

Primer



Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors



Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer provides a general overview of the statutes, sentencing guidelines, and case law regarding commercial sex acts and the sexual exploitation of minors. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. RELEVANT STATUTES

The statutes discussed in this primer cover a wide range of conduct involving both minors and adult victims. The conduct covered involves the illegal production and distribution of pornography, facilitation of prostitution, and failure to maintain required records. Violations of some of the following statutes are punishable by mandatory minimum penalties.

A. 8 U.S.C. § 1328 (IMPORTATION OF ALIEN FOR IMMORAL PURPOSE)

Section 1328 prohibits the direct or indirect importation (or attempted importation) into the United States of any alien for prostitution or any other immoral purpose.¹ 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 prostitution or any other immoral purpose.² Section 1328 has a maximum penalty of ten years in prison.³

B. 15 U.S.C. § 7704 (OTHER PROTECTIONS FOR USERS OF COMMERCIAL ELECTRONIC MAIL)

Section 7704(d) prohibits sending, to a protected computer, an email message that includes sexually oriented material without including in the subject heading certain required marks or notices, or without ensuring that 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.⁴ This section does not apply if the recipient has given prior affirmative consent to receipt of the message.⁵ “Sexually oriented material” means any material that depicts sexually explicit conduct (as that term is defined in 18 U.S.C. § 2256), unless the depiction constitutes a small and insignificant part of the

¹ 8 U.S.C. § 1328.

² *Id.*

³ *Id.*

⁴ 15 U.S.C. § 7704.

⁵ *Id.* § 7704(d)(2).

whole, the remainder of which is not primarily devoted to sexual matters.⁶ Section 7704(d) has a maximum penalty of five years in prison.⁷

C. 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 (1) depicts a minor engaging in sexually explicit conduct and is obscene, or (2) 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), and lacks serious literary, artistic, political, or scientific value.⁸

Section 1466A(b) prohibits knowingly possessing such visual depictions.⁹ Section 1466A(a) and (b) also prohibit attempts and conspiracies.¹⁰ Violations of these sections are subject to the penalties provided in 18 U.S.C. § 2252A(b)(1).¹¹ Note that pursuant to section 1466A(c), the minor depicted need not actually exist.¹²

D. 18 U.S.C. § 1591 (SEX TRAFFICKING OF CHILDREN OR BY FORCE, FRAUD, OR COERCION)

Section 1591 prohibits (1) knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining by any means a person, or (2) 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.¹³

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.¹⁴ “Coercion” means (1) threats of serious harm to, or (2) physical restraint against, any person, any scheme, plan, or pattern intended to cause a

⁶ *Id.* § 7704(d)(4).

⁷ *Id.* § 7704(d)(5).

⁸ 18 U.S.C. § 1466A(a).

⁹ *Id.* § 1466A(b).

¹⁰ *Id.* § 1466A(a), (b).

¹¹ *Id.* § 2252A(b)(1). *See infra* Section II.E.4 for discussion of the penalties.

¹² *Id.* § 1466A(c).

¹³ *Id.* § 1591(a).

¹⁴ *Id.* § 1591(e)(3).

person to believe that failure to perform an act would result in serious harm to or physical restraint against any person, or (3) the abuse or threatened abuse of law or the legal process.¹⁵ “Venture” means a group of two or more individuals associated in fact.¹⁶

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.¹⁷ If the offense was so effected, there is a mandatory minimum penalty of 15 years and a maximum of life in prison.¹⁸ If the offense was not so effected, and the minor was at least 14, but not yet 18, there is a mandatory minimum penalty of ten years and a maximum penalty of life in prison.¹⁹ The Ninth Circuit held that the mandatory minimum penalty at section 1591(b)(1) could not be used to establish the base offense level when the conduct under consideration was from a conviction for conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c).²⁰

E. CHAPTER 110 OF TITLE 18 (SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN)

1. 18 U.S.C. § 2251 (Sexual Exploitation of Children)

Section 2251(a) 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.²¹ Parents, legal guardians, and persons with custody or control of a minor also are forbidden from permitting the minor to engage in sexually explicit conduct to produce visual depiction thereof.²²

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.²³ Finally, section 2251(d) prohibits knowingly making, printing, or publishing an advertisement seeking or offering (1) to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction of a

¹⁵ *Id.* § 1591(e)(2).

¹⁶ *Id.* § 1591(e)(6).

¹⁷ *Id.* § 1591(b).

¹⁸ *Id.* § 1591(b)(1).

¹⁹ *Id.* § 1591(b)(2).

²⁰ *See* United States v. Wei Lin, 841 F.3d 823, 825 (9th Cir. 2016) (district court erred by using the 15-year mandatory minimum at 18 U.S.C. § 1591(b)(1) to determine the base offense level when the offense of conviction was conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c)).

²¹ 18 U.S.C. § 2251(a).

²² *Id.* § 2251(b).

²³ *Id.* § 2251(c).

minor engaging in sexually explicit conduct, or (2) seeking or offering participation in any act of sexual conduct by or with a minor to produce a visual depiction.²⁴ Subsections 2551(a)–(d) also prohibit attempts and conspiracies.²⁵

Section 2251 has a mandatory minimum penalty of 15 years and a maximum of 30 years in prison, which increases based on the defendant’s criminal history and the consequences of the offense.²⁶ If the defendant has one prior conviction under chapter 110 (Sexual Exploitation and Other Abuse of Children),²⁷ section 1591 (Sex Trafficking of Children or By Force, Fraud, or Coercion), chapter 71 (Obscenity),²⁸ chapter 109A (Sexual Abuse),²⁹ chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes),³⁰ section 920 of title 10 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or any analogous state conviction, there is a mandatory minimum penalty of 25 years and a maximum of 50 years in prison.³¹ If the defendant has two or more prior convictions, the mandatory minimum penalty is 35 years and the maximum penalty is life in prison.³² In addition, if an offense under this section results in the death of

²⁴ *Id.* § 2251(d).

²⁵ *Id.* § 2251(a)–(d).

²⁶ *Id.* § 2251(e).

²⁷ Substantive offenses in chapter 110 include 18 U.S.C. §§ 2251 (Sexual Exploitation of Children), 2251A (Selling or Buying of Children), 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors), 2252A (Certain Activities Relating to Material Constituting or Containing Child Pornography), 2252B (Misleading Domain Names on the Internet), 2252C (Misleading Words or Digital Images on the Internet), 2257 (Record Keeping Requirements), 2257A (Record Keeping Requirements for Simulated Sexual Conduct), 2258 (Failure to Report Child Abuse), 2258A (Reporting Requirements of Providers), and 2260 (Production of Sexually Explicit Depictions of a Minor for Importation into the United States).

²⁸ Substantive offenses in chapter 71 include 18 U.S.C. §§ 1460 (Possession with Intent to Sell, and Sale, of Obscene Matter on Federal Property), 1461 (Mailing Obscene or Crime-Inciting Matter), 1462 (Importation or Transportation of Obscene Matters), 1463 (Mailing Indecent Matter on Wrappers or Envelopes), 1464 (Broadcasting Obscene Language), 1465 (Production and Transportation of Obscene Matters for Sale or Distribution), 1466 (Engaging in the Business of Selling or Transferring Obscene Matter), 1466A (Obscene Visual Representations of the Sexual Abuse of Children), 1468 (Distributing Obscene Material by Cable or Subscription Television), and 1470 (Transfer of Obscene Material to Minors).

²⁹ Substantive offenses in chapter 109A include 18 U.S.C. §§ 2241 (Aggravated Sexual Abuse), 2242 (Sexual Abuse), 2243 (Sexual Abuse of a Minor or Ward), 2244 (Abusive Sexual Contact), and 2245 (Offenses Resulting in Death).

³⁰ Substantive offenses in chapter 117 include 18 U.S.C. §§ 2421 (Transportation Generally), 2421A (Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking), 2422 (Coercion and Enticement), 2423 (Transportation of Minors), 2424 (Filing Factual Statement About Alien Individual), and 2425 (Use of Interstate Facilities to Transmit Information About a Minor).

³¹ 18 U.S.C. § 2251(e).

³² *Id.*

a person, the mandatory minimum penalty becomes 30 years, the maximum penalty is life in prison, and the death penalty applies.³³

A defendant does not have to produce the child pornography which he offers to advertise or distribute.³⁴ Whether an image depicts a lascivious exhibition of the genitals turns on the overall content of the visual depiction.³⁵

2. 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 (1) with the knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or (2) 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.³⁶ Section 2251A(b) prohibits purchasing (or offering to purchase) or otherwise obtaining custody or control of a minor either (1) with knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or (2) 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.³⁷ Section 2251A(a) and (b) have a mandatory minimum penalty of 30 years and a maximum penalty of life imprisonment.³⁸

3. 18 U.S.C. § 2252 (Certain Activities Relating to Material Involving Sexual Exploitation of Minors)

Section 2252 prohibits certain activities related to visual depictions that were produced using a minor engaging in sexually explicit conduct and that depict such conduct.³⁹ Section 2252(a)(1) prohibits transporting or shipping such visual depictions by any means (including computer).⁴⁰ Section 2252(a)(2) prohibits knowingly receiving or

³³ *Id.*

³⁴ *United States v. Williams*, 659 F.3d 1223, 1225–26 (9th Cir. 2011); *see also United States v. Sewell*, 513 F.3d 820, 821–22 (8th Cir. 2008) (upholding conviction of a defendant who had used a file-sharing network to publish a notice to distribute child pornography).

³⁵ *United States v. Wells*, 843 F.3d 1251, 1254–55 (10th Cir. 2016) (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).

³⁶ 18 U.S.C. § 2251A(a).

³⁷ *Id.* § 2251A(b).

³⁸ *Id.* § 2251A(a)–(b).

³⁹ *Id.* § 2252.

⁴⁰ *Id.* § 2252(a)(1).

distributing such visual depictions or reproducing such visual depictions for distribution.⁴¹ Section 2252(a)(3) prohibits knowingly selling or possessing with intent to sell any such visual depiction.⁴² Section 2252(a)(4) prohibits knowingly possessing one or more books, magazines, periodicals, films, video tapes, or other matter containing such a visual depiction.⁴³

Subsections (a)(1), (a)(2), and (a)(3) also prohibit attempts and conspiracies and have a mandatory minimum penalty of five years and a maximum penalty of 20 years in prison.⁴⁴ If the defendant has a prior conviction under chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591, chapter 71 (Obscenity), chapter 109A (Sexual Abuse), chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), section 920 of title 10 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or an analogous state conviction, the mandatory minimum penalty is 15 years and the maximum is 40 years in prison.⁴⁵ Subsection (a)(4) has a maximum penalty of ten years in prison.⁴⁶ 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, the mandatory minimum penalty is ten years and the maximum penalty is 20 years in prison.⁴⁷

The Supreme Court held that the phrase “involving a minor or ward” modifies only the third and final phrase—“abusive sexual conduct”—in section 2252.⁴⁸ The ten-year mandatory minimum penalty under section 2252(b)(2) 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.⁴⁹ Courts have held that there is no *mens rea* requirement with respect to the victim’s age.⁵⁰

⁴¹ *Id.* § 2252(a)(2).

