

PRIMER



SEX OFFENSES: SEXUAL ABUSE AND FAILURE TO REGISTER OFFENSES

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

I. RELEVANT STATUTES

A. THE STATUTORY SCHEME

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

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

Section 113(a)(1) prohibits assault with intent to commit murder or a violation of title 18, section 2241 (Aggravated Sexual Abuse) or 2242 (Sexual Abuse). Subsection (a)(1) has no statutory minimum penalty and a maximum penalty of 20 years.

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

Section 113(a)(2) prohibits assault with intent to commit any felony, except murder or a violation of title 18, section 2241 or 2242. Subsection (a)(2) has no statutory minimum penalty and a maximum penalty of ten years.

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

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

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

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

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

18 U.S.C. § 2242 (Sexual Abuse)

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

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

Section 2243(a) prohibits knowingly engaging in a sexual act with another person who has attained 12 but not 16 years and is at least four years younger than the person so engaging. Section 2243(a) includes attempt, has no statutory minimum penalty, and a statutory maximum penalty of 15 years in prison.

Section 2243(b) prohibits knowingly engaging in a sexual act with another person in official detention and under the custodial, supervisory, or disciplinary authority of the person so engaging. Section 2243(b) includes attempt, has no statutory minimum penalty, and a statutory maximum penalty of 15 years in prison.

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

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

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

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

Subsection 2244(c) doubles the statutory maximum in cases that otherwise violate this section (except section 2244(a)(5)) which involve an individual who is younger than 12. Section 2244 does not include attempts.

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

Anyone who murders an individual while in the course of committing any of the offenses listed above¹ should be sentenced to death, or to any term of years, or for life.

18 U.S.C. § 2246 (Definitions)

The definitions relevant to this primer appear below and enumerated as they appear in the statute:

- (2) the term "sexual act" means:
 - (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse,

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

- humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
- (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
- (3) the term “sexual contact” means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
- (4) the term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

18 U.S.C. § 2247 (Repeat Offenders)

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

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

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

Section 2248 mandates an order of restitution for any offense listed above. The defendant shall pay the full amount of the victim’s losses, which include: (1) medical services relating to physical, psychiatric, or psychological care; (2) physical and occupational therapy or rehabilitation; (3) necessary transportation, temporary housing, and child care expenses; (4) lost income; (5) attorney fees, plus any costs incurred in obtaining a civil protection order; and (6) any other losses suffered by the victim as a proximate result of the offense.

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

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

Section 2250(a) prohibits knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA) if the defendant is (1) required to register under the Act, or (2) is a sex offender as defined for purposes of the Act by reason of a conviction under Federal law including the Uniform Code of Military Justice, the law of the District of Columbia, or Indian tribal law, or travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country. Subsection (a) has no statutory minimum penalty and a statutory maximum penalty of ten years.

Section 2250(b) prohibits knowingly failing to provide information required by SORNA relating to intended travel in foreign commerce and engage in the intended travel in foreign commerce. Section 2250(b) includes attempts and has a statutory maximum penalty of ten years in prison.

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

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

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

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

B. LEGAL ISSUES RELATING TO THE STATUTES

1. “Force” under 18 U.S.C. § 2241(a)

The element of “force” in section 2241(a) is satisfied by showing the use of “such physical force as is sufficient to overcome, restrain, or injure a person.”² A codefendant’s use of force during an aggravated sexual assault sufficient to prevent the victim from escaping constitutes force sufficient to enhance the defendant’s sentence.³

2. Attempt under 18 U.S.C. § 2241(a)

A defendant is criminally liable for aggravated sexual abuse where the circumstances evince an intent to cause another person to engage in a sexual act by use of force and he has taken a substantial step to do so. For example, in *United States v. Crowley*, the victim testified that the defendant “placed his hand on her vagina and tried to insert his finger, but was prevented by her physical resistance” before he stopped altogether.⁴ The court held that the evidence was sufficient for aggravated sexual abuse because “all of the sexual contact that [the defendant] did accomplish . . . was committed, according to the victim’s testimony, over her express verbal objection and against her physical resistance, by means of physical force.”⁵

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

A prior state conviction qualifies as a predicate offense for the mandatory life sentence under section 2241(c) only if the state offense requires all of the elements required by section 2241(c).⁶

² *United States v. Shaw*, 891 F.3d 441, 449–50 (3d Cir. 2018) (rejecting a standard that would include threats of harm as inconsistent with the statute and collecting cases for same); *United States v. Fool Bear*, 903 F.3d 704, 710–11 (8th Cir. 2018) (same); *see also United States v. Bercier*, 506 F.3d 625, 628 (8th Cir. 2007) (holding that the evidence was sufficient to sustain a conviction under 18 U.S.C. § 2241(a) where the victim testified that the defendant “pushed her back on the bed and would not let her push him away when he put his head and hand up her shirt and began touching and kissing her breasts[.]” and then “forcibly held her legs apart while he performed oral sex”); *United States v. Sharpfish*, 408 F.3d 507, 510–11 (8th Cir. 2005) (finding an adequate showing of force where the evidence showed that the defendant “had a great size advantage over the victim: he was said to weigh 235 to 240 pounds, whereas [the victim] was three years old,” the defendant “had used his size advantage to brutalize the child over time by beating and kicking her,” and the victim testified that the defendant would “lay on her, despite her telling him ‘no,’ and that he hurt her ‘down there’”).

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

⁴ 318 F.3d 401, 409 (2d Cir. 2003).

⁵ *Id.*

⁶ *See United States v. Jones*, 748 F.3d 64, 73–74 (1st Cir. 2014) (state offense for aggravated sexual assault with a victim under the age of 13 did not qualify for the mandatory life sentence because the state offense did not also require proof that the defendant acted with an intent to degrade, humiliate, arouse, etc., as required by section 2246’s definition of a “sexual act”).

