

Sex Offense Primer: Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors



**Prepared by
the Office of General Counsel
U.S. Sentencing Commission**

March 2011

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**SEX OFFENSE PRIMER: OFFENSES INVOLVING COMMERCIAL SEX ACTS AND SEXUAL
EXPLOITATION OF MINORS**

The purpose of this Primer is to provide a general overview of the statutes, sentencing guideline issues, and case law relating to commercial sex acts and the sexual exploitation of minors.

I. Relevant Statutes

A. The Statutory Scheme

Immigration: Chapter 12 of title 8.

8 U.S.C. § 1328 Importation of alien for immoral purpose.

Forbids the direct or indirect importation (or attempted importation) into the United States of any alien for the purpose of prostitution or any other immoral purpose. Also prohibits holding or attempting to hold any alien, or keeping, maintaining, controlling, supporting, employing, or harboring in any house or other place, for the purpose of prostitution or any other immoral purpose. *Section 1328 has a statutory maximum penalty of ten years in prison.*

Commerce and Trade: Chapter 103 of title 15.

15 U.S.C. § 7704 Other protections for users of commercial electronic mail.

Section 7704(d) prohibits sending, to a protected computer, an email message that includes sexually oriented material without including in the subject heading the marks or notices required, or providing that the matter in the message that is initially viewable to the recipient includes only required marks or notices, and among other things, information on how to access the sexually oriented material. This section does not apply to the transmission of an email message if the recipient has given prior affirmative consent to receipt of the message.

The term “sexually oriented material” in this section means any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters. *This section has a statutory maximum penalty of five years in prison.*

Obscenity: Chapter 71 of title 18.

18 U.S.C. § 1466A Obscene visual representations of the sexual abuse of children.

Section 1466A(a) prohibits knowingly producing, distributing, receiving, or possessing with intent to distribute, a visual depiction of any kind (including a drawing, cartoon, sculpture, or painting) that depicts a minor engaging in sexually explicit conduct, is obscene, or depicts (or appears to depict) a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal). Such visual depiction must also lack serious literary, artistic, political, or scientific value. *Section 1466A(a) includes attempt and conspiracy, and provides a cross reference to 18 U.S.C. § 2252A(b)(1) (see below) for penalties.*

Section 1466A(b) prohibits knowingly possessing a visual depiction of any kind (including a drawing, cartoon, sculpture, or painting) that depicts a minor engaging in sexually explicit conduct, is obscene, or depicts (or appears to depict) a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal). Such visual depiction must also lack serious literary, artistic, political, or scientific value. *Section 1466A(b) includes attempt and conspiracy, and provides a cross reference to 18 U.S.C. § 2252A(b)(2) (see below) for penalties.*

Pursuant to § 1466A(c), the minor depicted does not have to actually exist.

Peonage and Slavery: Chapter 77 of title 18.

18 U.S.C. § 1591 Sex trafficking of children or by force, fraud, or coercion.

Prohibits knowingly recruiting, enticing, harboring, transporting, providing, or obtaining by any means a person; or knowingly benefitting financially or otherwise, from participating in such an act; knowing that force, fraud or coercion will be used to cause the person to engage in a commercial sex act or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.

Pursuant to subsection (e), the term “commercial sex act” means any sex act, on account of which anything of value is given to or

received by any person. The term “coercion” means threats of serious harm to or physical restraint against any person, any scheme, plan, or pattern intended to cause a person to believe that failure to perform the act would result in serious harm to or physical restraint against any person, or the abuse or threatened abuse of law or the legal process. The term “venture” means a group of two or more individuals associated in fact.

Subsection (b) provides for different penalties depending on whether the offense was effected by force, fraud, or coercion or, alternatively, if the minor had not reached the age of 14 years at the time of the offense. If the offense was so effected, there is a statutory minimum penalty of fifteen years and a statutory maximum of life in prison. If the offense was not so effected, and the minor was at least 14, but not yet 18, there is a statutory minimum of ten years and a maximum penalty of life in prison.

Sexual Exploitation and Other Abuse of Children: Chapter 110 of title 18.

18 U.S.C. § 2251

Sexual exploitation of children.

Section 2251(a) prohibits employing, using, persuading, inducing, enticing, or coercing a minor, or transporting any minor in interstate or foreign commerce, with the intent that the minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

Section 2251(b) prohibits any parent, legal guardian, or person with custody or control of a minor from knowingly permitting the minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Section 2251 prohibits employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct.

Section 2251(d) prohibits knowingly making, printing, or publishing an advertisement seeking or offering to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction of a minor engaging in sexually explicit conduct, or seeking or offering participation in any act of sexual conduct by or with a minor for the purpose of producing a visual depiction of such conduct.

Section 2251 includes attempt and conspiracy, and has a statutory minimum penalty of 15 years and a maximum of 30 years in prison.

If the defendant has one prior conviction under chapter 110, section 1591, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or any analogous state conviction, there is a statutory minimum penalty of 25 years and a maximum of 50 years in prison.

If the defendant has two or more prior convictions, there is a statutory minimum penalty of 35 years and a maximum penalty of life in prison.

If, in the course of an offense under this section, the conduct results in the death of a person, there is a statutory minimum penalty of 30 years and a maximum penalty of life in prison, and the death penalty applies.

18 U.S.C. § 2251A Selling or buying of children.

Section 2251A(a) prohibits any parent, legal guardian, or person with custody or control of a minor from selling (or offering to sell) or otherwise transferring custody or control of such minor either with the knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or with the intent to promote the engaging in (or assisting in) of sexually explicit conduct by the minor for the purpose of producing a visual depiction of such conduct. *Section 2251A(a) has a statutory minimum penalty of 30 years and a maximum penalty of life.*

Section 2251A(b) prohibits purchasing (or offering to purchase) or otherwise obtaining custody or control of a minor either with knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or with the intent to promote the engaging in (or assisting in) sexually explicit conduct by the minor for the purpose of producing a visual depiction of such conduct. *Section 2251A(b) has a statutory minimum penalty of 30 years and a maximum penalty of life.*

18 U.S.C. § 2252

Certain activities relating to material involving sexual exploitation of minors.

Section 2252(a)(1) prohibits knowingly transporting or shipping by any means (including computer) any visual depiction if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct;

Section 2252(a)(2) prohibits knowingly receiving or distributing any visual depiction or knowingly reproducing any visual depiction for distribution if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct;

Section 2252(a)(3) prohibits knowingly selling or possessing with intent to sell any visual depiction if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct;

Section 2252(a)(4) prohibits knowingly possessing one or more books, magazines, periodicals, films, video tapes, or other matter containing a visual depiction if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct.

Subsections (a)(1), (a)(2), and (a)(3) include attempt and conspiracy, and have a statutory minimum penalty of five years and a maximum penalty of 20 years in prison. If the defendant has a prior conviction under chapter 110, section 1591, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of 15 years and a maximum of 40 years in prison.

Subsection (a)(4) has a statutory maximum penalty of ten years in prison. If the defendant has a prior conviction under chapter 110, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of ten years and a maximum penalty of 20 years in prison.

18 U.S.C. § 2252A

Certain activities relating to material constituting or containing child pornography.

Section 2252A(a)(1) prohibits knowingly mailing or transporting or shipping (including by computer) any child pornography;

Section 2252A(a)(2) prohibits knowingly receiving or distributing any child pornography or any material that contains child pornography;

Section 2252A(a)(3) prohibits knowingly reproducing any child pornography for distribution (including by computer) or advertising, promoting, presenting, distributing, or soliciting (including by computer) any material that contains an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct;

Section 2252A(a)(4) prohibits knowingly selling or possessing with the intent to sell any child pornography;

Section 2252A(a)(5) prohibits knowingly possessing any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography;

Section 2252A(a)(6) prohibits knowingly distributing, offering, sending, or providing to a minor any visual depiction (or what appears to be a depiction) of a minor engaging in sexually explicit conduct for purposes of inducing or persuading a minor to participate in illegal activity.

Section 2252A(a)(7) prohibits knowingly producing with intent to distribute or distributing (including by computer) child pornography that is an adapted or modified depiction of an identifiable minor.

Subsections (a)(1), (a)(2), (a)(3), (a)(4), and (a)(6) include attempt and conspiracy, and have a statutory minimum penalty of five years and a maximum of 20 years in prison. If the defendant has a prior conviction under chapter 110, section 1591, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of 15 years and a maximum of 40 years in prison.

Subsection (a)(5) includes attempts and conspiracies and has a statutory maximum penalty of ten years in prison. If the defendant has a prior conviction under chapter 110, chapter 71, chapter

109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of ten years and a maximum of 20 years in prison.

Subsection (a)(7) includes attempts and conspiracies and has a statutory maximum penalty of fifteen years in prison.

Section 2252A(g) prohibits engaging in a child exploitation enterprise by violating section 1591, section 1201 (if victim is a minor), or chapter 109A (if victim is a minor), 110 (except §§ 2257 and 2257A), or 117 (if victim is a minor) as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons. *Section 2252A(g) has a statutory minimum penalty of 20 years and a maximum penalty of life in prison.*

18 U.S.C. § 2257 Record keeping requirements.

This section requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of actual sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depiction. *This section has a statutory maximum penalty of five years in prison. If the defendant violates this section after previously being convicted under this section, there is a statutory minimum penalty of two years and a maximum penalty of ten years in prison.*

18 U.S.C. § 2257A Record keeping requirements for simulated sexual conduct.

This section requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of simulated sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depiction. *This section has a statutory maximum penalty of one year in prison. If the defendant violates this section in an effort to conceal a substantive offense, there is a statutory maximum penalty of five years in prison. If the defendant violates this section after previously being convicted under this section, there is a statutory minimum penalty of two years and a maximum penalty of ten years in prison.*

18 U.S.C. § 2260

Production of sexually explicit depictions of a minor for importation into the United States.

Section 2260(a) prohibits a person outside the United States from employing, using, persuading, inducing, enticing, or coercing, or transporting any minor with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, intending that the visual depiction will be imported into the United States. *Section 2260(a) includes attempt and conspiracy, and has a cross reference to the penalties provided in § 2251(e) (see above).*

Section 2260(b) prohibits a person outside the United States from knowingly receiving, transporting, shipping, distributing, selling, or possessing with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct, intending that the visual depiction will be imported into the United States. *Section 2260(b) includes attempt and conspiracy, and has a cross reference to the penalties provided in §§ 2252(b)(1) (see above).*

Transport for Illegal Sexual Activity and Related Crimes: Chapter 117 of title 18.

18 U.S.C. § 2421

Transportation.

Prohibits transporting any individual with the intent that such individual engage in prostitution, or in any illegal sexual activity. *Section 2421 includes attempt, and has a statutory maximum penalty of ten years in prison.*

18 U.S.C. § 2422

Coercion and enticement.

Section 2422(a) prohibits knowingly persuading, inducing, enticing, or coercing any individual to travel to engage in prostitution, or in any illegal sexual activity. *Section 2422(a) includes attempt, and has a statutory maximum penalty of 20 years in prison.*

Section 2422(b) prohibits using the mail or any facility or means of interstate commerce to knowingly persuade, induce, entice, or coerce any individual younger than 18 years old, to engage in prostitution or any illegal sexual activity. *Section 2422(b) includes attempt, has a statutory minimum penalty of ten years and has a maximum penalty of life in prison.*

18 U.S.C. § 2423

Transportation of minors.