⁴² *Id.* § 2252(a)(3).

⁴³ *Id.* § 2252(a)(4).

⁴⁴ *Id.* § 2252(b)(1).

⁴⁵ *Id.*

⁴⁶ *Id.* § 2252(b)(2).

⁴⁷ *Id.*

⁴⁸ *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016). Congress added not only the child sexual-abuse predicates at issue in *Lockhart*, but also a set of predicate state offenses relating to child pornography when it amended section 2252 in the Child Pornography Prevention Act of 1996. *See* Pub. L. No. 104–208, § 121(5), 110 Stat. 3009–30.

⁴⁹ *Lockhart*, 136 S. Ct. at 968–69.

⁵⁰ *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).

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 section 2252(b)(1)’s mandatory minimum provision.⁵¹

4. 18 U.S.C. § 2252A (Certain Activities Relating to Material Constituting or Containing Child Pornography)

Section 2252A prohibits knowingly: mailing, 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 (2252A(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 (2252A(a)(6)); and 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 (2252A(a)(7)).⁵² All subsections also prohibit attempts and conspiracies.⁵³

Subsections (a)(1)–(4), and (a)(6) have a mandatory minimum penalty of five years and a maximum of 20 years in prison.⁵⁴ If the defendant has a prior conviction under chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591, chapter 71 (Obscenity), chapter 109A (Sexual Abuse), chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), section 920 of title 10 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or an analogous state conviction, the mandatory minimum penalty is 15 years and the maximum is 40 years in prison.⁵⁵ Subsection (a)(5) has a maximum penalty of ten years in prison (or 20 years if the offense involved a minor under 12 years of age).⁵⁶ If the defendant has a prior conviction under

⁵¹ See *United States v. Gauld*, 865 F.3d 1030, 1034–35 (8th Cir. 2017) (en banc) (because Federal Juvenile Delinquency Act long has 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).

⁵² 18 U.S.C. § 2252A(a)(1)–(7).

⁵³ *Id.* § 2252A(b)(1)–(3).

⁵⁴ *Id.* § 2252A(b)(1).

⁵⁵ *Id.*

⁵⁶ *Id.* § 2252A(b)(2).

chapter 110, chapter 71, chapter 109A, chapter 117, section 920 of title 10, or an analogous state conviction, the mandatory minimum penalty is ten years and the maximum is 20 years in prison.⁵⁷ Subsection (a)(7) has a maximum penalty of 15 years in prison.⁵⁸

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).⁵⁹ Such an enterprise is prohibited when part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and when the defendant committed those offenses in concert with three or more other persons.⁶⁰ Section 2252A(g) has a mandatory minimum penalty of 20 years and a maximum penalty of life in prison.⁶¹

The Eleventh Circuit held that section 2252A requires that the item being distributed must have been delivered to someone other than the person who does the delivering.⁶² 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.⁶³ 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.⁶⁴

5. 18 U.S.C. § 2257 (Record Keeping Requirements)

Section 2257 requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of

⁵⁷ *Id.*

⁵⁸ *Id.* § 2252A(b)(3).

⁵⁹ *Id.* § 2252A(g).

⁶⁰ *Id.* § 2252A(g)(2).

⁶¹ *Id.* § 2252A(g)(1).

⁶² *United States v. Grzybowicz*, 747 F.3d 1296, 1307–10 (11th Cir. 2014) (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).

⁶³ *See United States v. Richardson*, 713 F.3d 232, 236 (5th Cir. 2013); *see also 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.”).

⁶⁴ *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).

actual sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depictions.⁶⁵

Section 2257 has a maximum penalty of five years in prison.⁶⁶ If the defendant violates this section after previously being convicted under this section, the minimum penalty is two years and the maximum penalty is ten years in prison.⁶⁷

6. 18 U.S.C. § 2257A (Record Keeping Requirements for Simulated Sexual Conduct)

Section 2257A 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 depictions.⁶⁸ Section 2257A has a maximum penalty of one year in prison.⁶⁹ If the defendant violates this section to conceal a substantive offense, the maximum penalty is five years in prison.⁷⁰ If the defendant violates this section after previously being convicted under this section, the minimum penalty is two years and the maximum penalty is ten years in prison.⁷¹

7. 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.⁷² 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,

⁶⁵ 18 U.S.C. § 2257.

⁶⁶ *Id.* § 2257(i).

⁶⁷ *Id.*

⁶⁸ *Id.* § 2257A.

⁶⁹ *Id.* § 2257A(i)(1).

⁷⁰ *Id.* § 2257A(i)(2).

⁷¹ *Id.* § 2257A(i)(3).

⁷² *Id.* § 2260(a).

intending that the visual depiction will be imported into the United States. Each section also prohibits attempts and conspiracies.⁷³

Violations of section 2260(a) are subject to the penalties provided in 18 U.S.C. § 2251(e).⁷⁴ Violations of section 2260(b) are subject to the penalties provided in section 2252(b)(1).⁷⁵

F. CHAPTER 117 OF TITLE 18 (TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES)

1. 18 U.S.C. § 2421 (Transportation Generally)

Section 2421 prohibits knowingly transporting individuals to engage in prostitution or any illegal sexual activity.⁷⁶ Section 2421 includes attempts and has a maximum penalty of ten years in prison.⁷⁷

2. 18 U.S.C. § 2421A (Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking)

Section 2421A(a) prohibits owning, managing, or operating an “interactive computer service”⁷⁸ with the intent to promote or facilitate the prostitution of another person.⁷⁹ Section 2421A(a) includes attempts and conspiracies and has a maximum penalty of ten years in prison.⁸⁰

Section 2421A(b) is an aggravated violation of section 2421A(a) where the defendant (1) promotes or facilitates the prostitution of five or more persons or (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of

⁷³ *Id.* § 2260(b).

⁷⁴ *Id.* § 2260(c)(1). *See supra* Section II.E.1 for discussion of the penalties.

⁷⁵ *Id.* § 2260(c)(2). *See supra* Section II.E.3 for discussion of the penalties.

⁷⁶ *Id.* § 2421(a).

⁷⁷ *Id.*

⁷⁸ “Interactive computer service” has definition set forth in section 230(f) the Communications Act of 1934, 47 U.S.C. § 230(f), namely:

any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

⁷⁹ 18 U.S.C. § 2421A(a).

⁸⁰ *Id.*

section 1591(a).⁸¹ Section 2421A(b) includes attempts and conspiracies and has a maximum penalty of 25 years in prison.⁸²

3. 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.⁸³

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.⁸⁴ Each section includes attempts.⁸⁵

Section 2422(a) has a maximum penalty of 20 years in prison, while section 2422(b) has a mandatory minimum penalty of ten years and a maximum penalty of life in prison.⁸⁶

For a conviction under sections 2422 or 2423(a), discussed *infra*, prostitution or other illegal sexual activity must be one of the dominant or principal purposes for coercing travel or transporting a minor in interstate commerce, but it need not be *the* dominant purpose.⁸⁷ In addition, 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” to be applied to the victim’s age, consistent with congressional intent that minors need special protection against sexual exploitation.⁸⁸

A defendant can be convicted of violating section 2422(b) for communicating with an adult intermediary to persuade, induce, or entice minors to engage in sexual intercourse

⁸¹ *Id.* § 2421A(b). *See supra* Section II.D for discussion of section 1591(a).

⁸² *Id.*

⁸³ *Id.* § 2422(a)

⁸⁴ *Id.* § 2422(b).

⁸⁵ *Id.* § 2422(a), (b).

⁸⁶ *Id.*

⁸⁷ *See* United States v. Miller, 148 F.3d 207, 211–13 (2d Cir. 1998).

⁸⁸ *See* United States v. Banker, 876 F.3d 530, 536–40 (4th Cir. 2017) (statute did not require the government to prove defendant knew victim was under the age of eighteen); United States v. Daniels, 685 F.3d 1237, 1248 (11th Cir. 2012) (statute does not require that defendant knew the victim was under the age of 18 for conviction); United States v. Daniels, 653 F.3d 399, 409–10 (6th Cir. 2011) (context of § 2423(a) dictates that the government did not need to prove that defendant knew victim was a minor); 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”).

even if he does not seek to have any of his communications with the adult passed on directly to the child.⁸⁹

4. 18 U.S.C. § 2423 (Transportation of Minors)

Section 2423(a) prohibits knowingly transporting an individual who has not reached the age of 18 with the intent that the individual engage in prostitution or in any illegal sexual activity.⁹⁰ 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.⁹¹ Section 2423(c) prohibits traveling in foreign commerce and engaging in any illicit sexual conduct.⁹² 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 the person is traveling in interstate or foreign commerce for the purpose of engaging in any illicit sexual conduct.⁹³ All four sections also prohibit attempts and conspiracies.⁹⁴

“Illicit sexual conduct” means a sexual act with a person under 18 that would be in violation of chapter 109A (Sexual Abuse) of title 18 if the sexual act occurred in the United States, any commercial act with a person under 18, or production of child pornography as defined in section 2256(8).⁹⁵ It is a defense that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had reached age 18.⁹⁶

Section 2423(a) has a mandatory minimum penalty of ten years and a maximum penalty of life in prison, while sections 2423(b)–(d) have a maximum penalty of 30 years in prison.⁹⁷

⁸⁹ See *United States v. Caudill*, 709 F.3d 444, 446–47 (5th Cir. 2013); *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007).

⁹⁰ 18 U.S.C. § 2423(a).

⁹¹ *Id.* § 2423(b).

⁹² *Id.* § 2423(c).

⁹³ *Id.* § 2423(d).

⁹⁴ *Id.* § 2423(e).

⁹⁵ *Id.* § 2423(f).

⁹⁶ *Id.* § 2423(g).

⁹⁷ *Id.* § 2423(a)–(d).

5. 18 U.S.C. § 2425 (Use of Interstate Facilities to Transmit Information About a Minor)

Section 2425 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.⁹⁸ Section 2425 includes attempts and has a maximum of five years in prison.⁹⁹

6. 18 U.S.C. § 2426 (Repeat Offenders)

Section 2426 provides for an enhanced term of imprisonment of up to three times the penalty otherwise provided for offenders with a “prior sex offense conviction.”¹⁰⁰ “Prior sex offense conviction” means a conviction under chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), chapter 109A (Sexual Abuse), chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591 (Sex Trafficking of Children or By Force, Fraud, or Coercion), or an analogous state conviction.¹⁰¹

7. 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 (“Victim Assistance Act”),¹⁰² provides that a 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.¹⁰³ Courts “shall consider the factors set forth in sections 3553(a) and 3572” when determining the special assessment amount.¹⁰⁴ These special assessments fund the Child Pornography Victims Reserve, also created by the Victim Assistance Act.¹⁰⁵

⁹⁸ *Id.* § 2425.

