No. __

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL A. BETTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Dated: November 10, 2026

Respectfully Submitted,

Daniel A. Betty, Petitioner

By: /s/ Adam P. Merrill
One of his Attorneys

Adam P. Merrill (6229850)
Watershed Law LLC
321 N. Clark St., Suite 2500
Chicago, Illinois 60654
(312) 368-5932
AMerrill@Watershed-Law.com

COUNSEL OF RECORD FOR PETITIONER

In the

United States Court of Appeals

For the Seventh Circuit

No. 24-2231

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL A. BETTY,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 2:20-cr-20001-1 — **James E. Shadid**, *Judge*.

ARGUED SEPTEMBER 11, 2025 — DECIDED AUGUST 12, 2026

Before EASTERBROOK, HAMILTON, and MALDONADO, *Circuit Judges*.

MALDONADO, *Circuit Judge*. Daniel Betty pleaded guilty to two counts of sexual exploitation of a child; one count of enticement of a minor; and one count of receipt of child pornography. He was sentenced to 264 months' imprisonment, well below the advisory guidelines range of life imprisonment. On appeal, Betty challenges only his sentence, which we affirm.

Appendix A

I

A. Factual Background

In September 2019, Betty used a dating app marketed to teenagers, Spot-a-Friend, to communicate with a 14-year-old girl, the victim. Betty, who was 27 years old at the time, listed his age on the app as 17 years old, and sent the victim, who listed her age as 14 years old, multiple sexually explicit messages.

Betty then began asking the victim to produce sexually explicit images for him, and she did so several times over the ensuing weeks. On one occasion, Betty asked to see the victim insert her fingers in her vagina, and an image depicting this act was found on the victim's cell phone time-stamped a couple days after Betty's request. On another occasion, Betty asked the victim to shave her pubic hair and the victim complied, attaching a photo.

Betty then arranged a sexual encounter with the victim. Before meeting, Betty told the victim that he was "really 19" years old, not 17. Again, Betty was in fact 27 years old at the time. The victim's friend texted Betty, telling him he was "going to jail," and Betty asked the victim if the friend was "going to report [him] to the cops." Undeterred, on October 6, 2019, Betty drove nearly an hour, picked up the victim at a park, and "engaged in vaginal sexual intercourse" with her in the backseat of his car.

Days later, the victim's mother discovered what had occurred and informed the authorities. Law enforcement quickly identified Betty, and, during an interview, Betty claimed that he had not used Spot-a-Friend since he was 19

years old. Spot-a-Friend, however, did not exist when Betty was 19 years old.

On January 7, 2020, a federal grand jury returned a four-count indictment. Counts 1 and 2 charged Betty with sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), (e), based on the two above-described occasions in which, per Betty's instructions, the victim sent Betty sexually explicit images of herself. Count 3 charged Betty with enticement of a minor, in violation of 18 U.S.C. § 2422(b), based on Betty's arrangement of a sexual encounter between him and the victim. And Count 4 charged him with receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A), (b)(1), based on Betty's receipt of the image referenced in Count 1, depicting the victim's shaved genitalia.

Betty moved the court to set a combined plea and sentencing hearing, and the court ordered preparation of the presentence investigation report ("PSR") in anticipation of his guilty plea.

B. PSR Calculations

In its PSR, the probation office calculated a total offense level of 43 under the United States Sentencing Guidelines ("the Guidelines"). For each count charged in the indictment, the PSR calculated the following offense levels:

- Count 1 (sexual exploitation): adjusted offense level of 36, including a two-level enhancement due to the victim's age, U.S.S.G. § 2G2.1(b)(1)(B); and a two-level enhancement for Betty's use of a computer to commit the offense, *id.* § 2G2.1(b)(6)(B).
- Count 2 (sexual exploitation): adjusted offense level of 38, including a two-level enhancement due to the

victim's age, U.S.S.G. § 2G2.1(b)(1)(B); a two-level enhancement for using a computer to commit the offense, *id.* § 2G2.1(b)(6)(B); and a two-level enhancement because the offense involved the commission of a sexual act or sexual contact, *id.* § 2G2.1(b)(2)(A).

