

APPENDIX

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UNPUBLISHEDUNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4788

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BENJAMIN ERNEST JOHNSON,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina,
at Asheville. Max O. Cogburn, Jr., District Judge. (1:16-cr-00006-MOC-DLH-1)

Submitted: September 26, 2017

Decided: October 4, 2017

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

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Sandra Barrett, Asheville, North Carolina, for Appellant. Amy Elizabeth Ray, Assistant
United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Benjamin Ernest Johnson pled guilty, pursuant to a plea agreement, to Count 2 of his 4-count indictment to enticing a minor to engage in criminal sexual activity (“sexting”), in violation of 18 U.S.C. § 2422(b) (2012). Johnson appeals his conviction and 204-month sentence with counsel raising four issues: (1) Johnson is actually innocent of the offense in the absence of a sufficient factual basis; (2) the Government manipulated Johnson’s sentence by taking the case from state prosecutors; (3) the district court improperly calculated Johnson’s sentence; and (4) Johnson’s sentence is substantively unreasonable. The Government has filed a motion to dismiss the appeal. We affirm in part and dismiss in part.

We review de novo the validity of a waiver of appeal rights and collateral attack rights, and “will enforce the waiver if it is valid and the issue[s] appealed [are] within the scope of the waiver. A waiver must be knowing and voluntary. In the absence of extraordinary circumstances, a properly conducted [Federal] Rule [of Criminal Procedure] 11 colloquy establishes the validity of the waiver.” *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (citations omitted). We note that the validity of waiver and Rule 11 hearing are uncontested. We grant the Government’s motion to dismiss Claims 1, 3, and 4 because the record reveals that Johnson waived his right to appeal these claims in his plea agreement and these issues fall within the scope of the waiver. Johnson waived his appellate rights, except for claims of ineffective assistance of counsel or prosecutorial misconduct.

Regarding Claim 2, Johnson alleges that the federal government manipulated his sentence by the taking his case from state authorities. First, we note such claims are treated with skepticism. *See United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994) (“We . . . note our skepticism as to whether the government could ever engage in conduct not outrageous enough so as to violate due process to an extent warranting dismissal of the government’s prosecution, yet outrageous enough to offend due process to an extent warranting a downward departure with respect to a defendant’s sentencing.”). Next, Johnson does not claim that he was sentenced in a manner that could result in appellate relief. *See United States v. Thornsbury*, 670 F.3d 532, 539 & n.7 (4th Cir. 2012) (discussing when a court might refuse to enforce a waiver in certain fundamental areas, “such as challenges claiming a district court exceeded its authority, claiming that a sentence was based on a constitutionally impermissible factor such as race, or claiming a post-plea violation of the right to counsel”). Finally, we note, that Johnson admits in his brief that the state authorities asked federal prosecutors for assistance (Appellant’s Br. at 14), so there is not even an inference of impropriety, much less prosecutorial misconduct.

Accordingly, we dismiss Claims, 1, 3, and 4, and affirm Johnson’s judgment as his remaining claim is without merit. 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 the decisional process.

*AFFIRMED IN PART;
DISMISSED IN PART*

FILED: November 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4788
(1:16-cr-00006-MOC-DLH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN ERNEST JOHNSON

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 Traxler, Judge King and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: October 4, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4788
(1:16-cr-00006-MOC-DLH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN ERNEST JOHNSON

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part. The appeal is dismissed in part.

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

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA

V.

BENJAMIN ERNEST JOHNSON

) **JUDGMENT IN A CRIMINAL CASE**

) (For Offenses Committed On or After November 1, 1987)

)

)

) Case Number: DNCW116CR000006-001

) USM Number: 32606-058

)

) R. Corey B. Atkins

) Defendant's Attorney

THE DEFENDANT:

- ☒ Pled guilty to count(s) 2.
☐ Pled nolo contendere to count(s) which was accepted by the court.
☐ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18 U.S.C. § 2422(b)	Coercion and Enticement of a Minor	02/28/2014	2

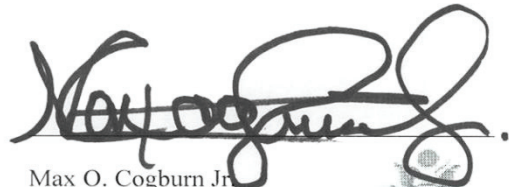
The Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

- ☐ The defendant has been found not guilty on count(s).
☒ Count(s) 1, 3 and 4 are dismissed on the motion of the United States.

