Primer

Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors

Prepared by the
Office of the General Counsel

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This document was produced and published at U.S. taxpayer expense.

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I. INTRODUCTION

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

II. SEX TRAFFICKING AND TRANSPORTATION OF MINORS—§§2G1.1 AND 2G1.3

This section of the primer discusses the statutes, sentencing guidelines, and case law related to sex trafficking offenses involving minor and adult victims.

A. STATUTORY SCHEME

Statutes related to sex trafficking and prostitution include 8 U.S.C. § 1328, 18 U.S.C. § 1591, and numerous provisions within chapter 117 of title 18 (Transportation for Illegal Sexual Activity and Related Crimes).

1. 8 U.S.C. § 1328 (Importation of Alien for Immoral Purpose)

Section 1328 prohibits the direct or indirect importation (or attempted importation) into the United States of any alien for prostitution or any other immoral purpose.[1] It also prohibits holding or attempting to hold any alien, or keeping, maintaining, controlling, supporting, employing, or harboring any alien in any house or other place, for prostitution or any other immoral purpose.[2] Section 1328 has a ten-year maximum penalty.[3]

2. 18 U.S.C. § 1591 (Sex Trafficking of Children or by Force, Fraud, or Coercion)

Section 1591(a) prohibits (1) knowingly recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting by any means a person, or (2) knowingly benefitting financially or receiving anything of value, from participating in a venture described in (1), knowing that force, fraud, threats of force, or coercion will be used to cause the person to engage in a commercial sex act, or that the

1 8 U.S.C. § 1328.

2 *Id.*

3 *Id.*

person has not attained the age of 18 and will be caused to engage in a commercial sex act.[4] Section 1591(a) has a ten-year mandatory minimum penalty and a maximum penalty of life imprisonment.[5] If the offense was effected by force, fraud, or coercion, or if the minor had not reached the age of 14 at the time of the offense, the mandatory minimum penalty increases to 15 years.[6]

3. 18 U.S.C. § 2421 (Transportation Generally)

Section 2421 prohibits knowingly transporting individuals to engage in prostitution or any illegal sexual activity.[7] Section 2421 includes attempts and has a ten-year maximum penalty.[8]

4. 18 U.S.C. § 2421A (Promotion or Facilitation of Prostitution and Reckless Disregard of Sex Trafficking)

Section 2421A(a) prohibits owning, managing, or operating an "interactive computer service"[9] with the intent to promote or facilitate the prostitution of another person.[10] Section 2421A(a) includes attempts and conspiracies and has a ten-year maximum penalty.[11]

Section 2421A(b) is an aggravated violation of section 2421A(a) where the defendant (1) "promotes or facilitates the prostitution of 5 or more persons" or (2) "acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of

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4 18 U.S.C. § 1591(a). "Commercial sex act" means "any sex act, on account of which anything of value is given to or received by any person." *Id.* § 1591(e)(3). "Coercion" means (1) "threats of serious harm to or physical restraint against, any person," (2) "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person," or (3) the "abuse or threatened abuse of law or the legal process." *Id.* § 1591(e)(2). "Venture" means a group of "two or more individuals associated in fact." *Id.* § 1591(e)(6).

5 *Id.* § 1591(b)(2).

6 *Id.* § 1591(b)(1).

7 *Id.* § 2421(a).

8 *Id.*

9 "Interactive computer service" has the definition set forth in section 230(f) the Communications Act of 1934, 47 U.S.C. § 230(f): "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

10 18 U.S.C. § 2421A(a).

11 *Id.*

[section] 1591(a)."[12] Section 2421A(b) includes attempts and conspiracies and has a 25-year maximum penalty.[13]

5. 18 U.S.C. § 2422 (Coercion and Enticement)

Section 2422(a) prohibits knowingly persuading, inducing, enticing, or coercing any individual to travel to engage in prostitution or in any illegal sexual activity.[14] Section 2422(b) prohibits using the mail or any means of interstate or foreign commerce to knowingly persuade, induce, entice, or coerce any individual younger than 18 to engage in prostitution or any illegal sexual activity.[15] Each section includes attempts.[16] Section 2422(a) has a 20-year maximum penalty, and section 2422(b) has a ten-year mandatory minimum penalty and a maximum penalty of life imprisonment.[17]

6. 18 U.S.C. § 2423 (Transportation of Minors)

Section 2423(a) prohibits knowingly transporting an individual younger than 18 with the intent that the individual engage in prostitution or in any illegal sexual activity.[18] Section 2423(b) prohibits traveling in interstate commerce or into the United States, or traveling in foreign commerce, with intent to engage in any illicit sexual conduct[19] with another person.[20] Section 2423(c) prohibits traveling in foreign commerce and engaging in any illicit sexual conduct.[21] In 2023, Congress added section 2423(d), which prohibits individuals involved in certain organizations, such as charities, from using their position to

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12 *Id.* § 2421A(b).

13 *Id.*

14 *Id.* § 2422(a).

15 *Id.* § 2422(b).

16 *Id.* § 2422(a), (b).

17 *Id.* The government is not required to prove that the defendant knew the victim was a minor. Courts have held that the term "knowingly" does not apply to the victim's age, consistent with congressional intent that minors need special protection against sexual exploitation. *See* United States v. Banker, 876 F.3d 530, 536–40 (4th Cir. 2017) (statute did not require the government to prove defendant knew victim was under 18); United States v. Daniels, 685 F.3d 1237, 1248 (11th Cir. 2012) (statute does not require that defendant knew the victim was under 18); United States v. Daniels, 653 F.3d 399, 409–10 (6th Cir. 2011) (context of § 2423(a) dictates that the government did not need to prove that defendant knew victim was a minor) (collecting cases).

18 18 U.S.C. § 2423(a).

19 "Illicit sexual conduct" means a sexual act with a person under 18 that would be a violation of chapter 109A (Sexual Abuse) of title 18 if the sexual act occurred in the United States, any commercial act with a person under 18, or production of child pornography as defined in 18 U.S.C. § 2256(8). *Id.* § 2423(g).

20 *Id.* § 2423(b).

21 *Id.* § 2423(c).

commit an act in furtherance of illicit sexual conduct.[22] Section 2423(e) prohibits arranging, inducing, procuring, or facilitating the travel of a person for the purpose of commercial advantage or private financial gain, knowing that the person is traveling in interstate or foreign commerce with intent to engage in any illicit sexual conduct.[23] All four subsections also prohibit attempts and conspiracies.[24] It is a defense that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had reached the age of 18.[25]

Section 2423(a) has a ten-year mandatory minimum penalty and a maximum penalty of life imprisonment.[26] Sections 2423(b)–(e) have a 30-year maximum penalty.[27]

7. 18 U.S.C. § 2425 (Use of Interstate Facilities to Transmit Information About a Minor)

Section 2425 prohibits knowingly initiating the "transmission of the name, address, telephone number, social security number, or electronic mail address of another individual," knowing that the individual is younger than 16, with the intent to entice, encourage, offer, or solicit any person to engage in any criminal sexual activity.[28] Section 2425 includes attempts and has a five-year maximum penalty.[29]

8. 18 U.S.C. § 2426 (Repeat Offenders)

Section 2426 provides an enhanced maximum penalty for defendants who violate chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) and have a "prior sex offense conviction" that is three times the penalty otherwise provided.[30]

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22 *Id.* § 2423(d).

23 *Id.* § 2423(e).

24 *Id.* § 2423(f).

25 *Id.* § 2423(i).

26 *Id.* § 2423(a).

27 *Id.* § 2423(b)–(e).

28 *Id.* § 2425.

29 *Id.*

30 *Id.* § 2426(a). A "prior sex offense conviction" is defined as a conviction under chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), chapter 109A (Sexual Abuse), chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591 (Sex Trafficking of Children) or an analogous offense under state law. *Id.*

9. 18 U.S.C. § 3014 (Additional Special Assessment)

Section 3014 provides for an assessment of $5,000 (in addition to the ordinary mandatory special assessment of $100 under 18 U.S.C. § 3013) on "any non-indigent person or entity" convicted of, among other things, any commercial sex acts, child sexual abuse, and child pornography offenses.[31] Many circuits have calculated the defendant's earning capacity prospectively, considering the defendant's earning potential following release from prison.[32]

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

The guidelines instruct users to determine the applicable Chapter Two offense guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).[33] For statutes related to the sex trafficking and prostitution of adult victims, Appendix A specifies the offense guideline at §2G1.1. Section 2G1.1 covers certain offenses under 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, or 2422. This guideline does not cover offenses involving minor victims.

1. Base Offense Level

Section 2G1.1(a) provides alternative base offense levels: if the offense of conviction is 18 U.S.C. § 1591(b)(1), the base offense level is 34; otherwise, the base offense level is 14.[34] Courts have disagreed about which base offense level applies to defendants convicted of conspiracy under 18 U.S.C. § 1594(c) when the underlying substantive offense listed in the indictment is section 1591(b)(1).[35]

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[31] *Id.* § 3014.

[32] *See* United States v. Procell, 31 F.4th 32, 38 (1st Cir. 2022) (acknowledging that the First Circuit had not provided guidance on the issue but stating that "the district court's focus on future earning potential has been endorsed by other circuits"); United States v. Shepherd, 922 F.3d 753, 758 (6th Cir. 2019) ("[W]e note that each circuit that has considered this issue has agreed that the district court may consider the defendant's future financial condition—such as his earnings potential—when making the indigency determination.") (collecting cases); United States v. Graves, 908 F.3d 137, 142 (5th Cir. 2018) (district court was correct to analyze whether the defendant was employable upon release from prison); *see also* United States v. Meek, 32 F.4th 576, 581 (6th Cir. 2022) (setting forth and applying factors to determine indigent status).

[33] U.S. SENT'G COMM'N, GUIDELINES MANUAL §1B1.2 (Nov. 2024) [hereinafter USSG].

[34] USSG §2G1.1(a).

[35] *Compare* United States v. Carter, 960 F.3d 1007, 1013–14 (8th Cir. 2020) (concluding that a base offense level 34 applies because "we must read §2G1.1 in light of §2X1.1 [Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)]" and referencing the general rule about conspiracy offenses at Application Note 7 to §1B1.3), *and* United States v. Sims, 957 F.3d 362, 363 (3d Cir. 2020) (same), *with* United

2. Specific Offense Characteristic: Fraud or Coercion

Section 2G1.1(b)(1) provides for a 4-level increase if the base offense level is 14 and the offense involved fraud or coercion.[36] The fraud or coercion must occur as part of the offense, and the enhancement does not anticipate any bodily injury.[37] If bodily injury occurs, an upward departure may be warranted.[38] For purposes of this subsection, "coercion" includes "any form of conduct that negates the voluntariness of the victim."[39] The enhancement generally does not apply, however, if the victim's voluntary use of drugs or alcohol resulted in the impairment of the victim's ability to appraise or control conduct.[40]

3. Cross Reference

Section 2G1.1(c)(1) provides that §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved conduct described in 18 U.S.C. §§ 2241(a) or (b) or 2242.[41] The conduct described in sections 2241(a) and (b) and 2242 generally includes sexual conduct that involves the use of force, threats, or other factors that limit the victim's ability to decline to participate.[42]

States v. Wei Lin, 841 F.3d 823, 826–27 (9th Cir. 2016) (holding that a base offense level of 34 applies only if the defendant was subject to the 15-year mandatory minimum penalty under section 1591(b)(1)).

[36] USSG §2G1.1(b)(1). Section §2G1.1(b)(1) is limited to convictions other than those under 18 U.S.C. § 1591(b)(1) to avoid unwarranted double counting, as fraud and coercion are built into the base offense level of 34 for offenses of conviction under subsection 1591(b)(1). *See* USSG App. C, amend. 701 (effective Nov. 1, 2007).

[37] USSG §2G1.1, comment. (n.2).

[38] *See id.* The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 2 to §2G1.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[39] USSG §2G1.1, comment. (n.2); *see also* United States v. Sweargin, 935 F.3d 1116, 1122–24 (10th Cir. 2019) (coercion enhancement properly applied where defendant threatened to upload a sexual video of the victim and later beat the victim for failing to engage in prostitution because these actions negated the voluntariness of the victim traveling with defendant).

[40] USSG §2G1.1, comment. (n.2).

[41] USSG §2G1.1(c)(1); *see also* United States v. Law, 990 F.3d 1058, 1065 (7th Cir. 2021) (cross-reference correctly applied where defendant placed victim spa employees "in fear of physical, financial, and psychological harms" and coerced them to provide sex services by confiscating their passports, monitoring them using security cameras, and withholding wages and food).

[42] USSG §2G1.1, comment. (n.4) (describing conduct prohibited by §§ 2241 and 2242).

4. Special Instruction

Section 2G1.1(d)(1) provides a special instruction that if the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) applies as if each victim had been charged in separate counts of conviction.[43] The special instruction applies if the "relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim."[44] Thus, victims who were not specifically charged in the indictment may only be considered under this special instruction if the conduct related to those victims is relevant conduct to the charged offense.[45] Multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts).[46] Because these counts cannot be grouped, expanded relevant conduct does not apply.[47]

5. Chapter Three Adjustments

For the purposes of §3B1.1 (Aggravating Role), a victim (as defined in §2G1.1) is "considered a participant only if that victim assisted in the promotion of a commercial sex act or prohibited sexual conduct in respect to another victim."[48]

6. Upward Departure Provision

An upward departure may be warranted if the offense involved more than ten victims.[49]

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[43] USSG §2G1.1(d)(1). "Victim" means "a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct" (whether or not the person consented) and includes undercover law enforcement officers. USSG §2G1.1, comment. (n.1).

[44] USSG §2G1.1, comment. (n.5).

[45] USSG §2G1.1, comment. (n.5); *see also* United States v. Carter, 960 F.3d 1007, 1011–12 (8th Cir. 2020) (additional victims were properly considered under the special instruction even though charges relating to those victims were dismissed).

[46] USSG §2G1.1, comment. (n.5).

[47] *See* USSG §1B1.3(a)(2); *see also* United States v. Randall, 924 F.3d 790, 797–800 (5th Cir. 2019) (additional victims were not included as relevant conduct to charged conviction because their abuse was not contemporaneous with, done in preparation of, or to avoid detection of the charged conduct; district court improperly applied §1B1.3(a)(2)); *infra* Section II.C.4 (discussing similar special instruction under §2G1.3) and Section III.B.4 (discussing similar special instruction under §2G2.1).

[48] USSG §2G1.1, comment. (n.3).

