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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4641

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RANDOLPH JOHNSON SPAIN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at
Wilmington. Terrence W. Boyle, District Judge. (7:14-cr-00021-BO-1)

Submitted: May 22, 2018

Decided: June 6, 2018

Before NIEMEYER and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit
Judge.

Affirmed by unpublished per curiam opinion.

Rudolph A. Ashton, III, DUNN PITTMAN SKINNER & CUSHMAN, PLLC, New Bern,
North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P.
May-Parker, First Assistant United States Attorney, Phillip A. Rubin, Assistant United
States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North
Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Randolph Johnson Spain of two counts of interstate transportation of an individual for purposes of prostitution, in violation of 18 U.S.C. § 2421 (2012). The district court originally sentenced Spain to the statutory maximum term of 120 months on each count, to run consecutively. In his first appeal, Spain challenged the sufficiency of the evidence to support one of the counts of conviction, the application of a cross-reference under the Sentencing Guidelines for the second count, and the calculation of his criminal history category. With respect to his challenge to the cross-reference, Spain argued that application of the cross-reference violated his Sixth Amendment rights because he was not charged with the conduct underlying the cross-reference or convicted of that conduct by the jury. We rejected this argument and affirmed the convictions, but vacated the sentence and remanded for resentencing as we concluded that the district court erred in calculating Spain's criminal history category. *United States v. Spain*, 666 F. App'x 313 (4th Cir. 2016) (No. 15-4692), *cert. denied*, 137 S. Ct. 2174 (2017).

Prior to the resentencing hearing, Spain filed several objections to the presentence report, including an objection to the cross-reference this court previously determined was correctly applied, and an objection to application of U.S. Sentencing Guidelines Manual § 5G1.2(d) (2016), contending that the sentences for the two counts should be run concurrently, rather than consecutively, resulting in a sentence not exceeding 10 years of imprisonment. As this court had determined that the cross-reference was correctly applied, this district court did not reconsider that issue. The court sentenced Spain to 120 months

of imprisonment for the first count, plus a consecutive 24 months of imprisonment for the second count. Spain now appeals. For the reasons that follow, we affirm.

Spain argues on appeal that the application of the cross-reference increasing his base offense level for one of the counts, coupled with application of USSG § 5G1.2(d) resulting in a consecutive sentence being imposed for the second count, violated his Sixth Amendment rights. Spain is foreclosed, however, from raising this argument based on the mandate rule. “We review *de novo* the district court’s interpretation of the mandate.” *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012). “The mandate rule governs what issues the lower court is permitted to consider on remand—it is bound to carry out the mandate of the higher court, but may not reconsider issues the mandate laid to rest.” *Id.* Where a remand for resentencing fails to impose any further limitations, “resentencing may proceed *de novo*, constrained only by the constitutional bar against vindictiveness, . . . the controlling statutes, and the Sentencing Guidelines.” *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 n.4 (4th Cir. 1995) (citing *United States v. Bell*, 5 F.3d 64, 67 (4th Cir. 1993)).

However, the mandate rule prohibits “litigation of issues decided by the district court but foregone on appeal or otherwise waived, for example because they were not raised in the district court.” *Susi*, 674 F.3d at 283 (internal quotation marks omitted). Moreover, under the mandate rule, “any issue that could have been but was not raised on appeal is waived and thus not remanded.” *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) (internal quotation marks omitted); *see also S. Atl. Ltd. P’ship of Tenn. v. Riese*, 356 F.3d 576, 583 (4th Cir. 2004) (mandate rule “forecloses litigation of issues decided by the

district court but foregone on appeal or otherwise waived") (internal quotation marks omitted).

Here, to the extent that Spain seeks to raise the issue previously decided by this court in the prior appeal—that application of the cross-reference under the Guidelines violated his Sixth Amendment rights—the mandate rule forecloses further litigation on that issue. To the extent that Spain seeks to raise a new argument—that the interrelation of the cross-reference with another Guidelines section violated his Sixth Amendment rights—he did not raise that argument in his prior appeal and therefore that issue was not remanded to the district court. *See Chao*, 511 F.3d at 465. We thus conclude that Spain was foreclosed from raising that argument on resentencing and is foreclosed from litigating it before this court. We further conclude that Spain's claim does not fall within any exception to the mandate rule. *See Bell*, 5 F.3d at 67 (4th Cir. 1993) (exceptions to mandate rule include (1) where controlling legal authority has changed dramatically; (2) where significant new evidence that could not have been previously obtained through due diligence is discovered; or (3) where a blatant error in the prior decision will, if uncorrected, result in a serious injustice).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED

FILED: June 6, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4641
(7:14-cr-00021-BO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDOLPH JOHNSON SPAIN

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: July 31, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4641
(7:14-cr-00021-BO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDOLPH JOHNSON SPAIN

Defendant - Appellant

M A N D A T E

The judgment of this court, entered June 6, 2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

FILED: July 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-4641
(7:14-cr-00021-BO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RANDOLPH JOHNSON SPAIN

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Traxler, and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-4692

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RANDOLPH JOHNSON SPAIN,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. James C. Fox, Senior District Judge. (7:14-cr-00021-F-1)

Submitted: November 21, 2016 Decided: December 20, 2016

Before NIEMEYER and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part and remanded by unpublished per curiam opinion.