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

Courts have held that the defendant must have knowledge that the victim is incapacitated.⁷

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

SORNA requires a defendant to register and update registration in the place the offender is *currently* residing, employed or a student, and does not require a sex offender to update registration in a state to reflect that he is moving out of the state. *United States v. Nichols*, 136 S. Ct. 1113 (2016). Venue, however, may be proper in any district in which the offense was begun, continued, or completed. *See United States v. Lewallyn*, 737 F. App'x 471 (11th Cir. 2018); *United States v. Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018); *United States v. Lewis*, 768 F.3d 1086, 1092–94 (10th Cir. 2014); *United States v. Howell*, 552 F.3d 709, 717–18 (8th Cir. 2009). *But see United States v. Haslage*, 853 F.3d 331, 335 (7th Cir. 2017) (conduct that is part of the failure to register offense cannot occur in the district where the offender begins his move because interstate travel is neither a distinct crime nor an element of the crime).

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

A nolo contendere plea in which adjudication is withheld can be a prior conviction under SORNA, leading to the requirement to register as a sex offender. *United States v. Bridges*, 741 F.3d 464, 469 (4th Cir. 2014) (finding defendant’s two-year probation term—a sentence that attached immediately and withheld only formal adjudication of guilt—to be a penal consequence, and thus a conviction under SORNA).

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

Whether the district court correctly concludes that a defendant is required to register under SORNA is a critical issue. Failing to properly register under SORNA is a criminal offense only if the defendant’s prior conviction was for a “sex offense” within the meaning of SORNA. To make this determination, courts generally select either the categorical or modified categorical approach, depending on whether the statute is divisible, and compare the statute at issue to the definitions in 42 U.S.C. § 16911.⁸ *See generally*

⁷ *See United States v. Bruguier*, 735 F.3d 754, 759–60 (8th Cir. 2013) (en banc) (finding “knowingly” in the statute requires not only that the defendant knowingly engaged in a sexual act, but that he also knew the victim was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act); *cf. United States v. Speights*, 712 F. App'x 423, 426 n.1 (5th Cir. 2018) (assuming but not deciding that knowledge is a required element).

⁸ *See Taylor v. United States*, 495 U.S. 575 (1990) (categorical approach); *Descamps v. United States*, 570 U.S. 254 (2013) (modified categorical approach). For a detailed description of the issues and case law, see U.S. SENTENCING COMM’N, CATEGORICAL APPROACH PRIMER (2019), https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Categorical_Approach.pdf.

United States v. Faulls, 821 F.3d 502, 511–12 (4th Cir. 2016) (discussing applicability of different approaches). However, if the federal statute refers to “the specific way in which an offender committed the crime on a specific occasion”—for example, SORNA’s definition of a “sex offense” as including “any conduct that by its nature is a sex offense against a minor,” 42 U.S.C. § 16911(7)(I)—courts will use the non-categorical, circumstance-specific approach outlined in *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009), and focus on the facts, not the elements, relating to the prior conviction.⁹

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

Another issue that arises under SORNA is whether the offense fits within the statutory exception and does not qualify as a countable “sex offense.” SORNA states that “an offense involving consensual sexual conduct is not a sex offense for the purposes of [the Act] if the victim . . . was at least 13 years old and the offender was not more than 4 years older than the victim.” Courts have found the statutory exception not applicable when more than 48 months separate the defendant’s and victim’s date of birth. *United States v. Black*, 773 F.3d 1113, 1117 (10th Cir. 2014) (“It simply cannot be reasonably argued that Congress intended substantive criminal liability to attach to a random . . . age analysis, rather than a straight-forward calculation as to the number of months . . .”) (citing *United States v. Brown*, 740 F.3d 145 (3d Cir. 2014)). See also *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014) (circumstance-specific approach, or non-categorical approach, applies to whether a prior conviction fits within the exception; the statutory exception for “offense involving . . . conduct” references the underlying conduct, consistent with a fact-specific analysis).¹⁰

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

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

⁹ See *United States v. Hill*, 820 F.3d 1003 (8th Cir. 2016) (holding courts should employ a circumstance-specific approach, not a categorical approach, in determining whether conduct is a sex offense against a minor under SORNA); *United States v. Price*, 777 F.3d 700 (4th Cir. 2015) (applying circumstance-specific approach and collecting cases for same). Courts use the same approaches when determining the correct sex offender tier under SORNA. See *infra* Section II.G.

¹⁰ See also *United States v. Douitt*, 926 F.3d 244 (6th Cir. 2019) (vacating and remanding where district court compared current ages of defendant and victim, without considering birthdates in the context of the §2G2.2(b)(5) enhancement for a pattern of activity involving the sexual abuse of a minor, which also requires a four-year age differential).

When the prior offense statute is broader than the federal crime of sexual abuse, the prior conviction is not a categorical match to the federal crime. *Id.* at 1134.¹¹

10. “Victim” Under 18 U.S.C. § 2260A

Courts have generally held that 2260A’s requirement that a new predicate offense committed by a registered sex offender “involve[] a minor” is satisfied where a law enforcement officer poses as a minor.¹²

II. CHAPTER TWO: OFFENSE GUIDELINE SECTIONS

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

The applicable Chapter Two (Offense Conduct) offense guideline section is determined by looking up the **offense of conviction** in the Statutory Index (Appendix A). *See* USSG §1B1.2 (Applicable Guidelines). For purposes of determining which offense guideline section is applicable where the Statutory Index specifies the use of more than one section for the offense of conviction, use the offense guideline section for the most specific definition of the offense of conviction.

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

Many of the subsections of the sex offense guidelines include the phrase “**if the offense involved.**” Section 1B1.1 defines “offense” to include “the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context.” USSG §1B1.1, comment. (n.1(I)). Section 1B1.3 states that the base offense level, any specific offense characteristics, cross references in Chapter Two, and adjustments in Chapter Three, are to be determined on the basis of relevant conduct. Therefore, while the applicable Chapter Two offense guideline section is determined by looking up the offense of conviction in Appendix A, relevant conduct is important to the application of many subsections.

¹¹ Additional decisions addressing the use of the categorical approach in the SORNA context may be found in the “§2A3.5 (Failure to Register)” section below.