Section 2423(a) prohibits knowingly transporting an individual who had not reached the age of 18 with the intent that the individual engage in prostitution, or in any illegal sexual activity. *Section 2423(a) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory minimum penalty of ten years and a maximum penalty of life in prison.*

Section 2423(b) prohibits traveling in interstate commerce or into the United States, or traveling in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person. *Section 2423(b) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory maximum penalty of 30 years in prison.*

Section 2423(c) prohibits traveling in foreign commerce and engaging in any illicit sexual conduct. *Section 2423(c) includes attempt and conspiracy, see 18 § 2423(e), and has a statutory maximum penalty of 30 years in prison.*

Section 2423(d) prohibits arranging, inducing, procuring, or facilitating the travel of a person, for the purpose of commercial advantage or private financial gain, knowing that person is traveling in interstate or foreign commerce for the purpose of engaging in any illicit sexual conduct. *Section 2423(d) includes attempt and conspiracy, see 18 § 2423(e), and has a statutory maximum penalty of 30 years in prison.*

Pursuant to 2423(f), “illicit sexual conduct” means a sexual act with a person under 18 that would be in violation of chapter 109A of title 18 if the sexual act occurred in the special maritime and territorial jurisdiction of the United States or any commercial act with a person under 18. Section 2423(g) makes it a defense that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had reached age 18.

18 U.S.C. § 2425

Use of interstate facilities to transmit information about a minor.

Prohibits knowingly initiating the transmission of the name, address, telephone number, social security number, or email address of another individual, knowing that the individual has not reached age 16, with the intent to entice, encourage, offer, or solicit any person to engage in any criminal sexual activity. *Section 2425*

includes attempt and has a statutory maximum of five years in prison.

18 U.S.C. § 2426 Repeat offenders.

This section doubles the maximum term of imprisonment for a violation of Chapter 117 of title 18 after a prior sex offense conviction (unless § 3559(e) (Mandatory life imprisonment for repeated sex offenses against children) applies).

The term “prior sex offense conviction” means a conviction under chapter 117, chapter 109A, chapter 110, or an analogous state conviction.

B. Legal Issues

18 U.S.C. § 2251 (Sexual exploitation of children):

United States v. Sewell, 513 F.3d 820 (8th Cir. 2008). The defendant’s use of a peer-to-peer file-sharing program (Kazaa), by placing a file containing child pornography in a shared folder with descriptive text, was an “offer” to distribute child pornography.

18 U.S.C. § 2252 (Certain activities relating to material involving the sexual exploitation of minors):

United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003). The Tenth Circuit held that the Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), “did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful image is of a real child.” *Id.* According to the court, “[j]uries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge.” *Id.*; see also *United States v. Deaton*, 328 F.3d 454 (8th Cir. 2003).

18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors)

United States v. Nagel, 559 F.3d 756 (7th Cir. 2009) (affirming 10-year mandatory minimum provision in § 2422(b) as not grossly disproportionate to the offense of sexual enticement of a minor).

United States v. Spurlock, 495 F.3d 1011 (8th Cir. 2007). A conviction for attempt under §§ 2422(b) or 2423(b) does not require proof that the intended

victim is an actual minor, as long as the defendant believes that the victim is a minor. *See also United States v. Cote*, 504 F.3d 682 (7th Cir. 2007) (“factual impossibility or mistake of fact is not a defense to an attempt charge”).

United States v. Miller, 148 F.3d 207 (2d Cir. 1998). For a conviction under 18 U.S.C. §§ 2422 or 2423, prostitution or other sexual activity must be one of the dominant or principle purposes for coercing travel or transporting a minor in interstate commerce, but it need not be *the* dominant purpose.

II. Chapter Two G Offense Guideline Sections

A. Applicable Offense Guideline is Determined by the Offense of Conviction

The applicable Chapter Two offense guideline section is determined by looking up the **offense of conviction** in the Statutory Index (Appendix A). *See* §1B1.2 (Applicable Guidelines). *For example, if a defendant was charged with enticing a minor to engage in sexually explicit conduct to produce a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a), but was convicted only of possession with intent to sell that visual depiction in violation of 18 U.S.C. § 2252(a), apply §2G2.2 (applicable to 18 U.S.C. § 2252(a)), not §2G2.1 (applicable to 18 U.S.C. § 2251(a)).*

For purposes of determining which offense guideline section is applicable where the Statutory Index specifies the use of more than one section for the offense of conviction, use the offense guideline section for the most specific definition of the offense of conviction. *For example, if the defendant was convicted of § 2251(a), use §2G2.1, not §2G2.2.*

B. Applicable Base Offense Level, Specific Offense Characteristics and Cross References are Determined by Relevant Conduct

Many of the subsections of the sex offense guidelines include the phrase “**if the offense involved.**” Section 1B1.1 defines “offense” to include “the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context.” §1B1.1, comment. (n.1(H)). Section 1B1.3 states that the base offense level, any specific offense characteristics and cross references in Chapter Two, and adjustments in Chapter Three are to be determined on the basis of relevant conduct. Therefore, while the applicable Chapter Two offense guideline section is determined by looking up the offense of conviction in Appendix A, relevant conduct is important to the application of many subsections. *For example, the specific offense characteristic at §2G2.2(b)(4) states “[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.” That characteristic applies where a defendant is convicted of transporting non-sadistic child pornography if the court determines that the defendant’s relevant conduct includes possession of material that portrays sadistic or masochistic conduct, or other depictions of violence.*

C. §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor)

Appendix A refers to §2G1.1 certain offenses under 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, or 2422(a). This guideline does not cover offenses involving minor victims.¹

1. **Determining the Base Offense Level.** If the offense of conviction is 18 U.S.C. § 1591(b)(1), the base offense level is **34**. Otherwise, the base offense level is **14**.
2. **Specific Offense Characteristic.**
 - a. **Fraud or coercion.** Section 2G1.1(b)(1) provides for a **4**-level enhancement if the base offense level is 14 and the offense involved fraud or coercion.
 1. **Fraud or Coercion.** The fraud must occur as part of the offense and cannot anticipate any bodily injury. If bodily injury does result from the fraud, an upward departure may be warranted. §2G1.1, comment. (n.2). For purposes of this subsection, “coercion” includes any form of conduct that negates the voluntariness of the victim. *See* §2G1.1, comment. (n.2). Physical force is not required. *See United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002) (upholding the coercion enhancement even though the defendant did not use force to transport the woman across state lines). Coercion generally does not apply if the victim’s voluntary use of drugs or alcohol resulted in the impairment of the victim’s ability to appraise or control conduct. *See* §2G1.1, comment. (n.2).

For offenses under 18 U.S.C. § 1591(b)(1), fraud and coercion are built into the base offense level. Limiting §2G1.1(b)(1) to convictions other than those under 18 U.S.C. § 1591(b)(1) avoids unwarranted double-counting.

¹Before November 1, 2004, this guideline covered Promoting a Commercial Sex Act or Prohibited Sexual Conduct with Another, regardless of age. The Commission promulgated a new guideline (§2G1.3, effective November 1, 2004) to deal with offenses involving minors. The Commission revised §2G1.1, also effective November 1, 2004, to cover offenses that do not involve a minor. *See* U.S.S.G. App. C, amend. 664.

3. **Cross Reference.** Section 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved conduct described in 18 U.S.C. §§ 2241(a) or (b) or 2242. For purposes of this subsection, conduct described in 18 U.S.C. §§ 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (1) using force against the victim; (2) threatening or placing the victim in fear that any person will be subjected to death, bodily injury, or kidnaping; (3) rendering the victim unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the victim to appraise or control conduct. *See* §2G1.1, comment. (n.4(A)).

For purposes of this subsection, conduct described in 18 U.S.C. § 2242 is engaging in, or causing another person to engage in, a sexual act with another person by (1) threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, bodily injury, or kidnaping); or (2) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act. *See* §2G1.1, comment. (n.4(B))

4. **Special Instruction.** Section 2G1.1(d)(1) provides that if the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) applies as if the conduct in respect to each victim had been charged in separate counts of conviction. Therefore, multiple counts involving multiple victims are not grouped under §3D1.2 (Groups of Closely Related Counts). *See* §2G1.1, comment. (n.5).

For purposes of this guideline, “victim” means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct (whether or not the person consented). *See* §2G1.1, comment. (n.1); *see also United States v. Young*, 590 F.3d 467 (7th Cir. 2009) (finding victims who were massage parlor employees were “enticed” into performing commercial sex acts when their income was confined to tips received for providing sexual massages); *United States v. Jenkins*, 207 F. App’x 351 (4th Cir. 2006) (unpublished) (holding that “there is no requirement that a prostitute be transported or travel across state lines to be considered a victim under §2G1.1”). The definition of “victim” includes undercover law enforcement officers. *See* §2G1.1, comment. (n.1).

5. **Note.** For the purposes of §3B1.1 (Aggravating Role), a victim (as defined in this guideline) is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim. *See* §2G1.1, comment. (n.3).
6. **Upward Departure Provision.** If the offense involved more than ten victims, an upward departure may be warranted. *See* §2G1.1, comment. (n.6).

D. §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor)

Appendix A specifies offense guideline §2G1.3 for offenses violating 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, 2422, (all with the requirement that the offense involved a minor victim), 2423, and 2425. The word “minor” in this guideline refers to an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §2G1.3, comment. (n.1).

1. **Determining the Base Offense Level.** Three of the four alternative base offense levels for §2G1.3 depend on the offense of conviction.
 - 1) The base offense level is **34** if the defendant was convicted under 18 U.S.C. § 1591(b)(1).
 - 2) If the defendant was convicted under 18 U.S.C. § 1591(b)(2), the base offense level is **30**.
 - 3) The base offense level is **28** if the defendant was convicted under 18 U.S.C. § 2422(b) or 2423(a).
 - 4) Otherwise, the base offense level is **24**.
2. **Specific Offense Characteristics.²**
 - a. Parent, relative, or legal guardian/care, custody, or supervisory control. Section 2G1.3(b)(1) calls for a **2**-level enhancement if the

² Most of the subsections in §2G1.3 carry forward the analogous subsection of §2G1.1 that was in effect before November 1, 2004. Case law applicable to those (now deleted) subsections should also apply to the subsection in §2G1.3.

defendant was a parent, relative, or legal guardian of the minor or if the minor was in the custody, care, or supervisory control of the defendant. The phrase “custody, care, or supervisory control” is intended to be broad, and applies whenever a minor is entrusted to the defendant, whether temporarily or permanently. *See* §2G1.3, comment. (n.2(A)). The enhancement applies only if there is a pre-existing parent-like authority that exists apart from the relationship forged during the crime itself. *United States v. Brooks*, 610 F.3d 1186 (9th Cir. 2010) (vacating application of the enhancement for a defendant who met the minors after their escape from residential treatment and acted as their pimp).

If this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill). *See* §2G1.3, comment. (n.2(B)).

b. Knowing misrepresentation or undue influence. Section 2G1.3(b)(2) provides for a 2-level enhancement if the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct or if a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct.

1. Misrepresentation of Identity. The enhancement for misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct does not prompt the application of this enhancement. *See* §2G1.3, comment. (n.3(A)).