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 11/8/2016

Signed: November 18, 2016



Max O. Cogburn Jr.
United States District Judge

Defendant: Benjamin Ernest Johnson
Case Number: DNCW116CR000006-001

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWO HUNDRED FOUR (204) MONTHS.

- ☒ The Court makes the following recommendations to the Bureau of Prisons:
- Participation in sex offender treatment programs, if eligible.
 - Defendant shall support all dependents from prison earnings.
 - Participation in the Federal Inmate Financial Responsibility Program.
 - Defendant shall receive medical treatment.

☒ The Defendant is remanded to the custody of the United States Marshal.

☐ The Defendant shall surrender to the United States Marshal for this District:

- ☐ As notified by the United States Marshal.
- ☐ At _ on _.

☐ The Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ As notified by the United States Marshal.
- ☐ Before 2 p.m. on _.
- ☐ As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively; The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of supervision.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office, vehicle and/or any computer system including computer data storage media, or any electronic device capable of storing, retrieving, and/or accessing data to which they have access or control, to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.
25. The defendant shall participate in transitional support services under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.

ADDITIONAL CONDITIONS:

26. Throughout the period of supervision the probation officer shall monitor the defendant's economic circumstances and shall report to the court, with recommendations as warranted, any material changes that affect the defendant's ability to pay any court-ordered penalties.

SEX OFFENDER**STANDARD CONDITIONS OF SUPERVISION**

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall have no direct or indirect contact, at any time, for any reason with the victim(s), the victim's family, or affected parties in this matter unless provided with specific written authorization to do so in advance by the U.S. Probation Officer.
2. The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional experienced in evaluating and managing sexual offenders as approved by the U.S. Probation Officer. The defendant shall complete the treatment recommendations and abide by all of the rules, requirements, and conditions of the program until discharged. The defendant shall take all medications as prescribed.
3. The defendant shall submit to risk assessments, psychological and physiological testing, which may include, but is not limited to a polygraph examination and/or Computer Voice Stress Analyzer (CVSA), or other specific tests to monitor the defendant's compliance with supervised release and treatment conditions, at the direction of the U.S. Probation Officer.
4. The defendant's residence and employment shall be approved by the U.S. Probation Officer. Any proposed change in residence or employment must be provided to the U.S. Probation Officer at least 10 days prior to the change and pre-approved before the change may take place.
5. The defendant shall not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256, nor shall the defendant enter any location where such materials can be accessed, obtained or viewed, including pictures, photographs, books, writings, drawings, videos, or video games
6. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense..

ADDITIONAL CONDITIONS:

7. The defendant shall not associate or have verbal, written, telephonic, or electronic communications with any person under the age of eighteen (18) except: 1) in the presence of the parent or legal guardian of said minor; 2) on the condition that the defendant notifies the parent or legal guardian of their conviction or prior history, and 3) has written approval from the U.S. Probation Officer. This provision does not encompass persons under the age of eighteen (18), such as waiters, cashiers, ticket vendors, etc., with whom the defendant must deal with, in order to obtain ordinary and usual commercial services.
8. The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer. Such computers, computer hardware or software is subject to warrantless searches and/or seizures by the U.S. Probation Office.
9. The defendant shall allow the U. S. Probation Officer, or other designee, to install software designed to monitor computer activities on any computer the defendant is authorized to use. This may include, but is not limited to, software that may record any and all activity on computers the defendant may use, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. The defendant shall pay any costs related to the monitoring of computer usage.
10. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files folders, or volumes of any media. The defendant shall, upon request, immediately provide the probation officer with any and all passwords required to access data compressed or encrypted for storage by any software.
11. The defendant shall provide a complete record of all passwords, internet service providers, email addresses, email accounts, screen names, etc. (past and present) to the probation officer and shall not make any changes without the prior approval of the U. S. Probation Officer.
12. The defendant shall not use, possess, or control any bootable linux or counter forensic tools.
13. The defendant shall not have any social networking accounts without the approval of the U. S. Probation Officer.