Thomas P. McNamara, Federal Public Defender, Eric J. Brignac, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant. John Stuart Bruce, Acting United States Attorney, Jennifer P. May-Parker, Barbara D. Kocher, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A federal jury convicted Randolph Johnson Spain of two counts of interstate transportation of an individual for purposes of prostitution, in violation of 18 U.S.C. § 2421 (2012). The district court upwardly departed from the Guidelines range and sentenced Spain to the statutory maximum of 240 months of imprisonment, and he now appeals. For the reasons that follow, we affirm the convictions, but vacate the sentence and remand.

Spain first challenges the sufficiency of the evidence for the second count of conviction. We review a district court's decision to deny a Fed. R. Crim. P. 29 motion for a judgment of acquittal *de novo*. United States v. Smith, 451 F.3d 209, 216 (4th Cir. 2006). A defendant challenging the sufficiency of the evidence faces a heavy burden. United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997). In determining whether the evidence is sufficient to support a conviction, we determine "whether there is substantial evidence in the record, when viewed in the light most favorable to the government, to support the conviction." United States v. Palacios, 677 F.3d 234, 248 (4th Cir. 2012) (internal quotation marks omitted). Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." Id. (internal

quotation marks omitted). Furthermore, “[d]eterminations of credibility are within the sole province of the jury and are not susceptible to judicial review.” Id. (internal quotation marks omitted).

Section 2421(a) prohibits knowingly transporting any individual in interstate commerce with intent that such individual engage in prostitution or any sexual activity that constitutes a criminal offense. 18 U.S.C. § 2421(a). The intent that the individual engage in prostitution, however, need not be the defendant’s sole motivation for the interstate travel where prostitution is the predominate purpose of the trip. Dingess v. United States, 315 F.2d 238, 239 (4th Cir. 1963). We have thoroughly reviewed the record and conclude that there was sufficient evidence to support the jury’s verdict of guilt on the second count.

Spain also argues that the district court erred in applying a cross-reference under the Sentencing Guidelines and that this error violated his Sixth Amendment right to a jury trial. We review a sentence for abuse of discretion, determining whether the sentence is procedurally and substantively reasonable. United States v. Heath, 559 F.3d 263, 266 (4th Cir. 2009). In so doing, we first examine the sentence for “significant procedural error,” including “failing to calculate (or improperly calculating) the Guidelines range, treating the

Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) [(2012)] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence". Gall v. United States, 552 U.S. 38, 51 (2007). We then "consider the substantive reasonableness of the sentence imposed." United States v. Evans, 526 F.3d 155, 161 (4th Cir. 2008) (quoting Gall, 552 U.S. at 51).

In addition, in reviewing the district court's calculations under the Guidelines, "we review the district court's legal conclusions *de novo* and its factual findings for clear error." United States v. Manigan, 592 F.3d 621, 626 (4th Cir. 2010) (internal quotation marks omitted). We will "find clear error only if, on the entire evidence, we are left with the definite and firm conviction that a mistake has been committed." Manigan, 592 F.3d at 631 (internal quotation marks omitted).

Section 2G1.1(c) of the Guidelines provides that a district court should apply U.S. Sentencing Guidelines § 2A3.1 (2015) in determining the offense level if the offense involved conduct described in 18 U.S.C. § 2242 (2012). USSG § 2G1.1(c). A defendant is guilty of violating § 2242 if he knowingly causes another person to engage in a sexual act by threatening or placing that other person in fear. 18 U.S.C. § 2242(1). Based on our review of the record, we conclude that the district court did not err in applying this cross-reference in calculating the

advisory Guidelines range. Moreover, as Spain concedes in his reply brief, his constitutional argument is foreclosed by binding circuit precedent. See United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008) ("Sentencing judges may find facts relevant to determining a Guidelines range by a preponderance of the evidence, so long as that Guidelines sentence is treated as advisory and falls within the statutory maximum authorized by the jury's verdict.").