- Count 3 (enticement): adjusted offense level of 34, including a two-level enhancement for Betty misrepresenting his age, U.S.S.G. § 2G1.3(b)(2)(A); a two-level enhancement for using a computer to commit the offense, *id.* § 2G1.3(b)(3)(A); and a two-level enhancement because the offense involved the commission of a sexual act or sexual contact, *id.* § 2G1.3(b)(4)(A).
- Count 4 (receipt of child pornography): adjusted offense level of 25, including a two-level reduction because the offense did not involve distribution of child pornography, U.S.S.G. § 2G2.2(b)(1); and a five-level enhancement for engaging in a pattern of activity involving the sexual exploitation of a minor, *id.* § 2G2.2(b)(5).

Applying the grouping rules set forth in U.S.S.G. §§ 3D1.2–1.4, the PSR placed each Count into its own Group, which resulted in a three-level enhancement in the combined adjusted offense level, yielding an offense level of 41.[1] Next,

[1] The PSR assigned Count 2 one Unit because Count 2 was "the group with the highest offense level." U.S.S.G. § 3D1.4. The PSR also assigned Counts 1 and 3 one Unit each because those Counts had offense levels that fell "from 1 to 4 levels less serious" than Count 2. *Id.* Count 4, however, which had an offense level thirteen levels less serious than Count 2, was assigned zero Units. *Id.* Because there were three Units assigned in total, the PSR added three levels to the highest offense level of all the counts, 38, to yield an offense level of 41. *Id.*

because Betty "engaged in a pattern of activity involving prohibited sexual conduct," *id.* § 4B1.5(b)(1), the PSR added an enhancement of five levels to Betty's offense level, yielding a total of 46. Finally, because he accepted responsibility and timely notified the authorities of his intention to plead guilty, he received a three-level reduction, *id.* § 3E1.1(a), (b), resulting in a total offense level of 43. Even considering Betty's lack of criminal history, the total offense level of 43 yielded a guidelines range of life imprisonment.

Betty timely objected to the PSR on two separate theories of double counting under the grouping rules based on (1) the five-level enhancement on the receipt of child pornography count (Count 4) under U.S.S.G. § 2G2.2(b)(5), for "engage[ing] in a pattern of activity involving the sexual abuse or exploitation of a minor"; and (2) the five-level overall enhancement under § 4B1.5(b)(1).

C. Sentencing

On September 8, 2020, the district court held a combined plea and sentencing hearing. After accepting Betty's guilty plea on Counts 1 through 4, the district court proceeded to sentencing. Betty's counsel argued that the application of the three-level increase under the grouping rules, and the five-level "pattern of activity" enhancement did not "make sense" because the adjustments were based on the "same victim[] [and] same course of conduct." Further, according to defense counsel, these added offense levels yielded an "absurd" guidelines range of life imprisonment despite Betty having "no criminal history whatsoever." Betty's counsel acknowledged, however, that "the state of the law [ ] in the Seventh Circuit" ran counter to those arguments and that the challenged adjustments "may be a technically correct application

of the guidelines." The district court observed that the argument sounded more like a variance request, and Betty's counsel agreed. The district court then adopted the PSR, and both parties agreed with the PSR's calculation of a total offense level of 43 and a criminal history category of I. When asked if there were "[a]ny further additions or corrections to be offered to the Presentence Report," both the government and Betty's counsel responded, "No."

After hearing from the victim's father as to the toll that Betty's crime had taken on his daughter and their family, the government's argument that the victim "attempted to take her own life" after the crime, and defense counsel's argument that Betty suffered from major depressive disorder and autism spectrum disorder, the district court turned to the 18 U.S.C. § 3553(a) factors. The district court stated that it was fair to characterize Betty "as a perpetrator, and a manipulator, [and] likely [a] predator," but observed that "life is [ ] not an appropriate sentence here" because "it is basically the same conduct for which [Betty was] being enhanced in different manners." The district court then found that a total sentence of 264 months' imprisonment was appropriate because it was "within what would be the guideline range [ ] without the five-point enhancement, but . . . also within the middle of the statutory amounts for Counts 1 and 2." Betty now appeals.