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 2426(a).

¹⁰¹ *Id.* § 2426(b).

¹⁰² Pub. L. No. 115–299, 132 Stat. 4383 (codified as 18 U.S.C. § 2259A).

¹⁰³ 18 U.S.C. § 2259A(a)(1)–(3).

¹⁰⁴ *Id.* § 2259A(c).

¹⁰⁵ See *infra* notes 336–343 and accompanying text for discussion of the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018.

8. 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. In determining whether a defendant is indigent, the analysis for earning capacity is prospective, considering the defendant’s earning potential following release from prison.¹⁰⁶

III. GUIDELINES OVERVIEW: CHAPTER TWO, PART G

A. APPLICABLE OFFENSE GUIDELINES

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted). The offense guidelines applicable to the statutes described above are found in Chapter Two, Part G of the *Guidelines Manual*.¹⁰⁷

B. RELEVANT CONDUCT

Many of the subsections of the sex offense guidelines in Chapter Two, Part G 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.”¹⁰⁸ 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 based on relevant conduct.¹⁰⁹ Therefore, relevant conduct is important to the application of many subsections.

¹⁰⁶ See *United States v. Graves*, 908 F.3d 137, 144 (5th Cir. 2018) (district court was correct to analyze whether the defendant was employable upon release from prison).

¹⁰⁷ U.S. SENT’G COMM’N, *Guidelines Manual*, §1B1.2 (Nov. 2018) [hereinafter USSG] (explaining how to determine the 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. See USSG App. A.

¹⁰⁸ USSG §1B1.1, comment. (n.1(I)).

¹⁰⁹ USSG §1B1.3(a).

For example, the specific offense characteristic at §2G2.2(b)(4) states if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels. That enhancement 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 consistently have held that extraterritorial conduct can be considered relevant conduct for sentencing purposes.¹¹⁰

C. SECTION 2G1.1 (PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH AN INDIVIDUAL OTHER THAN A MINOR)

Section 2G1.1 covers 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. 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 increase 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. If bodily injury occurs, an upward departure may be warranted.¹¹¹ For purposes of this subsection, "coercion" includes any form of conduct negating the voluntariness of the victim.¹¹² 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.¹¹³

¹¹⁰ See, e.g., *United States v. Spence*, 923 F.3d 929, 932–35 (11th Cir. 2019) (in issue of first impression, the court joined the Seventh, Tenth, and Eighth Circuits in 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; 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)), *cert. denied* 140 S. Ct. 1131 (2020).

¹¹¹ See USSG §2G1.1, comment. (n.2).

¹¹² *Id.*; see also *United States v. Swearin*, 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).

¹¹³ See USSG §2G1.1, comment. (n.2).

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

3. Cross Reference

Section 2G1.1(c)(1) provides that §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.¹¹⁴

For purposes of this subsection, conduct described in 18 U.S.C. § 2242 is (1) engaging in, or causing another person to engage in, a sexual act with another person by 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.¹¹⁵

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).¹¹⁶

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

¹¹⁴ USSG §2G1.1, comment. (n.4(A)).

¹¹⁵ USSG §2G1.1, comment. (n.4(B)).

¹¹⁶ USSG §2G1.1, comment. (n.5).

commercial sex act or prohibited sexual conduct (whether or not the person consented).¹¹⁷ “Victim” includes undercover law enforcement officers.¹¹⁸

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.¹¹⁹

6. Upward Departure Provision

If the offense involved more than ten victims, an upward departure may be warranted.¹²⁰

D. SECTION 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)

Section 2G1.3 covers 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).¹²¹

¹¹⁷ USSG §2G1.1, comment. (n.1); *see also* United States v. Young, 590 F.3d 467, 472–73 (7th Cir. 2009) (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).

¹¹⁸ USSG §2G1.1, comment. (n.1).

¹¹⁹ USSG §2G1.1, comment. (n.3).

¹²⁰ USSG §2G1.1, comment. (n.6).

¹²¹ USSG §2G1.3, comment. (n.1); *see also* United States v. Vasquez, 839 F.3d 409, 412–13 (5th Cir. 2016) (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); 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 see* 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.”).

1. 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); or
- (d) Otherwise, the base offense level is 24.

2. Specific Offense Characteristics

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

Section 2G1.3(b)(1) provides for a 2-level increase 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.¹²² The enhancement applies only if there is a pre-existing parent-like authority that exists apart from the relationship forged during the crime itself.¹²³ If this subsection applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).¹²⁴

b. Knowing misrepresentation or undue influence

Section 2G1.3(b)(2) provides for a 2-level increase 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.

¹²² USSG §2G1.3, comment. (n.2(A)).

¹²³ See *United States v. Brooks*, 610 F.3d 1186, 1200–02 (9th Cir. 2010).

¹²⁴ USSG §2G1.3, comment. (n.2(B)).

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. 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.¹²⁵

The misrepresentation enhancement still can apply even if the defendant ultimately tells the “minor” his or her true identity,¹²⁶ misrepresents marital status and occupation,¹²⁷ or misrepresents prior or current sexual relationships with other minors.¹²⁸

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.¹²⁹ 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.¹³⁰

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

¹²⁵ See USSG §2G1.3, comment. (n.3(A)).

¹²⁶ See *United States v. Holt*, 510 F.3d 1007, 1010–11 (9th Cir. 2007).

¹²⁷ See *United States v. Young*, 613 F.3d 735, 748–49 (8th Cir. 2010).

¹²⁸ See *United States v. Grauer*, 701 F.3d 318, 325–26 (8th Cir. 2012).

¹²⁹ See USSG §2G1.3, comment. (n.3(B)); see also *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, driving her to engagements, and handling the money.”) (internal citations omitted); *United States v. Mitteness*, 893 F.3d 1091, 1095–96 (8th Cir. 2018) (it was not double counting to apply parental control and undue influence enhancements where parent exerted influence above and beyond the parent-child relationship); *United States v. Daniels*, 685 F.3d 1237 (11th Cir. 2012) (per curiam) (enhancement applies even though minor already was working as a prostitute before meeting defendant; minor initially had 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).

¹³⁰ See *United States v. Willoughby*, 742 F.3d 229, 240–41 (6th Cir. 2014) (enhancement 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); *United States v. Smith*, 719 F.3d 1120, 1125 (9th Cir. 2013) (base offense level under §2G1.3(b)(2) and undue influence enhancement both may be applied because both provisions serve unique purposes).

years older than the minor.¹³¹ The undue influence enhancement does not apply if the only “minor” involved in the offense is an undercover officer.¹³²

c. Use of a computer

Section 2G1.3(b)(3) provides for a 2-level increase if a computer or an interactive computer service was used to: (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) 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.¹³³ The use of a cell phone to send voice mail and text messages directly to the victim is a “computer” for purposes of §2G1.3(b)(3), even though it was not used to connect to the internet.¹³⁴

Application Note 4 states that the first part of 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.”¹³⁵ However, courts regularly apply the enhancement if the defendant or a co-defendant uses the computer simply to post information about a minor.¹³⁶

¹³¹ USSG § 2G1.3, comment. (n.3(B)); *see also* United States v. Reid, 751 F.3d 763, 768–69 (6th Cir. 2014) (rebuttable presumption not overcome where defendant emotionally manipulated the victim, 35 years his junior); United States v. Watkins, 667 F.3d 254, 364–65 (2d Cir. 2012) (rebuttable presumption not overcome by victim’s “eagerness”); United States v. Miller, 601 F.3d 734, 737–38 (7th Cir. 2010) (prior sexual activity of minor was not sufficient to overcome rebuttable presumption where there was evidence of manipulation and grooming); United States v. Lay, 583 F.3d 436, 445–46 (6th Cir. 2009) (rebuttable presumption not overcome by “willing” victim who sought out sexual activity with an adult). *But see* United States v. Davis, 924 F.3d 899, 904 (6th Cir. 2019) (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’ ”).

¹³² USSG § 2G1.3, comment. (n.3(B)).

¹³³ *See* United States v. Cramer, 777 F.3d 597, 602–03 (2d Cir. 2015); *see also* United States v. Lay, 583 F.3d 436, 447–48 (6th Cir. 2009).

¹³⁴ *See* United States v. Kramer, 631 F.3d 900, 902–05 (8th Cir. 2011).

¹³⁵ USSG §2G1.3, comment. (n.4).

¹³⁶ *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, 435–36 (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).

d. Sex act or sexual contact/Commercial sex act

Section 2G1.3(b)(4) provides for a 2-level increase 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.¹³⁷ “Sexual contact” can include the touching of one’s self.¹³⁸

e. Minor younger than 12

Section 2G1.3(b)(5) provides for an 8-level increase 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 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.¹³⁹

3. Cross References

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

Section 2G1.3(c)(1) states that §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) 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

¹³⁷ See *United States v. Hornbuckle*, 784 F.3d 549, 553–54 (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.”); *United States v. Watkins*, 667 F.3d 254, 261–62 (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).

¹³⁸ See *United States v. Pawlowski*, 682 F.3d 205, 211–13 (3d Cir. 2012) (affirming application of enhancement when defendant masturbated on webcam while chatting with someone he believed to be 15-year-old minor).

¹³⁹ See *United States v. Hammond*, 698 F.3d 679, 681 (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)).

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.¹⁴⁰

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 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) 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.¹⁴¹ 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 18 U.S.C. § 2241.¹⁴²

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.¹⁴³

This subsection also covers 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

¹⁴⁰ See USSG §2G1.3, comment. (n.5(A)); *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, 1251–52 (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).

¹⁴¹ 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, 975–77 (7th Cir. 2012) (cross reference required where the defendant’s conduct involved conduct described in 18 U.S.C. § 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).

¹⁴² See *Osley v. United States*, 751 F.3d 1214, 1227–29 (11th Cir. 2014) (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)).

¹⁴³ USSG §2G1.3, comment. (n.5(B)(i)).

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 the age of 12, but has not reached the age of 16 (and is at least four years younger than the person so engaging).¹⁴⁴

Similarly covered is conduct described in 18 U.S.C. § 2242 that includes (1) engaging in, or causing another person to engage in, a sexual act with another person by 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.¹⁴⁵

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.¹⁴⁶ The special instruction applies if the “relevant conduct of an offense of conviction includes” the travel for a commercial sex act or prohibited sexual contact with more than one minor “whether [that minor is] specifically cited in the count of conviction” or not.¹⁴⁷ Thus, multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts).¹⁴⁸ 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).¹⁴⁹ Because these counts cannot be grouped, expanded relevant conduct does not apply.¹⁵⁰

¹⁴⁴ USSG §2G1.3, comment. (n.5(B)(ii)).