[49] USSG §2G1.1, comment. (n.6). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 6 to §2G1.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

C. SECTION 2G1.3 (PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH A MINOR; TRANSPORTATION OF MINORS TO ENGAGE IN A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT; TRAVEL TO ENGAGE IN COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT WITH A MINOR; SEX TRAFFICKING OF CHILDREN; USE OF INTERSTATE FACILITIES TO TRANSPORT INFORMATION ABOUT A MINOR)

Section 2G1.3 covers certain offenses under 8 U.S.C. § 1328, 18 U.S.C. §§ 1591, 2421, 2422 (all with the requirement that the offense involved a minor victim), 2423, and 2425. A "minor" for purposes of §2G1.3 is an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to have not attained the age of 18 (including a fictitious individual).[50]

1. Base Offense Level

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

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

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

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

(d) Otherwise, the base offense level is 24.[51]

2. Specific Offense Characteristics

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

Section 2G1.3(b)(1) provides for a 2-level increase if "the defendant was a parent, relative, or legal guardian of the minor" or if "the minor was otherwise in the custody, care, or supervisory control of the defendant."[52] The phrase "custody, care, or supervisory control" is "intended to have broad application" and applies whenever a minor is entrusted

[50] USSG §2G1.3, comment. (n.1); *see also* United States v. Fulford, 662 F.3d 1174, 1181 (11th Cir. 2011) (in context of §2G2.2, "where the defendant is not dealing with a law enforcement officer, the enhancement applies only where the 'minor' actually is a true, real live, sure enough minor"). *But see* United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008) (upholding conviction under 18 U.S.C. § 2243(a) where minor's mother created a fictitious internet profile that targeted the defendant before turning the information over to the FBI and stating in *dicta* that "the logic of the guideline definition [at §2A3.2 of "minor"] embraces an impersonator who is not an officer").

[51] USSG §2G1.3(a).

[52] USSG §2G1.3(b)(1).

to the defendant, whether temporarily or permanently.[53] Courts have held that the enhancement applies only if there is a pre-existing parent-like authority that exists apart from the relationship forged during the crime itself.[54] If this subsection applies, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply.[55]

b. Knowing misrepresentation or undue influence

Section 2G1.3(b)(2) provides for a 2-level increase if either "(A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct."[56]

i. Misrepresentation of identity

Misrepresentations under §2G1.3(b)(2)(A) include those of "a participant's name, age, occupation, gender, or status."[57] Because the misrepresentation must be to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, the use of a misleading computer screen name, for example, without that requisite intent is not sufficient to warrant the enhancement.[58] Courts have concluded that the enhancement applies even if the defendant ultimately reveals his true identity[59] and does not require that the misrepresentation be made for any specific length of time.[60]

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53 USSG §2G1.3, comment. (n.2(A)); *cf.* United States v. Gatlin, 90 F.4th 1050, 1071 (11th Cir. 2024) (the meaning of "custody, care, or supervisory control" in the context of §2G1.3(b)(1)(B) requires only that the person is "responsible for looking after the child's wellbeing" (citing United States v. Isaac, 987 F.3d 980, 992 (11th Cir. 2021)), *cert. denied*, 145 S. Ct. 1065 (2025).

54 *See* United States v. Brooks, 610 F.3d 1186, 1200–02 (9th Cir. 2010) (the language of §2G1.3(b)(1)(B) indicates that it is limited to relationships that are comparable to that of parents and legal guardians, so enhancement not applicable to defendant who prostituted two juvenile females); *see also infra* Section III.B.2.e (discussing cases reaching the same conclusion about a similar enhancement under §2G2.1(b)(5)).

55 USSG §2G1.3, comment. (n.2(B)).

56 USSG §2G1.3(b)(2).

57 USSG §2G1.3, comment. (n.3(A)).; *see also* United States v. Grauer, 701 F.3d 318, 326 (8th Cir. 2012) (although defendant's misrepresentation of his age alone ("like 49") may not have been sufficient, defendant also misrepresented occupation and relationships with other young women).

58 USSG §2G1.3, comment. (n.3(A)).

59 *See* United States v. Davis, 985 F.3d 298, 308–09 (3rd Cir. 2021) (defendant's "later revelation of his real age does not undo his initial misrepresentation"); United States v. Holt, 510 F.3d 1007, 1010–11 (9th Cir. 2007) (enhancement properly applied where defendant "initially identified himself as a nineteen-year-old college student and revealed his true age and identity only after more than six months of sexually explicit Internet chats with an undercover officer who had portrayed himself in his online persona as a thirteen-year-old girl").

60 *See* United States v. Young, 613 F.3d 735, 748–49 (8th Cir. 2010) (rejecting the defendant's attempt to distinguish his conduct and stating that "the Guidelines do not make a temporal distinction" regarding the period of time over which the misrepresentations occurred).

The enhancement applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor[61] but, unlike the enhancement for undue influence (§2G1.3(b)(2)(B)), may apply based on a sting operation.[62]

ii. Undue influence

Application Note 3 instructs that under §2G1.3(b)(2)(B), the court should look at the facts of each case closely to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.[63] It further provides a rebuttable presumption of undue influence if the participant is at least ten years older than the minor.[64]

The enhancement applies even if the offense has an element of force, fraud, or coercion because "undue influence" can involve conduct with no force, fraud, or coercion.[65] It is not double counting to apply the undue influence enhancement in conjunction with the enhancement for exercising parental control[66] or for a victim under the age of 12.[67]

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61 USSG §2G1.3, comment. (n.3(A)).

62 *See, e.g.*, *Davis*, 985 F.3d at 308 (comparing commentary to §2G1.3(b)(2)(A) and (b)(2)(B)).

63 USSG §2G1.3, comment. (n.3(B)); *see also* United States v. Kempter, 29 F.4th 960, 966–67 (8th Cir. 2022) (enhancement properly applied where defendant knew that the victim wanted to run away from home and "manipulated that weakness by corresponding with [the victim] for the purpose of eventual sexual activity"); United States v. Whyte, 928 F.3d 1317, 1336 (11th Cir. 2019) ("A defendant abuses his superior knowledge and resources by managing his victim's prostitution through actions like advertising her services, driving her to engagements, and handling the money." (internal citations omitted)).

64 USSG § 2G1.3, comment. (n.3(B)); *see also* United States v. Cruz, 976 F.3d 656, 661–62 (6th Cir. 2020) (rebuttable presumption not overcome where defendant had a two-year sexually explicit online relationship with the victim before driving the victim across country to engage in sexual activity with her); United States v. Watkins, 667 F.3d 254, 364–65 (2d Cir. 2012) (rebuttable presumption not overcome by victim's "eagerness" to participate in the offense). *But see* United States v. Davis, 924 F.3d 899, 904 (6th Cir. 2019) (district court erred in applying this enhancement based only upon the 16-year age gap between victim and defendant, stating that "[i]n cases where there is significant record evidence that undercuts this [rebuttable] presumption . . . a district court cannot rely solely on the presumption to determine that the defendant has 'compromised the voluntariness of the minor's behavior' ").

65 *See* United States v. Willoughby, 742 F.3d 229, 241 (6th Cir. 2014) (enhancement appropriate when the offense of conviction was based on a violation of section 1591 that included force, fraud, or coercion, because the "undue influence" related to the defendant's manipulation of and preying on the victim's status as a "homeless, destitute runaway"); United States v. Smith, 719 F.3d 1120, 1125 (9th Cir. 2013) (base offense level under §2G1.3(b)(2) and undue influence enhancement both may be applied because both provisions serve unique purposes).

66 *See* United States v. Mitteness, 893 F.3d 1091, 1095–96 (8th Cir. 2018) (it is not double counting to apply parental control and undue influence enhancements where parent exerted influence above and beyond the parent-child relationship).

67 *See* United States v. Arbaugh, 951 F.3d 167, 172–73 (4th Cir. 2020) (although the rebuttable presumption is triggered by an age disparity, "[b]y its plain terms, §2G1.3(b)(2)(B) focuses on a different aggravating factor (undue influence) than §2G1.3 (minor victims) or §2G1.3(b)(5)'s enhancement (minor victim under the age of twelve)").

The undue influence enhancement "does not apply if the only 'minor' involved in the offense is an undercover law enforcement officer."[68]

c. Use of a computer

Section 2G1.3(b)(3) provides for a 2-level increase if a computer or an interactive computer service was used to: "(A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor."[69]

Section 2G1.3(b)(3)(A) applies to a wide range of conduct encouraging sexual conduct with a minor; the phrase "the travel of" relates only to the word "facilitate" and not the preceding verbs.[70] Section 2G1.3(b)(3)(A) "is intended to apply only to the use of a computer . . . to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor."[71]

Section 2G1.3(b)(3)(B) does not apply if a person was convicted under 18 U.S.C. § 2421A (relating to promotion or facilitation of prostitution and reckless disregard of sex trafficking).[72]

d. Sex act or sexual contact/Commercial sex act

As of November 1, 2023, §2G1.3(b)(4) directs courts to apply the greater of two increases. Section 2G1.3(b)(4)(A) provides for a two-level increase if "(i) the offense involved the commission of a sex act or sexual contact; or (ii) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act."[73] Section 2G1.3(b)(4)(B) provides for a four-level increase if "(i) subsection (a)(4) applies; and (ii) the offense of conviction is

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68 USSG §2G1.3, comment. (n.3(B)).

69 USSG §2G1.3(b)(3). A cell phone used to send voice mail and text messages directly to the victim is a "computer" for purposes of §2G1.3(b)(3), even though it was not connected to the internet. *See* United States v. Kramer, 631 F.3d 900, 902–05 (8th Cir. 2011) (definition of "computer" in §2G1.3 "captures any device that makes use of a electronic data processor"); *cf.* United States v. Mathis, 767 F.3d 1264, 1283 (11th Cir. 2014) (defendant's use of a cell phone to call and send text messages constitutes use of a computer for purposes of §2G2.1(b)(6)).

70 *See* United States v. Procell, 31 F.4th 32, 35–37 (1st Cir. 2022) (rejecting defendant's argument that the enhancement applies only in cases where the defendant encourages *travel* to engage in prohibited sexual conduct).

71 USSG §2G1.3, comment. (n.4); *see also* USSG App. C, amend. 812 (effective Nov. 1, 2023) (clarifying that Application Note 4's limitation applies only to §2G1.3(b)(3)(A)).

72 USSG §2G1.3(b)(3)(B); *see also* USSG App. C, amend. 815 (effective Nov. 1, 2023) (adding this exception "because the use of a computer is already accounted for in the base offense level").

73 USSG §2G1.3(b)(4)(A).

18 U.S.C. § 2421A(b)(2)."[74] Offenses committed under 18 U.S.C. § 1591 are excluded from subsection (b)(4)(B) because they necessarily involve a commercial sex act.[75] However, courts have held that a defendant convicted under section 1591 may get the enhancement under subsection (b)(4)(A) because actual commission of a sex act or sexual contact is not an element of a conviction under section 1591 and, therefore, it is not double counting for a defendant to receive the enhancement.[76]

e. Minor younger than 12

Section 2G1.3(b)(5) provides for an 8-level increase if the offense involved a minor younger than 12 and the defendant was convicted of any offense covered by §2G1.3 other than 18 U.S.C. § 1591.[77] As in other guidelines, "minor" refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual).[78] Offenses committed under 18 U.S.C. § 1591 are not included in this specific offense characteristic because the age of the minor is already accounted for in the applicable base offense level.[79]

This enhancement applies where the victim is younger than 12 even if the defendant believes the victim is older.[80]

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[74] USSG §2G1.3(b)(4)(B); *see also* USSG App. C, amend. 815 (effective Nov. 1, 2023) (adding this four-level increase).

[75] USSG App. C, amend. 701 (effective Nov. 1, 2007).

[76] *See* United States v. Carter, 960 F.3d 1007, 1011 (8th Cir. 2020) ("Because it does not require 'the commission of' a commercial sex act, the (b)(4)(B) enhancement may be applied, for example, in a case where someone attempts to coerce a minor into committing a commercial sex act, but no sex act ultimately occurs."); United States v. Hornbuckle, 784 F.3d 549, 553–54 (9th Cir. 2015) (finding no double counting in application of §2G1.3(b)(4)(A) for defendants who pleaded guilty to two counts of sex trafficking of children under 18 U.S.C. § 1591 because commission of a sex act or sexual contact was not an element of sex trafficking of children under § 1591).

[77] USSG §2G1.3(b)(5).

[78] USSG §2G1.3, comment. (n.1); *see also* United States v. Vasquez, 839 F.3d 409, 412–13 (5th Cir. 2016) (definition of minor does not include a fictitious minor held out by the *defendant* as available for unlawful sexual activity, where the defendant was not a law enforcement officer and knew the child was fictitious); *infra* notes 151 (discussing cases considering definition of "minor" under §2G2.1).

[79] USSG App. C, amend. 701 (effective Nov. 1, 2007).

[80] *See* United States v. Hammond, 698 F.3d 679, 681 (8th Cir. 2012) (district court did not err in applying 8-level enhancement and denying a downward variance even though the defendant believed the victim to be 13 (rather than 11) years old); *cf.* United States v. Elboghdady, 117 F.4th 224, 237 (4th Cir. 2024) (the court procedurally erred when—although it found the evidence insufficient to prove intent to engage in sexual conduct with a fictious 11-year-old—it applied the enhancement at §2G1.3(b)(5) and the cross reference to §2A3.1(b)(2) with respect to a minor under the age of 12).

3. Cross References

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

Section 2G1.3(c)(1) states that §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) applies if "the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct" and the resulting offense level under §2G2.1 is greater than the offense level determined under §2G1.3. This subsection is to be construed broadly.[81]

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

Section 2G1.3(c)(2) states that §2A1.1 (First Degree Murder) applies if "a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111" and if the resulting offense level is greater than the one determined under §2G1.3.[82]

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

Section 2G1.3(c)(3) states that §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) applies if the offense involved conduct described in 18 U.S.C. §§ 2241 or 2242 and the resulting offense level is greater than the one determined under §2G1.3.[83] The conduct described in sections 2241 and 2242 generally includes sexual conduct that involves the use of force, threats, or other factors that limit the minors' ability to decline to participate.[84] When the cross reference at §2G1.3(c)(3) applies, the court can apply both the base offense level under §2A3.1 and the enhancement at §2A3.1(b) if the offense involved conduct described in 18 U.S.C. § 2241.[85]

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81 USSG §2G1.3, comment. (n.5(A)); *see also* United States v. Gould, 30 F.4th 538, 544–46 (6th Cir. 2022) (cross reference applies where an unnamed individual placed advertisement offering a minor for purpose of producing a visual depiction and defendant responded).

82 USSG §2G1.3(c)(2).

83 USSG §2G1.3(c)(3); *see also* United States v. Reynolds, 720 F.3d 665, 673–74 (8th Cir. 2013) (cross reference proper where the defendant placed minor victim in fear when he drove her to an isolated place and did not stop the sexual conduct after she resisted); United States v. Henzel, 668 F.3d 972, 975–77 (7th Cir. 2012) (cross reference required where the defendant's conduct involved conduct described in 18 U.S.C. § 2242, and where defendant understood victim was in fear when he coerced her, resisted her efforts to move away, and ignored her repeated protests and cries).

84 USSG §2G1.3, comment. (n.5(B)) (summarizing the conduct prohibited by §§ 2241 and 2242).

85 *See* Osley v. United States, 751 F.3d 1214, 1227 (11th Cir. 2014) ("[S]everal of our sister circuits have held that applying section 2G1.3(c)(3)'s cross-reference provision and the four-level enhancement does not constitute impermissible double counting because the Guidelines do not indicate otherwise." (citations omitted)).

