

Primer



Sexual Abuse and Failure to Register Offenses



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 the application of the criminal sexual abuse and sex offender registration guidelines, §§2A3.1 (Criminal Sexual Abuse; Attempt), 2A3.2 (Criminal Sexual Abuse of a Minor; Attempt), 2A3.3 (Criminal Sexual Abuse of a Ward; Attempt), 2A3.4 (Abusive Sexual Contact; Attempt), 2A3.5 (Failure to Register as a Sex Offender), and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender). 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. CRIMINAL SEXUAL ABUSE AND SEX OFFENDER REGISTRATION STATUTES

The most commonly used sexual abuse and failure to register statutes are discussed below.

A. ASSAULT WITH INTENT TO COMMIT SEXUAL ABUSE

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

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

2. 18 U.S.C. § 113(a)(2) (Assault With Intent To Commit Any Felony)

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

B. SEXUAL ABUSE (CHAPTER 109A OF TITLE 18)

1. 18 U.S.C. § 2241 (Aggravated Sexual Abuse)

Section 2241(a) prohibits knowingly causing another person to engage in a sexual act by using force against that person or by threatening or placing that person in fear that

¹ 18 U.S.C. § 113(a)(1).

² *Id.* § 113(a)(2).

any person will be subjected to death, serious bodily injury, or kidnapping.³ The element of “force” in section 2241(a) is satisfied by showing the use of “such physical force as is sufficient to overcome, restrain, or injure a person.”⁴ A codefendant’s use of force during an aggravated sexual assault that prevents the victim from escaping constitutes “force” sufficient to enhance the defendant’s sentence.⁵

Subsection (a) includes attempts and has a maximum penalty of life imprisonment.⁶ A defendant is criminally liable for attempted aggravated sexual abuse where the circumstances evince an intent to cause another person to engage in a sexual act by use of force and the defendant has taken a substantial step to do so. For example, in *United States v. Crowley*, the victim testified that the defendant “placed his hand on her vagina and tried to insert his finger, but was prevented by her physical resistance” before he stopped altogether.⁷ The Second Circuit held that the evidence was sufficient for attempted aggravated sexual abuse because “all of the sexual contact that [the defendant] did accomplish . . . was committed, according to the victim’s testimony, over her express verbal objection and against her physical resistance, by means of physical force.”⁸

Section 2241(b) prohibits knowingly (1) rendering another person unconscious and thereby engaging in a sexual act with that other person, or (2) administering to another person a drug or intoxicant by force or threat of force, or without the knowledge or permission of that person, and thereby (A) substantially impairing the ability of that other person to appraise or control conduct, and (B) engaging in a sexual act with that other person. Subsection (b) includes attempts and has a maximum penalty of life in prison.⁹

³ *Id.* § 2241(a).

⁴ *United States v. Shaw*, 891 F.3d 441, 448–49 (3d Cir. 2008) (quoting H.R. Rep. No. 99–594 at 14 n.54a (1986)); *see, e.g., United States v. Cates*, 973 F.3d 742, 745 (7th Cir. 2020) (“Aggravated sexual abuse can be reached when a person ‘knowingly causes another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.’”) (quoting *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995)); *United States v. Montgomery*, 966 F.3d 335, 338 (5th Cir. 2020) (aggravated sexual abuse under section 2241 requires “knowingly caus[ing] another person to engage in a sexual act” using force or “by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempt[ing] to do so.”); *United States v. Shaw*, 891 F.3d 441, 448–50 (3d Cir. 2018) (aggravated sexual abuse requires the jury to “find that the defendant (1) actually used force against the victim or (2) that he made a specific kind of threat—i.e., that he threatened or placed the victim in fear of death, serious bodily injury, or kidnapping.”); *see also United States v. Fool Bear*, 903 F.3d 704, 710–11 (8th Cir. 2018) (“[t]o render the distinction between sexual abuse and aggravated sexual abuse meaningful, Section 2241(a)(1) requires a showing of actual force.”).

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

⁶ 18 U.S.C. § 2241(a).

⁷ 318 F.3d 401, 409 (2d Cir. 2003).

⁸ *Id.*

⁹ 18 U.S.C. § 2241(b).

Section 2241(c) prohibits (1) crossing state lines with the intent to engage in a sexual act with a person under the age of 12, (2) knowingly engaging in a sexual act with a person under the age of 12, or (3) knowingly engaging in a sexual act under circumstances described in sections 2241(a) or 2241(b) with a person who is at least 12 and is not yet 16, and who is at least four years younger than the person engaging in the act. Subsection (c) includes attempts, has a mandatory minimum penalty of 30 years in prison, and a maximum penalty of life imprisonment. If the defendant was previously convicted of an offense under subsection (c) or an analogous state offense, the mandatory minimum penalty is life in prison.¹⁰ A prior state conviction qualifies as a predicate offense for the mandatory life sentence under section 2241(c) only if the state offense requires all of the elements required by section 2241(c).¹¹ In a prosecution under section 2241(c), the government does not have to prove that the defendant knew the other person engaging in the sexual act was under the age of 12.¹²

2. 18 U.S.C. § 2242 (Sexual Abuse)

Section 2242 prohibits knowingly (1) causing another person to engage in a sexual act by threatening or placing that person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping), or (2) engaging in a sexual act with another person if that person is (A) not capable of appraising the nature of the conduct, or (B) physically incapable of declining participation in or communicating unwillingness to engage in that sexual act. Courts have held that the defendant must have knowledge that the victim is incapacitated.¹³ Section 2242 includes attempts and has a maximum penalty of life imprisonment.¹⁴

¹⁰ *Id.* § 2241(c).

¹¹ *See* United States v. Jones, 748 F.3d 64, 73–74 (1st Cir. 2014) (state offense for aggravated sexual assault with a victim under the age of 13 did not qualify for the mandatory life sentence because the state offense did not “require proof that the defendant acted with an intent to degrade, humiliate, arouse, etc.,” as required by the definition of a “sexual act” in section 2246(2)(C)).

¹² 18 U.S.C. § 2241(d).

¹³ *See* United States v. Bruguier, 735 F.3d 754, 759–60 (8th Cir. 2013) (en banc) (“knowingly” requires not only that the defendant knowingly engaged in a sexual act, but that the defendant also knew the victim was incapable of appraising the nature of the conduct or was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act); United States v. A.S., 939 F.3d 1063, 1074 (10th Cir. 2019) (noting parties’ agreement of statutory requirement to prove defendant’s knowledge of incapacity); United States v. Price, 980 F.3d 1211, 1229 (9th Cir. 2019) (Gilman, J., concurring) (same); *cf.* United States v. Speights, 712 F. App’x. 423, 426 n.1 (5th Cir. 2018) (per curiam) (assuming but not deciding that knowledge is a required element).

¹⁴ 18 U.S.C. § 2242(2).

3. 18 U.S.C. § 2243 (Sexual Abuse of a Minor or Ward)

Section 2243(a) prohibits knowingly engaging in a sexual act with another person who (1) has attained 12 but not 16 years of age, and (2) is at least four years younger than the person so engaging. Section 2243(a) includes attempts and has a maximum penalty of 15 years in prison.¹⁵

In a prosecution under section 2243(a), it is a defense that the defendant reasonably believed that the other person had reached age 16.¹⁶ It is also a defense that the persons engaging in the sexual act were at that time married to each other.¹⁷ However, the government does not have to prove that the defendant knew (1) the age of the other person engaging in the act, or (2) that the requisite age difference existed between the people involved in the act.¹⁸

Section 2243(b) prohibits knowingly engaging in a sexual act with another person who is (1) in official detention, and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging. Section 2243(b) includes attempts and has a maximum penalty of 15 years in prison.¹⁹

4. 18 U.S.C. § 2244 (Abusive Sexual Contact)

Section 2244(a) prohibits knowingly engaging in or causing sexual contact with or by another person if doing so would violate 18 U.S.C. §§ 2241(a), (b), or (c), 2242, or 2243(a) or (b), had the sexual contact been a sexual act. If the contact would have violated section 2241(a) or (b), the maximum penalty is ten years in prison.²⁰ If the contact would have violated section 2241(c), the maximum penalty is life in prison.²¹ If the contact would have violated section 2242, the maximum penalty is three years in prison.²² If the contact would have violated section 2243(a) or (b), the maximum penalty is two years in prison.²³

¹⁵ *Id.* § 2243(a).

¹⁶ *Id.* § 2243(c)(1). The defendant must establish the defense by a preponderance of the evidence. *Id.*

¹⁷ *Id.* § 2243(c)(2). The defendant must establish the defense by a preponderance of the evidence. *Id.*

¹⁸ *Id.* § 2243(d).

¹⁹ *Id.* § 2243(b).

²⁰ *Id.* § 2244(a)(1).

²¹ *Id.* § 2244(a)(5).

²² *Id.* § 2244(a)(2).

²³ *Id.* § 2244(a)(3), (4).

Section 2244(b) prohibits knowingly engaging in sexual contact with another person without that other person's permission. This subsection has a maximum penalty of two years in prison.²⁴

Subsection 2244(c) doubles the statutory maximum in cases where the sexual contact that violates section 2244 (except section 2244(a)(5)) is with an individual who is younger than 12. Section 2244 does not include attempts.²⁵

5. 18 U.S.C. § 2245 (Offenses Resulting in Death)

Section 2245 provides that anyone who murders an individual while in the course of committing any of the offenses listed above shall be sentenced to death, or imprisoned for any term of years or for life.²⁶

6. 18 U.S.C. § 2246 (Definitions)

The definitions relevant to sexual abuse offenses (chapter 109A of title 18) are enumerated below as they appear in the statute:

- (2) the term "sexual act" means:
 - (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
 - (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
 - (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
 - (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;²⁷
- (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast,

²⁴ *Id.* § 2244(b).

