PRIMER

SEX OFFENSES:
SEXUAL ABUSE AND FAILURE TO REGISTER OFFENSES

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

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TABLE OF CONTENTS

The purpose of this primer is to provide a general overview of the statutes, sentencing guideline issues, and case law relating to sexual abuse and failure to register offenses. This primer is not intended to be comprehensive.

I. RELEVANT STATUTES

A. THE STATUTORY SCHEME

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

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

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

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

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

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

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

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

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

Section 2241(c) prohibits crossing state lines with the intent to engage in a sexual act with a person under the age of 12 years; knowingly engaging in a sexual act with a person under the age of 12 years; or knowingly engaging in a sexual act under circumstances described in subsections (a) or (b) with a person who is at least 12 years old and is not yet 16, and who is at least four years younger than the person engaging in the act.[1] Pursuant to section 2241(d), the government does not have to prove that the defendant knew the other person engaging in the sexual act was under 12 years old. Subsection (c) includes attempt, and has a statutory minimum penalty of 30 years in prison and a maximum penalty of life. If the defendant was previously convicted of an offense under subsection (c) or an analogous state offense, there is a statutory minimum penalty of life in prison.

18 U.S.C. § 2242 (Sexual Abuse)

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

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

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

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

[1] Many of the offenses found in Chapter 109A must have been committed in the special maritime and territorial jurisdiction of the United States or in Federal custody.

Pursuant to section 2243(c)(1), it is a defense that the defendant reasonably believed that the other person had reached age 16. Pursuant to section 2243(c)(2), it is a defense that the persons engaging in the sexual act were at that time married to each other. Pursuant to § 2243(d), however, the government does not have to prove that the defendant knew the age of the other person engaging in the act, or that the requisite age difference existed between the people involved in the act.

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

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

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

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

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

Anyone who murders an individual while in the course of committing any of the offenses listed above[2] should be sentenced to death or to any term of years or for life.

18 U.S.C. § 2246 (Definitions)

The definitions relevant to this primer appear below:

(2) the term "sexual act" means:

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

[2] Section 2245 also includes offenses committed under 18 U.S.C. §§ 1591, 2251, 2251A, 2260, 2421, 2422, 2423, and 2425.

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

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

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

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

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

18 U.S.C. § 2247 (Repeat Offenders)

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

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

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

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

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

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

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

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

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

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

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

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

B. LEGAL ISSUES RELATING TO THE STATUTES

1. "Force" under 18 U.S.C. § 2241(a)

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

The element of "force" in section 2241(a) "is satisfied by showing the use of such physical force as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim." *United States v. Bercier*, 506 F.3d 625, 628 (8th Cir. 2007) (quotation omitted) (holding that the evidence was sufficient to sustain a conviction under 18 U.S.C. § 2241(a) where the victim testified that the defendant "pushed her back on the bed and would not let her push him away when he put his head and hand up her shirt and began touching and kissing her breasts[,]" and then "forcibly held her legs apart while he performed oral sex"); *United States v. Sharpfish*, 408 F.3d 507, 510-11 (8th Cir. 2005) (finding an adequate showing of force where the evidence showed that the defendant "had a great size advantage over the victim: he was said to weigh 235 to 240 pounds, whereas [the victim] was three years old," the defendant "had used his size advantage to brutalize the child over time by beating and kicking her," and the victim testified that the defendant would "lay on her, despite her telling him 'no,' and that he hurt her 'down there'"). A codefendant's use of force during an aggravated sexual assault sufficient to prevent the victim from escaping constitutes force sufficient to enhance the defendant's sentence. *See United States v. Bowman*, 632 F.3d 906, 911-12 (5th Cir. 2011).

2. Attempt under 18 U.S.C. § 2241(a)

Another key issue involves the difference between attempted aggravated sexual abuse and sexual contact. Where the defendant had the intent to cause another person to engage in a sexual act by use of force, and has taken a substantial step to do so, he can be convicted of attempted aggravated sexual abuse. *See United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003) (finding sufficient evidence to support a conviction for attempted aggravated sexual abuse where the victim testified that the defendant "placed his hand on her vagina and tried to insert his finger, but was prevented by her physical resistance," and that "all of the sexual contact that [the defendant] did accomplish . . . was committed, according to the victim's testimony, over her express verbal objection and against her physical resistance, by means of physical force").

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

A key issue is whether a prior conviction qualifies for the mandatory life sentence under section 2241(c) for having committed the offense after having been convicted of another federal offense under section 2241(c) or a state offense that would have been a federal offense under the provision. A state offense cannot qualify as a predicate offense for the enhanced penalty provision if all the required elements in section 2241(c) are not met. *See United States v. Jones*, 748 F.3d 64, 73-74 (1st Cir. 2014) (finding a state offense for aggravated sexual assault with a victim under the age of 13 did not qualify for the mandatory life sentence because the state offense did not also require proof that the defendant acted with an intent to degrade, humiliate, arouse, etc., as required by the definition of a "sexual act" under section 2246).

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

A key issue involves whether the statute requires that the defendant knew the victim was incapacitated in order to support the conviction. *See United States v. Bruguier*, 735 F.3d 754, 759-760 (8th Cir. 2013) (en banc) (finding "knowingly" in the statute requires not only that the defendant knowingly engaged in a sexual act, but that he also knew the victim was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act); *United States v. James*, 810 F.3d 674, 682 (9th Cir), *cert. denied*, 137 S. Ct. 219 (Oct. 3, 2016) (as matter of first impression, broadly defining "physically incapable" in section 2242(2)(B), and reversing motion for acquittal , where victim was severely disabled by cerebral palsy and incapable of verbally communicating unwillingness to engage in sexual act and physically incapable of declining participation).

5. "Force" under 18 U.S.C. § 2244(a)(1)

One issue for a conviction under section 2244(a) is whether the sexual contact would have violated 18 U.S.C. § 2241(a) or (b) had the sexual contact been a sexual act. Although the statute does not define "force" for purposes of either section 2241 or 2244, in certain circumstances, aggravated sexual contact under section 2244 may be a lesser-included offense of aggravated sexual abuse under section 2241. *United States v. Cloud*, 780 F.3d 877, 879 (8th Cir. 2015). Thus, in making a determination whether the defendant used force, courts can look to the element of force requirements in section 2241. *Id*.

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

One key issue under SORNA is the issue of where proper criminal venue lies for purposes of updating SORNA registration. SORNA does not require a sex offender to update his registration in a state to reflect that he is moving out of the state. Instead, it requires a sex offender to register and keep the registration current where he is currently residing, currently employed and currently a student. *See United States v Nichols*, 136 S. Ct. 1113 (2016) (addressing a circuit split to hold sex offenders are not required to update their registrations in the state from which they move because SORNA uses present tense requiring registration where offender "resides," "is an employee,' and "is a student). *See also United States v. Haslage*, 2017 WL 1208430 (7th Cir. 2017) (finding venue was not proper in Wisconsin for a violation of SORNA when sex offender moved out of Wisconsin and moved into Minnesota).

