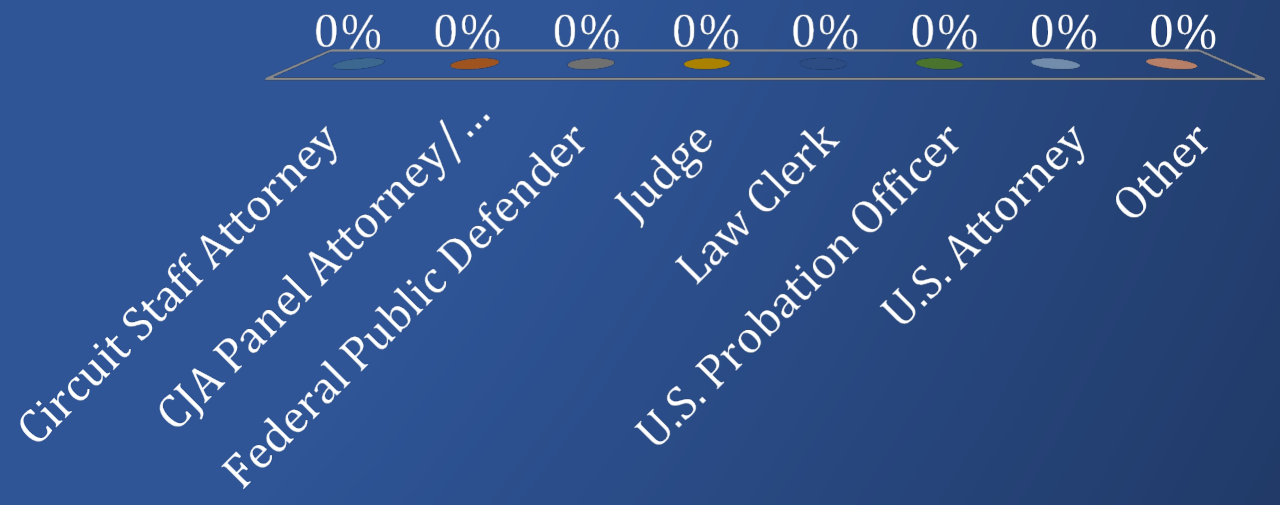
Federal Sex Offenses

San Antonio, Texas

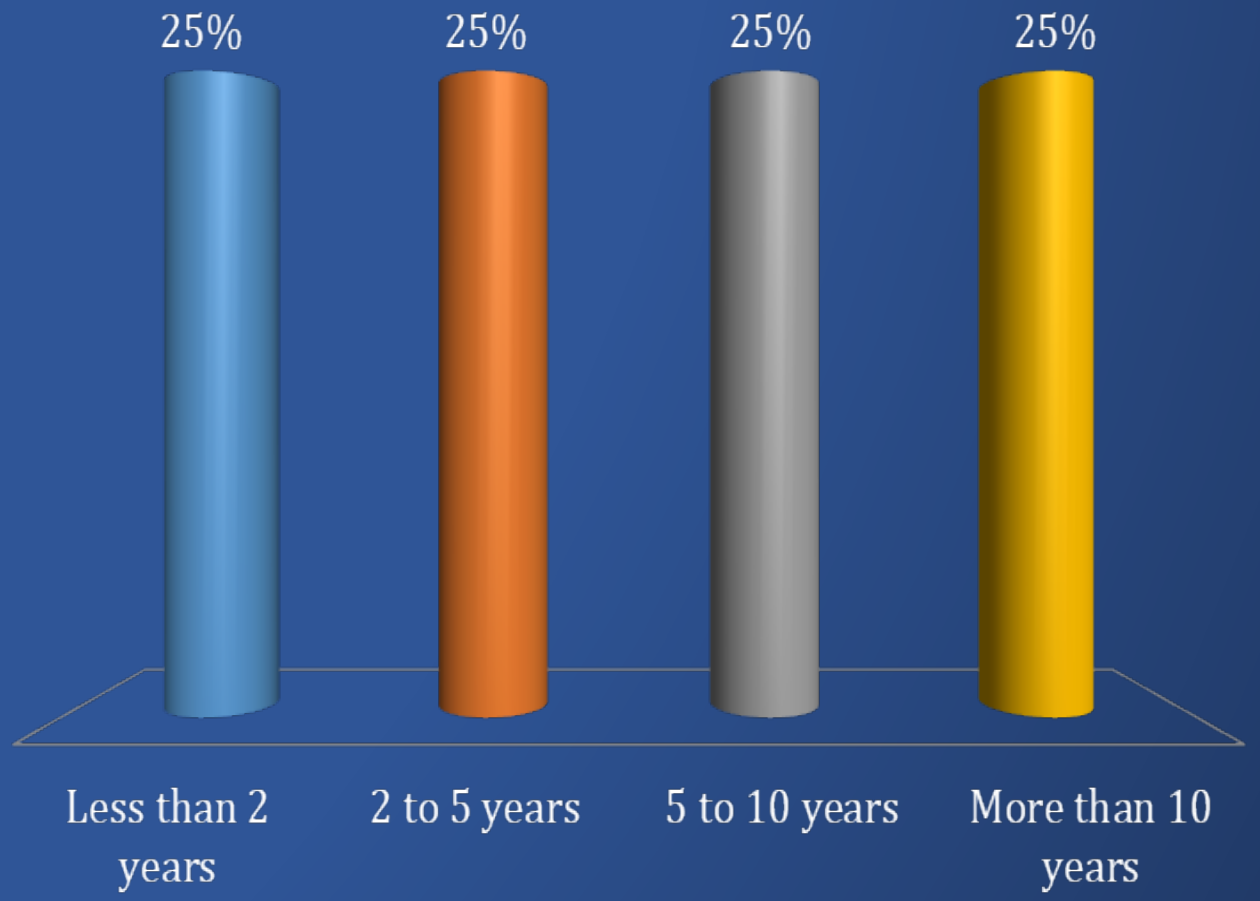
Who's in the audience?

A. Circuit Staff Attorney
B. CJA Panel Attorney/
   Private Defense Attorney
C. Federal Public Defender
D. Judge
E. Law Clerk
F. U.S. Probation Officer
G. U.S. Attorney
H. Other



Years of experience with federal sentencing?

A. Less than 2 years
B. 2 to 5 years
C. 5 to 10 years
D. More than 10 years



Main Sex Offense Guidelines & Statutes

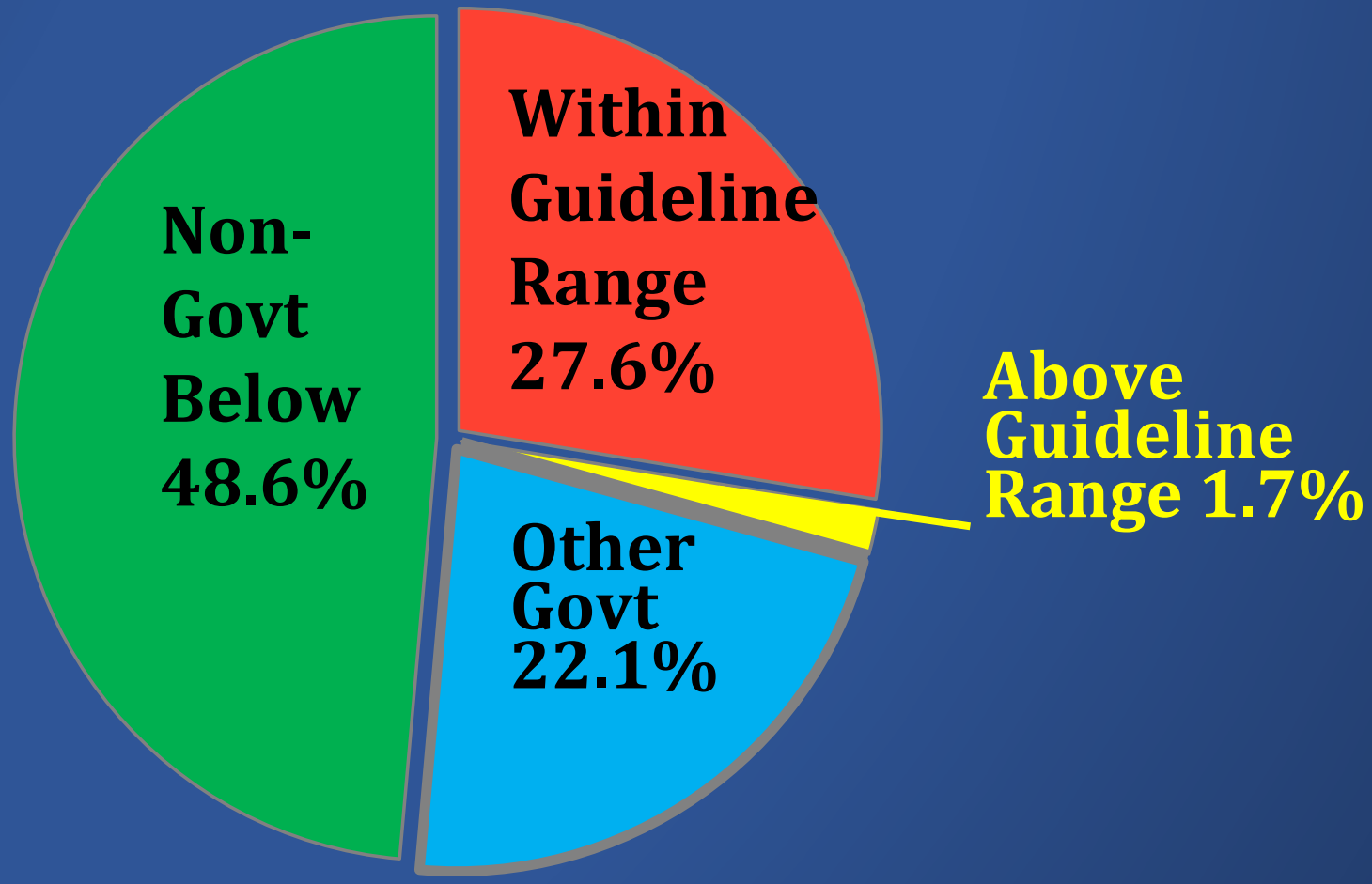
§2A3.1	18 U.S.C. § 2241	Rape
§2A3.2	18 U.S.C. § 2243	Stat. Rape
§2A3.4	18 U.S.C. § 2244	Sex Abuse
§2A3.5	18 U.S.C. § 2250	Failure to Register
§2G1.3	18 U.S.C. §§ 1591, 2422, 2423	Trafficking/Travel of Minors
§2G2.1	18 U.S.C. § 2251	Production
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Traffic, Receipt, Possession

Statutory Penalty Scheme for Child Porn Offenses

Mandatory Minimums and Statutory Maximums

Possession		Receipt/Distribution/ Transportation of Child Porn		Production	
1st Time Offender	Recidivist (Prior Sex Conviction)	1st Time Offender	Recidivist (Prior Sex Conviction)	1st Time Offender	Recidivist (Prior Sex Conviction)
No MM/ 10Y Max.; 20Y Max. if > age 12	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.

§2G2.2 Position of Sentences in Relation to Guideline Range National - FY 2015-16 (3,107 cases)



§2G2.2: Trafficking/Receipt/Possession

- Base offense level depends on offense of conviction:
  - 18 for possession offenses
  - 22 for receipt or trafficking offenses
    - Note: 5-year mandatory minimum for receipt & trafficking offenses (18 U.S.C. §§ 2252 & 2252A)

§2G2.2 Commonly Applied SOC's

- Prepubescent minor (b)(2) (94.1%)
- S/M enhancement (b)(4) (81.2%)
- Use of a computer (b)(6) (95.7%)
- Number of images (b)(7) (95.3%)

§2G2.2(b)(3): Distribution SOC

- Most common increase either 2 or 5 levels
- 5 levels for distribution for receipt/expectation of thing of value, even if not pecuniary gain (*e.g.*, trading images)
- Applies most often to file sharing cases

§2G2.2(b)(3)(F): Distribution SOC

- The 2-level specific offense characteristic applies "if the *defendant knowingly* engaged in distribution."
  - "Defendant" specific
  - Mens rea requirement: *knowingly*

§2G2.2: Knowledge

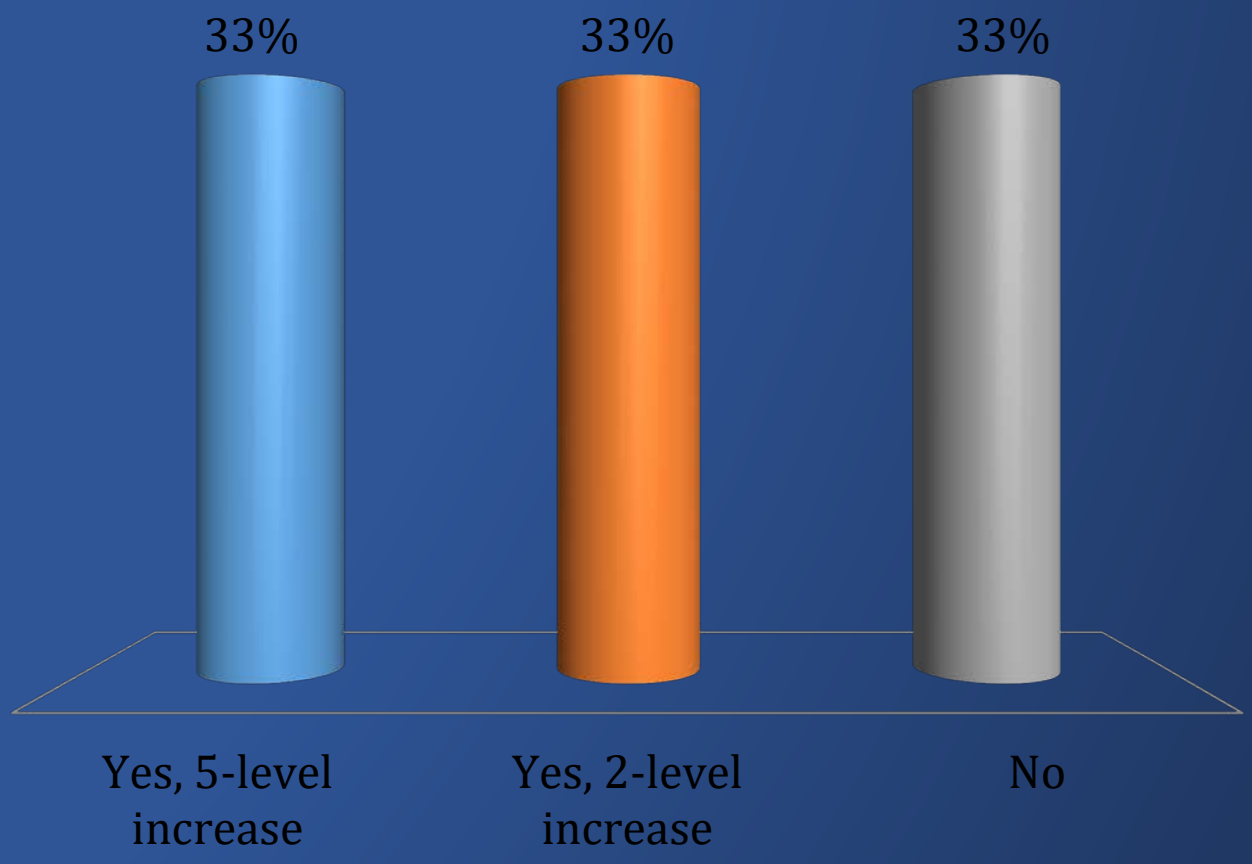
- "Although Dunning has not admitted that he knew how peer-to-peer file-sharing software works, neither has he presented any evidence that he did not know that file-sharing software shares—and thus distributes—files. Not only could the fact-finder have reasonably inferred that Dunning knew that his use of a file-sharing program distributed files, Dunning's argument that he removed the files from the software so that others would no longer have access to them undermines his argument that he did not know that file-sharing software shares files."
  - *U.S. v. Dunning*, 857 F.3d 342 (6th Cir. 2017)

Scenario 1: Should the defendant receive an enhancement under §2G2.2(b)(3)?

A. Yes, 5-level increase

B. Yes, 2-level increase

C. No



§2G2.2(b)(3)(B): 5-level Distribution SOC

- Applies "if the *defendant* distributed in exchange for any valuable consideration . . ."
- Application Note 1: "[This] means that the *defendant agreed* to an exchange with another person under which the *defendant knowingly distributed* to that other person *for the specific purpose of obtaining something of valuable consideration* from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child."

§2G2.2(b)(3)(B): 5-level Distribution

- "The district court did not clearly err in finding that this email exchange showed that Little sent Hall the pornography with the expectation that Hall would send him different child pornography in return. It is apparent from those emails that both Little and Hall wanted to exchange child pornography, and when Little sent Hall child pornography he expected Hall to respond in kind. The court did not err in applying the five-level enhancement under 2G2.2(b)(3)(B)."
  - *U.S. v. Little*, 864 F.3d 1283(11th Cir. 2017)

§2G2.2(b)(3)(B): 5-level Distribution

- "Bennett repeatedly engaged in "pass-for-pass" exchanges, in which he provided his password to another user with the expectation of receiving the other user's password. Indeed, in one exchange (relied upon by the District Court) Bennett and another user expressly discussed their pornography preferences before agreeing to provide each other access to their child-pornography files…. thus, 5-level enhancement applied."
- *U.S. v. Bennett*, 839 F.3d 153 (2d Cir. 2016)

§2G2.2(b)(5): Pattern of Activity SOC

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels

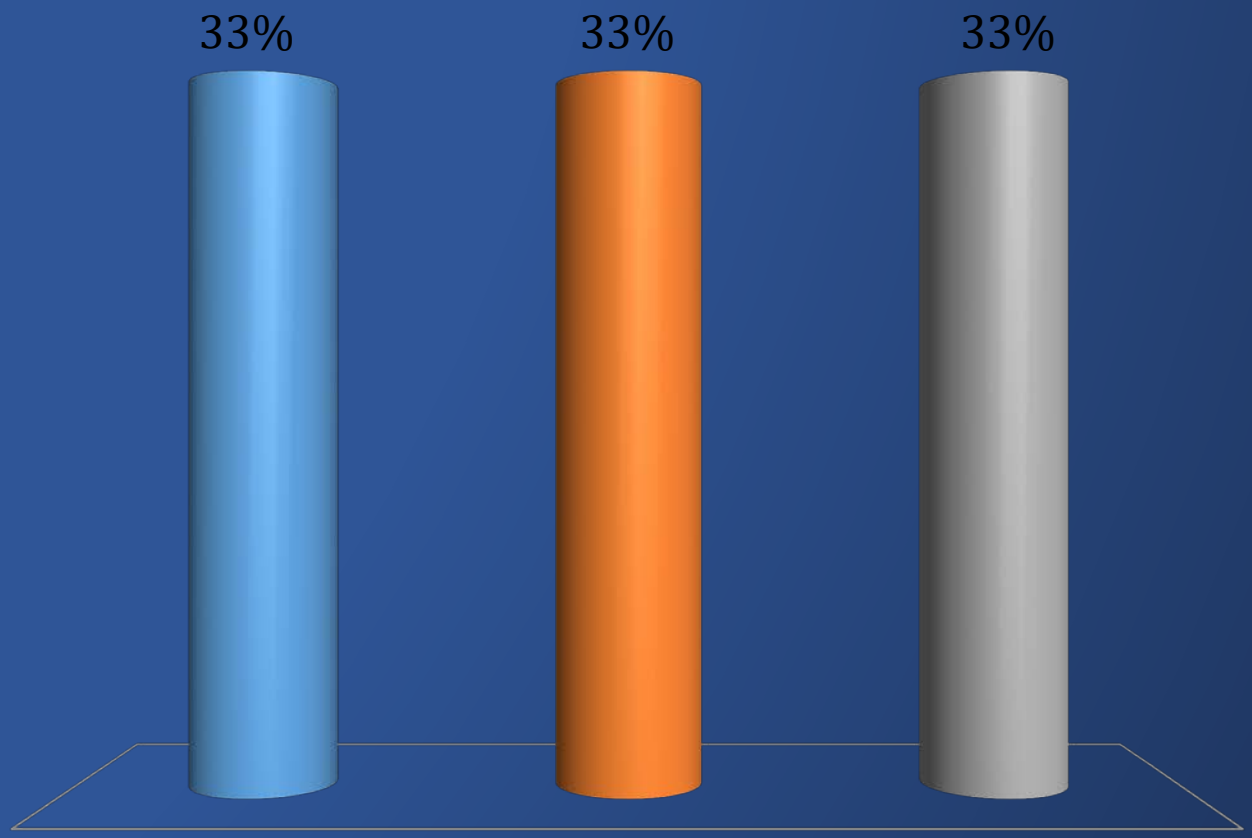
- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant

Scenario 2: Should the defendant receive the "pattern of activity enhancement under §2G2.2(b)(5)?

A. No, because conduct was 30 years ago

B. No, because you need a conviction to apply enhancement

C. Yes



§2G2.2(b)(5): Pattern of Activity (cont.)

- These instances can include conduct:
  - during the course of instant offense
  - involved the same minor, or
  - resulted in a conviction for such conduct
  - can include conduct when defendant was a minor (*U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013 and *U.S. v. Alberts*, 859 F.3d 979 (11th Cir. 2017))

§2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct
  - *U.S. v. Clark*, 685 F.3d 72 (1st Cir. 2012) (24 yrs)
  - *U.S. v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (16 yrs)
  - *U.S v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (30 yrs)
  - *U.S. v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
  - *U.S. v. Woodard*, 694 F.3d 950 (8thCir. 2012) (19 yrs)
  - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007) (35 yrs)
  - *U.S. v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (35 yrs)
  - *U.S. v. Alberts*, 859 F.3d 979 (11th Cir. 2017) (30 yrs)

§2G2.2(c)(1) Cross Reference

- If offense involved transporting, permitting or offering, or seeking by notice or advertisement a minor to engage in sexually explicit conduct, for purpose of producing a visual depiction of such conduct, apply §2G2.1 (Production)

§2G2.2(c)(1) Cross Reference to §2G2.1 (Production)

- *U.S. v. Cox*, 744 F.3d 305 (4th Cir. 2014)
- *U.S. v. Nicoson*, 793 F.3d 761 (7th Cir. 2015)
- *U.S. v. Steffen*, 818 F.3d 770 (8th Cir. 2016)
- *U.S. v. Burch*, 809 F.3d 1041 (8th Cir. 2016)
- *U.S. v. Zayas*, 758 F.3d 986 (8th Cir. 2014)
- *U.S. v. Zagorski*, 807 F.3d 291 (D.C. Cir. 2015)

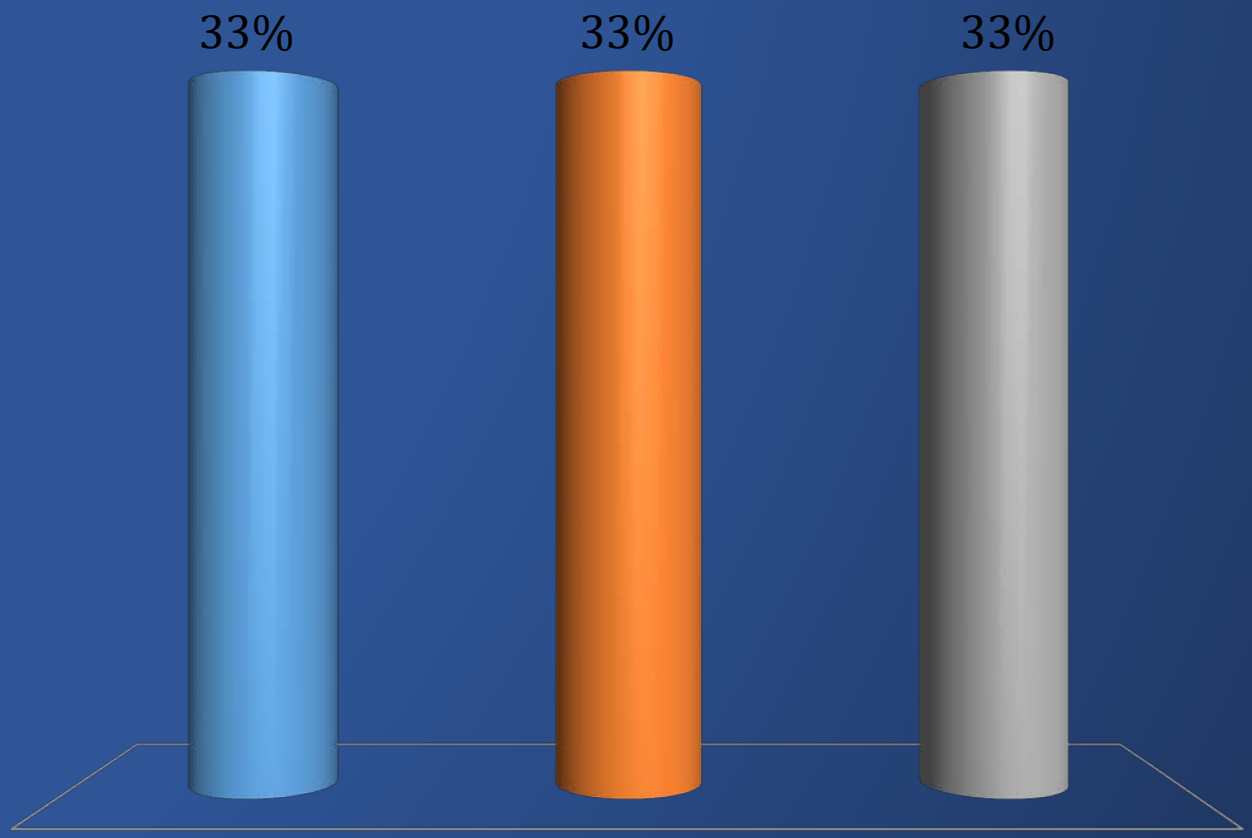
§2G2.1: Production

- Common specific offense characteristics
  - age of victim
  - sex act or contact
  - custody/care
  - Distribution
  - S/M enhancement

- Note: 15 year mandatory minimum for 18 U.S.C. § 2251 (Production)

Scenario 3: Should the enhancement at §2G2.1(b)(1) apply?