²⁵ *Id.* § 2244.

²⁶ *Id.* § 2245(a). In addition to the offenses listed above, section 2245 also includes offenses committed under 18 U.S.C. §§ 1591, 2251, 2251A, 2260, 2421, 2422, 2423, and 2425. *Id.*

²⁷ *Id.* § 2246(2).

inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;²⁸

- (4) the term “serious bodily injury” means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.²⁹

7. 18 U.S.C. § 2247 (Repeat Offenders)

Where a defendant commits a sexual abuse offense (chapter 109A of title 18) after a prior sex offense conviction, section 2247 increases the statutory maximum to twice the term otherwise provided (unless 18 U.S.C. § 3559(e) (Mandatory life imprisonment for repeated sex offenses against children) applies).³⁰

The term “prior sex offense conviction” means a conviction for an offense: (1) under chapters 109A, 110, or 117 of title 18, or 18 U.S.C. § 1591; or (2) under state law for an offense consisting of conduct that would have been an offense under chapters 109A, 110, or 117 of title 18 if the conduct had occurred within the special maritime and territorial jurisdiction of the United States.³¹

8. 18 U.S.C. § 2248 (Mandatory Restitution)

Section 2248 mandates an order of restitution for any sexual abuse offense under chapter 109A.³² The defendant shall pay the full amount of the victim’s losses, which include costs incurred by the victim for: (1) medical services relating to physical, psychiatric, or psychological care; (2) physical and occupational therapy or rehabilitation; (3) necessary transportation, temporary housing, and child care expenses; (4) lost income; (5) attorney fees, plus any costs incurred in obtaining a civil protection order; and (6) any other losses suffered by the victim as a proximate result of the offense.³³

²⁸ *Id.* § 2246(3).

²⁹ *Id.* § 2246(4).

³⁰ *Id.* § 2247(a).

³¹ *Id.* § 2426(b)(1).

³² *Id.* § 2248(a), (b)(4).

³³ *Id.* § 2248(b)(3).

C. OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER (CHAPTERS 109B (SEX OFFENDER AND CRIMES AGAINST CHILDREN REGISTRY) AND 110 OF TITLE 18 (SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN))

1. 18 U.S.C. § 2250 (Failure to Register)

Section 2250(a) prohibits knowingly failing to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA) if the defendant (1) is required to register under the Act, or (2) is a sex offender as defined for purposes of the Act. Subsection (a) has a maximum penalty of ten years in prison.³⁴

Section 2250(b) prohibits knowingly failing to provide information required by SORNA relating to intended travel in foreign commerce and engaging in the intended travel in foreign commerce. Section 2250(b) includes attempts and has a maximum penalty of ten years in prison.³⁵

It is an affirmative defense to these offenses that: (1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist.³⁶

In addition to penalties described above, section 2250(d)(1) provides for a mandatory minimum of five years and a maximum penalty of thirty years in prison for any individual described in section 2250(a) or 2250(b) who commits a crime of violence. This penalty runs consecutively to the punishment provided for the violation described in subsection (a) or (b).³⁷

2. 18 U.S.C. § 2260A (Penalties for Registered Sex Offenders)

Section 2260A provides for a term of imprisonment of ten years for anyone who is required by federal or other law to register as a sex offender and who commits a felony offense involving a minor in violation of 18 U.S.C. §§ 2241–2245, among other statutes. The ten-year sentence is consecutive and in addition to the sentence imposed for the underlying offense.³⁸

³⁴ *Id.* § 2250(a)(1)–(3).

³⁵ *Id.* § 2250(b)(1)–(3).

³⁶ *Id.* § 2250(c)(1)–(3).

³⁷ *Id.* § 2250(d)(1)–(2).

³⁸ *Id.* § 2260A.

D. VENUE FOR PROSECUTION OF 18 U.S.C. § 2250

SORNA requires a defendant to register and update registration in the place the offender is *currently* residing, employed, or a student, and does not require a sex offender to update registration in a state to reflect that he is moving out of the state.³⁹ Venue, however, may be proper in any district in which the offense was begun, continued, or completed.⁴⁰

E. “CONVICTION” WITHIN THE MEANING OF 18 U.S.C. § 2250

SORNA does not define the term “conviction,” but at 34 U.S.C. § 20912(b)⁴¹ Congress expressly granted the Attorney General authority to issue guidelines and regulations to interpret and implement SORNA. According to the Attorney General’s SMART guidelines⁴² “an adult sex offender is ‘convicted’ for SORNA purposes if the sex offender remains subject to penal consequences based on the conviction, however it may be styled.”⁴³ A *nolo contendere* plea, for example, in which adjudication is withheld, can be a prior conviction under SORNA, leading to the requirement to register as a sex offender.⁴⁴

F. CATEGORICAL APPROACH: “SEX OFFENSE” UNDER 18 U.S.C. § 2250

Failing to properly register under SORNA is a criminal offense only if the defendant’s prior conviction was for a “sex offense” within the meaning of SORNA. To make this determination, courts generally apply the categorical or modified categorical approach, depending on whether the statute is divisible, and compare the statute at issue to the

³⁹ *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016).

⁴⁰ *See, e.g.*, *United States v. Seward*, 967 F.3d 57, 61, 67 (1st Cir. 2020) (“[W]e hold [] the nature of the offense reveals that its locus delicti encompasses the departure jurisdiction”); *United States v. Lewallyn*, 737 F. App’x 471, 475 (11th Cir. 2018) (per curiam) (“Venue was proper in Georgia, where [the defendant] began the offense that he completed by failing to register in North Carolina.”); *United States v. Holcombe*, 883 F.3d 12, 15–16 (2d Cir. 2018) (“[T]ravel in interstate commerce is an essential element of a SORNA offense . . . [which] begins where the interstate journey begins[.]”); *United States v. Lewis*, 768 F.3d 1086, 1092–94 (10th Cir. 2014) (same); *United States v. Howell*, 552 F.3d 709, 717–18 (8th Cir. 2009) (same). *Contra* *United States v. Haslage*, 853 F.3d 331, 335 (7th Cir. 2017) (conduct that is part of the failure to register offense cannot occur in the district where the offender begins his move because interstate travel is neither a distinct crime nor an element of the crime).

⁴¹ Effective September 1, 2017, SORNA was moved to 34 U.S.C. § 20901 *et seq.*, without substantive change.

⁴² The National Guidelines for Sex Offender Registration and Notification, 73 FR 38,030 (July 2, 2008) (“SMART” guidelines).

⁴³ 73 FR at 38,050.

⁴⁴ *See* *United States v. Bridges*, 741 F.3d 464, 469 (4th Cir. 2014) (finding defendant’s two-year probation term—a sentence that attached immediately and withheld only formal adjudication of guilt—to be a penal consequence, and thus a conviction under SORNA).

definitions in 34 U.S.C. § 20911.⁴⁵ However, in considering how to determine if a prior offense constitutes “conduct that by its nature is a sex offense against a minor” under SORNA⁴⁶, courts have employed a non-categorical, circumstance-specific approach⁴⁷ to assess the victim’s age, focusing on the facts, not the elements, of the prior conviction.⁴⁸

G. EXCEPTION FOR DEFINITION OF “SEX OFFENSE” UNDER 34 U.S.C. § 20911

SORNA includes a statutory exception to its definition of a “sex offense” for offenses “involving consensual sexual conduct.”⁴⁹ Courts have found the statutory exception inapplicable when more than 48 months separate the defendant’s and victim’s dates of birth.⁵⁰

⁴⁵ See, e.g., *United States v. Vineyard*, 945 F.3d 1164, 1170 (11th Cir. 2019) (“Congress intended courts to apply a categorical approach to determine whether a conviction qualifies as a sex offense under the sexual contact provision of SORNA.”); *United States v. Barcus*, 892 F.3d 228, 232 (6th Cir. 2018) (“we join other circuits in applying the categorical approach”); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015) (same); see generally *Taylor v. United States*, 495 U.S. 575 (1990) (categorical approach); *Descamps v. United States*, 570 U.S. 254 (2013) (modified categorical approach). For a detailed description of the issues and case law concerning the categorical approach, see U.S. SENT’G COMM’N, PRIMER ON CATEGORICAL APPROACH (2021), <https://www.ussc.gov/guidelines/primers/categorical-approach>.

⁴⁶ 34 U.S.C. § 20911(7)(I).

⁴⁷ See *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009).

⁴⁸ See *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016) (courts should employ a circumstance-specific approach, not a categorical approach, in determining whether conduct is a sex offense against a minor under SORNA); *United States v. Price*, 777 F.3d 700, 708–09 (4th Cir. 2015) (applying circumstance-specific approach and collecting cases for same); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) (“based on the language, structure, and broad purpose of SORNA—we conclude that Congress contemplated a non-categorical approach to the age-differential determination in the § 16911(5)(C) exception”); *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008) (“the best reading of the statutory structure and language is that Congress contemplated a non-categorical approach as to the age of the victim in determining whether a particular conviction is for a “specified offense against a minor”). Courts use the same approaches when determining the correct sex offender tier under SORNA. See *infra* Section III.F.

⁴⁹ 34 U.S.C. § 20911(5)(C) (“An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.”).