7. Retroactivity of 18 U.S.C. § 2250(a)

One key issue for the courts is when the legal obligations to register as a sex offender pursuant to the SORNA attach. Although the requirements of SORNA are found in section 16911, the criminal offense for failing to register as required under SORNA is found at 18 U.S.C. § 2250. Although the Attorney General has promulgated rules and regulations that SORNA is to be retroactively applied to sex offenders convicted of a sex offense prior to the enactment of SORNA, the Supreme Court has held that the Act's registration requirements do not apply to pre-Act offenders until the Attorney General has so specified. *See United States v. Reynolds*, 132 S. Ct. 975 (2011) (reversing and remanding conviction under SORNA for interstate travel in September 2007, when defendant's substantive sex offense conviction was before the effective date of the Act, and leaving unanswered the question whether the Attorney General's Interim Rule specifying that SORNA applies to such sex offenders, which was promulgated on February 28, 2007, is valid). *See also United States v. Madera*, 528 F.3d 852, 857 (11th Cir. 2008). The Supreme Court has held that SORNA applies to a defendant who failed to register after moving within a state even without traveling in interstate commerce, because he was already subject to the Jacob Wetterling Act requiring him to register. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2500 (2013). The Supreme Court has also held that SORNA only applies to sex offenders whose interstate travel occurs after the effective date of SORNA. *United States v. Carr*, 560 U.S. 438 (2010).

Another key issue involves whether defendants in states that have not yet implemented SORNA can be convicted for failing to register as required by the Act.[3] *See*

[3] Although states were required to implement the provisions of the Act by July 27, 2010, and the federal sex offender registration requirements apply in all states, only 20 states, 108 tribes and three territories have

United States v. Dixon, 551 F.3d 578, 582 (7th Cir. 2008) (finding although the state had not established SORNA requirements, defendant was required to register after the Attorney General issued regulations)*, cert. granted, rev'd and remanded by Carr v. United States*, 560 U.S. 438 (2010).

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

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

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

Whether the district court correctly concludes that a defendant is required to register under SORNA is another important issue. Failing to properly register under SORNA is a criminal offense if the defendant's prior conviction was for a "sex offense" within the meaning of SORNA, and thus a key issue is whether a prior conviction is a sex offense within the meaning of the statute. There are three approaches a court can use in that determination. The first is the "categorical approach," in which the court analyzes the statutory definition of the prior offense with the elements of the generic federal offense specified. *See Taylor v. United States*, 495 U.S. 575 (1990). There is also the "modified categorical approach." In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court held that courts could use a "modified categorical approach" in those cases with "statute[s] with alternative elements. Specifically, although the Supreme Court had long stated that courts should "look only to the statutory definitions" of offenses, and focus on the "elements, not facts" underlying a particular conviction, in a "narrow range of cases" courts could look beyond the statute of conviction to such documents as the "charging paper and jury instructions." *Id*. at 2284. *See also United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016) (holding courts should employ a circumstance-specific approach, not a categorical approach, in determining whether conduct is a sex offense against a minor under SORNA). The modified categorical approach is not applicable where a statute states a single, indivisible set of elements. Finally, the non-categorical approach, or circumstance-specific approach, focuses on the facts, not the elements, relating to the prior conviction, and applies when the federal statute refers to "the specific way in which an offender committed the crime on a specific occasion." *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

complied to date, according to the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART).

SORNA defines a "sex offense" to include a criminal offense that is a specified offense against a minor, and a "specified offense against a minor" is further defined to include "any conduct that by its nature is a sex offense against a minor." 42 U.S.C. § 16911(7)(I). District courts may apply the non-categorical, or circumstance specific, approach to examine the underlying facts of a defendant's offense to determine whether a defendant has committed a "specified offense against a minor" as defined in subsection 16911(7)(I). In *United States v. Price*, 777 F.3d 700, 709 (4th Cir.), *cert. denied*, 135 S. Ct. 2911 (June 29, 2015), the Fourth Circuit found that the subsection's explicit reference to "conduct" underlying a prior offense refers to how the offense was committed, not to a generic offense. *See also United States v. Dodge*, 597 F.3d 1347, 1356 (11th Cir. 2010) (en banc) (finding courts may employ non-categorical approach to determine whether defendant committed specified offense against a minor); *United States v. Byun*, 539 F.3d 982, 990 (9th Cir. 2008) (holding that non-categorical approach applies to the victim's age in definition of "specified offense against a minor.").

A conviction for interstate domestic violence under 18 U.S.C. § 2261(a)(2) may also qualify as a "sex offense" under SORNA if the defendant committed that offense "in the course of or to facilitate such travel, committ[ing] a crime of violence against the victim." Under 42 U.S.C. § 16911, a "sex offense" is defined to include a criminal offense "that has an element involving a sexual act or sexual contact with another." In *United States v. Faulls*, 821 F.3d 502, 511-12 (4th Cir. 2016), the Fourth Circuit held that requiring a defendant to register as a sex offender under SORNA was appropriate where the defendant's crime of conviction, interstate domestic violence, was divisible because of its crime of violence element. *Id*. It found that it triggered the modified categorical approach because even though interstate domestic violence is not one of the enumerated crimes to qualify as a sex offender under SORNA, where the jury found the defendant guilty of interstate domestic violence and found that the defendant had committed aggravated sexual abuse during the offense, the court properly compared the elements of interstate domestic violence with the generic offense (SORNA's "sex offense" definition which includes a crime of violence) to impose the registration requirement under SORNA).

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

Another issue that arises under SORNA is whether the offense fits within the statutory exception and does not qualify as a countable "sex offense." SORNA states that "an offense involving consensual sexual conduct is not a sex offense for the purposes of [the Act] if the victim . . . was at least 13 years old and the offender was not more than 4 years older than the victim." Courts have found the statutory exception not applicable when more than 48 months separate the defendant's and victim's date of birth. *United States v. Black*, 773 F.3d 1113 (10th Cir. 2014) ("It simply cannot be reasonably argued that Congress intended substantive criminal liability to attach to a random . . . age analysis,

rather than a straight-forward calculation as to the number of months . . .") (*citing United States v. Brown*, 740 F.3d 145 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (Mar. 9, 2015)). *See also United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014) (finding that circumstance-specific approach, or non- categorical approach, applies to whether a prior conviction fits within the exception; the statutory exception for "offense involving . . . conduct" references the underlying conduct, consistent with a fact-specific analysis).

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

A key issue in SORNA cases is how the categorical approach governs whether a prior state conviction may be a predicate offense for determining the offender tier classification under 42 U.S.C. § 16911. To determine the appropriate tier classification, the court must decide whether the prior conviction is "comparable to or more severe than" the federal crime of sexual abuse. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir.), *cert. denied*, 135 S. Ct. 124 (Oct. 6, 2014).

SORNA denotes different tiers of sex offenders based on the offender's prior convictions, leading to different sex offender registration requirements. *See United States v. Stock*, 685 F.3d 621 (6th Cir. 2012) (finding that the requirement that the defendant register as a Tier III sex offender, meaning a sex offender whose offense is "comparable to or more severe than . . . aggravated sexual abuse or sexual abuse" as described in section 2241 and 2242 and therefore requiring a "sexual act," was not met because the relevant state sexual battery offense that requires the touching of another person, whether of the genitalia or not, did not meet the definition of a "sexual act" as described in those sections).

