PRIMER

SEX OFFENSES:
COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS

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The purpose of this primer is to provide a general overview of the statutes, sentencing guideline issues, and case law relating to commercial sex acts and the sexual exploitation of minors. Although this primer identifies some of the issues and cases related to the sentencing of commercial sex acts and sexual exploitation of minors, it is not intended to be comprehensive or a substitute for independent research.

I. RELEVANT STATUTES

A. THE STATUTORY SCHEME

Immigration: Chapter 12 of title 8

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

This statute forbids the direct or indirect importation (or attempted importation) into the United States of any alien for the purpose of prostitution or any other immoral purpose. It also prohibits holding or attempting to hold any alien, or keeping, maintaining, controlling, supporting, employing, or harboring any alien in any house or other place, for the purpose of prostitution or any other immoral purpose.

Penalties: *Section 1328 has a statutory maximum penalty of ten years in prison.*

Commerce and Trade: Chapter 103 of title 15

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

Section 15 U.S.C. § 7704(d) prohibits sending, to a protected computer, an email message that includes sexually oriented material without including in the subject heading the marks or notices required, or providing that the matter in the message that is initially viewable to the recipient includes only required marks or notices, and among other things, information on how to access the sexually oriented material. This section does not apply to the transmission of an email message if the recipient has given prior affirmative consent to receipt of the message. "Sexually oriented material" means any material that depicts sexually explicit conduct (as that term is defined in section 2256 of title 18), unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters.

Penalties: *This section has a statutory maximum penalty of five years in prison.*

Obscenity: Chapter 71 of title 18

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

Section 1466A(a) prohibits knowingly producing, distributing, receiving, or possessing with intent to distribute, a visual depiction of any kind (including a drawing, cartoon, sculpture, or painting) that depicts a minor engaging in sexually explicit conduct and is obscene, or depicts (or appears to depict) a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal). Such visual depiction must also lack serious literary, artistic, political, or scientific value. This includes attempt and conspiracy.

Penalties: Section 1466A(a) includes attempt and conspiracy, and provides a cross reference to 18 U.S.C. § 2252A(b)(1) (see below) for penalties.

Section 1466A(b) prohibits knowingly possessing a visual depiction of any kind (including a drawing, cartoon, sculpture, or painting) that depicts a minor engaging in sexually explicit conduct and is obscene, or depicts (or appears to depict) a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal). Such visual depiction must also lack serious literary, artistic, political, or scientific value. This includes attempt and conspiracy.

Penalties: Section 1466A(b) includes attempt and conspiracy, and provides a cross reference to 18 U.S.C. § 2252A(b)(2) (see below) for penalties.

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

Peonage and Slavery: Chapter 77 of title 18

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

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

"Commercial sex act" means any sex act, on account of which anything of value is given to or received by any person. "Coercion" means threats of serious harm to or physical restraint against any person, any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person, or the abuse or threatened abuse of law or the legal process. "Venture" means a group of two or more individuals associated in fact.

Penalties: *Subsection (b) provides for different penalties depending on whether the offense was effected by force, fraud, or coercion or, alternatively, if the minor had not reached the age of 14 at the time of the offense. If the offense was so effected, there is a statutory minimum penalty of 15 years and a statutory maximum of life in prison. If the offense was not so effected, and the minor was at least 14, but not yet 18, there is a statutory minimum of ten years and a maximum penalty of life in prison.*

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

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

Section 2251(a) addresses general interactions with a minor. It prohibits employing, using, persuading, inducing, enticing, or coercing a minor, or transporting any minor in interstate or foreign commerce, with the intent that the minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Parents, legal guardians, and persons with custody or control of a minor are also forbidden from permitting the minor to engage in sexually explicit conduct to produce visual depiction thereof. *See* 18 U.S.C. § 2251(b). Section 2251(c) prohibits employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct outside of the United States to produce a visual depiction of such conduct. Finally, section 2251(d) prohibits knowingly making, printing, or publishing an advertisement seeking or offering to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction of a minor engaging in sexually explicit conduct, or seeking or offering participation in any act of sexual conduct by or with a minor to produce a visual depiction. Subsections 2551(a)–(d) include attempt and conspiracy.

Penalties:

- *Section 2251 includes attempt and conspiracy and has a statutory minimum penalty of 15 years and a maximum of 30 years in prison.*
- *If the defendant has one prior conviction under chapter 110, section 1591, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or any analogous state conviction, there is a statutory minimum penalty of 25 years and a maximum of 50 years in prison.*
- *If the defendant has two or more prior convictions, 18 U.S.C. § 2251(e) provides a statutory minimum penalty of 35 years and a maximum penalty of life in prison.*
- *If, in the course of an offense under this section, the conduct results in the death of a person, there is a statutory minimum penalty of 30 years and a maximum penalty of life in prison, and the death penalty applies.*

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

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

Penalties: Section 2251A(a) has a statutory minimum penalty of 30 years and a maximum penalty of life.

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

Penalties: Section 2251A(b) has a statutory minimum penalty of 30 years and a maximum penalty of life.

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

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

Penalties:

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

statutory minimum penalty of ten years and a maximum penalty of 20 years in prison.

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

Section 2552A prohibits knowingly: mailing or transporting or shipping (including by computer) child pornography (2252A(a)(1)); receiving or distributing any material containing child pornography (2252A(a)(2)); reproducing child pornography for distribution (including by computer) or advertising, promoting, presenting, distributing, or soliciting (including by computer) material with an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct (2552A(a)(3)); selling, or possessing with the intent to sell, any child pornography (2252A(a)(4)); possessing any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography (2252A(a)(5)); distributing, offering, sending, or providing to a minor any visual depiction that appears to be a minor engaging in sexually explicit conduct, including a computer generated image (2552A(a)(6)); distributing, offering, sending, or providing to a minor any visual depiction (or what appears to be a depiction) of a minor engaging in sexually explicit conduct for purposes of inducing or persuading a minor to participate in illegal activity (2552A(a)(7)). All subsections include attempt and conspiracy.

Penalties:

- *Subsections (a)(1), (a)(2), (a)(3), (a)(4), and (a)(6) include attempt and conspiracy and have a statutory minimum penalty of five years and a maximum of 20 years in prison. If the defendant has a prior conviction under chapter 110, section 1591, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of 15 years and a maximum of 40 years in prison.*
- *Subsection (a)(5) includes attempt and conspiracy and has a statutory maximum penalty of ten years in prison (or 20 years if the offense involved a minor under 12 years of age). If the defendant has a prior conviction under chapter 110, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, there is a statutory minimum penalty of ten years and a maximum of 20 years in prison.*
- *Subsection (a)(7) includes attempt and conspiracy and has a statutory maximum penalty of 15 years in prison.*

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

Penalties: Section 2252A(g) has a statutory minimum penalty of 20 years and a maximum penalty of life in prison.

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

This section requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of actual sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

Penalties:

- *This section has a statutory maximum penalty of five years in prison.*
- *If the defendant violates this section after previously being convicted under this section, there is a statutory minimum penalty of two years and a maximum penalty of ten years in prison.*

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

This section requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of simulated sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depiction.

Penalties:

- *This section has a statutory maximum penalty of one year in prison.*
- *If the defendant violates this section in an effort to conceal a substantive offense, there is a statutory maximum penalty of five years in prison.*
- *If the defendant violates this section after previously being convicted under this section, there is a statutory minimum penalty of two years and a maximum penalty of ten years in prison.*

18 U.S.C. § 2260 (Production of sexually explicit depictions of a minor for importation into the United States)

Section 2260(a) prohibits a person outside the United States from employing, using, persuading, inducing, enticing, coercing, or transporting any minor with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, intending that the visual depiction will be imported into the United States. Section 2260(b) prohibits a person outside the United States from knowingly receiving, transporting, shipping, distributing, selling, or possessing with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct,

intending that the visual depiction will be imported into the United States. Each section includes attempt and conspiracy.

Penalties: Section 2260(a) includes attempt and conspiracy and has a cross reference to the penalties provided in § 2251(e) (see above).

Section 2260(b) prohibits a person outside the United States from knowingly receiving, transporting, shipping, distributing, selling, or possessing with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct, intending that the visual depiction will be imported into the United States.

Penalties: Section 2260(b) includes attempt and conspiracy and has a cross reference to the penalties provided in section 2252(b)(1) (see above).

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

18 U.S.C. § 2421 (Transportation generally)

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

Penalties: Section 2421 includes attempt and has a statutory maximum penalty of ten years in prison.

18 U.S.C. § 2422 (Coercion and enticement)

Section 2422(a) prohibits knowingly persuading, inducing, enticing, or coercing any individual to travel to engage in prostitution, or in any illegal sexual activity. Section 2422(b) prohibits using the mail or any means of interstate commerce to knowingly persuade, induce, entice, or coerce any individual younger than 18 to engage in prostitution or any illegal sexual activity. Each section includes attempt.

Penalties: Section 2422(a) includes attempt and has a statutory maximum penalty of 20 years in prison.

Section 2422(b) prohibits using the mail or any facility or means of interstate commerce to knowingly persuade, induce, entice, or coerce any individual younger than 18, to engage in prostitution or any illegal sexual activity.

Penalties: Section 2422(b) includes attempt and has a statutory minimum penalty of ten years and a maximum penalty of life in prison.

18 U.S.C. § 2423 (Transportation of minors)

Section 2423(a) prohibits knowingly transporting an individual who had not reached the age of 18 with the intent that the individual engage in prostitution or in any illegal sexual activity.

Penalties: Section 2423(a) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory minimum penalty of ten years and a maximum penalty of life in prison.

Section 2423(b) prohibits traveling in interstate commerce or into the United States, or traveling in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person.

Penalties: Section 2423(b) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory maximum penalty of 30 years in prison.

Section 2423(c) prohibits traveling in foreign commerce and engaging in any illicit sexual conduct.

Penalties: Section 2423(c) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory maximum penalty of 30 years in prison.

Section 2423(d) prohibits arranging, inducing, procuring, or facilitating the travel of a person, for the purpose of commercial advantage or private financial gain, knowing that person is traveling in interstate or foreign commerce for the purpose of engaging in any illicit sexual conduct.

Penalties: Section 2423(d) includes attempt and conspiracy, see 18 U.S.C. § 2423(e), and has a statutory maximum penalty of 30 years in prison.

Pursuant to 2423(f), "illicit sexual conduct" means a sexual act with a person under 18 that would be in violation of chapter 109A of title 18 if the sexual act occurred in the special maritime and territorial jurisdiction of the United States, any commercial act with a person under 18, or production of child pornography as defined in section 2256(8). Section 2423(g) establishes as a defense that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had reached age 18.

18 U.S.C. § 2425 (Use of interstate facilities to transmit information about a minor)

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

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

18 U.S.C. § 2426 (Repeat offenders)

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

18 U.S.C. § 2259A (Assessments in child pornography cases)

Section 2259A, adopted as part of the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 on December 7, 2018,[1] provides that a sentencing court may assess defendants up to $17,000 for child pornography possession offenses, $35,000 for other offenses involving trafficking in child pornography, and up to $50,000 for child pornography production crimes.[2] Sentencing courts "shall consider the factors set forth in sections 3553(a) and 3572" when determining the special assessment amount.[3] These special assessments fund the Child Pornography Victims Reserve, also created by the 2018 Act.[4]

18 U.S.C. § 3014 (Additional special assessment)

Section 3014, which took effect on May 29, 2015, provides for an assessment of $5,000 (in addition to the ordinary mandatory special assessment of $100) on "any non-indigent person or entity" convicted of, *inter alia*, any commercial sex acts, child sexual abuse, and child pornography offenses. The analysis for earning capacity is prospective, considering the defendant's earning potential following release from prison.[5]

B. LEGAL ISSUES

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

The mandatory minimum penalty does not apply to conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c). Section 1591(b)(1) of Chapter 18 of the United States Code imposes a 15-year mandatory minimum if the offense involved minors under the age of 14, or force, threats of force, fraud or coercion.[6]

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[1] Pub. L. No. 115–299, 132 Stat 4383 (Dec. 7, 2018) (adopting 18 U.S.C. § 2259A).
[2] 18 U.S.C. § 2259A(a)(1)–(3).
[3] *Id.* § 2259A(c).
[4] *See infra* notes 84–92 and accompanying text for discussion of Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018.
[5] *See* United States v. Graves, 908 F.3d 137 (5th Cir. 2018) (holding that district court was correct to analyze whether the defendant was employable upon release from prison).
[6] *See* United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016).

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

A defendant does not have to produce the child pornography which he offers to advertise or distribute.[7] Whether an image depicts a lascivious exhibition of the genitals turns on the overall content of the visual depiction.[8]

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

The Supreme Court held that the phrase "involving a minor or ward" modifies only the third and final phrase—"abusive sexual conduct"—in section 2252.[9] The ten-year mandatory minimum penalty under section 2252 therefore applies to a defendant who has been previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," where a prior conviction for sexual abuse or abusive sexual conduct involves an adult victim. Courts have held that there is not a *mens rea* requirement with respect to the victim's age.[10]

On the other hand, a juvenile delinquency adjudication for criminal sexual conduct involving a minor is not a "prior conviction" and thus cannot serve as a basis for triggering § 2252(b)(1)'s mandatory minimum provision.[11]

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

In *United States v. Grzybowicz*, the Eleventh Circuit held that § 2252A requires that the item being distributed must have been delivered to someone other than the person who does the delivering.[12]

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[7] United States v. Williams, 659 F.3d 1223 (9th Cir. 2011). *See also* United States v. Sewell, 513 F.3d 820 (8th Cir. 2008) (upholding conviction of a defendant who had used a file-sharing network to publish a notice to distribute child pornography).