⁵⁰ See *United States v. Black*, 773 F.3d 1113, 1117 (10th Cir. 2014) (“It simply cannot be reasonably argued that Congress intended substantive criminal liability to attach to a random . . . age analysis, rather than a straight-forward calculation as to the number of months.”); *United States v. Gonzalez-Medina*, 757 F.3d 425, 431 (5th Cir. 2014) (“Application of the categorical approach in this context would cause statutes without such an age differential as an element to fall outside of SORNA’s definition of ‘sex offense.’ We do not believe that Congress intended the age-differential language in the (5)(C) exception to restrict the reach of SORNA in this manner.”); *United States v. Brown*, 740 F.3d 145, 149–50 (3d Cir. 2014) (same); see also *United States v. Douitt*, 926 F.3d 244, 247 (6th Cir. 2019) (vacating and remanding where district court compared current ages of defendant and victim, without considering birthdates in the context of the §2G2.2(b)(5) enhancement for a pattern of activity involving the sexual abuse of a minor, which also requires a four-year age differential).

H. CATEGORICAL APPROACH: OFFENDER TIERS UNDER 34 U.S.C. § 20911

SORNA classifies offenders into one of three tiers depending on the severity of the offense for which the offender is required to register under 34 U.S.C. § 20911. A recurring issue in SORNA cases is the application of the categorical approach to determine the appropriate tier classification for a prior state conviction. The categorical approach requires the court to decide whether the prior conviction is “comparable to or more severe than” the generic federal offense.⁵¹ When the prior offense statute is broader than the federal offense, the prior conviction is not a categorical match and may not be used as predicate for an enhancement under SORNA’s tier categorization.⁵²

I. “VICTIM” UNDER 18 U.S.C. § 2260A

Courts generally have held that section 2260A’s requirement that a new offense committed by a registered sex offender “involve[] a minor” is satisfied where a law enforcement officer poses as a minor.⁵³

III. CRIMINAL SEXUAL ABUSE AND SEX OFFENDER REGISTRATION GUIDELINES

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 that is the basis of conviction).⁵⁴ Sections 2A3.1 (Criminal Sexual Abuse; Attempt), 2A3.2 (Criminal Sexual Abuse of a Minor;

⁵¹ United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1133 (9th Cir. 2014) (“Under that approach, a sentencing court must begin by comparing the statutory definition of the prior offense with the elements of the ‘generic’ federal offense specified as a sentencing predicate The prior conviction may operate as a predicate if it is defined more narrowly than, or has the same elements as, the generic federal crime If, however, the statute defining the prior offense ‘sweeps more broadly than the generic crime,’ the prior offense cannot serve as a statutory predicate.”).

⁵² *Id.* at 1134.

⁵³ See United States v. Fortner, 943 F.3d 1007, 1110–11 (6th Cir. 2019) (explaining that section 2260A “incorporates attempt offenses involving minors” and that the defendant’s “attempt involved a minor because the intended victim of the offense was a child”); United States v. Jones, 748 F.3d 64, 72 (1st Cir. 2014) (affirming the defendant’s conviction where the “minor” with whom the defendant had communicated online was a postal inspector); United States v. Slaughter, 708 F.3d 1208, 1214–16 (11th Cir. 2013) (finding defendant’s attempted enticement offense was a proper predicate offense even though the “minor” was a law enforcement officer). *But see* United States v. Dahl, 81 F. Supp. 3d 405, 408–09 (E.D. Pa. 2015) (rejecting *Slaughter’s* “flawed logic” and concluding instead that the text and history section 2260A make clear that the statute requires an actual minor be involved).

⁵⁴ U.S. SENT’G COMM’N, *Guidelines Manual*, §1B1.2 (Nov. 2018) [hereinafter USSG] (explaining how to determine the applicable guidelines).

Attempt), 2A3.3 (Criminal Sexual Abuse of a Ward; Attempt), 2A3.4 (Abusive Sexual Contact; Attempt), 2A3.5 (Failure to Register as a Sex Offender), and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) are the primary guidelines for sexual abuse and sex offender registration offenses.

B. SECTION 2A3.1 (CRIMINAL SEXUAL ABUSE; ATTEMPT TO COMMIT CRIMINAL SEXUAL ABUSE)

Where the offense of conviction is 18 U.S.C. §§ 2241 or 2242, §2A3.1 is the applicable guideline. Section 2A3.1 also applies where the offense of conviction is 18 U.S.C. § 113(a)(1) (Assault with intent to commit murder or a violation of section 2241 or 2242).

1. Subsection (a)—Base Offense Level

Section 2A3.1 provides for an offense level of 38 for a conviction under 18 U.S.C. § 2241(c);⁵⁵ otherwise the base offense level is 30.

2. Subsection (b)—Specific Offense Characteristics

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

Section 2A3.1(b)(1) provides for a 4-level increase if the offense involved aggravated sexual abuse as described in 18 U.S.C. § 2241(a) or (b).⁵⁶ Section 2241(a) and (b) prohibit several different forms of aggravated sexual abuse conduct, including the use or threat of force, threats of death, serious bodily injury, kidnapping, and sexual activity after drugging or intoxicating another person.⁵⁷

The enhancement applies even if the conduct that forms the basis of the enhancement is the same conduct that justified application of §2A3.1 via a cross reference from another guideline.⁵⁸ The enhancement does not apply, however, if the conduct that

⁵⁵ See 18 U.S.C. § 2241(c) (prohibiting aggravated sexual abuse with children).

⁵⁶ USSG §2A3.1(b)(1); see also 18 U.S.C. § 2241(a), (b) (prohibiting aggravated sexual abuse by force or threat, or other means).

⁵⁷ See, e.g., *United States v. Pujayasa*, 703 F. App'x 817, 820 (11th Cir. 2017) (per curiam) (describing prohibited conduct); *United States v. Lockhart*, 844 F.3d 501, 517 (5th Cir. 2016) (“Section 2A3.1(b)(1) provides for a four-level enhancement ‘[i]f the offense involved conduct described in 18 U.S.C. § 2241(a) or (b).’” (quoting USSG §2A3.1(b)(1))); *United States v. Wardlow*, 830 F.3d 817, 823 (8th Cir. 2016) (same); cf. *United States v. Blue*, 255 F.3d 609, 613 (8th Cir. 2001) (per curiam) (application of §2A3.1(b)(1) improper because the “size difference [between the defendant and victim] alone cannot establish use of force”).

⁵⁸ See *United States v. Flanders*, 752 F.3d 1317, 1340 (11th Cir. 2014) (no double counting in application of the cross reference at §2G1.1(c)(1) because offense involved conduct constituting sexual abuse warranting cross reference and the offense involved conduct constituting a more severe subset of aggravated sexual abuse under subsection 2241(b)(2) warranting application of §2A3.1(b)(1)).

forms the basis of conviction under 18 U.S.C. § 2241(c), which criminalizes sexual acts with children, is conduct described in 18 U.S.C. § 2241(a) or (b).⁵⁹ This prohibition recognizes that section 2241(c) offenses already result in the increased base offense level of 38, thus avoiding double counting.

b. Age of the victim

Section 2A3.1(b)(2) provides for a 4-level increase if the victim was under the age of 12, or a 2-level enhancement if the victim was at least 12 but under the age of 16. This age enhancement only applies for a base offense level of 30 under §2A3.1(a)(2).⁶⁰

c. Custody, care, or supervisory control

Section 2A3.1(b)(3) provides for a 2-level increase if the victim was in the custody, care, or supervisory control of the defendant or if the victim was held in the custody of a correctional facility. This enhancement is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently.⁶¹ The enhancement also applies to adult victims.⁶² Where the enhancement at §2A3.1(b)(3) applies, a court may not apply the enhancement under §3B1.1 for abuse of position of trust or special skill.⁶³

d. Bodily injury

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

⁵⁹ USSG §2A3.1, comment. (n.2(B)).

⁶⁰ USSG §2A3.1(b)(2).

⁶¹ USSG §2A3.1, comment. (n.3(A)) (“teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement.”); *United States v. Swank*, 676 F.3d 919, 923–24 (9th Cir. 2012) (enhancement applicable when the minor had been staying in the defendant’s home for two days, the defendant was the victim’s uncle, and he shared in the child-rearing of the children in the house, including the minor victim, and in preparing food for all the children); *United States v. Kenyon*, 481 F.3d 1054, 1072 (8th Cir. 2007) (“The enhancement may apply to anyone with ‘even peripheral or transitory custody,’ and there is no requirement that the defendant be entrusted with the child for a great length of time.” (citation omitted)).

⁶² See *United States v. Simmons*, 470 F.3d 1115, 1128–30 (5th Cir. 2006) (in the police-custody context, §2A3.1(b)(3) “punishes abuse of power over an individual in the officer’s physical and legal control” and “recognizes the particular harm inflicted when an individual entrusted to the care and supervision of an officer of the state is unlawfully abused by [her] supposed caretaker”).

⁶³ USSG §2A3.1, comment. (n.3(B)).

i. Permanent or life-threatening injury

The Commentary to §2A3.1 incorporates §1B1.1’s definitions of various terms.⁶⁴ “Permanent or life-threatening bodily injury” means an “injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent.”⁶⁵

ii. Serious bodily injury

A “serious bodily injury” is defined as an “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”⁶⁶ A “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242 or any similar offense under state law.⁶⁷ For purposes of §2A3.1 “serious bodily injury” means conduct *other than* the criminal sexual abuse, which is already has been taken into account in the base offense level under subsection (a).⁶⁸ However, courts have held that injuries resulting from criminal sexual abuse may support the enhancement.⁶⁹

e. Abduction

Section 2A3.1(b)(5) provides for a 4-level increase if the victim was abducted. “Abducted” means that “a victim was forced to accompany an offender to a different location.”⁷⁰ The requirement of a “different location” is flexible and fact specific.⁷¹ Actual or

⁶⁴ USSG §2A3.1, comment. (n.1).