Courts are to use the categorical approach for determining whether a prior state conviction can serve as the predicate for the tier classification. When the prior offense statute is more broad than the federal crime of sexual abuse, the prior conviction is not a categorical match to the federal crime. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir.), *cert. denied*, 135 S. Ct. 124 (Oct. 6, 2014) (finding defendant's prior conviction cannot serve as a predicate for classification as a Tier III sex offender because prior offense penalizes broader class of behavior; finding also modified categorical approach not appropriate because state statute states a single indivisible set of elements, and courts may not consult any extra-statutory materials). *See also United States v. White*, 782 F.3d 1118 (10th Cir. 2015) (finding SORNA's definition of a Tier III sex offender as requiring an offense "as described in section 2244" suggests Congress intended courts to employ categorical approach).

In *United States v. Morales*, 801 F.3d 1 (1st Cir. 2015), the First Circuit vacated the sentence, finding that the district court had erred in attributing a specific tier status under SORNA to the defendant. The court stated that the state offense was not "more comparable to or more severe than" an offense listed in Tier III category under the categorical approach limited to the elements of the relevant state statute. Also, in *United States v. Berry*, 814 F.3d

192, 197 (4th Cir. 2016), the Fourth Circuit found as a matter of first impression that a court must look to the actual age of the victim, but otherwise it must use the categorical approach to decide if a prior state offense fits into SORNA's requirements. It held that "Congress' decision to reference in SORNA a victim 'who has not attained the age of 13 years,' . . . must therefore be read as an instruction to courts to consider the specific circumstance of a victim's age, rather than simply applying the categorical approach" and vacating sentence for incorrect attribution as a Tier III offender." *Id*.

12. "Victim" Under 18 U.S.C. § 2260A

Whether an actual minor victim is required for a violation of 18 U.S.C. § 2260A is a key issue. *See United States v. Slaughter*, 708 F.3d 1208, 1214-16 (11th Cir. 2013) (finding defendant's attempted enticement offense was a proper predicate offense even though the "minor" was actually a law enforcement officer), *cert. denied*,133 S. Ct. 2868 (2013); *United States v. Jones*, 748 F.3d 64, 72 (1st Cir. 2014) (affirming the defendant's conviction where the "minor" with whom the defendant had communicated online was actually a postal inspector).

II. CHAPTER TWO: OFFENSE GUIDELINE SECTIONS

A. APPLICABLE OFFENSE GUIDELINE IS DRIVEN BY THE OFFENSE OF CONVICTION

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

For purposes of determining which offense guideline section is applicable where the Statutory Index specifies the use of more than one section for the offense of conviction, use the offense guideline section for the most specific definition of the offense of conviction.

B. APPLICABLE BASE OFFENSE LEVEL, SPECIFIC OFFENSE CHARACTERISTICS, AND CROSS REFERENCES CAN BE DRIVEN BY RELEVANT CONDUCT

Many of the subsections of the sex offense guidelines include the phrase "**if the offense involved**." Section 1B1.1 defines "offense" to include "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." §1B1.1, comment. (n.1(H)). Section 1B1.3 states that the base offense level, any specific offense characteristics, cross-references in Chapter Two, and adjustments in Chapter Three, are to be determined on the basis of

relevant conduct. Therefore, while the applicable Chapter Two offense guideline section is determined by looking up the offense of conviction in Appendix A, relevant conduct is important to the application of many subsections.

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

Appendix A specifies offense guideline §2A3.1 for use when the offense of conviction is 18 U.S.C. §§ 113(a)(1), 2241, 2242, and 37 (Violence at international airports). In §2A3.1, the term "minor" means an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 18 years (or who was represented by an undercover law enforcement officer to have not attained the age of 18 years). *See* §2A3.1, comment. (n.1).

1. Determining the Base Offense Level

If the defendant was convicted under 18 U.S.C. § 2241(c), the base offense level is **38**. Otherwise, the base offense level is **30**.

2. Specific Offense Characteristics

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

Section 2A3.1(b)(1) states that, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), the offense level is to be increased by **4** levels. *See United States v. Bowman*, 632 F.3d 906, 912 (5th Cir. 2011) (finding that restraint sufficient to prevent the victim from escaping the sexual conduct constitutes "force" within 18 U.S.C. § 2241); *United States v. Carey*, 589 F.3d 187, 194-95 (5th Cir. 2009) (force that occurs during the act of assault itself falls within conduct described in § 2241(a) for application of §2A3.1(b)(1)); *United States v. Two Elk*, 536 F.3d 890, 910 (8th Cir. 2008) (affirming application of §2A3.1(b)(1) upon the district court's finding of force where "there was a substantial discrepancy between the body mass of [the defendant]" and the minor, the defendant lifted the minor off the floor and placed her on the bed, and muffled the minor's cries with his hand); *United States v. Cerno*, 529 F.3d 926, 938-39 (10th Cir. 2008) (finding procedural error in the district court's failure to consider the nature and circumstances of the offense pursuant to § 3553(a) when it failed to consider the relative amount of force used to commit the sexual abuse). *But see United States v. Blue*, 255 F.3d 609, 613 (8th Cir. 2001) (holding application of §2A3.1(b)(1) improper because "size difference alone cannot establish use of force"). *United States v. Volpe,* 224 F.3d 72, 77 (2d Cir. 2000) ("[Section] 2A3.1(b)(1) appears to be aimed at uses of force to compel the victim's submission to a sexual assault, not at more forceful assaults . . . .").

This enhancement applies even if the conduct that forms the basis of the enhancement is the same conduct that justified application of §2A1.1 via a cross reference from another guideline. *United States v. Flanders*, 752 F.3d 1317, 1340 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1188 (Jan. 26, 2015), *reh'g denied*, 135 S. Ct. 1757 (Apr. 6, 2015) (finding no double-counting in application of the cross reference at §2G1.1(c)(1) because offense involved conduct constituting sexual abuse and application of §2A3.1(b)(1)). Specifically, in *Flanders*, the court found the Sentencing Commission intended for the entirety of §2A3.1, including the enhancement, to apply following application of the cross reference pursuant to §1B1.5(a) and the cross reference applied because offense involved sexual abuse under section 2241(b) and enhancement applied because the offense involved conduct constituting a more severe subset of aggravated sexual abuse under subsection 2241(b)(2)).

Section 2A3.1(b)(1) was amended in November 2007 so that this enhancement does not apply, if the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b). *See* §2A3.1(b)(1), comment. (n.2(B)). This express prohibition avoids unwarranted double-counting. *C.f. United States v. Beith*, 407 F.3d 881, 888 (7th Cir. 2005) ("Double counting is permissible unless the guidelines expressly provide otherwise or a compelling basis exists for implying such a prohibition." (internal quotation omitted)), *abrogated by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012).

Thus, since the amendment to this guideline, it is impermissible double-counting to apply the enhancement in §2A3.1(b)(1) in a case where the defendant was convicted under § 2241(c) for knowingly engaging in a sexual act with a person who is at least 12, but younger than 16 by: (1) using force against the victim; (2) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (3) rendering the victim unconscious; or (4) administering by force or threat of force or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the victim to appraise or control conduct.

b. Age of the victim

Section 2A3.1(b)(2) provides for a 4-level enhancement if the victim was under 12 years old and a 2-level enhancement if the victim was at least 12, but was under 16 years old. This enhancement only applies, however, if the base offense level is 30. The base offense level of 38 under §2A3.1(a)(1) already takes the age of the victim into account. Again, this avoids unwarranted double-counting.