The misrepresentation enhancement could still apply even if the defendant ultimately tells the “minor” his or her true identity. *See United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007) (holding that the district court properly applied the misrepresentation enhancement where the defendant initially gave an undercover officer a false identity, but then, after talking with the undercover officer for six months but before making plans to travel for sexual conduct, told the undercover officer his true name and age). The enhancement can also apply for misrepresenting marital status and occupation. *United States v. Young*, 613 F.3d 735 (8th Cir. 2010) (affirming the enhancement for a

defendant who groomed the victim by telling her he was not married and for not disclosing that he was a high school band director after she admitted she did not like band).

2. Undue Influence. The court should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. §2G1.3, comment. (n.3(B)).

Effective November 1, 2009, the Commission amended the commentary to provide: "The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring." §2G1.3, comment. (n.3(B)); App. C, Amdmt. 732.

If the participant is at least 10 years older than the minor, there is a rebuttable presumption (for purposes of this subsection only) that there was at least some degree of undue influence. §2G1.3, comment. (n.3(B)); *see also United States v. Lay*, 583 F.3d 436 (6th Cir. 2009) (finding the defendant did not overcome the presumption although the victim initiated the communication and proposed meeting with the defendant, because the defendant continued to ply the vulnerable and troubled teenager with gifts and attention); *United States v. Miller*, 601 F.3d 734 (7th Cir. 2010) (holding that although the victim had taken the initiative at several points in the relationship, the female defendant did not overcome the presumption because she wrote the teenaged victim numerous e-mails professing her love for her).

Effective November 1, 2009, the Commission amended the commentary to make it clear that the undue influence enhancement does not apply if the only "minor" involved in the offense is an undercover officer. §2G1.3, comment. (n.3(B)); App. C, Amdmt. 732; *see also United States v. Jerchow*, 631 F.3d 1181(11th Cir. 2011) (finding that the amendment only altered the commentary to §2G1.3 and was therefore clarifying, and thus was to be applied retroactively).

- c. Use of a computer. Section 2G1.3(b)(3) provides for a 2-level enhancement if a computer or an interactive computer service was used to: (1) persuade, induce, entice, coerce, or facilitate the travel

of, the minor to engage in prohibited sexual conduct; or (2) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor. This subsection applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. See §2G1.3, comment. (n.4). The enhancement is appropriately applied if the defendant begins to pursue the victim while using a computer, even if no sexual requests were sent via computer and even if the minor does not yet recognize the defendant's intent. *United States v. Lay*, 583 F.3d 436 (6th Cir. 2009). The use of a cellular telephone to send voice mail and text messages directly to the victim is a "computer" for purposes of §2G1.3(b)(3), even though it was not used to connect to the Internet. *United States v. Kramer*, 631 F.3d 900 (8th Cir. 2011).

- d. Sex act or sexual contact/commercial sex act. Section 2G1.3(b)(4) provides for a **2**-level enhancement if the offense involved the commission of a sex act or sexual contact, or if the offense involved a commercial sex act and: (1) the defendant was convicted under 18 U.S.C. §§ 2422(b) or 2423(a); or 2) the defendant was convicted of any offense covered by §2G1.3 other than 18 U.S.C. § 1591. Offenses committed under 18 U.S.C. § 1591 are not included in this specific offense characteristic because they necessarily involve a commercial sex act.
- b. Minor younger than 12. Section 2G1.3(b)(5) provides for an **8**-level enhancement if the offense involved a minor who had not attained the age of 12 years and the defendant was either: 1) convicted under 18 U.S.C. §§ 2422(b) or 2423(a); or 2) the defendant was convicted of any offense covered by §2G1.3 other than 18 U.S.C. § 1591. Offenses committed under 18 U.S.C. § 1591 are not included in this specific offense characteristic because the age of the minor is already taken into account in the applicable base offense level.

3. **Cross References.**

- a. Section 2G1.3(c)(1). Section 2G1.3(c)(1) states that §2G2.1 should apply if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct and if the resulting offense level under §2G2.1 is greater than the offense level determined under this guideline. This subsection is to be construed

broadly. See §2G1.3, comment. (n.5(A)); *United States v. Veazey*, 491 F.3d 700 (7th Cir. 2007) (holding “that the cross-reference [in §2G1.3(c)(1)] applies when one of the defendant’s purposes was to create a visual depiction of sexually explicit conduct, without regard to whether that purpose was the primary motivation for the defendant’s conduct”); *United States v. Bohannon*, 476 F.3d 1246 (11th Cir. 2007) (finding that the application of this cross reference was appropriate where the defendant arranged a meeting with the “minor” over the Internet and had a history of making visual depictions of other young girls).

- b. Section 2G1.3(c)(2). Section 2G1.3(c)(2) states that §2A1.1 (First Degree Murder) should apply if a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 and if the resulting offense level is greater than the one determined under this guideline.
- c. Section 2G1.3(c)(3). Section 2G1.3(c)(3) states that §2A3.1 should apply if the offense involved conduct described in 18 U.S.C. §§ 2241 or 2242 and if the resulting offense level is greater than the one determined under this guideline. See *United States v. Madison*, 477 F.3d 1312 (11th Cir. 2007) (finding that the district court properly applied the cross reference to §2A3.1 in a case where the defendant used “used violence and fear to cause [the minor prostitute] to engage in a sexual act with another person”).

For purposes of this subsection, conduct described in 18 U.S.C. §§ 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, bodily injury, or kidnaping; (3) rendering the minor unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the minor to appraise or control conduct. See §2G1.3, comment. (n.5(B)(i)).

For purposes of this subsection, conduct described in 18 U.S.C. § 2241(c) is (1) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12; (2) knowingly engaging in a sexual act with a minor who has not attained the age of 12; or (3) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) or (b) with a minor who has reached 12 years, but has not reached the age of 16 (and is

at least 4 years younger than the person so engaging). *See* §2G1.3, comment. (n.5(B)(ii)).

For purposes of this subsection, conduct described in 18 U.S.C. § 2242 is engaging in, or causing another person to engage in, a sexual act with another person by (1) threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, bodily injury, or kidnaping); or (2) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act. *See* §2G1.1, comment. (n.4(B)(iii)).

4. **Special Instruction.** Section 2G1.3(d)(1) provides that if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) should apply as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction. Thus, multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts). *See* §2G1.3, comment. (n.6). Each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, is to be treated as a separate minor. *See* §2G1.3, comment. (n.6).
5. **Upward Departure Provision.** If the offense involved more than ten minors, an upward departure may be warranted. *See* §2G1.3, comment. (n.7).

E. §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)

Appendix A specifies offense guideline §2G2.1 for offenses violating 18 U.S.C. §§ 1591, 2251, and 2260(b). The word “minor” in this guideline refers to an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §2G2.1, comment. (n.1).

“Distribution” includes posting materials involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant. *See* §2G2.1, comment. (n.1).

1. **Base Offense Level.** This guideline has one base offense level of **32**.
2. **Specific Offense Characteristics.**
 - a. **Age of the victim.** Section 2G2.1(b)(1) provides for a **4**-level enhancement if the offense involved a minor who had not attained the age of 12 years, and a **2**-level enhancement if the offense involved a minor who had attained the age of 12 years but had not attained the age of 16 years. *United States v. Garnette*, 474 F.3d 1057 (8th Cir. 2007) (holding that the district court did not err when it varied upward by 21 percent from the guideline range because §2G2.1(b)(1) does not account for particularly vulnerable victims significantly younger than 12 years old); *see also United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) (rejecting the defendant’s double-counting argument, and applying this enhancement as well as the vulnerable victim adjustment because of the victims’ extreme youth and small size).
 - b. **Sexual act or sexual conduct.** Section 2G2.1(b)(2) provides for a **2**-level enhancement if the offense involved the commission of a sexual act or sexual contact, or (if greater) a **4**-level enhancement if the offense involved both the commission of a sexual act and conduct described in 18 U.S.C. § 2241(a) or (b). *See United States v. Aldrich*, 566 F.3d 976 (11th Cir. 2009) (finding that defendant’s masturbation in front of his web camera met the definition of “sexual contact”); *United States v. Shafer*, 573 F.3d 267 (6th Cir. 2009), *cert. denied*, 176 L. Ed. 2d 136 (2010) (defining “sexual contact” broadly to include the victim’s self-masturbation); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (holding that the enhancement applied where the defendant’s relevant conduct included sexual acts undertaken by the victim that the defendant photographed, uploaded, and distributed); *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007) (finding, in a case where the defendant touched the minor victim’s penis for sexual pleasure, that the offense involved a sexual act or sexual contact).

For purposes of this subsection, conduct described in 18 U.S.C. § 2241(a) or (b) is: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, bodily injury, or kidnaping; (3) rendering the minor unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing

the ability of the minor to appraise or control conduct. See §2G2.1, comment. (n.2).

- c. Distribution. Section 2G2.1(b)(3) provides for a 2-level enhancement if the offense involved distribution.
- d. Sadistic or masochistic conduct.³ Section 2G2.1(b)(4) provides for a 4-level enhancement if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence. At least one court has held that “images involving an adult male performing anal sex on a minor girl are per se sadistic or violent,” *United States v. Street*, 531 F.3d 703 (8th Cir. 2008) and that “self-penetration by a foreign object qualifies as violence,” *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008). For a more detailed discussion of what constitutes “sadistic or masochistic” conduct, see infra page 26.
- e. Parent, relative, or guardian/custody, care, or supervisory control. Section 2G2.1(b)(5) provides for a 2-level enhancement if the defendant was a parent, relative, or legal guardian of the minor or if the minor was otherwise in the custody, care, or supervisory control of the defendant. This enhancement applies broadly and it includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. See §2G2.1, comment. (n.3(A)); see also *United States v. Alfaro*, 555 F.3d 496 (5th Cir. 2009) (affirming the enhancement and concluding that the relationship between the 36-year old defendant and his 15-year-old sister-in-law was “entrustful” even though the victim’s mother did not approve of the victim spending time with the defendant). The minor can be in the custody, care or supervisory control of more than one person at a time. See, e.g., *United States v. Carson*, 539 F.3d 611 (7th Cir. 2008) (holding that the district court properly applied the enhancement in a case in which the minor’s mother and the mother’s boyfriend had mutual custody over the minor during the minor’s visits to their house).

If the enhancement in §2G2.1(b)(5) applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. See §2G2.1, comment. (n.3(B)).

³ The Commission added this enhancement effective November 1, 2004. It is identical to the enhancement in §2G2.2(b)(4), and case law applicable to that provision is also applicable here.

- f. Knowing misrepresentation of identity/use of a computer. Section 2G2.1(b)(6) provides for a 2-level enhancement if, for the purpose of producing sexually explicit material, the offense involved either: (1) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (2) the use of a computer or interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or to solicit participation with a minor in sexually explicit conduct. *See United States v. Starr*, 533 F.3d 985 (8th Cir. 2008) (affirming enhancement for defendant who lied about his age, based on application note 4, because misrepresentation was made with intent to persuade or coerce the minor to engage in sexually explicit conduct).

The enhancement for misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct does not prompt the application of this enhancement. *See* §2G2.1, comment. (n.4(A)).

The computer or interactive computer service enhancement applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2G2.1, comment. (n.4(B)); *see also United States v. Jass*, 569 F.3d 47 (2nd Cir. 2009), *cert. denied*, 130 S. Ct. 2128 (2010) (rejecting this enhancement where a computer was used to show explicit material to desensitize minor victim to sexual activity with adults in order to persuade her to participate).