[8] United States v. Wells, 843 F.3d 1251 (10th Cir. 2016) (finding the visual depiction does not need to portray the minor in a pose that depicts lust or sexual coyness for the defendant to be guilty of violating section 2251).

[9] Lockhart v. United States, 136 S. Ct. 958 (2016).

[10] *See* United States v. Grimes, 888 F.3d 1012, 1016 (8th Cir. 2018) (defendant's prior state conviction in New York for second-degree sodomy triggered section 2252(b)(1) and (2) enhanced minimum and maximum penalties; no specific intent showing as to the victim's age is required).

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

[12] 747 F.3d 1296 (11th Cir. 2014) (finding no distribution where defendant sent the images from his cell phone to his personal email and downloaded the images to his computer, because there was no evidence that he shared the images with another person).

Peer-to-peer file sharing is sufficient for distribution, notwithstanding that the defendant did not actively transfer images, where the defendant admitted he knew that what was in his shared folder was available to others.[13] However, where there is no evidence to demonstrate that the defendant is aware that he is allowing access to files, the file's existence in a shared folder alone is not sufficient to support a conviction for distribution.[14]

18 U.S.C. §§ 2422 (Coercion and enticement) and 2423 (Transportation of minors)

For a conviction under §§ 2422 or 2423(a), prostitution or other illegal sexual activity must be one of the dominant or principle purposes for coercing travel or transporting a minor in interstate commerce, but it need not be *the* dominant purpose.[15]

The government is not required to prove that the defendant knew the victim was a minor. Courts have held that the context of the statutes compels a reading that does not require "knowingly" be applied to the victim's age,[16] consistent with congressional intent that minors need special protection against sexual exploitation.

A conviction for violating §2422(b) can be sustained by a defendant who communicates with an adult intermediary to persuade, induce, or entice minors to engage in sexual intercourse even if he does not seek to have any of his communications with the adult passed on directly to the child.[17]

[13] *See* United States v. Richardson, 713 F.3d 232 (5th Cir. 2013); United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) ("When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred" and the "fact that the defendant did not actively elect to transmit those files is irrelevant.").

[14] *See* United States v. Carroll, 886 F.3d 1347, 1353–54 (11th Cir. 2018) (refusing to hold defendant strictly liable for distribution where the files were automatically placed into a shared folder and made available for download without permission of the defendant and the government failed to show any evidence of knowledge).

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

[16] *See* United States v. Banker, 876 F.3d 530, 536–40 (4th Cir. 2017); United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012) (holding that statute does not require defendant knew the victim was under the age of 18 for conviction); United States v. Daniels, 653 F.3d 399 (6th Cir. 2011); United States v. Cote, 504 F.3d 682, 687–88 (7th Cir. 2007) (in context of attempt, reading a knowledge requirement into the statute, but holding that, "a defendant who believes certain requisite facts to be true has the necessary intent for a crime requiring the *mens rea* of knowledge" and, "factual impossibility or mistake of fact is not a defense to an attempt charge").

[17] *See* United States v. Caudill, 709 F.3d 444 (5th Cir. 2013); United States v. Spurlock, 495 F.3d 1011 (8th Cir. 2007).

II. CHAPTER TWO, PART G: OFFENSE GUIDELINE SECTIONS

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

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

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

B. APPLICABLE BASE OFFENSE LEVEL, SPECIFIC OFFENSE CHARACTERISTICS, AND CROSS REFERENCES ARE DETERMINED BY RELEVANT CONDUCT

Many of the subsections of the sex offense guidelines include the phrase "**if the offense involved**." Section 1B1.1 defines "offense" to include "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." USSG §1B1.1, comment. (n.1(I)). Section 1B1.3 states that the base offense level, any specific offense characteristics and cross references in Chapter Two, and adjustments in Chapter Three are to be determined on the basis of relevant conduct. Therefore, while the applicable Chapter Two offense guideline section is determined by looking up the offense of conviction in Appendix A, relevant conduct is important to the application of many subsections. For example, the specific offense characteristic at §2G2.2(b)(4) states "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels." That characteristic applies where a defendant is convicted of transporting non-sadistic child pornography if the court determines that the defendant's relevant conduct includes possession of material that portrays sadistic or masochistic conduct, or other depictions of violence. Courts have consistently held that extraterritorial conduct can be considered relevant conduct for sentencing purposes.[18]

[18] *See, e.g.*, United States v. Spence, 923 F.3d 929 (11th Cir. 2019) (in issue of first impression, the court joined the Seventh, Tenth, and Eighth Circuits, holding that the presumption against extraterritorial application of legislation should not be extended to preclude a district court from considering extraterritorial conduct for purposes of sentencing and district court properly considered as relevant conduct the defendant's out-of-country conduct to increase his offense level under §2G2.2(b)(3)(f) for distribution.), *cert. denied* --- S. Ct. ---, 2020 WL 872422 (Feb. 24, 2020) (No. 19-5946).

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

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

1. Determining the Base Offense Level

If the offense of conviction is 18 U.S.C. § 1591(b)(1), the base offense level is **34**. Otherwise, the base offense level is **14**.

2. Specific Offense Characteristic: Fraud or Coercion

Section 2G1.1(b)(1) provides for a 4-level enhancement if the base offense level is 14 and the offense involved fraud or coercion. The fraud must occur as part of the offense and cannot anticipate any bodily injury. Absent bodily injury, an upward departure may be warranted. *See* USSG §2G1.1, comment. (n.2). For purposes of this subsection, "coercion" includes any form of conduct negating the voluntariness of the victim.[19] *Id.* Coercion generally does not apply if the victim's voluntary use of drugs or alcohol resulted in the impairment of the victim's ability to appraise or control conduct. *Id.*

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

3. Cross Reference

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

[19] United States v. Sweargin, 935 F.3d 1116, 1122–24 (10th Cir. 2019) (coercion enhancement properly applied where defendant threatened to upload a sexual video of the victim, and later beat the victim, for failing to engage in prostitution because this negated the voluntariness of the victim traveling with defendant).

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

4. Special Instruction

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

For purposes of this guideline, "victim" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct (whether or not the person consented). *See* USSG §2G1.1, comment. (n.1). *See also United States v. Young*, 590 F.3d 467 (7th Cir. 2009) (finding massage parlor employees were victims where they were "enticed" into performing commercial sex acts when their income was confined to tips received for providing sexual massages). "Victim" includes undercover law enforcement officers. *See* USSG §2G1.1, comment. (n.1).

5. Chapter Three Adjustments

For the purposes of §3B1.1 (Aggravating Role), a victim (as defined in this guideline) is considered a participant only if that victim assisted in the promotion of a commercial sex act or prohibited sexual conduct in respect to another victim. *See* USSG §2G1.1, comment. (n.3).

6. Upward Departure Provision

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

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

Appendix A refers to §2G1.3 certain offenses under 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, 2422, (all with the requirement that the offense involved a minor victim), 2423, and 2425. The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have not attained the age of 18 (including a fictitious individual). *See* USSG §2G1.3, comment. (n.1).[20]

1. Determining the Base Offense Level.

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

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

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

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

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

[20] *See* United States v. Vasquez, 839 F.3d 409, 412–13 (5th Cir. 2016) (finding definition of minor does not include a fictitious minor held out by the *defendant* as available for unlawful sexual activity, where the defendant was not a law enforcement officer and knew the child was fictitious); *see also* United States v. Fulford, 662 F.3d 1174, 1181 (11th Cir. 2011) (In context of §2G2.2, "where the defendant is not dealing with a law enforcement officer, the enhancement applies only where the 'minor' actually is a true, real live, sure enough minor"). *But cf.* United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008) (upholding conviction under 18 U.S.C. § 2243(a) where minor's mother created a fictitious internet profile that targeted the defendant before turning the information over to the FBI and stating in *dicta* that "the logic of the guideline definition [at §2A3.2 of "minor"] embraces an impersonator who is not an officer.").

2. Specific Offense Characteristics

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

Section 2G1.3(b)(1) calls for a **2**-level enhancement if the defendant was a parent, relative, or legal guardian of the minor or if the minor was in the custody, care, or supervisory control of the defendant. The phrase "custody, care, or supervisory control" is intended to be broad, and applies whenever a minor is entrusted to the defendant, whether temporarily or permanently. *See* USSG §2G1.3, comment. (n.2(A)). The enhancement applies only if there is a pre-existing parent-like authority that exists apart from the relationship forged during the crime itself.[21] If this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill). *See* USSG §2G1.3, comment. (n.2(B)).

b. Knowing misrepresentation or undue influence

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

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

The misrepresentation enhancement can still apply even if the defendant ultimately tells the "minor" his or her true identity,[22] misrepresents marital status and occupation,[23] or misrepresents prior or current sexual relationships with other minors.[24]

(ii) Undue influence. The court should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. *See* USSG §2G1.3, comment. (n.3(B)).[25]

[21] *See* United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010).
[22] *See* United States v. Holt, 510 F.3d 1007 (9th Cir. 2007).
[23] *See* United States v. Young, 613 F.3d 735 (8th Cir. 2010).
[24] *See* United States v. Grauer, 701 F.3d 318 (8th Cir. 2012).
[25] *See* United States v. Whyte, 928 F.3d 1317, 1336 (11th Cir. 2019) ("A defendant abuses his superior knowledge and resources by managing his victim's prostitution through actions like advertising her services,

The enhancement applies even if the offense has an element of force, fraud, or coercion because an "undue influence" can involve conduct with no force, fraud, or coercion.[26]

Commentary to this enhancement provides that "[t]he voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring" and further provides for a rebuttable presumption of undue influence if the participant is at least ten years older than the minor. *See* USSG 2G1.3, comment. (n.3(B)).[27] The undue influence enhancement does not apply if the only "minor" involved in the offense is an undercover officer. *Id.*

c. Use of a computer

Section 2G1.3(b)(3) provides for a **2**-level enhancement if a computer or an interactive computer service was used to: (1) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (2) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor. The enhancement is appropriately applied if the defendant begins to pursue the victim while using a computer, even if no sexual requests were sent via computer and even if the minor does not yet recognize the defendant's intent.[28] The use of a cell phone to send voice mail

driving her to engagements, and handling the money.") (internal citations omitted); United States v. Daniels, 685 F.3d 1237 (11th Cir. 2012) (holding enhancement applies even though minor was already working as a prostitute before meeting defendant; minor had initially declined to work for defendant, and defendant arranged to send her to another city to work, brought her to bus station and purchased her ticket); *see also* United States v. Mitteness, 893 F.3d 1091 (8th Cir. 2018) (holding it was not double counting to apply parental control and undue influence enhancements where parent exerted influence above and beyond the parent-child relationship).

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

[27] *See also* United States v. Reid, 751 F.3d 763 (6th Cir. 2014) (holding rebuttable presumption not overcome where defendant emotionally manipulated the victim, 35 years his junior); United States v. Watkins, 667 F.3d 254 (2d Cir. 2012) (finding rebuttable presumption not overcome by victim's "eagerness"); United States v. Lay, 583 F.3d 436 (6th Cir. 2009); United States v. Miller, 601 F.3d 734 (7th Cir. 2010) (finding prior sexual activity of minor was not sufficient to overcome rebuttable presumption where there was evidence of manipulation and grooming). *But see* United States v. Davis, 924 F.3d 899, 904 (6th Cir. 2019) (holding that district court erred in applying this enhancement based only upon the 16-year age gap between victim and defendant, stating that "[i]n cases where there is significant record evidence that undercuts this [rebuttable] presumption . . . a district court cannot rely solely on the presumption to determine that the defendant has 'compromised the voluntariness of the minor's behavior'").

[28] *See* United States v. Cramer, 777 F.3d 597 (2d Cir. 2015); *see also* United States v. Lay, 583 F.3d 436 (6th

and text messages directly to the victim is a "computer" for purposes of §2G1.3(b)(3), even though it was not used to connect to the Internet.[29]

Application Note 4 states that the enhancement "is intended to apply only to the use of a computer to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor."[30] However, courts regularly apply the enhancement if the defendant or a co-defendant uses the computer simply to post information about a minor.[31]

d. Sex act or sexual contact/commercial sex act

Section 2G1.3(b)(4) provides for a **2**-level enhancement if the offense (A) involved the commission of a sex act or sexual contact; *or* (B) if the offense involved a commercial sex act and the defendant was convicted of any offense covered by §2G1.3 other than 18 U.S.C. § 1591. Offenses committed under 18 U.S.C. § 1591 are excluded from subsection (b)(4)(B) because they necessarily involve a commercial sex act. However, courts have held that a defendant convicted under section 1591 may get the enhancement under (b)(4)(A) because actual commission of a sex act or sexual contact is not an element of a conviction under section 1591 and, therefore, it is not double counting for a defendant to receive the enhancement under (b)(4)(A).[32] "Sexual contact" can include the touching of one's self.[33]

e. Minor younger than 12

Section 2G1.3(b)(5) provides for an **8**-level enhancement if the offense involved a minor who had not attained the age of 12 and the defendant was convicted of any offense covered by §2G1.3 other than 18 U.S.C. § 1591. Offenses committed under 18 U.S.C. § 1591 are not included in this specific offense characteristic because the age of the minor is

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Cir. 2009).