Finally, Spain argues that the court erred in awarding two criminal history points each to his 2011 Virginia conviction consisting of four counts of prostitution and his 2013 North Carolina conviction for assault because these convictions were on appeal. The Government has conceded the error and joins Spain in requesting that we vacate Spain's sentence. With respect to Spain's North Carolina conviction, the district court should have awarded that conviction only one criminal history point because it was on appeal. See United States v. Martin, 378 F.3d 353, 355-60 (4th Cir. 2004). The Virginia conviction, however, was not on appeal. Spain appealed the 2011 Virginia conviction and the presentence report makes clear that he pleaded guilty to one of the four prostitution charges while on appeal in the state circuit court. However, as the Government points out, the district court awarded two criminal history points each for (1) the 2011 conviction for four counts of

prostitution as well as (2) the 2011 Virginia conviction for one of those counts that resulted from Spain's appeal to the state circuit court. As these are not separate convictions, the district court double-counted them in calculating Spain's criminal history.

We are unable to determine on the record that this error was harmless.* Cf. United States v. Savillon-Matute, 636 F.3d 119, 123 (4th Cir. 2011) (to determine that incorrect Guidelines calculation was harmless, appellate court must determine that district court would have reached the same result if Guidelines had been properly calculated and sentence would have been reasonable). Accordingly, we affirm Spain's convictions, but vacate the sentence and remand for proceedings consistent with this opinion. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

* We express no opinion on the substantive reasonableness of the sentence that the district court imposed.

Appeal: 15-4692 Doc: 58 Filed: 05/30/2017 Pg: 1 of 1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 22, 2017

Clerk
United States Court of Appeals for the Fourth
Circuit
1100 East Main Street
Room 501
Richmond, VA 23219

Re: Randolph Johnson Spain
v. United States
No. 16-8747
(Your No. 15-4692)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk

Ch. 117

TRANSPORT FOR ILLEGAL SEXUAL ACTIVITY

18. § 2423

[§ 2401. Renumbered § 2441]

HISTORICAL AND STATUTORY NOTES

Codifications

Section 2401 was renumbered section 2441 of this title, by Pub.L. 104-294, § 605(p)(1), Oct. 11, 1996, 110 Stat. 3610.

CHAPTER 117—TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

Sec.	
2421.	Transportation generally.
2422.	Coercion and enticement.
2423.	Transportation of minors.
2424.	Filing factual statement about alien individual.
2425.	Use of interstate facilities to transmit information about a minor.
2426.	Repeat offenders.
2427.	Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense.
2428.	Forfeitures.

§ 2421. Transportation generally

(a) In general.—Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Requests to prosecute violations by State attorneys general.—

(1) In general.—The Attorney General shall grant a request by a State attorney general that a State or local attorney be cross designated to prosecute a violation of this section unless the Attorney General determines that granting the request would undermine the administration of justice.

(2) Reason for denial.—If the Attorney General denies a request under paragraph (1), the Attorney General shall submit to the State attorney general a detailed reason for the denial not later than 60 days after the date on which a request is received.

(Added Pub.L. 114-22, Title III, § 803, May 29, 2015, 129 Stat. 265.)

HISTORICAL AND STATUTORY NOTES

Prior Provisions

A prior section 2421, Act June 25, 1948, c. 645, 62 Stat. 812; May 24, 1949, c. 139, § 47, 63 Stat. 98; Pub.L. 99-628, § 5(b)(1), Nov. 7, 1988, 100 Stat. 3511; Pub.L. 104-294, Title VII, § 7070, Nov. 18, 1996, 110 Stat. 3610; Pub.L. 104-104, Title V, § 508, Feb. 8, 1996, 110 Stat. 377; Pub.L. 105-314, Title I, § 102, Oct. 20, 1998, 112 Stat. 2975; Pub.L. 108-21, Title I, § 103(a)(2)(A), (B), (b)(2)(A), Apr. 30, 2003, 117 Stat. 652, 653; Pub.L. 109-248, Title II, § 203, July 27, 2006, 120 Stat. 613.)

§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

(June 25, 1948, c. 645, 62 Stat. 812; Pub.L. 99-628, § 5(b)(1), Nov. 7, 1988, 100 Stat. 3511; Pub.L. 104-690, Title VII, § 7070, Nov. 18, 1996, 110 Stat. 3610; Pub.L. 104-104, Title V, § 508, Feb. 8, 1996, 110 Stat. 377; Pub.L. 105-314, Title I, § 102, Oct. 20, 1998, 112 Stat. 2975; Pub.L. 108-21, Title I, § 103(a)(2)(A), (B), (b)(2)(A), Apr. 30, 2003, 117 Stat. 652, 653; Pub.L. 109-248, Title II, § 203, July 27, 2006, 120 Stat. 613.)