¹⁴⁵ USSG §2G1.3, comment. (n.5(B)(iii)).

¹⁴⁶ USSG §2G1.3, comment. (n.6).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *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]”); *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).

¹⁵⁰ See USSG §1B1.3(a)(2); see also *United States v. Randall*, 924 F.3d 790, 797–800 (5th Cir. 2019) (additional victims were not included as 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

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted.¹⁵¹

E. SECTION 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)

Section 2G2.1 covers offenses under 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).¹⁵²

1. Base Offense Level

This guideline has a base offense level of 32.

2. Specific Offense Characteristics

a. Age of the victim

Section 2G2.1(b)(1) provides for a 4-level increase if the offense involved a minor who had not attained the age of 12, and a 2-level increase 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 provides an alternative enhancement. Specifically, §2G2.1(b)(4) provides for a 4-level increase “if the offense involved material that portrays . . . (B) an infant or toddler.” The accompanying application note clarifies that if subsection (b)(4)(B) applies, the vulnerable victim adjustment in Chapter Three does not apply.¹⁵³

b. Sexual act or sexual conduct

Section 2G2.1(b)(2) provides for (the greater) of a 2-level increase if the offense involved the commission of a sexual act or sexual contact, or a 4-level enhancement if the

improperly applied §1B1.3(a)(2)); *United States v. Weiner*, 518 F. App’x 358, 363–66 (6th Cir. 2013) (same).

¹⁵¹ USSG §2G1.3, comment. (n.7).

¹⁵² See USSG §2G2.1, comment. (n.1).

¹⁵³ See USSG §2G2.1, comment. (n.4).

offense involved both the commission of a sexual act and conduct described in 18 U.S.C. § 2241(a) or (b).¹⁵⁴ 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.¹⁵⁵

c. Distribution

Section 2G2.1(b)(3) provides for a 2-level increase if the offense involved knowing distribution. “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.¹⁵⁶ Distribution by a codefendant is relevant conduct attributable to a defendant who helped produce the images.¹⁵⁷ Sharing images with the minor victim qualifies as distribution.¹⁵⁸ 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.¹⁵⁹

d. Sadistic or masochistic conduct

Section 2G2.1(b)(4)(A) provides for a 4-level enhancement if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence.¹⁶⁰ At least one court has held that “images involving an adult male performing anal sex on a

¹⁵⁴ See *United States v. Aldrich*, 566 F.3d 976, 979 (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, 272–74 (6th Cir. 2009) (defining “sexual contact” broadly to include the victim’s self-masturbation); *United States v. Stoterau*, 524 F.3d 988, 997–98 (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, 666–67 (8th Cir. 2007) (where the defendant touched the minor victim’s penis for sexual pleasure, the offense involved a sexual act or sexual contact).

¹⁵⁵ USSG §2G2.1, comment. (n.2).

¹⁵⁶ USSG §2G2.1, comment. (n.1).

¹⁵⁷ See *United States v. Odom*, 694 F.3d 544, 547–48 (5th Cir. 2012) (per curiam).

¹⁵⁸ See *United States v. Hernandez*, 894 F.3d 1104, 1107–09 (9th Cir. 2018).

¹⁵⁹ See *United States v. Broxmeyer*, 699 F.3d 265, 282–83 (2d Cir. 2012).

¹⁶⁰ See *infra* Section III.F.2.d for a more detailed discussion of what constitutes “sadistic or masochistic” conduct.

minor girl are per se sadistic or violent,”¹⁶¹ and that “self-penetration by a foreign object qualifies as violence.”¹⁶²

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

Section 2G2.1(b)(5) provides for a 2-level increase 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.¹⁶³ The minor can be in the custody, care, or supervisory control of more than one person at a time.¹⁶⁴ 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.¹⁶⁵

f. Knowing misrepresentation of identity/Use of a computer

Section 2G2.1(b)(6) provides for a 2-level increase if, for the purpose of producing or transmitting sexually explicit material, the offense involved either: (1) the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (2) the use of a computer or interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct or to solicit participation with a minor in sexually explicit conduct.¹⁶⁶

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

¹⁶¹ United States v. Street, 531 F.3d 703, 711 (8th Cir. 2008).

¹⁶² United States v. Starr, 533 F.3d 985, 1001 (8th Cir. 2008).

¹⁶³ See USSG §2G2.1, comment. (n.5(A)); see also United States v. Isaac, 987 F.3d 980, 993 (11th Cir. 2021) (affirming the enhancement because the defendant’s conduct fit the commentary’s example of a temporary caretaker because as a 44-year-old adult and the only adult present, he had caretaking responsibilities for the 13-year-old minor); United States v. Alfaro, 555 F.3d 496, 499–500 (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).

¹⁶⁴ See, e.g., United States v. Carson, 539 F.3d 611, 612 (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).

¹⁶⁵ USSG §2G2.1, comment. (n.5(B)).

¹⁶⁶ See United States v. Starr, 533 F.3d 985, 1002–03 (8th Cir. 2008) (affirming enhancement, based on application note, for defendant who lied about his age 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).

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.¹⁶⁷

The computer or interactive computer service enhancement applies only to communications directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.¹⁶⁸

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 applied 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.¹⁶⁹ Therefore, multiple counts involving the exploitation of different minors are not to be grouped under §3D1.2 (Groups of Closely Related Counts).¹⁷⁰ Relevant conduct principles apply, however, and temporally distinct conduct must satisfy §1B1.3(a)(1)'s requirement that the conduct be "during the commission of" or "in preparation for" the offense of conviction.¹⁷¹

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted.¹⁷²

¹⁶⁷ See USSG §2G2.1, comment. (n.6(A)).

¹⁶⁸ See USSG §2G2.1, comment. (n.6(B)). *But see* United States v. Jass, 569 F.3d 47, 67–68 (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).

¹⁶⁹ See USSG §2G2.1, comment. (n.7).

¹⁷⁰ *Id.*

¹⁷¹ 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, 568–69 (6th Cir. 2017) (without 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 was not “during the commission of” or “in preparation for” the offense, so multiple count analysis did not apply).

¹⁷² USSG §2G2.1, comment. (n.8).

F. SECTION 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)

Section 2G2.2 covers violations of 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), and 2260(b). 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).¹⁷³

1. 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.¹⁷⁴ A decrease under this subsection may be denied when the defendant transported materials across state lines.¹⁷⁵

¹⁷³ USSG §2G2.2, comment. (n.1).

¹⁷⁴ *Id.*

¹⁷⁵ See *United States v. Fore*, 507 F.3d 412, 415 (6th Cir. 2007) (defendant did not meet the second requirement of §2G2.2(b)(1) “because his criminal conduct was not *limited* to the receipt or solicitation of pornographic materials, but also encompassed the transportation of materials involving the sexual exploitation of a minor in interstate commerce”).

b. Minor under 12 years

Section 2G2.2(b)(2) provides for a 2-level increase if the material involved a prepubescent minor or a minor under 12.¹⁷⁶ Pictures themselves can support the court's finding that the images are of children under 12 and that they depict actual children.¹⁷⁷

c. Distribution

Section 2G2.2(b)(3) provides a tiered enhancement scheme if the offense involved distribution. The greatest enhancement should apply.¹⁷⁸

i. Alternative enhancements

(A) Distribution for pecuniary gain

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 of the material, but by not less than 5 levels.¹⁷⁹

(B) Distribution in exchange for any valuable consideration

If the distribution was in exchange for any valuable consideration (but not for pecuniary gain), a 5-level increase applies.¹⁸⁰

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 child pornographic material, preferential access to child pornographic material, or access to a child.”¹⁸¹

¹⁷⁶ USSG §2G2.2(b)(2).

¹⁷⁷ See *United States v. McNealy*, 625 F.3d 858, 865 (5th Cir. 2010).

¹⁷⁸ USSG §2G2.2(b)(3).

¹⁷⁹ USSG §2G2.2(b)(3)(A).

¹⁸⁰ USSG §2G2.2(b)(3)(B).

¹⁸¹ USSG §2G2.2, comment. (n.1). A 2016 amendment to §2G2.2(b)(3) addressed the application of this 5-level enhancement in the specific context of peer-to-peer file sharing. See USSG App. C, amend. 801 (effective Nov. 1, 2016). While some courts had held that the enhancement applied whenever a defendant knowingly used file-sharing software, see *United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015), the Commission took a more restrictive view, directing that the distribution must be specifically linked to the valuable consideration and providing examples beyond the simple use of file-sharing programs, such as “recei[pt] in exchange for other child pornographic material”[,] “preferential access to child pornographic material, or access to a child.” 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.”¹⁸²

(C) Distribution to a minor

If the offense involved distribution to a minor, a 5-level increase applies.¹⁸³ “Distribution to a Minor” means “the knowing distribution to an individual who is a minor at the time of the offense” and can include fictitious persons.¹⁸⁴

(D) Distribution to a minor intended to persuade, induce, entice, or coerce that minor to engage in illegal activity

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.¹⁸⁵ Allowing a minor victim to make print copies of child pornography qualifies as distribution to a minor.¹⁸⁶

(E) Distribution to a minor intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct

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 increase applies.¹⁸⁷ Distribution to a person representing that he can provide a child to

¹⁸² 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).

¹⁸³ USSG §2G2.2(b)(3)(C).

¹⁸⁴ USSG §2G2.2, comment. (n.1); *see also* United States v. Fulford, 662 F.3d 1174, 1180–82 (11th Cir. 2011) (§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). *Compare Fulford*, 662 F.3d at 1181–82 (application of enhancement 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), *with* United States v. Wainwright, 509 F.3d 812, 815 (7th Cir. 2007) (affirming district court’s application of enhancement based on numerous messages defendant sent to individuals he believed were under 18 because of screen names they used, such as “Justified Facade–16yo,” but not deciding whether enhancement applies if the recipient is determined to be an adult).

¹⁸⁵ USSG §2G2.2(b)(3)(D).

¹⁸⁶ *See* United States v. Roybal, 737 F.3d 621, 623 (9th Cir. 2013) (application of enhancement appropriate where defendant permitted minor victim to make a “book” of child pornography from his collection).

¹⁸⁷ USSG §2G2.2(b)(3)(E).

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.¹⁸⁸

(F) Defendant knowingly engaged in distribution not otherwise covered

Finally, if the distribution was knowing and not otherwise described in (A) through (E), a 2-level increase applies.¹⁸⁹ Application Note 2 states that the enhancement applies only if the defendant knowingly committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute.¹⁹⁰ The intent of the commentary is to avoid the imposition of the enhancement where a defendant unwittingly makes child pornography available to others through use of a peer-to-peer file-sharing program.¹⁹¹

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.¹⁹²

ii. *Double counting*

It is not double counting to apply the distribution enhancement in a distribution of child pornography conviction.¹⁹³

¹⁸⁸ United States v. Love, 593 F.3d 1, 8 (D.C. Cir. 2010) (“[W]e 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.”).