3. **Cross Reference.** Section 2G2.1(c)(1) states that §2A1.1 (First Degree Murder) applies if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 and if the resulting offense level is greater than the one determined under this guideline.
4. **Special Instruction.** Section 2G2.1(d)(1) directs that when multiple minors are involved in the offense, Chapter Three, Part D (Multiple Counts) should be treated as though the exploitation of each minor had been contained in a separate count of conviction. Therefore, multiple counts involving the exploitation of different minors are not to be grouped under §3D1.2 (Groups of Closely Related Counts). *See United States v. Fadol*, 498 F.3d 862 (8th Cir. 2007) (holding that the application of

§2G2.1(d)(1) and §4B1.5(b) was not double-counting because §2G2.1(d)(1) punished the exploitation of different minors and §4B1.5(b) punished the exploitation of those minors on multiple occasions); *United States v. Peck*, 496 F.3d 885 (8th Cir. 2007) (“[T]he separate enhancements for the number of minors Peck exploited and for the fact that Peck exploited the minors on multiple occasions are not premised on the same harm.”).

5. **Upward Departure Provision.** If the offense involved more than ten minors, an upward departure may be warranted. *See* §2G2.1, comment. (n.6).

F. §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor)⁴

Appendix A specifies offense guideline §2G2.2 for offenses violating 18 U.S.C. §§ 1466A, 2252, 2252A, and 2260(b). Under this guideline, the word “minor” means an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §2G2.2, comment. (n.1). On November 1, 2004, the Commission amended this guideline to include in the definition of “minor” an “undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.” *See United States v. Stevens*, 462 F.3d 1169 (9th Cir. 2006) (reversing enhancement because the retroactive application of the amendment violated the *ex post facto* clause).

1. **Determining the Base Offense Level.** If the defendant was convicted under 18 U.S.C. §§ 1466A(b), 2252(a)(4), or 2252A(a)(5), the base offense level is **18**.

Otherwise, the base offense level is **22**.

2. **Specific Offense Characteristics.**

- a. **Receipt or solicitation only.** Section 2G2.2(b)(1) provides for a 2-level *decrease* if the base offense level is 22, the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and the defendant did

⁴ Sections 2G2.2 and 2G2.4 were consolidated into §2G2.2 in 2004. The guideline now applies to both trafficking and possession offenses.

not intend to traffic in or distribute the material. Thus, the adjusted offense level will be **20** for those defendants who were convicted of receipt of child pornography with no intent to traffic in or distribute the material.

Distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but it does not include the mere solicitation of such material. See §2G2.2, comment. (n.1). A decrease under this subsection may be denied when the defendant transported materials across state lines. See *United States v. Fore*, 507 F.3d 412 (6th Cir. 2007) (holding that the defendant did not meet the second requirement of §2G2.2(b)(1) “because his criminal conduct was not limited to the receipt or solicitation of pornographic materials, but also encompassed the transportation of materials involving the sexual exploitation of a minor in interstate commerce”).

- b. Minor under 12 years. Section 2G2.2(b)(2) provides for a **2**-level enhancement if the material involved a prepubescent minor or a minor who had not reached twelve years.

The pictures themselves can support the court’s finding that the images are of children under twelve and that they depict actual children. See *United States v. Deaton*, 328 F.3d 454 (8th Cir. 2003). The Eleventh Circuit has held that the enhancement does not apply if the defendant did not intend to receive material involving prepubescent children or children under 12 years old. *United States v. Saylor*, 959 F.2d 198 (11th Cir. 1992); see also *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) (upholding the enhancement where there was sufficient evidence “to conclude that [the defendant] intentionally ordered and possessed child pornography which depicted prepubescent minors or minors under the age of 12, or, at the very least, had reckless disregard of the age of the performers”).

- c. Distribution. Section 2G2.2(b)(3) provides six potential enhancements to the base offense level if the offense involved distribution. The greatest enhancement should apply.

A) If the distribution was for pecuniary gain (for profit), increase the base offense level by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value, but by not less than **5** levels.

B) If the distribution was for the receipt, or expectation of receipt of a thing of value (but not for pecuniary gain), a 5-level enhancement applies.

Distribution for this enhancement is any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. A “thing of value” is anything of valuable consideration, *i.e.*, child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received. *See* §2G2.2, comment. (n.1); *see also United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000) (stating that a distribution enhancement “is appropriate if the defendant distributed the images with a purpose of enticing another person to have sex with him”); *United States v. Whited*, 539 F.3d 693 (7th Cir. 2008) (holding that the phrase “expectation of receipt” does not require an explicit agreement or precise bargain, and finding that the “district court did not clearly err in finding that [the defendant] distributed child pornography in reasonable anticipation of obtaining sex from [another man]”). The “thing of value” could be the defendant’s increased accessibility to other users’ files based on the defendant’s high participation rate in a peer-to-peer program. *United States v. Carani*, 492 F.3d 867 (7th Cir. 2007).

Some courts have found that the enhancement applies if the defendant engaged in a peer-to-peer file sharing network expecting to receive either child pornography or expecting to be able to download child pornography from others at a faster rate of speed. *See United States v. Layton*, 564 F.3d 330 (4th Cir.), *cert. denied*, 130 S. Ct. 290 (2009) (concurring with the Seventh, Eighth and Eleventh Circuits, and holding that use of a peer-to-peer file-sharing program constitutes “distribution.”); *United States v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (holding that by sharing files on Kazaa, the defendant expects to receive a thing of value—access to others’ files—because these networks exist, as the name “file-sharing” suggests, for users to share, swap, barter, or trade files between one another); *cf. United States v. Gainer*, 498 F.3d 1104 (10th Cir. 2007) (rejecting the broad rule in *Griffin* and other cases, but finding the application of enhancement appropriate where defendant had changed his file-sharing peer-to-peer preferences to become a “priority trader” after learning that he could download files from others faster if he permitted others to obtain files from him).

C) If the distribution was to a minor, a **5-level** enhancement applies.

“Distribution to a Minor” means the knowing distribution to an individual who is a minor at the time of the offense. *See* §2G2.2, comment. (n.1); *see also United States v. Wainwright*, 509 F.3d 812 (7th Cir. 2007) (affirming the district court’s application of the enhancement based on numerous messages defendant had sent to individuals who defendant believed were under 18 years because of the screen names used by those individuals such as “Justified Facade-16yo”); *United States v. Stevens*, 462 F.3d 1169 (9th Cir. 2006) (holding that the Commission’s expansion of the definition of “minor” in the Commentary to §2G2.2 on November 1, 2004, to include law enforcement officers was a substantive change and therefore the sentencing court erred in applying the enhancement retroactively); *cf. United States v. Hecht*, 470 F.3d 177 (4th Cir. 2006) (pointing a web cam at 51 images of child pornography on computer screen and transmitting those images via the Internet is distribution because it is an act related to the transfer of material involving child pornography as defined in the guideline).

D) If the distribution was to a minor and was intended to persuade, induce, entice, or coerce that minor to engage in any illegal activity (except that activity covered by (E), below), a **6-level** enhancement applies.

E) If the distribution was to a minor and was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, a **7-level** enhancement applies. Distribution to a person who represents he can provide a child to engage in sexually explicit conduct is distribution to a minor when the material is distributed with knowledge it will be viewed by the minor. *United States v. Love*, 593 F.3d 1 (D.C. Cir. 2010).

F) Finally, if the distribution was distribution other than as described in (A) through (E), a **2-level** enhancement applies.

File-sharing cases (if the court does not find that there is an expectation of a thing of value) are often placed in this category. *See United States v. Darway*, 255 F. App’x 68 (6th Cir. 2007) (holding that the district court’s application of §2G2.2(b)(3)(F) was appropriate even though defendant did not actively send images to

others; simply maintaining files in an accessible public folder in a peer-to-peer network constitutes distribution). *But see United States v. Durham*, 618 F.3d 921 (8th Cir. 2010) (holding application of the enhancement improper where there was no evidence the defendant had any knowledge of the uploading capabilities of the file-sharing program). *See also United States v. Carani*, 492 F.3d 867 (7th Cir. 2007) (holding application of enhancement appropriate where the defendant knowingly made his child pornography on his computer available to others through Kazaa peer-to-peer file-sharing network); *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007) (same).

- d. Sadistic or masochistic conduct. Section 2G2.2(b)(4) provides for a 4-level enhancement if the material involved in the offense portrayed sadistic or masochistic conduct or other depictions of violence. This subsection applies whether the defendant specifically intended to possess, receive, or distribute such materials. *See* §2G2.2, comment (n.2) (resolving a circuit split on the issue).
- (I) Pain/Violence/Penetration. Courts have held that an image’s portrayal of sadistic conduct includes portrayal of conduct a viewer would likely think is causing physical or emotional pain to a depicted young child. This includes the penetration of a young child by an adult male. *See, e.g., United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007) (holding that a picture of a young boy with an expression of pain and disgust while being anally penetrated by an adult male represented conduct sufficiently likely to involve pain, supporting a finding that the image was sadistic or violent); *United States v. Lyckman*, 235 F.3d 234 (5th Cir. 2000) (stating that images showing the male sexual organ partially inserted into the sexual organ of a prepubescent female constituted “violence” and application is warranted when the sexual act depicted is “likely to cause pain in one so young”); *United States v. Myers*, 355 F.3d 1040 (7th Cir. 2004) (holding that a video of an adult male engaging in vaginal intercourse with a prepubescent girl between 5 and 8 years old that shows some difficulty in insertion because of the size disparity portrayed conduct that would have caused pain to the child and therefore is sadistic conduct); *United States v. Johnson*, 450 F.3d 831 (8th Cir. 2006) (stating that “sexual penetration of a minor female by an adult male is per se sadistic”); *United States v. Wright*, 373

F.3d 935 (9th Cir. 2004) (stating that “vaginally and anally penetrating a young child necessarily hurts the child”) (citation omitted); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (finding that the enhancement applies when “some of the images depict anal or vaginal penetration of *prepubescent* children by *adults* causing pain and humiliation,” and holding that expert testimony is not required to justify an enhancement for sadism); *see also United States v. Turchen*, 187 F.3d 735 (7th Cir. 1999) (finding that an image depicting males standing over and urinating on face of a grimacing prepubescent girl portrays the infliction of violent physical and mental harm on the child and is therefore sadistic).

Images showing an attempt by an adult male to penetrate a young child have also been found to be “sadistic” or “violent” for purposes of this enhancement. *See United States v. Belflower*, 390 F.3d 560 (8th Cir. 2004) (stating that images showing an attempt to penetrate a young child “bespeak a sadistic intent to achieve sexual pleasure through the necessarily violent depiction of a minor as either a sexual object ripe for or deserving of sexual exploitation, or as a sexual subject desirous of and complicit in his or her own sexual exploitation”).