§ 2423. Transportation of minors

(a) Transportation with intent to engage in criminal sexual activity.—A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

(b) Travel with intent to engage in illicit sexual conduct.—A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(c) Engaging in illicit sexual conduct in foreign places.—Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

(d) Ancillary offenses.—Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

(e) Attempt and conspiracy.—Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

Ch. 109A

SEXUAL ABUSE

18 § 2241

- (ii) at an excessive speed; or
- (iii) of a number of persons in excess of the rated capacity of the vessel; or
- (B) intentional grounding of a vessel in which persons are being transported.

(Added Pub.L. 109-177, Title III, § 303(a), Mar. 9, 2006, 120 Stat. 233; amended Pub.L. 111-281, Title IX, § 917, Oct. 15, 2010, 124 Stat. 3021.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Immigration and Nationality Act, referred to in subsec. (b)(4), is Act June 27, 1952, c. 477, 66 Stat. 163, as amended, also known as the

INA, the McCarran Act, and the McCarran-Walter Act, which is classified principally to chapter 12 of Title 8, 8 U.S.C.A. § 1101 et seq. Section 274 of the Act is classified to 8 U.S.C.A. § 1324. For complete classification, see Short Title note set out under 8 U.S.C.A. § 1101 and Tables.

Chapter 77, referred to in subsec. (b)(4), probably means chapter 77 of this title, 18 U.S.C.A. § 1581.

Section 581 of the Tariff Act of 1930, referred to in subsec. (c), is Act June 17, 1930, c. 497, Title IV, § 581, 46 Stat. 747, as amended, which is classified to 19 U.S.C.A. § 1581.

CHAPTER 109A—SEXUAL ABUSE

Sec.

- 2241. Aggravated sexual abuse.
- 2242. Sexual abuse.
- 2243. Sexual abuse of a minor or ward.
- 2244. Abusive sexual contact.
- 2245. Sexual abuse resulting in death.¹
- 2246. Definitions for chapter.
- 2247. Repeat offenders.
- 2248. Mandatory restitution.

¹ So in original. Section heading amended without corresponding amendment of analysis.

§ 2241. Aggravated sexual abuse

(a) **By force or threat.**—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act—

- (1) by using force against that other person; or
- (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) **By other means.**—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

- (1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

- (A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) **With children.**—Whoever crosses a State line with intent to engage in a sexual act with a person who has not

attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

(d) **State of mind proof requirement.**—In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3620; amended Pub.L. 103-222, Title XXXIII, § 330021(1), Sept. 18, 1994, 108 Stat. 2150; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121(7(b))], Sept. 30, 1996, 110 Stat. 3009-31; Pub.L. 105-314, Title III, § 301(a), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 109-102, Title XI, § 1177(e)(1), (2), Jan. 5, 2006, 119 Stat. 8125; Pub.L. 109-248, Title II, §§ 206(a)(1), 207(2), July 27, 2006, 120 Stat. 618, 615; Pub.L. 110-161, Div. II, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

HISTORICAL AND STATUTORY NOTES

Codifications

Identical provision was enacted by Pub.L. 99-554, § 2, Nov. 14, 1986, 100 Stat. 3650.

Effective and Applicability Provisions

1986 Acts. Pub.L. 99-646, § 87(e), Nov. 10, 1986, provided that: "This section and the amendments made by this section [enacting this chapter; amending sections 118(a), (b), 1111(a), 1163, and 3185(12) of this title, sections 300w-3(a)(1)(G), 300w-4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; and repealing chapter 99 (sections 2031 and 2032) of this title] shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L. 99-646, § 87(e), was enacted by Pub.L. 99-554, § 4, Nov. 14, 1986, 100 Stat. 3654.]

18 § 2241

CRIMES

Part 1

Short Title

1996 Amendments. Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121, subsec. 7(a)], Sept. 30, 1996, 110 Stat. 3009-31, provided that: "This section [probably should be this subsection, which amended this section and section 2243 of this title] may be cited as the 'Amber Hagerman Child Protection Act of 1996'."

1986 Amendments. Pub.L. 99-646, § 87(a), Nov. 10, 1986, provided that: "This section [enacting this chapter; amending sections 118(a), (b), 1111(a), 1153, and 8185(12) of this title, sections 800w-3(a)(1)(G), 800w-4(c)(b), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation; repealing chapter 99 (sections 2081 and 2092) of this title; and enacting note provision under this section] may be cited as the 'Sexual Abuse Act of 1986'."

[Short Title provision similar to Pub.L. 99-646, § 87(a), was enacted by Pub.L. 99-654, § 1, Nov. 14, 1986, 100 Stat. 3080.]

