

# PRIMER



# SEX OFFENSES: COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS

June 2015

*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 commercial sex acts and the sexual exploitation of minors.

## **I. RELEVANT STATUTES**

### **A. THE STATUTORY SCHEME**

#### **Immigration: Chapter 12 of title 8** ***8 U.S.C. § 1328 (Importation of alien for immoral purpose)***

Forbids the direct or indirect importation (or attempted importation) into the United States of any alien for the purpose of prostitution or any other immoral purpose. Also prohibits holding or attempting to hold any alien, or keeping, maintaining, controlling, supporting, employing, or harboring 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 2251(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 2252(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 2252A 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.

## **B. LEGAL ISSUES**

### **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. *United States v. Williams*, 659 F.3d 1223 (9th Cir. 2011). *See also United States v. Christie*, 624 F.3d 558 (3d Cir. 2010) (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) (upholding conviction of a defendant who had used a file-sharing network to publish a notice to distribute child pornography); *United States v. Rowe*, 414 F.3d 271 (2d. Cir. 2005) (concluding chat-room posting was sufficient to satisfy the elements of the statute).

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

In *United States v. Lockhart*, the Second Circuit held that the required ten year mandatory minimum under section 2252 if a 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” includes a prior sexual abuse conviction involving an adult victim, the defendant’s girlfriend. 749 F.3d 148 (2d Cir. 2014). The court found that the statutory phrase “involving a minor or ward” only modifies “abusive sexual conduct” and not “aggravated sexual abuse” or “sexual abuse.” *Id.*

In *United States v. Kimler*, the Tenth Circuit held that the Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), “did not establish a broad, categorical requirement that, in every case on the subject, absent direct evidence of identity, an expert must testify that the unlawful image is of a real child.” 335 F.3d 1132 (10th Cir. 2003). According to the court, “[j]uries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge.” *Id.*; *see also United States v. Deaton*, 328 F.3d 454 (8th Cir. 2003) (Independent proof was not required to prove images involved children under age of 12 when a 2-level enhancement was imposed for possession of child pornography).

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

In *United States v. Grzybowicz*, the Eleventh Circuit stated that Congress has not defined the term “distribute” for purposes of section 2252A, and held that implicit in definitions found in Black’s Law Dictionary and other dictionaries is 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.*

In an issue of first impression, the Fifth Circuit found that the defendant distributed images in violation of section 2252A when although he did not actively transfer possession of the images, he admitted he knew that what was in his shared folder was available to others through file sharing. *United States v. Richardson*, 713 F.3d 232 (5th Cir. 2013). *See also 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.”); *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007) (finding that defendant who downloaded images from a peer-to-peer computer network and stored them in a shared folder accessible to others had distributed child pornography because it was “delivered,” “transferred,” “dispersed,” or “dispensed” to others).

**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. *United States v. Miller*, 148 F.3d 207 (2d Cir. 1998). A conviction for attempt under §§ 2422(b) or 2423(b) does not require proof that the intended victim is an actual minor, as long as the defendant believes that the victim is a minor. *United States v. Spurlock*, 495 F.3d 1011 (8th Cir. 2007). *See also United States v. Cote*, 504 F.3d 682 (7th Cir. 2007) (“factual impossibility or mistake of fact is not a defense to an attempt charge”); *United States v. Daniels*, 685 F.3d 1237 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1240 (2013) (holding that statute does not require defendant knew the victim was under the age of eighteen for conviction).

## 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.*

### 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.<sup>1</sup>

**1. Determining the Base Offense Level**

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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**

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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. See *United States v. Williams*, 291 F.3d 1180 (9th Cir. 2002) (upholding the coercion enhancement even though the defendant did not use force to transport the woman across state lines). Coercion generally does not apply if the victim’s voluntary use of drugs or alcohol resulted in the impairment of the victim’s ability to appraise or control conduct. See §2G1.1, comment. (n.2).

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

**3. Cross Reference**

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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

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



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)).

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#### **4. Special Instruction**

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

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

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#### **5. Chapter Three Adjustments**

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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**

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If the offense involved more than ten victims, an upward departure may be warranted. *See* §2G1.1, comment. (n.6).

**D. §2G1.3 (PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH A MINOR; TRANSPORTATION OF MINORS TO ENGAGE IN A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT; TRAVEL TO ENGAGE IN COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH A MINOR; SEX TRAFFICKING OF CHILDREN; USE OF INTERSTATE FACILITIES TO TRANSPORT INFORMATION ABOUT A MINOR)**

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

### **1. Determining the Base Offense Level.**

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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).
- 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*<sup>2</sup>

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### 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. *United States v. Brooks*, 610 F.3d 1186 (9th Cir. 2010). 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. *See United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007). 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. *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

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

compromised the voluntariness of the minor's behavior. §2G1.3, comment. (n.3(B)). 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); *United States v. Harrison*, 535 F. App'x 829 (11th Cir. 2013) (finding court can look to a variety of factors, "including whether the conduct displays an abuse of superior knowledge, influence, or resources" and that defendant's superior knowledge was evidenced by his knowledge of computers to create advertisements depicting the victim, instructing her how to answer the phone, how much to charge, and training her on the work and his superior resources were evidenced by his use of a laptop computer, payment for the Internet advertisements, purchase of sex devices, and transportation of the victim to motels) (*citing United States v. Root*, 296 F.3d 1222, 1234 (11th Cir. 2002)).

It is permissible to apply the enhancement 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. 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).