4. Special Instruction

Section 2G1.3(d)(1) provides a special instruction requiring that if the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) applies "as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction."[86] Each minor transported, persuaded, induced, enticed, or coerced is to be treated as a separate minor.[87] The special instruction applies if the "relevant conduct of an offense of conviction includes" the travel for a commercial sex act or prohibited sexual contact with more than one minor "whether [that minor is] specifically cited in the count of conviction" or not.[88] Thus, multiple counts involving more than one minor are not grouped under §3D1.2 (Groups of Closely Related Counts).[89] A separate count under subsection (d)(1) may be supported by uncharged as well as charged victims so long as the uncharged conduct satisfies relevant conduct principles at §1B1.3(a)(1).[90] Because these counts cannot be grouped, expanded relevant conduct does not apply.[91]

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted.[92]

III. CHILD PORNOGRAPHY—§§2G2.1 AND 2G2.2

This section of the primer discusses the statutes, sentencing guidelines, and case law related to offenses involving the possession, receipt, trafficking, and distribution of child pornography.

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86 USSG §2G1.3(d)(1).

87 USSG §2G1.3, comment. (n.6).

88 *Id.*

89 *Id*.

90 *See* United States v. Garcia-Gonzalez, 714 F.3d 306, 316 (5th Cir. 2013) (sentencing court properly relied on uncharged conduct involving a minor victim as a separate count of conviction under §2G1.3(d)(1) because "offense" includes relevant conduct and the uncharged conduct occurred at the same time "through the same trafficking scheme" as the charged conduct with other minor victims).

91 *See* USSG §1B1.3(a)(2); *see also* United States v. Randall, 924 F.3d 790, 797–800 (5th Cir. 2019) (additional victims were not included as relevant conduct to charged conviction because their abuse was not contemporaneous with, done in preparation for, or to avoid detection of the charged conduct; district court improperly applied §1B1.3(a)(2)); *supra* Section II.B.4 (discussing similar special instruction under §2G1.1) and *infra* Section III.B.4 (discussing similar special instruction under §2G2.1).

92 USSG §2G1.3, comment. (n.7). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 7 to §2G1.3. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

A. STATUTORY SCHEME

Statutes related to child pornography offenses include 18 U.S.C. § 1466A and numerous provisions within chapter 110 of title 18 (Sexual Exploitation and Other Abuse of Children).

1. 18 U.S.C. § 1466A (Obscene Visual Representations of the Sexual Abuse of Children)

Section 1466A(a) prohibits knowingly producing, distributing, receiving, or possessing with intent to distribute, a visual depiction of any kind (including a drawing, cartoon, sculpture, or painting) that (1) depicts a minor engaging in sexually explicit conduct and is obscene, or (2) depicts (or appears to depict) a minor engaging in "graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal" and "lacks serious literary, artistic, political, or scientific value."[93] Section 1466A(b) prohibits knowingly possessing such visual depictions.[94] Section 1466A(a) and (b) prohibit attempts and conspiracies.[95]

Violations of these sections are subject to the penalties provided in 18 U.S.C. § 2252A(b)(1) and (b)(2).[96]

2. 18 U.S.C. § 2251 (Sexual Exploitation of Children)

Section 2251 prohibits a range of conduct related to visual depictions of minors engaging in sexually explicit conduct:

- Section 2251(a) prohibits employing, using, persuading, inducing, enticing, or coercing a minor, or transporting any minor in interstate or foreign commerce, with the intent that the minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or transmitting a live visual depiction of such conduct.[97]
- Section 2251(b) prohibits parents, legal guardians, and persons with custody or control of a minor from permitting the minor to engage in sexually explicit conduct to produce visual depictions thereof.[98]

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93 18 U.S.C. § 1466A(a).

94 *Id.* § 1466A(b).

95 *Id.* § 1466A(a), (b).

96 *Id.* § 2252A(b)(1), (2). *See infra* Section III.A.5 for discussion of the penalties.

97 18 U.S.C. § 2251(a).

98 *Id.* § 2251(b).

- Section 2251(c) prohibits employing, using, persuading, inducing, enticing, or coercing any minor to engage in any sexually explicit conduct outside of the United States to produce a visual depiction of such conduct if that person transports or intends to transport that depiction to the United States or its territories.[99]
- Section 2251(d) prohibits knowingly making, printing, or publishing any notice or advertisement seeking or offering (1) to receive, exchange, buy, produce, display, distribute, or reproduce any visual depiction of a minor engaging in sexually explicit conduct, or (2) seeking or offering participation in any act of sexual conduct by or with a minor to produce a visual depiction.[100]

Subsections 2551(a)–(d) also prohibit attempts and conspiracies.[101]

Section 2251 has a 15-year mandatory minimum penalty and a 30-year statutory maximum penalty, which increases based on the defendant's criminal history and the consequences of the offense.[102] If the defendant has one prior conviction under chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591 (Sex trafficking of children or by force, fraud, or coercion), chapter 71 (Obscenity), chapter 109A (Sexual Abuse), chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), 10 U.S.C. § 920 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or any analogous state conviction, the mandatory minimum penalty increases to 25 years and the maximum penalty increases to 50 years imprisonment.[103] If the defendant has two or more prior convictions under the same statutes or chapters, the mandatory minimum penalty is 35 years and the maximum penalty is life imprisonment.[104] In addition, if an offense under this section results in the death of a person, the mandatory minimum penalty is 30 years and the maximum penalty is death or life imprisonment.[105]

3. 18 U.S.C. § 2251A (Selling or Buying of Children)

Section 2251A(a) prohibits any parent, legal guardian, or person with custody or control of a minor from selling (or offering to sell) or otherwise transferring custody or control of such minor either (1) with the knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or (2) with the intent to promote the

99 *Id.* § 2251(c).

100 *Id.* § 2251(d).

101 *Id.* § 2251(e).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

minor engaging in (or assisting in) sexually explicit conduct for the purpose of producing a visual depiction of such conduct.[106]

Section 2251A(b) prohibits purchasing (or offering to purchase) or otherwise obtaining custody or control of a minor either (1) with knowledge that the minor will be portrayed in a visual depiction engaging in sexually explicit conduct, or (2) with the intent to promote the engaging in (or assisting in) sexually explicit conduct by the minor for the purpose of producing a visual depiction of such conduct.[107]

Subsections 2251A(a) and (b) each have a 30-year mandatory minimum penalty and a maximum penalty of life imprisonment.[108]

4. 18 U.S.C. § 2252 (Certain Activities Relating to Material Involving Sexual Exploitation of Minors)

Section 2252 prohibits activities related to distributing or receiving visual depictions the production of which involved the use of a minor engaging in sexually explicit conduct:

- Section 2252(a)(1) prohibits knowingly transporting or shipping such visual depictions by any means (including computer).[109]
- Section 2252(a)(2) prohibits knowingly receiving or distributing such visual depictions or reproducing such visual depictions for distribution.[110]
- Section 2252(a)(3) prohibits knowingly selling or possessing with intent to sell any such visual depiction.[111]
- Section 2252(a)(4) prohibits knowingly possessing or accessing with intent to view one or more books, magazines, periodicals, films, video tapes, or other matter containing such a visual depiction.[112]

Subsections (a)(1), (a)(2), and (a)(3) also prohibit attempts and conspiracies and have a five-year mandatory minimum penalty and a 20-year maximum penalty.[113] If the defendant has a qualifying prior conviction, the mandatory minimum penalty increases to 15 years

106 18 U.S.C. § 2251A(a).

107 *Id.* § 2251A(b).

108 *Id.* § 2251A(a)–(b).

109 *Id.* § 2252(a)(1).

110 *Id.* § 2252(a)(2).

111 *Id.* § 2252(a)(3).

112 *Id.* § 2252(a)(4).

113 *Id.* § 2252(b)(1).

and the maximum penalty increases to 40 years.[114] Subsection (a)(4) has a ten-year maximum penalty.[115] If any visual depiction involved a prepubescent minor or a minor under 12, the maximum penalty increases to 20 years.[116] If the defendant has a qualifying prior conviction, the mandatory minimum penalty increases to ten years and the maximum penalty increases to 20 years.[117]

5. 18 U.S.C. § 2252A (Certain Activities Relating to Material Constituting or Containing Child Pornography)

Section 2252A prohibits activities related to distributing or receiving child pornography:

- Section 2252A(a)(1) prohibits knowingly mailing, transporting, or shipping (including by computer) child pornography.[118]
- Section 2252A(a)(2) prohibits receiving or distributing any material containing child pornography.[119]
- Section 2252A(a)(3) prohibits knowingly reproducing child pornography for distribution (including by computer) or advertising, promoting, presenting, distributing, or soliciting (including by computer) material with an obscene visual depiction of a minor

[114] *Id.* Prior qualifying convictions are convictions under chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591, chapter 71 (Obscenity), chapter 109A (Sexual Abuse), chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), section 920 of title 10 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or an analogous state conviction. These enhanced penalties apply based on prior state convictions for sexual abuse or abusive sexual conduct involving an adult victim. *See* Lockhart v. United States, 577 U.S. 347 (2016) (holding that "involving a minor or ward" modifies only the third and final phrase—"abusive sexual conduct"—under section 2252(b)(2)'s enhanced penalties based on prior state offenses and therefore defendant was subject to increased mandatory minimum based on a prior state conviction for first degree sexual abuse of an adult victim). Courts have held that there is no *mens rea* requirement with respect to the victim's age. *See* United States v. Grimes, 888 F.3d 1012, 1016–17 (8th Cir. 2018) (defendant's prior state conviction in New York for second-degree sodomy triggered section 2252(b)(1) and (2) enhanced minimum and maximum penalties; no specific intent showing as to the victim's age is required). A juvenile delinquency adjudication for criminal sexual conduct involving a minor is not a "prior conviction" and thus cannot serve as a basis for triggering section 2252(b)(1)'s mandatory minimum provision. *See* United States v. Gauld, 865 F.3d 1030, 1034–35 (8th Cir. 2017) (en banc) (because Federal Juvenile Delinquency Act long has distinguished between adult criminal convictions and juvenile delinquency adjudications and because section 2252(b)(1) mentions only "convictions," Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum).

[115] 18 U.S.C. § 2252(b)(2).

[116] *Id.*

[117] *Id.* Subsections 2252(b)(1) and (b)(2) provide for increased penalties based on the same prior convictions. *See supra* note 114.

[118] 18 U.S.C. § 2252A(a)(1).

[119] *Id.* § 2252A(a)(2).

engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.[120]

- Section 2252A(a)(4) prohibits knowingly selling, or possessing with the intent to sell, any child pornography.[121]
- Section 2252A(a)(5) prohibits knowingly possessing any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography.[122]
- Section 2252A(a)(6) prohibits knowingly distributing, offering, sending, or providing to a minor any visual depiction that appears to be a minor engaging in sexually explicit conduct, including a computer-generated image.[123]
- Section 2252A(a)(7) prohibits knowingly producing with intent to distribute or distributing "child pornography that is an adapted or modified depiction of an identifiable minor."[124]

All subsections also prohibit attempts and conspiracies.[125]

Subsections (a)(1)–(4), and (a)(6) have a five-year mandatory minimum penalty and a 20-year maximum penalty, which increases to 15 years and 40 years, respectively, if the defendant has a qualifying prior conviction.[126] Subsection (a)(5) has a ten-year maximum penalty (or 20 years if the offense involved a prepubescent minor or a minor under 12).[127] If the defendant has a qualifying prior conviction, there is a ten-year mandatory minimum penalty and the maximum penalty increases to 20 years.[128] Subsection (a)(7) has a 15-year maximum penalty.[129]

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120 *Id.* § 2252A(a)(3).

121 *Id.* § 2252A(a)(4).

122 *Id.* § 2252A(a)(5).

123 *Id.* § 2252A(a)(6).

124 *Id.* § 2252A(a)(7).

125 *Id.* § 2252A(b)(1)–(3).

126 *Id.* § 2252A(b)(1). Qualifying prior convictions are offenses under chapter 110 (Sexual Exploitation and Other Abuse of Children), section 1591, chapter 71 (Obscenity), chapter 109A (Sexual Abuse), chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), section 920 of title 10 (article 120 of the Uniform Code of Military Justice (Rape and Sexual Assault Generally)), or an analogous state conviction. *Id.*

127 *Id.* § 2252A(b)(2).

128 *Id.* Subsections (b)(1) and (b)(2) provide for enhanced penalties based on the same prior offenses. *See supra* note 112 for offenses that increase the statutory penalties.

129 18 U.S.C. § 2252A(b)(3).

Section 2252A(g) provides a 20-year mandatory minimum penalty and a maximum penalty of life imprisonment for engaging in a "child exploitation enterprise."[130] A "child exploitation enterprise" exists where the defendant violates any of the enumerated sex offense statutes "as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim . . . in concert with three or more other persons."[131]

As technology advances, questions arise regarding what constitutes "distribution" under section 2252A(a)(2). The item being distributed must have been delivered or available to someone other than the person who sent the materials.[132] Using a peer-to-peer file sharing program qualifies as distribution if there is evidence that the defendant was aware that his shared folder was available to others notwithstanding that he did not actively transfer images.[133] However, where there is no evidence to demonstrate that the defendant is aware that he is allowing access to files, the file's existence in a shared folder alone is not sufficient to support a conviction for distribution.[134] The defendant's possession of multiple devices containing child pornography in one location constitutes a single offense.[135]

6. 18 U.S.C. § 2257 (Record Keeping Requirements)

Section 2257 requires producers of books, magazines, periodicals, films, videotapes, digital images, pictures, or other matters that contain one or more visual depictions of actual sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depictions.[136]

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130 *Id.* § 2252A(g)(1).

131 *Id.* § 2252A(g)(2) (listing section 1591, section 1201 (if victim is a minor), chapter 109A (if victim is a minor), chapter 110 (except §§ 2257 and 2257A), and chapter 117 (if victim is a minor)).

132 *See* United States v. Grzybowicz, 747 F.3d 1296, 1307–10 (11th Cir. 2014) (no distribution where defendant sent the images from his cell phone to his personal email and downloaded the images to his computer, because there was no evidence that he shared the images with another person).

133 *See* United States v. Richardson, 713 F.3d 232, 236 (5th Cir. 2013); United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) ("When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred" and the "fact that the defendant did not actively elect to transmit those files is irrelevant"); *see also* United States v. Siepman, 107 F.4th 762, 766 (7th Cir. 2024) (use of a peer-to-peer file sharing network to access and download child pornography amounts to "transportation" under section 2252A(a)(1)), *cert. denied*, 134 S. Ct. 1149 (2025).

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

135 *See* United States v. Elliot, 937 F.3d 1310, 1313–17 (10th Cir. 2019) (vacating all but one of the convictions as "multiplicitous").

136 18 U.S.C. § 2257(a).

Section 2257 has a five-year maximum penalty.[137] If the defendant violates this section after a prior conviction under this section, there is a two-year mandatory minimum penalty, and the maximum penalty increases to ten years' imprisonment.[138]

7. 18 U.S.C. § 2257A (Record Keeping Requirements for Simulated Sexual Conduct)

Section 2257A requires producers of books, magazines, periodicals, films, videotapes, digital images, computer-manipulated images, pictures, or other matters that contain one or more visual depictions of simulated sexually explicit conduct to create and maintain individually identifiable records pertaining to every performer portrayed in such visual depictions.[139]

Section 2257A has a one-year maximum penalty.[140] If the defendant violates this section to conceal a substantive offense, the maximum penalty is five years in prison.[141] If the defendant violates this section after previously being convicted under this section, the minimum penalty is two years and the maximum penalty is ten years in prison.[142]

8. 18 U.S.C. § 2260 (Production of Sexually Explicit Depictions of a Minor for Importation into the United States)

Section 2260(a) prohibits a person outside the United States from employing, using, persuading, inducing, enticing, coercing, or transporting any minor with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, intending that the visual depiction will be imported into the United States.[143] Section 2260(b) prohibits a person outside the United States from knowingly receiving, transporting, shipping, distributing, selling, or possessing with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct,

137 *Id.* § 2257(i).