Defendant: Benjamin Ernest Johnson
Case Number: DNCW116CR000006-001

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
\$100.00	\$0.00	\$0.00

☐ The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

FINE

The defendant shall pay interest on any fine or restitution of more than \$2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay \$0.00 towards court appointed fees.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A ☐ Lump sum payment of \$0.00 due immediately, balance due
☐ Not later than _____
☐ In accordance ☐ (C), ☐ (D) below; or
- B ☒ Payment to begin immediately (may be combined with ☐ (C), ☒ (D) below); or
- C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or
- D ☒ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of \$ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court costs:
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Any properties identified by the United States.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Defendant: Benjamin Ernest Johnson
Case Number: DNCW116CR000006-001

Judgment- Page 7 of 7

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____ months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

§ 2251. Sexual exploitation of children, 18 USCA § 2251

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§ 2251. Sexual exploitation of children, 18 USCA § 2251



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Unconstitutional or Preempted Prior Version Held Unconstitutional as Applied by [U.S. v. Matthews](#), N.D.Ala., Feb. 02, 2004[United States Code Annotated](#)[Title 18. Crimes and Criminal Procedure \(Refs & Annos\)](#)[Part I. Crimes \(Refs & Annos\)](#)[Chapter 110. Sexual Exploitation and Other Abuse of Children \(Refs & Annos\)](#)**18 U.S.C.A. § 2251****§ 2251. Sexual exploitation of children****Effective: October 13, 2008**[Currentness](#)

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by using any means or facility of interstate or foreign commerce or mail.

(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering--

(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

(2) The circumstance referred to in paragraph (1) is that--

(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed.

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, [section 1591](#), chapter 71, chapter 109A, or chapter 117, or under [section 920 of title 10](#) ([article 120 of the Uniform Code of Military Justice](#)), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt,

mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under [section 920 of title 10 \(article 120 of the Uniform Code of Military Justice\)](#), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

CREDIT(S)

(Added [Pub.L. 95-225](#), § 2(a), Feb. 6, 1978, 92 Stat. 7; amended [Pub.L. 98-292](#), § 3, May 21, 1984, 98 Stat. 204; [Pub.L. 99-500, Title I, § 101\(b\)](#) [Title VII, § 704(a)], Oct. 18, 1986, 100 Stat. 1783-75; [Pub.L. 99-591, Title I, § 101\(b\)](#) [Title VII, § 704(a)] Oct. 30, 1986, 100 Stat. 3341-75; [Pub.L. 99-628](#), §§ 2, 3, Nov. 7, 1986, 100 Stat. 3510; [Pub.L. 100-690, Title VII, § 7511\(a\)](#), Nov. 18, 1988, 102 Stat. 4485; [Pub.L. 101-647, Title XXXV, § 3563](#), Nov. 29, 1990, 104 Stat. 4928; [Pub.L. 103-322, Title VI, § 60011, Title XVI, § 160001\(b\)\(2\), \(c\), \(e\), Title XXXIII, § 330016\(1\)\(S\)](#) to (U), Sept. 13, 1994, 108 Stat. 1973, 2037, 2148; [Pub.L. 104-208](#), Div. A, Title I, § 101(a) [Title I, § 121[4]], Sept. 30, 1996, 110 Stat. 3009-30; [Pub.L. 105-314, Title II, § 201](#), Oct. 30, 1998, 112 Stat. 2977; [Pub.L. 108-21, Title I, § 103\(a\)\(1\)\(A\), \(b\)\(1\)\(A\), Title V, §§ 506, 507](#), Apr. 30, 2003, 117 Stat. 652, 653, 683; [Pub.L. 109-248, Title II, § 206\(b\)\(1\)](#), July 27, 2006, 120 Stat. 614; [Pub.L. 110-358, Title I, § 103\(a\)\(1\), \(b\)](#), Oct. 8, 2008, 122 Stat. 4002, 4003; [Pub.L. 110-401, Title III, § 301](#), Oct. 13, 2008, 122 Stat. 4242.)

[Notes of Decisions \(281\)](#)

18 U.S.C.A. § 2251, 18 USCA § 2251

Current through P.L. 114-327. Also includes P.L. 114-329 and 115-1 to 115-8. Title 26 current through 115-8.

End of Document

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§ 2422. Coercion and enticement, 18 USCA § 2422

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§ 2422. Coercion and enticement, 18 USCA § 2422

[United States Code Annotated](#)
[Title 18. Crimes and Criminal Procedure \(Refs & Annos\)](#)
[Part I. Crimes \(Refs & Annos\)](#)
[Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes \(Refs & Annos\)](#)

18 U.S.C.A. § 2422

§ 2422. Coercion and enticement

Effective: July 27, 2006

[Currentness](#)

(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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 812; [Pub.L. 99-628](#), § 5(b)(1), Nov. 7, 1986, 100 Stat. 3511; [Pub.L. 100-690, Title VII, § 7070](#), Nov. 18, 1988, 102 Stat. 4405; [Pub.L. 104-104, Title V, § 508](#), Feb. 8, 1996, 110 Stat. 137; [Pub.L. 105-314, Title I, § 102](#), Oct. 30, 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.)