II

Betty challenges his sentence on four grounds: (1) misapplication of the grouping rules under U.S.S.G. § 3D1.4, resulting in impermissible double counting; (2) misapplication of a two-level "sex act" enhancement under § 2G2.1(b)(2)(A); (3) reliance on purportedly unsupported victim impact evidence; and (4) failure to discuss evidence of Betty's mental

health struggles, corresponding to the factors identified in 18 U.S.C. § 3553(a). We examine each argument in turn.

A. Application of the Grouping Rules

Betty argues that the three-level increase under the grouping rules of U.S.S.G. § 3D1.4 constituted impermissible double counting under two separate theories.

First, Betty argues that the application of this increase along with the five-level "pattern of activity" enhancement under U.S.S.G. § 4B1.5(b), constituted impermissible "double counting" because both offense level increases involved the same victim and the same course of conduct. Betty raised this challenge in his objections to the PSR and at the sentencing hearing before the district court, so we review it *de novo*. *United States v. Wilcher*, 91 F.4th 864, 869 (7th Cir. 2024).

The argument fails at the outset because, as Betty's counsel conceded at the sentencing hearing, the Guidelines and the "state of the law [ ] in the Seventh Circuit" make clear that double counting is generally permissible. Specifically, the Guidelines provide that "enhancements, adjustments, and determinations may be triggered by the same conduct." U.S.S.G. § 1B1.1 cmt. n.4(B). And we've made clear in cases post-dating those cited by Betty that under the Guidelines, "cumulative application—that is, 'double counting'—is the default rule." *United States v. Vizcarra*, 668 F.3d 516, 521 (7th Cir. 2012); *United States v. Cook*, 850 F.3d 328, 334 (7th Cir. 2017) ("Any language in our earlier cases contradicting our holding in *Vizcarra* is no longer good law.").

Betty's second theory is that the five-level "pattern of activity" enhancement to Count 4 under U.S.S.G. § 2G2.2(b)(5) was predicated on the same conduct charged in Count 1,

which suggests the sort of commonality between the counts that should have led to grouping the two counts under § 3D1.2. As Betty contends, if he engaged in a "pattern of activity," which § 2G2.2(b)(5) defines as "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant," then the counts charging these "separate instances" should have been "grouped together into a single Group" under § 3D1.2(c). Betty concedes that he did not raise this argument before the district court, so we review for plain error. *United States v. Schrode*, 839 F.3d 545, 554 (7th Cir. 2016).

Under plain-error review, the defendant bears the burden of persuasion. *United States v. Olano*, 507 U.S. 725, 734 (1993). He must show that (1) there was an error; (2) the error was plain; (3) the error "affected the defendant's substantial rights," meaning that "but for the error, the outcome of the proceeding would have been different"; and (4) "the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Rosales-Mireles v. United States*, 585 U.S. 129, 134–35 (2018) (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)). "Satisfying all four prongs of the plain-error test 'is difficult.'" *Greer v. United States*, 593 U.S. 503, 508 (2021) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

Here, even assuming that Betty could show "an error that was plain, satisfying *Olano*'s first two conditions," Betty has not met his burden of showing the third condition: "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles*, 585 U.S. at 134–36 (quoting *Molina-Martinez*, 578 U.S. at 194). In particular, Betty has not "shown that the district court mistakenly

deemed applicable an incorrect, higher Guidelines range." *Molina-Martinez*, 578 U.S. at 200.

As the government correctly observes, the PSR miscalculated the offense level for the receipt of child pornography count (Count 4) in a manner advantageous to Betty, by failing to apply the cross-reference required under U.S.S.G. § 2G2.2(c)(1). "A cross-reference is an instruction to apply the offense level from another Guideline, rather than the one provided by the Guideline of the cited offense." *United States v. Taylor*, 160 F.4th 874, 881 (7th Cir. 2025) (citing U.S.S.G. § 1B1.5(a)). "It 'authoriz[es] a sentencing court to look to other guidelines provisions to impose a higher sentence on an offender under certain circumstances.'" *Id.* (quoting *United States v. Jones*, 313 F.3d 1019, 1022 (7th Cir. 2002)). Here, U.S.S.G. § 2G2.2(c)(1) provides for cross-referencing to § 2G2.1, which "establishes a much higher offense level . . . and imposes greater enhancements than the other sections" because it applies to the production, not the receipt, of child pornography. *United States v. Dawn*, 129 F.3d 878, 881 (7th Cir. 1997).

