

REVISED PROPOSED AMENDMENT: SEXUAL PREDATORS

Synopsis of Revised Proposed Amendment: *This is a three-part amendment that includes:*

- (A) *Amendments to implement the "pattern of activity" directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), and related amendments.*
- (B) *Amendments related to grouping certain child pornography counts of conviction.*
- (C) *Amendments to implement the directive in the Act to provide an enhancement for transportation offenses under chapter 117 of title 18, United States Code, and other related amendments.*

Part (A): Enhancement for Pattern of Activity

Synopsis: *Part A proposes to add a new guideline, §4B1.5, to satisfy the pattern of activity directive in the Act that requires the Commission to increase penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or sexual exploitation of a minor. The new guideline provides a two-tiered approach to provide increased penalties for defendants convicted of certain sex crimes whose conduct may indicate that the defendant is a high risk sex offender engaging in a pattern of prohibited sexual conduct.*

The first tier, in subsection (a) of the proposed guideline, aims to incapacitate high risk sex offenders who have an instant offense of conviction of sexual abuse and a prior felony conviction for sexual abuse (but who are not subject to the career offender guideline). Under this proposal, such a defendant would be subject to the greater of the offense level computed under Chapters Two and Three or the offense level obtained from a proposed table that, like the career offender guideline, bases the applicable offense level on the statutory maximum for the offense. Perhaps even more important, the defendant would be subject to a Criminal History Category of not less than level V.

The second tier, in subsection (b) of the proposed guideline, would provide a five-level increase in the offense level and a minimum offense level of level 22 for defendants who are not subject to the career offender guideline or to proposed subsection (a) but who nevertheless have engaged in a pattern of activity involving prohibited sexual conduct with minors. A "pattern of activity" requires that the defendant must have engaged in prohibited sexual conduct on at least two separate occasions and that at least two minors were victims of the pattern of activity on separate occasions.

In addition to the proposed new guideline, the proposal amends the guideline covering

terms of supervised release, §5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime shall be the maximum term authorized by statute.

Proposed Amendment:

Chapter Four, Part B, is amended by adding at the end the following:

§4B1.5. Repeat and Dangerous Sex Offender

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1(Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; and

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

	<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(i)	Life	37
(ii)	25 years or more	34
(iii)	20 years or more, but less than 25 years	32
(iv)	15 years or more, but less than 20 years	29
(v)	10 years or more, but less than 15 years	24
(vi)	5 years or more, but less than 10 years	17
(vii)	More than 1 year, but less than 5 years	12.

(2) The criminal history category shall be not less than Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, §4B1.1(Career Offender) and subsection (a) of this guideline do not apply, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three, but if the resulting offense level is less than level 22, increase to level 22.

- (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A (Criminal History).

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "minor" means an individual who had not attained the age of 18 years.
2. Covered Sex Crime as Instant Offense of Conviction.—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or a conspiracy to commit any offense described in subdivision (A).
3. Application of Subsection (a).—
 - (A) Definitions.—For purposes of subsection (a):
 - (i) "Offense Statutory Maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C. § 2247(a) or § 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.
 - (ii) "Sex offense conviction" (I) means an offense described in 18 U.S.C. § 2426 if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography.
 - (B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).
 - (C) Determination of Prior Sex Offense Convictions.—For purposes of subsection (a), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).

The date that a defendant sustained a conviction shall be the date that the guilt of the defendant was established, whether by guilty plea, trial, or plea of nolo

contendere.

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" (i) has the meaning given that term in 18 U.S.C. § 2426; (ii) includes the production of child pornography; (iii) includes trafficking in child pornography if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for trafficking in child pornography; and (iv) does not include possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if (i) the defendant engaged in prohibited sexual conduct with a minor on an occasion; and (ii) on an occasion separate from the occasion referred to in subdivision (i), the defendant engaged in prohibited sexual conduct with at least one minor other than, or in addition to, a minor referred to in subdivision (i). For example, the defendant engaged in a pattern of activity involving prohibited sexual conduct if there were two separate occasions of prohibited sexual conduct and each such occasion involved a different minor, or if there were two separate occasions of prohibited sexual conduct each of which involved the same two minors.

An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (i) occurred during the course of the offense; or (ii) resulted in a conviction for the conduct that occurred on that occasion.

Background: This guideline is intended to provide lengthy incarceration for offenders who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense specifically covered by the guideline, regardless of the specific sex offense of conviction or Chapter Two guideline under which the offender is sentenced. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline. In addition, treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of the term of supervised release that is imposed.

Conforming Amendments:

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

Application Notes:

* * *

~~5. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.~~

* * *

65. If a victim was sexually abused by more than one participant, an upward departure may be warranted.

~~7. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

* * *

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

* * *

Application Notes:

* * *

~~8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

§2A3.3 Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

* * *

Application Notes:

* * *

~~4. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

* * *

Application Notes:

* * *

~~8. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

Supervised Release Provision

§5D1.2. Term of Supervised Release

* * *

- (b) Except as otherwise provided;—
- (1) the term of supervised release imposed shall not be less than any statutorily required term of supervised release; and
 - (2) if the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum term of supervised release authorized by statute.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, the term “sex offense” means (A) an offense, perpetrated against a minor, under chapter 109A of title 18, United States Code; (B) an offense under chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (C) an offense under chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (D) an attempt or a conspiracy to commit any such offense described in subdivisions (A) through (C).
2. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).
3. Supervised Release Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

* * *

(B) GROUPING

Synopsis: Part B of the proposed amendment resolves a circuit conflict regarding who the “victim” is in child pornography cases for purposes of grouping of multiple counts. The amendment proposes two options for resolving the circuit conflict on the grouping of multiple counts of child pornography trafficking, receipt, and possession. Option One would allow grouping of child

pornography trafficking and possession counts pursuant to §3D1.2(d). This grouping provision does not require a determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction. Option Two would not permit the grouping of multiple counts of child pornography trafficking and possession pursuant to §3D1.2. This option is based on the premise that multiple acts of possession or trafficking represent separate instances of fear and risk of harm, and would require the assignment of units pursuant to §3D1.4.