- (ii) Double counting. Courts have held that it is not impermissible double counting to apply an enhancement for prepubescent age of the child and the sadistic or violent behavior. *See United States v. Lyckman*, 235 F.3d 234 (5th Cir. 2000) (ruling that the court could “consider the child’s prepubescence in assessing the sadistic or violent quality of the images without rendering [the enhancement for material involving a prepubescent minor] superfluous”); *United States v. Myers*, 355 F.3d 1040 (7th Cir. 2004) (holding that the prepubescent status of the minor does not implicate the enhancement under §2G2.2(b)(4); “[i]t is the conduct taken with respect to that prepubescent child that justifies that . . . enhancement”).
- (iii) Relevant conduct. An enhancement under §2G2.2(b)(4) can be based on relevant conduct such as visual depictions found in the defendant’s possession that are not part of the charged conduct in the indictment. *See United States v. Ellison*, 113 F.3d 77 (7th Cir. 1997) (holding that the

defendant's receipt of child pornographic materials (offense of conviction) and his possession of sadistic child pornographic materials (relevant conduct) "violate the same criminal statute and indicate his dangerous propensities in the realm of sexual exploitation of minors"); *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007) ("For the enhancement under section 2G2.2(b)(4) to apply, there is no requirement that the sadomasochistic image be one of the images underlying the conviction."); *see also United States v. Barevich*, 445 F.3d 956 (7th Cir. 2006) (finding an enhancement applicable when the defendant's sentence was based on images in the defendant's possession when he was arrested for transporting child pornography); *United States v. Stulock*, 308 F.3d 922 (8th Cir. 2002) (holding that a "defendant's contemporaneous possession of violent images during the same time frame that he or she engaged in the trafficking offense is 'relevant conduct' for the purposes of the trafficking charge"). *But see United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000) (holding that the possession of images of sadistic conduct is not relevant conduct if the defendant was convicted of transporting and shipping child pornography and there was no evidence showing that the defendant ever thought about sending the sadistic image to anyone).

- e. Pattern of activity. Section 2G2.2(b)(5) provides a 5-level enhancement if the defendant engaged in a pattern of activity that involved the sexual abuse or exploitation of a minor. "Pattern of activity" is defined as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred during the course of the offense, involved the same minor, or resulted in a conviction for such conduct. *See* §2G2.2, comment. (n.1); *United States v. Paull*, 551 F.3d 516 (6th Cir.), *cert. denied*, 130 S. Ct. 187 (2009) (affirming the district court's decision to apply the five-level enhancement in a case in which the defendant's neighbor wrote a letter to the court detailing specific allegations of sexual abuse perpetrated by the defendant against the neighbor when the neighbor was a minor); *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010) (holding application of the five-level enhancement under §2G2.2(b)(5) and the five-level enhancement under §4B1.5(b)(1) was appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors).

Evidence of an intent to continue abusing minors in the future, combined with evidence of past sexual abuse, is sufficient for imposition of the enhancement. *United States v. Acosta*, 619 F.3d 956 (8th Cir. 2010).

“Sexual abuse or exploitation” means conduct described in 18 U.S.C. §§ 2241, 2242, 2243, 2251, 2251A, 2260(b), 2421, 2422, 2423, an offense under state law that would have been an offense under federal law if there was jurisdiction, or an attempt or conspiracy to commit any of these offenses. It does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor. *See* §2G2.2, comment (n.1).

A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History). *See* §2G2.2, comment. (n.3).

- (I) No temporal limit on prior conduct. *See United States v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (agreeing with the First, Sixth, Seventh, and Ninth Circuits “that there is no temporal nexus necessary to establish a pattern of activity of sexual abuse or exploitation of a minor,” and applying the “pattern of activity” enhancement because the defendant had been convicted of two previous sexual assaults in 1986 and 1989, respectively); *United States v. Garner*, 490 F.3d 739 (9th Cir. 2007) (upholding the district court’s enhancement based on conduct in which the defendant had engaged 35 years earlier).
- (ii) Expanded relevant conduct. The definition of “pattern of activity” in Application Note 1 allows for the court to consider expanded relevant conduct. *See United States v. Williamson*, 439 F.3d 1125 (9th Cir. 2006) (the pattern of activity enhancement was applied under expanded relevant conduct rules because the defendant, convicted of trafficking, had sexually abused his own granddaughter when she was four to five years old and had created child pornography of the abuse); *United States v. Ashley*, 342 F.3d 850 (8th Cir. 2003) (stating that Application Note 1 is unambiguous that the enhancement applies whether or not the abuse occurred during the course of the offense); *United States v. Anderton*, 136 F.3d 747 (11th Cir. 1998) (“[T]he

clarifying amendment clearly permits an increased offense level for conduct unrelated to the offense of conviction.”).

(iii) Conduct must have been sexually explicit, but it includes attempt. Compare *United States v. Gleich*, 397 F.3d 608 (8th Cir. 2005) (holding that a “mooning” picture of a minor did not constitute an instance of sexual exploitation because the buttocks is a non-genital region and therefore does not meet the definition of “sexually explicit conduct”); with *United States v. Sommerville*, 276 F. App’x 903 (11th Cir. 2008) (unpublished) (upholding the application of the enhancement where the district court found that the defendant had, on two different occasions, spoken online with agents posed as mothers of minor children, had proposed meeting to have sex with the mothers and their minor children, and had sent them images and a video of child pornography).

f. Use of a computer. Section 2G2.2(b)(6) provides for a 2-level enhancement if the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material. This enhancement can apply even if the defendant responds to an advertisement for child pornography via computer but receives the material through the mail. See *United States v. Dotson*, 324 F.3d 256 (4th Cir. 2003) (holding that the language of the guidelines makes it clear that the computer enhancement applies not only to “the solicitor [of child pornography], but also the recipient of such solicitation”). Further, the enhancement can apply where the material was at some point transmitted using a computer, but, at the time it was seized, was no longer on a computer. See *United States v. Weisser*, 417 F.3d 336 (2d Cir. 2005).

g. Number of images. Section 2G2.2(b)(7) provides different enhancements for the number of images the offense involved.

If the offense involved at least ten but less than 150 images, there is a 2-level enhancement.

If the offense involved at least 150 images, but less than 300 there is a 3-level enhancement.

If the offense involved at least 300 images, but less than 600 there is a 4-level enhancement.

If the offense involved 600 or more images, there is a **5-level** enhancement.

“Image” means any visual depiction that constitutes child pornography. *See* §2G2.2, comment. (n.4(A)). Each photograph, picture, computer or computer-generated image, or similar visual depiction is considered one image. *United States v. Sampson*, 606 F.3d 505 (8th Cir. 2010) (affirming counting the same video twice, for a total of 150 images, because both acts of distribution compound the original sexual exploitation of the minor). Both duplicate hard copy images and duplicate digital images are to be counted separately. *United States v. McNerney*, ___ F.3d ___, 2011 WL 691178 (6th Cir. 2011). If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted. *See* §2G2.2, comment. (n.4(B)(I)). Each video, video-clip, movie, or similar recording is considered to have 75 images. If the recording is substantially longer than five minutes, an upward departure may be warranted. *See* §2G2.2, comment. (n.4(B)(ii)). An attempt to obtain pornographic videos is sufficient to support the enhancement under this subsection. *See United States v. Gnavi*, 474 F.3d 532 (8th Cir. 2007) (finding the enhancement appropriate where the defendant had attempted to receive a pornographic video, but holding that merely expressing interest is not enough).

3. **Cross Reference**. Section 2G2.2(c)(1) states that, if the resulting offense level is greater than the one resulting from this guideline, §2G2.1 applies if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The cross reference should be applied broadly. *See* §2G2.2, comment. (n.5).

Most issues under this subsection deal with what constitutes relevant conduct. *See, e.g., United States v. Bauer*, 626 F.3d 1004 (8th Cir. 2010) (finding application of the cross reference appropriate where there was an offer to purchase a webcam to send to the victim and the defendant sent money for the purchase); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (applying the cross reference to §2G2.1 “because [the defendant’s] offense conduct involved posing and photographing [the victim] as he engaged in sexually explicit conduct”); *United States v. Garcia*, 411 F.3d 1173 (10th Cir. 2005) (stating that the cross reference to §2G2.1 is to be construed broadly and should be applied to “not only the actual production of child pornography, but the active solicitation for the production of such images”); *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997) (holding that the district court properly applied the cross-reference even though the defendant made the sexually explicit films outside the United States); *United States v. Speelman*, 431 F.3d 1226 (9th Cir. 2005) (stating that the district court

did not err in applying the cross-reference even though the exploitation charge was dropped pursuant to a plea agreement); *United States v. Tagore*, 158 F.3d 1124 (10th Cir. 1998) (holding that the district court properly considered the reasonably foreseeable conduct of the defendant's co-conspirators when determining whether to apply this enhancement).

4. **Upward Departure Provision.** If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not it occurred during the course of the offense or resulted in a conviction), and subsection (b)(5) (Pattern of Activity Involving the Sexual Abuse or Exploitation of a Minor) does not apply, an upward departure may be warranted. An upward departure may also be warranted if subsection (b)(5) does apply, but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved. *See* §2G2.2, comment. (n.7).

G. §2G2.3 (Selling or Buying of Children for Use in the Production of Pornography)

Appendix A specifies offense guideline §2G2.3 for offenses violating 18 U.S.C. § 2251A.

1. **Base Offense Level.** The base offense level for this guideline is **38**.

Note: The statutory minimum sentence for a defendant convicted under § 2251A is now 30 years in prison.

H. §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email)

Appendix A specifies offense guideline §2G2.5 for offenses violating 15 U.S.C. § 7704(d) and 18 U.S.C. §§ 2257 and 2257A.

1. **Base Offense Level.** The base offense level under this guideline is **6**.
2. **Cross References.** Section 2G2.1 applies if the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. *See* §2G2.5(b)(1).

Section 2G2.2 applies if the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor. *See* §2G2.5(b)(2).

I. §2G2.6 (Child Exploitation Enterprises)

Appendix A specifies offense guideline §2G2.6 for offenses violating 18 U.S.C. § 2252A(g). For purposes of this guideline, the term “minor” means an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §2G2.6, comment. (n.1).

1. **Base Offense Level.** This guideline has a base offense level of **35**.
2. **Specific Offense Characteristics.**
 - a. **Age of the victim.** Section 2G2.6(b)(1) provides for a **4**-level enhancement if the victim had not reached 12 years. It provides for a **2**-level enhancement if the victim had reached 12, but had not reached the age of 16.
 - b. **Parent, relative, guardian/custody, care, or supervisory control.** Section 2G2.6(b)(2) provides for a **2**-level enhancement if the defendant was a parent, relative, or legal guardian of a minor victim or if the minor victim was otherwise in the custody, care, or supervisory control of the defendant. This subsection is to be applied broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. *See* §2G2.6 comment. (n.2(A)).

If subsection (b)(2) applies, the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* §2G2.6 comment. (n.2(B)).

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- c. **Conduct described in 18 U.S.C. § 2241(a) or (b).** Section 2G2.6(b)(3) provides for a **2**-level enhancement if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b).

For purposes of this subsection, conduct described in 18 U.S.C. § 2241(a) or (b) is: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, bodily injury, or kidnaping; (3) rendering the minor unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the minor to appraise or control conduct. *See* §2G2.6, comment.

(n.3).

- d. Use of a computer. Section 2G2.6(b)(4) provides for a 2-level enhancement if a computer or interactive computer service was used in furtherance of the offense.

III. Chapter Three: Adjustments

A. §3A1.1(b) (Vulnerable Victim)

Section 3A1.1(b)(1) provides for a 2-level adjustment if the defendant knew or should have known that a victim of the offense was a vulnerable victim. Further, §2A3.1(b)(2) provides that if (b)(1) applies and the offense involved a large number of vulnerable victims, the offense level should be adjusted another 2 levels.