For purposes of this guideline, the term "victim" includes an undercover law enforcement officer. *See* §2A3.1, comment. (n.1).

c. Custody, care, or supervisory control

Section 2A3.1(b)(3) provides for a 2-level enhancement if the victim was in the custody, care, or supervisory control of the defendant or if the victim was held in the custody of a correctional facility. This subsection is to be construed broadly and includes offenses involving a victim less than 18 years old entrusted to the defendant whether temporarily or permanently. *See* §2A3.1(b)(3), comment. (n.3(A)); *United States v. Swank*, 676 F.3d 919 (9th Cir. 2012) (stating "[i]n determining whether to apply the enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship," and finding the enhancement applicable when the minor had been staying in the defendant's home for two days, the defendant was the victim's uncle, and he shared in the child rearing of the children in the house, including the minor victim, and in preparing food for all the children); *United States v. Kenyon*, 481 F.3d 1054, 1072 (8th Cir. 2007) (stating that "[s]o long as the defendant has some responsibility for the child, he has been entrusted with the child, even if another shares that responsibility," but that mere "proximity [to the child] is not enough"). The subsection also applies to adult victims. *See United States v. Simmons*, 470 F.3d 1115, 1129-30 (5th Cir. 2006) (finding that the district court erred in failing to apply the enhancement for a police officer who raped an arrestee in his cruiser because the enhancement was applicable to adult victims in police custody).

If section 2A3.1(b)(3) applies, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* §2A3.1, comment. (n.3(B)).

d. Bodily injury

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

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

(ii) Serious bodily injury. According to §1B1.1, comment. (n.1(L)), "serious bodily injury" is "injury involving extreme physical pain or the

protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." *See also United States v. Robinson*, 436 F. App'x 82 (3d Cir. 2011) (unpub) (holding application of serious bodily injury enhancement appropriate where defendant severely beat the victims he prostituted and his co-conspirators subjected the victims to fractures, deep lacerations, and concussions); *United States v. Long Turkey*, 342 F.3d 856, 858-59 (8th Cir. 2003) (upholding the district court's application of the enhancement for a victim who suffered rectal laceration which needed to be repaired and who compared having the defendant's fist in her vagina to childbirth); *United States v. Guy*, 340 F.3d 655, 658-59 (8th Cir. 2003) (holding that an enhancement for serious bodily injury was appropriate where the crime was rape and the 14-year-old victim was impregnated and suffered extreme physical pain during her labor and delivery). Section 1B1.1, comment. (n.1(L)) also provides that "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under sections 2241 or 2242 or any similar offense under state law. For purposes of this guideline, "serious bodily injury" means conduct other than the criminal sexual abuse, which has already been taken into account in the base offense level under subsection (a). *See* §2A3.1, comment. (n.1). *But See United States v. Jim*, 786 F.3d 802, 814-815 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 348 (Oct. 13, 2015) (finding that the enhancement can still apply if based on the fact that victim's injuries meet the first definition; language of application note does not preclude court, in deciding whether the victim suffered serious bodily injury, from considering injuries resulting directly from the sexual abuse, where defendant caused victim to hit her head on floor, dragged her by her ankles, and raped her).

e. Abduction

Section 2A3.1(b)(5) provides for a 4-level enhancement if the victim was abducted. The word "abducted" "means that a victim was forced to accompany an offender to a different location." *See* §1B1.1, comment. (n.1(A)); *see also United States v. Hefferon*, 314 F.3d 211, 225 (5th Cir. 2002) (holding that the victim was "moved to another location" when the defendant moved the victim from one location on the property, where he first sexually assaulted the victim, to another location on the property, where he sexually assaulted the victim again); *United States v. Hawkins*, 87 F.3d 722, 727-28 (5th Cir. 1996) (holding "the term 'a different location' . . . to be flexible and thus susceptible of multiple interpretations, which are to be applied case by case to the particular facts under scrutiny, not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like").

Actual or threatened force is not necessary for the application of this enhancement; the abduction can also be committed by "the use of a force substitute such as inveigling," *United States v. Romero*, 189 F.3d 576, 590 (7th Cir. 1999), that is, imposing one's will through "trickery" or "gentle urging" or flattery, *United States v. Beith*, 407 F.3d 881, 893 (7th Cir. 2005), *abrogated on other grounds by United States v. Vizcarra,* 668 F.3d 516 (7th Cir. 2012). *See also United States v. Martinez-Hernandez*, 593 F.3d 761, 762 (8th Cir. 2010) (stating the only force necessary is that needed to overcome the particular victim's will, and need not be physical; force may be accomplished through a veiled coercion or an inveigling).

f. Knowing misrepresentation of identity and use of a computer

Section 2A3.1(b)(6) provides for a 2-level enhancement if, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel by a minor or a participant, to engage in prohibited sexual conduct, the offense involved: (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or interactive computer service. Subsections (b)(6)(A) and (b)(6)(B) are intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor or use of the computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2A3.1, comment. (n.4(A), (B)).

Misrepresentation of participant's identity. Such misrepresentation includes misrepresentation of a person's name, age, occupation, gender, or status *with the intent to* persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or, if to facilitate transportation or travel by a minor or a participant, to engage in prohibited sexual conduct. The use of a computer screen name, without such intent, does not prompt the application of this enhancement. *See* §2A3.1, comment. (n.4(A)).

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

3. Cross References

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

Section 2A3.1(c)(2) provides a cross reference to §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the criminal sexual abuse offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. Section 2G2.1 only applies if the offense level is greater than when determined under §2A3.1. This cross reference should be construed broadly. *See* §2A3.1, comment. (n.5(A)). The term "sexually explicit conduct" has the meaning provided in 18 U.S.C. § 2256(2). *See* §2A3.1, comment. (n.5(B)).

4. Special Instruction

Section 3A1.2(c)(2) (Official Victim) applies in cases in which the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official. *See* §2A3.1(d)(1).

5. Upward Departure Provision

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

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

Appendix A specifies offense guideline §2A3.2 for use when the offense of conviction is 18 U.S.C. §§ 113(a)(2) or 2243(a). Although in other sex offense guidelines, the definition of "minor" is a person who has not attained the age of 18, for purposes of §2A3.2, the definition of "minor" includes an individual (including fictitious individuals and law enforcement officers) who had not attained the age of 16 years (or who was represented by an undercover law enforcement officer to have not attained the age of 16 years). *See* §2A3.2, comment. (n.1). The Seventh Circuit has also stated in dicta that "the logic of the guideline definition [of "minor"] embraces an impersonator who is not an officer." *United States v. Morris*, 549 F.3d 548, 550 (7th Cir. 2008). For convictions under section 113(a)(2), §2A3.2 applies in a case with an assault with intent to commit a violation of section 2243. For convictions under section 2243(a), §2A3.2 only applies in a case in which the defendant is convicted of a statutory violation of sexual abuse of a minor over

the age of 12 years but under the age of 16 years when the minor is at least 4 years younger than the defendant, pursuant to 18 U.S.C. § 2243(a).

1. Base Offense Level.

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

2. Specific Offense Characteristics

a. Custody, care, or supervisory control

Section 2A3.2(b)(1) provides for a 4-level enhancement if the minor was in the custody, care, or supervisory control of the defendant. This subsection is to be construed broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. *See* §2A3.2, comment. (n.2(A)). If section (b)(1) applies, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* §2A3.2, comment. (n.2(B)).

b. Knowing misrepresentation of identity or undue influence

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

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

(ii) *Undue influence.* Courts should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. *See* §2A3.2, comment. (n.3(B)). The Sixth Circuit has found that a district court may

vary upward when it finds that §2A3.2(b)(2)(B)(ii) does not adequately consider the undue influence the defendant had over a minor. *United States v. Studabaker*, 578 F.3d 423, 432 (6th Cir. 2009).