[Notes of Decisions \(327\)](#)

18 U.S.C.A. § 2422, 18 USCA § 2422

Current through P.L. 114-327. Also includes P.L. 114-329 and 115-1 to 115-8. Title 26 current through 115-8.

18 U.S.C. § 3553

§ 3553. Imposition of a sentence

(a) **Factors to be considered in imposing a sentence.**— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider —

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed —
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for —
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines —
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement —
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

The Fifth Amendment provides that citizens not be subject to criminal prosecution and punishment without due process. Citizens may not be tried on the same set of facts twice, and are protected from self-incrimination (the right to remain silent). The amendment also establishes the power of eminent domain, ensuring that private property is not seized for public use without just compensation.

The Eighth Amendment prohibits excessive bail, excessive fines, and cruel and unusual punishments.

§ 2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual..., FSG § 2G1.3

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§ 2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual..., FSG § 2G1.3

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part G. Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity (Refs & Annos)
1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct (Refs & Annos)

USSG, § 2G1.3, 18 U.S.C.A.

§ 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

[Currentness](#)**(a)** Base Offense Level:

- (1) 34, if the defendant was convicted under [18 U.S.C. 1591\(b\)\(1\)](#);
- (2) 30, 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.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (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, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service 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, increase by 2 levels.

(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.”.

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

(1) 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.

(2) If a minor 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.

(3) If the offense involved conduct described in [18 U.S.C. § 2241](#) or [§ 2242](#), apply [§ 2A3.1](#) (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, [§ 2A3.1](#) shall apply, regardless of the “consent” of the minor.

(d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied 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.

CREDIT(S)

(Effective November 1, 2004; amended effective November 1, 2007; November 1, 2009.)

COMMENTARY

<**Statutory Provisions:** [8 U.S.C. § 1328](#) (only if the offense involved a minor); [18 U.S.C. §§ 1591](#) (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), 2423, 2425.>

<Application Notes:>

<**1. Definitions.**--For purposes of this guideline:>

<“Commercial sex act” has the meaning given that term in [18 U.S.C. § 1591\(e\)\(3\)](#).>

<“Computer” has the meaning given that term in [18 U.S.C. § 1030\(e\)\(1\)](#).>

<“Illicit sexual conduct” has the meaning given that term in [18 U.S.C. § 2423\(f\)](#).>

<“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” has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).>

<“Sexual act” has the meaning given that term in [18 U.S.C. § 2246\(2\)](#).>

<“Sexual contact” has the meaning given that term in [18 U.S.C. § 2246\(3\)](#).>

<**2. Application of Subsection (b)(1).**-->

<**(A) Custody, Care, or Supervisory Control.**--Subsection (b)(1) is intended to have broad application 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 under subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<3. Application of Subsection (b)(2).-->

<(A) Misrepresentation of Participant's Identity.--The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(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)(2)(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)(2)(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 persuade, induce, entice, coerce, or facilitate the travel of, a minor 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) Undue Influence.--In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior. The voluntariness of the minor's behavior may be compromised without prohibited sexual conduct occurring.>

<However, subsection (b)(2)(B) does not apply in a case in which the only "minor" (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.>

<In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.>

<4. Application of Subsection (b)(3).--Subsection (b)(3) 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 in subsection (b)(3) 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).-->

<(A) Application of Subsection (c)(1).--The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in [18 U.S.C. § 2256\(2\)](#).>

<(B) Application of Subsection (c)(3).--For purposes of subsection (c)(3):>

<(i) Conduct described in [18 U.S.C. § 2241\(a\)](#) or [\(b\)](#) is: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor 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 minor to appraise or control conduct was substantially impaired by drugs or alcohol.>

<(ii) Conduct described in [18 U.S.C. § 2241\(c\)](#) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in [18 U.S.C. § 2241\(a\)](#) and [\(b\)](#) with a minor 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).>

<(iii) Conduct described in [18 U.S.C. § 2242](#) is: (I) threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) victimizing a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.>

<**6. Application of Subsection (d)(1).**--For the purposes of Chapter Three, Part D (Multiple Counts), each minor 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 minor. Consequently, multiple counts involving more than one minor are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.>