¹² *See* United States v. Fortner, 943 F.3d 1007, 1110–11 (6th Cir. 2019) (explaining that section 2260A “incorporates attempt offenses involving minors” and that the defendant’s “attempt involved a minor because the intended victim of the offense was a child”); United States v. Jones, 748 F.3d 64, 72 (1st Cir. 2014) (affirming the defendant’s conviction where the “minor” with whom the defendant had communicated online was a postal inspector); United States v. Slaughter, 708 F.3d 1208, 1214–16 (11th Cir. 2013) (finding defendant’s attempted enticement offense was a proper predicate offense even though the “minor” was a law enforcement officer). *But see* United States v. Dahl, 81 F. Supp. 3d 405, 408–09 (E.D. Pa. 2015) (rejecting *Slaughter’s* “flawed logic” and concluding instead that the text and history § 2260A make clear that the statute require an actual minor be involved).

C. §2A3.1 (CRIMINAL SEXUAL ABUSE; ATTEMPT TO COMMIT CRIMINAL SEXUAL ABUSE)

Per Appendix A, §2A3.1 is the applicable guideline when the offense of conviction is 18 U.S.C. §§ 2241 or 2242, and may be appropriate when the offense of conviction is 18 U.S.C. §§ 37 (Violence at international airports) or 113(a)(1) (assaults within maritime and territorial jurisdiction. *See* USSG §1B1.2 (Applicable Guidelines). The commentary to §2A3.1 defines “minor” as an individual who had not attained the age of 18, including fictitious individuals created by law enforcement officers or undercover law enforcement officers represented to have not reached the age of 18. *See* USSG §2A3.1, comment. (n.1).

1. Determining the Base Offense Level

The guideline provides for an offense level of 38 for a conviction for a sex offense with a child under 12. *See* 18 U.S.C. § 2241(c). Otherwise, the base offense level is **30**.

2. Specific Offense Characteristics

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

Section 2A3.1(b)(1) provides for a 4-level enhancement if the offense involved aggravated sexual abuse as described in 18 U.S.C. § 2241(a) or (b). Sections 2241(a) and (b) set forth several different forms of conduct, including force, threats of death, serious bodily injury, kidnapping, and sexual activity after drugging or intoxicating another.¹³

The aggravated abuse enhancement applies even if the conduct that forms the basis of the enhancement is the same conduct that justified application of §2A31.1 via a cross reference from another guideline.¹⁴

¹³ *See, e.g.*, United States v. Bowman, 632 F.3d 906, 912 (5th Cir. 2011) (finding that restraint sufficient to prevent the victim from escaping the sexual conduct constitutes “force” within 18 U.S.C. § 2241); United States v. Carey, 589 F.3d 187, 194–95 (5th Cir. 2009) (force that occurs during the act of assault itself falls within conduct described in section 2241(a) for application of §2A3.1(b)(1)); United States v. Two Elk, 536 F.3d 890, 910 (8th Cir. 2008) (affirming application of §2A3.1(b)(1) upon the district court’s finding of force where “there was a substantial discrepancy between the body mass of [the defendant]” and the minor, the defendant lifted the minor off the floor and placed her on the bed, and muffled the minor’s cries with his hand); United States v. Cerno, 529 F.3d 926, 938–39 (10th Cir. 2008) (finding procedural error in the district court’s failure to consider the nature and circumstances of the offense pursuant to § 3553(a) when it failed to consider the relative amount of force used to commit the sexual abuse). *But see* United States v. Blue, 255 F.3d 609, 613 (8th Cir. 2001) (holding application of §2A3.1(b)(1) improper because “size difference alone cannot establish use of force”).

¹⁴ *See* United States v. Flanders, 752 F.3d 1317, 1340 (11th Cir. 2014) (no double-counting in application of the cross reference at §2G1.1(c)(1) because offense involved conduct constituting sexual abuse warranting cross reference and the offense involved conduct constituting a more severe subset of aggravated sexual abuse under subsection 2241(b)(2) warranting application of §2A3.1(b)(1)).

The aggravated abuse enhancement does not apply if the conduct that forms the basis of a conviction under 18 U.S.C. § 2241(c), which criminalizes sexual acts with children, is conduct described in 18 U.S.C. § 2241(a) or (b). *See* USSG §2A3.1(b)(1), comment. (n.2(B)). This prohibition recognizes that such offenses already result in a heightened offense level of 38 and is designed to avoid double counting.

b. Age of the victim

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

c. Custody, care, or supervisory control

Section 2A3.1(b)(3) provides for a 2-level enhancement if the victim was in the custody, care, or supervisory control of the defendant or if the victim was held in the custody of a correctional facility. This subsection is to be construed broadly and includes offenses involving a victim less than 18, entrusted to the defendant whether temporarily or permanently. *See* USSG §2A3.1(b)(3), comment. (n.3(A)); *United States v. Swank*, 676 F.3d 919, 923–24 (9th Cir. 2012) (finding the enhancement applicable when the minor had been staying in the defendant’s home for two days, the defendant was the victim’s uncle, and he shared in the child rearing of the children in the house, including the minor victim, and in preparing food for all the children); *United States v. Kenyon*, 481 F.3d 1054, 1072 (8th Cir. 2007) (stating that “[s]o long as the defendant has some responsibility for the child, he has been entrusted with the child, even if another shares that responsibility,” but that mere “‘proximity’ [to the child] is not enough”). The subsection also applies to adult victims. *See United States v. Simmons*, 470 F.3d 1115, 1129–30 (5th Cir. 2006) (finding that the district court erred in failing to apply the enhancement for a police officer who raped an arrestee in his cruiser because the enhancement was applicable to adult victims in police custody).

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

d. Bodily injury

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

- (i) *Permanent or life-threatening injury.* Section 1B1.1, comment. (n.1(K)) defines “permanent or life-threatening bodily injury” as “injury involving a substantial risk of death; loss or substantial impairment of

the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent.”