Effective November 1, 2009, the Commission amended the commentary to provide: "The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring." §2G1.3, comment. (n.3(B)); App. C, Amdmt. 732. If the participant is at least 10 years older than the minor, there is a rebuttable presumption (for purposes of this subsection only) that there was at least some degree of undue influence. §2G1.3, comment. (n.3(B)); see also *United States v. Reid*, 751 F.3d 763 (6th Cir. 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).

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

**c. Use of a computer**

Section 2G1.3(b)(3) provides for a 2-level enhancement if a computer or an interactive computer service was used to: (1) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (2) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor. This subsection applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2G1.3, comment. (n.4). The enhancement is appropriately applied if the defendant begins to pursue the victim while using a computer, even if no sexual requests were sent via computer and even if the minor does not yet recognize the defendant’s intent. *United States v. Lay*, 583 F.3d 436 (6th Cir. 2009). The use of a cellular telephone to send voice mail and text messages directly to the victim is a “computer” for purposes of §2G1.3(b)(3), even though it was not used to connect to the Internet. *United States v. Kramer*, 631 F.3d 900 (8th Cir. 2011). The enhancement can apply if it is a co-defendant who uses the computer to post information about a minor, although contrary to the language in Application Note 4 that states subsection (b)(3) 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 control of the minor. *United States v. Jackson*, 697 F.3d 1141 (9th Cir. 2012) (holding 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 application if the offense involved the use of a computer to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor; when the language of the guideline is inconsistent with the language of the Application Note, the plain language of the guideline controls).

**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. *See United States v. Watkins*, 667 F.3d 254 (2d Cir. 2012) (holding that the 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). “Sexual contact” can include the touching of one’s self. *See United States v. Pawlowski*, 682 F.3d 205 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 894 (2013), (affirming application of enhancement when defendant masturbated on webcam while chatting with someone he believed to be 15 year old minor).

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

**3. Cross References**

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**a. Section 2G1.3(c)(1)**

Section 2G1.3(c)(1) states that §2G2.1 should apply if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, and if the resulting offense level under §2G2.1 is greater than the offense level determined under this guideline. This subsection is to be construed broadly. *See* §2G1.3, comment. (n.5(A)); *United States v. Veazey*, 491 F.3d 700 (7th Cir. 2007) (holding “that the cross-reference [in §2G1.3(c)(1)] applies when one of the defendant’s purposes was to create a visual depiction of sexually explicit conduct, without regard to whether that purpose was the primary motivation for the defendant’s conduct”); *United States v. Bohannon*, 476 F.3d 1246 (11th Cir. 2007) (finding that the application of this cross reference was appropriate where the defendant arranged a meeting with the “minor” over the Internet and had a history of making visual depictions of other young girls).

**b. Section 2G1.3(c)(2)**

Section 2G1.3(c)(2) states that §2A1.1 (First Degree Murder) should apply if a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 and if the resulting offense level is greater than the one determined under this guideline.



**c. Section 2G1.3(c)(3)**

Section 2G1.3(c)(3) states that §2A3.1 should apply if the offense involved conduct described in 18 U.S.C. §§ 2241 or 2242 and if the resulting offense level is greater than the one determined under this guideline. *See United States v. Reynolds*, 720 F.3d 665, 674 (8th Cir. 2013) (finding cross reference proper where the defendant knowingly caused the minor victim to engage in a sexual act by placing her 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) (finding the cross reference should have been applied where the defendant's conduct involved conduct described in section 2242 when he admitted he understood why the victim felt forced to engage in sex with him after he placed her in fear when he coerced her, resisted her efforts to move away, and ignored her repeated protests and cries); *United States v. Robinson*, 436 F. App'x 82 (3d Cir. 2011) (holding application of §2G1.3(c)(3) appropriate where co-conspirator pimps' use of physically brutal violence and intimidation against juvenile and young adult prostitutes was foreseeable); *United States v. Madison*, 477 F.3d 1312 (11th Cir. 2007) (finding that the district court properly applied the cross reference to §2A3.1 in a case where the defendant "used violence and fear to cause [the minor prostitute] to engage in a sexual act with another person").

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 in §2A3.1 and the enhancement at §2A3.1(b) if the offense involved conduct described in section 2241. *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. § 2241(a) or (b)); *see also United States v. Archdale*, 229 F.3d 861, 869 (9th Cir. 2000); *United States v. Kizer*, 517 F. App'x 415 (6th Cir. 2013); *United States v. Scott*, 434 F. App'x 103, 106-07 (3d Cir. 2011).

For purposes of this subsection, conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, 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)).

For purposes of this subsection, conduct described in 18 U.S.C. § 2241(c) is (1) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12; (2) knowingly engaging in a sexual act with a minor who has not attained the age of 12; or (3) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) or (b) with a minor who has reached 12 years, but has not reached the age of 16 (and is at least 4 years younger than the person so engaging). *See* §2G1.3, comment. (n.5(B)(ii)). For purposes of this subsection, conduct described in 18 U.S.C. § 2242 is

engaging in, or causing another person to engage in, a sexual act with another person by (1) threatening or placing the 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.4(B)(iii)).

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#### **4. Special Instruction**

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Section 2G1.3(d)(1) provides that if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) should apply as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction. Thus, multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts). *See* §2G1.3, comment. (n.6). Each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, is to be treated as a separate minor. *See* §2G1.3, comment. (n.6). *See also United States v. Garcia-Gonzalez*, 714 F.3d 306, 316 (5th Cir. 2014) (finding that the 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) (holding that the defendant’s sexual conduct with minors does not fall within relevant conduct as 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 is not contained on that list).

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#### **5. Upward Departure Provision**

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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).