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3021; amended Pub.L. 103-322, Title XXXIII, § 330021(1), Sept. 18, 1994, 108 Stat. 2150; Pub.L. 109-162, Title XI, § 1177(a)(3), Jan. 5, 2006, 110 Stat. 3126; Pub.L. 109-248, Title II, §§ 205, 207(2), July 27, 2006, 120 Stat. 613, 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

HISTORICAL AND STATUTORY NOTES

Codifications

Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3081.

Effective and Applicability Provisions

1986 Acts. Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99-646, set out as a note under section 2241 of this title.

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(b) Of a ward.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is—

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

(c) Defenses.—(1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement.—In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew—

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3021; amended Pub.L. 101-647, Title III, § 822, Nov. 29, 1990, 104 Stat. 4818; Pub.L. 104-208, Div. A, Title I, § 101(a) [Title I, § 121(7)(a)], Sept. 30, 1996, 110 Stat. 3009-31; Pub.L. 106-314, Title III, § 301(b), Oct. 30, 1998, 112 Stat. 2978; Pub.L. 109-162, Title XI, § 1177(a)(4), (b)(1), Jan. 5, 2006, 110 Stat. 3126; Pub.L. 109-248, Title II, § 207, July 27, 2006, 120 Stat. 615; Pub.L. 110-161, Div. E, Title V, § 554, Dec. 26, 2007, 121 Stat. 2082.)

HISTORICAL AND STATUTORY NOTES

Codifications

Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3081.

Effective and Applicability Provisions

1986 Acts. Section effective 30 days after Nov. 10, 1986, see section 87(e) of Pub.L. 99-646, set out as a note under section 2241 of this title.

§ 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate

§2A3.1**3. CRIMINAL SEXUAL ABUSE AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER***Historical Note*

Effective November 1, 1987. Amended effective November 1, 2007 (amendment 701).

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

(a) Base Offense Level:

- (1) 38, if the defendant was convicted under 18 U.S.C. § 2241(c); or
- (2) 30, otherwise.

(b) Specific Offense Characteristics

- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.
- (2) If subsection (a)(2) applies and (A) the victim had not attained the age of twelve years, increase by 4 levels; or (B) the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.
- (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels.
- (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
- (5) If the victim was abducted, increase by 4 levels.
- (6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an interactive computer service, increase by 2 levels.

§2A3.1**(c) Cross References**

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (2) 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, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official, the offense shall be deemed to have an official victim for purposes of subsection (c)(2) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:**1. Definitions.**—For purposes of this guideline:

"Abducted", *"permanent or life-threatening bodily injury"*, and *"serious bodily injury"* have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, *"serious bodily injury"* means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"Custody or control" and *"prison official"* have the meaning given those terms in Application Note 4 of the Commentary to §3A1.2 (Official Victim).

"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transportation, and advertisement, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving

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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.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

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

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography.

"Victim" includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—

(A) **Definitions.**—For purposes of subsection (b)(1), *"conduct described in 18 U.S.C. § 2241(a) or (b)"* is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) **Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).**—If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).

3. Application of Subsection (b)(3).—

(A) **Care, Custody, or Supervisory Control.**—Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

§2A3.1**4. Application of Subsection (b)(6).—**

(A) **Misrepresentation of Participant's Identity.**—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) **Use of a Computer or Interactive Computer Service.**—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (c)(2).—

(A) **In General.**—The cross reference in subsection (c)(2) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(B) **Definition.**—For purposes of subsection (c)(2), "*sexually explicit conduct*" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Upward Departure Provision.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See §5K2.8 (Extreme Conduct).*

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 91 and 92); November 1, 1991 (amendment 392); November 1, 1992 (amendment 444); November 1, 1993 (amendment 477); November 1, 1995 (amendment 511); November 1, 1997 (amendment 545); November 1, 2000 (amendments 592 and 601); November 1, 2001 (amendment 616); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2008 (amendment 725).
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§2G1.1**PART G – OFFENSES INVOLVING COMMERCIAL SEX ACTS,
SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY**

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 641).
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1. PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 2000 (amendment 592); November 1, 2002 (amendment 641).
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§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

- (1) 84, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
- (2) 14, otherwise.

(b) Specific Offense Characteristic

- (1) If (A) subsection (a)(2) applies; and (B) the offense involved fraud or coercion, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

- (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1828 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor).