- (ii) **Serious bodily injury.** According to §1B1.1, comment. (n.1(M)), “serious bodily injury” is “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” Section 1B1.1, comment. (n.1(M)) also provides that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under sections 2241 or 2242 or any similar offense under state law. For purposes of this guideline, “serious bodily injury” means conduct *other than* the criminal sexual abuse, which has already been taken into account in the base offense level under subsection (a). See USSG §2A3.1, comment. (n.1). However, courts have held that injuries resulting from criminal sexual abuse may support the enhancement. *United States v. Jim*, 786 F.3d 802, 814–15 (10th Cir. 2015) (finding that the enhancement can still apply if the victim's injuries meet the first definition of serious bodily injury; language of application note does not preclude court, in deciding whether the victim suffered serious bodily injury, from considering injuries resulting directly from the sexual abuse; defendant caused victim to hit her head on floor, dragged her by her ankles, and raped her); *United States v. Long Turkey*, 342 F.3d 856, 858 (8th Cir. 2003) (only the act of sexual abuse is insufficient by itself to support the enhancement).

e. **Abduction**

Section 2A3.1(b)(5) provides for a 4-level enhancement if the victim was abducted. The word “abducted” “means that a victim was forced to accompany an offender to a different location.” See USSG §1B1.1, comment. (n.1(A)). The commentary’s reference to “different location” is flexible and fact-specific.¹⁵ Actual or threatened force is not required for the enhancement; the abduction can be committed by trickery, gentle urging, and flattery as well as by outright coercion.¹⁶ It is not double counting to apply the abduction

¹⁵ See *United States v. Hefferson*, 314 F.3d 211, 225 (5th Cir. 2002) (enhancement supported where the victim was “moved to a different location” when the defendant moved the victim from one location on the property, where he first sexually assaulted the victim, to another location on the property, where he sexually assaulted the victim again) (quotations omitted).

¹⁶ See *United States v. Beith*, 407 F.3d 881, 893 (7th Cir. 2005), *abrogated on other grounds by* *United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012) (trickery, gentle urging, or flattery sufficient for abduction enhancement), *United States v. Romero*, 189 F.3d 576, 590 (7th Cir. 1999) (“inveigling” sufficient); *Hefferson*, 314 F.3d at 225–26; see also *United States v. Martinez-Hernandez*, 593 F.3d 761, 762 (8th Cir. 2010) (force may be accomplished through a veiled coercion or an inveigling).

enhancement and the physical restraint adjustment at §3A1.3 where they are based on different facts.¹⁷

f. Knowing misrepresentation of identity and use of a computer

Section 2A3.1(b)(6) provides for a 2-level enhancement if the offense involved either (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or interactive computer service to persuade, induce, entice, or coerce a minor to engage in sexual conduct or to facilitate transportation of a minor to engage in sexual conduct. These provisions are intended to apply only to misrepresentations made directly to a minor or his guardian (as defined by the subsection), or use of the computer to communicate directly with the minor or the guardian. *See* USSG §2A3.1, comment. (n.4).

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

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

3. Cross References

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

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

¹⁷ *See* United States v. Strong, 826 F.3d 1109, 1116–17 (8th Cir. 2016).

“sexually explicit conduct” has the meaning provided in 18 U.S.C. § 2256(2). *See* USSG §2A3.1, comment. (n.5(B)).

The cross reference from §2G1.1 to §2A3.1 may apply where sexual abuse (or attempted sexual abuse) is relevant conduct to the offense, so long as the district court makes particularized findings as to the abuse.¹⁸

4. Special Instruction

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

5. Upward Departure Provision

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

D. §2A3.2 (CRIMINAL SEXUAL ABUSE OF A MINOR UNDER THE AGE OF SIXTEEN YEARS (STATUTORY RAPE) OR ATTEMPT TO COMMIT SUCH ACTS)

Section 2A3.2 is the applicable guideline when the offense of conviction is 18 U.S.C. §§ 113(a)(2) or 2243(a). The word “minor” in this guideline is defined as an individual who had not attained the age of 16 or an individual who is represented by a law enforcement officer to have not attained the age of 16 (including a fictitious individual). *See* USSG §2A3.2, comment. (n.1).¹⁹ For convictions under section 113(a)(2), §2A3.2 applies in a case with an assault with intent to commit a violation of section 2243. For convictions under section 2243(a), §2A3.2 only applies in a case in which the defendant is convicted of a statutory violation of sexual abuse of a minor over the age of 12 but under the age of 16 when the minor is at least four years younger than the defendant, pursuant to 18 U.S.C. § 2243(a).

¹⁸ *See* United States v. Angle, 234 F.3d 326, 345 (7th Cir. 2000) (guidelines expressly provide for application of §2A3.1 through cross reference and thus the district court may punish a defendant for relevant conduct notwithstanding whether the defendant was actually convicted of a particular offense).

¹⁹ In a case where a minor’s mother created a fictitious internet profile that targeted the defendant before turning the information over to the FBI, the Seventh Circuit stated in *dicta* that “the logic of the guideline definition [of “minor”] embraces an impersonator who is not an officer.” United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008).

1. Base Offense Level.

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

2. Specific Offense Characteristics

a. Custody, care, or supervisory control

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

b. Knowing misrepresentation of identity or undue influence

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

- (i) Misrepresentation of identity.* Such misrepresentation applies only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. The enhancement would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor. Such misrepresentation includes misrepresentation of a participant's name, age, occupation, gender, or status *with the intent* to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. The use of a computer screen name, without such intent, does not prompt the application of this enhancement. *See* USSG §2A3.2, comment. (n.3(A)).
- (ii) Undue influence.* Courts should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. *See* USSG §2A3.2, comment. (n.3(B)).

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

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

c. Use of a computer

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

3. Cross Reference

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

- a. Criminal sexual abuse.** *See United States v. Tyndall*, 521 F.3d 877, 883–84 (8th Cir. 2008) (affirming the district court’s cross reference to §2A3.1 for a defendant convicted under 18 U.S.C. § 2243(a), even though the defendant was acquitted of the charges under 18 U.S.C. § 2242, because the minor’s “inebriated state made her incapable of appraising the nature of the sexual act and physically incapable of refusing or communicating her refusal to participate in the sexual act”); *United States v. Searby*, 439 F.3d 961, 964 (8th Cir. 2006) (affirming the district court’s decision to apply the cross reference to §2A3.1 where the minor testified that the defendant “restrained her by holding her hands above her head” and that “she tried to fight him away and that she protested several times”); *United States v. Archdale*, 229 F.3d 861, 868–69 (9th Cir. 2000) (holding that the district court did not engage in impermissible double-counting when the court added four levels for use of force based on §2A3.1(b)(1) after properly applying the cross reference from §2A3.2).
- b. Victim under 12.** *See United States v. Beith*, 407 F.3d 881, 887 (7th Cir. 2005) (finding the application of the cross reference to §2A3.1 appropriate because the court was free to consider relevant conduct to which the defendant had admitted, and the victim was less than 12), *abrogated on other grounds by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012).