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### **1. Base Offense Level**

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This guideline has one base offense level of 32.

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### **2. Specific Offense Characteristics**

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#### **a. Age of the victim**

Section 2G2.1(b)(1) provides for a **4**-level enhancement if the offense involved a minor who had not attained the age of 12 years, and a **2**-level enhancement if the offense involved a minor who had attained the age of 12 years but had not attained the age of 16 years. *United States v. Garnette*, 474 F.3d 1057 (8th Cir. 2007) (holding that the district court did not err when it varied upward by 21 percent from the guideline range because §2G2.1(b)(1) does not account for particularly vulnerable victims significantly younger than 12 years old); *see also United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) (rejecting the defendant’s double-counting argument, and applying this enhancement as well as the vulnerable victim adjustment because of the victims’ extreme youth and small size).

#### **b. Sexual act or sexual conduct**

Section 2G2.1(b)(2) provides for a **2**-level enhancement if the offense involved the commission of a sexual act or sexual contact, or (if greater) a **4**-level enhancement if the offense involved both the commission of a sexual act and conduct described in 18 U.S.C. § 2241(a) or (b). *See United States v. Aldrich*, 566 F.3d 976 (11th Cir. 2009) (finding that defendant’s masturbation in front of his web camera met the definition of “sexual contact”); *United States v. Shafer*, 573 F.3d 267 (6th Cir. 2009) (defining “sexual contact” broadly to include the victim’s self-masturbation); *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (holding that the enhancement applied where the defendant’s relevant conduct included sexual acts undertaken by the victim that the defendant photographed, uploaded, and distributed); *United States v. Boston*, 494 F.3d 660 (8th Cir. 2007) (finding, in a case where the defendant touched the minor victim’s penis for sexual pleasure, that the offense involved a sexual act or sexual contact). For purposes of this subsection, conduct described in 18 U.S.C. § 2241(a) or (b) is: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, 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. See *United States v. Odom*, 694 F.3d 544 (5th Cir. 2012). 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. See *United States v. Broxmeyer*, 699 F.3d 265 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013).

**d. Sadistic or masochistic conduct<sup>3</sup>**

Section 2G2.1(b)(4) provides for a 4-level enhancement if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence. At least one court has held that “images involving an adult male performing anal sex on a minor girl are per se sadistic or violent,” *United States v. Street*, 531 F.3d 703 (8th Cir. 2008) and that “self-penetration by a foreign object qualifies as violence,” *United States v. Starr*, 533 F.3d 985 (8th Cir. 2008). For a more detailed discussion of what constitutes “sadistic or masochistic” conduct, see *infra* page 29.

**e. Parent, relative, or guardian/custody, care, or supervisory control**

Section 2G2.1(b)(5) provides for a 2-level enhancement if the defendant was a parent, relative, or legal guardian of the minor or if the minor was otherwise in the custody, care, or supervisory control of the defendant. This enhancement applies broadly and it includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. See §2G2.1, comment. (n.3(A)); see also *United States v. Alfaro*, 555 F.3d 496 (5th Cir. 2009) (affirming the enhancement and concluding that the relationship between the 36-year-old defendant and his 15-year-old sister-in-law was “entrustful” even though the victim’s mother did not approve of the victim spending time with the defendant). The minor can be in the custody, care or supervisory control of more than one person at a time. See, e.g., *United States v. Carson*, 539 F.3d 611 (7th Cir. 2008) (holding that the district court properly applied the enhancement in a case in which the minor’s mother and the mother’s boyfriend had mutual custody over the minor during the minor’s visits to their house). If the enhancement in §2G2.1(b)(5) applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. See §2G2.1, comment. (n.3(B)).

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

### **f. Knowing misrepresentation of identity/use of a computer**

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

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

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

### **3. Cross Reference**

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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**

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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); *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.”).

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## 5. Upward Departure Provision

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

**F. §2G2.2 (TRAFFICKING IN MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR; RECEIVING, TRANSPORTING, SHIPPING, SOLICITING, OR ADVERTISING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR; POSSESSING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR WITH INTENT TO TRAFFIC; POSSESSING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR)<sup>4</sup>**

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

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### 1. Determining the Base Offense Level

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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**.

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### 2. Specific Offense Characteristics

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

**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. *See United States v. Fore*, 507 F.3d 412 (6th Cir. 2007) (holding that the defendant did not meet the second requirement of §2G2.2(b)(1) "because his criminal conduct was not limited to the receipt or solicitation of pornographic materials, but also encompassed the transportation of materials involving the sexual exploitation of a minor in interstate commerce").

**b. Minor under 12 years**

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

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

**c. Distribution**

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

(i) *Alternative enhancements*

(1) 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.

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

Distribution for this enhancement is any transaction, including bartering or other in-kind transaction that is conducted for a thing of value, but not for profit. A “thing of value” is anything of valuable consideration, *i.e.*, child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received. *See* §2G2.2, comment. (n.1); *see also United States v. 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). The “thing of value” could be the defendant’s increased accessibility to other users’ files based on the defendant’s high participation rate in a peer-to-peer program. *United States v. Carani*, 492 F.3d 867 (7th Cir. 2007).

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

*States v. Spriggs*, 666 F.3d 1284 (11th Cir. 2012) (rejecting application of enhancement based on reasoning that file-sharing program exists to promote free access to information, not as forum for bartering, and “hope that a peer would reciprocate his generosity does not amount to a transaction conducted for ‘valuable consideration.’”).