138 *Id.*

139 *Id.* § 2257A.

140 *Id.* § 2257A(i)(1).

141 *Id.* § 2257A(i)(2).

142 *Id.* § 2257A(i)(3).

143 *Id.* § 2260(a).

intending that the visual depiction will be imported into the United States. Each section also prohibits attempts and conspiracies.[144]

Violations of section 2260(a) are subject to the penalties provided in 18 U.S.C. § 2251(e).[145] Violations of section 2260(b) are subject to the penalties provided in section 2252(b)(1).[146]

9. 18 U.S.C. § 2259A (Assessments in Child Pornography Cases)

Section 2259A, adopted as part of the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 ("Victim Assistance Act"),[147] provides that a court may assess defendants up to $17,000 for child pornography possession offenses, $35,000 for other offenses involving trafficking in child pornography, and up to $50,000 for child pornography production crimes.[148] Courts "shall consider the factors set forth in sections 3553(a) and 3572" when determining the special assessment amount.[149] These special assessments fund the Child Pornography Victims Reserve, also created by the Victim Assistance Act.[150]

10. 18 U.S.C. § 3014 (Additional Special Assessment)

As discussed in Section II of this primer, Section 3014 provides for an assessment of $5,000 (in addition to the ordinary mandatory special assessment of $100 under 18 U.S.C. § 3013) on "any non-indigent person or entity" convicted of, among other things, any commercial sex act, child sexual abuse, and child pornography offenses.[151] In determining whether a defendant is indigent, the analysis for earning capacity is prospective, considering the defendant's earning potential following release from prison.[152]

144 *Id.* § 2260(c).

145 *Id.* § 2260(c)(1). *See supra* Section III.A.2 for discussion of the penalties.

146 *Id.* § 2260(c)(2). *See supra* Section III.A.4 for discussion of the penalties.

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

148 18 U.S.C. § 2259A(a)(1)–(3).

149 *Id.* § 2259A(c).

150 *See infra* Section V.E (discussing restitution and the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018).

151 18 U.S.C. § 3014.

152 *See supra* note 31 (collecting cases).

B. SECTION 2G2.1 (SEXUALLY EXPLOITING A MINOR BY PRODUCTION OF SEXUALLY EXPLICIT VISUAL OR PRINTED MATERIAL; CUSTODIAN PERMITTING MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT; ADVERTISEMENT FOR MINORS TO ENGAGE IN PRODUCTION)

Section 2G2.1 covers offenses under 18 U.S.C. §§ 1591, 2251, and 2260(a). The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual).[153]

1. Base Offense Level

Section 2G2.1 has a base offense level of 32.[154]

2. Specific Offense Characteristics

a. Age of the victim

Section 2G2.1(b)(1) provides for a 4-level increase if the offense involved a minor who had not attained the age of 12, and a 2-level increase if the offense involved a minor who had attained the age of 12 but had not attained the age of 16.[155]

In addition, §2G2.1(b)(4) provides for a 4-level increase "if the offense involved material that portrays . . . (B) an infant or toddler."[156] The accompanying application note clarifies that if subsection (b)(4)(B) applies, the vulnerable victim adjustment in Chapter Three does not apply.[157]

b. Sexual act or sexual conduct

Section 2G2.1(b)(2) provides for (the greater) of a 2-level increase if the offense involved the commission of a sexual act or sexual contact, or a 4-level increase if the offense involved both the commission of a sexual act and conduct described in 18 U.S.C.

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153 *See* USSG §2G2.1, comment. (n.1); *see also* United States v. Haas, 986 F.3d 467, 480 (4th Cir. 2021) (finding it was error to apply the enhancement because the application note defining "minor" does not "encompass a situation in which a private citizen represents that a fictitious child could be provided to engage in sexual conduct" and the term "law enforcement officer" does not include private citizens working with law enforcement); *see supra* note 79 (discussing cases interpreting the same definition of minor under §2G1.3).

154 USSG §2G2.1(a)(1).

155 USSG §2G2.1(b)(1).

156 USSG §2G2.1(b)(4).

157 USSG §2G2.1, comment. (n.4).

§ 2241(a) or (b).[158] Application Note 2 summarizes the conduct prohibited by 18 U.S.C. § 2241(a) and (b), which generally involves force, threats, or rendering the minor unconscious or otherwise impairing the ability of the minor to appraise or control conduct.[159] Courts have concluded that masturbation qualifies as "a sexual act or sexual contact" within the meaning of the provision.[160]

c. Distribution

Section 2G2.1(b)(3) provides for a 2-level increase "if the defendant knowingly engaged in distribution."[161] "Distribution" includes "posting materials involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant."[162] Courts have applied the distribution enhancement where, for example, a codefendant's distribution of images was relevant conduct attributable to a defendant who helped produce the images[163] and where the defendant shared images of himself and the minor victim engaged in sexual activity with the minor victim.[164]

d. Sadistic or masochistic conduct/Infant or toddler

Section 2G2.1(b)(4)(A) provides for a 4-level enhancement if the offense involved material that portrays "sadistic or masochistic conduct or other depictions of violence."[165] Courts have held that self-penetration using a foreign object qualifies as violence for purposes of this enhancement,[166] but have disagreed about whether this applies as a per se

158 USSG §2G2.1(b)(2).

159 USSG §2G2.1, comment. (n.2).

160 *See* United States v. Sanchez, 30 F.4th 1063, 1075–76 (11th Cir. 2022) (collecting cases); United States v. Raiburn, 20 F.4th 416, 422–24 (8th Cir. 2021) (holding that defendant's masturbation over a video call qualifies as "sexual contact" and collecting other cases for the same).

161 USSG §2G2.1(b)(3).

162 USSG §2G2.1, comment. (n.1).

163 *See* United States v. Odom, 694 F.3d 544, 547–48 (5th Cir. 2012) (per curiam) (defendant's relevant conduct included the harm that resulted from his help in producing the images).

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

165 USSG §2G2.1(b)(4)(A). *See infra* Section III.C.2.d for a more detailed discussion of what constitutes "sadistic or masochistic" conduct.

166 *See, e.g.*, United States v. Sanchez, 30 F.4th 1063, 1075 (11th Cir. 2022) (upholding enhancement where defendant made victim insert a toothbrush into her vagina and collecting circuit cases applying enhancement based on self-penetration with foreign objects); United States v. Starr, 533 F.3d 985, 1001 (8th Cir. 2008) (explaining that "self-penetration by a foreign object qualifies as violence").

rule or on a case-by-case basis.[167] At least one court has held that "images involving an adult male performing anal sex on a minor girl . . . are per se sadistic or violent."[168] Several circuit courts have concluded that it is not impermissible double counting to apply both §2G2.1(b)(4)(A) and §2G2.1(b)(2)(A) based on similar conduct.[169]

As discussed above, §2G2.1(b)(4)(B) provides for a 4-level increase "if the offense involved material that portrays . . . (B) an infant or toddler."[170] The accompanying application note clarifies that if subsection (b)(4)(B) applies, the vulnerable victim adjustment in Chapter Three does not apply.[171]

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

Section 2G2.1(b)(5) provides for a 2-level increase if "the defendant was a parent, relative, or legal guardian of the minor" or if "the minor was otherwise in the custody, care, or supervisory control of the defendant."[172] This enhancement applies broadly, and it includes offenses "involving a minor entrusted to the defendant, whether temporarily or permanently."[173] The minor can be in the custody, care, or supervisory control of more

[167] *Compare* United States v. McGavitt, 28 F.4th 571, 576 (5th Cir. 2022) (enhancement warranted because of "the characteristics of the video"—a 12- or 13-year old victim penetrating herself with the handle of a hairbrush—"rather than any per se rule applicable to self-penetration cases"), *with Starr*, 533 F.3d at 1001–02 (adopting a per se approach).

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

[169] United States v. Clark, 780 F.3d 896, 898–899 (8th Cir. 2015) (collecting cases).

[170] USSG §2G2.1(b)(4).

[171] USSG §2G2.1, comment. (n.4).

[172] USSG §2G2.1(b)(5).

[173] USSG §2G2.1, comment. (n.5(A)); *see also* United States v. Perez-Colon, 62 F.4th 805, 813 (3d Cir. 2023) (enhancement under §2G2.1(b)(5) does not require "parent-like" authority); United States v. Isaac, 987 F.3d 980, 993 (11th Cir. 2021) (defendant's conduct as a 44-year-old adult and the only adult present and caretaking for the 13-year-old minor satisfied the commentary's example of a temporary caretaker); United States v. Alfaro, 555 F.3d 496, 499–500 (5th Cir. 2009) (affirming the enhancement and concluding that the relationship between the 36-year-old defendant and his 15-year-old sister-in-law was "entrustful" even though the victim's mother did not approve of the victim spending time with the defendant). *But see* United States v. Harris, 999 F.3d 1233, 1237–38 (9th Cir. 2021) (though the defendant lived with the minor victim for "five to eight weeks" and victim called defendant "dad" on one occasion, defendant "was never entrusted with parent-like authority" over minor victim because he "was never even a temporary caretaker or babysitter" and victim's mother did not leave victim alone with defendant).

than one person at a time.[174] If the enhancement in §2G2.1(b)(5) applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply.[175]

f. Knowing misrepresentation of identity/Use of a computer

Section 2G2.1(b)(6) provides for a 2-level increase

> [i]f, for the purpose of producing or transmitting sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) to solicit participation with a minor in sexually explicit conduct.[176]

The enhancement for misrepresentation at §2G2.1(b)(6)(A) applies only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.[177] Because the misrepresentation must be to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, the use of a misleading computer screen name, for example, without the requisite intent is not sufficient.[178]

The computer or interactive computer service enhancement at §2G2.1(b)(6)(B) applies only to communications directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.[179] Courts have held that use of a cell phone

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[174] *See, e.g.*, United States v. McGrain, 105 F.4th 37, 43 (2d Cir. 2024) (upholding §2G2.1(b)(5) enhancement where defendant shared some parental responsibilities and had a "relationship of trust and care" with the victim); United States v. Carson, 539 F.3d 611, 612 (7th Cir. 2008) (enhancement supported where the minor's mother and the mother's boyfriend had mutual custody over the minor during the minor's visits to their house).

[175] USSG §2G2.1, comment. (n.5(B)).

[176] USSG §2G2.1(b)(6); *see* United States v. Starr, 533 F.3d 985, 1002–03 (8th Cir. 2008) (affirming enhancement, based on application note, for defendant who lied about his age because misrepresentation was made with intent to persuade or coerce the minor to engage in sexually explicit conduct, and finding that minor does not have burden to discover defendant's true age).

[177] USSG §2G2.1, comment. (n.6(A)); *see also* United States v. Hinkley, 803 F.3d 85, 93 (1st Cir. 2015) (representation that defendant was 18 rather than 28 years old "was instrumental to his gaining access to his victims, because it made the minors and their parents put their guards down" and the application note "explicitly includes misrepresentation of age").

[178] USSG §2G2.1, comment. (n.6(A)).

[179] USSG §2G2.1, comment. (n.6(B)); United States v. Raiburn, 20 F.4th 416, 424–26 (8th Cir. 2021) (upholding application of enhancement at §2G2.1(b)(6)(B)(ii) where defendant and minor victim

to call and send text messages, regardless of whether it has a connection to the internet or internet capabilities, constitutes the use of a computer and warrants the enhancement.[180]

3. Cross Reference

Section 2G2.1(c)(1) states that §2A1.1 (First Degree Murder) applies if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111, and if the resulting offense level is greater than the one determined under §2G2.1.[181]

4. Special Instruction

Section 2G2.1(d)(1) directs that when multiple minors are involved in the offense, Chapter Three, Part D (Multiple Counts) should be applied as though "the exploitation of each minor had been contained in a separate count of conviction,"[182] and "each minor exploited is to be treated as a separate minor."[183] Therefore, multiple counts involving the exploitation of different minors are not to be grouped under §3D1.2 (Groups of Closely Related Counts).[184] The special instruction applies if the "relevant conduct of an offense of conviction includes more than one minor being exploited."[185] Thus, temporally distinct conduct must satisfy §1B1.3(a)(1)'s requirement that the conduct be "during the commission of" or "in preparation for" the offense of conviction.[186]

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masturbated at the same time over a video call against defendant's challenge that it did not qualify as soliciting " 'participation with' a minor in sexually explicit conduct"). *But see* United States v. Jass, 569 F.3d 47, 67–68 (2d Cir. 2009) (enhancement does not apply where computer was used to show explicit material to desensitize minor victim to sexual activity rather than for solicitation purposes).

[180] *See* United States v. Mathis, 767 F.3d 1264, 1283 (11th Cir. 2014); *cf.* United States v. Kramer, 631 F.3d 900, 902–05 (8th Cir. 2011) (same with respect to identical enhancement under §2G1.3).

[181] USSG §2G2.1(c)(1).

[182] USSG §2G2.1(d)(1).

[183] USSG §2G2.1, comment. (n.7); *see* United States v. Rosenow, 50 F.4th 715, 740–41 (9th Cir. 2022) (special instruction applied to defendant who was convicted of a single count of possession of child pornography where videos in which defendant engaged in sexually explicit conduct with four different minors were among the materials defendant possessed).

[184] USSG §2G2.1, comment. (n.7); *see* United States v. Hoover, 95 F.4th 763, 777 (4th Cir.) ("Grouping the production offenses separately did not result in double counting because those offenses concerned the separate harms [the defendant] inflicted on [two separate victims]."), *cert. denied*, 145 S. Ct. 399 (2024).

[185] USSG §2G2.1, comment. (n.7).

[186] USSG §1B1.3(a)(1); *see* United States v. Randall, 924 F.3d 790, 797–800 (5th Cir. 2019) ("[N]one of the conduct underlying the uncharged 'pseudo counts' . . . bear the necessary connection [] required by §1B1.3(a)(1)(A)."); United States v. Schock, 862 F.3d 563, 568–69 (6th Cir. 2017) (without evidence that defendant photographed Victims 1 and 2 together on the date alleged in indictment, conduct in taking pictures of Victim 1 two years later was not "during the commission of" the offense, so multiple count analysis did not apply); *supra* Section II.B.4 (discussing similar special instruction under §2G2.1).

5. Upward Departure Provision

If the offense involved more than ten minors, an upward departure may be warranted.[187]

C. SECTION 2G2.2 (TRAFFICKING IN MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR; RECEIVING, TRANSPORTING, SHIPPING, SOLICITING, OR ADVERTISING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR; POSSESSING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR WITH INTENT TO TRAFFIC; POSSESSING MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF A MINOR)

Section 2G2.2 covers violations of 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), and 2260(b). The word "minor" in this guideline refers to an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual).[188]

1. Base Offense Level

If the defendant was convicted under 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5), or 2252A(a)(7), the base offense level is 18**.** Otherwise, the base offense level is 22.[189]

2. Specific Offense Characteristics

a. Receipt or solicitation only

Section 2G2.2(b)(1) provides for a 2-level decrease if the base offense level is 22, "the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor," and "the defendant did not intend to traffic in or distribute" the material.[190] Circuit courts that have addressed the question have uniformly agreed that the "unambiguous text forecloses eligibility where a defendant engages in any distribution

[187] USSG §2G2.1, comment. (n.8). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 8 to §2G2.1. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[188] USSG §2G2.2, comment. (n.1).