4. Upward Departure Consideration

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

E. §2A3.3 (CRIMINAL SEXUAL ABUSE OF A WARD OR ATTEMPT TO COMMIT SUCH ACTS)

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

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

1. Base Offense Level

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

2. Specific Offense Characteristics

a. Knowing misrepresentation of identity

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

Such misrepresentation applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Such misrepresentation includes misrepresentation of a participant’s name, age, occupation, gender, or status with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Further, the use of a misleading computer screen name, without the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual

conduct does not prompt the application of this enhancement. *See* USSG §2A3.3, comment. (n.2).

b. Use of a computer

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

F. §2A3.4 (ABUSIVE SEXUAL CONTACT OR ATTEMPT TO COMMIT ABUSIVE SEXUAL CONTACT)

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

1. Determining the Base Offense Level

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

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

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

2. Specific Offense Characteristics

a. Victim under 12

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

b. Victim between 12 and 15

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

c. Custody, care, or supervisory control

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

d. Knowing misrepresentation of identity

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

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

e. Use of a computer

Section 2A3.4(b)(5) provides for a 2-level enhancement if a computer or interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in

prohibited sexual conduct. This subsection applies only to use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor. *See* USSG §2A3.4, comment. (n.6).

3. Cross References

Section 2A3.4 has two cross references. Section 2A3.4(c)(1) provides that §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. §§ 2241 or 2242. Because “involved” invokes relevant concept principles, the cross reference will apply even where a defendant is acquitted of sexual abuse charges.²⁰

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

G. §2A3.5 (FAILURE TO REGISTER AS A SEX OFFENDER)

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

1. Determining the Base Offense Level

The alternative base offense levels for §2A3.5 depend on the underlying sexual offense of conviction for which the defendant was required to register. The statute determines the seriousness of the failure to register offense based on the prior sexual offense and classifies them into one of three tiers, with Tier III being the most egregious offenders. The term “sex offense” is defined in 34 U.S.C. § 20911(5). *See* USSG §2A3.5, comment. (n.1).

- a.** If the offender was required to register as a Tier III offender, the base offense level is **16**.
- b.** If the offender was required to register as a Tier II offender, the base offense level is **14**.

²⁰ *See, e.g.,* United States v. No Neck, 472 F.3d 1048, 1055 (8th Cir. 2007) (affirming the district court’s cross reference to §2A3.1, even when the defendant was acquitted of criminal sexual abuse charges).

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

Courts typically use a categorical approach to determine the defendant's SORNA tier classification.²¹ However, courts use a "circumstance-specific approach" when considering a victim's age for purpose of SORNA's tier classifications.²² Although it agreed that the circumstance specific approach applies for purposes of considering a victim's age, the Fifth Circuit recently held, as a matter of first impression, that "the text of SORNA does not permit a court, when applying the categorical approach to determine sex offender tier levels, to conduct a circumstance-specific inquiry into *an offender-victim age differential* that is built into one of the corresponding cross-referenced offenses as an element of the crime."²³

2. Specific Offense Characteristics

a. Offense while in failure to register status

Section 2A3.5(b)(1) provides alternative enhancements if the defendant committed an offense while in a failure to register status. Specifically, it provides for the greatest of these enhancements: **6** levels for a sex offense against someone other than a minor, **6** levels for a felony offense against a minor that is not a sex offense, or **8** levels for a sex offense against a minor.²⁴ "Minor" includes a fictitious individual or law enforcement officer. See USSG §2A3.5, comment. (n.1).

²¹ See, e.g., *United States v. Escalante*, 933 F.3d 395, 398, 405 (5th Cir. 2019) ("We employ the categorical approach when classifying the SORNA tier of a defendant's state law sex offense."); *United States v. Cammorto*, 859 F.3d 311, 314–18 (4th Cir. 2017) (employing categorical approach to determine that offender was a Tier III sex offender); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014) (defendant's prior conviction cannot serve as a predicate for classification as a Tier III sex offender because prior offense penalizes broader class of behavior; modified categorical approach not appropriate because state statute states a single indivisible set of elements, and courts may not consult any extra-statutory materials).

²² See *Escalante*, 933 F.3d at 400–02 ("[I]n alignment with every other circuit to consider the question, we hold that when classifying sex offender tier levels . . . the text of SORNA requires a circumstance-specific inquiry into the victim's age to determine whether the victim was, in fact, a minor at the time of the offense."); *United States v. Walker*, 931 F.3d 576, 579–80 (7th Cir. 2019) (joining the Fourth and Tenth Circuits "in concluding that SORNA's text compels a hybrid approach"); *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016) (SORNA statute requires that courts look to the actual age of the victim in prior offense, but otherwise it must use the categorical approach to decide if a prior state offense fits into SORNA's requirements) and *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015) ("Congress intended courts to apply a categorical approach to sex offender tier classifications designated by reference to a specific federal criminal statute, but to employ a circumstance-specific comparison for the limited purpose of determining the victim's age.").

²³ *Escalante*, 933 F.3d at 405 (emphasis added).

²⁴ *United States v. Lott*, 750 F.3d 214, 220 (2d Cir. 2014) (finding although defendant was convicted of "prohibited acts" and not "lewd and lascivious conduct" under Vermont law for the attempted sexual contact with a 13 year old female while in failure to register status, enhancement is applicable to mere commission of a sex offense even absent a conviction for that offense); *United States v. Johnson*, 743 F.3d 196, 204 (7th Cir.

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

b. Excuse for failing to register

Section 2A3.5(b)(2) provides for a 3-level *decrease* if the defendant voluntarily corrected the failure to register or tried to register but was prevented from registering by uncontrollable circumstances to which the defendant did not contribute. For the decrease to apply, the defendant’s attempt to register or to correct the failure to register must have occurred before he knew or reasonably should have known that a jurisdiction had detected his failure to register. *See* USSG §2A3.5, comment. (n.3(A)). The attempt to correct must be genuine.²⁵

Note. The specific offense characteristic at §2A3.5(b)(2) does not apply if the specific offense characteristic at §2A3.5(b)(1) also applies. *See* USSG §2A3.5, comment. (n.3(B)).