⁶⁵ USSG §1B1.1, comment. (n.1(K)).

⁶⁶ USSG §1B1.1, comment. (n.1(M)).

⁶⁷ *Id.*

⁶⁸ USSG §2A3.1, comment. (n.1).

⁶⁹ See *United States v. Jim*, 786 F.3d 802, 814–15 (10th Cir. 2015) (“The two-level serious-bodily-injury enhancement can still apply to a sexual abuse offender, but it must be based on the fact that the victim’s injuries meet the first definition of ‘serious bodily injury’: ‘injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.’ ”); *United States v. Long Turkey*, 342 F.3d 856, 858 (8th Cir. 2003) (“This does not mean that any injuries resulting from an episode of criminal sexual abuse are excluded—only that the act of sexual abuse is insufficient by itself to support a § 2A3.1(b)(4)(B) enhancement.”).

⁷⁰ USSG §1B1.1, comment. (n.1(A)).

⁷¹ See *United States v. Strong*, 826 F.3d 1109, 1117 (8th Cir. 2016) (upholding abduction enhancement where victim was taken from neighbor’s residence back to defendant’s residence after an initial escape); *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (upholding enhancement based on district court’s finding that defendant “intentionally and forcibly moved [victims] from their post in the pharmacy [section]

threatened force is not required for the enhancement; the abduction can be committed by trickery, gentle urging, and flattery as well as by outright coercion.⁷² It is not double counting to apply both the abduction enhancement and the physical restraint adjustment at §3A1.3 where they are based on different facts.⁷³

f. Knowing misrepresentation of identity/Use of a computer

Section 2A3.1(b)(6) provides for a 2-level increase if the offense involved either (A) the knowing misrepresentation of a participant's identity, or (B) the use of a computer or interactive computer service to persuade, induce, entice, or coerce a minor to engage in sexual conduct, or to facilitate transportation or travel by a minor or a participant to engage in prohibited sexual conduct.⁷⁴ These provisions are intended to apply only to misrepresentations made directly to, or the use of a computer or interactive computer service to communicate directly with, a minor or to a person who exercises custody, care, or supervisory control of the minor.⁷⁵

The Commentary to §2A3.1 defines a "minor" as an individual who had not attained the age of 18, including fictitious individuals created by law enforcement officers, or undercover law enforcement officers representing they have not reached the age of 18.⁷⁶ Knowing misrepresentation of a participant's identity includes misrepresentation of a person's name, age, occupation, gender, or status *with the intent to* (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) to facilitate transportation or travel by a minor or a participant, to engage in prohibited sexual conduct.

at some distance across the [store area] to the front door," for the purpose of "facilitat[ing] [his] escape and his commission of the [offense]"); *United States v. Hefferon*, 314 F.3d 211, 225 (5th Cir. 2002) (enhancement supported where the defendant moved the victim from one location on the property, where he first sexually assaulted the victim, to another location on the property, where he sexually assaulted the victim again).

⁷² See *United States v. Beith*, 407 F.3d 881, 893 (7th Cir. 2005) (recognizing that "[i]nveigling, or imposing one's will through 'trickery' or 'gentle urging' or flattery, is a proper basis for applying the [abduction] enhancement," but finding "no tenable connection between the manner in which [the defendant] pursued [the victim] in molesting her and his ultimate act of driving her to Nevada that could justify a finding of abduction"), *abrogated on other grounds by* *United States v. Vizcarra*, 668 F.3d 516, 521 (7th Cir. 2012); *United States v. Romero*, 189 F.3d 576, 590 (7th Cir. 1999) ("inveigling" sufficient); see also *United States v. Martinez-Hernandez*, 593 F.3d 761, 762 (8th Cir. 2010) ("[T]he abduction adjustment requires only that force necessary to overcome the particular victim's will To 'force' means to compel 'by physical, moral, or intellectual means,' or 'to impose' or 'to win one's way.'" (citation omitted).

⁷³ See *Strong*, 826 F.3d at 1116–17 (guidelines do not intend the abduction and physical restraint enhancements to be mutually exclusive, and "the PSR shows that each enhancement was applied to separate conduct").

⁷⁴ USSG §2A3.1(b)(6), comment. (n.4(A)).

⁷⁵ USSG §2A3.1, comment. (n.4(B)).

⁷⁶ USSG §2A3.1, comment. (n.1).

The use of a computer screen name, without such intent, would not be a sufficient basis for the enhancement.⁷⁷

3. Cross References

Section 2A3.1(c)(1) provides a cross reference to §2A1.1 (First Degree Murder) if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111, and if the resulting offense level is greater than that determined under §2A3.1.⁷⁸

Section 2A3.1(c)(2) provides a cross reference to §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the criminal sexual abuse offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. The term “sexually explicit conduct” has the meaning provided in 18 U.S.C. § 2256(2).⁷⁹ The cross reference applies if the resulting offense level is greater than that determined under §2A3.1.⁸⁰ This cross reference should be construed broadly.⁸¹

Section 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) has a cross reference to §2A3.1, which applies where the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), or 18 U.S.C. § 2242. It requires particularized findings as to the criminal sexual abuse or attempted sexual abuse.⁸²

4. Special Instruction

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

⁷⁷ USSG §2A3.1, comment. (n.4(A)).

⁷⁸ USSG §2A3.1(c)(1).

⁷⁹ USSG §2A3.1, comment. (n.5(B)).

⁸⁰ USSG §2A3.1(c)(2).

⁸¹ USSG §2A3.1, comment. (n.5(A)).

⁸² See *United States v. Angle*, 234 F.3d 326, 345 (7th Cir. 2000) (guidelines expressly provide for application of §2A3.1 through cross reference and thus the district court may punish a defendant for relevant conduct notwithstanding whether the defendant was actually convicted of a particular offense).

5. Upward Departure Provision

An upward departure may be warranted if a victim was sexually abused by more than one participant.⁸³ A “participant” is someone criminally responsible for the commission of the offense, even if he has not been convicted.⁸⁴

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

Section 2A3.2 is the applicable guideline when the offense of conviction is 18 U.S.C. §§ 113(a)(2) (Assault with intent to commit any felony, except murder or a violation of section 2241 or 2242) or 2243(a) (Sexual abuse of a minor). A “minor” is defined as: (A) an individual who had not attained the age of 16; (B) an individual who a law enforcement officer represented to a participant (i) had not attained the age of 16 years (including a fictitious individual) and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.⁸⁵

1. Subsection (a)—Base Offense Level

Section 2A3.2 has a base offense level of 18.

2. Subsection (b)—Specific Offense Characteristics

a. Custody, care, or supervisory control

Section 2A3.2(b)(1) provides for a 4-level increase if the minor was in the custody, care, or supervisory control of the defendant. This subsection is intended to have a broad application and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently.⁸⁶ Where subsection (b)(1) applies, subsection (b)(2) and §3B1.3 (Abuse of Position of Trust or Use of Special Skill) do not apply.⁸⁷

⁸³ USSG §2A3.1, comment. (n.6) (referencing §5K2.8 (Extreme Conduct)).

⁸⁴ USSG §2A3.1, comment. (n.1) (citing USSG §3B1.1, comment. (n.1) (Aggravating Role)).

⁸⁵ USSG §2A3.2, comment. (n.1); *see also* United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008) (where a minor’s mother created a fictitious internet profile targeting the defendant before turning the information over to the FBI, the court stated, in *dicta*, that “the logic of the guideline definition embraces an impersonator who is not an officer”).

⁸⁶ USSG §2A3.2, comment. (n.2(A)).

⁸⁷ USSG §2A3.2, comment. (n.2(B)).

b. Knowing misrepresentation of identity or undue influence

Section 2A3.2(b)(2) provides that if (A) subsection (b)(1) does not apply, and (B) either (i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, a 4-level increase applies.⁸⁸

i. Knowing misrepresentation of identity

The enhancement for knowing misrepresentation of identity applies only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. The enhancement would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor. The misrepresentation to which the enhancement may apply includes misrepresentation of a participant's name, age, occupation, gender, or status *with the intent to persuade, induce, entice, or coerce* a minor to engage in prohibited sexual conduct. The use of a computer screen name, without such intent, would not be a sufficient basis for application of this enhancement.⁸⁹

ii. Undue influence

Courts should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.⁹⁰ The undue influence enhancement is inapplicable to cases in which the only "minor" involved in the offense is an undercover law enforcement officer.⁹¹ Where the participant is at least ten years older than the minor, there is a rebuttable presumption that subsection (b)(2)(B)(ii) applies because some degree of undue influence can be presumed based on the substantial age difference between the participant and the minor.⁹²

⁸⁸ USSG §2A3.2(b)(2).

⁸⁹ USSG §2A3.2, comment. (n.3(A)).

⁹⁰ USSG §2A3.2, comment. (n.3(B)).