[29] *See* United States v. Kramer, 631 F.3d 900 (8th Cir. 2011).

[30] USSG §2G1.3, comment. (n.4).

[31] *See* United States v. Whyte, 928 F.3d 1317, 1337 (11th Cir. 2019) ("We joined several of our sister circuits in holding 'that [Application Note 4] is patently inconsistent with the guideline.'"); United States v. Houston, 857 F.3d 427 (1st Cir. 2017) (upholding enhancement where defendant posted to Backpage, despite "obvious tension" between plain text of the guideline and Application Note 4, based on conclusion that Note 4 was not intended to limit the enhancement's scope)(joining Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits).

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

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

already accounted for in the applicable base offense level. This enhancement applies where the victim is younger than 12 even if the defendant believes the victim is older.[34]

3. Cross References

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

Section 2G1.3(c)(1) states that §2G2.1 should apply if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, and if the resulting offense level under §2G2.1 is greater than the offense level determined under this guideline. This subsection is to be construed broadly. *See* USSG §2G1.3, comment. (n.5(A)).[35]

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

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

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

Section 2G1.3(c)(3) states that §2A3.1 should apply if the offense involved conduct described in 18 U.S.C. §§ 2241 or 2242 and if the resulting offense level is greater than the one determined under this guideline.[36]

[34] *See* United States v. Hammond, 698 F.3d 679 (8th Cir. 2012) (district court did not err in applying 8-level enhancement and denying a downward variance even though the defendant believed the victim to be 13, rather than 11, years old; ignorance of the victim's age is not a characteristic that merits a downward variance under section 3553(a)).

[35] *See* United States v. Veazey, 491 F.3d 700, 707 (7th Cir. 2007) ("[T]he cross-reference [in §2G1.3(c)(1)] applies when one of the defendant's purposes was to create a visual depiction of sexually explicit conduct, without regard to whether that purpose was the primary motivation for the defendant's conduct."); United States v. Bohannon, 476 F.3d 1246 (11th Cir. 2007) (application of this cross reference is appropriate where the defendant arranged a meeting with the "minor" over the internet and had a history of making visual depictions of other young girls).

[36] *See* United States v. Reynolds, 720 F.3d 665, 674 (8th Cir. 2013) (cross reference proper where the defendant placed minor victim in fear when he drove her to an isolated place and did not stop the sexual conduct after she resisted); United States v. Henzel, 668 F.3d 972 (7th Cir. 2012) (cross reference required where the defendant's conduct involved conduct described in section 2242, and where defendant understood victim was in fear when he coerced her, resisted her efforts to move away, and ignored her repeated protests and cries).

When the cross reference at §2G1.3(c)(3) is applied, the court can apply both the base offense level under §2A3.1 and the enhancement at §2A3.1(b) if the offense involved conduct described in section 2241.[37]

The subsection's reference to 18 U.S.C. § 2241(a) and (b) means that all instances of sexual conduct involving the following will trigger the cross reference: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (3) rendering the minor unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the minor to appraise or control conduct. *See* USSG §2G1.3, comment. (n.5(B)(i)).

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

Similarly covered is conduct described in 18 U.S.C. § 2242 that includes engaging in, or causing another person to engage in, a sexual act with another person by (1) threatening or placing the minor in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (2) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act. *See* USSG §2G1.3, comment. (n.5(B)(iii)).

4. Special Instruction

Section 2G1.3(d)(1) provides that if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) should apply as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction. Each minor transported, persuaded, induced, enticed, or coerced is to be treated as a separate minor. *See* USSG §2G1.3, comment. (n.6). The special instruction applies if the "relevant conduct of the offense of conviction includes" the exploitation or enticement of more than one minor "whether [that minor is] specifically cited in the count of conviction" or not. *Id.* Thus,

[37] *See* Osley v. United States, 751 F.3d 1214 (11th Cir. 2014) (finding application of §2A3.1 and the enhancement reasonable where the offense involved the use of force or threats as described in 18 U.S.C. § 2241(a) or (b)).

multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts). *Id*. A separate count under subsection (d)(1) may be supported by uncharged as well as charged victims so long as the uncharged conduct satisfies relevant conduct principles at §1B1.3(a)(1)(A).[38] Because these counts cannot be grouped, expanded relevant conduct, under §1B1.3(a)(1)(B), does not apply.[39]

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted. *See* USSG §2G1.3, comment. (n.7).

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

Appendix A specifies offense guideline §2G2.1 for offenses violating 18 U.S.C. §§ 1591, 2251, and 2260(a). The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual). *See* USSG §2G2.1, comment. (n.1). "Distribution" includes posting materials involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant. *See* USSG §2G2.1, comment. (n.1).

1. Base Offense Level

This guideline has one base offense level of 32.

[38] *See* United States v. Garcia-Gonzalez, 714 F.3d 306, 316 (5th Cir. 2013) (sentencing court properly relied on uncharged conduct involving a minor victim as a separate count of conviction under §2G1.3(d)(1) because "offense" includes relevant conduct and the uncharged conduct occurred at the same time as the charged conduct with other minor victims); United States v. Powell, 778 F. App'x 200, 201 (3d Cir. 2019) (application of special instruction was not plain error where one minor was brought to meetings with another minor "reflecting an intent to intermingle [the defendant's abuse]").

[39] *See* USSG §1B1.3(a)(2); *see also* United States v. Weiner, 518 F. App'x 358, 363–66 (6th Cir. 2013) (additional victims were not relevant conduct to charged conviction because their abuse was not contemporaneous with, done in preparation of, or to avoid detection of the charged conduct; district court improperly applied §1B1.3(a)(2)); *cf.* United States v. Randall, 924 F.3d 790, 797–800 (5th Cir. 2019) (same, in the context of §2G2.1).

2. Specific Offense Characteristics

a. Age of the victim

Section 2G2.1(b)(1) provides for a **4**-level enhancement if the offense involved a minor who had not attained the age of 12, and a **2**-level enhancement if the offense involved a minor who had attained the age of 12 but had not attained the age of 16.

Where victims of exploitation are infants or toddlers, §§2G2.1 and 2G2.2 provide for additional enhancement by adding an alternative basis for application of the sadistic or masochistic enhancement. Section 2G2.1(b)(4) provides for a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler," while §2G2.2 provides a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler." The accompanying application note to each guideline clarifies that if subsection (b)(4)(B) applies, the vulnerable victim adjustment in Chapter Three does not apply.

b. Sexual act or sexual conduct

Section 2G2.1(b)(2) provides for (the greater) of a **2**-level enhancement if the offense involved the commission of a sexual act or sexual contact, or a **4**-level enhancement if the offense involved both the commission of a sexual act and conduct described in 18 U.S.C. § 2241(a) or (b).[40] For purposes of this subsection, conduct described in 18 U.S.C. § 2241(a) or (b) is: (1) using force against the minor; (2) threatening or placing the minor in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (3) rendering the minor unconscious; or (4) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and substantially impairing the ability of the minor to appraise or control conduct. *See* USSG §2G2.1, comment. (n.2).

c. Distribution

Section 2G2.1(b)(3) provides for a **2**-level enhancement if the offense involved distribution. Distribution by a codefendant is attributable relevant conduct to a defendant who helped produce the images.[41] Sharing images with the minor victim qualifies as

[40] *See* United States v. Aldrich, 566 F.3d 976 (11th Cir. 2009) (defendant's masturbation in front of his web camera met the definition of "sexual contact"); United States v. Shafer, 573 F.3d 267 (6th Cir. 2009) (defining "sexual contact" broadly to include the victim's self-masturbation); United States v. Stoterau, 524 F.3d 988 (9th Cir. 2008) (enhancement applied where the defendant's relevant conduct included sexual acts undertaken by the victim that the defendant photographed, uploaded, and distributed); United States v. Boston, 494 F.3d 660 (8th Cir. 2007) (where the defendant touched the minor victim's penis for sexual pleasure, the offense involved a sexual act or sexual contact).

[41] *See* United States v. Odom, 694 F.3d 544 (5th Cir. 2012).

distribution.[42] Distribution of images produced by defendant to another minor to induce that minor to create sexually explicit images of herself is relevant conduct in a conviction for attempted production.[43]

d. Sadistic or masochistic conduct

Section 2G2.1(b)(4) provides for a **4**-level enhancement if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence. At least one court has held that "images involving an adult male performing anal sex on a minor girl are per se sadistic or violent,"[44] and that "self-penetration by a foreign object qualifies as violence."[45] As noted in section 2(E)(2)(a), §§2G2.1 and 2G2.2 provide for additional enhancement pursuant to this section if the victim of exploitation was an infant or toddler. For a more detailed discussion of what constitutes "sadistic or masochistic" conduct, see section 2(F)(2)(d), *infra*.

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

Section 2G2.1(b)(5) provides for a **2**-level enhancement if the defendant was a parent, relative, or legal guardian of the minor or if the minor was otherwise in the custody, care, or supervisory control of the defendant. This enhancement applies broadly and it includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. *See* USSG §2G2.1, comment. (n.5(A)).[46] The minor can be in the custody, care or supervisory control of more than one person at a time.[47] If the enhancement in §2G2.1(b)(5) applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* USSG §2G2.1, comment. (n.5(B)).

f. Knowing misrepresentation of identity/use of a computer

Section 2G2.1(b)(6) provides for a **2**-level enhancement if, for the purpose of producing sexually explicit material, the offense involved either: (1) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (2) the use of a computer or interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a

[42] *See* United States v. Hernandez, 894 F.3d 1104 (9th Cir. 2018).
[43] *See* United States v. Broxmeyer, 699 F.3d 265 (2d Cir. 2012).
[44] United States v. Street, 531 F.3d 703, 711 (8th Cir. 2008).
[45] United States v. Starr, 533 F.3d 985, 1001 (8th Cir. 2008).
[46] *See also* United States v. Alfaro, 555 F.3d 496 (5th Cir. 2009) (affirming the enhancement and concluding that the relationship between the 36-year-old defendant and his 15-year-old sister-in-law was "entrustful" even though the victim's mother did not approve of the victim spending time with the defendant).
[47] *See, e.g.*, United States v. Carson, 539 F.3d 611 (7th Cir. 2008) (enhancement supported where the minor's mother and the mother's boyfriend had mutual custody over the minor during the minor's visits to their house).

minor to engage in sexually explicit conduct; or to solicit participation with a minor in sexually explicit conduct.[48]

The enhancement for misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct does not prompt the application of this enhancement. *See* USSG §2G2.1, comment. (n.6(A)).

The computer or interactive computer service enhancement applies only to communication directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* USSG §2G2.1, comment. (n.4(B)).[49]

3. Cross Reference

Section 2G2.1(c)(1) states that §2A1.1 (First Degree Murder) applies if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111, and if the resulting offense level is greater than the one determined under this guideline.

4. Special Instruction

Section 2G2.1(d)(1) directs that when multiple minors are involved in the offense, Chapter Three, Part D (Multiple Counts) should be treated as though the exploitation of each minor had been contained in a separate count of conviction. Each minor exploited is to be treated as a separate minor. *See* USSG §2G2.1, comment. (n.7). Therefore, multiple counts involving the exploitation of different minors are not to be grouped under §3D1.2 (Groups of Closely Related Counts). *Id.* Relevant conduct principles apply however, and temporally distinct conduct must satisfy §1B1.3's requirement that the conduct be "during the commission of" or "in preparation for" the offense of conviction.[50]

[48] *See* United States v. Starr, 533 F.3d 985 (8th Cir. 2008) (affirming enhancement for defendant who lied about his age, based on application note, because misrepresentation was made with intent to persuade or coerce the minor to engage in sexually explicit conduct, and finding that minor does not have burden to discover defendant's true age).

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

[50] *See* United States v. Randall, 924 F.3d 790, 797–800 (5th Cir. 2019) ("[N]one of the conduct underlying the uncharged 'pseudo counts' . . . bear the necessary connection [] required by §1B1.3(a)(1)(A)."); United States v. Schock, 862 F.3d 563 (6th Cir. 2017) (where no evidence that defendant photographed Victims 1 and 2 together on the date alleged in indictment, conduct in taking pictures of Victim 1 two years later not "during the commission of" or "in preparation for" the offense so multiple count analysis did not apply).

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted. *See* USSG §2G2.1, comment. (n.8).

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

For violations of 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), and 2260(b), Appendix A specifies that §2G2.2 will apply. The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual). *See* USSG §2G2.2, comment. (n.1).[51]

1. Determining the Base Offense Level

If the defendant was convicted under 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5), or 2252A(a)(7), the base offense level is **18.** Otherwise, the base offense level is **22**.