Because of an amendment to §2A3.2 in November 2009, the undue influence portion of §2A3.2(b)(2) no longer applies in a case in which the only "minor" involved in the offense is an undercover law enforcement officer. *See* §2A3.2, comment. (n.3(B)).

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

c. Use of a computer

Section 2A3.2(b)(3) provides for a 2-level enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. This subsection applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2A3.2, comment. (n.4).

3. Cross Reference

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

a. Criminal sexual abuse. *See United States v. Tyndall*, 521 F.3d 877, 883-84 (8th Cir. 2008) (affirming the district court's cross reference to §2A3.1 for a defendant convicted under 18 U.S.C. § 2243(a), even though the defendant was acquitted of the charges under 18 U.S.C. § 2242, because the minor's "inebriated state made her incapable of appraising the nature of the sexual act and physically incapable of refusing or communicating her refusal to participate in the sexual act"); *United States v. Searby*, 439 F.3d 961, 964 (8th Cir. 2006) (affirming the district court's decision to apply the cross-reference to §2A3.1 where the minor testified that the defendant "restrained her by holding her hands above her head" and that "she tried to fight him away and that she protested several times"); *United States v. Archdale*, 229 F.3d 861, 868-69 (9th Cir. 2000) (holding that the district court

did not engage in impermissible double-counting when the court added four levels for use of force based on §2A3.1(b)(1) after properly applying the cross-reference from §2A3.2).

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

4. Upward Departure Consideration

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

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

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

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

1. Base Offense Level

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

2. Specific Offense Characteristics

a. Knowing misrepresentation of identity

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

Such misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct does not prompt the application of this enhancement. *See* §2A3.3, comment. (n.2).

b. Use of a computer

Section 2A3.3(b)(2) provides for a 2-level enhancement if the participant used a computer or interactive computer service to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. This subsection applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* §2A3.3, comment. (n.3).

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

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

Several courts have struggled with the distinction between attempted sexual abuse and sexual contact. *Compare United States v. Hayward*, 359 F.3d 631, 641 (3d Cir. 2004) (finding that pushing the victim's head toward the defendant's penis while his pants were still on amounted to sexual contact (properly sentenced under §2A3.4), not an attempted sexual act) *with United States v. Miranda*, 348 F.3d 1322, 1331 (11th Cir. 2003) (holding that arranging in a chat room to meet with the victim (an undercover officer posing as a 13-

year-old girl) at a school to engage in sex, and then showing up at the school at the time arranged, constituted an attempted sexual act that falls under §2A3.2).

1. Determining the Base Offense Level

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

If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), the base offense level is **20**. For purposes of this subsection, such conduct is engaging in, *or causing sexual contact with*, or by another person by: (1) using force against the victim; (2) threatening or placing the victim in fear that any person will be subjected to death, bodily injury, or kidnapping; (3) rendering the victim unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the victim to appraise or control conduct. *See* §2A3.4, comment. (n.2).

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

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

2. Specific Offense Characteristics

a. Victim under 12 years

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

b. Victim between 12 and 15

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

c. Custody, care, or supervisory control

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

d. Knowing misrepresentation of identity

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

Such misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. The enhancement would not apply to a misrepresentation made by a participant to an airline representative while making travel arrangements for the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct does not prompt the application of this enhancement. *See* §2A3.4, comment. (n.5).

e. Use of a computer

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

3. Cross References

Section 2A3.4 has two cross references. Section 2A3.4(c)(1) provides that §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. §§ 2241 or 2242. *See United States v. No Neck*, 472 F.3d 1048, 1055 (8th Cir. 2007) (affirming the district court's cross reference to §2A3.1, even when the defendant was acquitted of criminal sexual abuse charges).

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

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

Appendix A specifies offense guideline §2A3.5 for failing to register as a sex offender under 18 U.S.C. § 2250(a).[4]

In §2A3.5, the term "minor" means an individual (including a fictitious individual or law enforcement officer) who had not attained the age of 18 years (or who was represented by an undercover law enforcement officer to have not attained the age of 18 years) and could be provided for purposes of engaging in sexually explicit conduct. *See* §2A3.5, comment. (n.1).

1. Determining the Base Offense Level

The alternative base offense levels for §2A3.5 depend on the sexual offense of conviction for which the defendant was required to register, whether a state or federal offense. The statute determines how serious the offense is based on the prior sexual offense committed and categorizes each offender into one of three tiers. Tier III offenders are the most egregious. The term "sex offense" is defined in 42 U.S.C. § 16911(5). *See* §2A3.5, comment. (n.1).

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

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

[4] The Fifth Circuit held in regard to §2A3.5 that, "where, at the time of sentencing there is no guideline in effect for the particular offense of conviction, and the Sentencing Commission has promulgated a proposed guideline applicable to the offense of conviction, the district court's failure to consider the proposed guideline when sentencing the defendant may result in reversible plain error." *United States v. Sanchez*, 527 F.3d 463, 466 (5th Cir. 2008). The Eleventh Circuit held that retroactive application of §2A3.5 was permissible under an advisory guideline system when the district court explicitly stated it would have imposed the same sentence regardless of the guidelines. *United States v. Shira*, 286 F. App'x 650, 653 (11th Cir. 2008) (unpub).

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

"Tier I offender," "Tier II offender," and "Tier III offender" have the meaning given those terms in SORNA, at 42 U.S.C. § 16911. Courts may use the modified categorical approach to determine the defendant's tier classification. *See United States v. Taylor*, 644 F.3d 573 (7th Cir. 2011) (holding the district court appropriately examined the charging instrument under a modified categorical approach to determine which tier the defendant should have been classified in, because the statute he had been convicted of violating prohibited all sodomy, including consensual sodomy with an adult).

2. Specific Offense Characteristics

a. Offense while in failure to register status

Section 2A3.5(b)(1) provides alternative enhancements. The greatest applicable enhancement applies. If while in a failure to register status, the defendant: committed a sex offense against someone other than a minor, the base offense level is increased by six levels; a felony offense against a minor that is not a sex offense, the base offense level is increased by six levels; or a sex offense against a minor, the base offense level is increased by eight levels.

A "sex offense" under §2A3.5 has the meaning given that term in 42 U.S.C. § 16911(5) and includes any crime with an element of a sexual act or sexual contact with another. *See* §2A3.5, comment. (n.1). *See also United States v. Romeo*, 385 F. App'x 45, 48-49 (2d Cir. 2010) (unpub) (finding violation of a state law defining "sexual contact" more broadly than the federal definition qualified for purposes of the enhancement).