For purposes of this subsection, “vulnerable victim” means a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) and who is unusually vulnerable due to age, physical or mental condition or who is otherwise particularly susceptible to the criminal conduct. §3A1.1, comment. (n. 2). *See United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007) (finding that the application of the adjustment under §3A1.1(b) and an enhancement based on sadistic conduct was not impermissible double-counting because “the enhancements . . . account for distinct characteristics of the crime: the sadistic conduct enhancement accounts for the pleasure necessarily experienced by the perpetrator, while the vulnerable victim enhancement accounts for the inability of the victim to resist sexual abuse”); *see also United States v. Newsom*, 402 F.3d 780 (7th Cir. 2005) (holding that, while every sleeping victim is not “vulnerable” under this guideline, under the facts of the case—the defendant moved the underwear of his sleeping victim to get better video shots of her genitals—the adjustment was proper); *United States v. Gawthrop*, 310 F.3d 405 (6th Cir. 2002) (affirming the district court’s application of the vulnerable victim adjustment where the defendant “molested and exposed his three-year-old granddaughter to child pornography by abusing his special position as her grandfather”); *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008) (affirming the district court’s application of the adjustment where the district court determined that the victim “had psychological and family problems of which [the defendant was or should have been aware,” and there was evidence in the record “on which the district court could infer that [the defendant] used” the victim’s psychological problems to gain the victim’s confidence).

The adjustment under §3A1.1(b) does not apply, however, if the factor that makes the person vulnerable is already incorporated into the offense guideline. *See* §3A1.1(b), comment. (n.2). Therefore, in child pornography offenses, if the

guideline provides an enhancement for the age of the minor victim, §3A1.1(b) applies only if the victim was unusually vulnerable for reasons unrelated to his/her age. §3A1.1, comment. (n. 2); *see, e.g., United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008) (holding that the victim’s petite and fragile stature, naivete, and poor communication skills made her unusually vulnerable for a 13-year-old girl); *United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007) (finding application of §3A1.1 warranted for possession of child pornography offense where the “child is so young and small that he or she is less able to resist than other child victims” of child pornography); *United States v. Lynn*, ___ F.3d ___, 2011 WL 635298 (9th Cir. 2011) (holding adjustment warranted where toddlers were portrayed in the videos). *But see United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) (*supra*, Section II.E).

B. §3B1.3 (Abuse of Position of Trust or Use of Special Skill)

Section 3B1.3 provides for a 2-level adjustment if the defendant abused a position of public or private trust in a manner that significantly facilitated commission or concealment of the crime. However, this adjustment does not apply in many of the child pornography guidelines if the specific offense characteristic for a victim being in the care, custody, or supervisory control of the defendant also apply. *See* §2G1.3, comment. (n.2(B)); §2G2.1, comment. (n.3(B)); §2G2.6, comment. (n.2(B)).

IV. Chapter Four: Repeat and Dangerous Sex Offender

A. §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)

Section 4B1.5 applies to offenders whose offense of conviction is one of the “covered sex crime[s]” committed against a minor and who present a continuing danger to the public. §4B1.5, comment. (n.2), (background). The “covered sex crime[s]” relevant to this Primer are offenses (including attempt and conspiracy to commit the offense), perpetrated against a minor, under chapter 110 of title 18 (not including trafficking in, receipt of, or possession of, child pornography or a recordkeeping offense), chapter 117 of title 18 (not including transmitting information about a minor or filing a factual statement about an alien individual, or 18 U.S.C. § 1591).

For purposes of this guideline, the term “minor means an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §4B1.5, comment. (n.1).

1. Determining the Base Offense Level & Criminal History Category

- a. At least one previous sex offense conviction. Section 4B1.5(a) applies where a 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 after sustaining at least one sex offense conviction.

“Sex offense conviction” means any offense described in 18 U.S.C. § 2426(b)(1)(A) of (B), if the offense was perpetrated against a minor. The term does not include trafficking in, receipt of, or possession of, child pornography. §4B1.5, comment. (n.3(A)(ii)).

“To determine whether a prior offense qualifies as a predicate offense for the purpose of a statutory mandatory minimum or sentencing enhancement, federal courts employ a ‘formal categorical approach’ which requires that the sentencing court ‘look only to the fact of conviction and the statutory definition of the prior offense.’” *United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008) (quoting *Shepard v. United States*, 544 U.S. 13 (2005)). If, however, “the prior offense was committed in a separate jurisdiction in which the offense is defined more broadly than the ‘generic offense’ enumerated in the current prosecution, federal courts employ a ‘modified categorical approach.’” *Id.* With regard to guilty pleas under this analysis, the Supreme Court has held that:

[I]nquiry . . . to determine whether a plea of guilty . . . defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Shepard v. United States, 544 U.S. 13 (2005).

The Eight Circuit has held that §4B1.5(a) does not require the formal entry of a judgment of conviction before a defendant is considered convicted for application of the enhancements. *United States v. Leach*, 491 F.3d 858 (8th Cir. 2007) (holding that §4B1.5(a) “only requires that the defendant have been found guilty of the offense”).

- (I) Base Offense Level. If subsection (a) applies, the base offense level is first determined under Chapters Two and Three of the applicable guidelines. Next, this offense level is compared to the offense level table provided in

§4B1.5(a)(1)(B), decreased by any applicable adjustment from §3E1.1 (Acceptance of Responsibility). The greater resulting offense level should be used.

The “offense statutory maximum” used in §4B1.5(a)(1)(B) includes any increase in the maximum term under a sentencing enhancement provision (such as 18 U.S.C. §§ 2247(a) or 2426(a)) that applies to that covered sex crime because of the defendant’s prior criminal record. §4B1.5, comment. (n. 3(A)). If more than one count of conviction is a covered sex crime, the maximum term for the count with the greatest statutory maximum should be used. *See* §4B1.5, comment. (n.3(B)).

- (II) Criminal History Category. The criminal history category is first determined under Chapter Four, Part A. Next, this criminal history category is compared to Criminal History Category V, and the greater criminal history category should apply.

Double counting. *See United States v. Cramer*, 414 F.3d 983 (8th Cir. 2005). In *Cramer*, the defendant pled guilty to transporting a minor with intent to engage in criminal sexual activity and the court applied an upward departure under §4A1.3 and §4B1.5. The circuit court held that applying both did not constitute impermissible double-counting because the upward departure under §4A1.3 was established on an independent basis from the §4B1.5(a) enhancement. Section §4B1.5(a) requires that the defendant have at least one prior sex offense conviction, whereas §4A1.3 takes into account evidence of prior sex offense conduct that did not result in a sex-offense conviction. Further, the §4A1.3 departure applied because the defendant’s possession of sexually explicit photographs of the victim and pornographic magazines were not considered when calculating his criminal history category.

- b. Pattern of activity involving prohibited sexual conduct. Section 4B1.5(b) applies when the defendant’s instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant has engaged in a pattern of activity involving prohibited sexual conduct.

“Prohibited sexual conduct” means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), the production of child pornography, or trafficking in child pornography only if, before the

commission of the instant offense, the defendant had been convicted for that trafficking in child pornography. It does not include receipt or possession of child pornography. §4B1.5, comment. (n.4(A)).

For purposes of this subsection, a defendant engaged in a “pattern of activity” if, on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. §4B1.5, comment. (n.4(B)(I)).

An “occasion of prohibited sexual conduct” can be considered for purposes of this subsection without regard to whether the conduct occurred during the course of the instant offense or whether there was a conviction for the conduct that occurred on that occasion. §4B1.5, comment. (n.4(B)(ii)). Thus, by its terms (and unlike subsection (a)), a previous conviction is not required for an enhancement under subsection (b). Courts have held that unadjudicated conduct that occurred while the defendant was a juvenile can be a predicate under this subsection. *See United States v. Phillips*, 431 F.3d 86 (2d Cir. 2005) (upholding the application of §4B1.5(b) where the defendant—who was being sentenced for a conviction for producing child pornography—had engaged in sexual conduct with the victim in the offense of conviction and had engaged in one instance of unadjudicated sexual conduct with another minor victim when the defendant was a juvenile).

- (I) Base Offense Level. If subsection (b) applies, the base offense level is first determined under Chapters Two and Three. **5** levels are then added to become the new offense level, unless the resulting offense level is less than **22**. If the resulting offense level is less than **22**, the new offense level shall be **22**, decreased by the number of levels corresponding to any applicable adjustment under §3E1.1 (Acceptance of Responsibility).
- (II) Criminal History Category. The criminal history category determined under Chapter Four, Part A is the criminal history category applicable for the offense.

Double counting. Section 4B1.5(b)(1) specifically states that the enhancement is to be added to the offense levels determined under Chapters Two and Three. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with

§4B1.5. See *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010) (holding application of the five-level enhancement under §2G2.2(b)(5) and the five-level enhancement under §4B1.5(b)(1) was appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors); *United States v. Fadl*, 498 F.3d 862 (8th Cir. 2007) (holding that the district court’s application of both §2G2.1(d)(1) and §4B1.5(b) did not constitute impermissible double-counting because “[t]he application of § 2G2.1(d)(1) punished [the defendant] ‘for exploiting[] different minors, while the § 4B1.5(b) enhancement punished him for exploiting those minors on multiple occasions’”) (citation omitted); *United States v. Schmeilski*, 408 F.3d 917 (7th Cir. 2005) (same); *United States v. Peck*, 496 F.3d 885 (8th Cir. 2007) (same); see also *United States v. Von Loh*, 417 F.3d 710 (7th Cir. 2005) (finding no impermissible double-counting where the district court did not group the counts and imposed enhancements under §3D1.4 and §4B1.5).

Note: If §4B1.1 (Career Offender) applies to the defendant, then §4B1.5 is inapplicable. See §4B1.5(a),(b).

Note: The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline, §4B1.5, comment. (n.5(A)), and treatment and monitoring should be considered as special conditions of any term of probation or supervised release. §4B1.5, comment. (n.5(B)).

Note: Repeat sex offenders under §4B1.5 are ineligible for a downward departure under §4A1.3. See §4A1.3(b)(2)(B).

V. Chapter Five: Probation, Supervised Release, and Departures

A. §5B1.3 (Conditions of Probation)

Section §5B1.3 sets out mandatory, standard, and special conditions of probation.

1. §5B1.3(a) (Mandatory Conditions). Section 5B1.3(a)(9)(A) provides that, in a state in which the requirements of the Sex Offender Registration and Notification Act do not apply, a defendant convicted of a sexual offense must report the address where he will reside and any subsequent change of address, and must register as a sex offender in any State where the defendant resides, is employed, carries on a vocation, or is a student. This subsection applies if the state continues to register sex offenders pursuant to the sex offender registry in place before the enactment of the Adam

Walsh Act. *See* §5B1.3, comment. (n. 1).

Section 5B1.3(a)(9)(B) provides that, in a state in which the requirements of the Sex Offender Registration and Notification Act apply, a sex offender must register and keep the registration current in both the jurisdiction where he lives, works, or is a student and where he was convicted.

2. §5B1.3(b). The guidelines allow courts to impose other conditions of probation if the conditions are “reasonably related to”: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public from further crimes by the defendant; and (5) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Such conditions can only involve such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a). *See* §5B1.3(b)(2).

3. §5B1.3(d) (Policy Statement). Section 5B1.3(d)(7) sets forth “special” conditions of probation that might be appropriate in sex offense convictions. Subsection (A) allows for a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. Subsection (B) allows for a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. Finally, subsection (c) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, by any law enforcement or probation officer of the defendant’s person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.

Courts have held that the “special needs” of the probation system are sufficient to justify conditioning a defendant’s probation for a child pornography conviction on a requirement that the defendant submit to computer monitoring. *See United States v. Lifshitz*, 369 F.3d 173 (2d Cir. 2004). The scope of the monitoring, however, cannot be overbroad. *Id.* (vacating a computer monitoring condition and remanding the case so the district court could “evaluate the privacy implications of the proposed

computer monitoring techniques as well as their efficacy as compared with computer filtering”).