⁹¹ *Id.*

⁹² *Id.*; *see also, e.g.*, United States v. Harrison, 535 F. App'x 829, 830 (11th Cir. 2013) (per curiam) ("Under both guidelines [§§2G1.3(b)(2)(B) and 2A3.2(b)(2)(B)] there is a rebuttable presumption that a participant unduly influenced the minor when the participant is at least ten years older than the victim."); United States v. Kupetsky, 501 F. App'x 214, 217 (3d Cir. 2012) ("Even accepting as true [defendant's] questionable assertion that his mental limitations serve to rebut the presumption of undue influence triggered by the 17-year age difference between him and his victim, the District Court still had ample grounds upon which to conclude that the [defendant] 'compromised the voluntariness of [the victim's] behavior.'").

c. Use of a computer

Section 2A3.2(b)(3) provides for a 2-level increase if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. This subsection is intended to apply only to communications directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.⁹³

3. Cross Reference

Section 2A3.2(c)(1) provides a cross reference to §2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. §§ 2241 or 2242). Additionally, if the victim was younger than 12 years, §2A3.1 applies, regardless of the “consent” of the minor.⁹⁴

4. Upward Departure Provision

In cases in which the offense level determined under §2A3.2 substantially understates the seriousness of the offense, an upward departure may be warranted.⁹⁵

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

Section 2A3.3 is the applicable guideline for offenses in violation of 18 U.S.C. §§ 113(a)(2) or 2243(b). The term “ward” means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.⁹⁶ The enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) should not apply for

⁹³ USSG §2A3.2, comment. (n.4); *see also* United States v. Shub, 210 F. App’x 547, 548 (8th Cir. 2006) (per curiam) (affirming computer enhancement where “[t]he undisputed facts in this case demonstrate that Mr. Shub used a computer to persuade, induce, entice, or coerce the child to have sex with him.”).

⁹⁴ USSG §2A3.2, comment. (backg’d.).

⁹⁵ USSG §2A3.2, comment. (n.6) (listing as examples instances in which the defendant committed the act in furtherance of a commercial scheme such as pandering, transporting persons for prostitution, or the production of pornography); *see also, e.g.*, United States v. Reis, 369 F.3d 143, 152 (2d Cir. 2004) (“When deciding the magnitude of the departure, a court should consider: (1) ‘the dangerousness of the defendant’s conduct’; (2) ‘the extent to which death or serious injury was intended or knowingly risked’; and (3) ‘the extent to which the offense level for the offense of conviction . . . already reflects the risk of personal injury.’ ”); United States v. Rice, 61 F. App’x 14, 21 (4th Cir. 2003) (per curiam) (“we affirm the district court’s two-level upward departure with respect to both [] use of the Internet and the age disparity between [the defendant] and his intended victim”).

⁹⁶ USSG §2A3.3, comment. (n.1).

defendants sentenced under §2A3.3 because an abuse of position of trust is assumed in all cases and is built into the base offense level.⁹⁷

1. Subsection (a)—Base Offense Level

The base offense level for §2A3.3 is 14.

2. Subsection (b)—Specific Offense Characteristics

a. Knowing misrepresentation of identity

Section 2A3.3(b)(1) provides for a 2-level increase if the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. The term “minor” in §2A3.3 means: (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.⁹⁸ The enhancement applies to misrepresentations of a participant’s name, age, occupation, gender, or status, made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor, with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct.⁹⁹ The use of a misleading computer screen name, without the requisite intent, would not be a sufficient basis for application of the enhancement.¹⁰⁰

b. Use of a computer

Section 2A3.3(b)(2) provides for a 2-level increase if a computer or interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. This subsection is intended to apply only to the use of a computer or interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.¹⁰¹

⁹⁷ USSG §2A3.3, comment. (n.4).

⁹⁸ USSG §2A3.3, comment. (n.1).

⁹⁹ USSG §2A3.3, comment. (n.2).

¹⁰⁰ *Id.*

¹⁰¹ USSG §2A3.3, comment. (n.3).

E. SECTION 2A3.4 (ABUSIVE SEXUAL CONTACT OR ATTEMPT TO COMMIT ABUSIVE SEXUAL CONTACT)

Section 2A3.4 is the guideline for offenses involving abusive sexual contact in violation of 18 U.S.C. §§ 113(a)(2) or 2244.¹⁰²

1. Subsection (a)—Base Offense Level

Section 2A3.4 has three possible base offense levels.¹⁰³

If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), the base offense level is 20. For the purposes of §2A3.4(a)(1), the conduct described in section 2241(a) or (b) is engaging in, or causing sexual contact with, or by another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.¹⁰⁴

If the offense involved conduct described in 18 U.S.C. § 2242, the base offense level is 16. For purposes of §2A3.4(a)(2), the conduct described in § 2242 is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than fear of death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.¹⁰⁵

Otherwise, the base offense level is 12.

2. Subsection (b)—Specific Offense Characteristics

a. Victim under 12

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

¹⁰² USSG §2A3.4, comment. (backg'd). Section 2A3.4 addresses abusive sexual contact not amounting to criminal sexual abuse, which is the subject of §§2A3.1–3.3.

¹⁰³ USSG §2A3.4(a)(1)–(3).

¹⁰⁴ USSG §2A3.4, comment. (n.2).

¹⁰⁵ USSG §2A3.4, comment. (n.3).

b. Victim between 12 and 15

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

c. Custody, care, or supervisory control

Section 2A3.4(b)(3) provides for a 2-level increase if the victim was in the custody, care, or supervisory control of the defendant. This subsection is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. In assessing the applicability of this enhancement, courts should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.¹⁰⁶ If the enhancement under subsection (b)(3) applies, the adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply.¹⁰⁷

d. Knowing misrepresentation of identity

Section 2A3.4(b)(4) provides for a 2-level increase if the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. The term "minor" in §2A3.4 means: (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.¹⁰⁸ The enhancement applies to misrepresentations of a participant's name, age, occupation, gender, or status, made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor, made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. The enhancement would not apply to a misrepresentation made by a participant to an airline representative while making travel arrangements for the minor. In addition, 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 is insufficient for the application of this enhancement.¹⁰⁹

¹⁰⁶ USSG §2A3.4, comment. (n.4(A)).

¹⁰⁷ USSG §2A3.4, comment. (n.4(B)).

¹⁰⁸ USSG §2A3.4, comment. (n.1).

¹⁰⁹ USSG §2A3.4, comment. (n.5).

e. Use of a computer

Section 2A3.4(b)(5) provides for a 2-level increase if a computer or interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. This subsection applies only to use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.¹¹⁰

3. Cross References

Section 2A3.4 has two cross references. Section 2A3.4(c)(1) provides for the application of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. §§ 2241 or 2242. Because “involved” invokes relevant concept principles, the cross reference will apply even where a defendant is acquitted of sexual abuse charges.¹¹¹

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

F. SECTION 2A3.5 (FAILURE TO REGISTER AS A SEX OFFENDER)

Section 2A3.5 is the guideline for failure to register offenses under 18 U.S.C. § 2250, except as to those defendants convicted under the recidivist provision in section 2250(d), who are sentenced pursuant to §2A3.6 (“Aggravated Offenses Relating to Registration as a Sex Offender”).

1. Subsection (a)—Base Offense Level

Section 2A3.5 provides three alternative base offense levels, depending on the tier level for the defendant established in 34 U.S.C. § 20911. Section 20911 defines three tiers of sex offenders based on the seriousness of their predicate offense. The seriousness of the failure to register offense is thus based on the predicate sex offense and classified into one

¹¹⁰ USSG §2A3.4, comment. (n.6).

¹¹¹ See *United States v. Castillo*, 981 F.3d 94, 107 (1st Cir. 2020) (noting the interaction of the cross reference to §2A3.1, but finding error in the district court’s factual basis for applying the cross reference); *United States v. No Neck*, 472 F.3d 1048, 1055 (8th Cir. 2007) (affirming the district court’s cross reference to §2A3.1, even when the defendant was acquitted of criminal sexual abuse charges).

of three tiers (Tier I, II, or III), with Tier III being the most egregious.¹¹² The term “sex offense” is defined in section 20911(5).¹¹³

Section 2A3.5 provides the following base offense levels:

- (1) 16, if the defendant was required to register as a Tier III offender;
- (2) 14, if the defendant was required to register as a Tier II offender; or
- (3) 12, if the defendant was required to register as a Tier I offender.

Courts typically use a categorical approach to determine the defendant’s SORNA tier classification.¹¹⁴ However, courts use a “circumstance-specific approach” when considering a victim’s age for purpose of SORNA’s tier classifications.¹¹⁵

2. Subsection (b)—Specific Offense Characteristics

a. Offense while in failure to register status

Section 2A3.5(b)(1) provides three alternative enhancements if the defendant committed an offense while in a failure to register status. It provides for the greatest of:

¹¹² 34 U.S.C. § 20911; *see also* United States v. Morales, 801 F.3d 1, 3–4 (1st Cir. 2015) (“SORNA classifies sex offenders into three tiers with each category corresponding to specific, enumerated crimes or to offenses incorporated from other federal sexual abuse laws. The most egregious offenders are grouped into Tier III Meanwhile, Tier II of the statute captures, *inter alia*, sexual offenses against victims aged 13 through 16 if the perpetrator is four or more years older than the victim The final category, Tier I, serves as a catch-all provision for convicted sex offenders not otherwise grouped into Tier II or Tier III.”).

¹¹³ 34 U.S.C. § 20911(5).

¹¹⁴ *See, e.g.*, United States v. Escalante, 933 F.3d 395, 398, 405 (5th Cir. 2019) (“We employ the categorical approach when classifying the SORNA tier of a defendant’s state law sex offense.”); United States v. Cammerto, 859 F.3d 311, 314 (4th Cir. 2017) (“In determining whether the underlying sex offense is comparable to or more severe than the enumerated federal offense, we use the categorical approach, under which we compare the elements of the underlying offense of conviction—not the underlying facts—with the elements of the federal offense.”); United States v. Morales, 801 F.3d 1, 6 (1st Cir. 2015) (“Therefore, our analysis will be limited solely to the elements of the relevant statutes.”); United States v. White, 782 F.3d 1118, 1135 (10th Cir. 2015) (“[W]e conclude Congress intended courts to apply a categorical approach to sex offender tier classifications designated by reference to a specific federal criminal statute, but to employ a circumstance-specific comparison for the limited purpose of determining the victim’s age.”); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1138 (9th Cir. 2014) (defendant’s prior conviction cannot serve as a predicate for classification as a Tier III sex offender because prior offense penalizes broader class of behavior).