If, while the defendant was in failure-to-register status, he committed either a sex offense against someone other than a minor or committed a felony offense other than a sex offense against a minor, a 6-level enhancement applies. *See United States v. Johnson*, 743 F.3d 196, 204 (7th Cir. 2014) (finding although a conviction is not required to apply the enhancement for committing a sexual offense against someone other than a minor, because defendant's sexual conduct with his adult girlfriend, while not consensual, did not meet the elements of a state sexual offense, the enhancement should not have been applied). If, while in failure-to-register status, the defendant committed a sex offense against a minor, an 8-level enhancement applies. *See United States v. Bevins*, 430 F. App'x 550 (8th Cir. 2011) (unpub) (finding the enhancement was properly applied because the minor's testimony that defendant sexually abused him while in a failure to register status was credibly coherent, plausible, and not contradicted by objective evidence, even though minor had been noncredible on other facts); *United States v. Lott*, 750 F.3d 214, 220 (2d Cir.) (finding although defendant was convicted of "prohibited acts" and not "lewd and lascivious conduct" under Vermont law for the attempted sexual contact with a 13 year old

female while in failure to register status, enhancement is applicable to mere commission of a sex offense even absent a conviction for that offense), *cert. denied*, 133 S. Ct. 253 (Oct. 6, 2014).

b. Excuse for failing to register

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

It is not a voluntary correction to a failure to register if it is not a genuine attempt to correct one's registration status. *See United States v. Forster*, 549 F. App'x 757, 770-71 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 1907 (Apr. 21, 2014) (unpub) (finding defendant's voluntary attempt to register after moving from one residence to another, after having been out of the country for eight months, was not a voluntary correction of his failure to register but was instead a desire to perpetuate a false claim that he had been at the first residence during that eight month period instead).

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

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

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

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

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

Section 2A3.6(b) provides that if the defendant was convicted under 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute, which is

ten years of imprisonment. This term must also be imposed consecutively to any sentence imposed for an offense listed under § 2260A. *See* §2A3.5, comment. (n.1).

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

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

III. CHAPTER THREE: ADJUSTMENTS

A. §3A1.1(b) (VULNERABLE VICTIM)

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

For purposes of this subsection, "vulnerable victim" means a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) and who is unusually vulnerable due to age, physical or mental condition or who is otherwise particularly susceptible to the criminal conduct. *See* §3A1.1, comment. (n.2); *see also United States v. Hayes*, 434 F. App'x 94 (3d Cir. 2011) (unpub) (holding application of §3A1.1 proper where defendant recruited and prostituted a minor victim with bi-polar disorder); *United States v. Irving*, 554 F.3d 64, 75 (2d Cir. 2009) (upholding application of the vulnerable victim enhancement because the minor victims living in Mexico and Honduras were homeless and without parental or other supervision and guidance); *United States v. Chee*, 514 F.3d 1106, 1117 (10th Cir. 2008) (upholding the district court's vulnerable victim enhancement where the victim "suffer[ed] from mental and physical handicaps, including a diminished mental capacity, seizures, and partial paralysis"); *United States v. Julian*, 427 F.3d 471, 489-90 (7th Cir. 2005) (finding no double-counting where the district court increased the defendant's sentence based on the victim's age under §2A3.1(b)(2) and based on the "economic vulnerability of the victims" under §3A1.1 because the defendant took "advantage of the poor and homeless children by offering shelter, housing and food").

The adjustment under §3A1.1(b) applies to offenses that involve an unusually vulnerable victim where the defendant knew or should have known of the victim's unusual vulnerability. The adjustment under §3A1.1(b) does not apply, however, if the factor that

makes the person vulnerable is already incorporated into the offense guideline. Therefore, in sexual abuse offenses against minors, if the guideline provides an enhancement for the age of the minor, §3A1.1 does not apply unless the victim was unusually vulnerable for reasons unrelated to the age of the victim. *See* §3A1.1, comment. (n.2); *see also United States v. Beith*, 407 F.3d 881, 892 (7th Cir. 2005) (holding that "allegations of molestation standing alone are insufficient to establish vulnerability" when the victim's "age had already been the subject of an enhancement" under §2A3.1(b)(2)), *abrogated on other grounds by United States v. Vizcarra,* 668 F.3d 516 (7th Cir. 2012). In cases involving sexual abuse against an adult, the adjustment is not incorporated into the offense guideline. *See United States v. Schoenborn*, 793 F.3d 964 (8th Cir. 2015) (finding it was not double counting in conviction for sexual abuse of incapacitated person under section 2242 to apply enhancement because section 2A3.1 did not take into account victim's extreme intoxication and unconscious state leading to lack of physical or verbal response).

B. §3A1.3 (RESTRAINT OF VICTIM)

Section 3A1.3 provides for a 2-level adjustment if a victim was physically restrained in the course of the offense. "Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up. *See* §1B1.1, comment. (n.1(K)). This adjustment does not apply where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself. *See* §3A1.3, comment. (n.2). *See also United States v. Joe*, 696 F.3d 1066 (10th Cir. 2012) (holding that because precedential circuit decisions including *United States v. Miera*, 539 F.3d 1232 (10th Cir. 2008), found that preventing a victim from even thinking about escape is to "physically restrain" that victim, the conduct giving rise to the restraint-of-the-victim enhancement in §3A1.3 is incorporated into the offense of aggravated sexual abuse in § 2241(a)); *United States v. Star*, 451 F. App'x. 708 (9th Cir. 2011) (unpub) (affirming application of §3A1.3 because "restraint of the victim is not an element of the offense of aggravated sexual abuse nor was it incorporated in the aggravated sexual assault offense Guideline applied"); *United States v. Strong*, 826 F.3d 1109 (8th Cir. 2016), *cert. denied*, 2017 WL 1366749 (Apr. 17, 2017) (holding it was not double counting to apply a 4-level enhancement at §2A3.1 for abduction and a 2-level enhancement for restraint of victim because conduct supporting application of each was different; conduct for abduction was based on defendant dragging victim to another location, and conduct for physical restraint was based on defendant confining the victim for three days); *but see United States v. Johnson*, 492 F.3d 254, 257 (4th Cir. 2007) (holding that the defendant's "act of gripping the victim's arms and holding her down while [another man] raped her is sufficiently akin to the [guideline] definition's examples (being tied, bound, or locked up) to constitute forcible restraint," and stating that a conviction under 18 U.S.C. § 2241(a)(1) "does not hinge on whether the victim was restrained or confined"). If the restraint was sufficiently egregious, an upward departure may be warranted. §3A1.3, comment. (n.3).

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

Section 3B1.3 provides for a 2-level adjustment if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offenses. *See United States v. Chee*, 514 F.3d 1106, 1118 (10th Cir. 2008) (finding whether an individual occupies a position of trust is evaluated from the perspective of the victim). However, this adjustment does not apply in the sexual abuse guidelines if the specific offense characteristics for a victim being in the care, custody, or supervisory control of the defendant or for the victim being held in the custody of a correctional facility apply. *See* §2A3.1, comment. (n.3(B)); §2A3.2, comment. (n.2(B)); §2A3.3, comment. (n.4); §2A3.4, comment. (n.4(B)).

IV. CHAPTER FOUR: CRIMINAL HISTORY

A. §4A1.1 (Criminal History Category)

Section 4A1.1 provides the determination for the defendant's criminal history category, adding different points for prior sentences of imprisonment of differing lengths and for prior sentences for convictions that are crimes of violence. A "crime of violence" is defined in the career offender guideline at §4B1.2. In determining whether a prior offense is a "crime of violence" as a predicate offense for the career offender guideline, courts should employ the categorical approach focusing on the statutory definition of the prior offense. *United States v. Velazquez*, 777 F.3d 91, 97 (1st Cir. 2015) (finding notwithstanding *Begay v. United States*, 553 U.S. 137 (2008), strict liability offense where use of force is not an element can be a crime of violence for purposes of criminal history under the residual clause; the offense of engaging in a sexual act with another person who has not attained the age of 14 is attended by a risk of physical injury and "indicative of a willingness to inflict harm . . ."), *but see United States v. McDonald*, 592 F.3d 808, 814 (7th Cir. 2010) (finding *Begay* to categorically remove strict liability sexual offenses from career offender guideline's residual clause).