The government can meet its burden of proving that the defendant expected to receive a thing of value with direct evidence such as an admission by the defendant that he knew he was using a peer-to-peer file sharing network and could download files from others who could also download files from him. See *United States v. Chase*, 717 F.3d 651 (8th Cir. 2013) (finding application of the enhancement for receipt of a thing of value appropriate where defendant failed to provide concrete evidence of any ignorance that he was distributing). But see *United States v. McManus*, 734 F.3d 315 (4th Cir. 2013) (remanding and holding no per se rule to apply enhancement to every use of closed file-sharing program where contents of shared folder available only to certain others because application requires proof of defendant’s state of mind).

(3) 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).



(4) 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).

(5) 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).

(6) Finally, if the distribution was distribution other than as described in (a) through (e), a 2-level enhancement applies.

(ii) *Circuit conflict.* There is a circuit conflict over whether courts should only apply the 2G2.2(b)(3)(F) enhancement, in a case where the defendant used a P2P file-sharing program, if there is the requisite *mens rea*, i.e. proof that the defendant knew that the file-sharing program would allow others to download his files.

(1) *Mens rea requirement.* The Second, Fourth, and Seventh Circuits have held the distribution enhancement in a P2P case does require proof the defendant knowingly made the files of child pornography available to others. *United States v. Baldwin*, 743 F.3d 357 (2d Cir. 2014) (“[A] district court must find that a defendant knew that his use of P2P software would make child-pornography files accessible to other users” [emphasis in the original]); see also *United States v. McManus*, 734 F.3d 315 (4th Cir. 2013); *United States v. Robinson*, 714 F.3d 466 (7th Cir. 2013).



(2) *No mens rea requirement.* The Fifth, Tenth, and Eleventh Circuits do not require proof that the defendant knowingly made files of child pornography available to others. The courts in these circuits have held that the enhancement for distribution is appropriate even where the government has not shown the defendant knew of the file-sharing capabilities of the program being used. See *United States v. Creel*, 783 F.3d 1357 (11th Cir. 2015); *United States v. Baker*, 742 F.3d 618 (5th Cir. 2014); *United States v. Ray*, 704 F.3d 1307 (10th Cir. 2013).

(3) *Intermediate Position.* The Eighth Circuit has adopted an intermediate position holding that the use of file-sharing software creates a “strong presumption” that the users understand others can access their files, such that the government does not need to prove knowledge to apply the enhancement, *United States v. Dodd*, 598 F.3d 449 (8th Cir. 2010), but the defendant can rebut the presumption with “concrete evidence of ignorance” of the file-sharing program’s capabilities. See *United States v. Durham*, 618 F.3d 921 (8th Cir. 2010).

Similarly, both the Sixth Circuit and Ninth Circuit have held that knowing use of a file-sharing program is sufficient to trigger the enhancement, but have also entertained the possibility (though not actually held) that a defendant could rebut this finding by showing “ignorance” of the network’s distribution capabilities in particular circumstances. See *United States v. Abbring*, No. 14-1987, 2015 WL 3559214 (6th Cir. June 9, 2015); *United States v. Vallejos*, 742 F.3d 902 (9th Cir. 2014).

(iii) *Double counting.* It is not double counting to apply the distribution enhancement in a conviction for distribution of child pornography. 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 (1<sup>st</sup> Cir. 2012); *United States v. Frakes*, 402 F. App’x 332 (10th Cir. 2010) (finding that §2G2.2 expressly allows enhancement for distribution such that enhancement “will always apply” to distribution offenses).

#### **d. Sadistic or masochistic conduct**

Section 2G2.2(b)(4) provides for a 4-level enhancement if the material involved in the offense portrayed sadistic or masochistic conduct or other depictions of violence. This subsection applies whether the defendant specifically intended to possess, receive, or distribute such materials. See §2G2.2, comment (n.2) (resolving circuit split on issue). The enhancement does not require a determination of whether the defendant intended to possess the images or actually derived pleasure from viewing the images. See *United States*

*v. Maurer*, 639 F.3d 72 (3d Cir. 2011) (holding that §2G2.2(b)(4) is applied on basis of strict liability).

- (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.), *cert. denied*, 133 S. Ct. 2375 (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. 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 superimposed 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) **Double counting.** Courts have held that it is not impermissible double counting to apply an enhancement for prepubescent age of the child and the sadistic or violent behavior. See *United States v. McLaughlin*, 760 F.3d 699 (10th Cir. 2014) (permitting double-counting for both age and

sadism enhancements, because the latter is “not, as a factual matter, based solely on the age of the children portrayed.”); *See United States v. Lyckman*, 235 F.3d 234 (5th Cir. 2000) (ruling that the court could “consider the [. . .] child’s prepubescence in assessing the sadistic or violent quality of the images without rendering [the enhancement for material involving a prepubescent minor] superfluous”); *United States v. Myers*, 355 F.3d 1040 (7th Cir. 2004) (holding that the prepubescent status of the minor does not implicate the enhancement under §2G2.2(b)(4); “[i]t is the conduct taken with respect to that prepubescent child that justifies that . . . enhancement”).

(iii) **Relevant conduct.** An enhancement under §2G2.2(b)(4) can be based on relevant conduct such as visual depictions found in the defendant’s possession that are not part of the charged conduct in the indictment. *See United States v. Ellison*, 113 F.3d 77 (7th Cir. 1997); *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) (holding that the possession of images of sadistic conduct is not relevant conduct if the defendant was convicted of transporting and shipping child pornography and there was no evidence showing that the defendant ever thought about sending the sadistic 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); *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) was appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors). Evidence of an intent to continue abusing minors in the future, combined with evidence of past sexual abuse, is sufficient for imposition of the enhancement. *United States v. Acosta*, 619 F.3d 956 (8th Cir. 2010).