2. Specific Offense Characteristics

a. Receipt or solicitation only

Section 2G2.2(b)(1) provides for a **2**-level *decrease* if the base offense level is 22, the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and the defendant did not intend to traffic in or distribute the material. Thus, the adjusted offense level will be **20** for those defendants who were convicted of receipt of child pornography with no intent to traffic in or distribute the material.

Distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but it does not include the mere solicitation of such material. *See* USSG §2G2.2, comment. (n.1). A decrease under this subsection may be denied when the defendant transported materials across state lines.[52]

[51] *See* United States v. Fulford, 662 F.3d 1174, 1180–82 (11th Cir. 2011) (finding §2G2.2(b)(3)(C) enhancement improper where defendant thought he distributed child pornography to a 13-year-old female and other minors, but the only identified recipients of his messages were adult males pretending to be minor females).

[52] *See* United States v. Fore, 507 F.3d 412, 415 (6th Cir. 2007) (holding that the defendant did not meet the

b. Minor under 12 years

Section 2G2.2(b)(2) provides for a **2**-level enhancement if the material involved a prepubescent minor or a minor under 12. The pictures themselves can support the court's finding that the images are of children under 12 and that they depict actual children.[53]

c. Distribution

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

(i) Alternative enhancements

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

(b) If the distribution was in exchange for any valuable consideration (but not for pecuniary gain) a **5**-level enhancement applies.

Distribution "in exchange for any valuable consideration" means "the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other pornographic material, preferential access to child pornographic material, or access to a child."[54]

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second requirement of §2G2.2(b)(1) "because his criminal conduct was not *limited* to the receipt or solicitation of pornographic materials, but also encompassed the transportation of materials involving the sexual exploitation of a minor in interstate commerce").

[53] *See* United States v. McNealy, 625 F.3d 858, 865 (5th Cir. 2010).

[54] USSG §2G2.2, comment. (n.1). A 2016 guideline amendment to §2G2.2(b)(3) addressed the application of the 5-level enhancement for distribution not for pecuniary gain in the specific context of peer-to-peer file sharing. *See* USSG App. C, amend. 801 (effective Nov. 1, 2016). Where previously some courts had held that the 5-level enhancement applied whenever a defendant knowingly used file-sharing software, *United States v. Groce,* 784 F.3d 291, 294 (5th Cir. 2015), the Sentencing Commission took a more restrictive view, directing that the distribution must be specifically linked to the valuable consideration and providing examples beyond the naked use of file-sharing programs, such as "receip[t] in exchange for other child pornographic material, preferential access to child pornographic material, or access to a child." Like the distribution enhancement, this commentary addressed the reach of the enhancement in the use of file-sharing programs. *See* USSG App. C, amend. 801 (effective Nov. 1, 2016). The changes to this subsection mirrored the changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

In order to determine if there was an exchange between the parties, a court must, "examine the purpose (or reasonably inferred purpose) of *both* parties, including the context of their discussions and circumstantial evidence such as their actions or comments".[55]

(c) If the offense involved distribution to a minor, a 5-level enhancement applies. "Distribution to a Minor" means "the knowing distribution to an individual who is a minor at the time of the offense," *see* USSG §2G2.2, comment. (n.1); and can include fictitious persons. *Compare United States v. Wainwright*, 509 F.3d 812 (7th Cir. 2007) (affirming district court's application of enhancement based on numerous messages defendant sent to individuals who he believed were under 18 because of screen names used by those individuals such as "Justified Facade-16yo" but not deciding whether enhancement applies if the recipient is determined to be an adult); *but cf. United States v. Fulford,* 662 F.3d 1174 (11th Cir. 2011) (holding application of enhancement for distribution to a minor based on defendant's belief that recipient was a minor was improper because enhancement only applies for actual minors or law enforcement officers represented to defendant as being a minor).

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

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

[55] United States v. Oliver, 919 F.3d 393, 405 (6th Cir. 2019) (remanding for further consideration of whether enhancement should apply where defendant intended to trade child pornography for images of a child, but it was unclear whether the other party ever agreed).

(e) If the distribution was to a minor and was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, a **7**-level enhancement applies. Distribution to a person representing that he can provide a child to engage in sexually explicit conduct is still distribution to a minor when the material is distributed with knowledge that it will be viewed by the minor. [56]

(f) Finally, if the distribution was knowing, and not otherwise described in (a) through (e), a **2**-level enhancement applies.

Enhancements for distribution may only be imposed upon a showing of *mens rea*. Specifically, the 2-level enhancement set forth in §2G2.2(b)(3)(F) provides that the enhancement applies only if "the defendant knowingly engaged in distribution." Application Note 2 states that the 2-level distribution enhancement applies only if the defendant *knowingly* "committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute." The intent of the commentary is to avoid the imposition of enhancement where a defendant unwittingly makes child pornography available to others through use of a peer-to-peer file-sharing program. *See* USSG App. C, amend. 801 (effective Nov. 1, 2016).[57]

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

[56] United States v. Love, 593 F.3d 1, 8 (D.C. Cir. 2010) ("We understand section 2G2.2 (b)(3)(E) to apply when, acting with the requisite purpose, the defendant engages in an act related to the transfer of child pornography with the knowledge it will be received or viewed by a minor.").

[57] *See* United States v. Lawrence, 920 F.3d 331, 335–37 (5th Cir. 2019) (adopting First Circuit approach allowing enhancement when defendant has knowledge that files are being shared with others, regardless of whether defendant actually intended to distribute the files); United States v. Montanez-Quinones, 911 F.3d 59, 67 (1st Cir. 2018) (enhancement properly applied where "defendant was a 'sophisticated and long-time computer user' who had selected from thousands of downloaded files a limited number to share through the file-sharing program"); United States v. Dunning, 857 F.3d 342 (6th Cir. 2017) (enhancement was appropriately applied where defendant argued that he removed files from file-sharing software so that others would no longer have access, demonstrating that defendant in fact understood he was sharing files).

(ii) Double counting.

It is not double counting to apply the distribution enhancement for a distribution of child pornography conviction.[58]

d. Sadistic or masochistic conduct

Section 2G2.2(b)(4) provides for a **4**-level enhancement if the material involved in the offense portrayed sadistic or masochistic conduct or other depictions of violence or if the images portray sexual abuse or exploitation of an infant or toddler. Unlike the distribution enhancement, this enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such materials. *See* USSG §2G2.2, comment (n.3). This enhancement does not require a determination of whether the defendant intended to possess the images or actually derived pleasure from viewing the images.[59] The enhancement applies even if the sadistic or masochistic sexual conduct depicted was directed at the defendant involved in the sexual activity rather than the victim.[60] Most courts have held that an objective, rather than subjective, standard is used to determine whether an image portrays sadistic or masochistic conduct.[61]

(i) Pain/violence/penetration.

Courts have held that an image's portrayal of sadistic conduct includes portrayal of conduct a viewer would likely think is causing physical or emotional pain to a depicted young child. *See United States v. Pappas*, 715 F.3d 225, 228 (8th Cir. 2013) (finding video showing victim being vaginally and anally penetrated "particularly distressing" and sufficient for enhancement); *United States v. Maurer*, 639 F.3d 72 (3d Cir. 2011) (finding images that depict sexual activity involving a prepubescent minor and that depict activity that would have caused pain to the minor sufficient for the enhancement). A video does not have to depict ongoing violent conduct to be "sadistic" if the evidence is sufficient to show that the defendant inflicted pain upon the victim. *See United States v. Cannon*, 703 F.3d 407 (8th Cir. 2013) (finding enhancement proper where video showed victim's wounds but not the actual abuse).

[58] *See* United States v. Cubero, 754 F.3d 888, 893–95 (11th Cir. 2014) ("To help sentencing courts differentiate the harm caused by such crimes, §2G2.2 draws many distinctions based on the defendant's conduct."); United States v. Reingold, 731 F.3d 204 (2d Cir. 2013) (remanding where district court held that any harm associated with distribution was fully accounted for in base offense level); *see also* United States v. Chiaradio, 684 F.3d 265 (1st Cir. 2012).
[59] *See* United States v. Maurer, 639 F.3d 72, 80 (3d Cir. 2011) ("Section 2G2.2(b)(4) is applied on the basis of strict liability.").
[60] *See* United States v. Scheels, 846 F.3d 1341 (11th Cir. 2017).
[61] United States v. Nesmith, 866 F.3d 677, 680 (5th Cir. 2017) (collecting circuit cases for same).

A portrayal of a young child experiencing physical or emotional pain includes the penetration of a young child by an adult. *See, e.g.*, *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007); *United States v. Johnson*, 450 F.3d 831 (8th Cir. 2006); *United States v. Myers*, 355 F.3d 1040 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003); *United States v. Lyckman*, 235 F.3d 234 (5th Cir. 2000); *cf. United States v. Wright*, 373 F.3d 935 (9th Cir. 2004) (in context of U.S.S.G. §5K2.8 extreme conduct departure). Images showing an attempt by an adult male to penetrate a young child have also been found to be "sadistic" or "violent" for purposes of this enhancement. *See United States v. Belflower*, 390 F.3d 560, 562 (8th Cir. 2004) (stating that images showing an attempt to penetrate a young child "bespeak a sadistic intent to achieve sexual pleasure through the necessarily violent depiction of a minor as either a sexual object ripe for or deserving of sexual exploitation, or as a sexual subject desirous of and complicit in his or her own sexual exploitation"). Digitally morphed child pornography images depicting an identifiable minor's head super-imposed onto the body of an adult female handcuffed and shackled wearing a collar and leash have been found to be sadistic. *See United States v. Hotaling*, 634 F.3d 725 (2d Cir. 2011) (finding the image portrayed both sexual activity involving a minor and sadistic conduct, which includes the likely infliction of pain, and portrayed a situation that involved physical and mental cruelty).

Mental pain or cruelty, without physical pain, is sufficient to trigger the sadism enhancement when the court, using an objective standard, determines that, "an outside viewer, as he is watching, would perceive the depicted activity as causing physical or mental pain to the minor during the course of the activity." *United States v. Bleau*, 930 F.3d 35, 41 (2d Cir. 2019) (affirming sadism enhancement proper where there was no evidence of physical harm, but the minor was "objectively . . . being degraded and humiliated" and looked sad, scared, and nervous in the videos).

(ii) Relevant conduct.

An enhancement under §2G2.2(b)(4) can be based on relevant conduct such as visual depictions found in the defendant's possession that are not part of the charged conduct in the indictment. *See United States v. Ellison*, 113 F.3d 77 (7th Cir. 1997); *see also United States v. Barevich*, 445 F.3d 956 (7th Cir. 2006); *United States v. Belflower*, 390 F.3d 560 (8th Cir. 2004) (*citing*

United States v. Stulock, 308 F.3d 922 (8th Cir. 2002)). *But see United States v. Fowler*, 216 F.3d 459 (5th Cir. 2000) (possession of images of sadistic conduct is not relevant conduct if the defendant was convicted of transporting and shipping child pornography and there was no evidence showing that the defendant ever thought about sending the sadistic images to anyone).

e. Pattern of activity

Section 2G2.2(b)(5) provides a **5**-level enhancement if the defendant engaged in a pattern of activity that involved the sexual abuse or exploitation of a minor.

"Pattern of activity" is defined as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred during the course of the offense, involved the same minor, or resulted in a conviction for such conduct. *See* USSG §2G2.2, comment. (n.1).[62] Evidence of an intent to continue abusing minors in the future, combined with evidence of past sexual abuse, is sufficient for imposition of the enhancement.[63]

"Sexual abuse or exploitation" means conduct described in 18 U.S.C. §§ 2241, 2242, 2243, 2251(a)–(c) & (d)(1)(B), 2251A, 2260(b), 2421, 2422, 2423, an offense under state law that would have been an offense under federal law if there was jurisdiction, or an attempt or conspiracy to commit any of these offenses.[64] It does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor. *See* USSG §2G2.2, comment (n.1).

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

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[62] *See* United States v. Cates, 897 F.3d 349 (1st Cir. 2018) (forcing the minor to fondle him and then later perform a sex act were separate instances of conduct which together could constitute a "pattern of activity"); United States v. Alberts, 859 F.3d 979 (11th Cir. 2017)(proper to base enhancement on admissions by defendant that he engaged in sexual acts with younger relatives when he was approximately 16 years old); United States v. Paull, 551 F.3d 516 (6th Cir. 2009) (affirming the district court's decision to apply the 5-level enhancement in a case in which the defendant's neighbor wrote a letter to the court detailing specific allegations of sexual abuse perpetrated by the defendant against the neighbor when the neighbor was a minor); United States v. Rothenberg, 610 F.3d 621 (11th Cir. 2010) (holding application of the 5-level enhancement under §2G2.2(b)(5) and the 5-level enhancement under §4B1.5(b)(1) were appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors).

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

[64] The Sixth Circuit held that in determining the age difference between minors to determine whether a past incident would qualify as "sexual abuse" under 18 U.S.C. § 2243(a), the "days-and-months" standard requires "'at least four years' older means at least 1,461 days . . . or 48 months older." United States v. Doutt, 926 F.3d 244, 247 (6th Cir. 2019) (remanding where the district court relied only on defendant and victim's approximate ages in years to determine whether there was a four-year age difference at the time of abuse).

(i) No temporal limit on prior conduct.