¹⁸⁹ USSG §2G2.2(b)(3)(F).

¹⁹⁰ USSG §2G2.2, comment (n.2).

¹⁹¹ See USSG App. C, amend. 801 (effective Nov. 1, 2016); see also 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, 350 (6th Cir. 2017) (enhancement was applied appropriately 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).

¹⁹² See USSG §§ 2G2.1(b)(3), 2G2.1, comment (n.3), 2G3.1(b)(1)(F), §2G3.1, comment (n.2).

¹⁹³ 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, 227–31 (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, 282–83 (1st Cir. 2012) (sentencing guidelines cover all child pornography

d. Sadistic or masochistic conduct/Infant or toddler

Section 2G2.2(b)(4) provides for a 4-level increase 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.¹⁹⁴ This enhancement does not require a determination of whether the defendant intended to possess the images or actually derived pleasure from viewing the images.¹⁹⁵ 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.¹⁹⁶ Most courts have held that an objective, rather than subjective, standard is used to determine whether an image portrays sadistic or masochistic conduct.¹⁹⁷

i. Pain/violence/penetration

Courts have held that an image's portrayal of sadistic conduct includes conduct a viewer likely would think is causing physical or emotional pain to a depicted young child.¹⁹⁸ 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.¹⁹⁹

A portrayal of a young child experiencing physical or emotional pain includes the penetration of a young child by an adult.²⁰⁰ Images showing an attempt by an adult male to penetrate a young child also have been found to be "sadistic" or "violent" for purposes of

offenses and use the base offense level and enhancements to reach appropriate sentences for different permutations of possession, solicitation, and distribution).

¹⁹⁴ USSG §2G2.2, comment (n.3).

¹⁹⁵ 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.").

¹⁹⁶ See *United States v. Scheels*, 846 F.3d 1341, 1342–43 (11th Cir. 2017) (per curiam).

¹⁹⁷ See *United States v. Nesmith*, 866 F.3d 677, 680 (5th Cir. 2017) (collecting circuit cases for same).

¹⁹⁸ 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, 79–80 (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).

¹⁹⁹ See *United States v. Cannon*, 703 F.3d 407, 415 (8th Cir. 2013) (enhancement proper where video showed victim's wounds but not the actual abuse).

²⁰⁰ See, e.g., *United States v. Hoey*, 508 F.3d 687, 691–92 (1st Cir. 2007); *United States v. Johnson*, 450 F.3d 831, 833–34 (8th Cir. 2006); *United States v. Myers*, 355 F.3d 1040, 1043–44 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1143–44 (10th Cir. 2003); *United States v. Lyckman*, 235 F.3d 234, 237–38 (5th Cir. 2000); cf. *United States v. Wright*, 373 F.3d 935, 939–41 (9th Cir. 2004) (in context of §5K2.8 extreme conduct departure).

this enhancement.²⁰¹ 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.²⁰²

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.”²⁰³

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.²⁰⁴

e. Pattern of activity

i. In general

Section 2G2.2(b)(5) provides for a 5-level increase if the defendant engaged in a pattern of activity that involved the sexual abuse or exploitation of a minor.²⁰⁵

“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,

²⁰¹ See *United States v. Belflower*, 390 F.3d 560, 562 (8th Cir. 2004) (per curiam) (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”).

²⁰² See *United States v. Hotaling*, 634 F.3d 725, 730–32 (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).

²⁰³ *United States v. Bleau*, 930 F.3d 35, 41 (2d Cir. 2019) (affirming sadism enhancement as 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).

²⁰⁴ See *United States v. Ellison*, 113 F.3d 77, 82 (7th Cir. 1997); see also *United States v. Barevich*, 445 F.3d 956, 958–59 (7th Cir. 2006); *Belflower*, 390 F.3d at 562 (citing *United States v. Stulock*, 308 F.3d 922, 926 (8th Cir. 2002)). *But see* *United States v. Fowler*, 216 F.3d 459, 461–62 (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).

²⁰⁵ USSG §2G2.2(b)(5).

or resulted in a conviction for such conduct.²⁰⁶ 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.²⁰⁷

“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.²⁰⁸ It does not include possession, accessing, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.²⁰⁹

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).²¹⁰

ii. Scope of prior conduct

There is no temporal limit on prior conduct that can be considered for this enhancement.²¹¹ Application Note 1 also specifies that the pattern of abuse need not be

²⁰⁶ USSG §2G2.2, comment. (n.1). *See also* United States v. Landreneau, 967 F.3d 443, 454 (5th Cir. 2020) (observing that, as USSG §2G2.2, comment. (n.1) explains, the pattern of activity enhancement does not require multiple victims, only multiple instances of abuse); United States v. Cates, 897 F.3d 349, 356–57 (1st Cir. 2018) (defendant’s forcing the minor to fondle him and then later perform a sex act were separate instances of conduct that together could constitute a “pattern of activity”); United States v. Alberts, 859 F.3d 979, 984–85 (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. Rothenberg, 610 F.3d 621, 625–28 (11th Cir. 2010) (application of enhancements under both §2G2.2(b)(5) and §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. Paull, 551 F.3d 516, 527–28 (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).

²⁰⁷ *See* United States v. Acosta, 619 F.3d 956, 961–62 (8th Cir. 2010).

²⁰⁸ USSG §2G2.2, comment. (n.1). 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), under the “days-and-months” standard, “ ‘at least four years’ older means at least 1,461 days . . . or 48 months older.” United States v. Doult, 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).

²⁰⁹ USSG §2G2.2, comment (n.1).

²¹⁰ USSG §2G2.2, comment. (n.5).

²¹¹ *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

related to the offense of conviction.²¹² The definition of “pattern of activity” in Application Note 1 allows the court to consider expanded relevant conduct.²¹³ For the enhancement to apply, the conduct must have been sexually explicit, but it can include attempts.²¹⁴

f. Use of a computer

Section 2G2.2(b)(6) provides for a 2-level increase 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.²¹⁵ 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.²¹⁶

g. Number of images

Section 2G2.2(b)(7) provides different increases for the number of images the offense involved.²¹⁷ If the offense involved:

- (a) At least ten but less than 150 images, there is a 2-level increase;

979, 983 (11th Cir. 2017)(district court properly based enhancement on 30-year-old conduct that occurred when defendant was a teenager); *United States v. Lucero*, 747 F.3d 1242, 1247–50 (10th Cir. 2014) (enhancement appropriate where defendant molested nieces 35 years before offense); *United States v. Reingold*, 731 F.3d 204, 223–24 (2d Cir. 2013) (conduct by defendant as a juvenile is properly considered).

²¹² See USSG §2G2.2, comment. (n.1).

²¹³ See *United States v. Bacon*, 646 F.3d 218, 221 (5th Cir. 2011) (per curiam) (“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, 1139 (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).

²¹⁴ Compare *United States v. Bishop*, 797 F. App’x 208, 211–13 (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), with *United States v. Gleich*, 397 F.3d 608, 613–15 (8th Cir. 2005) (a “mooning” picture of a minor did not constitute an instance of sexual exploitation because the buttocks are a non-genital region and therefore did not meet the definition of “sexually explicit conduct”).

²¹⁵ See *United States v. Glassgow*, 682 F.3d 1107, 1111 (8th Cir. 2012).

²¹⁶ See *United States v. Thornburg*, 760 F. App’x 937, 946 (11th Cir. 2019) (per curiam) (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”); *United States v. Reingold*, 731 F.3d 204, 226 (2d Cir. 2013) (enhancement proper because it did not reflect a harm already fully accounted for in the base offense: a “computer is not essential to the act of distributing child pornography”).

²¹⁷ USSG §2G2.2(b)(7).

- (b) At least 150 images, but less than 300 there is a 3-level increase;
- (c) At least 300 images, but less than 600 there is a 4-level increase; and
- (d) 600 or more images, there is a 5-level increase.

“Image” means any visual depiction that constitutes child pornography.²¹⁸ Each photograph, picture, computer or computer-generated image, or similar visual depiction is considered one image.²¹⁹ Both duplicate hard copy images and duplicate digital images are to be counted separately.²²⁰ If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.²²¹ Each video, video-clip, movie, or similar recording is considered to have 75 images.²²² If the recording is substantially longer than five minutes, an upward departure may be warranted.²²³ An attempt to obtain pornographic videos is sufficient to support this enhancement.²²⁴ Possession of additional images not distributed may not be relevant conduct to a distribution conviction.²²⁵

3. Cross Reference

Section 2G2.2(c)(1) states that §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) 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 or transmitting a visual depiction of such conduct, and if the resulting offense level is

²¹⁸ USSG §2G2.2, comment. (n.6(A)).

²¹⁹ USSG §2G2.2, comment. (n.6(B)(i)); *see also* United States v. Price, 711 F.3d 455, 459–60 (4th Cir. 2013) (court did not err by counting each individual duplicate picture as one image); United States v. Sampson, 606 F.3d 505, 509–10 (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).

²²⁰ *See* United States v. McNerney, 636 F.3d 772, 778–80 (6th Cir. 2011); United States v. Ardolf, 683 F.3d 894, 901–02 (8th Cir. 2012).

²²¹ USSG §2G2.2, comment. (n.6(B)(i)).

²²² USSG §2G2.2, comment. (n.6(B)(ii)).

²²³ *Id.*

²²⁴ *See* United States v. Gnavi, 474 F.3d 532, 536 (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).

²²⁵ *See* United States v. Teuschler, 689 F.3d 397, 399 (5th Cir. 2012) (possession of non-distributed images did not occur in preparation for, during, or in an attempt to avoid detection of the offense).

greater than the one resulting from this guideline.²²⁶ The cross reference should be applied broadly.²²⁷

Most disputes under this subsection deal with what constitutes relevant conduct.²²⁸ The cross reference may apply where a defendant strategically places a camera to record a minor in a state of undress.²²⁹

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.²³⁰ An upward departure also may be warranted if subsection (b)(5) does apply, but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.²³¹

G. SECTION 2G2.3 (SELLING OR BUYING OF CHILDREN FOR USE IN THE PRODUCTION OF PORNOGRAPHY)

Section 2G2.3 covers offenses violating 18 U.S.C. § 2251A.²³² The base offense level for this guideline is 38.²³³ Note that the mandatory minimum sentence for a defendant convicted under § 2251A is 30 years in prison.²³⁴

²²⁶ USSG §2G2.2(c)(1).

²²⁷ USSG §2G2.2, comment. (n.7(A)).

²²⁸ See, e.g., *United States v. Bauer*, 626 F.3d 1004, 1008–09 (8th Cir. 2010) (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”).