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

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

- (i) *No temporal limit on prior conduct.* See *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013) (finding that because no language in enhancement or application notes requires consideration of defendant’s age at time of instances of sexual abuse, such conduct by defendant as a juvenile is properly considered); *United States v. Woodward*, 694 F.3d 950 (8th Cir. 2012) (finding that because enhancement contains no temporal limitations, 19 year old juvenile adjudication for sexual abuse of two minors can be used in the determination); *United States v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (finding application appropriate where defendant molested nieces 35 years before offense); *United States v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (holding defendant’s admitted molestation of daughters 30 years prior to conviction for possession of child pornography was sufficient for enhancement); *United States v. Turner*, 626 F.3d 566 (11th Cir. 2010) (applying the enhancement where the abusive incidents occurred 20 years prior to the sentencing); *United States v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (agreeing with the First, Sixth, Seventh, and Ninth Circuits “that there is no temporal nexus necessary to establish a pattern of activity of sexual abuse or exploitation of a minor,” and applying the “pattern of activity” enhancement because the defendant had been convicted of two previous sexual assaults in 1986 and 1989, respectively); *United States v. Garner*, 490 F.3d 739 (9th Cir. 2007) (upholding the district court’s enhancement based on conduct in which the defendant had engaged 35 years earlier). Application Note 1 specifies that the pattern of abuse need not be related to the offense of conviction. See §2G2.2 (n. 1); *United States v. Lucero*, *infra*.
- (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 “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); *United States v. Ashley*, 342 F.3d 850 (8th Cir. 2003) (stating that Application Note 1 is unambiguous that the enhancement applies whether or not the abuse occurred during the course of the offense); *United States v. Anderton*, 136 F.3d 747 (11th Cir. 1998) (“[T]he clarifying amendment clearly permits an increased offense level for conduct unrelated to the offense of conviction.”).

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

#### **f. Use of a computer**

Section 2G2.2(b)(6) provides for a 2-level enhancement if the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material. This enhancement can apply even if the defendant responds to an advertisement for child pornography via computer but receives the material through the mail. See *United States v. Dotson*, 324 F.3d 256 (4th Cir. 2003) (holding that the language of the guidelines makes it clear that the computer enhancement applies not only to “the solicitor [of child pornography], but also the recipient of such solicitation”). Further, the enhancement can apply where the material was at some point transmitted using a computer but, at the time it was seized, was no longer on a computer. See *United States v. Weisser*, 417 F.3d 336 (2d Cir. 2005). Attempts to delete the images do not bar imposition of the enhancement. See *United States v. Glasgow*, 682 F.3d 1107 (8th Cir. 2012). It is not double counting to apply the use of a computer enhancement to a distribution offense through the use of 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**

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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”); *United States v. Dawn*, 129 F.3d 878 (7th Cir. 1997) (holding that the district court properly applied the cross reference even though the defendant made the sexually explicit films outside the United States); *United States v. Speelman*, 431 F.3d 1226 (9th Cir. 2005) (stating that the district court did not err in applying the cross reference even though the exploitation charge was dropped pursuant to a plea agreement); *United States v. Tagore*, 158 F.3d 1124 (10th Cir. 1998) (holding that the district court properly considered the reasonably foreseeable conduct of the defendant’s co-conspirators when determining whether to apply this enhancement).

The purpose requirement does not mean that the primary purpose must have been for the purpose of producing a visual depiction. *See United States v. Cox*, 744 F.3d 305, 309 (4th Cir. 2014) (finding that cross reference applies any time *one* of the purposes was to produce a visual depiction of the conduct).

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#### **4. Upward Departure Provision**

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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.

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##### **1. Base Offense Level**

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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**

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The base offense level under this guideline is 6.

**2. Cross References**

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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**

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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). See *United States v. Robinson*, 436 Fed. App’x 82 (3d Cir. 2011) (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”). The enhancement applies to defendants convicted of receipt, distribution, or possession of child pornography offenses. See *United States v. Jenkins*, 712 F.3d 209, 212 (5th Cir. 2013) (finding application of §3A1.1 appropriate for a defendant convicted of receipt, possession and distribution of child pornography; the victimization of children continues beyond the production of the images and the consumer of the material may be considered to be “causing the children depicted in those material to suffer . . .”).

The adjustment under §3A1.1(b) does not apply if the factor that makes the person vulnerable is already incorporated into the offense guideline. See §3A1.1(b), comment. (n.2). Therefore, in child pornography offenses, if the guideline provides an enhancement for the age of the minor victim, §3A1.1(b) applies only if the victim was unusually vulnerable for reasons unrelated to his/her age. §3A1.1, comment. (n. 2); see, e.g., *United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008) (holding that the victim’s petite and fragile stature, naiveté, and poor communication skills made her unusually vulnerable for a 13-year-old girl); *United States v. Holt*, 510 F.3d 1007 (9th Cir. 2007) (finding application of §3A1.1 warranted for possession of child pornography offense where the “child is so young and small that he or she is less able to resist than other child victims” of child pornography); *United States v. Lynn*, 636 F.3d 1127 (9th Cir. 2011) (holding adjustment warranted where toddlers were portrayed in the videos); *United States v. Jenkins*, 712 F.3d

209, 214 (5th Cir. 2013) (finding “the inquiry should focus on whether ‘the factor that makes the person a vulnerable victim is incorporated in the offense guideline;” application of an enhancement under §2G2.2(b)(2) if the material involved a prepubescent minor or a minor who had not attained the age of 12 years and application of the vulnerable victim enhancement was proper when a victim is especially vulnerable even as compared to most children under 12). *But see United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) (*supra*, Section II.E); *see also United States v. Britton*, 567 F. App’x 158 (3d Cir. 2014) (finding co-conspirator prostitute involved in the prostitution ring was properly considered a participant because she served as a trainer for a minor prostitute and pled guilty to conspiracy to engage in interstate prostitution).