§2G1.1**Application Notes:****1. Definitions.**—For purposes of this guideline:

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(e)(3).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Promoting a commercial sex act" means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

"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 to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See Chapter Five, Part K (Departures).* For purposes of subsection (b)(1), "*coercion*" includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. Application of Chapter Three Adjustment.—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. Application of Subsection (e)(1).—

(A) Conduct Described in 18 U.S.C. § 2241(a) or (b).—For purposes of subsection (e)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Conduct Described in 18 U.S.C. § 2242.—For purposes of subsection (e)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing

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another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

5. **Special Instruction at Subsection (d)(1).**—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §8D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that 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, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.
6. **Upward Departure Provision.**—If the offense involved more than ten victims, an upward departure may be warranted.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 157 and 168); November 1, 1990 (amendment 322); November 1, 1998 (amendment 588); November 1, 2000 (amendment 592); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2002 (amendment 641); November 1, 2004 (amendment 664); November 1, 2007 (amendment 701); November 1, 2009 (amendment 737).
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§2G1.2. [Deleted]

<i>Historical Note</i>	Section 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct), effective November 1, 1987, amended effective November 1, 1989 (amendments 159 and 160), November 1, 1990 (amendment 323), November 1, 1991 (amendment 400), and November 1, 1992 (amendment 444), was deleted by consolidation with §2G1.1 effective November 1, 1998 (amendment 538).
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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

(a) Base Offense Level:

- (1) 84, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
- (2) 80, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) 28, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) 24, otherwise.

§5G1.1**PART G — IMPLEMENTING THE TOTAL SENTENCE OF IMPRISONMENT****§5G1.1. Sentencing on a Single Count of Conviction**

- (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
- (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.
- (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—
 - (1) is not greater than the statutorily authorized maximum sentence, and
 - (2) is not less than any statutorily required minimum sentence.

Commentary

This section describes how the statutorily authorized maximum sentence, or a statutorily required minimum sentence, may affect the determination of a sentence under the guidelines. For example, if the applicable guideline range is 51–68 months and the maximum sentence authorized by statute for the offense of conviction is 48 months, the sentence required by the guidelines under subsection (a) is 48 months; a sentence of less than 48 months would be a guideline departure. If the applicable guideline range is 41–61 months and there is a statutorily required minimum sentence of 60 months, the sentence required by the guidelines under subsection (b) is 60 months; a sentence of more than 60 months would be a guideline departure. If the applicable guideline range is 51–68 months and the maximum sentence authorized by statute for the offense of conviction is 60 months, the guideline range is restricted to 51–60 months under subsection (c).

Historical Note

Effective November 1, 1987. Amended effective November 1, 1989 (amendment 286).

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

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- (b) For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.
- (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (e) In a case in which subsection (c) of §4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

Commentary**Application Notes:**

1. **In General.**—This section specifies the procedure for determining the specific sentence to be formally imposed on each count in a multiple-count case. The combined length of the sentences (“total punishment”) is determined by the court after determining the adjusted combined offense level and the Criminal History Category and determining the defendant’s guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).

Note that the defendant’s guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1 (Sentencing on a Single Count of Conviction), but also in a multiple-count case. *See Note 3, below.*

Except as otherwise required by subsection (e) or any other law, the total punishment is to be imposed on each count and the sentences on all counts are to be imposed to run concurrently to the extent allowed by the statutory maximum sentence of imprisonment for each count of conviction.

This section applies to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding.

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Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

2. **Mandatory Minimum and Mandatory Consecutive Terms of Imprisonment (Not Covered by Subsection (e)).—**

(A) **In General.**—Subsection (a) applies if a statute (i) specifies a term of imprisonment to be imposed; and (ii) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, and also requiring the sentence imposed to run consecutively to any other term of imprisonment) and 18 U.S.C. § 1028A (requiring a mandatory term of imprisonment of either two or five years, based on the conduct involved, and also requiring, except in the circumstances described in subdivision (B), the sentence imposed to run consecutively to any other term of imprisonment). Except for certain career offender situations in which subsection (c) of §4B1.1 (Career Offender) applies, the term of years to be imposed consecutively is the minimum required by the statute of conviction and is independent of the guideline sentence on any other count. *See, e.g.*, the Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding the determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. *See, e.g.*, Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.

(B) **Multiple Convictions Under 18 U.S.C. § 1028A.**—Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. § 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section “concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission . . .”.

In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

- (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2832b(g)(5)(B).
- (ii) Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A

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should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

(C) **Imposition of Supervised Release.**—In the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. § 3624(e).

3. **Application of Subsection (b).**—

(A) **In General.**—Subsection (b) provides that, for all counts not covered by subsection (a), the court shall determine the total punishment (*i.e.*, the combined length of the sentences to be imposed) and shall impose that total punishment on each such count, except to the extent otherwise required by law (such as where a statutorily required minimum sentence or a statutorily authorized maximum sentence otherwise requires).