[189] USSG §2G2.2(a).

[190] USSG §2G2.2(b)(1). "Distribution" includes "posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material." USSG §2G2.2, comment. (n.1).

at all, irrespective of his mental state."[191] As a result, courts regularly deny the reduction to defendants who used peer-to-peer file sharing networks, regardless of whether the defendant purposefully shared files or was aware that his files were accessible to others through the network.[192] This differs from how courts apply the enhancement for distribution at §2G2.2(b)(4): an enhancement for distribution applies based on a defendant's use of peer-to-peer networks only if there is a showing that the defendant intentionally shared files or understood the file-sharing capability of the platform.[193]

A decrease under §2G2.2(b)(1) may also be denied when the defendant transported pornographic materials across state lines.[194]

b. Prepubescent minor/Minor under 12 years

Section 2G2.2(b)(2) provides for a 2-level increase if the material involved a prepubescent minor or a minor under the age of 12.[195]

c. Distribution

Section 2G2.2(b)(3) provides a tiered enhancement scheme if the offense involved distribution.[196] The greatest enhancement applies, as follows:

[191] United States v. Miltier, 993 F.3d 267, 269 (4th Cir. 2021) (holding that the reduction was properly denied where defendant was unaware that his files were made available to others through peer-to-peer file-sharing network and collecting circuit cases concluding that the defendant's mental state is irrelevant).

[192] *See, e.g.*, *id.*; United States v. Meek, 32 F.4th 576, 580 (6th Cir. 2022) (noting that the defendant's admission that he had used LimeWire, a peer-to-peer file sharing network, "customarily is sufficient to support the denial of a §2G2.2(b)(1) reduction" and collecting cases for same).

[193] *See infra* Section III.C.2.c.

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

[195] USSG §2G2.2(b)(2).

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

	Type of Distribution	*Increase by:*
(A)	for pecuniary gain (for profit)	the number of levels from the table in §2B1.1 corresponding to the retail value of the material, but not less than 5 levels.[197]
(B)	in exchange for any valuable consideration (but not for pecuniary gain)	5 levels[198]
(C)	to a minor	5 levels[199]
(D)	to a minor and intended to persuade, induce, entice, or coerce that minor to engage in any illegal activity (unless covered by (E), below)	6 levels[200]
(E)	to a minor and was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct	7 levels[201]
(F)	knowing and not otherwise described in (A) through (E)	2 levels[202]

[197] USSG §2G2.2(b)(3)(A).

[198] USSG §2G2.2(b)(3)(B). Distribution "in exchange for any valuable consideration" means "the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child." USSG §2G2.2, comment. (n.1); *see also* United States v. Darrah, 132 F.4th 643, 650 (2d Cir. 2025) ("the district court erred in applying Section 2G2.2(b)(3)(B) by relying solely on [defendant's] unilateral expectations absent any assenting language or conduct from the[Online Covert Employee]—even assuming that a government agent can effectively create such an agreement"); United States v. Morehouse, 34 F.4th 381, 393–94 (4th Cir. 2022) (district court erred in imposing 5-level enhancement under §2G2.2(b)(3)(B), rather than 2-level enhancement under §2G2.2(b)(3)(F) where there was no evidence that defendant reached "*any* type of agreement with a specific person"); United States v. Randall, 34 F.4th 867, 873–74 (9th Cir. 2022) (as long as an agreement was reached, defendant does not need to *receive* valuable consideration for enhancement to apply); United States v. Oliver, 919 F.3d 393, 405 (6th Cir. 2019) (remanding for further consideration of whether enhancement should apply where defendant intended to trade child pornography for images of a child, but it was unclear whether the other party ever agreed).

[199] USSG §2G2.2(b)(3)(C). "Distribution to a minor" means "the knowing distribution to an individual who is a minor at the time of the offense" and can include fictitious persons when represented to be minors by law enforcement. USSG §2G2.2, comment. (n.1); *see also* United States v. Fulford, 662 F.3d 1174, 1180–82 (11th Cir. 2011) (§2G2.2(b)(3)(C) enhancement improper where defendant thought he distributed child pornography to a 13-year-old female and other minors, but the only identified recipients of his messages were adult males pretending to be minor females because enhancement applies only for distribution to actual minors or law enforcement officers represented to defendant as being a minor).

[200] USSG §2G2.2(b)(3)(D).

[201] USSG §2G2.2(b)(3)(E). Distribution to a person representing that he can provide a child to engage in sexually explicit conduct is still distribution to a minor when the material is distributed with knowledge that it will be viewed by the minor. *See* United States v. Love, 593 F.3d 1, 8 (D.C. Cir. 2010) ("[W]e understand section 2G2.2(b)(3)(E) to apply when, acting with the requisite purpose, the defendant engages in an act related to the transfer of child pornography with the knowledge it will be received or viewed by a minor.").

[202] USSG §2G2.2(b)(3)(F); *see also* United States v. Grabau, 89 F.4th 691, 693 (8th Cir. 2024) (enhancement appropriate when there is "direct evidence of knowledge beyond the simple fact that files were transferred

Application Note 2 instructs that the enhancement applies if the defendant knowingly committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute.[203] The Commission added this commentary to avoid the imposition of the enhancement where a defendant unwittingly makes child pornography available to others through use of a peer-to-peer file-sharing program.[204] After addition of this commentary, courts routinely apply the enhancement based on the defendant's use of a file-sharing network so long as there is sufficient evidence that the defendant understood that others could access their files.[205] However, the Seventh Circuit recently held that "merely uploading images to a cloud-storage device [without evidence others were ever granted access] is *not* distribution."[206]

It is not double counting to apply the distribution enhancement in a distribution of child pornography conviction because distribution is not an "essential element" of the underlying offense, which can also be committed by knowingly receiving or reproducing child pornography.[207]

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through a file-sharing program" (citing United States v. Martinez, 970 F.3d 986, 989 (8th Cir. 2020)); United States v. Lawrence, 920 F.3d 331, 335–37 (5th Cir. 2019) (enhancement properly applied when defendant has knowledge that files are being shared with others, regardless of whether defendant actually intended to distribute the files); United States v. Montanez-Quinones, 911 F.3d 59, 67 (1st Cir. 2018) (enhancement properly applied where "defendant was a 'sophisticated and long-time computer user' who had selected from thousands of downloaded files a limited number to share through the file-sharing program"); United States v. Dunning, 857 F.3d 342, 350 (6th Cir. 2017) (enhancement was applied appropriately where defendant argued that he removed files from file-sharing software so that others would no longer have access, demonstrating that defendant in fact understood he was sharing files).

[203] USSG §2G2.2, comment. (n.2).

[204] USSG App. C, amend. 801 (effective Nov. 1, 2016).

[205] *See* United States v. Hyatt, 28 F.4th 776, 785–86 (7th Cir. 2022) (not applying enhancement but collecting cases applying the enhancement where the defendant used Dropbox or a similar service to share child pornography with others or shared a link to files stored on a cloud-based storage service); United States v. Clarke, 979 F.3d 82, 95 & n.9 (2d Cir. 2020) (collecting appellate cases holding that a finding that the defendant "knowingly ma[de] child pornography available to be downloaded by other users on a peer-to-peer file-sharing network" supports a conviction for distribution under 18 U.S.C. § 2252 and that such a finding supports the enhancement); United States v. Martinez, 970 F.3d 986, 988–89 (8th Cir. 2020) (enhancement correctly applied where court found that defendant used BitTorrent file-sharing program and "knew of its characteristics and its capabilities").

[206] *Hyatt*, 28 F.4th at 785–86 (holding that it was error to apply the enhancement based on the act of uploading files to Dropbox without additional evidence that it was ever accessible to others and noting that no circuit has held that the enhancement "applies based solely on the upload of files to cloud-based storage").

[207] *See* United States v. Cubero, 754 F.3d 888, 893–95 (11th Cir. 2014) ("To help sentencing courts differentiate the harm caused by such crimes, §2G2.2 draws many distinctions based on the defendant's conduct."); United States v. Reingold, 731 F.3d 204, 227–31 (2d Cir. 2013) (remanding where district court held that any harm associated with distribution was fully accounted for in base offense level); *see also* United States v. Chiaradio, 684 F.3d 265, 282–83 (1st Cir. 2012) (sentencing guidelines cover all child pornography offenses and use the base offense level and enhancements to reach appropriate sentences for different permutations of possession, solicitation, and distribution).

d. Sadistic or masochistic conduct/Infant or toddler

Section 2G2.2(b)(4) provides for a 4-level increase if the material involved in the offense portrayed sadistic or masochistic conduct or other depictions of violence, or if the images portray sexual abuse or exploitation of an infant or toddler.[208] Unlike the distribution enhancement, this enhancement applies regardless of whether the defendant specifically intended to possess, access, receive, or distribute such materials.[209]

Most courts have held that an objective, rather than subjective, standard is used to determine whether an image portrays sadistic or masochistic conduct.[210] Courts have held that an image's portrayal of sadistic conduct includes conduct a viewer likely would think is causing contemporaneous physical or emotional pain.[211] This includes portrayals of penetration of a young child by an adult,[212] attempted penetration by an adult,[213] images that have been digitally morphed,[214] and mental pain or cruelty without physical pain.[215]

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[208] USSG §2G2.2(b)(4).

[209] USSG §2G2.2, comment (n.3).

[210] *See* United States v. Rogers, 989 F.3d 1255, 1262 (11th Cir. 2021) ("The question of whether an image portrays sadistic or masochistic conduct or other depictions of violence is strictly an objective inquiry."); United States v. Nesmith, 866 F.3d 677, 680 (5th Cir. 2017) (collecting circuit cases for same).

[211] *See Nesmith*, 866 F.3d at 681 (holding "that an image portrays sadistic conduct where it depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation" and rejecting government's argument that the enhancement could apply to victim who was asleep at the time the image was created based on the victim later learning of the image); United States v. Pappas, 715 F.3d 225, 228 (8th Cir. 2013) (finding video showing victim being vaginally and anally penetrated "particularly distressing" and sufficient for enhancement).

[212] *See, e.g.*, United States v. Hoey, 508 F.3d 687, 691–92 (1st Cir. 2007) ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' under the terms of [§]2G2.2(b)(4).").

[213] *See* United States v. Morgan, 842 F.3d 1070, 1076 (8th Cir. 2016) ("If an image depicts actual or attempted penetration, it is per se sadistic.").

[214] *See* United States v. Mecham, 950 F.3d 257, 267–68 (5th Cir. 2020) (discussing circumstances in which enhancement can apply to digitally morphed images and stating "[t]he key inquiry is whether a reasonable viewer would conclude that the image depicts the contemporaneous infliction of pain"); United States v. Hotaling, 634 F.3d 725, 731–32 (2d Cir. 2011) (digitally morphed child pornography images depicting an identifiable minor's head super-imposed onto the body of an adult female handcuffed and shackled wearing a collar and leash found to be sadistic).

[215] United States v. Bleau, 930 F.3d 35, 41 (2d Cir. 2019) (affirming sadism enhancement as proper where there was no evidence of physical harm, but one minor was "objectively . . . being degraded and humiliated" and another minor looked sad and nervous in the videos).

A video does not have to depict ongoing violent conduct to be "sadistic" if the evidence is sufficient to show that the defendant inflicted pain upon the victim.[216] The enhancement applies even if the sadistic or masochistic sexual conduct depicted was directed at the defendant rather than the victim.[217]

e. Pattern of activity

Section 2G2.2(b)(5) provides for a 5-level increase if the defendant "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[218] "Pattern of activity" is defined as "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct."[219] There is no temporal limit on prior conduct that can be considered for this enhancement.[220]

A conviction accounted for under subsection (b)(5) may also be considered for criminal purposes under Chapter Four, Part A (Criminal History).[221] It is not double

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[216] *See* United States v. Cannon, 703 F.3d 407, 415 (8th Cir. 2013) (enhancement proper where video showed victim's wounds but not the actual abuse because "[a]n image does not have to depict ongoing violence conduct to be 'sadistic' ").

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

[218] USSG §2G2.2(b)(5). "Sexual abuse or exploitation" means conduct described in 18 U.S.C. §§ 2241, 2242, 2243, 2251(a)–(c), (d)(1)(B), 2251A, 2260(b), 2421, 2422, 2423, an analogous offense under state law, or an attempt or conspiracy to commit any of these offenses. USSG §2G2.2, comment. (n.1). It does not include "possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor." *Id.* The Sixth Circuit held that in calculating the age difference between minors to determine whether a past incident would qualify as "sexual abuse" under 18 U.S.C. § 2243(a), " 'at least four years' older means at least 1,461 days . . . or 48 months older." United States v. Doutt, 926 F.3d 244, 247 (6th Cir. 2019) (remanding where the district court relied only on defendant and victim's approximate ages in years to determine whether there was a four-year age difference at the time of abuse).

[219] USSG §2G2.2, comment. (n.1); *see also* United States v. Landreneau, 967 F.3d 443, 454 (5th Cir. 2020) (observing that, as USSG §2G2.2, comment. (n.1) explains, the pattern of activity enhancement does not require multiple victims, only multiple instances of abuse); United States v. Cates, 897 F.3d 349, 356–57 (1st Cir. 2018) (defendant's forcing the minor to fondle him and then later perform a sex act were separate instances of conduct that together could constitute a "pattern of activity"); United States v. Alberts, 859 F.3d 979, 984–85 (11th Cir. 2017) (proper to base enhancement on admissions by defendant that he engaged in sexual acts with younger relatives when he was approximately 16 years old).

[220] *See* United States v. Coffin, 946 F.3d 1, 7 (1st Cir. 2019) (State Department of Health and Human Services' report and defendant's own Kik messages stating that he had abused a six-year-old child when he was 15, about 20 years earlier, sufficient to prove instance of sexual abuse for the enhancement); *Alberts*, 859 F.3d at 983 (district court properly based enhancement on 30-year-old conduct that occurred when defendant was a teenager); United States v. Lucero, 747 F.3d 1242, 1249–50 (10th Cir. 2014) (enhancement appropriate where defendant molested nieces 35 years before offense) (collecting cases); United States v. Reingold, 731 F.3d 204, 223–24 (2d Cir. 2013) (conduct by defendant as a juvenile is properly considered).