H. §2A3.6 (AGGRAVATED OFFENSES RELATING TO REGISTRATION AS A SEX OFFENDER)

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

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

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

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

2014) (defendant’s sexual conduct with his adult girlfriend, while not consensual, did not meet the elements of a state sexual offense and enhancement should not have been applied).

²⁵ *See* United States v. Forster, 549 F. App’x 757, 770–71 (10th Cir. 2013) (unpublished) (defendant’s voluntary attempt to register after moving from one residence to another, after having been out of the country for eight months, was not a voluntary correction of his failure to register but was instead a desire to perpetuate a false claim that he had been at the first residence during that eight month period instead).

ten years of imprisonment. This term must also be imposed consecutively to any sentence imposed for an offense listed under § 2260A. *See* USSG §2A3.6, comment. (n.1).

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

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

III. CHAPTER THREE: ADJUSTMENTS

A. §3A1.1(b) (VULNERABLE VICTIM)

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

For purposes of this subsection, “vulnerable victim” means a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) and who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. *See* USSG §3A1.1, comment. (n.2).²⁶

The adjustment under §3A1.1(b) applies to offenses that involve an unusually vulnerable victim where the defendant knew or should have known of the victim’s unusual vulnerability. The adjustment under §3A1.1(b) does not apply, however, if the factor that makes the person vulnerable is already incorporated into the offense guideline. Therefore, in sexual abuse offenses against minors, if the guideline provides an enhancement for the

²⁶ *See* United States v. Schoenborn, 793 F.3d 964 (8th Cir. 2015) (not double counting to apply vulnerable enhancement in conviction for abuse of incapacitated person under section 2242 because §2A3.1 did not take into account contributing factors of victim’s extreme intoxication and unconscious state); United States v. Irving, 554 F.3d 64, 75 (2d Cir. 2009) (upholding application of the vulnerable victim enhancement because the minor victims living in Mexico and Honduras were homeless and without parental or other supervision and guidance); United States v. Chee, 514 F.3d 1106, 1117 (10th Cir. 2008) (upholding the district court’s vulnerable victim enhancement where the victim “suffer[ed] from mental and physical handicaps, including a diminished mental capacity, seizures, and partial paralysis”); United States v. Julian, 427 F.3d 471, 489–90 (7th Cir. 2005) (finding no double-counting where the district court increased the defendant’s sentence based on the victim’s age under §2A3.1(b)(2) in combination with the “economic vulnerability of the victims” under §3A1.1 because the defendant took “advantage of the poor and homeless children by offering shelter, housing, and food”) (quotations omitted).

age of the minor, §3A1.1 does not apply unless the victim was unusually vulnerable for reasons unrelated to the age of the victim. *See* USSG §3A1.1, comment. (n.2).²⁷

B. §3A1.3 (RESTRAINT OF VICTIM)

Section 3A1.3 provides for a 2-level adjustment if a victim was physically restrained in the course of the offense. “Physically restrained” means the forcible restraint of the victim such as by being tied, bound, or locked up. *See* USSG §1B1.1, comment. (n.1(L)). This adjustment does not apply, however, where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself. *See* USSG §3A1.3, comment. (n.2).²⁸ If the restraint was sufficiently egregious, an upward departure may be warranted. *See* USSG §3A1.3, comment. (n.3).

C. §3B1.3 (ABUSE OF POSITION OF TRUST OR USE OF SPECIAL SKILL)

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

²⁷ *See United States v. Beith*, 407 F.3d 881, 892 (7th Cir. 2005) (holding that “allegations of molestation standing alone are insufficient to establish vulnerability” when the victim’s “age had already been the subject of an enhancement” under §2A3.1(b)(2)), *abrogated on other grounds by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012).

²⁸ *See United States v. Joe*, 696 F.3d 1066 (10th Cir. 2012) (preventing a victim from even thinking about escape is to “physically restrain” that victim, thus the conduct giving rise to the restraint-of-the-victim enhancement in §3A1.3 is incorporated into the offense of aggravated sexual abuse in § 2241(a)). *But see United States v. Strong*, 826 F.3d 1109 (8th Cir. 2016) (not double counting to apply a 4-level enhancement at §2A3.1 for abduction and a 2-level enhancement for restraint of victim because conduct supporting application of each was different; conduct for abduction was based on defendant dragging victim to another location, and conduct for physical restraint was based on defendant confining the victim for three days); *United States v. Star*, 451 F. App’x. 708, 709 (9th Cir. 2011) (unpublished) (affirming application of §3A1.3 because “restraint of the victim is not an element of the offense of aggravated sexual abuse nor was it incorporated in the aggravated sexual assault offense Guideline applied”).

IV. CHAPTER FOUR: CRIMINAL HISTORY

A. §4A1.1 (CRIMINAL HISTORY CATEGORY)

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

B. §4B1.5 (REPEAT AND DANGEROUS SEX OFFENDER AGAINST MINORS)²⁹

Section 4B1.5 applies to offenders whose offense of conviction is one of the "covered sex crime[s]" committed against a minor and who presents a continuing danger to the public because he committed the offense of conviction after at least one sex offense conviction (*see* USSG §4B1.5(a)). *See also* §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 109A (18 U.S.C. §§ 2241–2248). For purposes of this guideline, the term "minor" means an individual who had not attained the age of 18 or who was represented to have not attained the age of 18 by a law enforcement officer (including a fictitious individual). *See* USSG §4B1.5, comment. (n.1).³⁰

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

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

²⁹ For a detailed description of the issues and case law associated with §4B1.5, *see* U.S. SENTENCING COMM'N, SEX OFFENSES: COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS (2019), https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Sex_Offense_Commercial.pdf.