See United States v. Coffin, 946 F.3d 1, 7 (1st Cir. 2019) (Department of Health and Human Services' report and defendant's own Kik messages stating that he had abused a six-year-old child when he was 15, in 1998, sufficient to prove instance of sexual abuse for the enhancement); *United States v. Alberts*, 859 F.3d 979 (11th Cir. 2017)(district court properly based enhancement on the basis of 30-year-old conduct that occurred when defendant was a teenager); *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013) (conduct by defendant as a juvenile is properly considered); *United States v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (finding application appropriate where defendant molested nieces 35 years before offense). Application Note 1 also specifies that the pattern of abuse need not be related to the offense of conviction. *See* USSG §2G2.2, comment. (n.1).

(ii) Expanded relevant conduct.

The definition of "pattern of activity" in Application Note 1 allows for the court to consider expanded relevant conduct. *See United States v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (finding "relevant conduct" under §2G2.2 is intended to be more broadly construed than the general relevant conduct provision in §1B1.3); *United States v. Williamson*, 439 F.3d 1125 (9th Cir. 2006) (the pattern of activity enhancement was applied under expanded relevant conduct rules because the defendant, convicted of trafficking, had sexually abused his own granddaughter when she was four to five years old and had created child pornography of the abuse).

(iii) Conduct must have been sexually explicit, but it includes attempt.

Compare United States v. Gleich, 397 F.3d 608 (8th Cir. 2005) (holding that a "mooning" picture of a minor did not constitute an instance of sexual exploitation because the buttocks is a non-genital region and therefore does not meet the definition of "sexually explicit conduct"); *with United States v. Bishop*, 797 F. App'x 208, (6th Cir. 2019) (upholding enhancement where the defendant had, among other things, handed minors notes propositioning them for sex which constituted a "substantial step" towards commission of the offense and discussing other attempt cases).

f. Use of a computer

Section 2G2.2(b)(6) provides for a **2**-level enhancement if the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material. Attempts to delete the images do not bar imposition of the enhancement. *See United States v. Glassgow*, 682 F.3d 1107 (8th Cir. 2012). It is not double counting to apply the use of a computer enhancement to a distribution offense using a file-sharing program because the use of a computer was not essential to the act of distributing. *See United States v. Reingold*, 731 F.3d 204, 226 (2d Cir. 2013) (finding enhancement proper because it did not reflect a harm already fully accounted for in the base offense level because, a "computer is not essential to the act of distributing child pornography"); *cf. United States v. Thornburg*, 760 F. App'x 937, 946 (not double counting to apply enhancement to conviction for transportation under section 2252(a)(1) because the "base offense level may be applied whether a defendant uses a computer or not").

g. Number of images

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

at least ten but less than 150 images, there is a **2**-level enhancement.
at least 150 images, but less than 300 there is a **3**-level enhancement.
at least 300 images, but less than 600 there is a **4**-level enhancement
600 or more images, there is a **5**-level enhancement.

"Image" means any visual depiction that constitutes child pornography. *See* USSG §2G2.2, comment. (n.6(A)). Each photograph, picture, computer or computer-generated image, or similar visual depiction is considered one image. *See* USSG §2G2.2, comment. (n.6(B)(i)); *United States v. Price*, 711 F.3d 455 (4th Cir. 2013) (finding court did not err by counting each individual duplicate picture as one image); *see also United States v. Sampson*, 606 F.3d 505 (8th Cir. 2010) (affirming counting the same video twice, for a total of 150 images, because both acts of distribution compound the original sexual exploitation of the minor). Both duplicate hard copy images and duplicate digital images are to be counted separately. *United States v. McNerney*, 636 F.3d 772 (6th Cir. 2011); *United States v. Ardolf*, 683 F.3d 894 (8th Cir. 2012). If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted. *See* USSG §2G2.2, comment. (n.6(B)(i)). Each video, video-clip, movie, or similar recording is considered to have 75 images. If the recording is substantially longer than five minutes, an upward departure may be warranted. *See* USSG §2G2.2, comment. (n.6(B)(ii)). An attempt to obtain pornographic videos is sufficient to support the enhancement under this subsection. *See United States v. Gnavi*, 474 F.3d 532 (8th Cir. 2007) (finding the enhancement appropriate where the defendant had attempted to receive a pornographic video but holding that merely expressing interest is not enough). Possession of additional images not distributed may not be relevant conduct to a distribution conviction. *See United States v. Teuschler*, 689

F.3d 397 (5th Cir. 2012) (finding possession of non-distributed images did not occur in preparation for the offense, during the offense, or in an attempt to avoid detection of the offense).

3. Cross Reference

Section 2G2.2(c)(1) states that §2G2.1 applies if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, and if the resulting offense level is greater than the one resulting from this guideline. The cross reference should be applied broadly. *See* USSG §2G2.2, comment. (n.7).

Most issues under this subsection deal with what constitutes relevant conduct. *See, e.g.*, *United States v. Bauer*, 626 F.3d 1004 (8th Cir. 2010) (finding application of the cross reference appropriate where there was an offer to purchase a webcam to send to the victim and the defendant sent money for the purchase); *United States v. Stoterau*, 524 F.3d 988, 996 (9th Cir. 2008) (applying the cross reference to §2G2.1 "because [the defendant's] offense conduct involved posing and photographing [the victim] as he engaged in sexually explicit conduct"); *United States v. Garcia*, 411 F.3d 1173, 1179 (10th Cir. 2005) (stating that the cross reference to §2G2.1 is to be construed broadly and should be applied to "not only the actual production of child pornography, but the active solicitation for the production of such images"). The cross reference may apply where a defendant strategically places a camera to record a minor in a state of undress. *See, e.g.*, *United States v. Richard*, 901 F.3d 514 (5th Cir. 2018) (*citing United States v. McCall*, 833 F.3d 560 (5th Cir. 2016).

4. Upward Departure Provision

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not it occurred during the course of the offense or resulted in a conviction), and subsection (b)(5) (Pattern of Activity Involving the Sexual Abuse or Exploitation of a Minor) does not apply, an upward departure may be warranted. An upward departure may also be warranted if subsection (b)(5) does apply, but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved. *See* USSG §2G2.2, comment. (n.9).

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

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

1. Base Offense Level

The base offense level for this guideline is 38.

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

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

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

1. Base Offense Level

The base offense level under this guideline is 6.

2. Cross References

Section 2G2.1 applies if the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. *See* USSG §2G2.5(b)(1). Section 2G2.2 applies if the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor. *See* USSG §2G2.5(b)(2).

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

Appendix A specifies offense guideline §2G2.6 for offenses violating 18 U.S.C. § 2252A(g). The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual). *See* USSG §2G2.6, comment. (n.1).

1. Base Offense Level

This guideline has a base offense level of 35.

2. Specific Offense Characteristics

a. Age of the victim

Section 2G2.6(b)(1) provides for a **4**-level enhancement if the victim had not reached 12. It provides for a **2**-level enhancement if the victim had reached 12, but had not reached the age of 16.

b. Parent, relative, guardian/custody, care, or supervisory control

Section 2G2.6(b)(2) provides for a **2**-level enhancement if the defendant was a parent, relative, or legal guardian of a minor victim or if the minor victim was otherwise in the custody, care, or supervisory control of the defendant. This subsection is to be applied broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. *See* USSG §2G2.6 comment. (n.2(A)). If subsection (b)(2) applies, the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. *See* USSG §2G2.6 comment. (n.2(B)).

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

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

d. Use of a computer

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

III. CHAPTER THREE: ADJUSTMENTS

A. §3A1.1(b) (Vulnerable Victim)

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

For purposes of this subsection, "vulnerable victim" means a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) and who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. USSG §3A1.1, comment. (n.2).[65] The enhancement can apply to defendants convicted of receipt, distribution, or possession of child pornography offenses.[66]

A §3A1.1(b) adjustment does not apply, however, if the factor that makes the person vulnerable is already incorporated into the offense guideline. *See* USSG §3A1.1(b), comment. (n.2). Because child pornography guidelines provide for enhancements based on the age of the minor victims and the unusual vulnerability of toddlers and infants, §3A1.1(b) will apply only if the victim was unusually vulnerable for reasons unrelated to his/her age. *See* USSG §3A1.1, comment. (n.2). *Compare United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008) (holding that the victim's petite and fragile stature, naiveté, and poor communication skills made her unusually vulnerable for a 13-year-old girl), *with United States v. Dowell*, 771 F.3d 162, 174 (4th Cir. 2014) (if the reasons for enhancement are intimately related to the age of the victim, such as cognitive and psychological development, then the enhancement for vulnerable victim does not apply).

B. §3B1.1 (Aggravating Role)

Section 3B1.1 provides for a 4-level adjustment if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; a 3-level adjustment if the defendant was a manager or supervisor and the

[65] *See* United States v. Arsenault, 833 F.3d 24 (1st Cir. 2016) (finding application of the adjustment appropriate because two of defendant's victims (students in his special needs program) under the age of 12 were unusually vulnerable due to their special needs, where one minor had autism and the other was non-verbal); United States v. Robinson, 436 F. App'x 82 (3d Cir. 2011) (affirming application of §3A1.1 where conspirators targeted minor girls for prostitution, one with a cognitive impairment, and others who were homeless and from troubled families); United States v. Holt, 510 F.3d 1007, 1012 (9th Cir. 2007) (finding that the application of the adjustment under §3A1.1(b) and an enhancement based on sadistic conduct was not impermissible double-counting because "the enhancements . . . account for distinct characteristics of the crime: the sadistic conduct enhancement accounts for the pleasure necessarily experienced by the perpetrator, while the vulnerable victim enhancement accounts for the inability of the victim to resist sexual abuse"); United States v. Starr, 533 F.3d 985, 1002 (8th Cir. 2008) (affirming the district court's application of the adjustment where the district court determined that the victim "had psychological and family problems of which [the defendant was or should have been aware," and there was evidence in the record "on which the district court could infer that [the defendant] used" the victim's psychological problems to gain the victim's confidence); United States v. Newsom, 402 F.3d 780 (7th Cir. 2005) (holding that, while every sleeping victim is not "vulnerable" under this guideline, under the facts of the case—the defendant moved the underwear of his sleeping victim to get better video shots of her genitals—the adjustment was proper); United States v. Gawthrop, 310 F.3d 405, 412 (6th Cir. 2002) (affirming the district court's application of the vulnerable victim adjustment where the defendant "molested and exposed his three-year-old granddaughter to child pornography by abusing his special position as her grandfather").

[66] *See* United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013) (application of §3A1.1 appropriate because victimization of children continues beyond the production of the images and the consumer of the material may be considered to be "causing the children depicted in those material to suffer . . .") (quotations omitted).

criminal activity involved five or more participants or was otherwise extensive, and a 2-level adjustment if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than that described above. A "participant" includes a person who is criminally responsible for the commission of the offense, even if not convicted. A victim is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct with respect to another victim. *See* USSG §2G1.1, comment. (n.3).[67]

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

Section 3B1.3 provides for a **2**-level adjustment if the defendant abused a position of public or private trust in a manner that significantly facilitated commission or concealment of the crime. However, this adjustment does not apply in many of the child pornography guidelines if the specific offense characteristic for a victim being in the care, custody, or supervisory control of the defendant also applies. *See* USSG §§2G1.3, comment. (n.2(B)); §2G2.1, comment. (n.5(B)); §2G2.6, comment. (n.2(B)).

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

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

Section 4B1.5 applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who present a continuing danger to the public. *See* USSG §4B1.5, comment. (n.2), (backg'd). 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 109 of title 18, chapter 110 of title 18 (not including trafficking in, receipt of, or possession of, child pornography or a recordkeeping offense), and chapter 117 of title 18 (not including transmitting information about a minor or filing a factual statement about an alien individual, or 18 U.S.C. § 1591).

For purposes of this guideline, the word "minor" refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual). *See* USSG §4B1.5, comment. (n.1).

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

1. Determining the Base Offense Level & Criminal History Category

a. At least one previous sex offense conviction

Section 4B1.5(a) applies where a defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense after sustaining at least one sex offense conviction. "Sex offense conviction" means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor. The term does not include trafficking in, receipt of, or possession of, child pornography. *See* USSG §4B1.5, comment. (n.3(A)(ii)).

As is the case with the parallel recidivist guideline and statutory recidivist provisions, courts "employ a 'formal categorical approach' to determine whether a prior conviction qualifies as a defined sex offense conviction. The categorical approach requires that the sentencing court 'look only to the fact of conviction and the statutory definition of the prior offense.'" *United States v. Pierson*, 544 F.3d 933 (8th Cir. 2008) (*quoting Shepard v. United States*, 544 U.S. 13 (2005)).[68]

The Eight Circuit has held that §4B1.5(a) does not require the formal entry of a judgment of conviction before a defendant is considered convicted for application of the enhancements. *United States v. Leach*, 491 F.3d 858, 866 (8th Cir. 2007) (holding that §4B1.5(a) "only requires that the defendant have been found guilty of the offense").[69] The Eighth and Ninth Circuits have held that a juvenile-delinquency adjudication is not a prior sex offense conviction as defined by § 2252(b) and §4B1.5(a). *See United States v. Gauld*, 865 F.3d 1030 (8th Cir. 2017) (*en banc*) (Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications and because section 2252(b)(1) mentions only "convictions," Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum); *United States v. Nielsen*, 694 F.3d 1032 (9th Cir. 2012) (juvenile adjudication for sexual assault cannot be basis for §4B1.5(a) enhancement because its use of "sex offense conviction" indicates only adult convictions).