[221] USSG §2G2.2, comment. (n.5).

counting to apply the §2G2.2(b)(5) enhancement and a multiple count adjustment under §2G2.1(d)(1) for multiple minors.[222]

f. Use of a computer

Section 2G2.2(b)(6) provides for a 2-level increase if "the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material."[223] It is not double counting to apply the use of a computer enhancement to a distribution offense because the use of a computer is not essential to the act of distributing.[224]

g. Number of images

Section 2G2.2(b)(7) provides for an increase based on the number of images the offense involved. If the offense involved:

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

(b) at least 150 images, but less than 300, there is a 3-level increase;

(c) at least 300 images, but less than 600, there is a 4-level increase; and

(d) 600 or more images, there is a 5-level increase.[225]

Each photograph, picture, computer or computer-generated image, or similar visual depiction is considered one image.[226] Like hard copy images, each duplicate digital image is counted separately.[227] Each video, video-clip, movie, or similar recording is considered to

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[222] United States v. Fleischer, 971 F.3d 559, 572 (6th Cir. 2020) (concluding that "the Guidelines separately punish defendants who sexually exploit multiple victims, and child pornography offenders who have a history of more than one instance of sexually abusing or exploiting a child" and "are therefore not premised on the 'same type of harm' ").

[223] USSG §2G2.2(b)(6).

[224] *See* United States v. Libbey-Tipton, 948 F.3d 694, 707–08 (6th Cir. 2020) (concluding that §2G2.2(b)(6) punishes a "distinct harm," as distribution of child pornography through computers is "particularly harmful because it can reach an almost limitless audience"); *Reingold*, 731 F.3d at 226 (enhancement proper because it did not reflect a harm already fully accounted for in the base offense: a "computer is not essential to the act of distributing child pornography").

[225] USSG §2G2.2(b)(7). "Image" means any visual depiction that constitutes child pornography as defined in 18 U.S.C. § 2256(8). USSG §2G2.2, comment. (n.6(A)).

[226] USSG §2G2.2, comment. (n.6(B)(i)); *see also* United States v. Price, 711 F.3d 455, 459–60 (4th Cir. 2013) ("[A]ny image without regard to its originality should be counted when applying this enhancement") United States v. Sampson, 606 F.3d 505, 509–10 (8th Cir. 2010) (affirming counting the same video twice, for a total of 150 images, because both acts of distribution compound the original sexual exploitation of the minor).

[227] *See Price*, 711 F.3d at 460 (duplicate digital images); United States v. McNerney, 636 F.3d 772, 780 (6th Cir. 2011) (same).

have 75 images.[228] If the recording is substantially longer than five minutes, an upward departure may be warranted.[229] If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.[230] The enhancement may apply even if the defendant attempts to delete the images.[231]

3. Cross Reference

Section 2G2.2(c)(1) states that §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) applies if "the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct," and if the resulting offense level is greater than the one resulting from §2G2.2.[232] The cross reference applies broadly.[233]

Most disputes under this subsection deal with what constitutes relevant conduct.[234] The cross reference may apply, for example, where a defendant asked if abusive conduct

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[228] USSG §2G2.2, comment. (n.6(B)(ii)); *see also* United States v. Phillips, 54 F.4th 374, 384–86 (6th Cir. 2022) (Application Note 6(B) is authoritative because the guideline text is ambiguous. The application note is a permissible interpretation within the "zone of ambiguity," and the application note is the official, considered position of the Commission in its area of expertise). *But see* United States v. Haggerty, 107 F.4th 175, 182–184 (3d Cir. 2024) (Application Note 6(B)(ii) is not entitled to deference under *Kisor v. Wilkie*, 588 U.S. 558 (2019), because the term "image" is not ambiguous; in ordinary usage an "image" is synonymous with a "frame" in the video context).

[229] USSG §2G2.2, comment. (n.6(B)(ii)). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 6(B) to §2G2.2. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[230] USSG §2G2.2, comment. (n.6(B)(i)). *But see* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025) (deleting the upward departure in Application Note 6(B) to §2G2.2). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

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

[232] USSG §2G2.2(c)(1).

[233] USSG §2G2.2, comment. (n.7(A)). *But see* United States v. Avila, 134 F.4th 244, 247 (4th Cir. 2025) (the district court procedurally erred in applying the cross reference at §2G2.2(c) when it failed to make a factual finding that the defendant's offer of money "caused" a victim to make sexually explicit content "after and in response" to his direct request).

[234] *See, e.g.*, United States v. Bauer, 626 F.3d 1004, 1008–09 (8th Cir. 2010) (cross reference appropriate for a conviction for attempted receipt where there was an offer to purchase a webcam to send to the victim and the defendant sent money for the purchase); United States v. Stoterau, 524 F.3d 988, 996 (9th Cir. 2008)

being shown over a Zoom conference is "live"[235] or attempts to solicit production of images of sexually explicit conduct.[236]

4. Upward Departure Provision

An upward departure may be warranted "if the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not it occurred during the course of the offense or resulted in a conviction)" and the enhancement for pattern of activity at subsection (b)(5) either does not apply or applies but does not adequately reflect the seriousness of the sexual abuse or exploitation involved.[237]

D. ADDITIONAL GUIDELINES

1. Selling or Buying of Children (§2G2.3)

Section 2G2.3 (Selling or Buying of Children for Use in the Production of Pornography) covers violations of 18 U.S.C. § 2251A.[238] The base offense level for this guideline is 38.[239] The mandatory minimum sentence for a defendant convicted under section 2251A is 30 years imprisonment.[240]

(applying the cross reference to §2G2.1 "because [the defendant's] offense conduct involved posing and photographing [the victim] as he engaged in sexually explicit conduct").

[235] *See, e.g.*, United States v. Heatherly, 985 F.3d 254, 272 (3d Cir. 2021) (cross reference appropriate for conviction of receipt and distribution where a defendant asked a participant in the same Zoom conference room if that participant's sexual abuse of a young boy was "live," and encouraged his further actions when it was confirmed).

[236] United States v. Zagorski, 807 F.3d 291, 293 (D.C. Cir. 2015) (cross reference applied where defendant attempted to exchange child pornography "as payment" for "a live, sexually explicit webcam performance" by a purported 12-year-old girl; the defendant "attempted to cause a minor to engage in particular conduct by bartering with her purported custodian"); United States v. Garcia, 411 F.3d 1173, 1179 (10th Cir. 2005) (stating that the cross reference to §2G2.1 is to be construed broadly and should be applied to "not only the actual production of child pornography, but the active solicitation for the production of such images").

[237] USSG §2G2.2, comment. (n.9). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the upward departure in Application Note 9 to §2G2.2. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[238] USSG §2G2.3.

[239] USSG §2G2.3(a).

[240] USSG §2G2.3, comment. (backg'd.).

2. Recordkeeping Offenses (§2G2.5)

Section 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email) covers violations of 15 U.S.C. § 7704(d) and 18 U.S.C. §§ 2257 and 2257A.[241] The base offense level under this guideline is 6 and there are no specific offense characteristics.[242] Section 2G2.5 includes two cross references: (1) "[i]f the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct," §2G2.1 applies;[243] and (2) "[i]f the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor," §2G2.2 applies.[244]

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

Section §2G2.6 (Child Exploitation Enterprises) covers violations of 18 U.S.C. § 2252A(g).[245] This guideline has a base offense level of 35,[246] and includes four specific offense characteristics that increase the offense level, if: (1) the victim is under the age of 12 or older than 12 but younger than 16;[247] (2) the defendant is the parent, relative, legal guardian or otherwise exercised custody, care, or supervisory control of the minor victim;[248] (3) the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);[249] and (4) a computer or interactive computer service was used in furtherance of the offense.[250]

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241 USSG §2G2.5.

242 USSG §2G2.5(a).

243 USSG §2G2.5(b)(1).

244 USSG §2G2.5(b)(2).

245 USSG §2G2.6.

246 USSG §2G2.6(a).

247 USSG §2G2.6(b)(1) (providing a 4-level increase for a victim under 12 years old and a 2-level increase for a victim at least 12 but younger than 16 years old).

248 USSG §2G2.6(b)(2) (providing a 2-level increase). This subsection applies broadly and applies whenever the minor is entrusted to the defendant, whether temporarily or permanently. USSG §2G2.6 comment. (n.2(A)). If subsection (b)(2) applies, the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. USSG §2G2.6 comment. (n.2(B)).

249 USSG §2G2.6(b)(3) (2-level increase). Application Note 3 defines "conduct described in 18 U.S.C. § 2241(a) or (b)." USSG §2G2.6, comment. (n.3).

250 USSG §2G2.6(b)(4) (2-level increase).

IV. CHAPTER THREE: ADJUSTMENTS

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

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

Section 3A1.1(b)(1) provides for a 2-level increase "if the defendant knew or should have known that a victim of the offense was a vulnerable victim" and for a 4-level increase if both "the defendant knew or should have known that a victim of the offense was a vulnerable victim and the offense involved a large number of vulnerable victims."[251] A "vulnerable victim" is a "victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) [] who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct."[252] A §3A1.1(b) adjustment does not apply, however, if the factor that makes the person vulnerable is already incorporated into the offense guideline.[253] Because child pornography guidelines provide for enhancements based on the age of the minor victims and the unusual vulnerability of toddlers and infants, §3A1.1(b) will apply only if the victim was unusually vulnerable for reasons unrelated to age.[254] The enhancement can apply not only to production offenses but also to defendants convicted of receipt, distribution, or possession of child pornography offenses.[255]

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[251] USSG §3A1.1(b).

[252] USSG §3A1.1, comment. (n.2); *see* United States v. Starr, 533 F.3d 985, 1002 (8th Cir. 2008) (affirming application of the adjustment where the district court determined that the victim "had psychological and family problems of which [the defendant] was or should have been aware," and there was evidence in the record "on which the district court could infer that [the defendant] used" the victim's psychological problems to gain the victim's confidence).

[253] USSG §3A1.1, comment. (n.2); *see also* United States v. Dowell, 771 F.3d 162, 174 (4th Cir. 2014) (if the reasons for enhancement are intimately related to the age of the victim, such as cognitive and psychological development, then the enhancement for vulnerable victim does not apply).

[254] USSG §3A1.1, comment. (n.2); *see also* United States v. Arsenault, 833 F.3d 24, 31 (1st Cir. 2016) (adjustment appropriate because two of defendant's victims—students in his special needs program—under the age of 12 were unusually vulnerable due to their special needs, where one minor had autism and the other was non-verbal); United States v. Scott, 529 F.3d 1290, 1300–03 (10th Cir. 2008) (victim's "exceedingly petite" and fragile stature, naiveté, and poor communication skills made her "unusually vulnerable" for a 13-year-old girl).

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

B. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill)

Section 3B1.3 provides for a 2-level increase "if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated commission or concealment of the offense."[256] However, many child pornography guidelines instruct that this adjustment does not apply if the specific offense characteristic for a victim who was in the care, custody, or supervisory control of the defendant also applies.[257]

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

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

Section 4B1.5 applies to defendants whose offense of conviction is a "covered sex crime" committed against a minor and who present a continuing danger to the public.[258] It includes two subsections. Subsection 4B1.5(a), which applies to defendants with at least one previous sex offense conviction, provides for increases to *both* the defendant's offense level and criminal history calculation.[259] Subsection 4B1.5(b), which applies to defendants who have "engaged in a pattern of prohibited sexual conduct," provides for an increased offense level only. Both subsections instruct that if §4B1.1 (Career Offender) applies, §4B1.5 is inapplicable.[260] Application Note 2 lists the offenses that qualify as "covered sex crime[s]."[261] Consistent with other sex offense guidelines, a "minor" is an individual who had not attained the age of 18 or an individual who is represented by a law enforcement officer to not have attained the age of 18 (including a fictitious individual).[262]

Section 4B1.5 specifically provides that the enhancement is added to the offense levels determined under Chapters Two and Three.[263] Thus, the guidelines intend the cumulative application of most enhancements in conjunction with §4B1.5.[264]

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256 USSG §3B1.3.

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

258 USSG §4B1.5, comment. (backg'd.).

259 USSG §4B1.5(a).

260 USSG §4B1.5(a), (b).

261 USSG §4B1.5, comment. (n.2).

262 USSG §4B1.5, comment. (n.1).

263 *See* USSG §4B1.5(A)(1)(a), (b)(1).

264 *See id.*; *see also* United States v. Rogers, 989 F.3d 1255, 1263 (11th Cir. 2021) ("[T]he plain language of the guidelines establishes that the Sentencing Commission intended for the enhancements provided for in

Section 4B1.5 recommends the statutory maximum term of supervised release be imposed for defendants sentenced under this guideline,[265] and that treatment and monitoring be considered as special conditions of any term of probation or supervised release.[266] Section 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) provides that repeat sex offenders under §4B1.5 are ineligible for a downward departure.[267]

Subsections 4B1.5(a) and (b) each are discussed in more detail below.

1. At Least One Previous Sex Offense Conviction (§4B1.5(a))

Section 4B1.5(a) provides for both an enhanced offense level and criminal history calculation 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*."[268] If subsection (a) applies, the offense level is the greater of: (1) the offense level determined under Chapters Two and Three of the applicable guidelines; and (2) the offense level table provided at §4B1.5(a)(1)(B), after decreasing the number of levels corresponding to any applicable adjustment for §3E1.1 (Acceptance of Responsibility).[269] The applicable Criminal History Category (CHC) is the greater of: (1) the CHC determined under Chapter Four, Part A; or (2) CHC V.[270]

A "sex offense conviction" under §4B1.5(a) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B) (concerning repeat offenders), if the offense was perpetrated against

Chapter 4 to apply cumulatively to any other enhancements from Chapters 2 and 3."); United States v. Seibert, 971 F.3d 396, 401 (3d Cir. 2020) (affirming the application of both §2G2.2(b)(5) [pattern of activity involving the sexual abuse or exploitation of a minor] and §4B1.5(b)(1) as each provision accounts for different conduct).

[265] USSG §4B1.5, comment. (n.5(A)). The Commission recently promulgated a supervised release amendment that deletes Application Note 5(A) to §4B1.5. *See* Amendment 4 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[266] USSG §4B1.5, comment. (n.5(B)). The substance of Application Note 5(B) remains unchanged under the recently promulgated supervised release amendment although it becomes the sole note at Application Note 5 (Treatment and Monitoring). *See supra* note 265 (citing the recently promulgated supervised release amendment).

[267] USSG §4A1.3(b)(2)(B)(ii). The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the departure provisions in §4A1.3. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[268] USSG §4B1.5(a).

[269] *See* USSG §4B1.5(a)(1).

[270] *See* USSG §4B1.5(a)(2).

a minor.[271] The term does not include trafficking in, receipt of, or possession of, child pornography.[272] As is the case with the statutory recidivist provision (18 U.S.C. § 2251(e)), to determine whether a prior conviction qualifies as a defined sex offense conviction, courts "employ a 'formal categorical approach' which requires that the . . . court 'look only to the fact of conviction and the statutory definition of the prior offense.' "[273] Courts have concluded that a formal entry of judgment is not necessary for application of the enhancement.[274] The Eighth and Ninth Circuits have held that a juvenile-delinquency adjudication is not a prior "sex offense conviction" as defined by 18 U.S.C. § 2252(b) and §4B1.5(a).[275]

The table at §4B1.5(a)(1)(B) provides for offense levels based on the "offense statutory maximum."[276] The "offense statutory maximum" is defined as the maximum term of imprisonment authorized for the instant sex offense, including "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."[277] If more than one count of conviction is a covered sex crime, the maximum term for the count with the greatest statutory maximum is used.[278]

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

272 *Id.*, USSG §4B1.5, comment. (n.3(A)(ii)(II)).