B. §5D1.1 (Imposition of a Term of Supervised Release)

Pursuant to this section, the court must order a term of supervised release to follow imprisonment when a sentence of more than one year is imposed, or when required by statute.

C. §5D1.2 (Term of Supervised Release)

This section provides that the length of the term of supervised release cannot be less than the minimum term of years specified for the offense, and may be up to life if the offense is a sex offense. *See* §5D1.2(b)(2); *see also United States v. Hayes*, 445 F.3d 536 (2d Cir. 2006) (holding that a lifetime term of supervised release for a defendant who pleaded guilty to knowingly transporting child pornography was not unreasonable); *United States v. Daniels*, 541 F.3d 915 (9th Cir. 2008) (finding that a lifetime term of supervised release for a defendant who pleaded guilty to possessing child pornography and who had no prior sex offense convictions was reasonable). *But see United States v. Heckman*, 592 F.3d 400 (3d Cir. 2010) (finding an unconditional lifetime term of supervised release with a special condition prohibiting all Internet access a greater deprivation of liberty than necessary for a defendant convicted of transportation of child pornography because the defendant had not used the Internet to lure victims to engage in sexual activity and other, less restrictive means existed to control defendant’s behavior). The statutory maximum term of supervised release is recommended if the offense is a sex offense. §5D1.2(b)(2), p.s.

In the Adam Walsh Act of 2006, 18 U.S.C. § 3583 was amended such that the authorized term of supervised release for, among other offenses, sexual exploitation offenses under chapter 110 of Title 18, or the transportation of persons under chapter 117 of Title 18, increased from “any terms of years or life” to a mandatory minimum of five years with a statutory maximum term of life.

Additionally, § 3583 now requires that with respect to a defendant required to register under the Sex Offender Registration and Notification Act who commits a criminal offense under, among others, chapters 110 or 117, or sections 1201 or 1591 of title 18, the court is to 1) revoke a term of supervised release, and 2) require a defendant to serve a term of imprisonment for not less than five years.

Notice. Courts have found that Rule 32 requires that defendants receive notice of the possibility of imposition of special conditions of supervised release if those conditions are not contemplated by the guidelines. *See, e.g., United States v. Cope*, 527 F.3d 944 (9th Cir. 2008) (“Where a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness.”).

D. §5D1.3 (Conditions of Supervised Release)

Pursuant to § 3583(d)(1), conditions of supervised release must be “reasonably related” to the goals of deterrence, protection of the public, and rehabilitation of the defendant. Further, the conditions must involve no greater deprivation of liberty than is reasonably necessary to meet these goals, pursuant to § 3583(d)(2), and conditions that affect constitutional rights will “likely be valid if narrowly tailored and . . . directly related to deterring [the offender] and protecting the public.” See *United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999).

Section §5D1.3 sets out mandatory, standard, and special conditions of supervised release.

1. §5D1.3(a) (Mandatory Conditions). Section 5D1.3(a)(7)(A) provides that, in a state in which the requirements of the Sex Offender Registration and Notification Act do not apply, a defendant convicted of a sexual offense must report the address where he will reside and any subsequent change of address, and must register as a sex offender in any State where the defendant resides, is employed, carries on a vocation, or is a student. This subsection applies if the state continues to register sex offenders pursuant to the sex offender registry in place before the enactment of the Adam Walsh Act. See §5D1.3, comment. (n. 1).

Section 5D1.3(a)(7)(B) provides that, in a state in which the requirements of the Sex Offender Registration and Notification Act apply, a sex offender must register and keep the registration current in both the jurisdiction where he lives, works, or is a student and where he was convicted. Courts have held that this condition does not violate a defendant’s procedural due process right to a hearing. See *United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003).

Section 3583 states that, if a defendant required to register under the Sex Offender Registration and Notification Act commits a criminal offense under, among others, chapter 109A of title 18, the court is to 1) revoke a term of supervised release, and 2) require a defendant to serve a term of imprisonment for not less than five years.

2. §5D1.3(b). The guidelines allow courts to impose other conditions of supervised release if the conditions are “reasonably related to” any or all of the factors listed below. Following the statutory language of 18 U.S.C. § 3583(d)(1), there are four factors tied to the goals of supervised release. The first is the defendant’s history and characteristics and the nature and

circumstances of his offense. The second is the need for adequate deterrence of future criminal conduct. The third is the need to protect the public from further crimes by the defendant, and the fourth is effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.

Such conditions must also entail “no greater deprivation of liberty than is reasonably necessary” to achieve the goals of supervised release; must be consistent with any pertinent policy statements issued by the Commission; and must have adequate evidentiary support in the record. *See* §5D1.3(b)(2). *See also United States v. Blinkinsop*, 606 F.3d 1110 (9th Cir. 2010) (finding a special condition of supervised release that the defendant not possess camera phones or electronic devices capable of covert photography did not impose significant deprivation of liberty even though his crime did not involve producing child pornography; because of the large number of images he possessed, it was reasonable to anticipate that he might engage in covert photography in the future).

3. §5D1.3(d)(7) (Policy Statement) (Sex Offenses). Section 5D1.3(d)(7) lists “special” conditions of supervised release. Subsection (A) allows for a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. Subsection (B) allows for a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. *See, e.g., United States v. Taylor*, 338 F.3d 1280 (11th Cir. 2003). Finally, subsection (c) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, by any law enforcement or probation officer, of the defendant’s person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.

The court “may delegate to the probation officer details regarding the selection and schedule of a sex offender treatment program even though it must itself impose the actual condition requiring participation in a sex offender treatment program.” *United States v. Sines*, 303 F.3d 793 (7th Cir. 2002).

Courts have upheld “other” and “special” conditions:

(1) barring the defendant from contact with minors, *see, e.g., United States v. Levering*, 441 F.3d 566 (8th Cir. 2006) (holding that the district court did not abuse its discretion by imposing a condition of supervised release requiring a total prohibition on contact with juvenile females—without prior approval of his probation officer—where the defendant had pleaded

guilty to the forcible rape of a female juvenile); *United States v. Roy*, 438 F.3d 140 (1st Cir. 2006) (holding that the sentencing court did not abuse its discretion in imposing a special condition that the defendant, convicted of possession of child pornography, have no contact with his girlfriend or her minor children without the parole officer's approval because the condition served the permitted goal of protecting the minors from harm and also prevented recidivism);

(2) requiring that the defendant undergo sex offender treatment and physiological testing, *see, e.g., United States v. Morgan*, 44 F. App'x. 881 (10th Cir. 2002) (unpublished) (holding that a special condition of supervised release requiring the defendant "to participate in a sex offender treatment and 'submit to a risk assessment including physiological testing,' violates neither [the defendant's] constitutional rights nor the statutory and Guideline requirements for the imposition of special conditions of supervised release");

(3) requiring the defendant to submit to random polygraph testing, *see, e.g., United States v. Lee*, 315 F.3d 206 (3d Cir. 2003) (finding that a condition requiring a defendant who pleaded guilty to child pornography offenses to submit to random polygraph testing was not an abuse of discretion);

(4) prohibiting the defendant from possessing or viewing pornographic material, *see, e.g., United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003) (holding that a condition prohibiting the defendant from possessing or viewing pornographic material was reasonably related to a legitimate sentencing purpose because the defendant often videotaped his sexual attacks on his victims); *but see United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (finding a condition that prohibited the defendant from possessing matter that "depicted or alluded to sexual activity," or that "depicted minors under the age of 18" overbroad); *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008) (holding that a condition prohibiting the defendant from possessing "any materials . . . depicting and/or describing child pornography" is overbroad);

(5) restricting defendants' frequenting and loitering in places where children are likely to be, *see, e.g., United States v. Ristine*, 335 F.3d 692 (8th Cir. 2003) (finding that a condition prohibiting the defendant, who pled guilty to receipt of child pornography, from places where minor children congregate such as "residences, parks, beaches, pools, daycare centers, playgrounds, and schools" without prior written consent of the probation officer was not overbroad where the purpose of the condition was to limit the defendant's access to children); *United States v. Reardon*,

349 F.3d 608 (9th Cir. 2003) (same); *United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008) (same);

(6) authorizing probation to discuss third-party risks with employers, *see United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008) (holding that this condition is not overbroad because “the purpose of the employer notification condition is to aid the prevention of improper computer use,” and would not apply to all types of employment); and

(6) limiting computer or Internet access, *see, e.g., United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999)(upholding a special condition of supervised release that specified the defendant, who pled guilty to receipt of child pornography but who had also used the Internet to develop an illegal sexual relationship with a young girl, could not “possess, procure, purchase, or otherwise obtain access to any form of computer network, bulletin board, Internet or exchange format involving computers unless specifically approved” by probation because the condition is reasonably related to the defendant’s criminal activities, to protecting the public, and to deterring him from engaging in further criminal conduct); *United States v. Freeman*, 94 F. App’x 40 (3d Cir. 2004) (unpublished) (on remand, affirming a special condition restricting the defendant’s computer use including informing the probation officer of all computers to which he has access and any Internet provider he uses; accepting installation of monitoring software on his personal and business computers; and not using a computer to access any material involving child pornography, as narrowly tailored to “prevent improper conduct without interfering with inoffensive computer and Internet use and to allow the probation office to monitor that behavior”); *United States v. Buchanan*, 485 F.3d 274 (5th Cir. 2007) (affirming a special condition restricting Internet use for a defendant convicted of possession of child pornography as reasonably related to the offense of possession and the need to prevent recidivism and protect the public); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (upholding a special condition prohibiting the defendant, convicted of possession of child pornography, from using the Internet without prior permission from the probation office because the condition was not a complete ban on the Internet and therefore more “readily accomplishes the goal of restricting the Internet and more delicately balances the protection of the public”); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (affirming a condition for a defendant, who pled guilty to possession of child pornography, that required him to not possess or use a computer with access to any online service at any location including his employment without written approval from his probation officer); *United States v. Alvarez*, 478 F.3d 864 (8th Cir. 2007) (holding that there was sufficient nexus between the defendant’s use of the Internet and his exploitation of

the victim to warrant a special condition prohibiting him from having Internet access at his home and at any other location without the prior approval of his probation officer); *but see United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002) (remanding where the court imposed a special condition on a defendant, convicted of receipt of child pornography, that he not “access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer” because “in light of the nature of his offense,” the condition “inflicts a greater deprivation on [his] liberty than is reasonably necessary”): *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (overturning a special condition imposed on a defendant, convicted of using the Internet to receive child pornography, that required that he not possess a computer with Internet access as both too narrow and too broad; it was not reasonably related to prohibiting access to the Internet because it did not prohibit accessing the Internet from public places, but was greater than necessary in the balancing of protections of the public with the goals of sentencing because it prevented the defendant from using the Internet for legitimate reasons).

E. §5F1.5 (Occupational Restrictions)

Section §5F1.5(a) authorizes a court to impose occupational restrictions in limited circumstances. These occupational restrictions can do two things. First, they can prevent a defendant from taking a certain type of employment. For example, a sex offender may not be allowed to work around children. *See United States v. Daniels*, 541 F.3d 915 (9th Cir. 2008) (approving a condition of supervised release that required the defendant to obtain prior approval from the probation office before being employed by a business or organization “that causes him to regularly contact persons under the age of 18”). Second, a lesser restriction can limit the “terms” of a defendant’s employment. For example, a defendant convicted of fraud may be restricted from working in a position handling money at a bank or may be required to discuss with the employer bank the details of his criminal history. *See United States v. Du*, 476 F.3d 1168 (10th Cir. 2007) (stating that specific findings are required before a court imposes any employment conditions that are considered “occupational restrictions”).