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[68] *See also* United States v. Reinhart, 893 F.3d 606 (9th Cir. 2018) (reversing imposition of ten-year minimum penalty enhancement under section 2252(b)(2) because Calif. Penal Code § 311.3(a) (sexual exploitation of a child) and § 311.11(a) (possession of child pornography) are both indivisible and overbroad); United States v. Simard, 731 F.3d 156, 160 (2d Cir. 2013)(employing categorical approach to previous conviction under 13 Vt. Stat. Ann § 2602 offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," and finding the statute satisfied the predicate offense criteria for the 18 U.S.C. § 2252 (b)(2)); United States v. Dahl, 833 F.3d 345 (3d Cir. 2016) (vacating and remanding where state offense prohibited touching genitalia through clothing as more broad than "sexual act" which require penetration or actual skin-to-skin contact); United States v. Gardner, 649 F.3d 437 (6th Cir. 2011)(prior conviction for sexual battery was insufficient to trigger 15-year mandatory minimum sentence where sexual battery did not require as an element that complaining witness be a minor).

[69] *Cf.* United States v. Ary, 892 F.3d 787 (5th Cir. 2018) (Texas deferred adjudication qualifies as prior conviction for purposes of enhancement under section 2252(b)(1)).

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

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

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

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

b. Pattern of activity involving prohibited sexual conduct

Section 4B1.5(b) applies when the defendant's instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) and §4B1.5(a) do not apply, and the defendant has engaged in a pattern of activity involving prohibited sexual conduct. "Prohibited sexual conduct" means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), the production of child pornography, or trafficking in child pornography only if, before the commission of the instant offense, the defendant had been convicted for that trafficking in child pornography. It does not include receipt or possession of child pornography. *See* USSG §4B1.5, comment. (n.4(A)).

For purposes of this subsection, a defendant is engaged in a "pattern of activity" if, on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor. *See* USSG §4B1.5, comment. (n.4(B)(i)).[70] An "occasion of prohibited sexual conduct" can be considered for purposes of this subsection without regard to whether the conduct occurred during the course of the instant offense or a formal conviction entered. *See* USSG §4B1.5, comment. (n.4(B)(ii)).

A previous conviction is not required for an enhancement under §4B1.5(b). A conviction for attempted production of child pornography is considered "prohibited sexual conduct" for purposes of §4B1.5(b).[71] Courts have held that unadjudicated conduct that occurred while the defendant was a juvenile can be a predicate under this subsection.[72]

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

Double counting. Section 4B1.5(b)(1) specifically states that the enhancement is to be added to the offense levels determined under Chapters Two and Three. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5.[73]

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[70] Repeated conduct with a single minor can qualify as a pattern of activity for the purposes of this enhancement. *See* United States v. Fox, 926 F.3d 1275, 1280–81 (11th Cir. 2019) ("Multiple, distinct instances of abuse—whether ongoing, related, or random—meet the enhancement under § 4B1.5(b)(1).").

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

[72] *See* United States v. Phillips, 431 F.3d 86 (2d Cir. 2005) (concluding that court may consider conduct that occurred when defendant was a juvenile).

[73] *See* United States v. Babcock, 924 F.3d 1180, 1196–97 (11th Cir. 2019) (holding application of §2G2.1(b)(2) and §4B1.5(b) is not impermissible double counting because they do not inherently encompass the same harm); United States v. Rothenberg, 610 F.3d 621 (11th Cir. 2010) (holding application of the 5-level enhancement under §2G2.2(b)(5) and the 5-level enhancement under §4B1.5(b)(1) was appropriate where the defendant had two different online conversations with other adults in which he coached the adults on how to sexually abuse minors); United States v. Fadl, 498 F.3d 862, 867 (8th Cir. 2007) (holding that the district court's application of both §2G2.1(d)(1) and §4B1.5(b) did not constitute impermissible double-counting because "[t]he application of § 2G2.1(d)(1) punished [the defendant] 'for exploiting[ ] different minors, while the § 4B1.5(b) enhancement punished him for exploiting those minors on multiple occasions'") (citation omitted); United States v. Schmeilski, 408 F.3d 917 (7th Cir. 2005) (same); United States v. Peck, 496 F.3d 885 (8th Cir. 2007) (same); see also United States v. Von Loh, 417 F.3d 710 (7th Cir. 2005) (finding no impermissible double-counting where the district court did not group the counts and imposed enhancements

Note. If §4B1.1 (Career Offender) applies to the defendant, then §4B1.5 is inapplicable. *See* USSG §4B1.5(a), (b). The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline, §4B1.5, comment. (n.5(A)), and treatment and monitoring should be considered as special conditions of any term of probation or supervised release. *See* USSG §4B1.5, comment. (n.5(B)). Repeat sex offenders under §4B1.5 are ineligible for a downward departure under §4A1.3. *See* USSG §4A1.3(b)(2)(B).

B. §5B1.3 (Conditions of Probation)

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

1. §5B1.3(a) (Mandatory Conditions)

Section 5B1.3(a)(9) provides that "[i]f the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of the Act (18 U.S.C. § 3563(a))."

2. §5B1.3(b) (Discretionary Conditions)

The guidelines allow courts to impose other conditions of probation if the conditions are "reasonably related to": (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public from further crimes by the defendant; and (5) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner. Such conditions can only involve such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a). *See* USSG §5B1.3(b)(2).

3. §5B1.3(d) (Policy Statement)

Section 5B1.3(d)(7) sets forth "special" conditions of probation that are recommended for offenders convicted of sex offenses. Subsection (A) recommends 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) recommends 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) recommends a condition requiring the defendant to submit to a search, at any time, with or without a warrant, by any law enforcement or probation officer, of the defendant's person and any

under §3D1.4 and §4B1.5).

property, papers, or things upon reasonable suspicion concerning a violation of the probation or unlawful conduct.

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

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

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

This section provides that the length of the term of supervised release cannot be less than the minimum term of years specified for the offense, and may be up to life if the offense is a sex offense. *See* USSG §5D1.2(b)(2). The statutory maximum term of supervised release is recommended if the offense is a sex offense. *See* USSG §5D1.2(b)(2).[74]

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

Additionally, section 3583(k) of title 18 states that, if a defendant required to register under SORNA commits a criminal offense under, among others, chapter 109A of title 18, the court is to 1) revoke a term of supervised release, and 2) require a defendant to serve a term of imprisonment of not less than five years. In *United States v. Haymond*, a fractured opinion, the Supreme Court held that section 3583(k) is unconstitutional but left open the question of whether and how the constitutional infirmity could be remedied.[75] The plurality opinion concluded that 3583(k) violated the defendant's Fifth and Sixth Amendment rights by imposing a mandatory term based on facts found by a judge by a preponderance of the evidence, finding that these principles apply in the supervise release context.[76] Justice Breyer concurred only in the judgment, instead finding that section 3583(k) "is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach."[77] Justice Breyer's concurrence, as the

[74] *But see* United States v. Jenkins, 854 F.3d 181, 194 (2d Cir. 2017) (vacating 25-year supervised release term for man who will be 63 at time of release as unreasonable absent any justification for "unusually harsh" "post-release supervision that prevents [him] from ever re-engaging in any community in which he might find himself"); United States v. Inman, 666 F.3d 1001 (6th Cir. 2012) (vacating lifetime supervision where the district court imposed the lifetime term even though the parties had requested a ten-year term and the record did not demonstrate that the court had considered any of the pertinent section 3553(a) factors).
[75] 139 S. Ct. 2369, 2385–386 (2019).
[76] *Id.* at 2373–385 (Gorsuch, J., joined by Ginsburg, Sotomayor, and Kagan, JJ.).
[77] *Id.* at 2385–386 (Breyer, J., concurring).

narrowest point of agreement, is controlling.[78] Both the plurality and the concurrence left open the possibility of a remedy, rejecting the Tenth Circuit's conclusion that the last two sentences of the provision must be struck as "unconstitutional and unenforceable."[79]

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

Pursuant to section 3583(d)(1), conditions of supervised release must be "reasonably related" to the goals of deterrence, protection of the public, and rehabilitation of the defendant. Further, the conditions must involve no greater deprivation of liberty than is reasonably necessary to meet these goals, pursuant to § 3583(d)(2), and conditions that affect constitutional rights will likely be valid if "narrowly tailored and . . . directly related to deterring [the offender] and protecting the public."

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

1. §5D1.3(a) (Mandatory Conditions)

Section 5D1.3(a)(7) provides "[i]f the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of the Act (18 U.S.C. § 3583(d))."

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

2. §5D1.3(b) (Discretionary Conditions)

The guidelines allow courts to impose other conditions of supervised release if the conditions are "reasonably related to" any or all of the factors identified in 18 U.S.C. § 3583(d)(1): the first is the defendant's history and characteristics and the nature and circumstances of his offense; the need for adequate deterrence of future criminal conduct; the need to protect the public from further crimes by the defendant; and the effective

[78] *See, e.g.*, United States v. Watters, 947 F.3d 493, 497 (8th Cir. 2020) ("As noted by the dissent, Justice Breyer's opinion is the narrower opinion, and therefore controls.").

[79] The Supreme Court vacated and remanded to the Tenth Circuit for it to address the government's argument that a jury could be empaneled, and, because the government had not briefed that issue, whether that argument was adequately preserved. *Haymond*, 139 S. Ct. at 2385. The Tenth Circuit did not have the opportunity to address the issue of remedy. On remand, the government conceded that the argument had not been preserved and the case was dismissed. United States v. Haymond, 935 F.3d 1059 (10th Cir. 2019) (on remand from the Supreme Court). During the pendency of the proceedings, the defendant had been sentenced to time-served. *See id.* at 1063 (discussing procedural history).

provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.

Such conditions must also entail "no greater deprivation of liberty than is reasonably necessary" to achieve the goals of supervised release, must be consistent with any pertinent policy statements issued by the Commission, and must have adequate evidentiary support in the record. *See* USSG §5D1.3(b)(2); *United States v. Blinkinsop*, 606 F.3d 1110 (9th Cir. 2010) (finding a special condition of supervised release that the defendant not possess camera phones or electronic devices capable of covert photography did not impose significant deprivation of liberty even though his crime did not involve producing child pornography; because of the large number of images he possessed, it was reasonable to anticipate that he might engage in covert photography in the future).[80] Even if the record is devoid of individualized findings by the court of the facts and circumstances in the case, certain characteristics may justify conditions for the majority of offenders. *See United States v. Deatherage*, 682 F.3d 755, 762 (8th Cir. 2012) (affirming special condition prohibiting defendant from purchasing, possessing, or using "any media forms containing pornographic images or sexually oriented materials" because they were "obviously relevant to the child pornography offense" or to the defendant's history and characteristics). *But see United States v. Alvarado*, 691 F.3d 592 (5th Cir. 2012) (finding district court erred by automatically imposing lifetime term of supervised release without analysis of circumstances surrounding the crime).

Notice. Some courts have found that Rule 32 requires that defendants receive notice of the possibility of imposition of special conditions of supervised release if those conditions are not contemplated by the guidelines.[81]

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

Section 5D1.3(d)(7) lists "special" conditions of supervised release that are recommended for offenders convicted of sex offenses. Subsection (A) recommends 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) recommends 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) recommends a

[80] *See also* United States v. Muhlenbruch, 682 F.3d 1096, 1106 (8th Cir. 2012) (finding appropriate special condition requiring defendant to both get prior approval from probation officer before accessing the Internet and to notify probation officer of any location where he may receive mail and get approval before obtaining a new mailing address or post office box, as an "alternate channel for receiving child pornography.").
[81] *See, e.g.*, United States v. Cope, 527 F.3d 944, 953 (9th Cir. 2008) ("Where a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness."). *See also* United States v. Sherwood, 850 F.3d 391, 395 (8th Cir. 2017)("Advance notice of supervised release conditions fits into the category of recommended best practice rather than mandatory requirement.") (internal quotation marks omitted).

condition requiring the defendant to submit to a search, at any time, with or without a warrant, by any law enforcement or probation officer, of the defendant's person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.

The court "may delegate to the probation officer details regarding the selection and schedule of a sex offender treatment program even though it must itself impose the actual condition requiring participation in a sex offender treatment program." *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002).