273 United States v. Pierson, 544 F.3d 933, 942 (8th Cir. 2008) (quoting Shepard v. United States, 544 U.S. 13, 17 (2005)); *see also* United States v. Reinhart, 893 F.3d 606, 619–21 (9th Cir. 2018) (affirming inapplicability of ten-year minimum penalty enhancement under 18 U.S.C. § 2252(b)(2) because Calif. Penal Code § 311.3(a) (sexual exploitation of a child) and § 311.11(a) (possession of child pornography) are both indivisible and overbroad); United States v. Dahl, 833 F.3d 345, 356–57 (3d Cir. 2016) (vacating and remanding where state offense that prohibited touching genitalia through clothing was not a "sex offense conviction" because it was broader than "sexual act," which requires penetration or actual skin-to-skin contact). *But see* United States v. Abreu, 106 F.4th 1, 16–17 (1st Cir. 2024) (upholding a sentencing enhancement under § 2251(e) because a "conviction for enticement of a child under the age of sixteen with the intent of committing indecent assault and battery is categorically related to the generic crime of abusive sexual contact with a minor or ward").

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

275 *See* United States v. Gauld, 865 F.3d 1030, 1034–35 (8th Cir. 2017) (en banc) (Federal Juvenile Delinquency Act has long distinguished between adult criminal convictions and juvenile delinquency adjudications and because 18 U.S.C. § 2252(b)(1) mentions only "convictions," Congress did not intend juvenile adjudications to trigger that statute's mandatory minimum); United States v. Nielsen, 694 F.3d 1032, 1037–38 (9th Cir. 2012) (juvenile adjudication for sexual assault cannot be basis for §4B1.5(a) enhancement because the use of "sex offense conviction" indicates only adult convictions).

276 USSG §4B1.5(a)(1)(B).

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

278 USSG §4B1.5, comment. (n.3(B)).

2. Pattern of Activity Involving Prohibited Sexual Conduct (§4B1.5(b))

Section 4B1.5(b) provides for an enhanced offense level where the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 (Career Offender) nor §4B1.5(a) applies, and "the defendant engaged in a pattern of activity involving prohibited sexual conduct."[279] A previous conviction is not required for an enhancement under §4B1.5(b) to apply.[280] If subsection (b) applies, the offense level is the offense level determined under Chapters Two and Three increased by five levels.[281] If, however, the resulting offense level is less than 22, the offense level is 22, decreased by the number of levels corresponding to any applicable adjustment under §3E1.1 (Acceptance of Responsibility).[282] The criminal history category determined under Chapter Four, Part A is the criminal history category applicable for the offense.[283]

"Pattern of activity" means the defendant engaged in prohibited sexual conduct with a minor on at least two separate occasions.[284] An "occasion of prohibited sexual conduct" may be considered regardless of whether the conduct occurred during the course of the instant offense or resulted in a conviction.[285] "Prohibited sexual conduct" means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), the production of child pornography, or trafficking in child pornography only if, before the commission of the instant offense, the defendant had been convicted for that trafficking.[286] "Prohibited sexual conduct" does not include receipt or possession of child pornography.[287]

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279 USSG §4B1.5(b). The Sixth Circuit held that engaging in a child exploitation enterprise, in violation of 18 U.S.C. § 2252A(g), qualifies as a "covered sex crime" even where the underlying felony violations were distributing and receiving child pornography because "the focus of the crime of engaging in a child exploitation enterprise is not the underlying felony violation," but instead "[t]he focus is on the enterprise and organizational aspects of the crime." United States v. Hollon, 948 F.3d 753, 754–59 (6th Cir. 2020).

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

281 USSG §4B1.5(b)(1).

282 *Id.*

283 USSG §4B1.5(b)(2).

284 USSG §4B1.5, comment. (n.4(B)(i)). Repeated conduct with a single minor can qualify as a pattern of activity for the purposes of this enhancement. *See*, *e.g.*, United States v. Isaac, 987 F.3d 980, 994 (11th Cir. 2021) (defendant produced child pornography of the same victim on two separate occasions, which qualifies as a "pattern" under §4B1.5(b)(1)); United States v. Fox, 926 F.3d 1275, 1280–81 (11th Cir. 2019) (collecting cases from the Second, Sixth, and Eighth Circuits and joining in holding that repeated sexual contact with the same minor qualifies for the enhancement). Courts also have applied the enhancement where all predicate instances of prohibited sexual conduct stem from the crime of conviction. *See* United States v. Gates, 84 F.4th 496, 504 (2d Cir. 2023).

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

286 USSG §4B1.5, comment. (n.4(A)).

287 *Id.*

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

Section §5B1.3 sets out mandatory, discretionary, standard, and special conditions of probation, many of which apply to sex offenses. Provisions that are particularly relevant to sex offenses are highlighted below.

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

Section 5B1.3(a)(9) provides that "[i]f the defendant is required to register under the Sex Offender Registration and Notification Act ["SORNA"], the defendant shall comply with the requirements of the Act (18 U.S.C. § 3563(a))."[288]

2. Section 5B1.3(d) ("Special" Conditions (Policy Statement))

Section 5B1.3(d)(7) sets forth "special" conditions of probation that are recommended for defendants convicted of sex offenses.[289] Subsection (A) recommends a "condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders."[290] Subsection (B) recommends a "condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items."[291] Finally, subsection (C) recommends a "condition requiring the defendant to submit to a search, at any time, with or without a warrant, by any law enforcement or probation officer, of the defendant's person and any property," including the defendant's papers, computer, electronic devices or media "upon reasonable suspicion concerning a violation of probation or unlawful conduct."[292]

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

Section 5D1.2(b) provides that if the offense is a sex offense, the length of the term of supervised release cannot be less than the minimum term of years specified for the

[288] USSG §5B1.3(a)(9).

[289] *See* USSG §5B1.3(d)(7). The Commission recently promulgated a supervised release amendment that no longer defines "sex offense" in §5B1.3(d)(7) by reference to "Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)." Instead, the amendment adds a new Application Note 2 to §5B1.3, separately defining both "sex offense" and "minor" for use in application of §5B1.3(d)(7). *See* Amendment 4 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[290] USSG §5B1.3(d)(7)(A).

[291] USSG §5B1.3(d)(7)(B).

[292] USSG §5B1.3(d)(7)(C).

offense and may be up to life.[293] The statutory maximum term of supervised release is recommended for sex offenses.[294]

Section 3583 of title 18 (Inclusion of a term of supervised release after imprisonment) sets forth the statutory authority, requirements, and limitations for terms of supervised release.[295] Subsection 3583(k) includes requirements that are specific to certain sex offenders and mandates a term of supervised release of not less than five years, with a statutory maximum term of life for, among other offenses, sexual exploitation offenses under chapter 110 (Sexual Exploitation and Other Abuse of Children) of title 18, or the transportation of persons under chapter 117 of title 18.[296]

Additionally, section 3583(k) requires that, if a defendant required to register under SORNA commits a criminal offense under, among others, chapter 109A (Sexual Abuse) of title 18, the court must (1) revoke a term of supervised release, and (2) require a defendant to serve a term of imprisonment of not less than five years.[297] In *United States v. Haymond*, a fractured opinion, the Supreme Court held that section 3583(k) is unconstitutional but left open the question of whether and how the constitutional infirmity could be remedied.[298] The plurality opinion concluded that 3583(k) violated the defendant's Fifth and Sixth Amendment rights by imposing a mandatory term based on facts found by a judge by a preponderance of the evidence (rather than by a jury beyond a reasonable doubt), finding that these constitutional principles apply in the supervised release context.[299] Justice Breyer concurred only in the judgment, distinguishing section 3583(k) from revocation proceedings more generally, because it "is less like ordinary revocation and more like punishment for a new offense, to which the jury right would typically attach."[300] Justice Breyer's concurrence, as the narrowest point of agreement, is

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293 USSG §5D1.2(b)(2).

294 USSG §5D1.2(b)(2) (Policy Statement); *see also* United States v. Jenkins, 854 F.3d 181, 194 (2d Cir. 2017) (vacating 25-year supervised release term for man who will be 63 at time of release as an unreasonable duration absent any justification for "unusually harsh" "post-release supervision that prevents [him] from ever re-engaging in any community in which he might find himself"); United States v. Inman, 666 F.3d 1001, 1004–07 (6th Cir. 2012) (vacating lifetime supervision where the district court imposed the lifetime term even though the parties had requested a ten-year term and the record did not demonstrate that the court had considered any of the pertinent section 3553(a) factors). The recently promulgated supervised release amendment deletes what is currently §5D1.2(b)(2) and adds a new Application Note 2 to §5D1.2 regarding terrorism and sex offense cases. *See supra* note 289.

295 18 U.S.C. § 3583.

296 *Id.* § 3583(k).

297 *Id.*

298 588 U.S. 634, 656–59 (2019).

299 *Id.* at 637–59 (plurality opinion).

300 *Id.* at 656–59 (Breyer, J., concurring).

controlling.[301] Both the plurality and the concurrence left open the possibility of a remedy, rejecting the Tenth Circuit's conclusion below that the last two sentences of the provision must be struck as "unconstitutional and unenforceable."[302]

Recently, the Tenth Circuit explained that *Haymond* does not apply in the event that the defendant is convicted of a new offense that is also the basis for a supervised release revocation, because "Justice Breyer's as-applied *Haymond* analysis does not apply unless each of the three critical factors identified in his concurrence are present," including "the imposition of a mandatory minimum sentence based on the trial court's finding of the existence of a triggering crime under the preponderance standard."[303]

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

Pursuant to 18 U.S.C. § 3583(d)(1), conditions of supervised release must be "reasonably related" to the goals of deterrence, protection of the public, and rehabilitation of the defendant.[304] Further, the conditions must involve no greater deprivation of liberty than is reasonably necessary to meet these goals, pursuant to section 3583(d)(2).[305] Conditions that affect constitutional rights will likely be valid if "narrowly tailored and . . . directly related to deterring [the defendant] and protecting the public."[306]

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

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[301] *See, e.g.*, United States v. Shakespeare, 32 F.4th 1228, 1237 (10th Cir. 2022) (collecting cases concluding that Justice Breyer's opinion is controlling); United States v. Watters, 947 F.3d 493, 497 (8th Cir. 2020) ("As noted by the dissent, Justice Breyer's opinion is the narrower opinion, and therefore controls.").

[302] The Supreme Court vacated and remanded to the Tenth Circuit for it to address the government's argument that a jury could be empaneled, and, because the government had not briefed that issue, whether that argument was adequately preserved. *Haymond*, 588 U.S. at 656–57. The Tenth Circuit did not have the opportunity to address the issue of remedy. On remand, the government conceded that the argument had not been preserved and the case was dismissed. United States v. Haymond, 935 F.3d 1059, 1064 (10th Cir. 2019) (on remand from the Supreme Court).

[303] *See Shakespeare*, 32 F.4th at 1237. The other two factors that Judge Breyer considered "in combination" were that section 3583(k) "applies only when a defendant commits a discrete set of [specified] federal criminal offenses" and that it "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment and for how long." *Haymond*, 588 U.S. at 659.

[304] *See* 18 U.S.C. § 3583(d)(1).

[305] *Id.* § 3583(d)(2)

[306] *See id.*

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

Section 5D1.3(a)(7) provides that "[i]f the defendant is required to register under [SORNA], the defendant shall comply with the requirements of that Act (18 U.S.C. § 3583(d))."[307]

If a defendant required to register under SORNA commits a criminal offense under, among others, chapter 109A (Sexual Abuse) of title 18, the court is to (1) revoke a term of supervised release, and (2) require the defendant to serve a term of imprisonment for not less than five years.[308]

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

The guidelines allow courts to impose other conditions of supervised release if the conditions are "reasonably related to": (A) the defendant's history and characteristics and the nature and circumstances of his offense; (B) the need for adequate deterrence of future criminal conduct; (C) the need to protect the public from further crimes by the defendant; and (D) the effective provision of educational or vocational treatment, medical care, or other needed correctional treatment to the defendant.[309]

Such conditions also must entail "no greater deprivation of liberty than is reasonably necessary" to achieve the goals of supervised release, must be consistent with any pertinent policy statements issued by the Commission, and must have adequate evidentiary support in the record.[310]

Some courts have found that Rule 32 of the Federal Rules of Criminal Procedure requires that defendants receive notice of the possibility of imposition of special conditions of supervised release if those conditions are not contemplated by the guidelines.[311]

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307 USSG §5D1.3(a)(7).

308 *See* 18 U.S.C. § 3583(k).

309 USSG §5D1.3(b)(1). The recently promulgated supervised release amendment revises §5D1.3(b) to instruct courts to conduct an individualized assessment of the need for discretionary conditions of supervised release. *See supra* note 289.

310 USSG §5D1.3(b)(2). Under the recently promulgated supervised release amendment §5D1.3(b)(2) is renumbered as §5D1.3(b)(1)(B). *See supra* note 289.

311 *See, e.g.*, United States v. Sherwood, 850 F.3d 391, 395 (8th Cir. 2017) ("Advance notice of supervised release conditions fits into the category of recommended best practice rather than mandatory requirement." (internal quotation marks omitted)); United States v. Cope, 527 F.3d 944, 953 (9th Cir. 2008) ("Where a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness.").

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

Section 5D1.3(d)(7) lists "special" conditions of supervised release that are recommended for defendants convicted of sex offenses.[312] Subsection (A) recommends "a condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders."[313] Subsection (B) recommends "a condition limiting the use of a computer or an interactive computer service in cases where defendant used such items."[314] Finally, subsection (C) recommends 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," including the defendant's papers, computer or electronic devices "upon reasonable suspicion concerning a violation of the supervised release or unlawful conduct."[315]

Although conditions requiring sex offender treatment programs are regularly upheld,[316] they must be appropriately tailored to the defendant and may not delegate authority to the probation officer or a treatment provider that is properly the authority of the sentencing court.[317] The court "may delegate to the probation officer details regarding the selection and schedule of a sex offender treatment program even though it must itself

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[312] *See* USSG §5D1.3(d)(7). The recently promulgated supervised release amendment redesignates "special" conditions specific to sex offense as §5D1.3(b)(3)(G) and adds a fourth "special" condition at §5D1.3(b)(3)(G)(iv)"prohibiting the defendant from communicating, or otherwise interacting, with any victim of the offense, either directly or through someone else." *See supra* note 289.

[313] USSG §5D1.3(d)(7)(A). Under the recently promulgated supervised release amendment, §5D1.3(d)(7)(A) is renumbered as §5D1.3(b)(3)(G)(i). *See supra* note 289.

[314] USSG §5D1.3(d)(7)(B); *see also* United States v. Comer, 5 F.4th 535 (4th Cir. 2021) (upholding condition prohibiting use of "any social networking accounts" without prior approval of probation officer for defendant who used social networks to recruit others into prostitution). Under the recently promulgated supervised release amendment, §5D1.3(d)(7)(B) is renumbered as §5D1.3(b)(3)(G)(ii). *See supra* note 289.

[315] USSG §5D1.3(d)(7)(C). Under the recently promulgated supervised release amendment, §5D1.3(d)(7)(C) is renumbered as §5D1.3(b)(3)(G)(ii). *See supra* note 289.