(B) **Effect on Guidelines Range of Mandatory Minimum or Statutory Maximum.**—The defendant's guideline range on the Sentencing Table may be affected or restricted by a statutorily authorized maximum sentence or a statutorily required minimum sentence not only in a single-count case, *see* §5G1.1, but also in a multiple-count case.

In particular, where a statutorily required minimum sentence on any count is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence on that count shall be the guideline sentence on all counts. *See* §5G1.1(b). Similarly, where a statutorily required minimum sentence on any count is greater than the minimum of the applicable guideline range, the guideline range for all counts is restricted by that statutorily required minimum sentence. *See* §5G1.1(c)(2) and accompanying Commentary.

However, where a statutorily authorized maximum sentence on a particular count is less than the minimum of the applicable guideline range, the sentence imposed on that count shall not be greater than the statutorily authorized maximum sentence on that count. *See* §5G1.1(a).

(C) **Examples.**—The following examples illustrate how subsection (b) applies, and how the restrictions in subparagraph (B) operate, when a statutorily required minimum sentence is involved.

Defendant A and Defendant B are each convicted of the same four counts. Counts 1, 3, and 4 have statutory maximums of 10 years, 20 years, and 2 years, respectively. Count 2 has a statutory maximum of 30 years and a mandatory minimum of 10 years.

For Defendant A, the court determines that the final offense level is 19 and the defendant is in Criminal History Category I, which yields a guideline range on the Sentencing Table of 30 to 37 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant A's guideline sentence is 120 months. *See* subparagraph (B), above. After considering that guideline sentence, the court determines

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that the appropriate "total punishment" to be imposed on Defendant A is 120 months. Therefore, subsection (b) requires that the total punishment of 120 months be imposed on each of Counts 1, 2, and 3. The sentence imposed on Count 4 is limited to 24 months, because a statutory maximum of 2 years applies to that particular count.

For Defendant B, in contrast, the court determines that the final offense level is 30 and the defendant is in Criminal History Category II, which yields a guideline range on the Sentencing Table of 108 to 135 months. Because of the 10-year mandatory minimum on Count 2, however, Defendant B's guideline range is restricted to 120 to 135 months. *See subparagraph (B), above.* After considering that restricted guideline range, the court determines that the appropriate "total punishment" to be imposed on Defendant B is 130 months. Therefore, subsection (b) requires that the total punishment of 130 months be imposed on each of Counts 2 and 3. The sentences imposed on Counts 1 and 4 are limited to 120 months (10 years) and 24 months (2 years), respectively, because of the applicable statutory maximums.

(D) **Special Rule on Resentencing.**—In a case in which (i) the defendant's guideline range on the Sentencing Table was affected or restricted by a statutorily required minimum sentence (as described in subparagraph (B)), (ii) the court is resentencing the defendant, and (iii) the statutorily required minimum sentence no longer applies, the defendant's guideline range for purposes of the remaining counts shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence.

4. Career Offenders Covered under Subsection (e).—

(A) **Imposing Sentence.**—The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under §4B1.1(c) be apportioned among all the counts of conviction. In most cases this can be achieved by imposing the statutory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under §4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction. In some cases covered by subsection (e), a consecutive term of imprisonment longer than the minimum required by 18 U.S.C. § 924(c) or § 929(a) will be necessary in order both to achieve the total punishment determined by the court and to comply with the applicable statutory requirements.

(B) **Examples.**—The following examples illustrate the application of subsection (e) in a multiple count situation:

(i) The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 300 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 60 months on the 18 U.S.C. § 924(c) count, subtracts that 60 months from the total punishment of 300 months and imposes the remainder of 240 months on the 21 U.S.C. § 841 count. As required by statute, the sentence on the 18 U.S.C. § 924(c) count is imposed to run consecutively.

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- (ii) The defendant is convicted of one count of 18 U.S.C. § 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(C) (20 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 327 months is appropriate (applicable guideline range of 262–327). The court then imposes a sentence of 240 months on the 21 U.S.C. § 841 count and a sentence of 87 months on the 18 U.S.C. § 924(c) count to run consecutively to the sentence on the 21 U.S.C. § 841 count.
- (iii) The defendant is convicted of two counts of 18 U.S.C. § 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. § 113(a)(3) (10 year statutory maximum). Applying §4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. § 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. § 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. § 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 287 and 288); November 1, 1994 (amendment 507); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2002 (amendment 642); November 1, 2004 (amendment 674); November 1, 2005 (amendments 677 and 680); November 1, 2010 (amendment 747); November 1, 2012 (amendments 767 and 770).
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§5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment

- (a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- (b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
 - (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
 - (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

Amend. V

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Effect of delay in taking defendant into custody after conviction and sentence, 76 A.L.R.5th 485.