A. Yes, 2-level enhancement
B. Yes, 4-level enhancement
C. No



§3D1.2(d) and Relevant Conduct

- **§2G2.1 (Production)** is on the "*excluded* list" at §3D1.2(d), therefore relevant conduct **will not include** acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2))

§1B1.3(a)(1) & (a)(2): Analysis

WHEN: Offense of Conviction

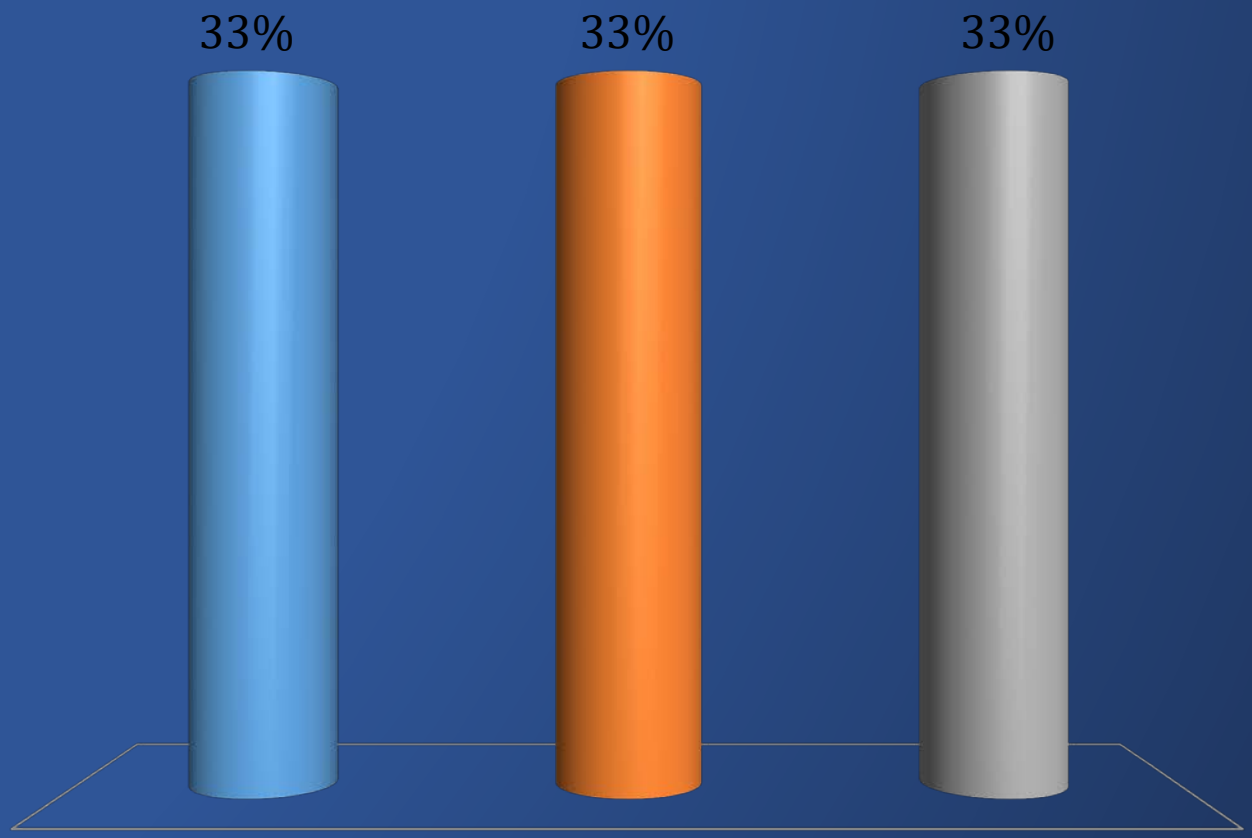
(a)(1): In preparation | During | Avoiding detection

(a)(2): ~~Same course of conduct/ Common scheme or plan~~

Scenario 4: Should the special instruction at §2G2.1(d)(1) apply?

A. No

B. Yes



Special Instruction

§2G2.1(d)(1) & App. Note 5 (Production)

- If the relevant conduct of the offense of conviction includes more than one minor being exploited, *whether specifically cited in the count of conviction or not*, each such minor shall be treated *as if* contained in a separate count of conviction

- Multiple counts involving more than one minor are not to be grouped together

Special Instruction

§2G2.1(d)(1) & App. Note 5

Production – Child 1 (§2G2.1)	Production – Child 2 (§2G2.1)
Ch. Two TOTAL 40	Ch. Two TOTAL 38

§2G2.1(d)(1) Applied

- *U.S. v. Ahders,* 622 F.3d 115 (2d Cir. 2010)
  - "The conduct involving BB and VB occurred "during the commission of the offense of conviction," as it occurred during the period that Ahders was producing pornographic images and film of EM. Ahders exploited and abused all three children, including abusing EM and BB together, during Mother's Day weekend in 2007 when VB and BB were staying with EM for a sleepover. During this weekend, Ahders produced pornographic images of all three children. Clearly, then, the abuse of VB and BB was "relevant conduct," and it was properly considered by the district court."

§2G2.1(d)(1) Did Not Apply

- *U.S. v. Schock,* 862 F.3d 563 (6th Cir. 2017)
  - "Because Schock's exploitation of Victim 1 in August 2014 did not occur until almost a year after the commission of the offense of conviction—photographing Victim 2 in September 2013—the government has not established that Schock's conduct with respect to Victim 1 occurred during the commission of the offense of conviction under § 1B1.3(a)(1)."

§2G1.3: Travel Cases & Child Sex Trafficking

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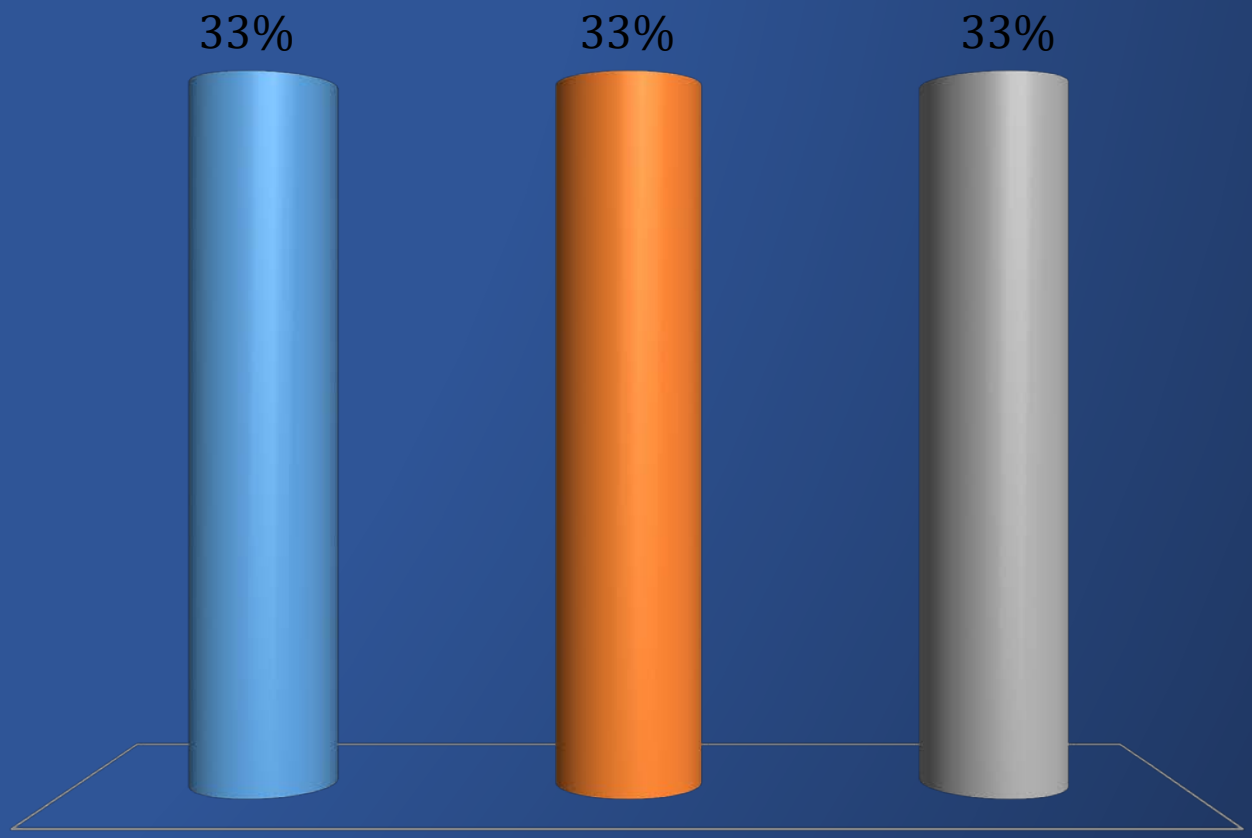
§2G1.3: Travel Cases and Child Sex Trafficking

- Note: mandatory minimum 10 years for 18 U.S.C. §§ 2422(b) & 2423(a) offenses

- Base Offense Levels
  - 34 (§1591(b)(1) – victim under 14)
  - 30 (§1591(b)(2) – victim between 14-18)
  - 28 (§§ 2422(b) or 2423(a) – enticement or transport of minor)
  - 24 otherwise

Scenario 5: What is the base offense level?

A. 34
B. 24
C. 32



§1B1.3, Application Note 7

- "An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute."

- *But see U.S. v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016)

§2G1.3 Specific Offense Characteristics

- Use of a computer (+2)
- Sex act, sexual contact, or commercial sex act (+2)
- Undue influence (+2)
- Age of victim (+8)
- Care, custody, control (+2)

Examples of Undue Influence §2G1.3(b)(2)

- *U.S. v. Houston*, 857 F.3d 427 (1st Cir. 2017)
- *U.S. v. Pringler*, 765 F.3d 445 (5th Cir. 2014)
- *U.S. v. Reid*, 751 F.3d 763 (6th Cir. 2014)
- *U.S. v. McMillian*, 777 F.3d 444 (7th Cir. 2015)
- *U.S. v. Brooks*, 610 F.3d 1186 (8th Cir. 2010)
- *U.S. v. Hornbuckle*, 784 F.3d 549 (9th Cir. 2015)
- *U.S. v. Blake*, 868 F.3d 960 (11th Cir. 2017)

§2G1.3(b)(3): Use of Computer & App. Note 4

- §2G1.3, Application Note 4 is inconsistent with §2G1.3(b)(3)(B)
  - *U.S. v. Houston*, 857 F.3d 427 (1st Cir. 2017)
  - *U.S. v. Cramer*, 777 F.3d 597 (2d Cir. 2015)
  - *U.S. v. Pringler*, 765 F.3d 445 (5th Cir. 2014)
  - *U.S. v. McMillian*, 777 F.3d 444 (7th Cir. 2015)
  - *U.S. v Gibson*, 840 F.3d 512 (8th Cir. 2016)
  - *U.S. v. Hill*, 783 F.3d 842 (11th Cir. 2015)

- New amendment, Effective Nov, 1, 2018
  - Can apply the SOC for prostitution cases

§2G1.3 Cross-References

- Cross reference to Production (§2G2.1)
  - *U.S. v. Veazy*, 491 F.3d 700 (7th Cir. 2007)
  - *U.S. v. Bohannon*, 476 F.3d 1246 (11th Cir. 2007)

- Cross reference to Rape (§2A3.1)
  - *U.S. v. Ray*, 831 F.3d 431 (7th Cir. 2016)
  - *U.S. v. Reynolds*, 720 F.3d 685 (8th Cir. 2013)
  - *U.S. v. Flanders*, 752 F.3d 1317 (11th Cir. 2014)

Special Instruction

§2G1.3(d)(1) & App. Note 6 (Travel/Transportation)

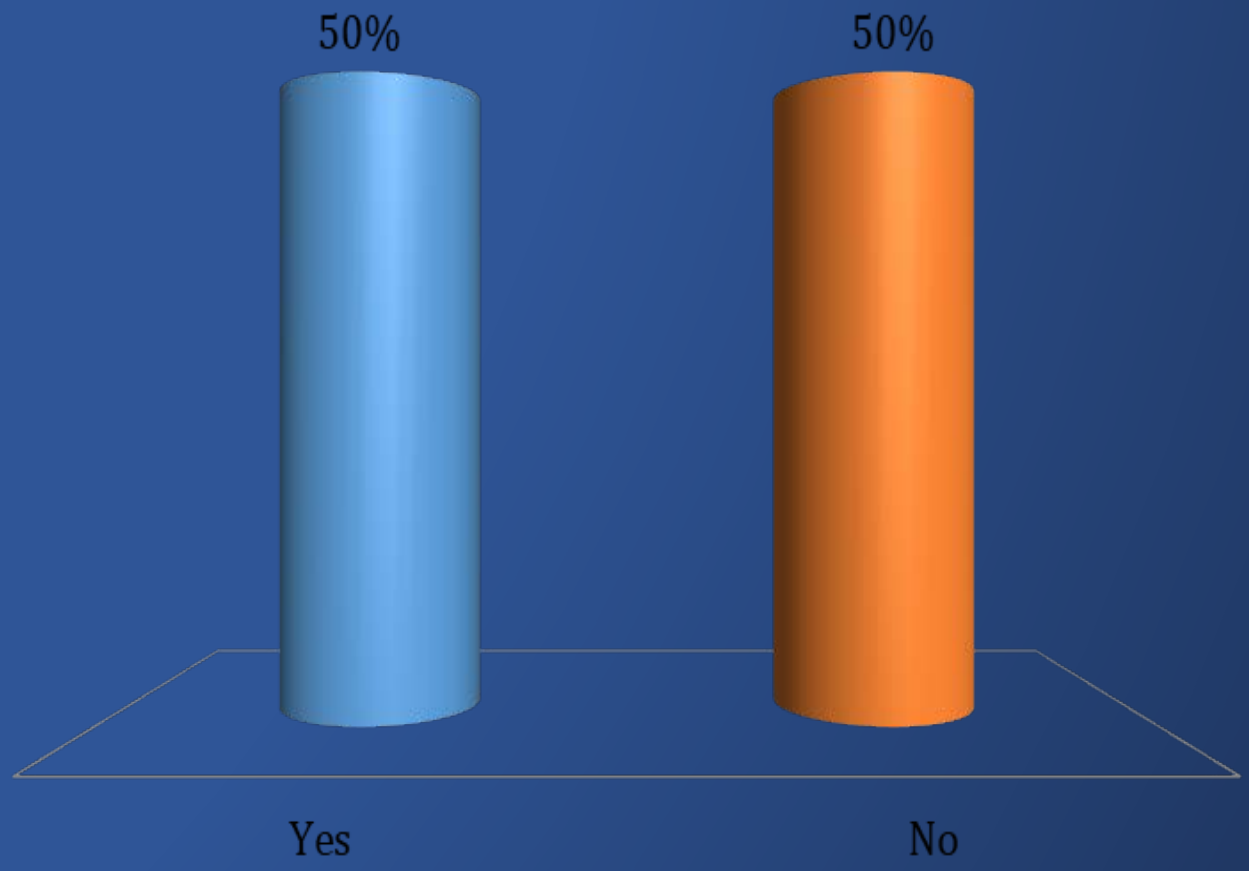
- If the relevant conduct of the offense of conviction involved more than one minor victim, *whether specifically cited in the count of conviction or not*, each such minor shall be treated *as if* contained in a separate count of conviction

- Multiple counts involving more than one minor are not to be grouped together

Scenario 6: Should the special instruction at §2G1.3(b)(1) apply?

A. Yes

B. No



Application of the Special Instruction When It Applies

§2G1.3(d)(1) & App. Note 6

Trafficking – Child 1 (§2G1.3)
Ch. Two TOTAL 38

Trafficking – Child 2 (§2G1.3)
Ch. Two TOTAL 36

§2G1.3(d)(1)

- *U.S. v. Billups,* 850 F.3d 762 (5th Cir. 2016)
  - Pseudo count adjustment applies to fictitious victims

- *U.S. v. Garcia-Gonzalez,* 714 F.3d 306 (5th Cir. 2013)
  - Can rely on uncharged conduct in applying §2G1.3(d)

- *U.S. v. Davis,* 453 F. App'x 452 (5th Cir. 2013)
  - Court should not have used special instruction because conduct with the other minor was not relevant conduct to the first victim because it was before date of the indictment

§4B1.5: Repeat and Dangerous Sex Offender

- a) Defendant's instant offense is a covered sex crime…and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction increase offense level by a table and CHC V

- b) Instant offense is a covered sex crime, subsection (a) of this guideline does not apply, and, the defendant engaged in a pattern of activity involving prohibited sexual conduct: increase offense level by 5

§4B1.5(a)

- Instant offense of conviction includes an offense against a minor under Chapter 109(A), Chapter 110 (not including trafficking, receipt, or possession of child pornography), Chapter 117

- These offenses include: production of child pornography, travel cases, and sex trafficking

§4B1.5(a)

- Criminal History Category is V

- Offense level determined by a table based on statutory maximum
  - Unless the offense level from Chapters Two and Three is greater

Statutory Maximum	Offense Level *
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

* **Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)**

§4B1.5(a)

- Prior sex offense conviction must be against a minor
  - *U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016)
- Must use the categorical approach
  - *U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)
  - *U.S. v. Wikkerink*, 841 F.3d 327 (5th Cir. 2016)
- No time limit on prior sex offense conviction
  - *U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)

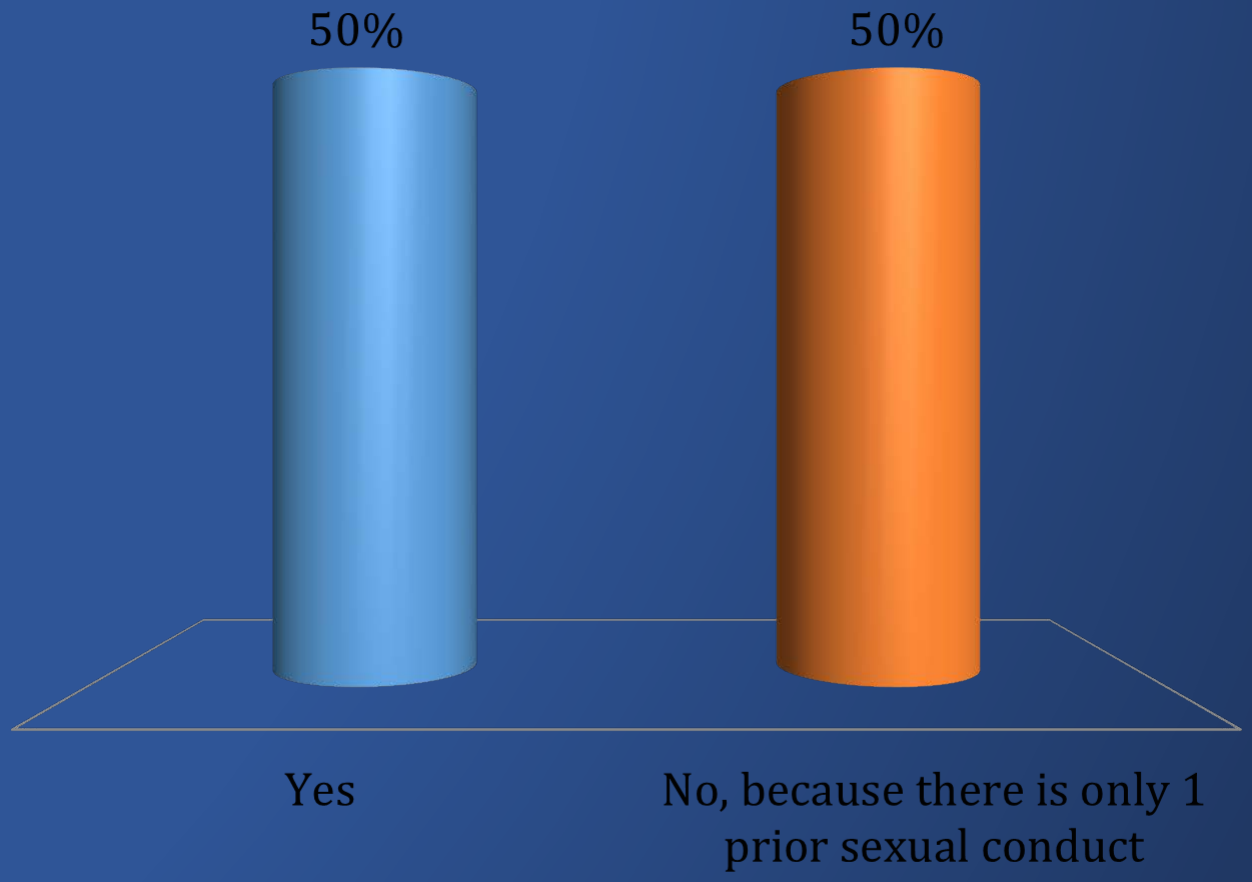
§4B1.5(b):

- Instant offense of conviction is a covered sex crime, subsection (a) of this guideline does not apply, and, the defendant engaged in a pattern of activity involving prohibited sexual conduct: the offense level is shall be 5 plus the offense level determined under Chapters Two and Three.