The cross-reference applies to Count 4 because, as Betty concedes, the image Betty was convicted of receiving in Count 4 is the same image he was convicted of producing in Count 1. *See* U.S.S.G. § 2G2.2 cmt. n.7 ("The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved . . . enticing [or] coercing . . . a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."). Applying the cross-reference, the appropriate adjusted offense level for Count 4 should have been 36, not 25, as the district court found. *See* U.S.S.G. § 2G2.1. No "pattern of activity"

enhancement would have applied, however, as no such enhancement is set forth in § 2G2.1. And taking the pattern enhancement out of the equation removes the basis for grouping the counts together, insofar as the production charged in Count 1 no longer "embodies conduct that is treated as a specific offense characteristic in . . . the guideline applicable to" Count 4. *See* U.S.S.G. § 3D1.2(c); *cf. United States v. Hoover*, 95 F.4th 763, 776 (4th Cir. 2024) (challenge to "pattern-of-behavior adjustment under § 2G2.2(b)(5)" failed where "the district court followed the cross-reference provision at § 2G2.2(c)(1) and applied the guidelines at § 2G2.1" and thus, "[a]ny error in the court's initial application of § 2G2.2(b)(5) thus would be harmless.").

Furthermore, applying the grouping rules set forth in U.S.S.G. § 3D1.4 to a properly calculated offense level of 36 for Count 4, Betty's total offense level would have been one level higher than the offense level adopted by the court. Specifically, Counts 1 through 3 would still each be assigned one Unit, but now so would Count 4, yielding four Units total under the grouping rules. *See id.* § 3D1.4. Accordingly, Betty would have received a four-level increase—rather than a three-level increase—under the grouping rules set forth in § 3D1.4. As a result, the applicable guidelines range would still be life imprisonment. U.S.S.G. Ch. 5 Pt. A. And "[t]here is no need to remand for resentencing on a slightly different guideline calculation that would still result in a recommended range of life in prison." *United States v. Thomas*, 897

F.3d 807, 818 (7th Cir. 2018). Betty therefore has failed to prove prejudice under the third prong of plain-error review.

B. Sexual Contact Enhancement

Betty next argues that the two-level enhancement applied to Count 2, pursuant to U.S.S.G. § 2G2.1(b)(2)(A), was improper because the photo taken by the victim featuring her "vagina with two fingers inserted in it" did not depict a "sexual act" within the meaning of 18 U.S.C. § 2246(2). Betty did not raise this argument before the district court, so we review for plain error. *See Schrode*, 839 F.3d at 554.

Betty's arguments focus solely on the definition of "sexual act," the term deployed in the PSR, but the Guidelines provide for a two-level enhancement where "the offense involved . . . the commission of a sexual act *or* sexual contact." U.S.S.G. § 2G2.1(b)(2)(A) (emphasis added). "Sexual act" and "sexual contact" are defined by reference to 18 U.S.C. § 2246(2) and § 2246(3), respectively. U.S.S.G. § 2G2.1(b)(2)(A) cmt. n.2. In relevant part, "the term 'sexual contact' means the intentional touching . . . of the genitalia . . . of any person with an intent to . . . arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3).

Several of our sister circuits have agreed that intentional self-touching by a victim is "sexual contact" for the purposes of the Guidelines. *See United States v. Butler*, 65 F.4th 199, 202 (5th Cir. 2023) ("Sexual contact" includes "both masturbation by the defendant and the coerced masturbation of a victim."); *United States v. Sanchez*, 30 F.4th 1063, 1075 (11th Cir. 2022) (rejecting argument that the victims' "masturbation does not amount to a sexual act or sexual contact within the meaning of the" application of the two-level enhancement under

U.S.S.G. § 2G2.1(b)(2)(A)); *United States v. Raiburn*, 20 F.4th 416, 422 (8th Cir. 2021) ("Following our sister circuits, we reject [defendant]'s arguments and hold that the plain meaning of 'sexual contact' under U.S.S.G. § 2G2.1(b)(2)(A) . . . includes the act of masturbating") (internal quotation omitted); *United States v. Pawlowski*, 682 F.3d 205, 213 (3d Cir. 2012) (where the defendant caused the minor victim to masturbate, such masturbation was "a form of 'sexual contact.'"); *United States v. Shafer*, 573 F.3d 267, 279 (6th Cir. 2009) (concluding that because the victim's "self-masturbation constitutes 'sexual contact,' . . . the district court did not err in imposing a § 2G2.1(b)(2)(A) enhancement in calculating [defendant]'s sentence upon his conviction for violating 18 U.S.C. § 2251(a)").