Effect of use, or alleged use, of internet on personal jurisdiction in, or venue of, federal court case, 155 A.L.R. Fed. 535.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 A.L.R.4th 1263.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—State cases, 70 A.L.R.5th 587.

Extent and determination of attorney's right or privilege against self-incrimination in disbarment or other disciplinary proceedings—post-Spevack cases, 30 A.L.R.4th 243.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial—state cases, 40 A.L.R.4th 741.

Limitations on state prosecuting attorney's discretion to initiate prosecution by indictment or by information, 44 A.L.R.4th 401.

Mental subnormality of accused as affecting voluntariness or admissibility of confession, 8 A.L.R.4th 16.

Propriety of court's failure or refusal to strike direct testimony of government witness who refuses, on grounds of self-incrimination, to answer questions on cross-examination, 55 A.L.R. Fed. 742.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury, 3 A.L.R.4th 374.

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Propriety of use of multiple juries at joint trial of multiple defendants in state criminal prosecution, 41 A.L.R.4th 1189.

Requirement that court advise accused of, and make inquiry with respect to, waiver of right to testify, 72 A.L.R.5th 403.

Restrictive covenants, conditions, or agreements in respect of real property discriminating against persons on account of race, color, or religion, 3 A.L.R.2d 466.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

Right of jailed or imprisoned parent to visit from minor child, 15 A.L.R.4th 1234.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 A.L.R.4th 366.

Sex discrimination in treatment of jail or prison inmates, 12 A.L.R.4th 1219.

Validity and construction of "right-to-work" laws, 92 A.L.R.2d 598.

Validity of statutory classifications based on population—jury selection statutes, 97 A.L.R.3d 434.

What law determines just compensation when licensee of Federal Power Commission exercises power of eminent domain in federal court under sec. 21 of Federal Power Act (16 USCS sec. 814), 51 A.L.R. Fed. 929.

Encyclopedias

16B Am Jur 2d, Constitutional Law §§ 890 et seq.

21 Am Jur 2d, Criminal Law §§ 319 et seq.

26 & 27 Am Jur 2d, Eminent Domain §§ 1 et seq.

C.J.S. Criminal Law §§ 211, 213, 245.

Practice References

50 Am Jur Proof of Facts 3d 449, Disqualification of Trial Judge for Cause.

53 Am Jur Proof of Facts 3d 249, Proof of Defense of Entrapment by Estoppel.

41 Am Jur Trials 349, Habeas Corpus: Pretrial Rulings, §§ 16-24 (Double jeopardy).

Amendment VI. Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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1 Apprendi requires you to indict for the punishment that you
2 might receive.

3 MR. ASHTON: Well, the issue that we would suggest
4 is that the problem with this case is, he was not indicted
5 with a crime that could receive greater than 120 months. It
6 was -- each count was a maximum 120 months. And there was
7 nothing in the indictment or a trial that a jury could
8 consider the enhanced sentence. Had he been convicted of
9 one count, he, obviously, could have only gotten 120 months.
10 And his argument is the multi-count adjustment actually --

11 THE COURT: That's an interesting point. I don't
12 know that it's been resolved, has it?

13 MR. ASHTON: I've not seen a case on point. I
14 think it --

15 THE COURT: You're saying that Apprendi principle
16 requires you to indict and -- if you want to -- you can't
17 stack without putting that in the indictment or putting that
18 in the jury verdict?

19 MR. ASHTON: Correct. And what happens, basically,
20 the enhancement here, the cross-reference enhancement raised
21 it from 14 to 30, which was pretty significant. And as I
22 think you are aware of the reasonable resentencing hearing.
23 And Mr. Spain has argued all along that that violated
24 Apprendi and we've discussed that case at some length.

25 THE COURT: Yeah. Okay. Well, I'm inclined to

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1 sentence him today as the final sentence to 120 months on
2 Count 1 and 24 months on Count 2 consecutive to the sentence
3 on Count 1, which would be a gross sentence of 144 months,
4 which would be within the guideline and which would stack in
5 order to achieve the middle range of the guideline, but it
6 doesn't -- it leaves you with your Apprendi argument for
7 another court.

8 MR. ASHTON: Thank you. We appreciate that. Also,
9 in the original sentence, I believe, you did recommend
10 mental health counseling, drug treatment program,
11 educational, vocational, and FCI Bennettsville, South
12 Carolina.

13 THE COURT: I'll continue to make those
14 recommendations.

15 MR. ASHTON: If you would put that in this one as
16 well, Your Honor.

17 THE COURT: I'll make that recommendation. Thank
18 you.

19 MR. ASHTON: Thank you.

20 THE COURT: I thank the government.

21 (The foregoing proceedings concluded at 2:42 p.m.)

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