- Pattern means: any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant

Scenario 7: Should §4B1.5(b) apply?

A. Yes
B. No, because there is only 1 prior sexual exploitation



§4B1.5(b)

- Can include conduct involved in instant offense
  - *U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2008)
- No conviction necessary
  - *U.S. v. Bevins*, 848 F.3d 835 (8th Cir. 2017)
- Can include attempts and fictitious minors
  - *U.S. v. Morgan*, 842 F.3d 1070 (8th Cir. 2016)

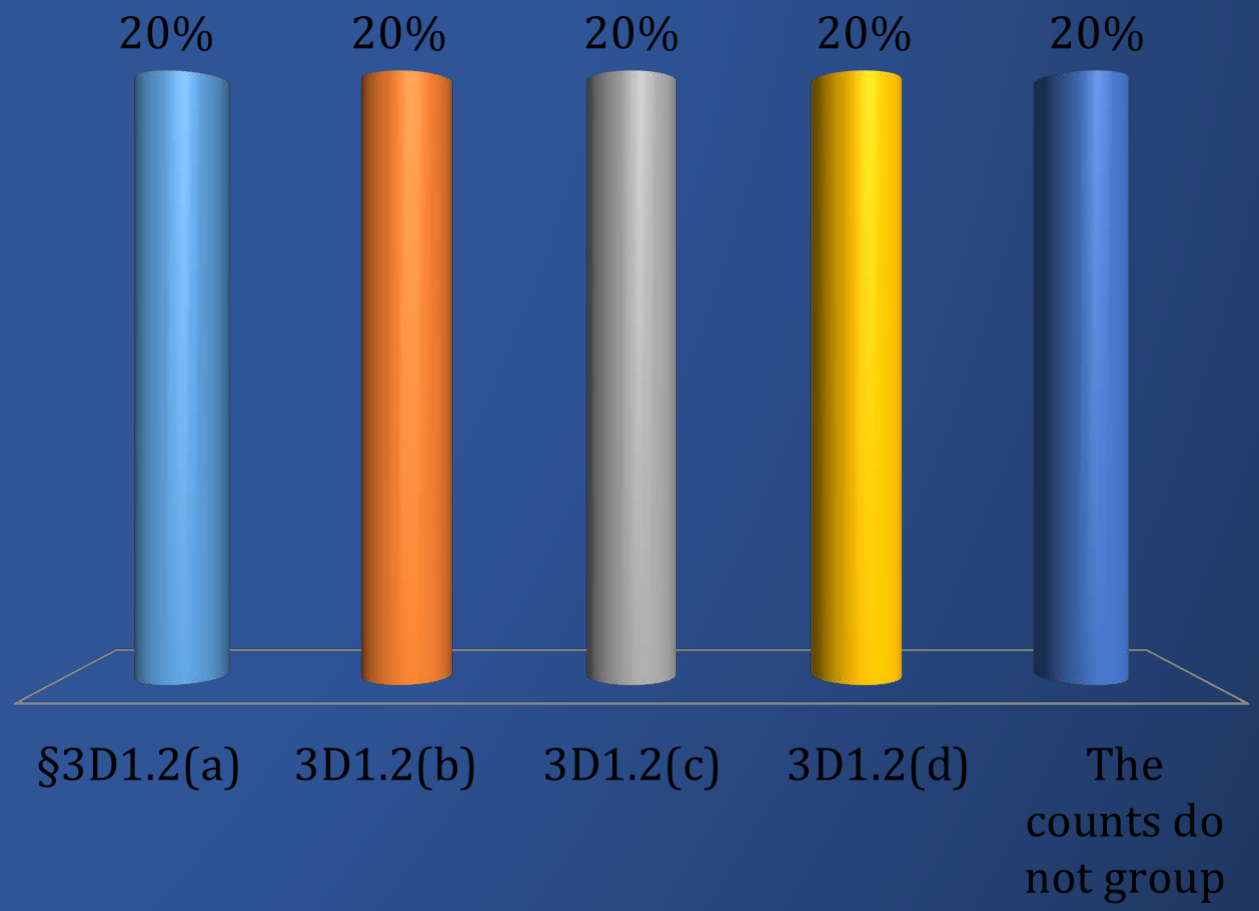
§4B1.5(b)

- Can apply both §2G2.2(b)(5) and §4B1.5(a) if multiple convictions
  - *U.S. v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010)
  - *U.S. v. Dowell*, 771 F.3d 162 (4th Cir. 2014)

- Can apply both §2G2.1(d)(1) and §4B1.5(a) to same case
  - *U.S. v. Fadi,* 498 F.3d 862 (8th Cir. 2007)
  - *U.S. v. Peck*, 496 F.3d 885 (8th Cir. 2007)

Scenario 8: How do the counts group?

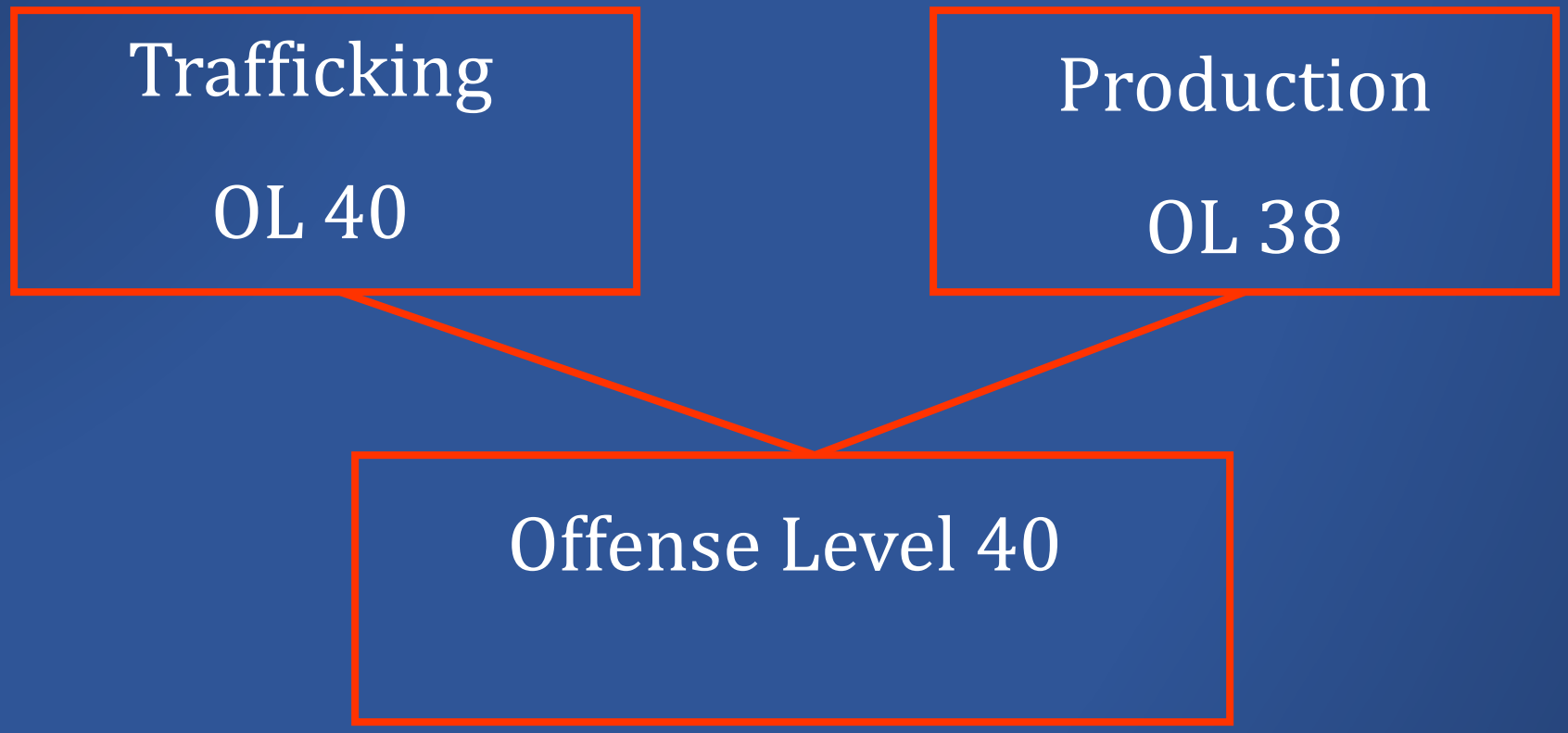
A. §3D1.2(a)
B. 3D1.2(b)
C. 3D1.2(c)
D. 3D1.2(d)
E. The counts do not group



"§3D1.2 (c)"

"When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."

Impact of Counts Grouping under Rule (c)



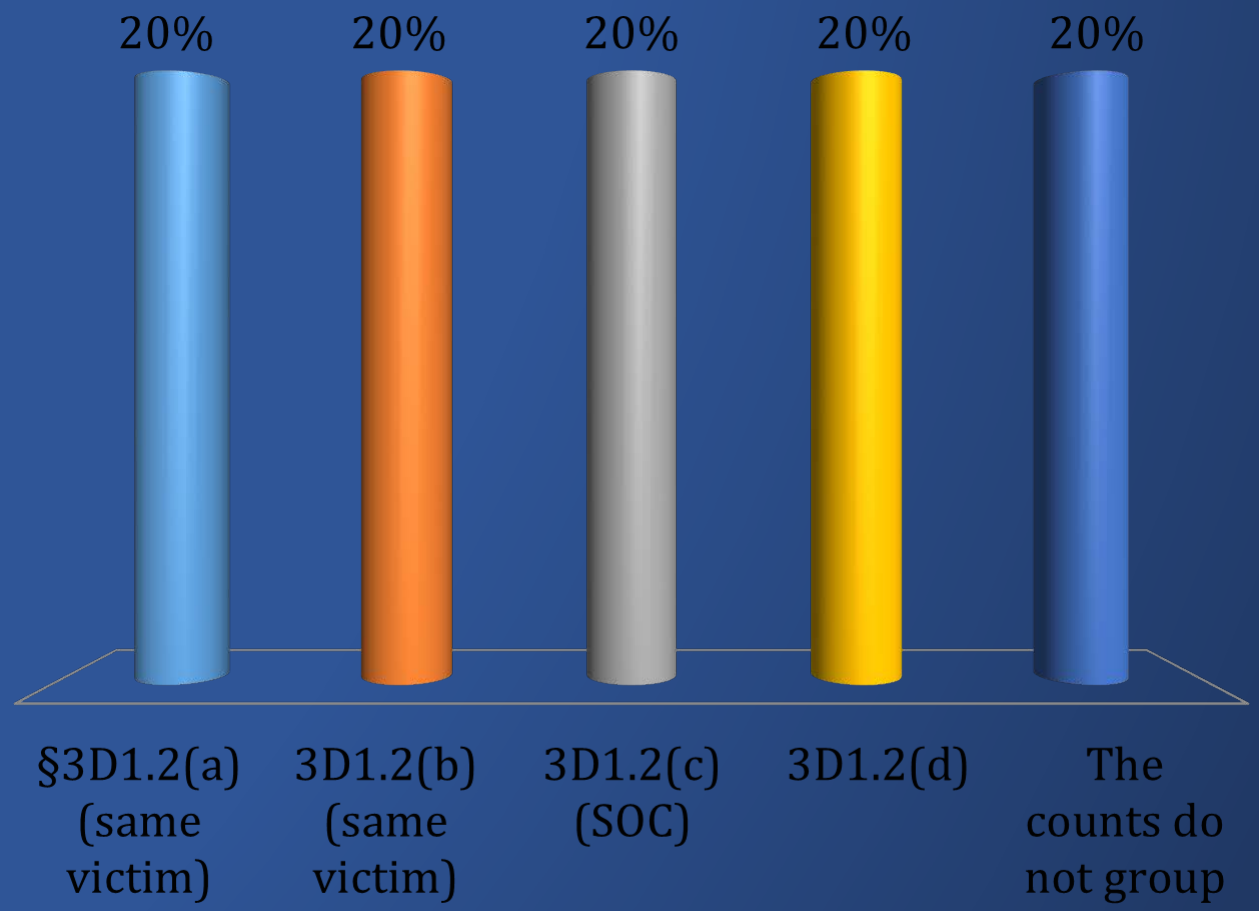
Scenario

- Defendant pleaded guilty to three counts of enticement of a minor to engage in sexual activity under 18 U.S.C. § 2422(b)

- The defendant had sex with a 14 year old boy on three separate occasions (on 1/1/2016, 2/1/2016, and 3/1/2016)

Scenario: How do the counts group?

A. §3D1.2(a) (same victim)
B. 3D1.2(b) (same victim)
C. 3D1.2(c) (SOC)
D. 3D1.2(d)
E. The counts do not group



Section 3D1.2(b), Application Note 4:

"The defendant is convicted of two counts of rape for raping the person on different days. The counts are not to be grouped together."

See U.S. v. Nagel, 835 F.3d 1371 (11th Cir. 2017) (do not apply §3D1.2(b) even if "consensual sex"

Failure to Register Offenses: 18 U.S.C. § 2250 and §2A3.5

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BOL: Determined by Tier (42 U.S.C. § 16911(5))

- Tier III: aggravated sex abuse, abusive sex contact against minor under 13, kidnapping not by parent (BOL 16)

- Tier II: sex trafficking, coercion and enticement, transportation for sex activity, abusive sexual contact, solicitation of minor for prostitution, distribution or production of child pornography (BOL 14)

- Tier I: other than Tier II or Tier III offender (BOL 12)

Tiers

- Must use categorical approach except for age question
  - *U.S. v. Berry*, 814 F.3d 192 (4th Cir. 2016)
  - *U.S. v. White*, 782 F.3d 1118 (10th Cir. 2015)

- NJ child endangerment was not Tier III
  - *U.S. v. Berry*, 814 F.3d 192 (4th Cir. 2016)

- GA rape was a Tier III offense
  - *U.S. v. Cammorto*, 859 F.3d 311 (4th Cir. 2017)

Tiers

- RI first degree child molestation was not Tier III
  - *U.S. v. Morales*, 801 F.3d 1 (1st Cir. 2015)

- CA inducing sex conduct by misrepr. creating fear is Tier III
  - *U.S. v. Alexander*, 802 F.3d 1134 (10th Cir. 2015)

- NC taking indecent liberties with a child should have been Tier I
  - *U.S. v. White*, 782 F.3d 1118 (10th Cir. 2015)

§2A3.5

- (b)(1): offense committed while in failure to register status
  - 8-level increase for sex offense against a minor victim
  - 6-level increase for sex offense against non-minor victim, or any other felony offense against a minor

- (b)(2): defendant voluntarily (A) corrected the failure to register or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels

Sex Offenses Scenarios

Scenario 1

Defendant is convicted of one count of possession of child pornography on June 1, 2017. The defendant used a file sharing program to download images of child pornography.

The government believes that the 5-level increase for distribution of pornography under §2G2.2(b)(3) applies based on the defendant's knowledge that other individuals in the file sharing program could access his files.

Should the defendant receive an enhancement under §2G2.2(b)(3) (distribution SOC)?

Scenario 2

The defendant is convicted of possession of child pornography under 18 U.S.C. § 2252. The defendant's step-daughter testified at the sentencing hearing that the defendant sexually abused her on numerous occasions 30 years ago when she was 14. The government argues that the 5-level pattern of activity enhancement at §2G2.2(b)(5) should apply, but the defendant objects because while he admits the conduct took place, it occurred 30 years ago and there was no conviction for the conduct.

Should the enhancement for pattern of activity apply?

Scenario 3

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2017. On July 7, 2017, the defendant also produced child pornography exploiting a different child, age 9.

The probation officer applied a two-level increase for the offense involving a minor between 12-16 under §2G2.1(b)(1)(b). The government has objected, arguing that the court should impose a four-level increase for a minor under 12 under §2G2.1(b)(1)(A).

Should an enhancement at §2G2.1(b)(1) apply?

Sex Offenses Scenarios

Scenario 4

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on a December 2, 2017; applicable guideline §2G2.1. In the video, there is another child who is also filmed engaging in sexual activity. Does the special instruction at §2G2.1(d)(1) apply?

Scenario 5

The defendant is convicted 18 U.S.C. § 1594 (Conspiracy to violate 18 U.S.C. § 1591(a), Sex Trafficking of Children). The probation officer applied a base offense level 34, pursuant to §2G1.3(a)(1). The defendant objects, and believes the base offense should be 24, pursuant to §2G1.3(a)(4).

What is the correct base offense level?

Scenario 6

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution on February 5, 2018. The government alleges the defendant also transported a second minor age 16 on February 1 for purposes of prostitution.

Does the special instruction at §2G1.3(d)(1) apply?

Scenario 7

The defendant is convicted of production of child pornography for producing a video of himself engaging in sexual activity with one of his 13-year old students on July 5, 2016. The defendant admitted that he had sex with another student one time in 2013. The probation officer has applied §4B1.5(b). The defendant objected, arguing that he only has one prior prohibited

sexual conduct and that the enhancement should not apply because the enhancement requires two prior instances of sexual abuse.

Should the enhancement at §4B1.5(b) apply?

Scenario 8

Count 1 – Trafficking child pornography on April 15, 2017; Applicable guideline §2G2.2; Offense Level 40

Count 2 – Production of child pornography, citing one minor exploited during the production on April 15, 2017; Applicable guideline §2G2.1; Offense Level 38

The probation officer applied §2G2.1(b)(3) for the offense involving distribution of child pornography.

The distribution cited in the trafficking count is the same child pornography cited in the production count.

Will the counts group?

If so, under which grouping rule?

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Sex Offenses

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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))

Sex Offenses
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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.

PRIMER

SEX OFFENSES:
COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS

May 2018

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

TABLE OF CONTENTS

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. Although this primer identifies some of the issues and cases related to the sentencing of commercial sex acts and sexual exploitation of minors, it is not intended to be comprehensive or a substitute for independent research.

I. RELEVANT STATUTES

A. THE STATUTORY SCHEME

Immigration: Chapter 12 of title 8

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

This statute 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. It also prohibits holding or attempting to hold any alien, or keeping, maintaining, controlling, supporting, employing, or harboring any alien in any house or other place, for the purpose of prostitution or any other immoral purpose.

Penalties: *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 15 U.S.C. § 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. "Sexually oriented material" 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.

Penalties: *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 and 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. This includes attempt and conspiracy.

Penalties: 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 and 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. This includes attempt and conspiracy.

Penalties: 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, obtaining, or maintaining 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.

"Commercial sex act" in subsection (e) means any sex act, on account of which anything of value is given to or received by any person. "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 an 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. "Venture" means a group of two or more individuals associated in fact.

Penalties: 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) addresses general interactions with a minor. It 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. Parents, legal guardians, and persons with custody or control of a minor are also forbidden from permitting the minor to engage in sexually explicit conduct to produce visual depiction thereof. Section 2251(b). Section 2251(c) prohibits employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct outside of the United States to produce a visual depiction of such conduct. Finally, 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 to produce a visual depiction. Section 2551(a)-(d) include attempt and conspiracy.

Penalties:

- *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.

Penalties: 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.

Penalties: 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)

Sections 2552(a)(1)– (3) include attempt and conspiracy. Section 2252(a)(1) prohibits any means (including computer) of transporting or shipping visual depictions. Section 2252(a)(2) prohibits knowingly receiving or distributing visual depiction or reproducing visual depictions for distribution. Section 2252(a)(3) prohibits knowingly selling or possessing with intent to sell any visual depiction. Section 2252(a)(4) prohibits knowingly possessing one or more books, magazines, periodicals, films, video tapes, or other matter containing a visual depiction. In each section, the relevant activity is prohibited 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.

Penalties:

- *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 2552A prohibits knowingly: mailing or transporting or shipping (including by computer) child pornography (2252A(a)(1)); receiving or distributing any material containing child (2252A(a)(2)); reproducing child pornography for distribution (including by computer) or advertising, promoting, presenting, distributing, or soliciting (including by computer) material with obscene visual depictions of minors engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct (2552A(a)(3); selling, or possessing with the intent to sell, any child pornography (2252A(a)(4)); possessing any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography (2252A(a)(5)); 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 (2552A(a)(7)). All subsections include attempt and conspiracy.

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 committing those offenses in concert with three or more other persons.

Penalties:

- *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 committing those offenses in concert with three or more other persons.

Penalties: *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.

Penalties:

- *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.

Penalties:

- *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, 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(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. Each section includes attempt and conspiracy.

Penalties: 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.

Penalties: 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 generally)

Prohibits knowingly transporting individuals to engage in prostitution or any illegal sexual activity.

Penalties: 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(b) prohibits using the mail or any 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. Each section includes attempt.

Penalties: 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.

Penalties: Section 2422(b) includes attempt, and has a statutory minimum penalty of ten years and 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.

Penalties: 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.

Penalties: 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.

Penalties: Section 2423(c) includes attempt and conspiracy, see 18 U.S.C. § 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.

Penalties: Section 2423(d) *includes attempt and conspiracy, see 18 U.S.C. § 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) establishes as 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. This includes attempt.

Penalties: Section 2425 includes attempt and has a statutory maximum of five years in prison.

18 U.S.C. § 2426 (Repeat offenders)

"Prior sex offense conviction" means a conviction under chapter 117, chapter 109A, chapter 110, section 1591, or an analogous state conviction.

The term "prior sex offense conviction" means a conviction under chapter 117, chapter 109A, chapter 110, section 1591, or an analogous state conviction.

18 U.S.C. § 3014 (Additional Special Assessment)

Section 3014, which took effect on May 29, 2015, provides for an assessment of $5,000 (in addition to the ordinary mandatory special assessment of $100) on "any non-indigent person or entity" convicted of, *inter alia*, any commercial sex acts, child sexual abuse, and child pornography offenses,

B. LEGAL ISSUES

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

The mandatory minimum does not apply to conspiracy to commit sex trafficking under 18 U.S.C. 1594(c). 18 U.S.C. 1591(b)(1) imposes a 15-year mandatory minimum if the offense involved minors under the age of 14, or force, threats of force, fraud or coercion.[1]

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

A defendant does not have to produce the child pornography which he offers to advertise or distribute.[2] Whether an image depicts a lascivious exhibition of the genitals turns on the overall content of the visual depiction.[3]

[1] *See* United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016).
[2] United States v. Williams, 659 F.3d 1223 (9th Cir. 2011). See also United States v. Christie, 624 F.3d 558 (3d Cir. 2010) **Error! Main Document Only.**(affirming conviction of a defendant under section 2251(d)(1)(A) for running a website that allowed file sharing of child pornography even though there was no personal production involved); United States v. Sewell, 513 F.3d 820 (8th Cir. 2008) **Error! Main Document Only.** (upholding conviction of a defendant who had used a file-sharing network to publish a notice to distribute child pornography).
[3] United States v. Wells, 843 F.3d 1251 (10th Cir. 2016) (finding the visual depiction does not need to portray the minor in a pose that depicts lust or sexual coyness for the defendant to be guilty of violating section 2251).

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

In *Lockhart v. United States*, 136 S. Ct. 958 (2016), the Supreme Court held that the phrase "involving a minor or ward" modifies only the phrase "abusive sexual conduct" immediately preceding it in section 2252. The required 10-year mandatory minimum under section 2252 therefore applies if the defendant has been previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," and the defendant's prior conviction for sexual abuse involving an adult victim, the defendant's girlfriend, is a proper predicate offense for the mandatory minimum. On the other hand, a juvenile delinquency adjudication for criminal sexual conduct involving a minor is not a "prior conviction" and thus cannot serve as a basis for triggering § 2252(b)(1)'s mandatory minimum provision.[4]

18 U.S.C. § 2252A (Certain activities relating to material constituting or containing child pornography)

In *United States v. Grzybowicz*, the Eleventh Circuit held that § 2252A requires that the item being distributed must have been delivered to someone other than the person who does the delivering. 747 F.3d 1296 (11th Cir. 2014). Because the defendant sent images of child pornography from his cellphone to his own email account and then downloaded those images onto his own computer, with no evidence that he shared those images with anyone else, his conduct did not amount to "distribution" for purposes of a conviction under section 2252A. *Id*.

