of 16 when he was 56 years  
10 old. *Barker*, 723 F.3d at 318. At sentencing, the district court  
11 determined that Barker’s prior conviction was one under state law  
12 “relating to aggravated sexual abuse, sexual abuse, or abusive sexual  
13 conduct involving a minor or ward,” 18 U.S.C. § 2252(b), and  
14 enhanced his sentence. *Barker*, 723 F.3d at 318. On appeal, we  
15 affirmed application of the enhanced penalty using the categorical  
16 approach. Because the state statute criminalized sexual acts with  
17 persons under the age of 16, we concluded that this conduct  
18 “plainly” related to the “sexual abuse of a minor.” *Id.* at 324. In  
19 reaching that conclusion, we rejected Barker’s argument that  
20 whether a prior conviction should qualify should be determined by  
21 reference to the federal criminal code. *Id.* at 318–22. In doing so, we  
22 reasoned:

23 [S]ection 2252(b)(2) employs broader language when defining  
24 state convictions that qualify as a predicate sex offense than it  
25 does when defining predicate federal offenses, such as those  
26 located in chapter 109A. While a sentencing enhancement for  
27 a prior *federal* offense under section 2252(b)(2) requires  
28 commission of specified crimes, including convictions under  
29 chapter 109A, a defendant with a prior *state* conviction need  
30 only have been convicted of a state offense “relating to . . .  
31 sexual abuse [involving a minor or ward].” In the context of

1 sentencing enhancements, “relating to” has been broadly  
2 interpreted to apply not simply to state offenses that are  
3 equivalent to sexual abuse, but rather to any state offense that  
4 stands in some relation to, bears upon, or is associated with  
5 the generic offense.

6 *Id.* at 322-23 (internal quotation marks, citations, and alterations  
7 omitted) (emphases in original). We further explained that broadly  
8 interpreting the phrase “relating to” was appropriate because  
9 “federal law defines the *category* of laws ‘relating to . . . abusive  
10 sexual conduct involving a minor,’ but that category is defined only  
11 in general terms, recognizing diversity among the several states in  
12 the *specific elements* of sexual misconduct laws.” *Id.* at 323 (emphases  
13 in original). Consequently, we found that in using the words  
14 “conviction” and “relating to” in 18 U.S.C. § 2252(b)(2), Congress  
15 was recognizing the “*variation* in the diverse state sexual misconduct  
16 laws that could lead to predicate offenses under section 2252(b)(2)  
17 and, as relevant here, it left for states to define the relevant  
18 boundary between consensual and nonconsensual sexual activity.”  
19 *Barker*, 723 F.3d at 324 (emphasis in original).

20 Nothing about our analysis of the section at issue here,  
21 § 2252A, counsels a different result from that reached in *Barker* when  
22 examining 18 U.S.C. § 2252. Thus, even if New York’s sexual abuse  
23 statute differs from the definition of sexual abuse found in 18 U.S.C.  
24 § 2243, it still triggers statutory enhancements because it “relat[es]  
25 to” the “sexual abuse of a minor” as that phrase is ordinarily  
26 understood.

## 27 CONCLUSION

28 We have carefully considered Allen’s remaining arguments  
29 and find them to be without merit. For the foregoing reasons, the  
30 judgment of the district court is **AFFIRMED**.