#### **B. §3B1.1 (AGGRAVATING ROLE)**

Section 3B1.1 provides for a 4-level adjustment if the defendant was an 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).

#### **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)).

### **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).

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## **1. Determining the Base Offense Level & Criminal History Category**

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### **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)).

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

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

*Shepard v. United States*, 544 U.S. 13 (2005). The Eight Circuit has held that §4B1.5(a) does not require the formal entry of a judgment of conviction before a defendant is considered convicted for application of the enhancements. *United States v. Leach*, 491 F.3d 858 (8th Cir.

2007) (holding that §4B1.5(a) “only requires that the defendant have been found guilty of the offense”).

- (i) **Base offense level.** If subsection (a) applies, the base offense level is first determined under Chapters Two and Three of the applicable guidelines. Next, this offense level is compared to the offense level table provided in §4B1.5(a)(1)(B), decreased by any applicable adjustment from §3E1.1 (Acceptance of Responsibility). The greater resulting offense level should be used.

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

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

**Double counting.** 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 whether there was a conviction for the conduct that occurred on that occasion. §4B1.5, comment. (n.4(B)(ii)). Thus, by its terms (and unlike subsection (a)), a previous conviction is not required for an enhancement under subsection (b). *See United States v. Broxmeyer*, 699 F.3d 265 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013). Courts have held that un-adjudicated conduct that occurred while the defendant was a juvenile can be a predicate under this subsection. *See United States v. Phillips*, 431 F.3d 86 (2d Cir. 2005) (upholding the application of §4B1.5(b) where the defendant—who was being sentenced for a conviction for producing child pornography—had engaged in sexual conduct with the victim in the offense of conviction and had engaged in one instance of unadjudicated sexual conduct with another minor victim when the defendant was a juvenile).

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

**Double counting.** Section 4B1.5(b)(1) specifically states that the enhancement is to be added to the offense levels determined under Chapters Two and Three. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5. *See United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010) (holding application of the 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).



*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)**

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

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

### **2. §5B1.3(b)**

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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)

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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.

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

#### 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); *see also United States v. Hayes*, 445 F.3d 536 (2d Cir. 2006) (holding that a lifetime term of supervised release for a defendant who pleaded guilty to knowingly transporting child pornography was not unreasonable); *United States v. Daniels*, 541 F.3d 915 (9th Cir. 2008) (finding that a lifetime term of supervised release for a defendant who pleaded guilty to possessing child pornography and who had no prior sex offense convictions was reasonable). *But see United States v. 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). The statutory maximum term of supervised release is recommended if the offense is a sex offense. §5D1.2(b)(2), p.s.

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

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

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

#### **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." *See United States v. Crandon*, 173 F.3d 122 (3d Cir. 1999).

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

### **1. §5D1.3(a) (Mandatory Conditions)**

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

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

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

### **2. §5D1.3(b)**

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The guidelines allow courts to impose other conditions of supervised release if the conditions are "reasonably related to" any or all of the factors listed below. Following the statutory language of 18 U.S.C. § 3583(d)(1), there are four factors tied to the goals of supervised release. The first is the defendant's history and characteristics and the nature and circumstances of his offense. The second is the need for adequate deterrence of future criminal conduct. The third is the need to protect the public from further crimes by the defendant, and the fourth is effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.

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

### ***3. §5D1.3(d)(7) (Policy Statement) (Sex Offenses)***

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

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

Courts have upheld “other” and “special” conditions, but have also struck conditions as overbroad or unreasonable even in light of district court’s significant discretion in imposing supervised release:

- a. **barring the defendant from 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 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. 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 that the defendant undergo sex offender treatment and physiological testing.** *See, e.g., United States v. Morgan*, 44 F. App’x 881 (10th Cir. 2002) (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. Weber*, 451 F.3d 552 (9th Cir. 2006); *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.”).
- (i) requiring penile plethysmograph (PPG) testing.* *See 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). *But see 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 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).

- (ii) *mandating medication in limited contexts*. See *United States v. Mike*, 632 F.3d 686 (10th Cir. 2011) (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 posing 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).
- (iii) *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) (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.*, 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. 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. 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 *United States v. MacMillen*, 544 F.3d 7p1 (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) (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. Crandon*, 173 F.3d 122 (3d Cir. 1999) (upholding a special condition of supervised release that specified the defendant could not possess, procure, purchase, or otherwise obtain access to any form of computer network, bulletin board, Internet or exchange format involving computers unless specifically approved by probation; *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) (holding there was sufficient nexus between the defendant’s use of the Internet and his exploitation of the victim to warrant a special condition prohibiting him from having Internet access at any location without the prior approval of his probation officer); *United States v. Freeman*, 94 F. App’x 40 (3d Cir. 2004) (unpub); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (affirming a condition for a defendant, who pled guilty to possession of child pornography, that required him to not possess or use a computer with access to any online service at any location including his employment without written approval from his probation officer); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (upholding a special condition prohibiting the defendant, convicted of possession of child pornography, from using the Internet

without prior permission from the probation office because the condition was not a complete ban on the Internet and therefore more “readily accomplishes the goal of restricting the Internet and more delicately balances the protection of the public”). *But see 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*, by a 5-4 vote, the Supreme Court resolved a circuit split as to the more 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 “where it can be shown both that a defendant possessed a victim’s images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant” through the more traditional but-for causal inquiry, 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: the victim’s total losses caused by traffic in her images, the number of past criminal defendants who contributed to those losses, reasonable predictions of the number of future offenders likely to be caught and convicted for contributing, an estimate of the broader number of offenders involved, whether the defendant reproduced or distributed the images, whether the defendant had any connection to the initial production of the images, and 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.”