Peer-to-peer file sharing is sufficient for distribution, notwithstanding that the defendant did not actively transfer images, where the defendant admitted he knew that what was in his shared folder was available to others. *United States v. Richardson*, 713 F.3d 232 (5th Cir. 2013).[5]

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

For a conviction under §§ 2422 or 2423(a), prostitution or other illegal 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.[6] A

[4] United States v. Gauld, 865 F.3d 1030 (8th Cir. 2017) (en banc) (because Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications and because § 2252(b)(1) mentions only "convictions," Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum).

[5] *See* United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012) ("When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred" and the "fact that the defendant did not actively elect to transmit those files is irrelevant.").

[6] United States v. Miller, 148 F.3d 207 (2d Cir. 1998).

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. *United States v. Spurlock*, 495 F.3d 1011 (8th Cir. 2007).[7]

A conviction for violating §2422(b) can be sustained by a defendant who communicates with an adult intermediary to persuade, induce or entice minors to engage in sexual intercourse even if he does not seek to have any of his communications with the adult passed on directly to the child.[8]

A conviction for violating §2423(a) was affirmed after a defendant appealed claiming that the government had to prove that the defendant knew he was transporting a minor and it failed to do so. The court held that the context of §2423 compels reading that does not require "knowingly" be applied to the victims age. That reading is consistent with congressional intent that minors need special protection against sexual exploitation. Further, the court held that "age" in this section is not a factor that distinguishes criminal behavior from innocent conduct, but rather serves to justify a harsher penalty when a victim is underage.[9]

II. CHAPTER TWO, PART 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.

[7] *See* 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. Daniels*, 685 F.3d 1237 (11th Cir. 2012) (holding that statute does not require defendant knew the victim was under the age of eighteen for conviction).
[8] *See* United States v. Caudill, 709 F.3d 444 (5th Cir. 2013).
[9] See United States v. Daniels, 653 F.3d 399 (11th Cir. 2011).

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. This guideline does not cover offenses involving minor victims.

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: 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. The fraud must occur as part of the offense and cannot anticipate any bodily injury. Absent bodily injury, an upward departure may be warranted. §2G1.1, comment. (n.2). For purposes of this subsection, "coercion" includes any form of conduct negating the voluntariness of the victim. See §2G1.1, comment. (n.2). Physical force is not required.[10] 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).

[10] *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).

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.

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, serious bodily injury, or kidnapping; (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, serious bodily injury, or kidnapping); 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). "Victim" includes undercover law enforcement officers. *See* §2G1.1, comment. (n.1).

5. Chapter Three Adjustments

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 (or who was represented to have not attained the age of 18). *See* §2G1.3, comment. (n.1).[11]

1. Determining the Base Offense Level.

Three of the four alternative base offense levels for §2G1.3 depend on the offense of conviction.

a. The base offense level is **34** if the defendant was convicted under 18 U.S.C. § 1591(b)(1).

b. The base offense level is **30** if the defendant was convicted under 18 U.S.C. § 1591(b)(2).

[11] *See* United States v. Vasquez, 839 F.3d 409 (5th Cir. 2016) (finding definition of minor does not include a fictitious minor held out by the defendant as available for unlawful sexual activity, where the defendant was not himself a law enforcement officer who was representing that the victim had not attained 18 years and could be provided.).

c. The base offense level is **28** if the defendant was convicted under 18 U.S.C. §§ 2422(b) or 2423(a).

d. Otherwise, the base offense level is **24**.

2. Specific Offense Characteristics

a. Parent, relative, or legal guardian/care, custody, or supervisory control

Section 2G1.3(b)(1) calls for a **2**-level enhancement if the 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.[12] 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.

(i) 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.[13] The enhancement can also apply for misrepresenting marital status and occupation. *United States v. Young*, 613 F.3d 735 (8th Cir. 2010). The enhancement can also apply for misrepresenting prior or current sexual relationships with other minors.[14]

[12] *See* United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010).
[13] *See* United States v. Holt, 510 F.3d 1007 (9th Cir. 2007).
[14] *See* United States v. Grauer, 701 F.3d 318 (8th Cir. 2012).

(ii) 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)).[15]

The enhancement applies even if the offense has an element of force, fraud, or coercion because an "undue influence" can involve conduct with no force, fraud or coercion.[16]

Commentary to this enhancement provides that "[t]he voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring." and further provides for a rebuttal presumption of undue influence if the participant is at least 10 years older than the minor §2G1.3, comment. (n.3(B)).[17] The undue influence enhancement does not apply if the only "minor" involved in the offense is an undercover officer. USSG §2G1.3, comment. (n.3(B)).

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 when a computer is used in furtherance of sex trafficking crimes.[18] The enhancement is also 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*

[15] *See* United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012), cert. denied, 133 S. Ct. 1240 (2013) (holding enhancement applies even though minor was already working as a prostitute before meeting defendant; minor had initially declined to work for defendant, and defendant arranged to send her to another city to work, brought her to bus station and purchased her ticket).

[16] *See* United States v. Smith, 719 F.3d 1120, 1125 (9th Cir. 2013) (finding application of base offense level under §2G1.3(b)(2) and undue influence enhancement may both be applied because both provisions serve unique purposes). *See also* United States v. Willoughby, 742 F.3d 229 (6th Cir. 2014) (finding application appropriate when the offense of conviction was based on a violation of section 1591 and included force, fraud or coercion, because the term "undue influence" is not limited to force, fraud, or coercion and the application was based instead on the defendant's manipulation of and preying on the victim's status as a homeless, destitute runaway).

[17] *See also* United States v. Reid, 751 F.3d 763 (6th Cir.); cert. denied, 135 S. Ct. 766 (2014); United States v. Watkins, 667 F.3d 254 (2d Cir. 2012); United States v. Lay, 583 F.3d 436 (6th Cir. 2009); United States v. Miller, 601 F.3d 734 (7th Cir. 2010).

[18] *See* United States v. Cramer, 777 F.3d 597 (2nd Cir. 2015).

v. Lay, 583 F.3d 436 (6th Cir. 2009). The use of a cell phone 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).

Although Application Note 4 states that the enhancement "is intended to apply only to the use of a computer to communicate directly with a minor or a person who exercises custody, care, or supervisory control of the minor," the enhancement will apply if the defendant or a co-defendant uses the computer simply to post information about a minor.[19]

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 the defendant was either: (1) convicted under 18 U.S.C. §§ 2422(b) or 2423(a); or (2) 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.[20] "Sexual contact" can include the touching of one's self.[21]

e. 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) 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

[19] *See* United States v. Jackson, 697 F.3d 1141 (9th Cir. 2012) (although the defendant directed two co-defendants to post photos of a teenage prostitute in an online advertisement on craigslist.com, application of the enhancement was appropriate, regardless of Application Note 4, because the plain language in §2G1.3(b)(3)(B) affords applies if offense involved use of computer to entice, encourage, offer, or solicit application if the offense involved the use of a computer to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct). *See also* United States v. Houston, 857 F.3d 427 (1st Cir. 2017)(upholding enhancement, despite "obvious tension" between plain text of the guideline and Application Note 4, which enhancement, note 4 was not intended to limit the enhancement's scope and therefore posting on Backpage covered by enhancement notwithstanding commentary)(joining Second, Fourth, Fifth, Seventh, Eight and Eleventh Circuits).

[20] *See* United States v. Watkins, 667 F.3d 254 (2d Cir. 2012) (enhancement is not double counting because the statute prohibits travel with intent to engage in sexual activity and therefore one may violate the statute without actually having committed a sexual act). *See also* United States v. Hornbuckle, 784 F.3d 549 (9th Cir. 2015)(finding "[w]here defendants pleaded guilty to two counts of sex trafficking of children under 18 U.S.C. § 1591, there was no double counting in the application of a sentence enhancement under . . . §2G1.3(b)(4)(A) because commission of a sex act or sexual contact was not an element of sex trafficking of children under § 1591.").

[21] *See* United States v. Pawlowski, 682 F.3d 205 (3d Cir. 2012) (affirming application of enhancement when defendant masturbated on webcam while chatting with someone he believed to be 15-year-old minor).

this specific offense characteristic because the age of the minor is already taken into account in the applicable base offense level.[22]

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)).[23]

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.[24]

When the cross reference at §2G1.3(c)(3) is applied, the court can apply both the base offense level under §2A3.1 and the enhancement at §2A3.1(b) if the offense involved conduct described in section 2241.[25]

[22] *See* United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012) (enhancement for offenses involving a victim who has not attained the age of 12 applies regardless of whether the defendant themselves were directly involved in the underlying sexual molestation).
[23] *See* United States v. Veazey, 491 F.3d 700 (7th Cir. 2007) ("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) (application of this cross reference 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).
[24] *See* United States v. Reynolds, 720 F.3d 665, 674 (8th Cir. 2013) (cross reference proper where the defendant placed minor victim in fear when he drove her to an isolated place and did not stop the sexual conduct after she resisted); United States v. Henzel, 668 F.3d 972 (7th Cir. 2012) (cross reference required where the defendant's conduct involved conduct described in section 2242, and where defendant understood victim was in fear when he coerced her, resisted her efforts to move away, and ignored her repeated protests and cries).
[25] *See* Osley v. United States, 751 F.3d 1214 (11th Cir. 2014) (finding application of §2A3.1 and the enhancement reasonable where the offense involved the use of force or threats as described in 18 U.S.C. §

The subsection's reference to 18 U.S.C. § 2241(a) and (b) means that all instances of sexual conduct involving the following will trigger the cross reference: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (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)).

Also covered by this subsection is conduct described in 18 U.S.C. § 2241(c), that includes (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)).

Similarly covered is conduct described in 18 U.S.C. § 2242 that includes engaging in, or causing another person to engage in, a sexual act with another person by (1) threatening or placing the minor in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (2) engaging in, or causing another person to engage in, a sexual act with a minor 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* §2G1.3, comment. (n.5(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 is to be treated as a separate minor. *Id*. The grouping enhancement may be supported by uncharged as well as charged victims so long as the uncharged conduct satisfies relevant conduct principles.[26]

2241(a) or (b)).

[26] *See* United States v. Garcia-Gonzalez, 714 F.3d 306, 316 (5th Cir. 2014) (sentencing court properly relied on uncharged conduct involving a minor victim as a separate count of conviction under §2G1.3(d)(1) because "offense" includes relevant conduct and the uncharged conduct occurred at the same time as the charged conduct with other minor victims); but see United States v. Weiner, 518 F. App'x 358, *364 (6th Cir. 2013) (unpub) (holding that the defendant's sexual conduct with minors does not fall within relevant conduct as

5. Upward Departure Provision

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

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(a). 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 but had not attained the age of 16.

Where victims of exploitation are infants or toddlers, §§2G2.1 and 2G2.2 provide for additional enhancement by adding an alternative basis for application of the sadistic or masochistic enhancement Section 2G2.1(b)(4) provides for a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler," while §2G2.2 provides a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler". The

required by §1B1.3 and application of the special instruction because of relevant conduct applies only to those offenses for which §3D1.2 requires grouping, and offenses under §2G1.3 are not contained on that list).

accompanying application note to each guideline clarifies that if subsection (b)(4)(B) applies, the vulnerable victim adjustment in Chapter Three does not apply.

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).[27] 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, serious bodily injury, or kidnapping; (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. Distribution by a codefendant is attributable relevant conduct to a defendant who helped produce the images.[28] Distribution of images produced by defendant to another minor to induce that minor to create sexually explicit images of herself is relevant conduct in a conviction for attempted production.[29]

d. Sadistic or masochistic conduct

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). As noted in section 2(E)(2)(a), *supra*, §§2G2.1 and 2G2.2 provide for additional enhancement pursuant to this section if the victim of exploitation was an infant or toddler. For a more detailed discussion of what constitutes "sadistic or masochistic" conduct, see section 2(F)(2)(d), *infra*.

[27] *See* United States v. Aldrich, 566 F.3d 976 (11th Cir. 2009) (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) (defining "sexual contact" broadly to include the victim's self-masturbation); United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008) (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) (where the defendant touched the minor victim's penis for sexual pleasure, the offense involved a sexual act or sexual contact).
[28] *See* United States v. Odom, 694 F.3d 544 (5th Cir. 2012).
[29] *See* United States v. Broxmeyer, 699 F.3d 265 (2d Cir. 2012).

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)).[30] The minor can be in the custody, care or supervisory control of more than one person at a time.[31] 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)).

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.[32]

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)).[33]

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[30] *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).

[31] *See, e.g.,* United States v. Carson, 539 F.3d 611 (7th Cir. 2008) (enhancement supported where the minor's mother and the mother's boyfriend had mutual custody over the minor during the minor's visits to their house).

[32] *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).

[33] *But see* United States v. Jass, 569 F.3d 47 (2d Cir. 2009) (enhancement does not apply where computer was used to show explicit material to desensitize minor victim to sexual activity rather than for solicitation purposes).

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* §2G2.1, comment. (n.5); *United States v. Fadl*, 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).[34] Relevant conduct principles apply however, and temporally distinct conduct must satisfy §1B1.3's requirement that the conduct be "during the commission of" or "in preparation for" the offense of conviction.[35]

5. Upward Departure Provision

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

[34] *See* 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.").

[35] *See* United States v. Schock, 862 F.3d 563 (6th Cir. 2017)(where no evidence that defendant photographed Victims 1 and 2 together on the date alleged in indictment, conduct in taking pictures of Victim 1 two years later not "during the commission of" or "in preparation for" the offense so multiple count analysis did not apply).

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)

For violations of 18 U.S.C. §§ 1466A, 2252, 2252A, and 2260(b), Appendix A specifies that §2G2.2 will apply. 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). Included in the definition of "minor" is an "undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years." *Id.*

1. Determining the Base Offense Level

If the defendant was convicted under 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5), or 2252A(a)(7), 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 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.[36]

[36] *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 under 12. The pictures themselves can support the court's finding that the images are of children under twelve and that they depict actual children.[37]

c. Distribution

Section 2G2.2(b)(3) provides tiered enhancement scheme if the offense involved distribution. The greatest enhancement should apply.

(i) Alternative enhancements

(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, preferential access to child pornographic material, or access to a child. *See* §2G2.2, comment. (n.1).[38]

A 2016 guideline amendment to §2G2.2(b)(3) addressed the application of the 5-level enhancement for distribution not for pecuniary gain in the specific context of peer-to-peer file sharing. Where previously some courts had held that the 5-level enhancement applied whenever a defendant knowingly used file-sharing software, *United States v. Groce,* 784 F.3d 291, 294 (5th Cir. 2015), the Sentencing Commission took a more restrictive view, directing that the distribution must be specifically linked to the

[37] *See* United States v. McNealy, 625 F.3d 858, 865 (5th Cir. 2010).
[38] *See also* United States v. Whited, 539 F.3d 693 (7th Cir. 2008) (holding that phrase "expectation of receipt" does not require explicit agreement or precise bargain, and finding that district court did not clearly err in finding defendant distributed child pornography in reasonable anticipation of obtaining sex from another); United States v. Fowler, 216 F.3d 459 (5th Cir. 2000) (stating distribution enhancement appropriate if defendant distributed images with purpose of enticing another to have sex with him).

valuable consideration and providing examples beyond the naked use of file-sharing programs, such as "receip[t] in exchange for other child pornographic material, preferential access to child pornographic material, or access to a child." Like the distribution enhancement, this commentary addressed the reach of the enhancement in the use of file-sharing programs. *See* Appx. C, Amendment 801, *Reasons for Amendment*. The changes to this subsection mirrored the changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

(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 district court's application of enhancement based on numerous messages defendant sent to individuals who he believed were under 18 years because of screen names used by those individuals such as "Justified Facade-16yo"); *cf. United States v. Fulford,* 662 F.3d 1174 (11th Cir. 2011) (holding application of enhancement for distribution to a minor based on defendant's belief that recipient was a minor was improper because enhancement only applies for actual minors or law enforcement officers represented to defendant as being a minor); *United States v. Stevens*, 462 F.3d 1169 (9th Cir. 2006) (holding that Commission's expansion of definition of "minor" in Commentary to §2G2.2 on November 1, 2004, to include law enforcement officers was substantive change and therefore sentencing court erred in applying 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 Internet is distribution because it is an act related to transfer of material involving child pornography as defined in 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.

Allowing a minor victim to make print copies of child pornography qualifies as distribution to a minor. *See United States v. Roybal*, 737 F.3d 621, 623 (9th Cir. 2013) (finding application of enhancement appropriate where defendant permitted minor victim to make "book" of child pornography from his collection).

(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 that 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.

Enhancements for distribution may only be imposed upon a showing of *mens rea*. Specifically, the 2-level enhancement set forth in §2G2.2(b)(3)(F) provides that the enhancement applies only if "the defendant knowingly engaged in distribution." Application Note 2 states that the 2-level distribution enhancement applies only if the defendant *knowingly* "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute." The intent of the commentary is to avoid the imposition of enhancement where a defendant unwittingly makes child pornography available to others through use of a peer-to-peer file-sharing program. *See* Appx. C, Amendment 801, *Reasons for Amendment*.

The *mens rea* requirement for the distribution enhancement appears in the parallel provisions of §2G2.1(b)(3) and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which likewise contains the tiered distribution enhancement scheme.

(ii) Double counting.

It is not double counting to apply the distribution enhancement in a conviction for distribution of child pornography.[39]

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, or an alternative enhancement if the images portray sexual abuse or exploitation of an infant or toddler. Unlike the distribution enhancement, this enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such materials. *See* §2G2.2, comment (n.3). This enhancement does not require a determination of whether the defendant intended to possess the images or actually derived pleasure from viewing the images.[40] The enhancement applies even if the sadistic or masochistic sexual conduct depicted was directed at the defendant involved in the sexual activity rather than the victim.[41]

(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. *See United States v. Pappas*, 715 F.3d 225 (8th Cir. 2013) (finding video showing victim being vaginally and anally penetrated "particularly distressing" and sufficient for enhancement); *United States v. Maurer*, 639 F.3d 72 (3d Cir. 2011) (finding images that depict sexual activity involving a prepubescent minor and that depict activity that would have caused pain to the minor sufficient for the enhancement). A video does not have to depict ongoing violent conduct to be "sadistic" if the evidence is sufficient to show that the defendant inflicted pain upon the victim. *See United States v. Cannon*, 703 F.3d 407 (8th Cir. 2013).

A portrayal of a young child experiencing physical or emotional pain includes the penetration of a young child by an adult. *See, e.g.*, *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007); *United States v.*

[39] *See* United States v. Reingold, 731 F.3d 204 (2d Cir. 2013) (remanding where district court held that any harm associated with distribution was fully accounted for in base offense level); see also United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012).
[40] *See* United States v. Maurer, 639 F.3d 72 (3d Cir. 2011) (Section 2G2.2(b)(4) is applied on basis of strict liability).
[41] *See* United States v. Scheels, 846 F.3d 1341 (11th Cir. 2017).

Johnson, 450 F.3d 831 (8th Cir. 2006); *United States v. Myers*, 355 F.3d 1040 (7th Cir. 2004); *United States v. Wright*, 373 F.3d 935 (9th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003); *United States v. Lyckman*, 235 F.3d 234 (5th Cir. 2000). 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"). Digitally morphed child pornography images depicting an identifiable minor's head super-imposed onto the body of an adult female handcuffed and shackled wearing a collar and leash have been found to be sadistic. *See United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2011) (finding the image portrayed both sexual activity involving a minor and sadistic conduct, which includes the likely infliction of pain, and portrayed a situation that involved physical and mental cruelty).

(ii) 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); *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007). *See also United States v. Barevich*, 445 F.3d 956 (7th Cir. 2006); *United States v. Belflower*, 390 F.3d 560 (8th Cir. 2004) (Citing *United States v. Stulock*, 308 F.3d 922 (8th Cir. 2002). *But see United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000) (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 images 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).[42] 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.[43]

"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. Alberts, 859 F.3d 979 (11th Cir. 2017)(district court properly based enhancement on the basis of 35-year-old conduct that occurred when defendant a teenager); *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013) (conduct by defendant as a juvenile is properly considered); *United States v. Woodward*, 694 F.3d 950 (8th Cir. 2012) (19 year old juvenile adjudication for sexual abuse of two minors can be used as basis for enhancement); *United States v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (finding application appropriate where defendant molested nieces 35 years before offense). Application Note 1 also specifies that the pattern of abuse need not be related to the offense of conviction. *See* §2G2.2 *(*n. 1).

(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. Bacon*, 646 F.3d 218 (5th Cir. 2011) (finding

[42] United States v. Alberts, 859 F.3d 979 (11th Cir. 2017)(proper to base enhancement on admissions by defendant that he engaged in sexual acts with younger relatives when he was approximately 16 years old);; United States v. Paull, 551 F.3d 516 (6th Cir. 2009) (affirming the district court's decision to apply the 5-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 5-level enhancement under §2G2.2(b)(5) and the 5-level enhancement under §4B1.5(b)(1) were appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors).

[43] *See* United States v. Acosta, 619 F.3d 956 (8th Cir. 2010).

"relevant conduct" under §2G2.2 is intended to be more broadly construed than the general relevant conduct provision in §1B1.3); *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).

(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) (unpub) (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. Attempts to delete the images do not bar imposition of the enhancement. *See United States v. Glassgow*, 682 F.3d 1107 (8th Cir. 2012). It is not double counting to apply the use of a computer enhancement to a distribution offense using a file-sharing program because the use of a computer was not essential to the act of distributing. *See United States v. Reingold*, 731 F.3d 204, 226 (2d Cir. 2013) (finding enhancement proper because it did not reflect a harm already fully accounted for in the base offense level).

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.
at least 150 images, but less than 300 there is a **3**-level enhancement.
at least 300 images, but less than 600 there is a **4**-level enhancement
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. Price*, 711 F.3d 455 (4th Cir. 2013). *See also*, *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*, 636 F.3d 772 (6th Cir. 2011); *United States v. Ardolf*, 683 F.3d 894 (8th Cir. 2012). If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted. §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. §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). Possession of additional images not distributed may not be relevant conduct to a distribution conviction. *See United States v. Teuschler*, 689 F.3d 397 (5th Cir. 2012) (finding possession of non-distributed images did not occur in preparation for the offense, during the offense, or in an attempt to avoid detection of the offense).

3. Cross Reference

Section 2G2.2(c)(1) states that §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, and if the resulting offense level is greater than the one resulting from this guideline. 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").

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)).

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, serious bodily injury, or kidnapping; (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, §3A1.1(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).[44] The enhancement can apply to defendants convicted of receipt, distribution, or possession of child pornography offenses.[45]

[44] *See* United States v. Arsenault, 833 F.3d 24 (1st Cir. 2016) (finding application of the adjustment appropriate because two of defendant's victims (students in his special needs program) under the age of 12 were unusually vulnerable due to their special needs, where one minor had autism and the other was non-verbal); United States v. Robinson, 436 F. App'x 82 (3d. Cir. 2011) (unpub) (affirming application of §3A1.1 where conspirators targeted minor girls for prostitution, one with a cognitive impairment, and others who were homeless and from troubled families); 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. 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); 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").