<**7. Upward Departure Provision.**--If the offense involved more than ten minors, an upward departure may be warranted.>

[Notes of Decisions \(37\)](#)

Federal Sentencing Guidelines, § 2G1.3, 18 U.S.C.A., FSG § 2G1.3

As amended to 3-10-17

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§ 2G2.1. Sexually Exploiting a Minor by Production of Sexually..., FSG § 2G2.1

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§ 2G2.1. Sexually Exploiting a Minor by Production of Sexually..., FSG § 2G2.1



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [U.S. v. Detwiler](#), D.Or., Oct. 05, 2004[United States Code Annotated](#)[Federal Sentencing Guidelines \(Refs & Annos\)](#)[Chapter Two. Offense Conduct \(Refs & Annos\)](#)[Part G. Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity \(Refs & Annos\)](#)[2. Sexual Exploitation of a Minor](#)

USSG, § 2G2.1, 18 U.S.C.A.

§ 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

[Currentness](#)**(a)** Base Offense Level: 32**(b)** Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.

(2) (Apply the greater) If the offense involved--

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in [18 U.S.C. § 2241\(a\)](#) or [\(b\)](#), increase by 4 levels.

(3) If the defendant knowingly engaged in distribution, increase by 2 levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by 4 levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(6) If, for the purpose of producing 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 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) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Cross Reference

(1) If the victim was killed in 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.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1991; November 1, 1996; November 1, 1997; November 1, 2000; May 1, 2001; November 1, 2001; November 1, 2003; November 1, 2004; November 1, 2009; November 1, 2016.)

COMMENTARY

<**Statutory Provisions:** [18 U.S.C. §§ 1591](#), [2251\(a\)-\(c\)](#), [2251\(d\)\(1\)\(B\)](#), [2260\(a\)](#). For additional statutory provision(s), see Appendix A (Statutory Index).>

<**Application Notes:**>

<**1. Definitions.**--For purposes of this guideline:>

<“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, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, 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 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\(f\)\(2\)](#)).>

<“Material” includes a visual depiction, as defined in [18 U.S.C. 2256](#).>

<“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.>

<“Sexually explicit conduct” has the meaning given that term in [18 U.S.C. § 2256\(2\)](#).>

<2. Application of Subsection (b)(2).--For purposes of subsection (b)(2):>

<“Conduct described in [18 U.S.C. § 2241\(a\)](#) or [\(b\)](#)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor 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 minor to appraise or control conduct was substantially impaired by drugs or alcohol.>

<“Sexual act” has the meaning given that term in [18 U.S.C. § 2246\(2\)](#).>

<“Sexual contact” has the meaning given that term in [18 U.S.C. § 2246\(3\)](#).>

<3. Application of Subsection (b)(3).--For purposes of subsection (b)(3), the defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.>

<4. Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§ 3A1.1(b)).--If subsection (b)(4)(B) applies, do not apply § 3A1.1(b) .>

<5. Application of Subsection (b)(5).-->

<(A) **In General.**--Subsection (b)(5) is intended to have broad application and includes offenses involving a minor 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 adjustment, 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)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).>

<6. **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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. 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 persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. 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 an Interactive Computer Service.**--Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. 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.>

<7. **Application of Subsection (d)(1).**--For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.>

<8. **Upward Departure Provision.**--An upward departure may be warranted if the offense involved more than 10 minors.>

§3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table:

NUMBER OF UNITS	INCREASE IN OFFENSE LEVEL
1	none
1 1/2	add 1 level
2	add 2 levels
2 1/2 – 3	add 3 levels
3 1/2 – 5	add 4 levels
More than 5	add 5 levels

In determining the number of Units for purposes of this section:

- (a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.
- (b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.
- (c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

§ 4B1.5. Repeat and Dangerous Sex Offender Against Minors, FSG § 4B1.5

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§ 4B1.5. Repeat and Dangerous Sex Offender Against Minors, FSG § 4B1.5



KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [U.S. v. Detwiler](#), D.Or., Oct. 05, 2004

[United States Code Annotated](#)

[Federal Sentencing Guidelines \(Refs & Annos\)](#)

[Chapter Four. Criminal History and Criminal Livelihood \(Refs & Annos\)](#)

[Part B. Career Offenders and Criminal Livelihood](#)

USSG, § 4B1.5, 18 U.S.C.A.