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

a. barring contact with minors, *see, e.g.*, *United States v. Maurer*, 639 F.3d 72 (3d Cir. 2011) (finding special condition restricting contact with minors not overly broad for a conviction for possessing child pornography when defendant's conduct included initiating sexual conversation with a purported minor on the Internet); *United States v. Levering*, 441 F.3d 566 (8th Cir. 2006) (holding that the district court did not abuse its discretion by imposing a condition of supervised release requiring a total prohibition on contact with juvenile females—without prior approval of his probation officer—where the defendant had pleaded guilty to the forcible rape of a female juvenile); *United States v. Roy*, 438 F.3d 140 (1st Cir. 2006) (holding that the sentencing court did not abuse its discretion in imposing a special condition that the defendant, convicted of possession of child pornography, have no contact with his girlfriend or her minor children without the parole officer's approval because the condition served the permitted goal of protecting the minors from harm and also prevented recidivism). *But see United States v. Jenkins*, 854 F.3d 181 (2d Cir. 2017)(vacating condition barring direct or indirect contact with minors, noting that such a condition would bar the defendant from any interaction with family or community absent preapproval by the Probation Office); *United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012) (holding that a condition barring the defendant from residing with or being in the company of his own minor daughters or from dating anyone with minor children was unreasonable and impermissibly overbroad).

b. requiring sex offender treatment and physiological testing, *see, e.g.*, *United States v. Mercado*, 777 F.3d 532 (1st Cir. 2015) (finding requirement that defendant participate in a sex offender treatment program reasonable in the context of SORNA); *United States v. Muhlenbruch*, 682 F.3d 1096, 1102 (8th Cir. 2012) (upholding sex offender treatment program with polygraph testing where there was a pattern of child pornography

possession and defendant gave false testimony about possession at trial); *United States v. Morgan*, 44 F. App'x 881, 888 (10th Cir. 2002) (holding that a special condition of supervised release requiring the defendant "to participate in a sex offender treatment and 'submit to a risk assessment including physiological testing,' violates neither [the defendant's] constitutional rights nor the statutory and Guideline requirements for the imposition of special conditions of supervised release"). *But see United States v. Wagner,* 872 F.3d 535, 542–43 (7th Cir. 2017)(holding that condition that allowed treatment provider to decide if defendant could view adult pornography was impermissible delegation); *United States v. Stoterau*, 524 F.3d 988, 1005 (9th Cir. 2008) (setting forth a "heightened procedural requirement" in which the district court must follow "additional procedures and make special findings" for conditions of supervised release that implicate "a particularly significant liberty interest," such as mandating antipsychotic medication or certain invasive types of physiological testing, as these procedures and medicines impinge the "constitutional interest inherent in avoiding unwanted bodily intrusions or manipulations.").[82] *See also United States v. Iverson,* 874 F.3d 855, 860 (5th Cir. 2017)(vacating condition that defendant "follow all other lifestyle or restrictions or treatment requirements imposed by the therapist" because allowing therapist to set restrictions on conduct usurped judge's sentencing authority).[83]

[82] The use of one physiological testing instrument, the Penile Plethysmograph (PPG), has been contentious. While its use has been sporadically approved, *see, e.g.*, United States v. Dotson, 324 F.3d 256 (4th Cir. 2003) (upholding PPG testing condition as useful for the treatment of sex offenders and within the discretion of the district court), courts in recent years have expressed significant misgivings regarding its use. *See* United States v. Rock, 863 F.3d 827, 833 (D.C. Cir. 2017)(striking PPG testing condition because it "implicates significant liberty interests and would require, at a minimum, a more substantial justification than other typical conditions of supervised release."); United States v. Medina, 779 F.3d 55, 74 (1st Cir. 2015) (finding the PPG testing condition without substantial justification and thus "facially unreasonable"; deeming PPG testing an "extraordinarily invasive supervised release condition" in context of SORNA violation); United States v. McLaurin, 731 F.3d 258, 262 (2d Cir. 2013) (finding the PPG testing condition to be an "extraordinarily invasive" condition such that "there is a line at which the government must stop. Penile plethysmography testing crosses it."; to impose such a "demeaning" condition, the district court must at a minimum, make findings, sufficiently informative and defendant-specific for appellate review, that the test is "therapeutically beneficial," that its benefits substantially outweigh any costs to the subject's dignity, that no less intrusive means exists, and that it is narrowly tailored to serve a "compelling government interest" in context of SORNA violation); United States v. Weber, 451 F.3d 552 (9th Cir. 2006) (vacating the PPG testing condition because the district court failed to make "on-the-record medically-grounded findings" demonstrating that the significant liberty interest and the degree of intrusion is reasonably necessary and maintaining that the burden is on the government, not the defendant, to establish at the time of sentencing that the condition is reasonably necessary).

[83] Similarly problematic are conditions that seek to regulate adult relationships through supervision. *See, e.g.*, *Rock*, 863 F.3d at 832 (striking condition that defendant notify the probation office of "any significant romantic relationship" as unconstitutionally vague)(*citing* United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010)).

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

(ii) requiring ABEL testing (a diagnostic exam for sex offenders that measures "visual reaction time" to non-erotic images of adults and children in order to determine his sexual interest), *see, e.g.*, *United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (upholding ABEL testing condition because it is less invasive than medication requirements or plethysmograph testing). *But see United States v. T.M.*, 330 F.3d 1235 (9th Cir. 2003) (vacating sex offender conditions, including ABEL testing, as not reasonably related to deterrence, public safety, or rehabilitation, where the defendant had a 20-year-old kidnapping conviction involving undressing and nude picture-taking of an 8-year-old girl and a 40-year-old dismissed charge of a sexual relationship with a minor and was being sentenced for a probation violation based on a drug offense).

c. requiring the defendant to submit to random polygraph testing upheld if it does not interfere with defendant's Fifth Amendment rights, s*ee, e.g.*, *United States v. Lee*, 315 F.3d 206 (3d Cir. 2003) (finding no abuse of discretion where court imposed a condition requiring defendant submit to random polygraph testing but not to answer incriminating questions); *United States v. Stoterau*, 524 F.3d 988, 1004 (9th Cir. 2008) (upholding a polygraph testing condition but explaining that defendant retains his Fifth Amendment rights during any such testing that he may invoke and remain silent; "should the government desire [defendant] to answer, it may afford his answers the protection of use and derivative use immunity."). *But see United States v. Bahr*, 730 F.3d 963 (9th Cir. 2013) (requiring polygraph with threat of revocation rises to compulsion that violates Fifth Amendment).

d. prohibiting the defendant from possessing or viewing pornographic material, *see, e.g.*, *United States v. Carson*, 924 F.3d 467, 472 (8th Cir. 2019) (upholding condition banning "any matter that is pornographic/erotic" because it does not involve a greater deprivation of liberty than is reasonably necessary, and distinguishing erotic material from protected art forms featuring nudity); *United States v. Miller*, 665 F.3d 114 (5th Cir. 2011) (holding that a condition restricting viewing any sexually stimulating or sexually oriented material was not overbroad where one video in his possession depicted a minor engaged in sexual activity with a male adult while a female adult held the child in place, because the presence of adults in the video permitted the conclusion that the defendant's interest in sexually stimulating materials involving adults was "intertwined with his sexual interest in minors"); *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003) (holding that a condition prohibiting the defendant from possessing or viewing pornographic material was reasonably related to a legitimate sentencing purpose because the defendant often videotaped his sexual attacks on his adult and minor victims). *But see United States v. Wagner*, 872 F.3d 535, 542–43 (7th Cir. 2017)(condition that left the decision of whether defendant could view adult pornography to treatment provider selected by the probation department was "impermissible delegation" and would require specific evidence before the district court to support its imposition); *United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (finding a condition that prohibited the defendant from possessing matter that "depicted or alluded to sexual activity," or that "depicted minors under the age of 18" overbroad); *United States v. Cope*, 527 F.3d 944 (9th Cir. 2008) (holding that a condition prohibiting the defendant from possessing "any materials . . . depicting and/or describing child pornography" is overbroad).

e. restricting defendants' frequenting and loitering in places where children are likely to be, *see, e.g.*, *United States v. Ristine*, 335 F.3d 692, 696 (8th Cir. 2003) (finding that a condition prohibiting the defendant, who pled

guilty to receipt of child pornography, from places where minor children congregate such as "residences, parks, beaches, pools, daycare centers, playgrounds, and schools" without prior written consent of the probation officer was not overbroad where the purpose of the condition was to limit the defendant's access to children); *United States v. Reardon*, 349 F.3d 608 (9th Cir. 2003) (same); *United States v. MacMillen*, 544 F.3d 71 (2d Cir. 2008) (same).

f. authorizing probation to discuss third-party risks with employers, *see, e.g.*, *United States v. MacMillen*, 544 F.3d 71, 77 (2d Cir. 2008) (holding that this condition is not overbroad because "the purpose of the employer notification condition is to aid the prevention of improper computer use," and would not apply to all types of employment). *But see United States v. Mike*, 632 F.3d 686 (10th Cir. 2011) (finding infirm the conditions requiring the defendant to notify potential employers or educational programs about his criminal convictions because such notification constitutes an "occupational restriction," and the court did not make the required specific findings as set forth in *United States v. Souser*, 405 F.3d 1162 (10th Cir. 2005) under §5F1.5).

g. limiting computer or Internet access, *see, e.g.*, *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) (finding a restriction on computer use is proper where, "the defendant did more than merely possess child pornography" and the condition does not completely ban internet access); *United States v. Perrin*, 926 F.3d 1044 (8th Cir. 2019) (rejecting defendant's First Amendment challenge to condition prohibiting possession or use of a computer or accessing any online service without prior approval where defendant had used devices for producing in the past); *United States v. Rock*, 863 F.3d 827 (D.C. Cir. 2017)(upholding prohibition on use of any digital device to access pornography of any kind where defendant had distributed child pornography by use of a computer); *United States v. Buchanan*, 485 F.3d 274 (5th Cir. 2007) (affirming a special condition restricting Internet use for a defendant convicted of possession of child pornography as reasonably related to the offense of possession and the need to prevent recidivism and protect the public); *United States v. Alvarez*, 478 F.3d 864 (8th Cir. 2007) (sufficient nexus between the defendant's use of the Internet and his exploitation of the victim to warrant a special condition prohibiting him from having Internet access at any location without the prior approval of his probation officer). *But see United States v. Blair*, 933 F.3d 1271, 1280 (10th Cir. 2019) ("[Computer use restriction] sections require special conditions of release that neither absolutely prohibit the defendant's access to computers or the Internet nor permit the probation offices to achieve that result by . . . refusing affirmatively to allow any Internet access."); *United States v. Wagner*, 872 F.3d 535, 542–43 (7th Cir. 2017) (poor wording of condition seemingly

giving sex offender treatment provider discretion over aspects of internet use "vague" and leading to "absurd result"); *United States v. Duke,* 788 F.3d 392 (5th Cir. 2015) (vacating a special condition of supervised release that prohibited defendant from accessing computers or the Internet for the rest of his life because the scope coupled with the duration of the condition contravened § 2583(d)'s requirement that release conditions be "narrowly tailored" to avoid imposing a greater deprivation than was reasonably necessary and because the ban would completely preclude the defendant from "participating in modern society" in light of the "ubiquity and importance of the Internet" in using the Internet for innocent purposes such as paying bills online or taking online classes); *United States v. Sofsky*, 287 F.3d 122, 124–26 (2d Cir. 2002) (remanding where the court imposed a special condition on a defendant, convicted of receipt of child pornography, that he not "access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer" because "in light of the nature of his offense," the condition "inflicts a greater deprivation on [his] liberty than is reasonably necessary"); *United States v. White*, 244 F.3d 1199 (10th Cir. 2001) (overturning a special condition imposed on a defendant, convicted of using the Internet to receive child pornography, that required that he not possess a computer with Internet access as both too narrow and too broad; it was not reasonably related to prohibiting access to the Internet because it did not prohibit accessing the Internet from public places, but was greater than necessary in the balancing of protections of the public with the goals of sentencing because it prevented the defendant from using the Internet for legitimate reasons).

F. §5E1.1 (RESTITUTION)

Section 5E1.1 requires courts to order restitution for identifiable victims. Restitution is mandatory under §5E1.1 and 18 U.S.C. § 2559 for offenses that involve the sexual exploitation of children and child pornography. The President signed the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 ("the Act") on December 7, 2018,[84] which amends 18 U.S.C. § 2259 to modify procedures for determining the amount of mandatory restitution in child pornography cases. The Act requires a court to determine the full amount of a victim's losses and order restitution from a defendant for an amount reflecting the defendant's relative role in the causal process. However, after determining the full loss amount for each identifiable child pornography trafficking victim, the sentencing court must impose a minimum of $3,000 in restitution for each victim.[85]

[84] Pub. L. No. 115–299, 132 Stat 4383 (Dec. 7, 2018) (amending 18 U.S.C. § 2259 and adopting 18 U.S.C. § 2259A).