[45] *See* United States v. Jenkins, 712 F.3d 209, 212 (5th Cir. 2013) (application of §3A1.1 appropriate because victimization of children continues beyond the production of the images and the consumer of the material

A §3A1.1(b) adjustment 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). Because child pornography guidelines provide for enhancements based on the age of the minor victims and the unusual vulnerability of toddlers and infants, §3A1.1(b) will apply 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, naiveté, and poor communication skills made her unusually vulnerable for a 13-year-old girl).

B. §3B1.1 (Aggravating Role)

Section 3B1.1 provides for a 4-level adjustment if the defendant was on organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; a 3-level adjustment if the defendant was a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive, and a 2-level adjustment if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than that described above. A "participant" includes a person who is criminally responsible for the commission of the offense, even if not convicted. A victim is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct with respect to another victim. *See* §2G1.1, comment. (n.3).[46]

C. §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 applies. *See* §2G1.3, comment. (n.2(B)); §2G2.1, comment. (n.3(B)); §2G2.6, comment. (n.2(B)).

may be considered to be "causing the children depicted in those material to suffer . . .").

[46] *See* United States v. Tavares, 705 F.3d 4 (1st Cir. 2013), cert denied, 133 S. Ct. 2371 (2013) (A participant for the purpose of a §3B1.1(c) "organizer or leader" enhancement can be an immunized witness against the defendant.).

IV. CHAPTER FOUR: REPEAT AND DANGEROUS SEX OFFENDER AGAINST MINORS, PROBATION, SUPERVISED RELEASE, AND DEPARTURES

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), and 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) or (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)).

As is the case with the parallel recidivist guideline and statutory recidivist provisions, courts "employ a 'formal categorical approach' to determine whether a prior conviction qualifies as a defined sex offense conviction. The categorical approach 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)).[47] If, however, "the prior offense was committed in a separate jurisdiction in which the offense is defined more broadly than the 'generic offense'

[47] *See also* United States v. Simard, 731 F.3d 156 (2d Cir. 2013), cert. denied 134 S. Ct. 1874 (2014)(employing categorical approach to previous conviction under 13 Vt. Stat. Ann § 2602 offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," and finding the statute satisfied the predicate offense criteria for the 18 U.S.C. § 2252 (b)(2).

enumerated in the current prosecution, federal courts employ a 'modified categorical approach.'" *Id*.[48]

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"). The Eighth and Ninth Circuits have held that a juvenile-delinquency adjudication is not a prior sex offense conviction as defined by § 2252(b) and §4B1.5(a). *See United States v. Gauld*, 865 F.3d 1030 (8th Cir. 2017) (*en banc*)(Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications and because § 2252(b)(1) mentions only "convictions," Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum); *United States v. Nielsen*, 694 F.3d 1032 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 2157, (2014)(juvenile adjudication for sexual assault cannot be basis for §4B1.5(a) enhancement because its use of "sex offense conviction" indicates only adult convictions)

(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.

[48] *See also* United States v. Dahl, 833 F.3d 345 (3d Cir. 2016) (vacating and remanding where state offense prohibited touching genitalia through clothing as more broad than "sexual act" which require penetration or actual skin-to-skin contact); United States v. Gardner, 649 F.3d 437 (6th Cir. 2011)(prior conviction for sexual battery was insufficient to trigger 15-year mandatory minimum sentence where sexual battery did not require as an element that complaining witness be a minor).

Double counting. In *United States v. 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. 414 F.3d 983 (8th Cir. 2005). 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 is 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 a formal conviction entered §4B1.5, comment. (n.4(B)(ii)).

A previous conviction is not required for an enhancement under §4B1.5(b). A conviction for attempted production of child pornography is considered "prohibited sexual conduct" for purposes of §4B1.5(b).[49] Courts have held that unadjudicated conduct that occurred while the defendant was a juvenile can be a predicate under this subsection.[50]

(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

[49] *See* United States v. Morgan, 842 F.3d 1070 (8th Cir. 2017).
[50] *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).

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.[51]

Note. If §4B1.1 (Career Offender) applies to the defendant, then §4B1.5 is inapplicable. *See* §4B1.5(a), (b). 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)). Repeat sex offenders under §4B1.5 are ineligible for a downward departure under §4A1.3. *See* §4A1.3(b)(2)(B).

B. §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. 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.

[51] *See* United States v. Rothenberg, 610 F.3d 621 (11th Cir. 2010) (holding application of the 5-level enhancement under §2G2.2(b)(5) and the 5-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).

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 probation or unlawful conduct.

C. §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.

D. §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). The statutory maximum term of supervised release is recommended if the offense is a sex offense. *See* §5D1.2(b)(2).[52]

[52] *But see* United States v. Jenkins, 854 F.3d 1818 (2d Cir. 2017)(vacating 25-year supervised release term for man who will be 63 at time of release as unreasonable absent any justification for "unusually harsh" "post-release supervision that will prevent him from every re-engaging in any community in which he might find

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.

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

Pursuant to section 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."

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).

himself"); United States v. Inman, 666 F.3d 1001 (6th Cir. 2012) (vacating lifetime supervision where the district court imposed the lifetime term even though the parties had requested a ten year term and the record did not demonstrate that the court had considered any of the pertinent section 3553(a) factors); 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).

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.

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) (Discretionary Conditions)

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); *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).[53] Even if the record is devoid of individualized findings by the court of the facts and circumstances in the case, certain characteristics may justify conditions for the majority of offenders. *See United States v. Deatherage*, 682 F.3d 755 (8th Cir. 2012) (affirming special condition prohibiting defendant from purchasing, possessing or using "any media forms containing pornographic images or sexually oriented materials" because they were "obviously relevant to the child pornography offense" or to the defendant's history and characteristics). *But see United States v. Alvarado*, 691 F.3d 592 (5th Cir. 2012) (finding district court erred by automatically imposing lifetime term of supervised release without analysis of circumstances surrounding the crime).

[53] *See also* United States v. Muhlenbruch, 682 F.3d 1096 (8th Cir. 2012) (finding appropriate special condition requiring defendant to both get prior approval from probation officer before accessing the Internet and to notify probation officer of any location where he may receive mail and get approval before obtaining a new mailing address or post office box, as an "alternate channel for receiving child pornography.").

Notice. Some 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.[54]

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.[55] 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, but have also struck conditions as overbroad or unreasonable even in light of district court's significant discretion in imposing supervised release:

a. barring contact with minors, *see, e.g.*, *United States v. Maurer*, 639 F.3d 72 (3d Cir. 2011) (finding special condition restricting contact with minors not overly broad for a conviction for possessing child pornography when defendant's conduct included initiating sexual conversation with a purported minor on the Internet); *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

[54] *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."). *See also* United States v. Sherwood, 850 F.3d 391 (8th Cir. 2017)("Advance notice of supervised release conditions fits into the category of recommended best practice rather than mandatory requirement.").

[55] *See, e.g.*, United States v. Taylor, 338 F.3d 1280 (11th Cir. 2003).

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). *But see United States v. Jenkins*, 854 F.3d 1818 (2d Cir. 2017)(vacating condition barring direct or indirect contact with minors, noting that such a condition would bar the defendant from any interaction with family or community absent preapproval by the Probation Office); *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012) (holding that a condition barring the defendant from residing with or being in the company of his own minor daughters or from dating anyone with minor children was unreasonable and impermissibly overbroad).

b. requiring sex offender treatment and physiological testing, *see, e.g.*, *United States v. Mercado*, 777 F.3d 532 (1st Cir. 2015) (finding that requiring a defendant to participate in a sex offender treatment program and obtain pre-approval to visit his children was reasonable); *United States v. Morgan*, 44 F. App'x 881 (10th Cir. 2002) (unpub) (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"). *But see United States v. Wagner,* 872 F.3d 535, 542-543 (7th Cir. 2017)(holding that condition that allowed treatment provider to decide if defendant could view adult pornography was impermissible delegation); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (setting forth a "heightened procedural requirement" in which the district court must follow "additional procedures and make special findings" for conditions of supervised release that implicate "a particularly significant liberty interest," such as mandating antipsychotic medication or certain invasive types of physiological testing, as these procedures and medicines impinge the "constitutional interest inherent in avoiding unwanted bodily intrusions or manipulations.").[56] *See also United States v. Iverson*, 874 F.3d

[56] The use of one physiological testing instrument, the Penile Plethysmograph (PPG), has been contentious. While its use has been approved sporadically approved, *see, e.g.*, United States v. Dotson, 324 F.3d 256 (4th Cir. 2003) (upholding PPG testing condition as useful for the treatment of sex offenders and within the discretion of the district court), courts in recent years have expressed significant misgivings regarding its use. *See* United States v. Rock, 863 F.3d 827 (D.C. Cir. 2017)(striking PPG testing condition because it "implicates significant liberty interests and would require, at a minimum, a more substantial justification than other typical conditions of supervised release."); United States v. Medina, 779 F.3d 55 (1st Cir. 2015) (finding the PPG testing condition without substantial justification and thus "facially unreasonable"; deeming PPG testing an "extraordinarily invasive supervised release condition"); United States v. McLaurin, 731 F.3d 258 (2d Cir. 2013) (finding the PPG testing condition to be an "extraordinarily invasive" condition such that "there is a line at which the government must stop. Penile plethysmography testing crosses it."; to impose such a "demeaning" condition, the district court must at a minimum, make findings, sufficiently informative and

855 (5th Cir. 2017)(vacating condition that defendant "follow all other lifestyle or restrictions or treatment requirements imposed by the therapist" because allowing therapist to set restrictions on conduct usurped judge's sentencing authority).[57]

(i) *mandating medication in limited contexts, see, e.g., United States v. Mike*, 632 F.3d 686 (10th Cir. 2011), *cert. denied*, 135 S. Ct. 2891 (June 29, 2015) (rejecting defendant's overbreadth challenge to the condition that he take all prescribed medications, finding instead that "in the context in which they were placed" the requirement is limited to "those medications that are related to his mental health programs."). *But see United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014) (finding condition that defendant take "any and all prescribed medication," was impermissibly vague and positing numerous unanswered questions such as: "why is a probation officer, rather than a physician or nurse or pharmacist, entrusted with directing *which* medications the defendant must take?"). *See also United States v. Cope*, 527 F.3d 944 (9th Cir. 2008) (explaining that a medication requirement condition is supportable when construed narrowly and when it does not include any medication which implicates a "particularly significant liberty interest" such as antipsychotics; if the condition does involve medications such as antipsychotics, the district court must satisfy "heightened" requirements and make "on-the-record, medically-grounded findings" that court-ordered medication is necessary to accomplish a section 3583(d)(1) factor and involves no greater deprivation of liberty than reasonably necessary).

(ii) *requiring Abel testing* (a diagnostic exam for sex offenders that measures "visual reaction time" to non-erotic images of adults and children in order to determine his sexual interest), *see, e.g., United States v. Teeple*, 447 F. App'x 712 (6th Cir. 2012) (unpub) (upholding Abel testing condition as reasonably related to the defendant's status as a sex offender, the need for deterrence and public protection, and the defendant's correctional treatment). *But see United States v. T.M.*,

defendant-specific for appellate review, that the test is "therapeutically beneficial," that its benefits substantially outweigh any costs to the subject's dignity, that no less intrusive means exists, and that it is narrowly tailored to serve a "compelling government interest"); United States v. Weber, 451 F.3d 552 (9th Cir. 2006) (vacating the PPG testing condition because the district court failed to make "on-the-record medically-grounded findings" demonstrating that the significant liberty interest and the degree of intrusion is reasonably necessary and maintaining that the burden is on the government, not the defendant, to establish at the time of sentencing that the condition is reasonably necessary).

[57] Similarly problematic are conditions that seek to regulate adult relationships through supervision. *See, e.g.*, United States v. Rock, 863 F.3d 827 (D.C. Cir. 2017)(striking condition that defendant notify the probation office of "any significant romantic relationship" as unconstitutionally vague)(citing United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010)).

330 F.3d 1235 (9th Cir. 2003) (vacating sex offender conditions, including Abel testing, as not reasonably related to deterrence, public safety, or rehabilitation, where the defendant had a twenty-year-old kidnapping conviction involving undressing and nude picture-taking of an eight-year-old girl and a forty-year-old dismissed charge of a sexual relationship with a minor).

c. requiring the defendant to submit to random polygraph testing, *see, e.g.*, *United States v.* Brand, 597 F. App'x 624 (11th Cir. 2015) (unpub) (polygraph testing reasonable in light of the defendant's lack of respect for the law, the offense, and his personal history); *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); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (upholding a polygraph testing condition but explaining that defendant retains his Fifth Amendment rights during any such testing that he may invoke and remain silent; "should the government desire defendant to answer, it may afford his answers the protection of use and derivative use immunity.").

d. prohibiting the defendant from possessing or viewing pornographic material, *see, e.g.*, *United States v. Miller*, 665 F.3d 114 (5th Cir. 2011) (holding that a condition restricting viewing any sexually stimulating or sexually oriented material was not overbroad where one video in his possession depicted a minor engaged in sexual activity with a male adult while a female adult held the child in place, because the presence of adults in the video permitted the conclusion that the defendant's interest in sexually stimulating materials involving adults was "intertwined with his sexual interest in minors"); *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. Wagner,* 872 F.3d 535, 542-543 (7th Cir. 2017)(condition that left decision the decision of whether defendant could view adult pornography to treatment provider selected by the probation department was "impermissible delegation" and would require specific evidence before the district court to support its imposition);*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).

e. 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).

f. authorizing probation to discuss third-party risks with employers, *see, e.g., 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). *But see United States v. Mike*, 632 F.3d 686 (10th Cir. 2011), *cert. denied*, 135 S. Ct. 2891 (June 29, 2015) (finding infirm the conditions requiring the defendant to notify potential employers or educational programs about his criminal convictions because such notification constitutes an "**occupational** restriction," and the court did not make the required specific findings as set forth in *United States v. Souser*, 405 F.3d 1162 (10th Cir. 2003) under §5F1.5.

g. limiting computer or Internet access, *see, e.g.*, *United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017)(upholding prohibition on use of any digital device to access pornography of any kind where defendant had distributed child pornography by use of a computer); (*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. Alvarez*, 478 F.3d 864 (8th Cir. 2007) (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 any location without the prior approval of his probation officer); *But see United States v. Wagner,* 872 F.3d 535, 542-543 (7th Cir. 2017)(poor wording of condition seemingly giving sex offender treatment provider discretion over aspects of internet use "vague" and leading to "absurd result"); *United States v. Duke,* 788 F.3d 392 (5th Cir. 2015) (vacating a special condition of supervised release that prohibited defendant from accessing computers or the Internet for the rest of his life because the scope coupled with the duration of the condition contravened § 2583(d)'s requirement that release conditions be "narrowly tailored" to avoid imposing a greater deprivation than was reasonably necessary and because the ban would completely preclude the defendant from

"participating in modern society" in light of the "ubiquity and importance of the Internet" in using the Internet for innocent purposes such as paying bills online or taking online classes); *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).

F. §5E1.1 (RESTITUTION)

Section 5E1.1 requires courts to order a term of restitution for identifiable victims. Restitution is mandatory under §5E1.1 and 18 U.S.C. § 2559 for offenses that involve the sexual exploitation of children and child pornography. *Paroline v. United States*, 134 S. Ct. 1710, 1728 (2014). Restitution is proper under section 2259 only to the extent that the defendant's offense proximately caused the victim's losses. *Id.* at 1720, 1722. Even mere possessors of child pornography cause proximate harm to the victims. *Id.* Because child pornography victims suffer "continuing and grievous harm as a result of [knowing] that a large, indeterminate number of individuals have viewed and will in the future view images of the sexual abuse she endured[,]" all persons who reproduce, distribute, or possess child pornography play a part in this tragedy and are liable for restitution. *Id.*

In *Paroline*, the Supreme Court considered the difficult task of determining the appropriate *amount* of restitution—i.e. how much of the victim's losses are attributable to the defendant's conduct. The defendant was convicted of possessing child pornography and admitted to possessing a total of 150-300 images, two of which were images of the victim at issue. The victim sought $3.4 million in damages, and the Fifth Circuit sitting *en banc* held that each defendant who possessed the victim's images should be made liable for the victim's entire loss of $3.4 million from the trade in her images. In vacating and remanding, the Court held that there is a general proximate cause requirement for all losses under section 2259, and that the court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general

losses." The Court provided further guidance to district courts by enumerating factors to consider in determining the amount of restitution:

1. the victim's total losses caused by traffic in her images,
2. the number of past criminal defendants who contributed to those losses,
3. reasonable predictions of the number of future offenders likely to be caught and convicted for contributing,
4. an estimate of the broader number of offenders involved,
5. whether the defendant reproduced or distributed the images,
6. whether the defendant had any connection to the initial production of the images, and
7. how many images of the victim the defendant possessed.

In the case of a "possessor like Paroline" who played a relatively small part in the victim's overall losses, the Court held that the amount would "not be severe" but would also not be "a token or nominal amount." However, the Court declined to "prescribe a precise algorithm" and urged the courts to use "discretion and sound judgment."

Selected Post-*Paroline* cases. *United States v.* Osman, 853 F.3d 1184 (11th Cir. 2017)(affirming award of $16,250 for future psychiatric care where defendant had committed contact sexual abuse against victim); United *States v.* Darabise, 164 F. Supp.3d 400 (E.D.N.Y. 2016) (applying the *Paroline* analysis to limit the restitution to victims sought); United States v. *Beckman*, 786 F.3d 672 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 270 (Oct. 5, 2015) (applying the *Paroline* analysis in upholding a $3,000 per victim restitution order); *United States v. Rogers*, 758 F.3d 37 (1st Cir. 2014) (upholding a restitution order of $3,150 to victim who appeared in nine video clips that defendant possessed);

G. §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.[58] Second, a lesser restriction can limit the "terms" of a

[58] *See* United States v. Daniels, 541 F.3d 915 (9th Cir. 2008) (approving a condition 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").

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.

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 were occupational restrictions because the restrictions did not prohibit him from working in his profession as an art director or set decorator). Occupational restrictions must be supported by specific findings as to the relationship of the offense and the public protection necessity.[59] See United States v. Dunn, 777 F.3d 1171 (10th Cir. 2015) (that stated, "given the required scrutiny which we give to occupational restrictions, we conclude we must vacate the occupational restriction relating to computer use and monitoring and remand for further consideration, including making the findings required before imposition of any occupational restriction.")

H. §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)).

I. §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.

[59] *See* United States v. Dunn, 777 F.3d 1171 (10th Cir. 2015) (that stated, "given the required scrutiny which we give to occupational restrictions, we conclude we must vacate the occupational restriction relating to computer use and monitoring and remand for further consideration, including making the findings required before imposition of any occupational restriction.")' United States v. Du, 476 F.3d 1168 (10th Cir. 2007) (specific findings are required before a court imposes any employment conditions that are considered "occupational restrictions").

V. CHAPTER FIVE: POST-BOOKER VARIANCE UNDER 3553(a)

A. First Circuit

United States v. Crespo-Rios, 787 F.3d 34 (1st Cir. 2015), *aff'd on remand*, 2015 WL 6394256 (Oct. 19, 2015). The district court erred in sentencing defendant because there was an inadequate justification for the extreme variance imposed. It focused exclusively on defendant's potential for rehabilitation and did not explain how it weighed the other factors in 18 U.S.C.S. § 3553(a) or why the particular sentence was appropriate in light of those factors.

United States v. Medina, 779 F.3d 55 (1st Cir. 2015). District court committed plain error in imposing a twenty-year term of supervised release for defendant's violation of SORNA, 18 U.S.C.S. § 2250, because the term "sex offense" in U.S. Sentencing Guidelines Manual § 5D1.2(b) did not encompass a SORNA violation for failing to register as a sex offender.

B. Second Circuit

United States v. Jenkins, 854 F.3d 181 (2nd Cir. 2017). The Second Circuit vacated and remanded the defendant's 225-month sentence for possession and transportation of child pornography. Notwithstanding the fact that the sentence imposed was within the properly calculated guideline range, the court held that the term of imprisonment was "shockingly high" and the conditions of the 25-year term of supervised release were "excessively severe." The court cited prior circuit decisions emphasizing that district courts must take particular care to reconcile sentences under §2G2.2 with the factors set forth in 18 U.S.C. § 3553(a) because the guideline has been developed "at the direction of Congress" rather than by the expertise of the Sentencing Commission. The court noted that the sentencing range produced by §2G2.2 approached the statutory maximum and failed to distinguish between the most dangerous defendants and others. The Second Circuit determined that the district court's failure to consider these concerns resulted in a substantively unreasonable sentence.

United States v. Brown, 843 F.3d 74 (2d Cir. 2016) Sentence of 720 months for three counts of production of child pornography, 240 months for each count to be served consecutively, and two counts of possession of child pornography, to be served concurrently, reasonable because of the seriousness of the crimes. The sentence imposed was below the guideline range of 110 years, down from life imprisonment because of statutory maximums. The defendant had sexual contact repeatedly with multiple young victims and the fact that the victims were asleep when some of the visual depictions and videos were taken does not make this conduct any less serious.

United States v. Cossey, 632 F.3d 82 (2d Cir. 2011). The district court plainly erred by imposing a sentence based on its conclusion that the defendant would reoffend based on genetic composition. While recidivism is one of many factors that the sentencing court may consider, the court cannot rely solely on this factor in imposing a sentence, especially where the court's belief of likely recidivism is based on an unsupported assumption of defendant's genetic predisposition to do so.

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010). The Second circuit vacated the within-guideline sentence 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 § 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 [g]uidelines range based solely on a policy disagreement with the [g]uidelines, 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."

C. THIRD CIRCUIT

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 child pornography guidelines based on Congress' role in their development. 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. 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.

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.

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 and 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.

D. FOURTH CIRCUIT

United States v. Zuk, 874 F.3d 398 (4th Cir. 2017). The Fourth Circuit remanded the defendant's 26-month time-served sentence for possessing child pornography, holding that the sentence was substantively unreasonable under the 18 U.S.C. § 3553(a) sentencing factors. Given the "egregious" nature of the defendant's conduct, a 90 percent variance based "almost exclusively" on the defendant's post-arrest diagnosis of mild autism was substantively unreasonable. The court stated that the sentence was "simply below the bare minimum necessary" to reflect the seriousness of the offense, promote respect for the law and provide just punishment.

United States v. Dowell, 771 F.3d 162 (4th Cir. 2014). The Fourth Circuit held that a sentence of 960 months for production and transportation of child pornography was substantively reasonable. Defendant received this sentence due in part to a 5-level specific offense character increase under §2G2.2(b)(5) for being "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor" and a 5-level increase above the base offense level under §4B1.5(b)(1) because "the defendant engaged in a pattern of activity involving prohibited sexual conduct." Defendant argued that receiving both enhancements constituted double counting, but the Fourth Circuit held that there is a well-established

principle that double counting is appropriate unless the Sentencing Guidelines expressly prohibits it. The Fourth Circuit found it improper to apply the "vulnerable victim" enhancement under §3A1.1(b)(1) simply because of the low age of the victims when the defendant had already received the specific offense characteristic for a minor victim under §2G2.1(b)(1)(A) for victims being under the age of twelve. However, the Fourth Circuit found the error to be harmless because the defendant's offense level would be above the maximum offense level of 43, with or without the "vulnerable victim" enhancement.

E. FIFTH CIRCUIT

United States v. Robinson, 741 F.3d 588 (5th Cir. 2014). A sentencing court commits procedural error if it fails to appreciate its discretion to consider evidence of cooperation under 18 U.S.C. § 3553(a). The error was not harmless to the defendant and the sentencing court had the power to consider defendant's cooperation under statutory sentencing factors in the absence of substantial assistance motion.