Such restrictions can only be imposed, however, if the court determines (1) that there is a reasonably direct relationship between the defendant’s occupation and the offense conduct; and (2) that imposition of the restriction is reasonably necessary to protect the public. Pursuant to §5F1.5(b), an occupational restriction may only be in place for “the minimum time and to the minimum extent necessary to protect the public. *See United States v. Reardon*, 349 F.3d 608 (9th Cir. 2003) (denying defendant’s argument that the special conditions on his use of his computer and the Internet was an occupational restriction because the restriction did not prohibit him from working in his profession as an art director or set decorator).

F. §5K2.0 (Grounds for Departure (Policy Statement))

Pursuant to §5K2.0(b), the only grounds for a departure for “sexual offenses” below the range established by the applicable guidelines are those enumerated in Part K. *See* §5K2.0, comment. (n.4(B)). The definition of “sexual offenses” includes, among others, offenses under 18 U.S.C. § 1591, and chapters 71, 110, and 117 of title 18. *See* §5K2.0, comment. (n. 4(A)).

G. §5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement))

For offenses committed under 18 U.S.C. § 1591, or chapters 71, 110, or 117 (among others), of title 18, (1) age is only a reason to depart downward if and to the extent permitted by §5H1.1, (2) an extraordinary physical impairment is only a reason to depart downward if and to the extent permitted by §5H1.4, and (3) drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

VI. Post-Booker Reasonableness Determinations

The following are examples of cases discussing whether the defendant’s sentence is either procedurally or substantively reasonable:

United States v. Bradley, 628 F.3d 394 (7th Cir. 2010). The Seventh Circuit vacated and remanded the defendant’s above-guideline sentence for traveling to engage in sexual conduct with a minor because it found the district court based the sentence on speculation. The sentencing court imposed a sentence of 240 months, 169 months above the advisory guideline range, based on its assumptions that the defendant had engaged in similar behaviors in the past and his potential for recidivism. Although the evidence did establish that the defendant possessed child pornography, the circuit court stated possession was a separate offense that the court properly considered, but found “it is unclear how the [district] court connected the possession of child pornography with the conclusion that [the defendant] had committed this crime before and would commit it again.”

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010). The Second circuit vacated the within-guideline sentenced of 20 years, finding it procedurally and substantively unreasonable. The court found that §2G2.2 is “fundamentally different” from most other guidelines and that “unless applied with great care, can lead to unreasonable sentences that are inconsistent with what section 3553 requires.” Although the guidelines are typically developed by the Commission using an empirical approach based on data about past practices, the court stated that the Commission did not use that empirical approach for this guideline when it amended the guideline at the direction of Congress. The court stated that in keeping with *Kimbrough*, a district court may vary from the guideline range based solely on a policy disagreement with the guidelines, “even where that disagreement applies to a wide class of offenders or offenses.” Further, it encouraged district courts to take their broad discretion seriously when reaching sentencing decisions under §2G2.2 because it is “an eccentric guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”

United States v. Grober, 624 F.3d 592 (3d Cir. 2010). The Third Circuit found a below-guideline sentence of the statutory minimum for receipt of child pornography to be procedurally reasonable because *Kimbrough* permits a court to vary even when a guideline is a direct reflection of a congressional directive. Although the guidelines deserve careful consideration and cannot be ignored when produced at the direction of Congress, the court found it was not an abuse of discretion for the district court to vary because it set out sufficiently compelling explanations to justify its below-guideline sentence. The sentencing court relied on Troy Stabenow's *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* and other district court opinions expressing concern for the guidelines based on Congress' role in the development of the child pornography guidelines. The Third Circuit stated that the Commission's subsequent *History of the Child Pornography Guidelines* report from 2009 further supported the district court's decision because it demonstrated the role Congress has played in the development of the child pornography guidelines.

United States v. Plate, 361 F. App'x 318 (3d Cir. 2010). The Third Circuit held that the defendant's sentence was not substantively unreasonable because §2G2.2 was based on statutory directives as opposed to empirical data and national experience. The court stated that *Kimbrough* did not hold it was impermissible for a guideline to be formulated based on statutory directives, but that when it is so formulated, a court may choose to give it less weight.

United States v. Brown, 578 F.3d 221 (3d Cir. 2009). The Third Circuit vacated and remanded the defendant's above-guideline sentence because the district court failed to distinguish whether it was the product of a departure or a variance. The court stated: "Whether a district court has imposed a departure or, instead, a variance has real consequences for an appellate court's review." It explained:

We expressly distinguish between departures from the guidelines and variances from the guidelines. . . . Departures are enhancements of, or subtractions from, a guidelines calculation based on a specific Guidelines departure provision. . . . These require a motion by the requesting party and an express ruling by the court. . . . Variances, in contrast, are discretionary changes to a guidelines sentencing range based on a judge's review of all the § 3553(a) factors and do not require advance notice. . . . "District courts should be careful to articulate whether a sentence is a departure or a variance from an advisory Guidelines range."

Citations omitted.

United States v. Harris, 339 F. App'x 533 (6th Cir. 2009) (unpublished). Defendant's guideline range for possession and distribution of child pornography was 210-262 months. The district court imposed a sentence of 84 months, relying primarily on the defendant's lack of a significant criminal history, his employment history, family life and psychological evaluation. It also considered the conditions of release it imposed, including mandatory medical treatment. The Sixth Circuit reversed the variance as substantively unreasonable, and vacated the sentence. The

circuit court stated that the court “relied on factors common to many defendants.” It also found that the court mis-characterized the defendant’s psychological assessment, particularly considering the magnitude of the variance, and that it failed to recognize the seriousness of the offense.

United States v. Huffstatler, 571 F.3d 620 (7th Cir. 2009) (per curiam). The defendant’s guideline range for production of child pornography was 300 to 365 months, and the court imposed an above-guideline sentence of 450 months. The defendant argued that his sentence was unreasonable, stating that the court was obligated to sentence him below the guideline range because the child pornography guidelines “were crafted without the benefit of the Sentencing Commission’s usual empirical study and are invalid.” The Seventh Circuit rejected the defendant’s argument that “methodological flaws” that “run through the child-pornography guidelines invalidate them entirely.” The court held that the child pornography guidelines are valid and that “while district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines, as with the crack guidelines, they are certainly not required to do so.”

United States v. Jones, 563 F.3d 725 (8th Cir. 2009). The Eighth Circuit stated that the Supreme Court has been equivocal about whether a sentencing court should give greater deference to guidelines that exemplify the Commission’s “characteristic institutional role of basing determinations on ‘empirical data and national experience.’” It found, however, that assuming a sentencing court may disregard a guideline on policy grounds does not mean that it must disagree with a guideline, “whether it reflects a policy judgment of Congress or the Commission’s ‘characteristic’ empirical approach.” (Citing *United States v. Barron*, 557 F.3d 866 (8th Cir. 2009)).

United States v. Lychock, 578 F.3d 214 (3d Cir. 2009). The defendant’s guideline range for possessing child pornography was 30-37 months. The court sentenced him to probation, stating that imprisonment would be “counterproductive,” and that the variance was justified by the defendant’s cooperation, age, acceptance of responsibility, supportive family and desire to seek psychological treatment. The Third Circuit found the district court’s analysis so “procedurally flawed” as to result in a substantively unreasonable sentence. It explained that the district court erred by failing to address the government’s argument regarding avoiding sentencing disparity among co-defendants. It also stated that the district court relied too heavily on characteristics such as defendant’s age and lack of criminal history, which were common to the majority of child pornography offenders, and not enough on the statutory factors. Lastly, the court held that the district court failed to sufficiently explain its view that imprisonment would not provide deterrence or protection of the public. It stated:

To the extent that these assertions reflect a policy disagreement with the Guidelines recommendations [], such a disagreement is permissible only if a District Court provides “sufficiently compelling” reasons to justify it.

(Footnote and citation omitted.)

United States v. Huckins, 529 F.3d 1312 (10th Cir. 2008). The Tenth Circuit affirmed a sentence of 18 months in prison after the defendant pleaded guilty to one count of possession of child pornography. The guideline range for the offense was 78-97 months in prison. The court held that the district court properly considered the § 3553(a) factors, and considered the defendant “as an individual.”

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008). The Eleventh Circuit reversed a sentence of five years probation for a plea of knowingly possessing child pornography. The guideline range was 97-120 months in prison. The court held that the “probationary sentence utterly failed to adequately promote general deterrence, reflect the seriousness of [the defendant’s] offense, show respect for the law, or address in any way the relevant Guidelines policy statements and directives.”

United States v. Vowell, 516 F.3d 503 (6th Cir. 2008). The Sixth Circuit affirmed a sentence that was 242% above the top of the guideline range and 160% above the statutory minimum in a case in which the defendant pleaded guilty to coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct and possession of child pornography.

United States v. Fink, 502 F.3d 585 (6th Cir. 2007). The Sixth Circuit held that a sentence of 70 months in prison, where the guideline range was 188-235 months, ‘ was unreasonable. The court held that the sentence did not reflect the seriousness of the crime, did not provide just punishment for the offense, was unlikely to deter similar criminal conduct, and would result in unwarranted sentencing disparity.

United States v. Goff, 501 F.3d 250 (3d Cir. 2007). The Third Circuit reversed a four-month sentence for possession of hundreds of images of child pornography imposed because the defendant had never acted in a sexual way with children and had no criminal history. The court held that the defendant’s sentence was too lenient, was procedurally and substantively unreasonable, and found that the district court had failed to reflect the required analysis of the 18 U.S.C. § 3553(a) factors.

United States v. Goldberg, 491 F.3d 668 (7th Cir. 2007). The Seventh Circuit remanded a one-day sentence for possession of child pornography where the guideline range was at least 63 to 78 months in prison. The court held that this sentence did not give due weight to the nature and circumstances of the offense or the history or characteristics of the defendant, confined at home due to a drug conviction at the time of the offense, and did not reflect the seriousness of the offense, promote respect for the law or provide just punishment for the offense. *But see United States v. Baker*, 445 F.3d 987 (7th Cir. 2006) (affirming a below-guidelines sentence of 87 months in prison after the defendant pleaded guilty to possession of child pornography where the guideline range was 108-135 months in prison); *United States v. Pisman*, 443 F.3d 912 (7th Cir. 2006) (affirming a sentence of 60 months in prison for the defendant’s role in a conspiracy to entice a minor to engage in illicit sex where the guideline range was 108-135 months).

United States v. Gnani, 474 F.3d 532 (8th Cir. 2007). The Eighth Circuit upheld as reasonable a 120-month sentence for attempting to receive child pornography, which was a 54% upward variance from the top of the guideline range. The court noted that the sentencing court had based its sentence on concern for public safety where the defendant had been “acting out in the community towards children.” *See also United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006) (affirming a 270-month sentence where the guideline range was 121-151 months in prison).

United States v. Reinhart, 442 F.3d 857 (5th Cir. 2006). The Fifth Circuit affirmed as reasonable a sentence of 235 months in prison where the guideline range was 121-151 months’ because the district court based its sentence on the factors laid out in 18 U.S.C. § 3553(a) and did not take into account any inappropriate or unreasonable factors.