²²⁹ See, e.g., *United States v. Richard*, 901 F.3d 514, 517 (5th Cir. 2018) (citing *United States v. McCall*, 833 F.3d 560 (5th Cir. 2016)).

²³⁰ USSG §2G2.2, comment. (n.9).

²³¹ *Id.*

²³² USSG App. A.

²³³ USSG §2G2.3(a).

²³⁴ 18 U.S.C. § 2251A(a).

H. SECTION 2G2.5 (RECORDKEEPING OFFENSES INVOLVING THE PRODUCTION OF SEXUALLY EXPLICIT MATERIALS; FAILURE TO PROVIDE REQUIRED MARKS IN COMMERCIAL ELECTRONIC EMAIL)

Section 2G2.5 covers offenses violating 15 U.S.C. § 7704(d) and 18 U.S.C. §§ 2257 and 2257A.²³⁵

1. Base Offense Level

The base offense level under this guideline is 6 and there are no specific offense characteristics.²³⁶

2. Cross References

Section 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) 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.²³⁷ Section 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) applies if the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor.²³⁸

I. SECTION 2G2.6 (CHILD EXPLOITATION ENTERPRISES)

Section §2G2.6 covers offenses violating 18 U.S.C. § 2252A(g).²³⁹ 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).²⁴⁰

²³⁵ USSG App. A.

²³⁶ USSG §2G2.5(a).

²³⁷ USSG §2G2.5(b)(1).

²³⁸ USSG §2G2.5(b)(2).

²³⁹ USSG App. A.

²⁴⁰ USSG §2G2.6, comment. (n.1).

1. Base Offense Level

This guideline has a base offense level of 35.²⁴¹

2. Specific Offense Characteristics

a. Age of the victim

Section 2G2.6(b)(1) provides for a 4-level increase if the victim had not reached the age of 12.²⁴² It provides for a 2-level increase if the victim had reached 12 but had not reached the age of 16.²⁴³

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

Section 2G2.6(b)(2) provides for a 2-level increase if the defendant was a parent, relative, or legal guardian of a minor victim or if a minor victim was otherwise in the custody, care, or supervisory control of the defendant.²⁴⁴ This subsection is to be applied broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently.²⁴⁵ 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.²⁴⁶

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

Section 2G2.6(b)(3) provides for a 2-level increase if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b).²⁴⁷ 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 minor, a drug, intoxicant, or other similar substance and substantially impairing the ability of the minor to appraise or control conduct.²⁴⁸

²⁴¹ USSG §2G2.6(a).

²⁴² USSG §2G2.6(b)(1)(A).

²⁴³ USSG §2G2.6(b)(1)(B).

²⁴⁴ USSG §2G2.6(b)(2).

²⁴⁵ USSG §2G2.6 comment. (n.2(A)).

²⁴⁶ USSG §2G2.6 comment. (n.2(B)).

²⁴⁷ USSG §2G2.6(b)(3).

²⁴⁸ USSG §2G2.6, comment. (n.3).

d. Use of a computer

Section 2G2.6(b)(4) provides for a 2-level increase if a computer or interactive computer service was used in furtherance of the offense.²⁴⁹

IV. CHAPTER THREE: ADJUSTMENTS

Except as noted above, each of the offenses covered by Chapter Two, Part G is subject to the adjustments in Chapter Three. The most commonly used adjustments for these offenses are described below.

A. SECTION 3A1.1(b) (VULNERABLE VICTIM)

Section 3A1.1(b)(1) provides for a 2-level increase if the defendant knew or should have known that a victim of the offense was a vulnerable victim.²⁵⁰ 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 increased another 2 levels.²⁵¹

For purposes of this subsection, “vulnerable victim” means a person who is a victim of the offense of conviction and of 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.²⁵²

²⁴⁹ USSG §2G2.6(b)(4).

²⁵⁰ USSG §3A1.1(b)(1).

²⁵¹ USSG §3A1.1(b)(2).

²⁵² USSG §3A1.1, comment. (n.2); *see* *United States v. Arsenault*, 833 F.3d 24, 31 (1st Cir. 2016) (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, 83 (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. Starr*, 533 F.3d 985, 1002 (8th Cir. 2008) (affirming 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. Holt*, 510 F.3d 1007, 1012 (9th Cir. 2007) (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. Newsom*, 402 F.3d 780, 785–86 (7th Cir. 2005) (while every sleeping victim is not “vulnerable,” 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 application of the adjustment where the defendant “molested and exposed his three-year-old granddaughter to child pornography by abusing his special position as her grandfather.”).

The enhancement can apply to defendants convicted of receipt, distribution, or possession of child pornography offenses.²⁵³

A §3A1.1(b) adjustment does not apply, however, if the factor that makes the person vulnerable is already incorporated into the offense guideline.²⁵⁴ 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 age.²⁵⁵

B. SECTION 3B1.1 (AGGRAVATING ROLE)

Section 3B1.1 provides for a 4-level increase 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 increase if the defendant was a manager or supervisor and the criminal activity involved five or more participants or was otherwise extensive; and a 2-level increase if the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than that described above.²⁵⁶ A “participant” includes a person who is criminally responsible for the commission of the offense, even if not convicted.²⁵⁷ 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.²⁵⁸

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

Section 3B1.3 provides for a 2-level increase if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated commission or concealment of the crime.²⁵⁹ However, this adjustment does not apply in

²⁵³ 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 materials to suffer”) (quotations omitted).

²⁵⁴ USSG §3A1.1, comment. (n.2).

²⁵⁵ *Id. Compare* *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), *with* *United States v. Scott*, 529 F.3d 1290, 1300–03 (10th Cir. 2008) (victim’s petite and fragile stature, naiveté, and poor communication skills made her unusually vulnerable for a 13-year-old girl).

²⁵⁶ USSG §3B1.1(a)–(c).

²⁵⁷ USSG §3B1.1, comment. (n.1).

²⁵⁸ USSG §2G1.1, comment. (n.3); *see also* *United States v. Tavares*, 705 F.3d 4, 30 (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).

²⁵⁹ USSG §3B1.3.

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.²⁶⁰

V. CHAPTERS FOUR AND FIVE: REPEAT OFFENDERS, PROBATION, SUPERVISED RELEASE, RESTITUTION, AND DEPARTURES

A. SECTION 4B1.5 (REPEAT AND DANGEROUS SEX OFFENDER AGAINST MINORS)

Section 4B1.5—which establishes enhanced offense levels and criminal history calculations—applies to offenders whose offense of conviction is a “covered sex crime” committed against a minor and who present a continuing danger to the public.²⁶¹ 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 of title 18, chapter 110 (Sexual Exploitation and Other Abuse of Children) of title 18 (not including trafficking in, receipt of, or possession of, child pornography or a recordkeeping offense), and chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18 (not including transmitting information about a minor or filing a factual statement about an alien individual), or 18 U.S.C. § 1591.²⁶²

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).²⁶³

1. Base Offense Level and Criminal History Category

a. At least one previous sex offense conviction

Section 4B1.5(a)’s enhanced offense level and criminal history calculation apply 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.²⁶⁴ “Sex offense conviction” means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B) (concerning repeat offenders) if the offense was perpetrated against a minor. The term does not include trafficking in, receipt of, or possession of, child pornography.²⁶⁵

²⁶⁰ See USSG §§2G1.3, comment. (n.2(B)), 2G2.1, comment. (n.5(B)), 2G2.6, comment. (n.2(B)).

²⁶¹ USSG §4B1.5.

²⁶² USSG §4B1.5, comment. (n.2).

²⁶³ USSG §4B1.5, comment. (n.1).

²⁶⁴ USSG §4B1.5(a).

²⁶⁵ USSG §4B1.5, comment. (n.3(A)(ii)).

As is the case with the parallel recidivist guideline (§4B1.5) and statutory recidivist provisions (18 U.S.C. § 2251(e)), courts “employ a ‘formal categorical approach’ to determine whether a prior conviction qualifies as a defined sex offense conviction that requires the court to ‘look only to the fact of conviction and the statutory definition of the prior offense.’”²⁶⁶

The Eighth 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 guideline.²⁶⁷ The Eighth and Ninth Circuits have held that a juvenile-delinquency adjudication is not a prior “sex offense conviction” as defined by 18 U.S.C. § 2252(b) and §4B1.5(a).²⁶⁸

i. Base offense level

If subsection (a) applies, the offense level is first determined under Chapters Two and Three of the applicable guidelines.²⁶⁹ Next, this offense level is compared to the offense level table in §4B1.5(a)(1)(B)—which establishes different levels based on the offense statutory maximum—decreased by any applicable adjustment from §3E1.1 (Acceptance of Responsibility).²⁷⁰ 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.

²⁶⁶ United States v. Pierson, 544 F.3d 933, 942 (8th Cir. 2008) (quoting Shepard v. United States, 544 U.S. 13, 17 (2005)); see also United States v. Reinhart, 893 F.3d 606, 619–21 (9th Cir. 2018) (affirming inapplicability of ten-year minimum penalty enhancement under 18 U.S.C. § 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. Dahl, 833 F.3d 345, 353–57 (3d Cir. 2016) (vacating and remanding where state offense that prohibited touching genitalia through clothing was broader than “sexual act,” which requires penetration or actual skin-to-skin contact); United States v. Simard, 731 F.3d 156, 160 (2d Cir. 2013) (per curiam) (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 18 U.S.C. § 2252 (b)(2)); United States v. Gardner, 649 F.3d 437, 442–44 (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).

²⁶⁷ United States v. Leach, 491 F.3d 858, 866 (8th Cir. 2007) (§4B1.5(a) “only requires that the defendant have been found guilty of the offense”); cf. United States v. Ary, 892 F.3d 787, 789–90 (5th Cir. 2018) (Texas deferred adjudication qualifies as prior conviction for purposes of enhancement under section 2252(b)(1)).

²⁶⁸ See United States v. Gauld, 865 F.3d 1030, 1035 (8th Cir. 2017) (en banc) (Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications and because 18 U.S.C. § 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, 1037–38 (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).

²⁶⁹ See USSG §4B1.5(a)(1)(A).

²⁷⁰ See USSG §4B1.5(a)(1)(B).

§§ 2247(a) or 2426(a)) that applies to that covered sex crime because of the defendant's prior criminal record.²⁷¹ 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.²⁷²

ii. Criminal history category

The criminal history category is first determined under Chapter Four, Part A.²⁷³ Next, this criminal history category is compared to Criminal History Category V, and the greater criminal history category should apply.²⁷⁴

iii. Double counting

Defendants have raised double-counting concerns with the application of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) and §4B1.5. In *United States v. Cramer*, the defendant pled guilty to transporting a minor with intent to engage in criminal sexual activity, and the court applied upward departures under both §4A1.3 and §4B1.5.²⁷⁵ The Eighth Circuit held that applying both sections 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.²⁷⁶ Section §4B1.5(a) requires that the defendant have at least one prior sex offense conviction, whereas §4A1.3 accounts for evidence of prior sex offense conduct that did not result in a sex-offense conviction.²⁷⁷ 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.²⁷⁸

b. Pattern of activity involving prohibited sexual conduct

Section 4B1.5(b)'s enhanced offense level and criminal history calculation apply 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.²⁷⁹ "Prohibited sexual conduct" means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), the production of child pornography,

²⁷¹ USSG §4B1.5, comment. (n.3(A)(i)).