United States v. Fraga, 704 F.3d 432 (5th Cir. 2013). The defendant's sentence was not substantively unreasonable where he received 27 months, which was a 9-month upward departure from the sentencing guideline range. It was not unreasonable for a judge to weigh his history of repeated assaults, several sexual in nature, against women and girls more heavily in her considerations than the fact that the defendant cooperated with the government in another case. His testimony turned out to be unnecessary in that case. The judge's upward departure was based on 18 U.S.C. § 3553(a) and the nature and circumstances of the offense and the defendant's history and characteristics and a need to deter the defendant's future criminal conduct and protect the public.

F. SIXTH CIRCUIT

United States v. Robinson, 778 F.3d 515 (6th Cir.), *cert. denied*, 135 S. Ct. 2904 (June 29, 2015). The defendant's sentence of one-day imprisonment, followed by five years of supervised release, following a guilty plea for knowing possession of over 7,100 images, was substantively unreasonable. The district court failed to consider any of the 18 U.S.C. § 3553(a) factors and the mitigating evidence presented was insufficient to justify the remarkable variance form the guideline recommendations.

United States v. Richards, 659 F.3d 527 (6th Cir. 2011). The Sixth Circuit found that a defendant's below-guideline sentence of 16 years' imprisonment for production, distribution, advertising, and possession of child pornography for operating a website featuring pornography involving underage adolescent males was reasonable. The government argued on appeal that the sentence was only one year greater than the mandatory minimum sentence on the production of child pornography alone, but although

the court found "troubling aspects" in the district court's rationale, including its mitigation of the seriousness of the defendant's actions "by noting that his relationship with minors was to a certain extent consensual," it found the district court had thoroughly addressed the parties' arguments and understood its sentencing options. The district court had stated "[i]f 16 years of sex offender, mental health, and addiction treatment cannot change [the defendant's 'taste for sex with adolescents'] certainly 30 or 40 years has no better chance of doing so" and had found the eight years of supervised release after imprisonment to be an "extensive period" that put "substantial limitations on his freedom and provide more opportunity for treatment and close supervision." The Sixth Circuit found that "[w]hile we cannot say that this is the sentence we would have given," the variance did not exceed the discretion Gall gives district courts.

G. SEVENTH CIRCUIT

United States v. Martin, 718 F.3d 684 (7th Cir. 2013). The defendant appealed his sentence for possession of child pornography. The defendant argued that the sentence was unreasonable because he had multiple significant mental health and substance abuse issues. The case was remanded because the lower court failed to address the defendant's argument that he was a low risk for recidivism now that he was receiving treatment. The case was also remanded because the lower court failed to consider the defendant's argument that the sentencing guidelines produce disproportionately long sentences for child-pornography possessors. However, the appellate court rejected the defendant's argument that a below the guidelines sentence was necessary to avoid unwarranted sentencing disparities.

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. 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."

H. EIGHTH CIRCUIT

United States v. Woodall, 782 F.3d 383 (8th Cir. 2015). The defendant appealed the district court's special condition of his supervised release prohibiting his consumption of alcohol and entering establishments that derive their primary source of income from alcohol sales. The eighth circuit court vacated the special condition holding that since the defendant has no history of alcohol influencing him to be a danger to society, the alcohol prohibition would be a greater deprivation of liberty than necessary to achieve the goals of rehabilitation and protection considered by 18 U.S.C. § 3553(a).

United States v. Franik, 687 F.3d 988 (8th Cir. 2012). The defendant pled guilty to forcibly taking a 13-year-old girl across state lines, tying her to a tree in the woods, molesting her, and then leaving her in the woods. He received 360 months' incarceration which was 33 months above the guideline range. The Eighth Circuit held the district court's determination that the guidelines did not take into account the defendant's criminal history, which indicated his high risk to reoffend, and that the extraordinary trauma to the victim and her family also justified a higher sentence. The defendant had six prior convictions, only one of which contributed to his sentence under the guidelines. The district court was not unreasonable to not take more into consideration the facts that the defendant was under the influence of methamphetamines at the time of his crime, that he never consummated the full extent of the sexual acts with the victim because he decided it was wrong and that he did not use a weapon.

United States v. Hammond, 698 F.3d 679 (8th Cir. 2012). The Eighth Circuit found that the district court did not err in denying a downward variance for a defendant convicted of enticement of a minor to engage in prohibited sexual activity, even though the defendant believed the victim to be 13, rather than 11, years old. The court applied an 8-level enhancement because the offense involved a child under the age of 12 because the victim was, in fact, 11 years old. The court held that ignorance of the victim's age is not a characteristic that merits a downward variance under section 3553(a)..

United States v. Gnavi, 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 percent 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).

I. NINTH CIRCUIT

United States v. Shouse, 755 F.3d 1104 (9th Cir. 2014). The Ninth Circuit affirmed the district court's imposition of a 50-year sentence for a defendant convicted of one count of child pornography and a separate count of doing so while a registered sex offender. The sentence was adequately supported by the judge's discussion of the "horrific," "dangerous," and "predatory" nature of the offense and the record was clear that the judge had considered all of the § 3553(a) factors before selecting the sentences imposed and directing that they run consecutively rather than concurrently.

J. TENTH CIRCUIT

United States v. Wireman, 849 F.3d 956 (10th Cir. 2017). The Tenth Circuit affirmed the defendant's six concurrent 240-month sentences for distribution and possession of child pornography. The court rejected the defendant's claim that the district court did not adequately address his policy critiques of §2G2.2, stating that the district court was not required to defend §2G2.2 or otherwise do or say anything more. The circuit court nonetheless encouraged district courts to go beyond the bare minimum and directly address a defendant's arguments for leniency even if not required to do so.

United States v. Grigsby, 749 F.3d 908 (10th Cir. 2014), *cert. denied*, 136 S. Ct. 2031 (2016). The Tenth Circuit found that a sentence of 260 years for the production of child pornography was reasonable. The district court found the total offense level was level 43, but that the statutory maximum sentence was 260 years. Because 260 years is less than life, the court sentenced him to 260 years. Relying on the Commission's 2012 Report to Congress: Federal Child Pornography Offenses (Dec. 2012) and *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), the defendant argued that §2G2.1 is a flawed guideline and the court should have instead sentenced him only on consideration of the factors in 18 U.S.C. § 3553(a). The circuit court found that although the Report "urg[ed] the Commission and Congress to revise the non-production sentencing scheme," the Report had also observed that "[s]entencing in federal production cases has been less controversial than in non-production cases." The court held that the district court correctly included the guidelines in its consideration, even if the Commission did not use an empirical approach, and rejected the idea that a guideline provision is unreasonable because it might not be based on empirical data.

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 18 U.S.C. § 3553(a) factors, and considered the defendant "as an individual."

K. ELEVENTH CIRCUIT

United States v. Cubero, 754 F.3d 888 (11th Cir.), cert. *denied*, 135 S. Ct. (Dec. 6, 2014). The defendant appealed his 151-month sentence for pleading guilty to distribution and possession of child pornography. The district court rejected the defendant's argument that distribution is an essential element of 18 U.S.C. Section, 2252(a)(2) and was therefore taken into account when calculating his base offense level. Distribution is not an essential element of 2252(a)(2) because a violation can also be based on receipt or reproduction of child pornography. The district court also rejected the defendant's argument that his 2-level increase for distribution under 2G2.2(b)(3)(F) was impermissibly duplicative of his base offense level calculated under 2G2.2(a)(2), which covers multiple possible violations of 2252(a)(2). There was no double counting since the sentencing commission properly differentiated between the "potential harm caused by receipt and distribution."

United States v. Flanders, 752 F.3d 1317 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1188 (2015). The defendant's life sentences for sex trafficking and related offenses were not substantively unreasonable.

United States v. Curtis, 513 F. App'x 823 (11th Cir. 2013) (unpub). Imposition of a 360-month sentence following convictions for sex trafficking of a minor and production of child pornography - 18 U.S.C. Sections, 1591(a)(1), (b)(2) and 2251(a) & (e) - was substantively reasonable, even though the defendant had only a minor criminal history, where the defendant lacked remorse, blamed the victim and continued to deny that he knew the victim's age. The sentence was necessary to protect the public.

United States v. Lebowitz, 676 F.3d 1000 (11th Cir. 2012). The Eleventh Circuit found that a within guideline sentence of 320 months was substantively reasonable for production of child pornography and attempting to entice a child to engage in unlawful sexual activity, even though the district court noted that the defendant had a history of doing "many good things" and that his conduct was not the "most extreme." The court found that the defendant, who was HIV positive, engaged in the "clandestine exposure of his minor victims to even a minimal risk of HIV" and this exposure was relevant to his offense conduct, and was therefore properly considered by the court.

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."

L. D.C. CIRCUIT

United States v. Pyles, 862 F.3d 82 (D.C. Cir. 2017). In affirming the defendant's within-guidelines sentence of 132 months for possession of child pornography and traveling with intent to engage in illicit sexual acts, the court held that the district court did not commit procedural error by not explicitly addressing each and every non-frivolous mitigation argument on the record when pronouncing the sentence. The D.C. Circuit held that, although a district court must consider the defendant's non-frivolous mitigation arguments before imposing a sentence, it is not required to individually and expressly address each argument on the record if it gives a reasoned basis for the sentence.

United States v. Fry, 851 F.3d 1329 (D.C. Cir. 2017). The court found the within-guideline sentence of 108 months for possession of child pornography reasonable because the offense conduct involved more than possession. In the instant case, the defendant offered to give an undercover agent pornographic materials if the agent would allow him to watch the agent sexually abuse a victim. The court stated that this bartering behavior would have created a new victim and was therefore serious conduct.

United States v. Russell, 600 F.3d 631 (D.C. Cir. 2010). The appellate court upheld a sentence that included a 30-year supervised release term for a violation of 18 U.S.C. § 2423(b) as substantively reasonable. The appellate court found the special condition of the defendant's supervised release which prohibited him from possessing or using a computer for any reason to be substantively unreasonable and not in keeping with the sentencing goals of specific deterrence and rehabilitation.

PRIMER

SEX OFFENSES:
SEXUAL ABUSE AND FAILURE TO REGISTER OFFENSES

May 2018

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

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The purpose of this primer is to provide a general overview of the statutes, sentencing guideline issues, and case law relating to sentencing of sexual abuse offenses and failure to register offenses. Although this primer identifies some of the issues and cases related to the sentencing of these offenses, it is not intended to be comprehensive or a substitute for independent research.

I. RELEVANT STATUTES

A. THE STATUTORY SCHEME

Offenses Against the Person: Assault with Intent to Commit Sexual Abuse

18 U.S.C. § 113(a)(1) (Assault with Intent to Commit a Violation of 18 U.S.C. §§ 2241 or 2242)

With enactment of the Violence Against Women Act of 2013, section 113(a)(1) was amended to prohibit assault with intent to commit murder or a violation of title 18, section 2241 (Aggravated Sexual Abuse) or 2242 (Sexual Abuse). Subsection (a)(1) has no statutory minimum penalty and a maximum penalty of 20 years.

18 U.S.C. § 113(a)(2) (Assault with Intent to Commit a Violation of 18 U.S.C. §§ 2243 or 2244)

With enactment of the Violence Against Women Act of 2013, section 113(a)(2) was amended to prohibit assault with intent to commit any felony, except murder or a violation of title 18, section 2241 or 2242. Previously, section 113(a)(2) had excluded assault with intent to commit a violation of Chapter 109A, including sections 2241, 2242, 2243, and 2244. The effect of the statutory change is that an assault with intent to commit a violation of section 2243 (Sexual Abuse of a Minor or Ward) or 2244 (Abusive Sexual Contact) may now be prosecuted under section 113(a)(2). Subsection (a)(2) has no statutory minimum penalty and a maximum penalty of ten years.

Offenses Against the Person: Sexual Abuse (Chapter 109A of title 18)

18 U.S.C. § 2241 (Aggravated Sexual Abuse)

Section 2241(a) prohibits knowingly causing another person to engage in a sexual act by using force against that person or by threatening or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping. Subsection (a) includes attempt, and has no statutory minimum penalty and a maximum penalty of life.

Section 2241(b) prohibits knowingly rendering another person unconscious and engaging in a sexual act with that person or administering to another person a drug or intoxicant by force or threat of force or without knowledge or permission of that person and substantially impairing the ability of that person to appraise or control conduct and engaging in a sexual act with that person. Subsection (b) includes attempt, and has no statutory minimum penalty and a maximum penalty of life.

Section 2241(c) prohibits crossing state lines with the intent to engage in a sexual act with a person under the age of 12 years; knowingly engaging in a sexual act with a person under the age of 12 years; or knowingly engaging in a sexual act under circumstances described in subsections (a) or (b) with a person who is at least 12 years old and is not yet 16, and who is at least four years younger than the person engaging in the act. Pursuant to section 2241(d), the government does not have to prove that the defendant knew the other person engaging in the sexual act was under 12 years old. Subsection (c) includes attempt, and has a statutory minimum penalty of 30 years in prison and a maximum penalty of life. If the defendant was previously convicted of an offense under subsection (c) or an analogous state offense, there is a statutory minimum penalty of life in prison.

18 U.S.C. § 2242 (Sexual Abuse)

Section 2242 prohibits knowingly causing another person to engage in a sexual act by threatening or placing that person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or engaging in a sexual act with another person if that person is not capable of appraising the nature of the conduct or is physically incapable of declining participation in or communicating unwillingness to engage in that sexual act. Section 2242 includes attempt, and has no statutory minimum and has a maximum penalty of life.

18 U.S.C. § 2243 (Sexual Abuse of a Minor or Ward)

Section 2243(a) prohibits knowingly engaging in a sexual act with another person who has attained 12 years but not 16 years and is at least 4 years younger than the person so engaging. Section 2243(a) includes attempt, and has a statutory maximum penalty of 15 years in prison.

Section 2243(b) prohibits knowingly engaging in a sexual act with another person in official detention and under the custodial, supervisory, or disciplinary authority of the person so engaging. Section 2243(b) includes attempt, and has a statutory maximum penalty of 15 years in prison.

Pursuant to section 2243(c)(1), it is a defense that the defendant reasonably believed that the other person had reached age 16. Pursuant to section 2243(c)(2), it is a

defense that the persons engaging in the sexual act were at that time married to each other. Pursuant to § 2243(d), however, the government does not have to prove that the defendant knew the age of the other person engaging in the act, or that the requisite age difference existed between the people involved in the act.

18 U.S.C. § 2244 (Abusive Sexual Contact)

Section 2244(a) prohibits knowingly engaging in or causing sexual contact with or by another person if doing so would violate 18 U.S.C. §§ 2241, 2242, or 2243, had the sexual contact been a sexual act. If the contact would have violated § 2241(a) or (b), there is a statutory maximum penalty of ten years in prison. If the contact would have violated § 2241(c), there is a statutory maximum penalty of life in prison. If the contact would have violated § 2242, there is a statutory maximum penalty of three years in prison. If the contact would have violated § 2243(a) or (b), there is a statutory maximum penalty of two years in prison.

Section 2244(b) prohibits knowingly engaging in sexual contact with another person without that other person's permission. This subsection has a statutory maximum of two years in prison.

Subsection 2244(c) doubles the statutory maximum in cases that otherwise violate this section (except section 2244(a)(5) which relates to contact that would have violated section 2241(c)) and involve an individual who is younger than 12 years old. Section 2244 does not include attempts.

18 U.S.C. § 2245 (Offenses Resulting in Death)

Anyone who murders an individual while in the course of committing any of the offenses listed above[1] should be sentenced to death or to any term of years or for life.

18 U.S.C. § 2246 (Definitions)

The definitions relevant to this primer appear below:

(2) the term "sexual act" means:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

[1] In addition to the offenses listed above, § 2245 also includes offenses committed under 18 U.S.C. §§ 1591, 2251, 2251A, 2260, 2421, 2422, 2423, and 2425.

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

18 U.S.C. § 2247 (Repeat Offenders)

Section 2247 states if the defendant has violated one of the above statutes after a prior sex offense conviction, the statutory maximum is twice the term otherwise provided (unless § 3559(e) (Mandatory life imprisonment for repeated sex offenses against children) applies).

The term "prior sex offense conviction" means a conviction for an offense: (1) under chapter 109A, 110, or 117 of title 18 or 18 U.S.C. § 1591; or (2) under State law for an offense consisting of conduct that would have been an offense under the chapters listed above if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. § 2426(b).

18 U.S.C. § 2248 (Mandatory Restitution)

Section 2248 mandates an order of restitution for any offense listed above. The defendant shall pay the full amount of the victim's losses, which include: (1) medical services relating to physical, psychiatric, or psychological care; (2) physical and occupational therapy or rehabilitation; (3) necessary transportation, temporary housing, and child care expenses; (4) lost income; (5) attorney fees, plus any costs incurred in

obtaining a civil protection order; and (6) any other losses suffered by the victim as a proximate result of the offense.

Offenses Related to Registration as a Sex Offender (Chapters 109B and 110A of title 18)

18 U.S.C. § 2250 (Failure to Register)

Section 2250(a) prohibits knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA) if the defendant is (1) required to register under the Act, or (2) is a sex offender as defined for purposes of the Act by reason of a conviction under Federal law including the Uniform Code of Military Justice, the law of the District of Columbia, or Indian tribal law, or travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country. Section 2250(b) prohibits whoever is required to register under SORNA to knowingly fail to provide information required by SORNA relating to intended travel in foreign commerce and engage in the intended travel in foreign commerce. Section 2250(b) includes attempts and has a statutory maximum penalty of ten years in prison.

Pursuant to § 2250(c), it is an affirmative defense that: (1) uncontrollable circumstances prevented the individual from complying; (2) he or she did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; (3) and he or she complied as soon as such circumstances ceased to exist.

Section 2250(d) provides for a statutory minimum of five years and a statutory maximum penalty of thirty years in prison for any individual described in subsection (a) who commits a crime of violence under Federal law. This penalty is in addition to, and runs consecutive to, the punishment provided in subsection (a) or (b).

18 U.S.C. § 2260A (Penalties for Registered Sex Offenders)

Section 2260A provides for a ten-year term of imprisonment for anyone who is required by Federal or other law to register as a sex offender and who commits a felony offense involving a minor violating, among others, 18 U.S.C. §§ 2241-2245. The ten-year sentence is in addition to, and runs consecutive to, any sentence imposed for the offense under the provisions listed in this section.

B. Legal Issues Relating to the Statutes

1. "Force" under 18 U.S.C. § 2241(a)

How courts define the term "force" in section 2241(a) is important because an offense involving conduct described in section 2241(a), prompts cross references in the guidelines, and because such conduct subjects the defendant to an enhancement in §2A3.1.

The element of "force" in section 2241(a) "is satisfied by showing the use of such physical force as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim."[2] A codefendant's use of force during an aggravated sexual assault sufficient to prevent the victim from escaping constitutes force sufficient to enhance the defendant's sentence.[3]

2. Attempt under 18 U.S.C. § 2241(a)

Another key issue revolves sexual contact becomes attempted aggravated sexual abuse that is prohibited by § 2241(a). A defendant is criminally liable for aggravated sexual abuse where the circumstances evince an intent to cause another person to engage in a sexual act by use of force and he has taken a substantial step to do so. For example, in *United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003), the victim testified that the defendant "placed his hand on her vagina and tried to insert his finger, but was prevented by her physical resistance" before he stopped altogether. The court held that the evidence was sufficient for aggravated sexual abuse because "all of the sexual contact that [the defendant] did accomplish . . . was committed, according to the victim's testimony, over her express verbal objection and against her physical resistance, by means of physical force").

3. Mandatory Life Sentence under 18 U.S.C. § 2241(c)

A key issue is whether a prior conviction qualifies for the mandatory life sentence under section 2241(c) for having committed the offense after having been convicted of another federal offense under section 2241(c) or a state offense that would have been a federal offense under the provision. A state offense cannot qualify as a predicate offense for the enhanced penalty provision if all the required elements in section 2241(c) are not met.[4]

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[2] *See also* United States v. Bercier, 506 F.3d 625, 628 (8th Cir. 2007) (quotation omitted) (holding that the evidence was sufficient to sustain a conviction under 18 U.S.C. § 2241(a) where the victim testified that the defendant "pushed her back on the bed and would not let her push him away when he put his head and hand up her shirt and began touching and kissing her breasts[,]" and then "forcibly held her legs apart while he performed oral sex"). United States v. Sharpfish, 408 F.3d 507, 510-11 (8th Cir. 2005) (finding an adequate showing of force where the evidence showed that the defendant "had a great size advantage over the victim: he was said to weigh 235 to 240 pounds, whereas [the victim] was three years old," the defendant "had used his size advantage to brutalize the child over time by beating and kicking her," and the victim testified that the defendant would "lay on her, despite her telling him 'no,' and that he hurt her 'down there'").

[3] *See* United States v. Bowman, 632 F.3d 906, 911-12 (5th Cir. 2011).

[4] *See* United States v. Jones, 748 F.3d 64, 73-74 (1st Cir. 2014) (state offense for aggravated sexual assault with a victim under the age of 13 did not qualify for the mandatory life sentence because the state offense did not also require proof that the defendant acted with an intent to degrade, humiliate, arouse, etc., as required by § 2246's definition of a "sexual act").

4. Knowledge of Incapacitation under 18 U.S.C. § 2242

Whether the statute requires that the defendant knew the victim was incapacitated in order to support the conviction is a close issue.[5]

5. Venue for Prosecution of 18 U.S.C. § 2250

One key issue under SORNA is the issue of where proper criminal venue lies for purposes of updating SORNA registration. The locus of the crime is properly in the place the offender is *currently* residing, employed or a student because SORNA does not require a sex offender to update his registration in a state to reflect that he is moving out of the state. *United States v Nichols*, 136 S. Ct. 1113 (2016).

6. "Conviction" within Meaning of 18 U.S.C. § 2250

A nolo contendere plea in which adjudication is withheld can be a prior conviction under SORNA leading to the requirement to register as a sex offender. *United States v. Bridges*, 741 F.3d 464 (4th Cir. 2014) (finding defendant's 2-year probation term, a sentence that attached immediately and withheld only formal adjudication of guilt pursuant to his nolo contendere plea a penal consequence, thus a conviction under definition in SORNA).

7. Categorical Approach: "Sex Offense" Under 18 U.S.C. § 2250

Whether the district court correctly concludes that a defendant is required to register under SORNA is a critical issue. Failing to properly register under SORNA is a criminal offense only if the defendant's prior conviction was for a "sex offense" within the meaning of SORNA. To make this determination, courts generally select either the categorical or modified categorical approach, depending on whether the statute is divisible, and compare the statute at issue to the definitions in 42 U.S.C. § 16911.[6] *See generally United States v. Faulls*, 821 F.3d 502, 511-12 (4th Cir. 2016)(discussing applicability of different approaches).[7] However, if the federal statute refers to "the specific way in which

[5] *See* United States v. Bruguier, 735 F.3d 754, 759-760 (8th Cir. 2013) (en banc) (finding "knowingly" in the statute requires not only that the defendant knowingly engaged in a sexual act, but that he also knew the victim was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act); United States v. James, 810 F.3d 674, 682 (9th Cir. 2016) (defining "physically incapable" in section 2242(2)(B) broadly in includes case where victim was severely disabled by cerebral palsy and incapable of verbally communicating unwillingness to engage in sexual act and physically incapable of declining participation).

[6] *See* Taylor v. United States, 495 U.S. 575 (1990) (categorical approach); Descamps v. United States, 133 S. Ct. 2276 (2013) (modified categorical approach).

