

2018
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Sex Offenses 2018 Annual National Seminar

This document provides an overview of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) and includes guideline application pointers as well as information on restitution and supervised release conditions in sex offenses.

Repeat and Dangerous Sex Offender Against Minors

Guideline 4B1.5 applies to offenders whose instant offense of conviction is a covered sex offense against a minor (e.g., Production of Child Pornography, Sex Trafficking, or Sexual Abuse) and who are repeat child sex offenders. The guideline contains a tiered approach to punishing these offenders, depending on whether the defendant has a prior sex offense conviction or the defendant engaged in a pattern of activity involving prohibited sexual conduct.

Section 4B1.5(a) applies to a defendant whose instant offense of conviction is a covered sex crime and the defendant has a prior sex offense conviction. A prior sex offense conviction is defined as any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B) against a minor. A conviction for possession, receipt, and trafficking of child pornography is not included as a prior sex offense conviction. If a defendant qualifies under this subsection, his offense level will be increased based on a table that is tied to the statutory maximum of the instant offense and the defendant's criminal history category is increased to V.

Section 4B1.5 (b) applies to a defendant whose instant offense is a covered sex crime and the defendant engaged in a pattern of activity involving prohibited sexual conduct. A defendant engages in a pattern of activity if on at least two separate occasions, the defendant engaged in a prohibited sexual conduct with a minor. If the court determines that the defendant engaged in a pattern of activity, a 5-level increase applies.

Guideline Application Pointers

§4B1.5(a) (“Prior conviction”)

- If the defendant qualifies under subsection (a), the court cannot apply subsection (b) even if the application of subsection (b) would result in a greater offense level.
- The court should apply the categorical approach to determine whether a prior conviction is a sex offense conviction under §4B1.5(a). (See *U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)).
- The prior conviction does not have to receive criminal history points and there is no time limit on the prior conviction (See *U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)).
- Prior sex offense conviction must be against a minor and not an adult (See *U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016))

§4B1.5(b) (“Pattern of activity”)

- An occasion of “prohibited sexual conduct” may be considered without regard to whether the occasion occurred during of the instant offense (See *U.S. v. Gibson*, 840 F.3d 512 (8th Cir. 2016) and *U.S. v. Evans*, 782 F.3d 1115 (10th Cir. 2015)).
- An “occasion of prohibited sexual conduct” may be considered without regard to whether there was a conviction for that conduct.
- Attempted sexual conduct can be included as prohibited sexual conduct with a minor. (See *U.S. v. Morgan*, 842 F.3d 1370 (8th Cir. 2016))



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Restitution

Mandatory Restitution for Sex Trafficking 18 U.S.C. § 1593

Court must order restitution for any offender convicted of offenses related to trafficking of persons. (18 U.S.C. § 1593 (a)).

The order of restitution shall direct the defendant to pay the victim, through the appropriate mechanism, the full amount of the victim's losses (18 U.S.C. § 1593 (b)(1)).

"The full amount of victim's losses" has the same meaning as outlined in section 2259(b)(3) and in addition shall "include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act. (18 U.S.C. § 1593 (b)(3)).

The term "victim" means any individual harmed as a result of the crime. If the victim is under 18, incompetent, incapacitated, or deceased, the court can appoint the legal guardian of the victim, another family member, or any other suitable by the court as a representative. (18 U.S.C. § 1593 (c)).

Supervised Release Conditions

Statutes & Guidelines Implicated

18 U.S.C. § 3583(d)
18 U.S.C. § 3583(k)
§§5D1.1 – 5D1.3

Court needs to provide notice and explanation regarding imposition of special conditions of supervised release.

Court should examine length of time between instant offense and any prior sexual misconduct

Conditions that involve fundamental liberties (e.g., association with own children, residency restrictions) need more detailed explanation than other conditions.

If a defendant is convicted of failure to register as a sex offender, court should determine if the prior sex offense conviction involved a computer.

Losses Included for Restitution Purposes (18 U.S.C. § 2259):

Definition.—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.