§ 4B1.5. Repeat and Dangerous Sex Offender Against Minors

[Currentness](#)

(a) In any case in which the 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 of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from [§ 3E1.1](#) (Acceptance of Responsibility):

Offense Statutory Maximum	Offense Level
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32

(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12.

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.

(b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither [§ 4B1.1](#) nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:

(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from [§ 3E1.1](#).

(2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

CREDIT(S)

(Effective November 1, 2001; amended [Pub.L. 108-21, Title IV, § 401\(i\)\(1\)\(A\)](#), Apr. 30, 2003, 117 Stat. 672; effective April 30, 2003; November 1, 2003; November 1, 2007.)

COMMENTARY

<Application Notes:>

<1. Definition.--For purposes of this guideline, "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.>

<2. Covered Sex Crime as Instant Offense of Conviction.--For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) [18 U.S.C. 1591](#); or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A) (i) through (iv) of this note.>

<3. Application of Subsection (a).-->

<(A) Definitions.--For purposes of subsection (a):>

<(i) “Offense statutory maximum” means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in [18 U.S.C. 2247\(a\)](#) or [2426\(a\)](#)) that applies to that covered sex crime because of the defendant’s prior criminal record.>

<(ii) “Sex offense conviction” (I) means any offense described in [18 U.S.C. 2426\(b\)\(1\)\(A\) or \(B\)](#), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. “Child pornography” has the meaning given that term in [18 U.S.C. 2256\(8\)](#).>

<(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.--

In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).>

<4. Application of Subsection (b).-->

<(A) Definition.--For purposes of subsection (b), “prohibited sexual conduct” means any of the following: (i) any offense described in [18 U.S.C. 2426\(b\)\(1\)\(A\) or \(B\)](#); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. “Child pornography” has the meaning given that term in [18 U.S.C. 2256\(8\)](#).>

<(B) Determination of Pattern of Activity.-->

<(i) In General.--For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.>

<(ii) Occasion of Prohibited Sexual Conduct.--An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.>

<5. Treatment and Monitoring.-->

<(A) Recommended Maximum Term of Supervised Release.--The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.>

<(B) Recommended Conditions of Probation and Supervised Release.--Treatment and monitoring are

important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.>

<**Background:** This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor and who present a continuing danger to the public. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see [18 U.S.C. 2247](#), [2426](#)). In addition, section 632 of Public Law 102-141 and section 505 of Public Law 105-314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors. Section 401(i)(1)(A) of Public Law 108-21 directly amended Application Note 4(b)(i), effective April 30, 2003.>

[Notes of Decisions \(28\)](#)

Federal Sentencing Guidelines, § 4B1.5, 18 U.S.C.A., FSG § 4B1.5

As amended to 3-10-17

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SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	15-21
	10	6-12	8-14	10-16	15-21	18-24
	11	8-14	10-16	12-18	18-24	21-27
Zone C	12	10-16	12-18	15-21	21-27	24-30
	13	12-18	15-21	18-24	24-30	27-33
Zone D	14	15-21	18-24	21-27	27-33	30-37
	15	18-24	21-27	24-30	30-37	33-41
	16	21-27	24-30	27-33	33-41	37-46
	17	24-30	27-33	30-37	37-46	41-51
	18	27-33	30-37	33-41	41-51	46-57
	19	30-37	33-41	37-46	46-57	51-63
	20	33-41	37-46	41-51	51-63	57-71
	21	37-46	41-51	46-57	57-71	63-78
	22	41-51	46-57	51-63	63-78	70-87
	23	46-57	51-63	57-71	70-87	77-96
	24	51-63	57-71	63-78	77-96	84-105
	25	57-71	63-78	70-87	84-105	92-115
	26	63-78	70-87	78-97	92-115	100-125
	27	70-87	78-97	87-108	100-125	110-137
	28	78-97	87-108	97-121	110-137	120-150
	29	87-108	97-121	108-135	121-151	130-162
	30	97-121	108-135	121-151	135-168	140-175
	31	108-135	121-151	135-168	151-188	151-188
	32	121-151	135-168	151-188	168-210	168-210
	33	135-168	151-188	168-210	188-235	188-235
	34	151-188	168-210	188-235	210-262	210-262
	35	168-210	188-235	210-262	235-293	235-293
	36	188-235	210-262	235-293	262-327	262-327
	37	210-262	235-293	262-327	292-365	292-365
	38	235-293	262-327	292-365	324-405	324-405
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life