¹¹⁵ *Escalante*, 933 F.3d at 400–02 (“[I]n alignment with every other circuit to consider the question, we hold that when classifying sex offender tier levels . . . the text of SORNA requires a circumstance-specific inquiry into the victim’s age to determine whether the victim was, in fact, a minor at the time of the offense.”); United States v. Walker, 931 F.3d 576, 579–80 (7th Cir. 2019) (joining the Fourth and Tenth Circuits “in concluding that SORNA’s text compels a hybrid approach.”); United States v. Berry, 814 F.3d 192, 197 (4th Cir. 2016) (SORNA requires that courts look to the actual age of the victim in the prior offense, but otherwise it must use the categorical approach to decide if a prior state offense fits into SORNA’s requirements).

(A) a 6-level increase for a sex offense against someone other than a minor; (B) a 6-level increase for a felony offense against a minor not otherwise covered by (C); or (C) an 8-level increase for a sex offense against a minor.¹¹⁶ A “sex offense” under §2A3.5 has the meaning given that term in 34 U.S.C. § 20911(5) and includes any crime with an element of a sexual act or sexual contact with another.¹¹⁷

b. Mitigation for failing to register

Section 2A3.5(b)(2) provides for a 3-level *decrease* in offense level if the defendant voluntarily corrected the failure to register or tried to register but was prevented from registering by uncontrollable circumstances to which the defendant did not contribute.¹¹⁸ For the decrease to apply, the defendant’s attempt to register or to correct the failure to register must have occurred before he knew or reasonably should have known that a jurisdiction had detected his failure to register.¹¹⁹ The attempt to correct the failure to register must be genuine.¹²⁰ Note that the reduction in offense level envisioned in §2A3.5(b)(2) does not apply if the defendant committed an offense subject to enhancement under §2A3.5(b)(1).¹²¹

G. SECTION 2A3.6 (AGGRAVATED OFFENSES RELATING TO REGISTRATION AS A SEX OFFENDER)

As noted above, 18 U.S.C. § 2250(d) provides penalties for the commission of a crime of violence by an individual required to register under SORNA, while 18 U.S.C. § 2260A provides penalties for the commission of a felony offense involving a minor by an

¹¹⁶ USSG §2A3.5(b)(1); *see also* United States v. Lott, 750 F.3d 214, 220–21 (2d Cir. 2014) (“Neither 42 U.S.C. § 16911(5) [the prior location of 34 U.S.C. § 20911(5)] nor U.S.S.G. § 2A3.5(b)(1)(C) require a sex offense conviction in order to apply an eight-level increase pursuant to section 2A3.5; conduct amounting to a ‘sex offense’ is enough. To the contrary, the [g]uidelines specify that the enhancement is triggered by the commission of an act.”); United States v. Johnson, 743 F.3d 196, 204 (7th Cir. 2014) (because defendant’s sexual conduct with his adult girlfriend, while not consensual, did not meet the elements of a criminal sexual assault or abuse under Illinois law, the enhancement was improper).

¹¹⁷ USSG §2A3.5, comment. (n.1); 34 U.S.C. § 20911(5)(A)(i).

¹¹⁸ USSG §2A3.5(b)(2).

¹¹⁹ USSG §2A3.5, comment. (n.3(A)).

¹²⁰ *See* United States v. Forster, 549 F. App’x 757, 770–71 (10th Cir. 2013) (defendant’s voluntary attempt to register after moving from one residence to another, after having been out of the country for eight months, was not a voluntary correction of his failure to register but was instead a desire to perpetuate a false claim that he had been at the first residence during that eight-month period).

¹²¹ USSG §2A3.5, comment. (n.3(B)).

individual required to register under SORNA.¹²² Section 2A3.6 is the applicable guideline for offenses in violation of sections 2250(d) or 2260A.¹²³

A violation of section 2250(d) carries a mandatory minimum term of five years and a maximum term of 30 years of imprisonment. The sentence under section 2250(d) is consecutive to the sentence for the failure to register offense under 18 U.S.C. § 2250(a) or (b).¹²⁴ If a defendant is convicted under section 2250(d), the guideline sentence under §2A3.6(a) is the five-year mandatory minimum term required by statute.¹²⁵ A sentence above five years of imprisonment imposed under §2A3.6(a) is considered an upward departure, and may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.¹²⁶

A violation of section 2260A carries a ten-year mandatory term of imprisonment. The sentence under section 2260A is consecutive to any sentence imposed for the underlying felony offense against the minor listed in section 2260A.¹²⁷ If the defendant is convicted under section 2260A, the guideline sentence under §2A3.6(b) is the ten-year mandatory term required by statute.¹²⁸

Note that Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) do not apply to any offense sentenced under §2A3.6 because the guideline sentence for each offense is determined only by the relevant statute.¹²⁹ In addition, if a defendant is sentenced under this guideline in conjunction with a sentence for an underlying offense, any specific offense characteristics that are based on the same conduct as the conduct comprising the conviction under 18 U.S.C. §§ 2250(d) or 2260A do not apply.¹³⁰

IV. CHAPTER THREE: ADJUSTMENTS

Certain Chapter Three adjustments, discussed below, are used frequently in sexual abuse and failure to register cases.

¹²² 18 U.S.C. §§ 2250(d)(1) and 2260A.

¹²³ USSG §2A3.6(a), (b).

¹²⁴ 18 U.S.C. § 2250(d)(2); USSG §2A3.6, comment. (n.1).

¹²⁵ USSG §2A3.6(a).

¹²⁶ USSG §2A3.6, comment. (n.4).

¹²⁷ 18 U.S.C. § 2260A; USSG §2A3.6, comment. (n.1).

¹²⁸ USSG §2A3.6(b).

¹²⁹ USSG §2A3.6, comment. (n.2).

¹³⁰ USSG §2A3.6, comment. (n.3).

A. SECTION 3A1.1 (HATE CRIME MOTIVATION OR VULNERABLE VICTIM)

Section 3A1.1(a) imposes a 3-level increase in offense level where the finder of fact (at trial or, in the case of a guilty or *nolo contendere* plea, the court at sentencing) determines *beyond a reasonable doubt* that the defendant intentionally selected any victim or property as the object of the offense of conviction based on a hate crime motivation.¹³¹ Subsection (a) does not apply on the basis of gender in the case of a sexual offense as this factor is taken into account by the offense level of the Chapter Two offense guideline.¹³²

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. Further, §3A1.1(b)(2) provides that if (A) the vulnerable victim enhancement applies, and (B) the offense involved a large number of vulnerable victims, the offense level should be increased by another two levels. For purposes of subsection (b), “vulnerable victim” means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct), and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.¹³³

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

¹³¹ Such motivations include the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person. USSG §3A1.1(a) & comment. (n.1).

¹³² USSG §3A1.1, comment. (n.1).

¹³³ USSG §3A1.1, comment. (n.2); *see also* United States v. Sunmola, 887 F.3d 830, 837–38 (7th Cir. 2018) (affirming vulnerable victim enhancement where victims were “unusually vulnerable to falling for [defendant’s] and his co-conspirators’ deceitful tactics.”); United States v. Schoenborn, 793 F.3d 964, 967 (8th Cir. 2015) (not double counting to apply vulnerable victim enhancement in conviction for abuse of incapacitated person under 18 U.S.C. § 2242 because §2A3.1 did not take into account contributing factors of victim’s extreme intoxication and unconscious state); United States v. Irving, 554 F.3d 64, 75 (2d Cir. 2009) (upholding application of the vulnerable victim enhancement because the minor victims living in Mexico and Honduras were homeless and without parental or other supervision and guidance, making them unusually vulnerable, independent of their ages); United States v. Chee, 514 F.3d 1106, 1117 (10th Cir. 2008) (upholding the district court’s vulnerable victim enhancement where the victim “suffer[ed] from mental and physical handicaps, including a diminished mental capacity, seizures, and partial paralysis”); United States v. Julian, 427 F.3d 471, 489–90 (7th Cir. 2005) (finding no double counting where the district court increased the defendant’s sentence based on the victim’s age under §2A3.1(b)(2) in combination with the “economic vulnerability of the victims” under §3A1.1 because the defendant took “advantage of the poor and homeless children by offering shelter, housing and food”) (citations omitted).

does not apply unless the victim was unusually vulnerable for reasons unrelated to the age of the victim.¹³⁴

B. SECTION 3A1.3 (RESTRAINT OF VICTIM)

Section 3A1.3 provides for a 2-level increase if a victim was physically restrained in the course of the offense. “Physically restrained” means the forcible restraint of the victim such as by being tied, bound, or locked up.¹³⁵ This adjustment does not apply, however, where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself.¹³⁶ If the restraint was sufficiently egregious, an upward departure may be warranted pursuant to §5K2.4 (Abduction or Unlawful Restraint).¹³⁷

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 the commission or concealment of the offense.¹³⁸ The Commentary to §3B1.3 defines “public or private trust” as a position characterized by professional or managerial discretion usually subject to significantly less supervision than those whose responsibilities are primarily

¹³⁴ USSG §3A1.1, comment. (n.2); *see also* United States v. Beith, 407 F.3d 881, 892 (7th Cir. 2005) (“allegations of molestation standing alone are insufficient to establish vulnerability” when the victim’s “age had already been the subject of an enhancement” under §2A3.1(b)(2)), *abrogated on other grounds by* United States v. Vizcarra, 668 F.3d 516, 521 (7th Cir. 2012).

¹³⁵ USSG §3A1.3, comment. (n.1); USSG §1B1.1, comment. (n.1(L)).