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

Section 4B1.5 applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who presents a continuing danger to the public because he committed the offense of conviction after at least one sex offense

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

conviction (*see* §4B1.5(a)). *See also* §4B1.5 comment. (n.2), (background). The "covered sex crime[s]" relevant to this primer are offenses (including attempt and conspiracy to commit the offense), perpetrated against a minor, under Chapter 109A (18 U.S.C. §§ 2241-2248). For purposes of this guideline, the term "minor" means an individual (including a fictitious individual or law enforcement officer) who had not attained the age of 18 years (or who was represented to have not attained the age of 18 years) and could be provided for the purposes of engaging in sexually explicit conduct. *See* §4B1.5, comment. (n.1). *See United States v. Cerno*, 529 F.3d 926, 938 (10th Cir. 2008) (finding a conviction under 18 U.S.C. § 2241(a) a "covered sex crime" when the victim was over the age of 16 even though certain offenses within Chapter 109A pertain to minors under either the age of 12 or the age of 16).

Section 4B1.5 also applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who presents a continuing danger to the public because he has engaged in a pattern of activity involving prohibited sexual conduct (*see* §4B1.5(b)). "Pattern of activity" is determined for purposes of §4B1.5(b) if the defendant engaged in a pattern of activity involving prohibited sexual conduct "if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor." *See* §4B1.5, comment. (n.4(B). *See also United States v. Brown*, 634 F. App'x 477 (6th Cir. 2015) (unpub) (finding enhancement reasonably applied for defendant's pattern of conduct because it involved at least two separate occasions, and also finding upward variance reasonable for seriousness of defendant's conduct, where defendant engaged in prohibited sexual conduct with victim on at least four separate occasions).

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

Section 4B1.5(b)(1) specifically states that the offense level is five plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be 22, decreased by the number of levels based on the applicability of §3E1.1. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5, foreclosing many double-counting arguments. *See United States v. Joey*, 845 F.3d 1291 (9th Cir. 2017) (finding application of §4B1.5 not double counting with conviction for violation of 18 U.S.C. § 2260A because the Commission did not forbid application of §4B1.5 for offenses underlying a section 2260A conviction and §4B1.5 and section 2260A serve distinct penological goals).

V. CHAPTER FIVE: PROBATION, SUPERVISED RELEASE, AND DEPARTURES

A. §5B1.3 (CONDITIONS OF PROBATION)

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

1. §5B1.3(a) (Mandatory Conditions)

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

Section 5B1.3(a)(9)(B) provides that, in a state in which the requirements of SORNA apply, a sex offender must register and keep the registration current in both the jurisdiction where he lives, works, or is a student and where he was convicted. Thus, §5B1.3(a)(9)(B) requires defendants to comply with the requirements of that Act (*see* 18 U.S.C.§ 3563(a).

2. §5B1.3(b)

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

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

3. §5B1.3(d) (Policy Statement)

Section 5B1.3(d)(7) sets forth "special" conditions of probation that might be appropriate in sex offense convictions. Subsection (A) allows for a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. Subsection (B) allows for a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. Finally, subsection (C) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct. *See United States v. Morin*, 832 F.3d 513 (5th Cir. 2016) (vacating and remanding condition of supervised release that directed defendant to comply with lifestyle restrictions that could be imposed by the therapist, without review by the court, as an impermissible delegation of judicial authority); *United States v. Huor*, 2017 WL 958311 (5th Cir. 2017) (same).

B. §5D1.1 (IMPOSITION OF A TERM OF SUPERVISED RELEASE)

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

C. §5D1.2 (TERM OF SUPERVISED RELEASE)

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

The statutory maximum term of supervised release is recommended if the offense is a sex offense. *See* §5D1.2(b)(2); *United States v. Williams*, 636 F.3d 1229 (9th Cir. 2011) (finding sentence of lifetime term of supervised release did not violate the Eighth Amendment because no "gross disproportionality" was inferred, *citing Graham v. Florida*, 560 U.S. 48, 59 (2010), and the sentence was not substantively unreasonable because of high risk of recidivism of sex offenders). *See also United States v. James*, 792 F.3d 962 (8th

Cir. 2015) (holding lifetime term of supervised release reasonable where defendant's sexual deviance went back to his teenage years, he had never completed any sex-offender treatment program he had entered in the past, and his prior post-treatment personality described by hospital staff was described as devious and manipulative); *United States v. Winding*, 817 F.3d 910 (5th Cir. 2016) (finding lifetime term of supervised release reasonable, where defendant was indicted for sexual battery, domestic violence, and aggravated sexual assault of his minor daughter while on supervised release for a prior offense of failing to register as a sex offender); *United States v. Trailer*, 827 F.3d 933 (11th Cir. 2016) (finding lifetime term of supervised release for failing to register as a sex offender after sexually abusing girlfriend's daughter substantively reasonable and not greater than necessary where defendant violated multiple conditions of release including living with new girlfriend and her four children).

The failure to register as a sex offender under 18 U.S.C. § 2250 is not a "sex offense" within the meaning of §5D1.2(b)(2). *See* §5D1.2, comment. (n.1). *See also United States v. Douglas*, 2017 WL 937496 (4th Cir. 2017) (same); *United States v. Price*, 777 F.3d 700, 711 (4th Cir.), *cert. denied*, 135 S. Ct. 2911 (June 29, 2015); *but see United States v. Putnam*, 806 F.3d 853, 855 (5th Cir. 2015) (vacating sentence where district court treated conviction for failing to register as a sex offender as a sex offense thus imposing a 15 year term of supervised release; citing Amendment 786 of the Guideline Manual where Sentencing Commission clarified that failing to register is not a sex offense, circuit court stated "[t]he Guidelines recommendation for the length of supervised release is thus just five years, rather than the range of five years to life . . . ."); *United States v. Scott*, 626 F. App'x 722, 724 (9th Cir. 2015) (unpub) (vacating sentence of ten-year supervised release imposed for failure to register as a sex offender where defendant's conviction was not a sex offense; stating because not a sex offense, "[t]he supervised release range for failure to register was in fact five years, not five years to life.").

Where the statutory minimum term of supervised release is greater than the advisory guideline range, §5D1.2(c) creates a single point advisory term at the statutory minimum. *See* §5D1.2, comment. n. 6 (explaining that §5D1.2(a) provides a range of years based on the offense, and if the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, if the offense is a "sex offense" under §5D1.2(b), the term of supervised release is restricted to five years to life). *See also United States v. Goodwin*, 717 F.3d 511 (7th Cir. 2013);

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

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

1. §5D1.3(a) (Mandatory Conditions)

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

Section 5D1.3(a)(7)(B) provides that, in a state in which the requirements of SORNA apply, a sex offender must register and keep the registration current in both the jurisdiction where he lives, works, or is a student and where he was convicted. Thus §5D1.3(a)(7) requires defendants to comply with the requirements of SORNA.