**Post-*Paroline* cases.** *United States v. Beckman*, No. 14–3086, 2015 WL 2330455 (8th Cir. May 15, 2015) (applying the *Paroline* analysis in upholding a \$3,000 per victim restitution order); *U.S. v. Jacob*, Nos. 14–2960, 14–3800, 2015 WL 1963807, at \*3 (3d Cir. May 4, 2015) (upholding \$60,000 in restitution constituting payment for past medical expenses and mental health counseling); *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); *United States v. Hagerman*, 586 F. App’x 64 (2d Cir. 2014) (summary order) (affirming a \$3,281 restitution order that represented the defendant’s portion of the victim’s treatment and lost income from the trauma of knowing her images were continuing to be viewed).

## 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. *See United States v. Daniels*, 541 F.3d 915 (9th Cir. 2008) (approving a condition of supervised release that required the defendant to obtain prior approval from the probation office before being employed by a business or organization “that causes him to regularly contact persons under the age of 18”). Second, a lesser restriction can limit the “terms” of a defendant’s employment. For example, a defendant convicted of fraud may be restricted from working in a position handling money at a bank or may be required to discuss with the employer bank the details of his criminal history. *See United States v. Du*, 476 F.3d 1168 (10th Cir. 2007) (stating that specific findings are required before a court imposes any employment conditions that are considered “occupational restrictions”).

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

#### **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.

## V. CHAPTER FIVE: POST-BOOKER REASONABLENESS DETERMINATIONS

### A. FIRST CIRCUIT

*United States v. Breton*, 740 F.3d 1 (1st Cir. 2014). The district court had sentenced a defendant to a term of imprisonment of 340 months, concurrent, after being convicted of production, distribution, and possession of child pornography. The total offense level after grouping was a level 43, with a resulting guideline sentence of life. However, a maximum term of life was not available because the production offense had the highest statutory maximum penalty, at 30 years. Therefore, the court added the maximum statutorily authorized penalties for each count, for a total sentence of 720 months. Relying on an appendix in the Commission's 2011 Sourcebook of Federal Sentencing Statistics, the defendant argued that the Commission had capped a life sentence at 470 months and therefore a 720 month sentence was unreasonable. The First Circuit held that the Commission had placed no cap on the guidelines to limit a life sentence to 470 months, and therefore a sentence of 340 months was reasonable.

### B. SECOND CIRCUIT

*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 *Kimrough*, “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. Begin*, 696 F.3d 405 (3d Cir. 2012). The Third Circuit found procedurally unreasonable a sentence above the advisory guideline range for a conviction for an attempt to persuade a minor to engage in illegal sexual activity because the district court failed to consider the defendant's request for a downward departure. The sentence of 240 months was 30 months above the advisory guideline range, and above the statutory

minimum 10 years' imprisonment. During the sentencing hearing, the defendant sought the departure based, in part, on the disparity between the advisory guideline range and the federal sentence he would have faced had he actually committed statutory rape, with a statutory maximum of 15 years. He argued that his sentence for an attempt to commit statutory rape under 18 U.S.C. § 2422(b) should not exceed the statutory maximum for an actual statutory rape offense. The Third Circuit agreed that the district court had failed to provide a sufficient record to demonstrate its consideration of his argument, and "did not even specifically rule on [the defendant's] request for a variance." Thus, the court vacated and remanded the sentence. On remand, the district court reimposed the same 240 month sentence and the defendant appealed. On the second appeal, the Third Circuit found the sentence to be reasonable because the district court provided thorough and meaningful consideration to the defendant's request for a downward variance. See *United States v. Begin*, 540 f. App'x 86 (3d Cir. 2013).

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

***United States v. Brown***, 578 F.3d 221 (3d Cir. 2009). The Third Circuit vacated and remanded the defendant's above-guideline sentence because the district court failed to distinguish whether it was the product of a departure or a variance.

***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. 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 of these 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. Reinhart***, 442 F.3d 857 (5th Cir. 2006). The Fifth Circuit affirmed as reasonable a sentence of 235 months in prison where the guideline range was 121-151



months because the district court based its sentence on the factors laid out in 18 U.S.C. § 3553(a) and did not take into account any inappropriate or unreasonable factors.

## F. SIXTH CIRCUIT

***United States v. Bistline***, 665 F.3d 758 (6th Cir. 2012). The Sixth Circuit found a sentence of confinement of one night in a courthouse lockup and ten years supervised release for possession of child pornography to be substantively unreasonable. The sentencing court had described the child pornography guidelines as “seriously flawed” because Congress actively crafted those guidelines and therefore §2G2.2 was not a result of “the ordinary deliberations of the Sentencing Commission” through empirical study and data. The circuit court noted that under our system of government, defining crimes and fixing penalties is a legislative function, and although Congress delegates a limited measure of its power to the Commission to set sentencing policy, it retains the remainder for itself. Thus, the Sixth Circuit found that a district court cannot reasonably reject §2G2.2 or any guideline based merely on the ground that Congress exercised its power to set the policies reflected therein. The circuit court also rejected the sentencing court’s criticism of §2G2.2 because it was not a result of ordinary deliberation, stating that although the Commission did not act in its usual institutional role with respect to the guideline, Congress was the relevant actor, therefore putting §2G2.2 on stronger ground than the crack cocaine guideline at issue in *Kimrough*. On remand, the district court again sentenced the defendant to one day of confinement, and in a subsequent opinion, the Sixth Circuit again vacated and remanded, and assigned the case to a different judge on remand. The court found that the district court had repeated many of the same errors it had in its first decision, including that it had again failed to make the guidelines the starting point and the initial benchmark for the sentence, and had continued to treat the issue of the guidelines’ validity “strictly as a question of social science.” *United States v. Bistline*, 720 F.3d 631, 633 (6th Cir. 2013).