¹³⁶ USSG §3A1.3, comment. (n.2); *see also* United States v. Joe, 696 F.3d 1066, 1072 (10th Cir. 2012) (“[I]t appears to be impossible to commit the offense of aggravated sexual abuse under § 2241(a)(1) without also applying force that, in our circuit, constitutes physical restraint of the victim”). *But see* United States v. Corder, 724 F. App’x 394, 410 (6th Cir. 2018) (affirming application of §3A1.3 enhancement against a challenge of double counting where “the base offense level and the enhancement each were adequately supported by separate instances of defendant’s conduct”); United States v. Strong, 826 F.3d 1109, 1117 (8th Cir. 2016) (not double counting to apply a 4-level enhancement under §2A3.1 for abduction and a 2-level enhancement under §3A1.3 for restraint of victim because conduct supporting application of each was different; conduct for abduction was based on defendant dragging victim to another location, and conduct for physical restraint was based on defendant confining the victim for three days); United States v. Star, 451 F. App’x 708, 709 (9th Cir. 2011) (affirming application of §3A1.3 because “restraint of the victim is not an element of the offense of aggravated sexual abuse nor was it incorporated in the aggravated sexual assault offense Guideline applied”).

¹³⁷ USSG §3A1.3, comment. (n.3).

¹³⁸ USSG §3B1.3; *see also, e.g.*, United States v. Chee, 514 F.3d 1106, 1118 (10th Cir. 2008) (whether an individual occupies a position of trust is evaluated from the perspective of the victim).

non-discretionary.¹³⁹ “Special skill” refers to a skill not possessed by members of the general public, often requiring substantial education, training, or licensing.¹⁴⁰

The abuse of position of trust or special skill adjustment does not apply to criminal sexual abuse guidelines where the defendant is already subject to an enhancement as a result of the victim being in the care, custody, or supervisory control of the defendant, or the victim being held in the custody of a correctional facility.¹⁴¹

V. CHAPTER FOUR: SECTION 4B1.5 (REPEAT AND DANGEROUS SEX OFFENDER AGAINST MINORS)

A. IN GENERAL

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.¹⁴² A “covered sex crime” for purposes of §4B1.5 is an offense (including attempt and conspiracy to commit the offense), perpetrated against a minor, under: (i) chapter 109A of title 18; (ii) chapter 110 of title 18 (not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense); (iii) chapter 117 of title 18 (not including transmitting information about a minor or filing a factual statement about an alien individual); or (iv) 18 U.S.C. § 1591.¹⁴³

For purposes of this guideline, the term “minor” means: (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.¹⁴⁴

¹³⁹ USSG §3B1.3, comment. (n.1).

¹⁴⁰ USSG §3B1.3, comment. (n.4).

¹⁴¹ See USSG §2A3.1, comment. (n.3(B)); USSG §2A3.2, comment. (n.2(B)); USSG §2A3.3, comment. (n.4); USSG §2A3.4, comment. (n.4(B)).

¹⁴² USSG §4B1.5 (backg’d). For a detailed description of the issues and case law associated with §4B1.5, see U.S. SENT’G COMM’N, PRIMER ON OFFENSES INVOLVING COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS (2021), <https://www.ussc.gov/guidelines/primers/commercial-sex-acts-and-sexual-abuse-minor>.

¹⁴³ USSG §4B1.5, comment. (n.2).

¹⁴⁴ USSG §4B1.5, comment. (n.1); see also *United States v. Cerno*, 529 F.3d 926, 938 (10th Cir. 2008) (finding a conviction under 18 U.S.C. § 2241(a) a “covered sex crime” where the victim was under the age of 18, even though certain offenses within chapter 109A pertain to minors under the age of 12 or the age of 16).

B. BASE OFFENSE LEVEL AND CRIMINAL HISTORY CATEGORY

1. 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.¹⁴⁵ "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.¹⁴⁶

Courts employ a "formal categorical approach" to determine whether a prior conviction qualifies as a defined sex offense conviction. The categorical approach "requires that the sentencing court 'look only to the fact of conviction and the statutory definition of the prior offense.'" ¹⁴⁷

a. Base offense level

If subsection (a) applies, the offense level is first determined under Chapters Two and Three of the applicable guidelines. Next, this offense level is compared to the offense level table 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). The greater resulting offense level applies.

¹⁴⁵ USSG §4B1.5(a); USSG §4B1.5, comment. (n.2), (backg'd). The term "sex offense conviction" means (I) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. USSG §4B1.5, comment. (n.3(A)(ii)).

¹⁴⁶ USSG §4B1.5, comment. (n.3(A)(ii)).

¹⁴⁷ *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, 621 (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, 353–54 (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, 444 (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).

The “offense statutory maximum” used in §4B1.5(a)(1)(B) includes any increase in the maximum term under a sentencing enhancement provision (such as 18 U.S.C. §§ 2247(a) or 2426(a)) that applies to that covered sex crime because of the defendant’s prior criminal record.¹⁴⁸ 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.¹⁴⁹

b. Criminal history category

The criminal history category is first determined under Chapter Four, Part A. Next, this criminal history category is compared to Criminal History Category V, and the greater criminal history category should apply.¹⁵⁰

2. Pattern of Activity Involving Prohibited Sexual Conduct

Subsection 4B1.5(b) applies in any case in which the defendant’s instant offense of conviction is a covered sex crime, neither §4B1.1 (Career Offender) nor subsection 4B1.5(a) apply, and the defendant engaged in a pattern of activity involving prohibited sexual conduct. The term “prohibited sexual conduct” means: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography.¹⁵¹ It does not include receipt or possession of child pornography.

A defendant engages in a pattern of activity involving prohibited sexual conduct “if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.”¹⁵² 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.¹⁵³

a. Base offense level

Under subsection 4B1.5(b), the offense level is five plus the offense level determined under Chapters Two and Three; however, if the resulting offense level is less than 22, the offense level shall be level 22, less any applicable adjustment for acceptance of responsibility.

¹⁴⁸ See USSG §4B1.5, comment. (n.3(A)(i)).

¹⁴⁹ See USSG §4B1.5, comment. (n.3(B)).

¹⁵⁰ USSG §4B1.5(a)(2).

¹⁵¹ USSG §4B1.5, comment. (n.4(A)).

¹⁵² USSG §4B1.5, comment. (n.4(B)(i)).

¹⁵³ USSG §4B1.5, comment. (n.4(B)(ii)).

b. Criminal history category

The defendant’s criminal history category is determined under Chapter Four, Part A.¹⁵⁴

c. Double counting

Section 4B1.5(b)(1) specifically states that the enhancement for a pattern of activity is to be added to the offense levels determined under Chapters Two and Three.¹⁵⁵ Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5.¹⁵⁶

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

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

Section 5B1.3 sets out mandatory, discretionary, standard, and special conditions of probation, some of which are specific to defendants convicted of sex offenses.

1. Section 5B1.3(a) (Mandatory Conditions)

Among the enumerated mandatory conditions of probation, §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 that Act (*see* 18 U.S.C. § 3563(a)).”¹⁵⁷ Mandatory conditions of probation also include compliance with restitution orders and related payment schedules, and notification of any material change in economic

¹⁵⁴ USSG §4B1.5(b)(2).

¹⁵⁵ *See* United States v. Joey, 845 F.3d 1291, 1299 (9th Cir. 2017) (application of §4B1.5 not double counting with conviction under 18 U.S.C. § 2260A because the Commission did not forbid such application, and §4B1.5 and section 2260A serve distinct penological goals).

¹⁵⁶ *See* United States v. Seibert, 971 F.3d 396, 400–01 (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. 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 exploiting [] 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 (8th Cir. 2007); United States v. Schmeilski, 408 F.3d 917, 919 (7th Cir. 2005) (same), *abrogated on other grounds by* United States v. Vizcarra, 668 F.3d 516 (7th Cir. 2012).

¹⁵⁷ USSG §5B1.3(a)(9); *see also e.g.*, United States v. Arms, 349 F. App’x 889, 892 (5th Cir. 2009) (prior offenses did not require registration under §5B1.3(a)(9)).

circumstances, along with a special condition, when warranted, of providing access to financial information.¹⁵⁸

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

The guidelines allow courts the discretion to impose other conditions of probation to the extent that such 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 of 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.¹⁵⁹ Such conditions can only involve such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a).¹⁶⁰

3. Section 5B1.3(c) (“Standard” Conditions (Policy Statement))

Section 5B1.3(c) sets forth “standard” conditions of probation, which generally apply to all defendants, including risk-notification to third parties and organizations, or that a defendant “answer truthfully” questions asked by the probation officer.¹⁶¹ However, the legitimate invocation of the Fifth Amendment privilege against self-incrimination shall not be considered a violation of this condition.¹⁶²

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

Section 5B1.3(d)(7) recommends “special” conditions of probation specific to offenders convicted of sex offenses: (A) 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; (B) a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items; and (C) 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,

¹⁵⁸ See, e.g., USSG §5B1.3(a)(2), (a)(6), (a)(7), (d)(3). In addition, 18 U.S.C § 3664(k) requires that restitution orders provide that the defendant shall notify the court of any material change in the defendant’s economic circumstances that might affect his or her ability to pay.

¹⁵⁹ USSG §5B1.3(b).

¹⁶⁰ USSG §5B1.3(b).

¹⁶¹ USSG §5B1.3(c)(4), (c)(12).

¹⁶² USSG §5B1.3, comment. (n.1). See generally *McKathan v. United States*, 969 F.3d 1213, 1217 (11th Cir. 2020) (discussing “classic penalty situation” in the context of probationer’s invocation of Fifth Amendment privilege).

house, residence, vehicle, papers, computer, electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant.