Section 3583 of title 18 states that, if a defendant required to register under SORNA commits a criminal offense under, among others, chapter 109A of title 18, the court is to 1) revoke a term of supervised release, and 2) require a defendant to serve a term of imprisonment for not less than 5 years.

2. §5D1.3(b) (Special Conditions)

The guidelines allow courts to impose other conditions of supervised release if the conditions are "reasonably related to" any or all of the factors listed below. Following the statutory language of 18 U.S.C. § 3583(d)(1), there are four factors tied to the goals of supervised release. The first is the defendant's history and characteristics and the nature and circumstances of his offense. The second is the need for adequate deterrence of future criminal conduct. The third is the need to protect the public from further crimes by the defendant, and the fourth is an effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant. *See United States v. Perazza-Mercado*, 553 F.3d 65, 72 (1st Cir. 2009) (holding a special condition of supervised release requiring a total ban on Internet access at home inconsistent with the vocational and educational goals of supervised release where the defendant had no history of impermissible Internet use and the Internet was not an instrumentality of the offense); *United States v. Bango*, 386 F. App'x 50 (3d Cir. 2010) (unpub) (holding special condition of supervised release requiring defendant, a landlord, to disclose to female tenants his convictions for sexual battery and failure to register as a sex offender reasonably related to the need to protect the public pursuant to 18 U.S.C. § 3553(a)(2)(C)); *United States v. Webster*, 819 F.3d 35 (1st Cir. 2016) (finding sex offender treatment appropriate special condition of supervised release even where underlying violation was not a sex offense because condition was reasonably related to one or more goals of supervised release).

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. Fey*, 834 F.3d 1 (1st Cir. 2016) (vacating special condition that defendant have no contact with children under age 18 after conviction for violating SORNA because 1999 sex offense, rape of a 16-year old co-worker he provided with alcohol, was remote in time; defendant had not committed any sexual or violent offense in the intervening years; and government made no argument he was a danger to children); *United States v. Gnirke*, 775 F.3d 1155 (9th Cir. 2015) (finding condition that defendant not possess any materials depicting "sexually explicit conduct" - including depictions of adult sexual conduct - using a statutory definition of "sexually explicit conduct" that should only apply to depictions of children reasonably related to the goals of supervised release to include protection of the public, however because the condition as written deprived the defendant of more liberty than reasonably necessary, court narrowed condition regarding adult sexual conduct); *United States v. Fraga*, 704 F.3d 432 (5th Cir. 2013) (finding plain error in the automatic imposition of a lifetime term of supervised release "without regard for the specific facts and circumstances of the case or the range provided for in the statute"); *but see United States v. Wallette*, 686 F.3d 476 (8th Cir. 2012) (finding although court erred by failing to make an individualized determination before imposing special condition of supervised release that defendant abstain from possessing "materials depicting or describing sexually explicit conduct," error was not plain because based on his history of sexual abuse and his need for treatment, "there is little likelihood that the district court, upon further consideration, would remove the condition"). *See also United States v. Levering*, 441 F.3d 566, 569-70 (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. Morgan*, 44 F. App'x. 881, 888 (10th Cir. 2002) (unpub) (holding that a special condition of supervised release requiring the defendant "to participate in a sex offender treatment and 'submit to a risk assessment including physiological testing,' violates neither [the defendant's] constitutional rights nor the statutory and Guideline requirements for the imposition of special conditions of supervised release").

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

Section 5D1.3(d)(7) lists "special" conditions of supervised release. Subsection (A) allows for a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. Subsection (B) allows for a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. Finally, subsection (C) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's

person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.

E. §5F1.5 (Occupational Restrictions)

Section §5F1.5(a) authorizes a court to impose occupational restrictions in limited circumstances. These occupational restrictions can do two things. First, they can prevent a defendant from taking a certain type of employment. For example, a sex offender may not be allowed to work around children. Second, a lesser restriction can limit the "terms" of a defendant's employment. For example, a defendant convicted of fraud may be restricted from working in a position handling money at a bank or may be required to discuss with the employer bank the details of his criminal history. *See United States v. Du*, 476 F.3d 1168, 1170 (10th Cir. 2007) (stating that specific findings are required before a court imposes any employment conditions that are considered "occupational restrictions").

Such restrictions can only be imposed, however, if the court determines (1) that there is a reasonably direct relationship between the defendant's occupation and the offense conduct; and (2) that imposition of the restriction is reasonably necessary to protect the public. *See* §5F1.5(a). Pursuant to §5F1.5(b), an occupational restriction may only be in place for "the minimum time and to the minimum extent necessary to protect the public."

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

Pursuant to §5K2.0(b), the only grounds for a departure for "sexual offenses" below the range established by the applicable guidelines are those enumerated in Part K. *See* §5K2.0, comment. (n.4(B)). Courts may depart upward for "child crimes and sexual offenses" if it finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i) that there is an aggravating circumstance not adequately taken into consideration by the Commission. *See United States v. King*, 604 F.3d 125, 143-44 (3d Cir. 2010) (finding a five level upward departure reasonable for a defendant convicted of traveling to engage in sex with a minor for his pattern of sexually abusing minors, similar to the child pornography guideline's enhancement). The definition of "sexual offenses" includes offenses under chapter 109A of title 18. *See* §5K2.0, comment. (n. 4(A)).

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

Pursuant to §5K2.8, if the conduct was unusually heinous, cruel, brutal, or degrading to the victim, a court may increase the sentence above the guideline range to reflect the nature of the conduct. *See United States v. Flanders*, 752 F.3d 1317, 1341 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1188 (Jan. 26, 2015), *reh'g denied*, 135 S. Ct. 1757 (Apr. 2015)

(finding an upward departure reasonable for defendants who drugged women without their knowledge, videotaped sexual activity with the women who "woke up covered in bodily fluids and uncertain of what had happened to them," and distributed the images over the Internet); *United States v. Pujayasa,* 654 F. App'x 976 (11th Cir. 2016) (unpub)(vacating and remanding for procedural error, where court departed upward five levels pursuant to §5K2.3 (Extreme Psychological Injury) and §5K2.8, without specifically stating number of departure levels it was applying for which guideline provisions).

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

For offenses committed under chapter 109A (among others), of title 18, (1) age is only a reason to depart downward if and to the extent permitted by §5H1.1, (2) an extraordinary physical impairment is only a reason to depart downward if and to the extent permitted by §5H1.4, and (3) drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

For offenses committed under chapter 109A (among others), of title 18, (1) age is only a reason to depart downward if and to the extent permitted by §5H1.1, (2) an extraordinary physical impairment is only a reason to depart downward if and to the extent permitted by §5H1.4, and (3) drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

VI. POST-*BOOKER* REASONABLENESS DETERMINATIONS

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

United States v. Flanders, 752 F.3d 1317, 1342 (11th Cir. 2014) *cert. denied*, 135 S. Ct. 1188 (Jan. 26, 2015), *reh'g denied*, 135 S. Ct. 1757 (Apr. 2015) (finding defendants' life sentences substantively reasonable because they had used false pretenses to convince women to travel purportedly for purpose of making an audition for a liquor commercial, fed the victims alcohol laced with other drugs without the victims' knowledge, had sex with the victims while they were unconscious, filmed the sexual activity and subsequently distributed the DVDs containing the images over the Internet).

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

month downward variance on the grounds that the codefendant who raped the child was more culpable).

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

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

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