³⁰ *See* United States v. Cerno, 529 F.3d 926, 938 (10th Cir. 2008) (finding a conviction under 18 U.S.C. § 2241(a) a "covered sex crime" when the victim was over the age of 16 even though certain offenses within Chapter 109A pertain to minors under either the age of 12 or the age of 16).

Section 4B1.5(b)(1) specifically states that the offense level is five plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be 22, decreased by the number of levels based on the applicability of §3E1.1. Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5, foreclosing many double-counting arguments.³¹

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

A. §5B1.3 (CONDITIONS OF PROBATION)

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

1. §5B1.3(a) (Mandatory Conditions)

Section 5B1.3(a)(9) 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 (*see* 18 U.S.C. § 3563(a)).”

2. §5B1.3(b)

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

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

3. §5B1.3(d) (Policy Statement)

Section 5B1.3(d)(7) sets forth “special” conditions of probation that might be appropriate in sex offense convictions. Subsection (A) allows for a condition requiring the

³¹ *See* United States v. Joey, 845 F.3d 1291 (9th Cir. 2017) (finding application of §4B1.5 not double counting with conviction for violation of 18 U.S.C. § 2260A because the Commission did not forbid application of §4B1.5 for offenses underlying a section 2260A conviction and §4B1.5 and section 2260A serves distinct penological goals).

defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders. Subsection (B) allows for a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items. Finally, subsection (C) allows for a condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, papers, or things upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.

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

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

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

Under §5D1.2(a), the guideline term of supervised release is determine based on the classification of the defendant's original conviction (for example, if the offense is a Class A or B felony, the term shall be at least two years but not more than five years). However, pursuant to §5D1.2(b), notwithstanding §5D1.2(a), the length of the term of supervised release is not to be less than the minimum term of years specified for the offense, and may be up to life, if the offense is, among others, a sex offense.

Pursuant to the Adam Walsh Act of 2006, 18 U.S.C. § 3583 was amended to increase the authorized term of supervised release for, among other offenses, any sexual abuse offense perpetrated against a minor under chapter 109A of title 18.³² The term of supervised release is currently a mandatory minimum of five years with a statutory maximum term of life. The failure to register as a sex offender under 18 U.S.C. § 2250 is not, however, a "sex offense" within the meaning of §5D1.2(b)(2). *See* USSG §5D1.2, comment. (n.1). Thus, the guideline supervised release term under §5D1.2(b)(2) for a failure to register offense is five years. *See* USSG §5D1.2(a)(1).³³

The statutory maximum term of supervised release is recommended if the offense is a sex offense. *See* USSG §5D1.2(b)(2).³⁴ Where the statutory minimum term of supervised

³² Pub. L. No. 109-248, 120 Stat. 587, 603 (amending section 3583(k)).

³³ *But see* United States v. James, 792 F.3d 962, 968–69 (8th Cir. 2015) (affirming district court's upward variance to a lifetime term of supervised release for SORNA violation).

³⁴ *See* United States v. Williams, 636 F.3d 1229 (9th Cir. 2011) (finding sentence of lifetime term of supervised release did not violate the Eighth Amendment because no "gross disproportionality" was inferred, *citing* *Graham v. Florida*, 560 U.S. 48, 59 (2010), and the sentence was not substantively unreasonable because of high risk of recidivism of sex offenders); *see also* *James*, 792 F.3d at 968–69 (upholding lifetime term of supervised release reasonable where defendant's sexual deviance went back to his teenage years, he had never completed any sex-offender treatment program he had entered in the past, and his prior post-

release is greater than the advisory guideline range, §5D1.2(c) creates a single point advisory term at the statutory minimum.³⁵

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.³⁶ 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.³⁷ 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."³⁸ Justice Breyer's concurrence, as the narrowest point of agreement, is controlling.³⁹ 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."⁴⁰

D. §5D1.3 (CONDITIONS OF SUPERVISED RELEASE)

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

treatment personality described by hospital staff was described as devious and manipulative); *United States v. Winding*, 817 F.3d 910 (5th Cir. 2016) (finding lifetime term of supervised release reasonable, where defendant was indicted for sexual battery, domestic violence, and aggravated sexual assault of his minor daughter while on supervised release for a prior offense of failing to register as a sex offender); *United States v. Trailer*, 827 F.3d 933 (11th Cir. 2016) (finding lifetime term of supervised release for failing to register as a sex offender after sexually abusing girlfriend's daughter substantively reasonable and not greater than necessary where defendant violated multiple conditions of release including living with new girlfriend and her four children).

³⁵ See USSG §5D1.2, comment. (n.6) (explaining that §5D1.2(a) provides a range of years based on the offense, and if the relevant statute requires a minimum term of supervised release of five years the minimum term becomes the low end of the guideline range).

³⁶ 139 S. Ct. 2369, 2385–386 (2019).

³⁷ *Id.* at 2373–385 (Gorsuch, J., joined by Ginsburg, Sotomayor, and Kagan, JJ.).

³⁸ *Id.* at 2385–386 (Breyer, J., concurring).

³⁹ 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.").

⁴⁰ 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).

1. §5D1.3(a) (Mandatory Conditions)

Section 5D1.3(a)(7) 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 (*see* 18 U.S.C. § 3583(d)).”

2. §5D1.3(b) (Special Conditions)

The guidelines allow courts to impose other conditions of supervised release if the conditions are “reasonably related to” any or all of the factors listed below. Following the statutory language of 18 U.S.C. § 3583(d)(1), there are four factors tied to the goals of supervised release.⁴¹ The first is the defendant’s history and characteristics and the nature and circumstances of his offense. The second is the need for adequate deterrence of future criminal conduct. The third is the need to protect the public from further crimes by the defendant, and the fourth is an effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.