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

Pursuant to section 5D1.1(a), 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.¹⁶³

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

The guideline term of supervised release under §5D1.2(a) is based on the classification of the defendant's original conviction as determined by 18 U.S.C. § 3583 (for example, if the offense is a Class A or B felony, the term shall be at least two years but not more than five years).¹⁶⁴ However, notwithstanding §5D1.2(a), the length of the term of supervised release is not to be less than the minimum term of years specified for the offense, and may be up to life, if the offense is, among others, a sex offense. The statutory maximum term of supervised release is recommended if the offense is a sex offense.¹⁶⁵

Pursuant to the Adam Walsh Act of 2006, section 3583 was amended to increase the authorized term of supervised release for, among other offenses, any sexual abuse offense perpetrated against a minor under chapter 109A of title 18.¹⁶⁶ The term of supervised release is now a mandatory minimum of five years with a statutory maximum term of life.¹⁶⁷ The failure to register as a sex offender under 18 U.S.C. § 2250 is not, however, a "sex offense" within the meaning of §5D1.2(b)(2).¹⁶⁸ Nevertheless, under 18 U.S.C. § 3583(k), the supervised release term under §5D1.2(b)(2) for a failure to register offense is five years.¹⁶⁹

Additionally, under section 3583(k), a defendant required to register under SORNA who commits a criminal offense under, among others, chapter 109A of title 18, is subject to

¹⁶³ USSG §5D1.1, comment. (n.1).

¹⁶⁴ USSG §5D1.2(a)(1).

¹⁶⁵ USSG §5D1.2(b)(2).

¹⁶⁶ Pub. L. No. 109-248, § 141, 120 Stat. 587, 603 (amending 18 U.S.C. § 3583(k)).

¹⁶⁷ 18 U.S.C. § 3583(k).

¹⁶⁸ USSG §5D1.2, comment. (n.1).

¹⁶⁹ USSG §5D1.2, comment. (n.6) (explaining that if subsection (a) provides a range of two to five years, but the relevant statute requires a minimum term of supervised release of five years and a maximum term of life, the term of supervised release provided by the guidelines is five years); *see also* United States v. James, 792 F.3d 962, 968-69 (8th Cir. 2015) (affirming district court's upward variance from five years to a lifetime term of supervised release for SORNA violation).

(1) revocation of a term of supervised release, and (2) a mandatory term of imprisonment of not less than five years. In *United States v. Haymond*, in a fractured opinion, a plurality of the Supreme Court found section 3583(k) unconstitutional in that it violated the defendant’s Fifth and Sixth Amendment rights by requiring a mandatory term of imprisonment based on facts found by a judge by a preponderance of the evidence.¹⁷⁰ *Haymond* left open the question of whether and how the constitutional infirmity could be remedied.¹⁷¹

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

Section §5D1.3 sets out mandatory, discretionary, standard, and special conditions of supervised release, some of which are specific to defendants convicted of 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 the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. § 3583(d)).” Mandatory conditions of supervision also include compliance with restitution orders and related payment schedules, and notification of any material change in economic circumstances, along with a special condition, when warranted, of providing access to financial information.¹⁷²

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

Section 5D1.3(b) allows courts to impose discretionary conditions of supervised release to the extent such conditions: (1) 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 afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth in (A)–(D) and are consistent with pertinent policy statements by the Commission.¹⁷³

¹⁷⁰ 139 S.Ct. 2369, 2373–85 (2019).

¹⁷¹ *Id.* at 2385.

¹⁷² USSG §5D1.3(a)(6), (d)(3).

¹⁷³ USSG §5D1.3(b); *see also* *United States v. Hamilton*, 986 F.3d 413, 419 (4th Cir. 2021) (“Although the statutory grant of authority to district courts does not limit the kinds of special conditions they may impose, it does require that any such condition be ‘reasonably related to . . . the nature and circumstances of the offense and the history and characteristics of the defendant.’ ”); *United States v. Sherwood*, 850 F.3d 391, 396 (8th Cir. 2017) (vacating special financial conditions in sexual abuse case where conditions were “totally unrelated” to offense and the district court failed to reflect the individualized inquiry required); *United States v. Fey*, 834 F.3d 1, 5 (1st Cir. 2016) (vacating special condition that defendant have no contact with

3. Section 5D1.3(c) (“Standard” Conditions (Policy Statement))

Section 5D1.3(c) provides “standard” conditions that are recommended for supervised release, some of which are an expansion of the statutorily required conditions. None of the “standard” conditions specifically refer to defendants convicted of a sex offense or required to register by SORNA. As with the condition of probation requiring the defendant to “answer truthfully” questions asked by probation officers, a defendant’s legitimate invocation of this Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.¹⁷⁴

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

Section 5D1.3(d)(7) lists “special” conditions specific to sex offenses, as defined in §5D1.2: (A) 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; (B) a condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items; and (C) a condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer’s supervision functions.¹⁷⁵

E. SECTION 5F1.5 (OCCUPATIONAL RESTRICTIONS)

Section 5F1.5(a) authorizes a court to impose occupational restrictions as a condition of probation or supervised release in limited circumstances.¹⁷⁶ Title 18 U.S.C. § 3563(b)(5), for example, authorizes the imposition of occupational restrictions as a

children under age 18 after conviction for violating SORNA because a 1999 sex offense, rape of a 16-year old co-worker he provided with alcohol, was remote in time, defendant had not committed any sexual or violent offense in the intervening years, and government made no argument he was a danger to children); *United States v. Gnirke*, 775 F.3d 1155, 1166 (9th Cir. 2015) (finding condition that defendant not possess any materials depicting “sexually explicit conduct”—including depictions of adult sexual conduct—reasonably related to the goals of supervised release but narrowing condition because it deprived the defendant of more liberty than reasonably necessary).

¹⁷⁴ USSG §5D1.3(c)(4); USSG §5D1.3, comment. (n.1).

¹⁷⁵ *See also* *United States v. Perazza-Mercado*, 553 F.3d 65, 72 (1st Cir. 2009) (a special condition requiring a total ban on internet access at home was inconsistent with the vocational and educational goals of supervised release where the defendant had no history of impermissible internet use and the internet was not an instrumentality of the offense).

¹⁷⁶ USSG §5F1.5.

condition of probation, which may require a defendant (A) to refrain “from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense,” or (B) to engage in such a specified occupation, business or profession “only to a stated degree or under stated circumstances.”¹⁷⁷

A court may impose occupational restrictions, however, only if the court determines that (1) a reasonably direct relationship existed between the defendant’s occupation, business, or profession and the conduct relevant to the offense of conviction, and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted.¹⁷⁸ Further, §5F1.5(b) limits the imposition of an occupational restriction to “the minimum time and to the minimum extent necessary to protect the public.”¹⁷⁹

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

Section 5K2.0 addresses upward and downward departures in the case of child crimes and sexual offenses. Section 5K2.0(a)(1)(B) authorizes an upward departure if, in the case of child crimes and sexual offenses, the court finds that there exists “an aggravating circumstance, of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.”¹⁸⁰

Section 5K2.0(b) is the only available grounds for a downward departure in child crimes and sexual offenses. The standard for a downward departure includes a requirement, set forth in §5K2.0(b) and 18 U.S.C. § 3553(b)(2)(A)(ii)(I), that any mitigating circumstance that forms the basis for a downward departure be “affirmatively and specifically identified as a ground” for a downward departure in Chapter 5, Part K.¹⁸¹ Thus, for child crimes and sexual offenses, the standard for a downward departure differs

¹⁷⁷ 18 U.S.C. § 3563(b)(5) (cited in USSG §5F1.5, comment. (backg’d)); *see e.g.*, *United States v. Du*, 476 F.3d 1168, 1170–71 (10th Cir. 2007) (specific findings are required before a court imposes any employment conditions that are considered “occupational restrictions”).

¹⁷⁸ USSG §5F1.5(a).

¹⁷⁹ USSG §5F1.5(b); *see also* *United States v. Hamilton*, 986 F.3d 413, 420 (4th Cir. 2021) (“To ensure comportment with the statutory requirements, ‘[a] sentencing court must provide an individualized explanation for why any special conditions it imposes are appropriate in light of the § 3583(d) factors.’”) (citation omitted).

¹⁸⁰ USSG §5K2.0(a)(1)(B); 18 U.S.C. § 3553(b)(2)(A)(i); *see e.g.*, *United States v. King*, 604 F.3d 125, 142 (3d Cir. 2010) (5-level upward departure reasonable for a defendant convicted of traveling to engage in sex with a minor, based on aggravating circumstances including “defendant’s pattern of sexually abusing minors, including his own daughter”).

¹⁸¹ USSG §5K2.0, comment. (n.4(B)).

substantially from the standard for an upward departure, which only requires an aggravating circumstance not adequately taken into consideration by the Commission. The definition of “child crimes and sexual offenses” includes sexual abuse offenses under chapter 109A of title 18.¹⁸²

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

Section 5K2.8 envisions that if a defendant’s conduct was unusually heinous, cruel, brutal, or degrading to the victim, a court may increase the sentence above the guideline range to reflect the nature of the conduct.¹⁸³

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

Section 5K2.22 restricts the availability of departures based on certain specific offender characteristics in cases of child crimes and sexual offenses: (1) 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.

¹⁸² USSG §5K2.0, comment. (n.4(A)).

¹⁸³ See, e.g., *United States v. Flanders*, 752 F.3d 1317, 1341 (11th Cir. 2014) (finding an upward departure reasonable for defendants who drugged women without their knowledge, videotaped sexual activity with the women who “woke up covered in bodily fluids and uncertain of what had happened to them,” and distributed the images over the internet).