[7] In Faulls, the Fourth Circuit applied the modified categorical approach to conclude that interstate domestic violence under 18 U.S.C. § 2261(a)(2) qualifies as a "sex offense" under SORNA, because one of the predicate components of interstate stalking can be "a criminal offense that has as an element involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(5)(A)(i). Where the jury found the defendant guilty of interstate domestic

an offender committed the crime on a specific occasion" – for example, SORNA's definition of a "sex offense" as including "any conduct that by its nature is a sex offense against a minor," 42 U.S.C. § 16911(7)(I) - courts will use the non-categorical, circumstance-specific approach outlined in *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009), and focus on the facts, not the elements, relating to the prior conviction. *See United States v. Hill,* 820 F.3d 1003 (8th Cir. 2016) (holding courts should employ a circumstance-specific approach, not a categorical approach, in determining whether conduct is a sex offense against a minor under SORNA).[8]

8. Exception from "Sex Offense" Requirement in 42 U.S.C. § 16911 for 18 U.S.C. § 2250

Another issue that arises under SORNA is whether the offense fits within the statutory exception and does not qualify as a countable "sex offense." SORNA states that "an offense involving consensual sexual conduct is not a sex offense for the purposes of [the Act] if the victim . . . was at least 13 years old and the offender was not more than 4 years older than the victim." Courts have found the statutory exception not applicable when more than 48 months separate the defendant's and victim's date of birth. *United States v. Black*, 773 F.3d 1113 (10th Cir. 2014) ("It simply cannot be reasonably argued that Congress intended substantive criminal liability to attach to a random . . . age analysis, rather than a straight-forward calculation as to the number of months . . .") (*citing United States v. Brown*, 740 F.3d 145 (3d Cir. 2014)). *See also United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014) (circumstance-specific approach, or non- categorical approach, applies to whether a prior conviction fits within the exception; the statutory exception for "offense involving . . . conduct" references the underlying conduct, consistent with a fact-specific analysis).

9. Categorical Approach: Offender Tiers Under 18 U.S.C. § 2250

SORNA classifies offenders into one of three tiers depending on the severity of the offense for which he was required to register. A recurring issue in SORNA cases is the application of the categorical approach to determine which tier classification a prior state conviction triggers pursuant to 42 U.S.C. § 16911. The approach requires the court to decide whether the prior conviction is "comparable to or more severe than" the federal crime of sexual abuse. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014).

violence and further found that the defendant had committed aggravated sexual abuse during the offense, the court properly compared the elements of interstate domestic violence with the generic offense (SORNA's "sex offense" definition) to hold SORNA's registration requirement applied to the defendant.

[8] *See also* United States v. Dodge, 597 F.3d 1347, 1356 (11th Cir. 2010) (*en banc*) (courts may employ non-categorical approach to determine whether defendant committed specified offense against a minor); United States v. Byun, 539 F.3d 982, 990 (9th Cir. 2008) (non-categorical approach applies to the victim's age in definition of "specified offense against a minor.").

When the prior offense statute is broader than the federal crime of sexual abuse, the prior conviction is not a categorical match to the federal crime. *Id.*[9]

10. "Victim" Under 18 U.S.C. § 2260A

Courts have generally held that 2260A's requirement that a new predicate offense committed by a registered sex offender "involve[] a minor" is satisfied where a law enforcement officer poses as a minor.[10]

II. CHAPTER TWO: OFFENSE GUIDELINE SECTIONS

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

The applicable Chapter Two (Offense Conduct) offense guideline section is determined by looking up the **offense of conviction** in the Statutory Index (Appendix A). *See* §1B1.2 (Applicable Guidelines). 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.

B. Applicable Base Offense Level, Specific Offense Characteristics, and Cross References Can be Driven 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, 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.

[9] Additional decisions addressing the use of the categorical approach in the SORNA context may be found in the "§2A3.5 (Failure to Register)" section below.

[10] *See* United States v. Jones, 748 F.3d 64, 72 (1st Cir. 2014) (affirming the defendant's conviction where the "minor" with whom the defendant had communicated online was a postal inspector); United States v. Slaughter, 708 F.3d 1208, 1214-16 (11th Cir. 2013) (finding defendant's attempted enticement offense was a proper predicate offense even though the "minor" was a law enforcement officer). *But see* United States v. Dahl, 81 F. Supp. 3d 405, 408–09 (E.D. Pa. 2015) (rejecting *Slaughter*'s "flawed logic" and concluding instead that the text and history § 2260A make clear that the statute require an actual minor be involved).

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

Per Appendix A, §2A3.1 is the applicable guideline when the offense of conviction is 18 U.S.C. §§ 2241 or2242, and may be appropriate when the offense of conviction is 18 U.S.C. §§ 37 (Violence at international airports) or 113(a)(1) (assaults within maritime and territorial jurisdiction. *See* §1B1.2 (Applicable Guidelines). The commentary to §2A3.1 defines "minor" as an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years. *See* §2A3.1, comment. (n.1).

1. Determining the Base Offense Level

The first step in the §2A3.1 calculation is determining the base offense level. The guideline provides for an elevated offense level of 38 for a conviction for a sex offense with a child under 12. *See* 18 U.S.C. § 2241(c). Otherwise, the base offense level is **30**.

2. Specific Offense Characteristics

a. Conduct described in 18 U.S.C. § 2241 (a) or (b)

If the offense involved aggravated sexual abuse as described in 18 U.S.C. § 2241(a) or (b), the base offense is increased by four levels. Section 2241(a) & (b) sets forth several different forms of conduct that will suffice, including force, threats of death, serious bodily injury, kidnapping, and sexual activity after drugging or intoxicating another.[11]

The aggravated abuse enhancement applies even if the conduct that forms the basis of the enhancement is the same conduct that justified application of §2A1.1 via a cross reference from another guideline.[12] Specifically, in *Flanders*, the court found the Sentencing

[11] *See, e.g.*, United States v. Bowman, 632 F.3d 906, 912 (5th Cir. 2011) (finding that restraint sufficient to prevent the victim from escaping the sexual conduct constitutes "force" within 18 U.S.C. § 2241); United States v. Carey, 589 F.3d 187, 194-95 (5th Cir. 2009) (force that occurs during the act of assault itself falls within conduct described in § 2241(a) for application of §2A3.1(b)(1)); United States v. Two Elk, 536 F.3d 890, 910 (8th Cir. 2008) (affirming application of §2A3.1(b)(1) upon the district court's finding of force where "there was a substantial discrepancy between the body mass of [the defendant]" and the minor, the defendant lifted the minor off the floor and placed her on the bed, and muffled the minor's cries with his hand); United States v. Cerno, 529 F.3d 926, 938-39 (10th Cir. 2008) (finding procedural error in the district court's failure to consider the nature and circumstances of the offense pursuant to § 3553(a) when it failed to consider the relative amount of force used to commit the sexual abuse). But see United States v. Blue, 255 F.3d 609, 613 (8th Cir. 2001) (holding application of §2A3.1(b)(1) improper because "size difference alone cannot establish use of force"). United States v. Volpe, 224 F.3d 72, 77 (2d Cir. 2000) ("[Section] 2A3.1(b)(1) appears to be aimed at uses of force to compel the victim's submission to a sexual assault, not at more forceful assaults . . . .").

[12] *See* United States v. Flanders, 752 F.3d 1317, 1340 (11th Cir. 2014) (no double-counting in application of the cross reference at §2G1.1(c)(1) because offense involved conduct constituting sexual abuse and thus application of §2A3.1(b)(1)).

Commission intended for the entirety of §2A3.1, including the enhancement, to apply following application of the cross reference pursuant to §1B1.5(a) and the cross reference applied because offense involved sexual abuse under section 2241(b) and enhancement applied because the offense involved conduct constituting a more severe subset of aggravated sexual abuse under subsection 2241(b)(2)).

The aggravated abuse enhancement does not apply if the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c), which criminalizes sexual acts with children, is conduct described in 18 U.S.C. § 2241(a) or (b). *See* §2A3.1(b)(1), comment. (n.2(B)). This prohibition recognizes that such offenses already result in a heightened offense level of 38 and is designed to avoid the specter of double counting. Thus, it is impermissible double-counting to apply the aggravated abuse enhancement where the defendant was convicted under § 2241(c) for knowingly engaging in a sexual act with a person who is at least 12 but younger than 16 by: (1) using force against the victim; (2) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (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.

b. Age of the victim

Section 2A3.1(b)(2) provides for a 4-level enhancement if the victim was under 12 years old, or a 2-level enhancement if the victim was at least 12 but under 16 . To avoid unwarranted double-counting, this age enhancement only applies, if the base offense level is 30 because the alternative base offense level of 38 already accounts for the age of the victim.

c. Custody, care, or supervisory control

Section 2A3.1(b)(3) provides for a 2-level enhancement if the victim was in the custody, care, or supervisory control of the defendant or if the victim was held in the custody of a correctional facility. This subsection is to be construed broadly and includes offenses involving a victim less than 18 years old entrusted to the defendant whether temporarily or permanently. *See* §2A3.1(b)(3), comment. (n.3(A)); *United States v. Swank*, 676 F.3d 919 (9th Cir. 2012) (stating "[i]n determining whether to apply the enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship," and finding the enhancement applicable when the minor had been staying in the defendant's home for two days, the defendant was the victim's uncle, and he shared in the child rearing of the children in the house, including the minor victim, and in preparing food for all the children); *United States v. Kenyon*, 481 F.3d 1054, 1072 (8th Cir. 2007) (stating that "[s]o long as the defendant has some responsibility for the child, he has been entrusted with the child, even if another shares that responsibility," but that mere "proximity [to the child] is

not enough"). The subsection also applies to adult victims. *See United States v. Simmons*, 470 F.3d 1115, 1129-30 (5th Cir. 2006) (finding that the district court erred in failing to apply the enhancement for a police officer who raped an arrestee in his cruiser because the enhancement was applicable to adult victims in police custody).

If a court applies the enhancement at section 2A3.1(b)(3), it may not apply the increase for an abuse of position of trust. *See* §2A3.1, comment. (n.3(B)).

d. Bodily injury

Section 2A3.1(b)(4) provides for (1) a 4-level enhancement if the victim sustained permanent or life-threatening bodily injury; (2) a 2-level enhancement if the victim sustained serious bodily injury; and (3) a 3-level enhancement if the degree of injury is between that specified in (1) and (2).

(i) *Permanent or life-threatening injury.* Section 1B1.1, comment. (n.1(J)) defines "permanent or life-threatening bodily injury" as "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." *See, e.g., United States v. James*, 957 F.2d 679, 681 (9th Cir. 1992) (holding that a 4-level enhancement for infecting a 9-year-old child with Herpes Type-II virus was appropriate because the enhancement encompasses the impairment of organs as well as bodily members and that the defendant inflicted an incurable serious disease).

(ii) *Serious bodily injury.* According to §1B1.1, comment. (n.1(L)), "serious bodily injury" is "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *See also United States v. Robinson*, 436 F. App'x 82 (3d Cir. 2011) (unpub) (holding application of serious bodily injury enhancement appropriate where defendant severely beat the victims he prostituted and his co-conspirators subjected the victims to fractures, deep lacerations, and concussions); *United States v. Long Turkey*, 342 F.3d 856, 858-59 (8th Cir. 2003) (upholding the district court's application of the enhancement for a victim who suffered rectal laceration which needed to be repaired and who compared having the defendant's fist in her vagina to childbirth); *United States v. Guy*, 340 F.3d 655, 658-59 (8th Cir. 2003) (holding that an enhancement for serious bodily injury was appropriate where the crime was rape and the 14-year-old victim was impregnated and suffered extreme physical pain during her labor and delivery). Section 1B1.1, comment. (n.1(L)) also provides that "serious bodily injury" is

deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under sections 2241 or 2242 or any similar offense under state law. For purposes of this guideline, "serious bodily injury" means conduct other than the criminal sexual abuse, which has already been taken into account in the base offense level under subsection (a). *See* §2A3.1, comment. (n.1). *But See United States v. Jim*, 786 F.3d 802, 814-815 (10th Cir. 2015) (finding that the enhancement can still apply if based on the fact that victim's injuries meet the first definition; language of application note does not preclude court, in deciding whether the victim suffered serious bodily injury, from considering injuries resulting directly from the sexual abuse, where defendant caused victim to hit her head on floor, dragged her by her ankles, and raped her).

e. Abduction

Section 2A3.1(b)(5) provides for a 4-level enhancement if the victim was abducted. The word "abducted" "means that a victim was forced to accompany an offender to a different location." *See* §1B1.1, comment. (n.1(A)). The commentary's reference to "different location" is flexible and fact-specific.[13] Actual or threatened force is not required for the enhancement; the abduction can be committed by trickery, gentle urging, and flattery as well as by outright coercion.[14]

f. Knowing misrepresentation of identity and use of a computer

Section 2A3.1(b)(6) provides for a 2-level enhancement in internet and travel cases where the offense involved either: (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or interactive computer service. These provisions are intended to apply only to misrepresentations made directly to a minor or his guardian (as defined by the subsection), or use of the computer to communicate directly with the minor or the guardian. *See* §2A3.1, comment. (n.4(A), (B)).

Misrepresentation of participant's identity. Such misrepresentation includes misrepresentation of a person's name, age, occupation, gender, or status *with the intent to*

[13] *See* United States v. Buck, 847 F.3d 267, 276-77 (5th Cir. 2017) ("We have repeatedly construed the 'abduction' enhancement as applicable when a victim is forced from one part of a building to another. We have also indicated that the term "different location" should be interpreted with fixability.") (citations omitted). *See also* United States v. Hefferon, 314 F.3d 211, 225 (5th Cir. 2002) (enhancement supported where the victim was "moved to another location" when the defendant moved the victim from one location on the property, where he first sexually assaulted the victim, to another location on the property, where he sexually assaulted the victim again).

[14] *See* United States v. Beith, 407 F.3d 881, 893 (7th Cir. 2005), abrogated on other grounds by United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012) (trickery, gentle urging or flattery sufficient for abduction enhancement), United States v. Romero, 189 F.3d 576, 590 (7th Cir. 1999) ("inveigling" sufficient). *See also* United States v. Martinez-Hernandez, 593 F.3d 761, 762 (8th Cir. 2010) (force may be accomplished through a veiled coercion or an inveigling).

persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or, if to facilitate transportation or travel by a minor or a participant, to engage in prohibited sexual conduct. The use of a computer screen name, without such intent, does not prompt the application of this enhancement. *See* §2A3.1, comment. (n.4(A)).

Use of a computer or interactive computer service. An enhancement is intended to apply to the use of a computer or interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct or to facilitate transportation or travel, by either a minor or by a participant, to engage in prohibited sexual conduct. *See* §2A3.1, comment. (n.4(B)).

3. Cross References

Section 2A3.1 has two cross references. Section 2A3.1(c)(1) provides a cross reference to §2A1.1 (First Degree Murder), but only if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111, and only if the resulting offense level is greater than that determined under §2A3.1.

Section 2A3.1(c)(2) provides a cross reference to §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) if the criminal sexual abuse 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. Section 2G2.1 only applies if the offense level is greater than that determined under §2A3.1. This cross reference should be construed broadly. *See* §2A3.1, comment. (n.5(A)). The term "sexually explicit conduct" has the meaning provided in 18 U.S.C. § 2256(2). *See* §2A3.1, comment. (n.5(B)).

By the same token, the cross reference to §2A1.3 and its higher offense levels can be invoked where sexual abuse (or attempted sexual abuse) is relevant conduct to §2G1.1 so long as the district court makes particularized findings as to the abuse.[15]

4. Special Instruction

Section 2A3.1(d)(1) directs the application of the Official Victim increase under §3A1.2(c)(2) if the offense occurred in the custody or control of a prison or other correctional facility, and the victim was a prison official.

[15] *See* United States v. Angle, 234 F.3d 326, 345 (7th Cir. 2000) (guidelines expressly provide for application of §2A3.1 through cross reference and thus the district court may punish a defendant for relevant conduct (e.g., "all acts and commissions ... that occurred during the commission of the offense of conviction, § 1B1.3(a)(1)(A)), notwithstanding whether the defendant was actually convicted of a particular offense).

5. Upward Departure Provision

An upward departure may be warranted if the victim was sexually abused by more than one participant. *See* §2A3.1, comment. (n.6). For purposes of this guideline, a participant is someone criminally responsible for the commission of the offense, even if he has not been convicted. *See* §2A3.1. comment. (n.1); §3B1.1 (Aggravating Role), comment. (n.1).

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

Appendix A specifies offense guideline §2A3.2 for use when the offense of conviction is 18 U.S.C. §§ 113(a)(2) or 2243(a). Although in other sex offense guidelines, the definition of "minor" is a person who has not attained the age of 18, for purposes of §2A3.2, the definition of "minor" includes an individual (including fictitious individuals[16] and law enforcement officers) who had not attained the age of 16 years (or who was represented by an undercover law enforcement officer to have not attained the age of 16 years). *See* §2A3.2, comment. (n.1). For convictions under section 113(a)(2), §2A3.2 applies in a case with an assault with intent to commit a violation of section 2243. For convictions under section 2243(a), §2A3.2 only applies in a case in which the defendant is convicted of a statutory violation of sexual abuse of a minor over the age of 12 years but under the age of 16 years when the minor is at least 4 years younger than the defendant, pursuant to 18 U.S.C. § 2243(a).

1. Base Offense Level.

This guideline has a base offense level of **18**.

2. Specific Offense Characteristics

a. Custody, care, or supervisory control

Section 2A3.2(b)(1) provides for a 4-level enhancement if the minor was in the custody, care, or supervisory control of the defendant. This subsection is to be construed broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. *See* §2A3.2, comment. (n.2(A)). If section (b)(1) applies,

[16] In a case where a minor's mother created a fictitious internet profile that targeted the defendant before turning the information over to the FBI, the Seventh Circuit stated in dicta that "the logic of the guideline definition [of "minor"] embraces an impersonator who is not an officer." United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008).

§3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* §2A3.2, comment. (n.2(B)).

b. Knowing misrepresentation of identity or undue influence

Section 2A3.2(b)(2) provides that if the minor was not in the care, custody, or supervisory control of the defendant, and the offense involved either knowingly misrepresenting a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or otherwise unduly influencing the minor to engage in prohibited sexual conduct, a 4-level enhancement applies.

(i) *Misrepresentation of identity.* Such misrepresentation applies only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. The enhancement would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status *with the intent to* persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. The use of a computer screen name, without such intent, does not prompt the application of this enhancement. *See* §2A3.2, comment. (n.3(A)).

(ii) *Undue influence.* Courts 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. *See* §2A3.2, comment. (n.3(B)). The Sixth Circuit has found that a district court may vary upward when it finds that §2A3.2(b)(2)(B)(ii) does not adequately consider the undue influence the defendant had over a minor. *United States v. Studabaker*, 578 F.3d 423, 432 (6th Cir. 2009).

The enhancement for undue influence is inapplicable to cases in which the only "minor" involved in the offense is an undercover law enforcement officer. *See* §2A3.2, comment. (n.3(B)).

If the participant is at least ten years older than the minor, there is a rebuttable presumption that subsection (b)(2)(B)(ii) applies because some degree of undue influence can be presumed based on the substantial age difference. *See* §2A3.2, comment. (n.3(B)).

c. Use of a computer

Section 2A3.2(b)(3) provides for a 2-level enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to

engage in prohibited sexual conduct. 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* §2A3.2, comment. (n.4).

3. Cross Reference

Section 2A3.2(c) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involves criminal sexual abuse (or attempt to commit criminal sexual abuse) as defined in 18 U.S.C. §§ 2241 or 2242. Additionally, if the victim was younger than 12 years old, §2A3.1 applies, regardless of the "consent" of the minor.

a. Criminal sexual abuse. *See United States v. Tyndall*, 521 F.3d 877, 883-84 (8th Cir. 2008) (affirming the district court's cross reference to §2A3.1 for a defendant convicted under 18 U.S.C. § 2243(a), even though the defendant was acquitted of the charges under 18 U.S.C. § 2242, because the minor's "inebriated state made her incapable of appraising the nature of the sexual act and physically incapable of refusing or communicating her refusal to participate in the sexual act"); *United States v. Searby*, 439 F.3d 961, 964 (8th Cir. 2006) (affirming the district court's decision to apply the cross reference to §2A3.1 where the minor testified that the defendant "restrained her by holding her hands above her head" and that "she tried to fight him away and that she protested several times"); *United States v. Archdale*, 229 F.3d 861, 868-69 (9th Cir. 2000) (holding that the district court did not engage in impermissible double-counting when the court added four levels for use of force based on §2A3.1(b)(1) after properly applying the cross reference from §2A3.2).

b. Victim under 12 years old. *See United States v. Beith*, 407 F.3d 881, 887 (7th Cir. 2005) (finding the application of the cross reference to §2A3.1 appropriate because the court was free to consider relevant conduct to which the defendant had admitted, and the victim was less than 12 years old), *abrogated on other grounds by United States v. Vizcarra,* 668 F.3d 516 (7th Cir. 2012).

4. Upward Departure Consideration

In cases in which the offense level determined under this guideline substantially understates the seriousness of the offense, an upward departure may be warranted. *See* §2A3.2, comment. (n.6) (listing as examples instances in which the defendant committed the act in furtherance of a commercial scheme such as pandering, transporting persons for prostitution, or the production of pornography).

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

Appendix A specifies offense guideline §2A3.3 for offenses committed in violation of 18 U.S.C. §§ 113(a)(2) or 2243(b). In §2A3.3, 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 by an undercover law enforcement officer to have not attained the age of 18 years). *See* §2A3.3, comment. (n.1). The term "ward" means someone in official detention under the custodial, supervisory, or disciplinary authority of the defendant. *See* §2A3.3, comment. (n.1).

Note. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should not apply if the defendant is sentenced under §2A3.3, because an abuse of position of trust is assumed in all cases and is built into the base offense level. §2A3.3, comment. (n.4).

1. Base Offense Level

This guideline has a base offense level of **14**.

2. Specific Offense Characteristics

a. Knowing misrepresentation of identity

Section 2A3.3(b)(1) provides for a 2-level enhancement if the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct.

Such misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. 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* §2A3.3, comment. (n.2).

b. Use of a computer

Section 2A3.3(b)(2) provides for a 2-level enhancement if the participant used a computer or interactive computer service to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. 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* §2A3.3, comment. (n.3).

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

Appendix A specifies offense guideline §2A3.4 for offenses involving abusive sexual contact in violation of 18 U.S.C. §§ 113(a)(2), 2244, or 37. This section applies to abusive sexual contact that does not amount to criminal sexual abuse. In §2A3.4, the term "minor" means an individual (including a fictitious individual or law enforcement officer) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years). *See* §2A3.4, comment. (n.1).

1. Determining the Base Offense Level

The different base offense levels in this guideline consider the different means that could be used to commit the offense.

If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), the base offense level is **20**. For purposes of this subsection, such conduct is engaging in, *or causing sexual contact with*, or by 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 kidnapping; (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* §2A3.4, comment. (n.2).

If the offense involved conduct described in 18 U.S.C. § 2242, the base offense level is **16**. For purposes of this subsection, such conduct is: (1) engaging in, *or causing sexual contact with*, or by another person by threatening or placing the victim in fear (other than fear of death, kidnapping, or serious bodily injury); or (2) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act. *See* §2A3.4, comment. (n.3).

Otherwise, the base offense level is **12**.