[85] 18 U.S.C. § 2259(b). After determining the full loss amount for each identifiable child pornography trafficking victim, the sentencing court must impose a minimum of $3,000 in restitution for each victim. However, "the victim's total aggregate recovery shall not exceed the full amount of the victim's demonstrated

As amended by the Act, section 2259 requires a court sentencing a defendant convicted of "trafficking" child pornography—which is defined by reference to statutory provisions to include advertisement, distribution, receipt, reproduction, and possession of child pornography[86]—to first determine the full amount of the victim's losses and then to order restitution for the amount reflecting the defendant's relative role in the causal process.[87] The full amount of the victim's loss includes the following:

> [A]ny costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—
> **(A)** medical services relating to physical, psychiatric, or psychological care;
> **(B)** physical and occupational therapy or rehabilitation;
> **(C)** necessary transportation, temporary housing, and child care expenses;
> **(D)** lost income;
> **(E)** reasonable attorneys' fees, as well as other costs incurred; and
> **(F)** any other relevant losses incurred by the victim.[88]

The Act responded to difficulties in applying *Paroline v. United States*, 572 U.S. 434 (2014). In *Paroline*, the Supreme Court created a multi-factor test to determine how much of the victim's losses are attributable to the defendant's conduct, overruling the Fifth Circuit's holding that each defendant who possessed the victim's images could be held liable for the entire damage amount. The Court held that there is a general proximate cause requirement for all losses under section 2259, and that the court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." The Court provided further guidance to district courts by

loss." *Id.* § 2259(b)(2)(C). Accordingly, "[a]fter the victim has received restitution in the full amount of the victim's losses found in any case involving that victim that has resulted in a final restitution order[,] . . . the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim is terminated." *Id.*

[86] "[T]he term 'trafficking in child pornography' means conduct proscribed by section 2251(d) [advertising], 2252 [transport, receive, distribute, reproduce, or possess child pornography], 2252A(a)(1) through (5) [transport, receive, distribute, reproduce, or possess child pornography], [and] 2252A(g) [Child Exploitation Enterprise]." *Id.* § 2259(c)(3).

[87] *Id.* § 2259(b). The Act also created a fund—the Child Pornography Victims Reserve ("CPVR")—to compensate victims of trafficking in child pornography. Victims of child pornography trafficking offenses identified by the sentencing court have the option of electing to receive a one-time "defined monetary assistance" payment from the CPVR for $35,000 (indexed for inflation). *Id.* § 2259(d)(1)(A)–(D). Victims who obtain a "defined monetary assistance" payment are not barred from receiving restitution against any defendant for any other offense not covered by the Act. *Id.* § 2259(d)(2)(B). Furthermore, if a victim receives a "defined monetary assistance" payment and subsequently seeks additional restitution under the Act, the sentencing court must deduct the amount the victim received from the "defined monetary assistance" payment when determining the full amount of the victim's losses. *Id.* § 2259(d)(2)(C). Conversely, if a victim collected a restitution payment pursuant to the Act for an amount greater than $35,000, the victim is ineligible to receive a "defined monetary assistance" payment. *Id.* §2259(d)(3).

[88] *Id.* § 2259(c)(2)(A)–(F).

enumerating a number of factors[89] to consider in determining the amount of restitution.[90] *Paroline* initially proved difficult for lower courts to apply and could result in a victim receiving little restitution. The Act codified *Paroline's* multi-factor approach, while setting a restitution floor.[91] Following the Act, courts have continued to apply the *Paroline* analysis.[92]

G. §5F1.5 (Occupational Restrictions)

Section §5F1.5(a) authorizes a court to impose occupational restrictions in limited circumstances. These occupational restrictions can do two things. First, they can prevent a defendant from taking a certain type of employment. For example, a sex offender may not be allowed to work around children.[93] 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 bank employer the details of his criminal history.

Such restrictions can only be imposed, however, if the court determines (1) that there is a reasonably direct relationship between the defendant's occupation and the offense conduct; and (2) that imposition of the restriction is reasonably necessary to protect the public. Pursuant to §5F1.5(b), an occupational restriction may only be in place for "the minimum time and to the minimum extent necessary to protect the public." *See United States v. Reardon*, 349 F.3d 608, 622 (9th Cir. 2003) (denying defendant's argument that the special conditions on his use of his computer and the Internet were occupational restrictions because the restrictions did not prohibit him from working in his profession as an art director or set decorator). Occupational restrictions must be supported by specific findings as to the relationship of the offense and the public protection necessity. *See United*

[89] The factors are, "the number of past criminal defendants found to have contributed to the victim's general losses; reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses; any available and reasonable reliable estimate of the broader number of offenders involved . . . ; whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant's relative causal role." *Paroline*, 574 U.S. 434, 460 (2014) (noting that there is no formula for applying these factors and that they are meant to be guideposts).

[90] For recent applications of the *Paroline* factors, *see* United States v. Rothenberg, 923 F.3d 1309 (11th Cir. 2019) (upholding the district court's grant of restitution to eight of nine victims based on a *Paroline* analysis for each victim and discussing post-*Paroline* cases); United States v. Monzel, 930 F.3d 470 (D.C. Cir. 2019) (affirming lower court's restitution award despite defendant's many evidentiary objections and discussing required evidence submitted by government under *Paroline* and district court's reasoning).

[91] *Monzel*, 930 F.3d at 476 n.1 ("Congress has since amended Section 2259 to both codify *Paroline*'s basic approach and to set a restitution floor of $3,000.").

[92] *See, e.g.*, United States v. Berry, No. 1:18-cr-00107-AA, 2020 WL 86194 (D. Or. Jan. 6, 2020) (analyzing each victim's restitution request under *Paroline* and requiring a $3,000 award for victim's where the government did not prove the victim's total losses in accordance with the Act).

[93] *See* United States v. Daniels, 541 F.3d 915, 928–29 (9th Cir. 2008) (approving a condition that required the defendant to obtain prior approval from the probation office before being employed by a business or organization "that causes him to regularly contact persons under the age of 18") (quotations omitted).

States v. Dunn, 777 F.3d 1171, 1179 (10th Cir. 2015) (that stated, "given the required scrutiny which we give to occupational restrictions, we conclude we must vacate the occupational restriction relating to computer use and monitoring and remand for further consideration, including making the findings required before imposition of any occupational restriction.").

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

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

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

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

V. CHAPTER FIVE: SUBSTANTIVE REASONABLENESS AND POST-BOOKER VARIANCES UNDER 3553(a)

A. First Circuit

United States v. Crespo-Rios, 787 F.3d 34 (1st Cir. 2015), *aff'd on remand*, No, 08-208, 2015 WL 6394256 (Oct. 19, 2015). The district court erred in sentencing defendant because there was an inadequate justification for the extreme variance imposed. It focused exclusively on defendant's potential for rehabilitation and did not explain how it weighed the other factors in 18 U.S.C.S. § 3553(a) or why the particular sentence was appropriate in light of those factors.

United States v. Medina, 779 F.3d 55 (1st Cir. 2015). District court committed plain error in imposing a 20-year term of supervised release for defendant's violation of SORNA, 18 U.S.C.S. § 2250, because the term "sex offense" in §5D1.2(b) did not encompass a SORNA violation for failing to register as a sex offender.

B. SECOND CIRCUIT

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

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

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

United States v. Dorvee, 616 F.3d 174, 184, 188 (2d Cir. 2010). The Second Circuit vacated the within-guideline sentence of 20 years, finding it procedurally and substantively unreasonable. The court found that §2G2.2 is "fundamentally different" from most other guidelines and that "unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires." Although the guidelines are typically developed by the Commission using an empirical approach based on data about past practices, the court stated that the Commission did not use that empirical approach for this guideline when it amended the guideline at the direction of Congress. The court stated that in keeping with *Kimbrough*, "a district court may vary from the [g]uidelines range based solely on a policy disagreement with the [g]uidelines, even where that disagreement applies to a wide class of offenders or offenses." Further, it encouraged district courts to take their broad discretion seriously when reaching sentencing decisions under §2G2.2

because it is "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."

C. THIRD CIRCUIT

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

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

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

D. Fourth Circuit

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

United States v. Dowell, 771 F.3d 162 (4th Cir. 2014). The Fourth Circuit held that a sentence of 960 months for production and transportation of child pornography was substantively reasonable. Defendant received this sentence due in part to a 5-level specific offense character increase under §2G2.2(b)(5) for being "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor" and a 5-level increase above the base offense level under §4B1.5(b)(1) because "the defendant engaged in a pattern of activity involving prohibited sexual conduct." Defendant argued that receiving both enhancements constituted double counting, but the Fourth Circuit held that there is a well-established principle that double counting is appropriate unless the Sentencing Guidelines expressly prohibits it. The Fourth Circuit found it improper to apply the "vulnerable victim" enhancement under §3A1.1(b)(1) simply because of the low age of the victims when the defendant had already received the specific offense characteristic for a minor victim under §2G2.1(b)(1)(A) for victims being under the age of twelve. However, the Fourth Circuit found the error to be harmless because the defendant's offense level would be above the maximum offense level of 43, with or without the "vulnerable victim" enhancement.

E. Fifth Circuit

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

F. Sixth Circuit

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

United States v. Richards, 659 F.3d 527, 550–51 (6th Cir. 2011). The Sixth Circuit found that a defendant's below-guideline sentence of 16 years' imprisonment for production, distribution, advertising, and possession of child pornography for operating a website featuring pornography involving underage adolescent males was reasonable. The government argued on appeal that the sentence was only one year greater than the mandatory minimum sentence on the production of child pornography alone, but although the court found "troubling aspects" in the district court's rationale, including its mitigation of the seriousness of the defendant's actions "by noting that his relationship with minors was to a certain extent consensual," it found the district court had thoroughly addressed the parties' arguments and understood its sentencing options. The district court had stated "[i]f 16 years of sex offender, mental health, and addiction treatment cannot change [the defendant's 'taste for sex with adolescents'] certainly 30 or 40 years has no better chance of doing so" and had found the eight years of supervised release after imprisonment to be an "extensive period" that put "substantial limitations on his freedom and provide more opportunity for treatment and close supervision." The Sixth Circuit found that "[w]hile we cannot say that this is the sentence we would have given," the variance did not exceed the discretion Gall gives district courts.

G. SEVENTH CIRCUIT

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

United States v. Bradley, 628 F.3d 394, 401 (7th Cir. 2010). The Seventh Circuit vacated and remanded the defendant's above-guideline sentence for traveling to engage in sexual conduct with a minor because it found the district court based the sentence on speculation. The sentencing court imposed a sentence of 240 months, 169 months above the advisory guideline range, based on its assumptions that the defendant had engaged in similar behaviors in the past and his potential for recidivism. Although the evidence did establish that the defendant possessed child pornography, the circuit court stated possession was a separate offense that the court properly considered, but found "it is unclear how the [district] court connected the possession of child pornography with the conclusion that [the defendant] had committed this crime before and would commit it again."

United States v. Huffstatler, 571 F.3d 620, 622–24 (7th Cir. 2009) (per curiam). The defendant's guideline range for production of child pornography was 300 to 365 months, and the court imposed an above-guideline sentence of 450 months. The defendant argued that his sentence was unreasonable, stating that the court was obligated to sentence him below the guideline range because the child pornography guidelines "were crafted without the benefit of the Sentencing Commission's usual empirical study and are invalid." The Seventh Circuit rejected the defendant's argument that "methodological flaws" that "run through the child-pornography guidelines invalidate them entirely." The court held that the child pornography guidelines are valid and that "while district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines, as with the crack guidelines, they are certainly not required to do so."

H. EIGHTH CIRCUIT

United States v. Lynde, 926 F.3d 275 (8th Cir. 2019). The defendant appealed his below guidelines sentence in this child pornography case, arguing that §2G2.2 enhancements were unreasonable because of Congressional involvement with the guideline, and because the enhancements apply to most child pornography offenders. The court here rejected each of these arguments, reasoning that Congressional involvement does not negate the validity of the enhancement, and that if certain behavior results in harm, then an enhancement should apply, regardless of the frequency of application.

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

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

I. NINTH CIRCUIT

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

J. TENTH CIRCUIT

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

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

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

K. Eleventh Circuit

United States v. Kirby, 938 F.3d 1254 (11th Cir. 2019). The defendant appealed his 1440-month sentence. The statutory maximum penalty for each of his five production and possession of child pornography counts was not more than life in prison. The district court therefore ordered the sentence for each conviction to run concurrently, resulting in a 1440-month sentence. The court held that the district court did not err, reasoning that because life imprisonment lacks a fixed term, the combined statutory maximums for each count produced the closest available sentence to "indefinite incarceration." The court further held that the sentence was not substantively unreasonable.

United States v. Fox, 926 F.3d 1275 (11th Cir. 2019). The defendant appealed his 360-month sentence for violating 18 U.S.C. § 2251(a) and (e). The defendant argued that because he was 60 years old at the time of sentencing, his sentence of 360 months was substantively unreasonable. The court held that the district court did not abuse its discretion by giving more weight to the seriousness of the defendant's crimes than the age of the defendant when evaluating the section 3553(a) factors.

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

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

United States v. Irey, 612 F.3d 1160 (11th Cir. 2010). The Eleventh Circuit held defendant's sentence unreasonable where the district court varied downward to almost the mandatory minimum sentence in a case involving the rape, torture, and production of child pornography of over fifty young girls. The district court erred in its consideration of the section 3553(a) factors, including the defendant's age, that pedophilia caused impaired volition, that defendant was a victim himself because he viewed child pornography, and the victim's otherwise "good character". The district court also erred by not properly considering the "horrific" and serious nature of the crimes, and both general and specific deterrence. The appeals court held that the downward variance was unreasonable and that the appropriate sentence on remand is the statutory maximum of 30 years.

United States v. Pugh, 515 F.3d 1179, 1183 (11th Cir. 2008). The Eleventh Circuit reversed a sentence of five years' probation for a plea of knowingly possessing child pornography. The guideline range was 97–120 months in prison. The court held that the "probationary sentence utterly failed to adequately promote general deterrence, reflect the seriousness of [the defendant's] offense, show respect for the law, or address in any way the relevant Guidelines policy statements and directives."

L. D.C. CIRCUIT

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

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