²⁷² USSG §4B1.5, comment. (n.3(B)).

²⁷³ See USSG §4B1.5(a)(2)(A).

²⁷⁴ See USSG §4B1.5(a)(2)(B).

²⁷⁵ 414 F.3d 983, 985 (8th Cir. 2005).

²⁷⁶ *Id.* at 986–88.

²⁷⁷ *Id.* at 987.

²⁷⁸ *Id.* at 988.

²⁷⁹ See USSG §4B1.5(b).

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.²⁸⁰

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.²⁸¹ 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 resulted.²⁸²

A previous conviction is not required for an enhancement under §4B1.5(b).²⁸³ A conviction for attempted production of child pornography is considered “prohibited sexual conduct” for purposes of §4B1.5(b).²⁸⁴ Courts have held that unadjudicated conduct that occurred while the defendant was a juvenile can be a predicate under this subsection.²⁸⁵

i. Base offense level

If subsection (b) applies, the base offense level is first determined under Chapters Two and Three and five levels are added to become the new offense level.²⁸⁶ 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).²⁸⁷

ii. Criminal history category

The criminal history category determined under Chapter Four, Part A is the criminal history category applicable for the offense.²⁸⁸

²⁸⁰ USSG §4B1.5, comment. (n.4(A)).

²⁸¹ USSG §4B1.5, comment. (n.4(B)(i)). Repeated conduct with a single minor can qualify as a pattern of activity for the purposes of this enhancement. *See, e.g.,* United States v. Isaac, 987 F.3d 980, 994 (11th Cir. Feb. 5, 2021) (defendant produced child pornography of the same victim on two separate occasions, which is a pattern under §4B1.5(b)(1)); 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).”).

²⁸² *See* USSG §4B1.5, comment. (n.4(B)(ii)).

²⁸³ *Id.*

²⁸⁴ *See* United States v. Morgan, 842 F.3d 1070, 1075 (8th Cir. 2016).

²⁸⁵ *See* United States v. Phillips, 431 F.3d 86, 90–93 (2d Cir. 2005) (court may consider conduct that occurred when defendant was a juvenile).

²⁸⁶ *See* USSG §4B1.5(b)(1).

²⁸⁷ *Id.*

²⁸⁸ *See* USSG §4B1.5(b)(2).

iii. 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.²⁸⁹ Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5.²⁹⁰

c. Additional Considerations

If §4B1.1 (Career Offender) applies to the defendant, then §4B1.5 is inapplicable.²⁹¹ The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline,²⁹² and treatment and monitoring should be considered as special conditions of any term of probation or supervised release.²⁹³ Repeat sex offenders under §4B1.5 are ineligible for a downward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).²⁹⁴

B. SECTION 5B1.3 (CONDITIONS OF PROBATION)

Section §5B1.3 sets out mandatory, discretionary, standard, and special conditions of probation, many of which apply to sex offenses.

²⁸⁹ See USSG §4B1.5(b)(1).

²⁹⁰ See *United States v. Seibert*, 971 F.3d 396, 401 (3d Cir. 2020) (affirming the application of both §2G2.2(b)(5) [pattern of activity involving the sexual abuse or exploitation of a minor] and §4B1.5(b)(1) as each provision accounts for different conduct); *United States v. Babcock*, 924 F.3d 1180, 1196–97 (11th Cir. 2019) (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, 625–27 (11th Cir. 2010) (application of the enhancements under both §2G2.2(b)(5) and §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) (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 exploit[ing] different minors, while the § 4B1.5(b) enhancement punished him for exploiting those minors on multiple occasions.’”) (citation omitted); *United States v. Peck*, 496 F.3d 885, 890–91 (8th Cir. 2007) (same); *United States v. Schmeilski*, 408 F.3d 917, 919–20 (7th Cir. 2005) (same); *United States v. Von Loh*, 417 F.3d 710, 714–15 (7th Cir. 2005) (no impermissible double counting where the district court did not group the counts and imposed enhancements under §3D1.4 and §4B1.5).

²⁹¹ See USSG §4B1.5(a), (b).

²⁹² USSG §4B1.5, comment. (n.5(A))

²⁹³ USSG §4B1.5, comment. (n.5(B)).

²⁹⁴ See USSG §4A1.3(b)(2)(B).

1. Section 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)).”²⁹⁵

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

The guidelines allow courts to impose other conditions of probation if the conditions are “reasonably related to”: (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) 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; (C) the need for the sentence imposed to afford adequate deterrence; (D) the need to protect the public from further crimes by the defendant; and (E) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.²⁹⁶ Such conditions can involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a).²⁹⁷

3. Section 5B1.3(d) (“Special” Conditions (Policy Statement))

Section 5B1.3(d)(7) sets forth “special” conditions of probation that are recommended for offenders convicted of sex offenses.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰ 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 property, papers, or electronic devices upon reasonable suspicion concerning a violation of probation or unlawful conduct.³⁰¹

²⁹⁵ USSG §5B1.3(a)(9).

²⁹⁶ USSG §5B1.3(b).

²⁹⁷ *Id.*

²⁹⁸ *See* USSG §5B1.3(d)(7).

²⁹⁹ USSG §5B1.3(d)(7)(A).

³⁰⁰ USSG §5B1.3(d)(7)(B).

³⁰¹ USSG §5B1.3(d)(7)(C).

C. SECTION 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.³⁰²

D. SECTION 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.³⁰³ The statutory maximum term of supervised release is recommended if the offense is a sex offense.³⁰⁴

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 (Sexual Exploitation and Other Abuse of Children) 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.³⁰⁵

Additionally, section 3583(k) of title 18 states that, if a defendant required to register under the Sex Offender Registration and Notification Act (“SORNA”) commits a criminal offense under, among others, chapter 109A (Sexual Abuse) 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.³⁰⁶ 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.³⁰⁷ 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 (rather than by a jury beyond a reasonable doubt), finding

³⁰² See USSG §5D1.1(a).

³⁰³ See USSG §5D1.2(b)(2).

³⁰⁴ USSG §5D1.2(b)(2) (Policy Statement). *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, 1004–07 (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).

³⁰⁵ See 18 U.S.C. § 3583(k).

³⁰⁶ *Id.*

³⁰⁷ 139 S. Ct. 2369, 2385–86 (2019).

that these constitutional principles apply in the supervised release context.³⁰⁸ 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.”³⁰⁹ Justice Breyer’s concurrence, as the narrowest point of agreement, is controlling.³¹⁰ Both the plurality and the concurrence left open the possibility of a remedy, rejecting the Tenth Circuit’s conclusion below that the last two sentences of the provision must be struck as “unconstitutional and unenforceable.”³¹¹

E. SECTION 5D1.3 (CONDITIONS OF SUPERVISED RELEASE)

Pursuant to 18 U.S.C. § 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.³¹² Further, the conditions must involve no greater deprivation of liberty than is reasonably necessary to meet these goals, pursuant to section 3583(d)(2). Conditions that affect constitutional rights will likely be valid if “narrowly tailored and . . . directly related to deterring [the offender] and protecting the public.”³¹³

Section §5D1.3 sets out mandatory, discretionary, standard, and special conditions of supervised release, many of which apply to sex offenses.

1. Section 5D1.3(a) (Mandatory Conditions)

Section 5D1.3(a)(7) provides that “[i]f the defendant is required to register under [SORNA], the defendant shall comply with the requirements of that Act (18 U.S.C. § 3583(d)).”³¹⁴

If a defendant required to register under the SORNA commits a criminal offense under, among others, chapter 109A (Sexual Abuse) of title 18, the court is to (1) revoke a

³⁰⁸ *Id.* at 2373–85 (plurality opinion).

³⁰⁹ *Id.* at 2385–86 (Breyer, J., concurring).

³¹⁰ *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.”).

³¹¹ 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, 1064 (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).

³¹² *See* 18 U.S.C. § 3583(d)(1).

³¹³ *See id.* § 3583(d)(2).

³¹⁴ USSG §5D1.3(a)(7).

term of supervised release, and (2) require the defendant to serve a term of imprisonment for not less than five years.³¹⁵

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

The guidelines allow courts to impose other conditions of supervised release if the conditions are “reasonably related to”: (A) the defendant’s history and characteristics and the nature and circumstances of his offense; (B) the need for adequate deterrence of future criminal conduct; (C) the need to protect the public from further crimes by the defendant; and (D) the effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.³¹⁶

Such conditions also must 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.³¹⁷ 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.³¹⁸

Note that some courts have found that Rule 32 of the Federal Rules of Criminal Procedure 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.³¹⁹

3. Section 5D1.3(d)(7) (“Special” Conditions (Policy Statement))

Section 5D1.3(d)(7) lists “special” conditions of supervised release that are recommended for offenders convicted of sex offenses.³²⁰ Subsection (A) recommends a

³¹⁵ See 18 U.S.C. § 3583(k).

³¹⁶ USSG §5D1.3(b)(1).

³¹⁷ USSG §5D1.3(b)(2).

³¹⁸ *But see* United States v. Alvarado, 691 F.3d 592, 598 (5th Cir. 2012) (district court erred by automatically imposing lifetime term of supervised release without analysis of circumstances surrounding the crime).

³¹⁹ See, e.g., 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); 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.”).

³²⁰ See USSG §5D1.3(d)(7). See, e.g., 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

condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.³²¹ 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.³²² 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 property, papers, or electronic devices upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct.³²³

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.”³²⁴

Courts have upheld “other” and “special” conditions but also have struck conditions as overbroad or unreasonable even in light of district court’s significant discretion in imposing supervised release.³²⁵

a. Contact with minors

Special conditions barring contact with minors often are upheld, unless the minors are the defendant’s own children.³²⁶

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); *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.”); *United States v. Blinkinsop*, 606 F.3d 1110, 1122–23 (9th Cir. 2010) (special condition 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).

³²¹ USSG §5D1.3(d)(7)(A).

³²² USSG §5D1.3(d)(7)(B).

³²³ USSG §5D1.3(d)(7)(C).

³²⁴ *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002).

³²⁵ *See, e.g., United States v. Hamilton*, 986 F.3d 413, 419 (4th Cir. 2021) (special condition requiring that the defendant “must not work in any type of employment without the prior approval of the probation officer” was overbroad and lacking an appropriate nexus to “the nature and circumstances of the offense” (citing 18 U.S.C. § 3553(a)(1))).