2. Specific Offense Characteristics

a. Victim under 12 years

Section 2A3.4(b)(1) provides for a 4-level enhancement if the victim had not attained the age of 12. The section also provides that if the resulting offense level is less than **22**, the offense level must be increased to level **22**.

b. Victim between 12 and 15

Section 2A3.4(b)(2) provides for a 2-level enhancement if the base offense level is either **20** or **16**, and the victim had attained the age of 12 but not the age of 16.

c. Custody, care, or supervisory control

Section 2A3.4(b)(3) provides for a 2-level enhancement if the victim was in the custody, care, or supervisory control of the defendant. This subsection is to be construed broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. The court is directed to look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant and victim relationship. *See* §2A3.4, comment. (n.4(A)). If section (b)(3) applies, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* §2A3.4, comment. (n.4(B)).

d. Knowing misrepresentation of identity

Section 2A3.4(b)(4) provides for a 2-level enhancement if the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct.

Such misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. The enhancement would not apply to a misrepresentation made by a participant to an airline representative while making travel arrangements for the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. 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* §2A3.4, comment. (n.5).

e. Use of a computer

Section 2A3.4(b)(5) provides for a 2-level enhancement if a computer or interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. This subsection applies only to use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2A3.4, comment. (n.6).

3. Cross References

Section 2A3.4 has two cross references. Section 2A3.4(c)(1) provides that §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in

18 U.S.C. §§ 2241 or 2242. Because "involved" invokes relevant concept principles, the cross reference will apply even where a defendant is acquitted of sexual abuse charges.[17]

Section 2A3.4(c)(2) provides that §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) applies if the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor, as defined in 18 U.S.C. § 2243(a), if the resulting offense level is greater than that determined under §2A3.4.

G. §2A3.5 (Failure to Register as a Sex Offender)

Appendix A specifies guideline §2A3.5 for violations of the Failure to Register statute,18 U.S.C. § 2250. Failure to register offenses are sentenced pursuant to §2A3.5, except for those defendants convicted under the recidivist provision in § 2250(d), who are to be sentenced pursuant to §2A3.6.

1. Determining the Base Offense Level

The alternative base offense levels for §2A3.5 depend on the underlying sexual offense of conviction for which the defendant was required to register. The statute determines the seriousness of the failure to register offense based on the prior sexual offense, and classifies them into one of three tiers, with Tier III being the most egregious offenders. The term "sex offense" is defined in 42 U.S.C. § 16911(5). *See* §2A3.5, comment. (n.1).

a. If the offender was required to register as a Tier III offender, the base offense level is **16**.

b. If the offender was required to register as a Tier II offender, the base offense level is **14**.

c. If the offender was required to register as a Tier I offender, the base offense level is **12**.

Courts use a modified categorical approach to determine the defendant's tier classification.[18]

[17] *See*, *e.g.*, United States v. No Neck, 472 F.3d 1048, 1055 (8th Cir. 2007) (affirming the district court's cross reference to §2A3.1, even when the defendant was acquitted of criminal sexual abuse charges).

[18] *See*, *e.g.*, United States v. Cammorto, 859 F.3d 211 (4th Cir. 2017)(employing categorical approach to compare George rape statute to 18 U.S.C. § 2254(a) & (b) to determine state statute narrower than federal aggravated sexual abuse and so qualifies as a Tier III offense); United States v. White, 782 F.3d 1118 (10th Cir. 2015) (finding SORNA's definition of a Tier III sex offender as requiring an offense "as described in section 2244" suggests Congress intended courts to employ categorical approach); United States v. Stock, 685 F.3d 621 (6th Cir. 2012)

2. Specific Offense Characteristics

a. Offense while in failure to register status

Section 2A3.5(b)(1) provides alternative enhancements if the defendant committed an offense, while in a failure to register status. Specifically, it provides for the greatest of these enhancements: **6** levels for a sex offense against someone other than a minor, **6** levels for a felony offense against a minor that is not a sex offense, or **8** levels for a sex offense against a minor.[19] "Minor" includes a fictitious individual or law enforcement officer. §2A3.5, comment. (n.1).

A "sex offense" under §2A3.5 has the meaning given that term in 42 U.S.C. § 16911(5) and includes any crime with an element of a sexual act or sexual contact with another. *See* §2A3.5, comment. (n.1).

b. Excuse for failing to register

Section 2A3.5(b)(2) provides for a 3-level *decrease* if the defendant voluntarily corrected the failure to register or tried to register but was prevented from registering by uncontrollable circumstances to which the defendant did not contribute. For the decrease to apply, the defendant's attempt to register or to correct the failure to register must have occurred before he knew or reasonably should have known that a jurisdiction had detected his failure to register. *See* §2A3.5, comment. (n.2(A)). The attempt to correct must be genuine.[20]

(finding that the requirement that the defendant register as a Tier III sex offender, meaning a sex offender whose offense is "comparable to or more severe than . . . aggravated sexual abuse or sexual abuse" as described in section 2241 and 2242 and therefore requiring a "sexual act," was not met because the relevant state sexual battery offense that requires the touching of another person, whether of the genitalia or not, did not meet the definition of a "sexual act" as described in those sections); United States v. Taylor, 644 F.3d 573 (7th Cir. 2011) (holding the district court appropriately examined the charging instrument under a modified categorical approach to determine which tier the defendant should have been classified in, because the statute he had been convicted of violating prohibited all sodomy, including consensual sodomy with an adult); United States v. Cabrera-Gutierrez, 756 F.3d 1125 (9th Cir. 2014) (defendant's prior conviction cannot serve as a predicate for classification as a Tier III sex offender because prior offense penalizes broader class of behavior; modified categorical approach not appropriate because state statute states a single indivisible set of elements, and courts may not consult any extra-statutory materials). *See also* United States v. Berry, 814 F.3d 192, 197 (4th Cir. 2016) (SORNA statute requires that courts look to the actual age of the victim in prior offense, but otherwise it must use the categorical approach to decide if a prior state offense fits into SORNA's requirements).

[19] United States v. Lott, 750 F.3d 214, 220 (2d Cir. 2014) (finding although defendant was convicted of "prohibited acts" and not "lewd and lascivious conduct" under Vermont law for the attempted sexual contact with a 13 year old female while in failure to register status, enhancement is applicable to mere commission of a sex offense even absent a conviction for that offense); United States v. Johnson, 743 F.3d 196, 204 (7th Cir. 2014) (defendant's sexual conduct with his adult girlfriend, while not consensual, did not meet the elements of a state sexual offense and enhancement should not have been applied).

[20] *See* United States v. Forster, 549 F. App'x 757, 770-71 (10th Cir. 2013) (unpub) (defendant's voluntary attempt to register after moving from one residence to another, after having been out of the country for eight months, was not a

Note. The specific offense characteristic at §2A3.5(b)(2) does not apply if the specific offense characteristic at §2A3.5(b)(1) also applies. *See* §2A3.5, comment. (n.2(B)).

H. §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender)

Appendix A specifies offense guideline §2A3.6 for offenses violating 18 U.S.C. §§ 2250(d) or 2260A for aggravated offenses relating to failing to register as a sex offender.

Section 2A3.6(a) provides that if the defendant was convicted under 18 U.S.C. § 2250(c), the guideline sentence under §2A3.6 is the minimum term required by statute. Section 2250(d) provides a mandatory minimum term of five years and a statutory maximum term of 30 years of imprisonment.

A sentence above five years of imprisonment is considered an upward departure, and may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor. *See* §2A3.6, comment. (n.4). The statute requires any sentence under this statute to be applied consecutively to any sentence imposed under 18 U.S.C. § 2250(a) (Failure to Register). *See* §2A3.5, comment. (n.1).

Section 2A3.6(b) provides that if the defendant was convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute, which is ten years of imprisonment. This term must also be imposed consecutively to any sentence imposed for an offense listed under § 2260A. *See* §2A3.5, comment. (n.1).

Note. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) do not apply to sentences under this guideline. The guideline sentence for these offenses is determined only by the relevant statute. *See* §2A3.6, comment. (n.2).

Note. If a defendant is sentenced under this guideline in conjunction with a sentence for an underlying offense, any specific offense characteristics that are based on the same conduct as the conduct comprising the conviction under 18 U.S.C. §§ 2250(c) or 2260A do not apply. *See* §2A3.6, comment. (n.3).

III. CHAPTER THREE: ADJUSTMENTS

voluntary correction of his failure to register but was instead a desire to perpetuate a false claim that he had been at the first residence during that eight month period instead).

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, §3A1.1(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. *See* §3A1.1, comment. (n.2).[21]

The adjustment under §3A1.1(b) applies to offenses that involve an unusually vulnerable victim where the defendant knew or should have known of the victim's unusual vulnerability. 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. Therefore, in sexual abuse offenses against minors, if the guideline provides an enhancement for the age of the minor, §3A1.1 does not apply unless the victim was unusually vulnerable for reasons unrelated to the age of the victim. *See* §3A1.1, comment. (n.2).[22]

B. §3A1.3 (RESTRAINT OF VICTIM)

Section 3A1.3 provides for a 2-level adjustment if a victim was physically restrained in the course of the offense. "Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up. *See* §1B1.1, comment. (n.1(K)). This adjustment does not apply, however, where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself. *See*

[21] *See* United States v. Schoenborn, 793 F.3d 964 (8th Cir. 2015) (not double counting to apply vulnerable enhancement in conviction for abuse of incapacitated person under § 2242 because §2A3.1 did not take into account contributing factors of victim's extreme intoxication and unconscious state); United States v. Irving, 554 F.3d 64, 75 (2d Cir. 2009) (upholding application of the vulnerable victim enhancement because the minor victims living in Mexico and Honduras were homeless and without parental or other supervision and guidance); United States v. Chee, 514 F.3d 1106, 1117 (10th Cir. 2008) (upholding the district court's vulnerable victim enhancement where the victim "suffer[ed] from mental and physical handicaps, including a diminished mental capacity, seizures, and partial paralysis"); United States v. Julian, 427 F.3d 471, 489-90 (7th Cir. 2005) (finding no double-counting where the district court increased the defendant's sentence based on the victim's age under §2A3.1(b)(2) in combination with the "economic vulnerability of the victims" under §3A1.1 because the defendant took "advantage of the poor and homeless children by offering shelter, housing and food").

[22] *See* United States v. Beith, 407 F.3d 881, 892 (7th Cir. 2005) (holding that "allegations of molestation standing alone are insufficient to establish vulnerability" when the victim's "age had already been the subject of an enhancement" under §2A3.1(b)(2)), abrogated on other grounds by United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012).

§3A1.3, comment. (n.2).[23] If the restraint was sufficiently egregious, an upward departure may be warranted. §3A1.3, comment. (n.3).

C. §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, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offenses. *See United States v. Chee*, 514 F.3d 1106, 1118 (10th Cir. 2008) (finding whether an individual occupies a position of trust is evaluated from the perspective of the victim). However, this adjustment does not apply in the sexual abuse guidelines if the specific offense characteristics for a victim being in the care, custody, or supervisory control of the defendant or for the victim being held in the custody of a correctional facility apply. *See* §2A3.1, comment. (n.3(B)); §2A3.2, comment. (n.2(B)); §2A3.3, comment. (n.4); §2A3.4, comment. (n.4(B)).

IV. CHAPTER FOUR: CRIMINAL HISTORY

A. §4A1.1 (Criminal History Category)

Section 4A1.1 provides the determination for the defendant's criminal history category, adding different points for prior sentences of imprisonment of differing lengths and for prior sentences for convictions that are crimes of violence. A "crime of violence" is defined in the career offender guideline at §4B1.2. In determining whether a prior offense is a "crime of violence" as a predicate offense for the career offender guideline, courts should employ the categorical approach focusing on the statutory definition of the prior offense.

[23] *See* United States v. Joe, 696 F.3d 1066 (10th Cir. 2012) (preventing a victim from even thinking about escape is to "physically restrain" that victim, thus the conduct giving rise to the restraint-of-the-victim enhancement in §3A1.3 is incorporated into the offense of aggravated sexual abuse in § 2241(a)). But see United States v. Strong, 826 F.3d 1109 (8th Cir. 2016) (not double counting to apply a 4-level enhancement at §2A3.1 for abduction and a 2-level enhancement for restraint of victim because conduct supporting application of each was different; conduct for abduction was based on defendant dragging victim to another location, and conduct for physical restraint was based on defendant confining the victim for three days); United States v. Star, 451 F. App'x. 708 (9th Cir. 2011) (unpub) (affirming application of §3A1.3 because "restraint of the victim is not an element of the offense of aggravated sexual abuse nor was it incorporated in the aggravated sexual assault offense Guideline applied").

B. §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)[24]

Section 4B1.5 applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who presents a continuing danger to the public because he committed the offense of conviction after at least one sex offense conviction (*see* §4B1.5(a)). *See also* §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 109A (18 U.S.C. §§ 2241-2248). For purposes of this guideline, the term "minor" means an individual (including a fictitious individual or law enforcement officer) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years) and could be provided for the purposes of engaging in sexually explicit conduct. *See* §4B1.5, comment. (n.1).[25]

Section 4B1.5 also applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who presents a continuing danger to the public because he has engaged in a pattern of activity involving prohibited sexual conduct (*see* §4B1.5(b)). "Pattern of activity" is determined for purposes of §4B1.5(b) if the defendant engaged in a pattern of activity involving prohibited sexual conduct "if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor." *See* §4B1.5, comment. (n.4(B)).

Section 4B1.5(a) specifically states that the offense level is the greater of the offense level under Chapters Two and Three or the offense level determined based on a corresponding table decreased by §3E1.1. *See* §4B1.5(a)(1). The criminal history category is the greater of either the criminal history category determined under Chapter Four, Part A, or criminal history category V. *See* §4B1.5(a)(2).

Section 4B1.5(b)(1) specifically states that the offense level is five plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be 22, decreased by the number of levels based on the applicability of §3E1.1. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5, foreclosing many double-counting arguments.[26]

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[24] For a detailed description of the issues and case law associated with §4B1.5, see the Commission's primer on *Sex Offenses: Commercial Sex Acts and Sexual Exploitation of Minors*, at http://www.ussc.gov/training/primers.

[25] *See* United States v. Cerno, 529 F.3d 926, 938 (10th Cir. 2008) (finding a conviction under 18 U.S.C. § 2241(a) a "covered sex crime" when the victim was over the age of 16 even though certain offenses within Chapter 109A pertain to minors under either the age of 12 or the age of 16).

[26] *See* United States v. Joey, 845 F.3d 1291 (9th Cir. 2017) (finding application of §4B1.5 not double counting with conviction for violation of 18 U.S.C. § 2260A because the Commission did not forbid application of §4B1.5 for offenses underlying a section 2260A conviction and §4B1.5 and section 2260A serve distinct penological goals).

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 SORNA 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 SORNA 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. Thus, §5B1.3(a)(9)(B) requires defendants to comply with the requirements of that Act (*see* 18 U.S.C.§ 3563(a).

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 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, and 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.

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)

Under §5D1.2(a), if the offense is a Class A or B felony, the guideline term of supervised release is at least two years but not more than five years. However, pursuant to §5D1.2(b), notwithstanding §5D1.2(a), the length of the term of supervised release is not to be less than the minimum term of years specified for the offense, and may be up to life, if the offense is, among others, a sex offense. Pursuant to the Adam Walsh Act of 2006, 18 U.S.C. § 3583 was amended to increase the authorized term of supervised release for, among other offenses, any sexual abuse offense perpetrated against a minor under chapter 109A of title 18. The term of supervised release is currently a mandatory minimum of five years with a statutory maximum term of life. The failure to register as a sex offender under 18 U.S.C. § 2250 is not, however, a "sex offense" within the meaning of §5D1.2(b)(2). See §5D1.2, comment. (n.1). Thus, the maximum length imposable is the statutory maximum of five years rather than life. §5D1.2(a)(1).

The statutory maximum term of supervised release is recommended if the offense is a sex offense. *See* §5D1.2(b)(2).[27] Where the statutory minimum term of supervised release

[27] *See* United States v. Williams, 636 F.3d 1229 (9th Cir. 2011) (finding sentence of lifetime term of supervised release did not violate the Eighth Amendment because no "gross disproportionality" was inferred, citing Graham v. Florida, 560 U.S. 48, 59 (2010), and the sentence was not substantively unreasonable because of high risk of recidivism of sex offenders). *See also* United States v. James, 792 F.3d 962 (8th Cir. 2015) (holding lifetime term of supervised release reasonable where defendant's sexual deviance went back to his teenage years, he had never completed any sex-offender treatment program he had entered in the past, and his prior post-treatment personality described by hospital staff was described as devious and manipulative); United States v. Winding, 817 F.3d 910 (5th Cir. 2016) (finding lifetime term of supervised release reasonable, where defendant was indicted for sexual battery, domestic violence, and aggravated sexual assault of his minor daughter while on supervised release for a prior offense of failing to register as a sex offender); United States v. Trailer, 827 F.3d 933 (11th Cir. 2016) (finding

is greater than the advisory guideline range, §5D1.2(c) creates a single point advisory term at the statutory minimum.[28]

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

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 SORNA 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 SORNA 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. Thus §5D1.3(a)(7) requires defendants to comply with the requirements of SORNA.

Section 3583(k) of title 18 states that, if a defendant required to register under SORNA 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 of not less than 5 years. The Tenth Circuit, however, has held this provision unconstitutional, stating that it violates general principles of due process and the right to jury trial. The court held that section 3583(k) imposes a mandatory sentencing range based on facts found by a judge and imposes increased punishment based on subsequent conduct, rather than the original crime of conviction. *United States v. Haymond,* 869 F.3d 1153 (10th Cir. 2017).

2. §5D1.3(b) (Special Conditions)

lifetime term of supervised release for failing to register as a sex offender after sexually abusing girlfriend's daughter substantively reasonable and not greater than necessary where defendant violated multiple conditions of release including living with new girlfriend and her four children).

[28] See §5D1.2, comment. n. 6 (explaining that §5D1.2(a) provides a range of years based on the offense, and if the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, if the offense is a "sex offense" under §5D1.2(b), the term of supervised release is restricted to five years to life).

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 an effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.[29]

Such conditions may not entail any "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).[30] Particularly severe deprivations untethered to record support will be reversed.[31]

[29] *See* United States v. Perazza-Mercado, 553 F.3d 65, 72 (1st Cir. 2009) (holding a special condition of supervised release requiring a total ban on Internet access at home inconsistent with the vocational and educational goals of supervised release where the defendant had no history of impermissible Internet use and the Internet was not an instrumentality of the offense); United States v. Bango, 386 F. App'x 50 (3d Cir. 2010) (unpub) (holding special condition of supervised release requiring defendant, a landlord, to disclose to female tenants his convictions for sexual battery and failure to register as a sex offender reasonably related to the need to protect the public pursuant to 18 U.S.C. § 3553(a)(2)(C)); United States v. Webster, 819 F.3d 35 (1st Cir. 2016) (finding sex offender treatment appropriate special condition of supervised release even where underlying violation was not a sex offense because condition was reasonably related to one or more goals of supervised release).

[30] *See, e.g.*, United States v. Levering, 441 F.3d 566, 569-70 (8th Cir. 2006) (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);

[31] *See* United States v. Sherwood, 850 F.3d 391 (8th Cir. 2017)(vacating special financial conditions in sexual abuse case where conditions "totally unrelated" to offense and the district court failed to reflect the individualized inquiry required); United States v. Iverson, 874 F.3d 855 (5th Cir. 2017)(vacating condition that defendant "follow all other lifestyle or restrictions or treatment requirements imposed by the therapist" because allowing therapist to set restrictions on conduct usurped judge's sentencing authority); United States v. Fey, 834 F.3d 1 (1st Cir. 2016) (vacating special condition that defendant have no contact with children under age 18 after conviction for violating SORNA because 1999 sex offense, rape of a 16-year old co-worker he provided with alcohol, was remote in time; defendant had not committed any sexual or violent offense in the intervening years; and government made no argument he was a danger to children); United States v. Gnirke, 775 F.3d 1155 (9th Cir. 2015) (finding condition that defendant not possess any materials depicting "sexually explicit conduct" - including depictions of adult sexual conduct - using a statutory definition of "sexually explicit conduct" that should only apply to depictions of children reasonably related to the goals of supervised release to include protection of the public, however because the condition as written deprived the defendant of more liberty than reasonably necessary, court narrowed condition regarding adult sexual conduct); United States v. Fraga, 704 F.3d 432 (5th Cir. 2013) (finding plain error in the automatic imposition of a lifetime term of supervised release "without regard for the specific facts and circumstances of the case or the range provided for in the statute"). *But see* United States v. Wallette, 686 F.3d 476 (8th Cir. 2012) (finding although court erred by failing to make an individualized determination before imposing special condition of supervised release that defendant abstain from possessing "materials depicting or describing sexually explicit conduct," error was not plain because based on his history of sexual abuse and his need for treatment, "there is little likelihood that the district court, upon further consideration, would remove the condition").

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. Finally, subsection (C) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, and 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.

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. 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, 1170 (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. *See* §5F1.5(a). 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."

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)). Courts may depart upward for "child crimes and sexual offenses" if it finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i) that there is an aggravating circumstance not adequately taken into consideration by the Commission.[32] The definition

[32] *See* United States v. King, 604 F.3d 125, 143-44 (3d Cir. 2010) (five-level upward departure reasonable for a defendant convicted of traveling to engage in sex with a minor for his pattern of sexually abusing minors, analogizing to enhancement in child pornography guidelines).

of "sexual offenses" includes offenses under chapter 109A of title 18. *See* §5K2.0, comment. (n. 4(A)).

G. §5K2.8 (Extreme Conduct (Policy Statement))

Pursuant to §5K2.8, if the conduct was unusually heinous, cruel, brutal, or degrading to the victim, a court may increase the sentence above the guideline range to reflect the nature of the conduct.[33]

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

For offenses committed under chapter 109A (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.

For offenses committed under chapter 109A (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

United States v. Cheeks, 647 F. App'x 310 (5th Cir. 2016) (unpub) (finding life term of supervised release reasonable; although failure to register is not a sex offense, defendant's history included multiple revocations and a significant criminal history).

United States v. Flanders, 752 F.3d 1317, 1342 (11th Cir. 2014) (defendants' life sentences substantively reasonable because they had used false pretenses to convince women to travel purportedly for purpose of making an audition for a liquor commercial, fed the victims alcohol laced with other drugs without the victims' knowledge, had sex with the victims while they were unconscious, filmed the sexual activity and subsequently distributed the DVDs containing the images over the Internet).

[33] *See* United States v. Flanders, 752 F.3d 1317, 1341 (11th Cir. 2014) (finding an upward departure reasonable for defendants who drugged women without their knowledge, videotaped sexual activity with the women who "woke up covered in bodily fluids and uncertain of what had happened to them," and distributed the images over the Internet).

United States v. Kane, 639 F.3d 1121 (8th Cir. 2011) (reversing and remanding a 120-month sentence for aggravated sexual abuse as procedurally unreasonable because the district court had found the defendant posed a low risk of recidivism even though she had held her daughter down during more than 200 sexual assaults, and had imposed a 90-month downward variance on the grounds that the codefendant who raped the child was more culpable).

United States v. Ausburn, 362 F. App'x 259, 262 (3d Cir. 2010) (unpub) (affirming the district court's sentence of 144-months' imprisonment—double the high-end of the guidelines range—as substantively reasonable when the defendant used his position as a police chief to insulate himself with the victim and her family.).

United States v. Simmons, 568 F.3d 564 (5th Cir. 2009) (finding the district court committed procedural error inconsistent with *Kimbrough v. United States*, 552 U.S. 85 (2007), by stating even though it disagreed with the guideline policy statement it lacked discretion to consider the defendant's age in deciding whether to depart downward).

United States v. Poynter, 495 F.3d 349, 353 (6th Cir. 2007) (applying a "proportionality principle," and holding that the district court's "60-year sentence, a 206% upward variance from the top of the guidelines range, cannot be sustained" because nothing distinguished the defendant from other repeat sex offenders).