Proposed Amendment:

§3D1.2. Groups of Closely Related Counts

* * *

- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

* * *

§§2F1.1, 2F1.2;
§§2G2.2, 2G2.4;
§2K2.1;

* * *

(C) ENHANCEMENT FOR TRANSPORTATION OFFENSES AND OTHER AMENDMENTS

Synopsis: *Part C of the proposed amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. Pursuant to the authority in the Act and pursuant to the Commission’s general authority under 28 U.S.C. § 994 to promulgate guideline amendments, the amendment proposes a number of offense level increases in §2A3.2, the "statutory rape" guideline, and in §2A3.4, the abusive sexual contact guideline. Specifically, the amendment proposes to do the following:*

- (1) *Distinguish between chapter 117 violations that involve the commission of an underlying sexual act and those violations (e.g., sting cases) that do not, by providing in an alternative base offense level in §2A3.2 three additional levels for chapter 117 violations that also involve an underlying sexual act.*
- (2) *Provide an across-the-board three-level increase in the base offense level for offenses sentenced under §2A3.2, such that the base offense level (A) for statutory rape in its most basic form unaccompanied by aggravating conduct is increased*

from level 15 to level 18; (B) for a chapter 117 violation (unaccompanied by a sexual act) is increased from level 18 to level 21; and (C) a chapter 117 violation (accompanied by a sexual act) results in a base offense level of level 24. This increase also maintains the proportionality between §§2A3.2 and 2G2.2.

- (3) *Provide an enhancement of 2 levels if the offense involved incest as an additional enhancement to the two-level enhancement for custody, care, or supervisory control, and provide in the Commentary a definition of "incest" that tracks that found in the Model Penal Code. A review of the 228 case files from FY 99 that involved sex crimes against children revealed that 26% of the offenders were parents or relatives of the victim. Additionally, 45 other offenders were either the boyfriend/girlfriend of the parent, or a step-parent or step grandparent of the victim.*
- (4) *Amend the Statutory Index to include a reference to the statutory rape guideline, §2A3.2, for chapter 117 offenses. Often in "sting" cases, the defendant travels across state lines in order to meet a minor for what the defendant believes will be an encounter involving consensual sexual activity.*
- (5) *Make conforming changes to the existing three-level decrease for chapter 117 violations that do not include aggravating conduct so that such violations receive the offense level applicable to statutory rape in its basic form.*
- (6) *Make technical changes (such as the addition of headings and the reordering of applications notes) not intended to have substantive effect.*

In addition, the amendment proposes to amend the guideline covering the production of child pornography, §2G2.1, to provide additional enhancements to account for aggravating conduct that may be present in such cases, specifically, the production of sadistic or masochistic material, serious bodily injury, or the trafficking of produced materials. Note that the addition of the enhancement in §2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under §3D1.2(c), contrary to the proposal in Option 2 of Part B of this amendment. These amendments also are intended to restore proportionality in sentences between child pornography production offenses and child pornography trafficking offenses.

Proposed Amendment:

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

- (b) Specific Offense Characteristics

* * *

- (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

* * *

- (7) If the offense involved incest, increase by 2 levels.

Commentary

* * *

Application Notes:

* * *

1. Definitions.—For purposes of this guideline—

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

* * *

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

2. Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

* * *

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

- (a) Base Offense Level:

- (1) **24**, if the offense involved a violation of chapter 117 of title 18, United

States Code, and the commission, or attempted commission, of a sexual act;

(+2) **21**, if the offense involved a violation of chapter 117 of title 18, United States Code, but not the commission, or not the attempted commission, of a sexual act; or

(23) **18**, otherwise.

(b) Specific Offense Characteristics

(1) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.

* * *

~~(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by [3] levels.~~

(4) If the offense involved incest, increase by 2 levels.

(5) If (A) none of subsections (b)(1) through (b)(3) applies; and (B) subsection (a)(1) applies, decrease by **6** levels.

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

* * *

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of

§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

* * *

2. ~~If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).~~

2. Attempted Commission of a Sexual Act.—For the purposes of subsections (a)(1) and (a)(2), traveling in interstate or foreign commerce with the intent to commit a sexual act does not alone constitute an attempt to commit such an act; such an intent must be accompanied by an overt act (e.g., any kind of "sexual contact", as defined in 18 U.S.C. § 2246(3)) taken toward the commission of the sexual act.

3. Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(1) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

4. Abuse of Position of Trust.—If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. Misrepresentation of Identity.—

* * *

6. Use of Computer or Internet-Access Device.—

* * *

7. Cross Reference.—

* * *

8. Upward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography. ~~If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.~~

* * *

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense involved incest, increase by 2 levels.

(7) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.

* * *

Commentary

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

"Minor" means an individual who had not attained the age of 18 years.

* * *

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2423(b) 2A3.1, 2A3.2, 2A3.3, 2A3.4

* * *