[316] *See, e.g.*, United States v. Pabon, 819 F.3d 26, 30–31 (1st Cir. 2016) (summarizing factors courts consider with respect to supervised release conditions, stating "we have found sex offender treatment conditions a reasonable means of enabling defendants to 'manage their impulses and . . . reduce recividism,' " and collecting cases supporting same); United States v. Muhlenbruch, 682 F.3d 1096, 1103 (8th Cir. 2012) (upholding sex offender treatment program with polygraph testing where there was a pattern of child pornography possession and defendant gave false testimony about possession at trial).

[317] *See* United States v. Wagner, 872 F.3d 535, 542–43 (7th Cir. 2017) (condition that allowed treatment provider to decide if defendant could view adult pornography was impermissible delegation); United States v. Iverson, 874 F.3d 855, 860 (5th Cir. 2017) (vacating condition that defendant "follow all other lifestyle or restrictions or treatment requirements imposed by the therapist" because allowing therapist to set restrictions on conduct usurped judge's sentencing authority).

impose the actual condition requiring participation in a sex offender treatment program."[318]

Courts are reluctant to impose overly restrictive computer access limitations, recognizing that current society relies heavily on technology-based communication for individual livelihoods.[319] However, the degree of restriction depends on the individual defendant and his offense conduct.[320]

Courts have upheld "other" and "special" conditions but also have struck conditions as overbroad or unreasonable even in light of district courts' significant discretion in imposing supervised release. As with the conditions discussed above, courts typically consider whether the condition is appropriately tailored to the defendant and whether it delegates impermissible authority to an actor other than the sentencing court. Some conditions that are frequently considered for sex offenders include the following:

- Limitations on contact with minors;[321]

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[318] United States v. Sines, 303 F.3d 793, 799 (7th Cir. 2002); *see also* United States v. Schrode, 839 F.3d 545, 556 (7th Cir. 2016) (stating in dicta that imposition of a condition of sex offender treatment "as deemed necessary by probation" is "particularly troubling" because it "delegates to the probation officer not merely the administration of an imposed condition, but the underlying judgment of whether the condition will be imposed at all").

[319] *See, e.g.*, United States v. Blair, 933 F.3d 1271, 1280 (10th Cir. 2019) ("The demands of sections 3553 and 3583 [of title 18] . . . require special conditions of release that neither absolutely prohibit the defendant's access to computers or the Internet nor permit the probation office to achieve that result by . . . refusing affirmatively to allow any Internet access."); United States v. Duke, 788 F.3d 392, 399–01 (5th Cir. 2015) (per curiam) (vacating a special condition of supervised release that prohibited defendant from accessing computers or the internet for the rest of his life because the scope coupled with the duration of the condition contravened 18 U.S.C. § 3583(d)'s requirement that release conditions be "narrowly tailored" to avoid imposing a greater deprivation than was reasonably necessary and because the ban would completely preclude the defendant from "meaningfully participating in modern society" in light of the "ubiquity and importance of the Internet" in using the internet for innocent purposes such as paying bills online or taking online classes).

[320] United States v. Trimble, 969 F.3d 853, 857 (8th Cir. 2020) (per curiam) (restricting defendant's access to the Internet, computers, and media storage devices is "reasonably related to the sentencing factors and the . . . Commission's pertinent policy statements"); United States v. Carson, 924 F.3d 467, 473 (8th Cir. 2019) (restriction on computer use is proper where "the defendant did more than merely possess child pornography" and the condition does not completely ban internet access); United States v. Perrin, 926 F.3d 1044, 1048–50 (8th Cir. 2019) (rejecting defendant's First Amendment challenge to condition prohibiting possession or use of a computer or accessing any online service without prior approval where defendant had used devices for contacting victims in the past).

[321] *Compare* United States v. Wright, 958 F.3d 693, 697–98 (8th Cir. 2020) (affirming the special condition prohibiting defendant from having unapproved contact with minors, including a requirement to seek prior approval for contact with his own children); United States v. Maurer, 639 F.3d 72, 85–86 (3d Cir. 2011) (special condition restricting contact with minors not overly broad for a conviction for possessing child pornography when defendant's conduct included initiating sexual conversation with a purported minor on the Internet), *with* United States v. Jenkins, 854 F.3d 181, 194–95 (2d Cir. 2017) (vacating condition barring direct or indirect contact with minors unless supervised by someone approved by the Probation Office, noting

- Limitations on locations with minors;[322]
- Limiting or banning pornographic material;[323]
- Medication requirements;[324]
- Employment-related limitations[325] or notification requirements;[326] and

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that such a condition would bar the defendant from any interaction with family or community absent preapproval); United States v. Wolf Child, 699 F.3d 1082, 1100–02 (9th Cir. 2012) (condition barring the defendant from residing with or being in the company of his own minor daughters or from dating anyone with minor children without approval from the Probation Office was unreasonable and impermissibly overbroad).

[322] *See, e.g.*, United States v. MacMillen, 544 F.3d 71, 75–76 (2d Cir. 2008) (condition prohibiting the defendant, who pled guilty to receipt of child pornography, from places where minor children "are likely to congregate," such as parks, daycare centers, playgrounds, arcades, recreational facilities, and schools, without prior written consent of the probation officer was not overbroad where the purpose of the condition was to limit the defendant's access to children); United States v. Reardon, 349 F.3d 608, 620 (9th Cir. 2003) (same); United States v. Ristine, 335 F.3d 692, 696–97 (8th Cir. 2003) (same).

[323] *See, e.g.*, United States v. Carson, 924 F.3d 467, 472 (8th Cir. 2019) (upholding condition banning "any matter that is pornographic/erotic" because it does not involve a greater deprivation of liberty than is reasonably necessary, and distinguishing erotic material from protected art forms featuring nudity); United States v. Miller, 665 F.3d 114, 135–36 (5th Cir. 2011) (condition restricting viewing any sexually stimulating or sexually oriented material was not overbroad where one video in defendant's possession depicted a minor engaged in sexual activity with a male adult while a female adult held the child in place). *But see* United States v. Cope, 527 F.3d 944, 957–58 (9th Cir. 2008) (condition prohibiting the defendant from possessing "any materials . . . depicting and/or describing child pornography" including "writings . . . describing child pornography" is overbroad because it would cover his journal-writing that may be required in sex offender treatment).

[324] *See, e.g.*, United States v. Siegel, 753 F.3d 705, 713–14 (7th Cir. 2014) (finding condition that defendant take "any and all prescribed medication" was impermissibly vague); United States v. Mike, 632 F.3d 686, 699 (10th Cir. 2011) (rejecting defendant's overbreadth challenge to the condition that he take all prescribed medications, finding instead that the requirement is limited to "those medications that are related to his mental health programs" in the context of conviction for assault resulting in serious bodily injury); *Cope*, 527 F.3d at 954–56 (a medication requirement condition is supportable when construed narrowly and when it does not include any medication that implicates a "particularly significant liberty interest," such as antipsychotics; if the condition does involve such medications, the district court must satisfy "heightened" requirements and make "on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish" a section 3583(d)(1) factor and involves no greater deprivation of liberty than reasonably necessary; rejecting condition as overbroad).

[325] *See, e.g.*, United States v. Hamilton, 986 F.3d 413, 419 (4th Cir. 2021) (special condition requiring that the defendant "must not work in any type of employment without the prior approval of the probation officer" was overbroad and lacking an appropriate nexus to "the nature and circumstances of the offense" (citing 18 U.S.C. § 3553(a)(1))); *see also* USSG §5F1.5 (Occupational Restrictions).

[326] *See, e.g.*, *MacMillen*, 544 F.3d at 77 (condition is not overbroad because "the purpose of the employer notification condition is to aid the prevention of improper computer use," and would not apply to all types of employment). *But see Mike*, 632 F.3d at 698 (finding infirm the conditions requiring notification of potential employers or educational programs about criminal convictions because such notification constitutes an

- Monitoring of adult relationships.[327]

E. SECTION 5E1.1 (RESTITUTION)

Section 5E1.1 requires courts to order restitution for identifiable victims. Restitution is mandatory under §5E1.1 and 18 U.S.C. § 2259 for offenses that involve the sexual exploitation of children and child pornography. The Victim Assistance Act amended 18 U.S.C. § 2259 to modify procedures for determining the amount of mandatory restitution in child pornography cases.[328] Under the Act, after determining the full loss amount for each identifiable child pornography trafficking victim, the sentencing court must impose a minimum of $3,000 in restitution for each victim.[329]

As amended by the Victim Assistance Act, section 2259 requires a court sentencing a defendant convicted of "trafficking" child pornography—which is defined by reference to statutory provisions to include advertisement, distribution, receipt, reproduction, and possession of child pornography[330]—to first determine the full amount of the victim's losses and then to order restitution for the amount reflecting the defendant's relative role in the causal process.[331] The full amount of the victim's loss includes the following:

"occupational restriction," and the court did not make the required specific findings under §5F1.5 as set forth in *United States v. Souser*, 405 F.3d 1162, 1167 (10th Cir. 2005)).

327 *See, e.g.*, United States v. Rock, 863 F.3d 827, 832–33 (D.C. Cir. 2017) (striking condition that defendant notify the probation office of "any significant romantic relationship" as unconstitutionally vague (citing United States v. Reeves, 591 F.3d 77, 81 (2d Cir. 2010))).

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

329 18 U.S.C. § 2259(b)(2)(B). However, "a victim's total aggregate recovery . . . shall not exceed the full amount of the victim's demonstrated losses." *Id.* § 2259(b)(2)(C). Accordingly, "[a]fter the victim has received restitution in the full amount of the victim's losses . . . found in any case involving that victim that has resulted in a final restitution order[,] . . . the liability of each defendant who is or has been ordered to pay restitution for such losses to that victim [is] terminated." *Id.*

330 *Id.* § 2259(b)(2)(A), (B). "[T]he term 'trafficking in child pornography' means conduct proscribed by section 2251(d) [advertising], 2252 [transport, receive, distribute, reproduce, or possess child pornography], 2252A(a)(1) through (5) [transport, receive, distribute, reproduce, or possess child pornography], [and] 2252A(g) [Child Exploitation Enterprise]." *Id.* § 2259(c)(3).

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

> [A]ny costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim, and in the case of trafficking in child pornography offenses, as a proximate result of all trafficking in child pornography offenses involving the same victim, including—
>
> (A) medical services relating to physical, psychiatric, or psychological care;
>
> (B) physical and occupational therapy or rehabilitation;
>
> (C) necessary transportation, temporary housing, and child care expenses;
>
> (D) lost income;
>
> (E) reasonable attorneys' fees, as well as other costs incurred; and
>
> (F) any other relevant losses incurred by the victim.[332]

The Victim Assistance Act responded to difficulties in applying *Paroline v. United States*[333] In *Paroline*, the Supreme Court created a multi-factor test to determine how much of the victim's losses are attributable to the defendant's conduct, overruling the Fifth Circuit's holding that each defendant who possessed the victim's images could be held liable for the entire damage amount.[334] The Court held that there is a general proximate cause requirement for all losses under section 2259, and that the court "should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."[335] The Court provided further guidance to district courts by enumerating several factors to consider in determining the amount of restitution.[336] *Paroline* initially proved difficult for lower courts to apply and could result in a victim receiving little restitution. The Victim Assistance Act codified *Paroline's* multi-

collected a restitution payment pursuant to the Act for an amount greater than $35,000, the victim is ineligible to receive a "defined monetary assistance" payment. *Id.* §2259(d)(3).

[332] *Id.* § 2259(c)(2)(A)–(F).

[333] 572 U.S. 434 (2014).

[334] *Id.*

[335] *Id.* at 458.

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

factor approach, while setting a restitution floor.[337] Following the Act, courts have continued to apply the *Paroline* analysis.[338]

F. SECTION 5F1.5 (OCCUPATIONAL RESTRICTIONS)

Section §5F1.5(a) authorizes a court to impose a condition of probation or supervised release that either (1) prohibits the defendant from certain occupations, or (2) limits the terms upon which the defendant may engage in that occupation.[339] For example, a sex offender may not be allowed to work around children.[340] Such restrictions may be imposed, however, only if the court determines (1) that there is a reasonably direct relationship between the defendant's occupation and the offense conduct and (2) that imposition of the restriction is reasonably necessary to protect the public.[341] In addition, pursuant to §5F1.5(b), an occupational restriction may be in place only for "the minimum time and to the minimum extent necessary to protect the public."[342] Occupational restrictions must be supported by specific findings as to the relationship between the offense and the public protection necessity.[343]

G. DEPARTURES

Pursuant to §5K2.0(b), Part K of Chapter Five (Other Ground for Departure) are the only grounds under which a court may impose a sentence below the range calculated

[337] United States v. Monzel, 930 F.3d 470, 476 & n.1 (D.C. Cir. 2019) ("Congress has since amended Section 2259 to both codify *Paroline*'s basic approach and to set a restitution floor of $3,000.").

[338] *See, e.g.*, United States v. Berry, No. 1:18-cr-00107-AA, 2020 WL 86194, at *5 (D. Or. Jan. 6, 2020) (analyzing each victim's restitution request under *Paroline* and requiring a $3,000 award for victims where the government did not prove the victims' total restitution amounts in accordance with the Victim Assistance Act); United States v. Rothenberg, 923 F.3d 1309, 1337–40 (11th Cir. 2019) (upholding the district court's grant of restitution to eight of nine victims based on a *Paroline* analysis for each victim and discussing post-*Paroline* cases); *Monzel*, 930 F.3d at 486–87 (affirming lower court's restitution award despite defendant's many evidentiary objections and discussing required evidence submitted by government under *Paroline* and district court's reasoning).

[339] USSG §5F1.5(a).

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

[341] USSG §5F1.5(a).

[342] USSG §5F1.5(b); *see also* United States v. Hamilton, 986 F.3d 413, 420 (4th Cir. 2021) (the "all-encompassing" restriction prohibiting defendant from *any* type of employment without prior approval of the probation officer, rather than a more limited restriction involving regular contact with minors, "lack[ed] an appropriate nexus" to the offense).

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

under the applicable guideline in "child crimes and sexual offenses."[344] These grounds differ "from the standard for other departures" because pursuant to 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and §5K2.0(b)(1), the standard for such offenses "includes a requirement [that] . . . any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for [such a] downward departure."[345]

Section 5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)) provides further instruction about the extent to which certain offender characteristics may provide a reason to depart downward when sentencing a defendant convicted of enumerated sex offenses involving a minor victim.[346]

[344] USSG §5K2.0. The Commission recently promulgated an amendment that deletes departures throughout the *Guidelines Manual*, including the departure provisions in §5K2.0. *See* Amendment 5 of the amendments submitted by the Commission to Congress on April 30, 2025, 90 FR 19798 (May 9, 2025). Absent congressional action to the contrary, the amendment will become effective November 1, 2025.

[345] USSG §5K2.0, comment. (n.4(B)). The definition of "child crimes and sexual offenses" includes, among others, offenses under 18 U.S.C. § 1591, and chapters 71 (Obscenity), 109A (Sexual Abuse), 110 (Sexual Exploitation and Other Abuse of Children), and 117 (Transportation for Illegal Sexual Activity and Related Crimes) of title 18. USSG §5K2.0, comment. (n.4(A)). *But see supra* note 344 (citing recently promulgated amendment 5, which deletes departures, including §5K2.0).

[346] USSG §5K2.22. *But see supra* note 344 (citing recently promulgated amendment 5, which deletes departures, including §5K2.22).