Such conditions may not entail any “greater deprivation of liberty than is reasonably necessary” to achieve the goals of supervised release; must be consistent with any pertinent policy statements issued by the Commission; and must have adequate evidentiary support in the record. *See* USSG §5D1.3(b)(2).⁴² Particularly severe deprivations untethered to record support will be reversed.⁴³

⁴¹ *See e.g.*, *Sealed Appellee v. Sealed Appellant*, 937 F.3d 392, 402–05 (5th Cir. 2019) (upholding special conditions of sex-offense specific assessment and sex offender treatment where defendant’s instant offense was a drug crime but criminal history included convictions for sexual assault and attempted sexual assault on a child and defendant had not previously undergone treatment); *United States v. Webster*, 819 F.3d 35 (1st Cir. 2016) (finding sex offender treatment appropriate special condition of supervised release even where underlying violation was not a sex offense because condition was reasonably related to one or more goals of supervised release); *United States v. Bango*, 386 F. App’x 50 (3d Cir. 2010) (unpublished) (holding special condition of supervised release requiring defendant, a landlord, to disclose to female tenants his convictions for sexual battery and failure to register as a sex offender reasonably related to the need to protect the public pursuant to 18 U.S.C. § 3553(a)(2)(C)).

⁴² *See e.g.*, *United States v. Perazza-Mercado*, 553 F.3d 65, 72 (1st Cir. 2009) (holding a special condition of supervised release requiring a total ban on internet access at home inconsistent with the vocational and educational goals of supervised release where the defendant had no history of impermissible internet use and the internet was not an instrumentality of the offense); *United States v. Levering*, 441 F.3d 566, 569–70 (8th Cir. 2006) (district court did not abuse its discretion by imposing a condition of supervised release requiring a total prohibition on contact with juvenile females—without prior approval of his probation officer—where the defendant had pleaded guilty to the forcible rape of a female juvenile).

⁴³ *See United States v. Sherwood*, 850 F.3d 391, 396 (8th Cir. 2017) (vacating special financial conditions in sexual abuse case where conditions “totally unrelated” to offense and the district court failed to reflect the individualized inquiry required); *United States v. Fey*, 834 F.3d 1 (1st Cir. 2016) (vacating special condition that defendant have no contact with children under age 18 after conviction for violating SORNA because a 1999 sex offense, rape of a 16-year old co-worker he provided with alcohol, was remote in time; defendant had not committed any sexual or violent offense in the intervening years; and government made no argument he was a danger to children); *United States v. Gnirke*, 775 F.3d 1155 (9th Cir. 2015) (finding condition that defendant not possess any materials depicting “sexually explicit conduct”—including depictions of adult

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

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

E. §5F1.5 (OCCUPATIONAL RESTRICTIONS)

Section §5F1.5(a) authorizes a court to impose occupational restrictions in limited circumstances. These occupational restrictions can do two things. First, they can prevent a defendant from taking a certain type of employment. For example, a sex offender may not be allowed to work around children. Second, a lesser restriction can limit the “terms” of a defendant’s employment. For example, a defendant convicted of fraud may be restricted from working in a position handling money at a bank or may be required to discuss with the employer the details of his criminal history. *See United States v. Du*, 476 F.3d 1168, 1170–71 (10th Cir. 2007) (stating that specific findings are required before a court imposes any employment conditions that are considered “occupational restrictions”).

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

F. §5K2.0 (GROUNDS FOR DEPARTURE (POLICY STATEMENT))

Pursuant to §5K2.0(b), the only grounds for a departure for “sexual offenses” below the guideline range are those enumerated in Part K. *See* USSG §5K2.0, comment. (n.4(B)).

sexual conduct—using a statutory definition of “sexually explicit conduct” that should only apply to depictions of children reasonably related to the goals of supervised release to include protection of the public, however because the condition as written deprived the defendant of more liberty than reasonably necessary, court narrowed condition regarding adult sexual conduct). *But see* *United States v. Wallete*, 686 F.3d 476, 484–85 (8th Cir. 2012) (finding although court erred by failing to make an individualized determination before imposing special condition of supervised release that defendant abstain from possessing “materials depicting or describing sexually explicit conduct,” error was not plain because based on his history of sexual abuse and his need for treatment, “there is little likelihood that the district court, upon further consideration, would remove the condition”).

Courts may depart upward for “child crimes and sexual offenses” if it finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there is an aggravating circumstance not adequately taken into consideration by the Commission. *See* USSG §5K2.0(a)(1)(B).⁴⁴ The definition of “sexual offenses” includes offenses under chapter 109A of title 18. *See* USSG §5K2.0, comment. (n.4(A)).

G. §5K2.8 (EXTREME CONDUCT (POLICY STATEMENT))

Pursuant to §5K2.8, if the conduct was unusually heinous, cruel, brutal, or degrading to the victim, a court may increase the sentence above the guideline range to reflect the nature of the conduct.⁴⁵

H. §5K2.22 (SPECIFIC OFFENDER CHARACTERISTICS AS GROUNDS FOR DOWNWARD DEPARTURE IN CHILD CRIMES AND SEXUAL OFFENSES (POLICY STATEMENT))

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

VI. POST-BOOKER REASONABLENESS DETERMINATIONS

United States v. Cloud, No. 18-1170, 2019 WL 2494523, at *2 (8th Cir. June 17, 2019) (upholding 23-month upward variance as substantively reasonable in a case involving the sexual abuse of a minor; the district court did not plainly err by relying on uncontested information in the presentence report documenting the defendant’s prior unscored tribal court convictions to support its upward variance and although the court mentioned potential disparities between federal and state sentences under section 3553(a)(6), it “did not afford any such disparities significant weight” in justifying its upward variance).

United States v. Flanders, 752 F.3d 1317, 1342 (11th Cir. 2014) (defendants’ life sentences substantively reasonable because they had used false pretenses to convince women to travel purportedly for purpose of making an audition for a liquor commercial, fed the victims alcohol laced with other drugs without the victims’ knowledge, had sex with

⁴⁴ *See* *United States v. King*, 604 F.3d 125, 143–44 (3d Cir. 2010) (5-level upward departure reasonable for a defendant convicted of traveling to engage in sex with a minor for his pattern of sexually abusing minors, analogizing to enhancement in child pornography guidelines).

⁴⁵ *See* *United States v. Flanders*, 752 F.3d 1317, 1341 (11th Cir. 2014) (finding an upward departure reasonable for defendants who drugged women without their knowledge, videotaped sexual activity with the women who “woke up covered in bodily fluids and uncertain of what had happened to them,” and distributed the images over the Internet).

the victims while they were unconscious, filmed the sexual activity and subsequently distributed the DVDs containing the images over the Internet).

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

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

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