³²⁶ *See, e.g., United States v. Wright*, 958 F.3d 693, 698 (8th Cir. 2020) (affirming the special condition prohibiting defendant from having unapproved contact with minors, including a requirement to seek prior approval for contact with his own children); *United States v. Maurer*, 639 F.3d 72, 85–86 (3d Cir. 2011) (special condition restricting contact with minors not overly broad for a conviction for possessing child

b. Sex offender treatment and physiological testing

The imposition of treatment requirements is not always upheld, with courts sometimes deeming the conditions an impermissible delegation of sentencing authority.³²⁷ Similarly problematic are conditions that seek to regulate adult relationships through supervision.³²⁸

i. Medication

Conditions mandating medications may be upheld in limited contexts.³²⁹

pornography when defendant's conduct included initiating sexual conversation with a purported minor on the Internet); *United States v. Levering*, 441 F.3d 566, 569–70 (8th Cir. 2006) (district court did not abuse its discretion by imposing a condition 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, 144–45 (1st Cir. 2006) (no abuse of 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, 194–95 (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, 1100–02 (9th Cir. 2012) (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).

³²⁷ *See, e.g.*, *United States v. Mercado*, 777 F.3d 532, 537–38 (1st Cir. 2015) (requirement that defendant participate in a sex offender treatment program reasonable in the context of SORNA); *United States v. Muhlenbruch*, 682 F.3d 1096, 1103 (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) (special condition 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) (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.").³²⁷ *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).

³²⁸ *See, e.g.*, *United States v. Rock*, 863 F.3d 827, 832 (D.C. Cir. 2017) (striking condition that defendant notify the probation office of "any significant romantic relationship" as unconstitutionally vague (citing *United States v. Reeves*, 591 F.3d 77, 81 (2d Cir. 2010))).

³²⁹ *See, e.g.*, *United States v. Siegel*, 753 F.3d 705, 713–14 (7th Cir. 2014) (finding condition that defendant take "any and all prescribed medication" was impermissibly vague and asking "why is a probation officer, rather than a physician or nurse or pharmacist, entrusted with directing which medications the defendant

ii. ABEL testing

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 sexual interest, is something upheld.³³⁰

c. Polygraph testing

Requiring the defendant to submit to random polygraph testing is upheld if it does not interfere with defendant’s Fifth Amendment rights.³³¹

d. Pornographic material

Conditions prohibiting the defendant from possessing or viewing pornographic material generally are upheld but sometimes are considered overbroad.³³²

must take?”); *United States v. Mike*, 632 F.3d 686, 699 (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); *United States v. Cope*, 527 F.3d 944, 953–56 (9th Cir. 2008) (a medication requirement condition is supportable when construed narrowly and when it does not include any medication that 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).

³³⁰ See, e.g., *Stoterau*, 524 F.3d at 1004–07 (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, 1243 (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 eight-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).

³³¹ See, e.g., *Stoterau*, 524 F.3d at 1004 (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.”); *United States v. Lee*, 315 F.3d 206, 212–14 (3d Cir. 2003) (no abuse of discretion where court imposed a condition requiring defendant to submit to random polygraph testing but not to answer incriminating questions). *But see* *United States v. Bahr*, 730 F.3d 963, 966–67 (9th Cir. 2013) (requiring polygraph with threat of revocation rises to compulsion that violates Fifth Amendment).

³³² 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, 135–36 (5th Cir. 2011) (condition restricting viewing any sexually stimulating or sexually oriented material was not overbroad where one video in defendant’s possession depicted a minor engaged in sexual activity with a male adult while a female adult held the child in place; presence of adults in the video permitted the conclusion that the defendant’s interest in sexually stimulating materials involving

e. Places with children

Conditions restricting defendants' frequenting and loitering in places where children are likely to be often are upheld.³³³

f. Employer notification

Conditions authorizing probation officers to discuss third-party risks with employers sometimes are upheld.³³⁴

g. Computer or internet access

Conditions that limit computer or internet access are not always upheld as courts recognize that current society relies heavily on technology-based communication for individual livelihoods.³³⁵

adults was "intertwined with his sexual interest in minors"); *United States v. Simmons*, 343 F.3d 72, 82–83 (2d Cir. 2003) (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 to the district court to support its imposition); *United States v. Cope*, 527 F.3d 944, 957–58 (9th Cir. 2008) (condition prohibiting the defendant from possessing "any materials . . . depicting and/or describing child pornography" is overbroad); *United States v. Cabot*, 325 F.3d 384, 386 (2d Cir. 2003) (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).

³³³ *See, e.g., United States v. MacMillen*, 544 F.3d 71, 74–76 (2d Cir. 2008) (condition prohibiting the defendant, who pled guilty to receipt of child pornography, from places where minor children congregate, such as parks, daycare centers, playgrounds, arcades, recreational facilities, 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, 620 (9th Cir. 2003) (same); *United States v. Ristine*, 335 F.3d 692, 696–97 (8th Cir. 2003) (same).

³³⁴ *See, e.g., MacMillen*, 544 F.3d at 77 (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, 698 (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 under §5F1.5 as set forth in *United States v. Souser*, 405 F.3d 1162, 1167 (10th Cir. 2005)).

³³⁵ *See, e.g., United States v. Trimble*, 969 F.3d 853, 857 (8th Cir. 2020) (per curiam) (restricting defendant's access to the internet, computers, and media storage devices is reasonably related to the sentencing factors and the Commission's pertinent policy statements); *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019) (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, 1048–50 (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, 831–32

F. SECTION 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. § 2259 for offenses that involve the sexual exploitation of children and child pornography. The Victim Assistance Act amends 18 U.S.C. § 2259 to modify procedures for determining the amount of mandatory restitution in child pornography cases.³³⁶ 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.³³⁷

As amended by the Victim Assistance Act, section 2259 requires a court sentencing a defendant convicted of “trafficking” child pornography—which is defined by reference to

(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, 287–88 (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, 867–68 (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, 399–01 (5th Cir. 2015) (per curiam) (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 18 U.S.C. § 3583(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, 1204–07 (10th Cir. 2001) (overturning a special condition that defendant, convicted of using the internet to receive child pornography, not possess a computer with internet access as both too narrow because it did not prohibit accessing the internet from public places, and too broad because it prevented the defendant from using the internet for legitimate reasons).

³³⁶ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115–299, 132 Stat 4383 (amending 18 U.S.C. § 2259 and adopting 18 U.S.C. § 2259A).

³³⁷ 18 U.S.C. § 2259(b)(2)(B). However, “a victim’s total aggregate recovery . . . shall not exceed the full amount of the victim’s demonstrated losses.” *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.*

statutory provisions to include advertisement, distribution, receipt, reproduction, and possession of child pornography³³⁸—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.³³⁹ 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.³⁴⁰

The Victim Assistance 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

³³⁸ “[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).

³³⁹ *Id.* § 2259(b). The Victim Assistance 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).

³⁴⁰ *Id.* § 2259(c)(2)(A)–(F).

“should order restitution in an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses.” The Court provided further guidance to district courts by enumerating several factors to consider in determining the amount of restitution.³⁴¹ *Paroline* initially proved difficult for lower courts to apply and could result in a victim receiving little restitution. The Victim Assistance Act codified *Paroline*’s multi-factor approach, while setting a restitution floor.³⁴² Following the Act, courts have continued to apply the *Paroline* analysis.³⁴³

G. SECTION 5F1.5 (OCCUPATIONAL RESTRICTIONS)

Section §5F1.5(a) authorizes a court to impose occupational restrictions in limited circumstances.³⁴⁴ These occupational restrictions can serve two purposes. First, they can prevent a defendant from taking a certain type of employment.³⁴⁵ For example, a sex offender may not be allowed to work around children.³⁴⁶ Second, a lesser restriction can limit the “terms” of a defendant’s employment.³⁴⁷ 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.

³⁴¹ 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 reasonably 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. at 460 (noting that there is no formula for applying these factors and that they are meant to be guideposts).

³⁴² *United States v. Monzel*, 930 F.3d 470, 476 n.1 (D.C. Cir. 2019) (“Congress has since amended Section 2259 to both codify *Paroline*’s basic approach and to set a restitution floor of \$3,000.”).

³⁴³ *See, e.g.*, *United States v. Berry*, No. 1:18-cr-00107-AA, 2020 WL 86194, at *5 (D. Or. Jan. 6, 2020) (analyzing each victim’s restitution request under *Paroline* and requiring a \$3,000 award for victims where the government did not prove the victims’ total losses in accordance with the Victim Assistance Act); *United States v. Rothenberg*, 923 F.3d 1309, 1333–40 (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); *Monzel*, 930 F.3d at 487 (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).

³⁴⁴ *See* USSG §5F1.5(a).

³⁴⁵ *Id.*

³⁴⁶ *See, e.g.*, *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).

³⁴⁷ *See* USSG §5F1.5(a).

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.³⁴⁸ In addition, 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.”³⁴⁹ Occupational restrictions must be supported by specific findings as to the relationship between the offense and the public protection necessity.³⁵⁰

H. SECTION 5K2.0 (GROUNDS FOR DEPARTURE (POLICY STATEMENT))

Pursuant to §5K2.0(b), the only grounds for a downward departure for “child crimes and sexual offenses” are those specifically enumerated in Part K.³⁵¹ The definition of “child crimes and sexual offenses” includes, among others, offenses under 18 U.S.C. § 1591, and chapters 71 (Obscenity), 109A (Sexual Abuse), 110 (Sexual Exploitation and Other Abuse of Children), and 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18.³⁵²

I. SECTION 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 (Obscenity), 109A, 110 (Sexual Exploitation and Other Abuse of Children), or 117 (among others), of title 18, (1) the defendant’s age may be a reason to depart downward only if and to the extent permitted by §5H1.1 (Age (Policy Statement)), (2) an extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)), and (3) drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.³⁵³

³⁴⁸ *Id.*; *see also* United States v. Hamilton, 986 F.3d 413, 420 (4th Cir. 2021) (“the all-encompassing restriction here lacks an appropriate nexus to ‘the nature and circumstances of the offense.’” (quoting 18 U.S.C. § 3553(a)(1))).

³⁴⁹ USSG §5F1.5(b); *see* United States v. Reardon, 349 F.3d 608, 622 (9th Cir. 2003) (rejecting defendant’s argument that special conditions on his use of his computer and the internet were occupational restrictions because they did not prohibit him from working in his profession as an art director or set decorator).

³⁵⁰ *See* United States v. Dunn, 777 F.3d 1171, 1179 (10th Cir. 2015) (“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.”).

³⁵¹ *See* USSG §5K2.0, comment. (n.4(B)).

³⁵² USSG §5K2.0, comment. (n.4(A)).

³⁵³ USSG §5K2.22.