***United States v. Robinson***, 669 F.3d 767 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 929 (2013). The Sixth Circuit vacated a sentence of one day in custody for possession of child pornography as substantively unreasonable. The district court based the sentence on a psychological report that the defendant did not appear to be a pedophile and had scored in the lowest risk category on risk assessments relative to other adult male sex offenders. The Sixth Circuit found the sentence substantively unreasonable because of a lack of weight given to the section 3553(a) factors other than the defendant’s history and characteristics and the need to protect the public from future crimes, including the need to reflect the seriousness of the crime, general deterrence and the need to avoid unwarranted sentencing disparities. It further found that the district court had based the sentence on a prediction of the defendant’s future dangerousness to children, which was a crime that was not at issue in the case.

***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.

***United States v. Harris***, 339 F. App'x 533 (6th Cir. 2009). Defendant's guideline range for possession and distribution of child pornography was 210-262 months. The district court imposed a sentence of 84 months, relying primarily on the defendant's lack of a significant criminal history, his employment history, family life, and psychological evaluation. It also considered the conditions of release it imposed, including mandatory medical treatment. The Sixth Circuit reversed the variance as substantively unreasonable, and vacated the sentence. The circuit court stated that the court "relied on factors common to many defendants." It also found that the court mis-characterized the defendant's psychological assessment, particularly considering the magnitude of the variance, and that it failed to recognize the seriousness of the offense.

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

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

## G. SEVENTH CIRCUIT

**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.”

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

## H. EIGHTH CIRCUIT

**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 years old. The court applied an eight-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, and therefore the sentence was reasonable).

***United States v. Kane***, 639 F.3d 1121 (8th Cir. 2011). After the Supreme Court vacated and remanded the case for reconsideration in light of both Gall and Pepper, the Eighth Circuit again held that a sentence of 120 months for a conviction of aggravated sexual abuse was substantively unreasonable because, in part, the district court committed clear error in concluding that the defendant posed a low risk of recidivism and determining that her substance abuse and mental health issues minimized her responsibility for her crimes. The defendant had held her daughter down to be sexually abused by the defendant's boyfriend more than 200 times, receiving payment for each instance of abuse. The applicable guideline range was 235 to 293 months. At the resentencing, the district court stated, without elaborating reasons therefore, that it did not think the defendant was a danger to the public or presented a likelihood to recidivate. First, the circuit court found that the facts showed the defendant repeated her crimes over and over again and chose to continue her abuse over two years. In its view, nothing in Pepper altered its conclusion and it emphasized that the Court had found in Pepper that “the likelihood that [the defendant] will engage in future criminal conduct” is a “central factor that district courts must assess when imposing a sentence.” Second, the Eighth Circuit found the record devoid of any evidence that the defendant's past substance abuse and mental health issues caused her to be victimized by her boyfriend, thus minimizing her responsibility for her crimes against her child, and Pepper did not offer any reason to change that conclusion. However, in light of Pepper, the circuit court reversed its earlier decision that a downward variance due to the defendant's post-sentence rehabilitation in earning her GED and completing parenting classes and vocational training was procedural error.

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

***United States v. 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% 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. Rudd***, 662 F.3d 1257 (9th Cir. 2011). The Ninth Circuit vacated and remanded a sentence as procedurally unreasonable where the sentencing court failed to adequately explain its imposition of a more severe residency requirement than that agreed to by the parties in the plea agreement. The defendant was convicted of traveling to a foreign country and engaging in illicit sexual conduct. The parties had agreed to a special condition of supervised release that the defendant not reside “within direct view of” places minors typically congregate, but the court accepted the probation officer’s recommendation in the PSR that the defendant not reside “within 2,000 feet of” places minors typically congregate, finding what it termed only a “minor variation” between this condition and that found in the plea agreement. The circuit court found that the difference between a condition prohibiting residence within 2,000 feet of, and one prohibiting residence within direct view of, places primarily used by minors could “hardly be described as a ‘minor variation.’” It further found that the reasons for the court’s decision to deviate were not apparent from the record and that there was an absence in the record of any explanation of how the “arbitrary” distance of 2,000 feet was chosen. Therefore, it vacated the restriction and remanded for the sentencing court to “articulate a basis for imposing the condition, tailored to the nature and circumstances of [the defendant’s] offense and his specific character and history.”

## J. TENTH CIRCUIT

***United States v. Grigsby***, F.3d 908 (10th Cir. 2014). The Tenth Circuit found that a sentence of 260 years for the production of child pornography was reasonable. The defendant pled guilty to eight counts of sexual exploitation of a child for the purpose of producing child pornography, possession of child pornography, and being a felon in possession of a firearm. 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 § 3553(a) factors, and considered the defendant “as an individual.”

#### K. ELEVENTH CIRCUIT

***United States v. Lebowitz***, 676 F.3d 1000 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1492 (2013). 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.”