We agree. The undisputed conduct here meets the definition of "sexual contact" under the Guidelines, and therefore, regardless of whether the PSR mentioned only a "sexual act" rather than "sexual contact," the two-level enhancement for Count 2 was not in error.

C. Inclusion of Evidence About the Victim's Suffering

Third, Betty argues that the government relied on unproven or unreliable evidence at sentencing to urge the imposition of a "lengthy sentence." In particular, Betty objects to the district court's adoption of the government's assertions that the victim "attempted to take her own life," and will spend the rest of her "lifetime . . . recovering from this incident," and that "there were other purported minors that [Betty] was chatting with." Betty did not raise this argument

before the district court, so we review for plain error. *See Schrode*, 839 F.3d at 554.

A district court may not rely on "'materially untrue' assumptions" in imposing a sentence. *United States v. Barnes*, 907 F.2d 693, 696 (7th Cir. 1990) (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). But a defendant "may admit far more than the elements of the charged crime . . . by agreeing with the government's factual basis, or even by answering the judge's questions during the plea colloquy." *United States v. Robinson*, 964 F.3d 632, 640 (7th Cir. 2020). And a district court is entitled to rely on such admissions. *United States v. Longstreet*, 567 F.3d 911, 929 (7th Cir. 2009).

Here, during the plea colloquy, Betty admitted, without qualification, that the factual basis of his charges was correct. This admission included the government's contention that Betty was "chatting with" "other purported minors." Betty also did not dispute the government's statements at sentencing outlining the significant psychological toll that his conduct had taken on the victim. Nor did he object to the victim impact statement provided by the victim's father explaining that Betty "changed [the victim's family's] lives forever" and forced them to deal with "doctors' visits and counseling." Instead, Betty's counsel argued that Betty was responsible only for "a part of" "what she's suffering right now." But this objection does not refute the government's contention that the victim attempted suicide and faced substantial future suffering. Given Betty's agreement to the factual basis underlying his charge, his failure to object to the government's comments about the psychological toll his actions took on the victim, and his agreement that the victim was suffering psychologically and he was in part to blame, Betty cannot show that the

district court committed plain error by relying on any inaccurate information.

D. Application of the 18 U.S.C. § 3553(a) Factors

Last, Betty argues that the district court failed to address his arguments as to the 18 U.S.C. § 3553(a) sentencing factors because it did not discuss the "absurd[ity]" of a guidelines range of life imprisonment considering Betty's offense, Betty's relevant psychological conditions, or the need to avoid sentence disparities among similarly situated defendants. We review the adequacy of a district court's explanation of its sentence *de novo*. *Wilcher*, 91 F.4th at 870.

A district court must adequately explain its sentence with reference to the 18 U.S.C. § 3553(a) factors, and it must address a defendant's principal arguments in mitigation, but, as Betty concedes, a district court is not required to address every factor or respond to every argument. *United States v. Hendrix*, 74 F.4th 859, 867–68 (7th Cir. 2023). Instead, "[i]t is enough that the court considers the § 3553(a) factors and articulates why its sentence is appropriate on a reviewable record." *Id.* at 867. And "[a] district court's treatment of a mitigation argument 'can be implicit or imprecise and does not need to be extensive,' as long as we can recognize that the judge considered the argument." *United States v. Patel*, 921 F.3d 663, 670 (7th Cir. 2019) (quoting *United States v. Tounisi*, 900 F.3d 982, 987 (7th Cir. 2018)).

The district court here explained Betty's sentence in sufficient detail, and with appropriate reference to both the § 3553(a) factors and Betty's mitigation arguments. Touching on Betty's absurdity argument, the district court stated, "[A] significant sentence is appropriate. The Guidelines call for

life. I think that life [ ] will not be an appropriate sentence here. I think the statute is more in line with an appropriate sentence." Addressing Betty's psychological conditions, the district court also observed that "there were clearly a number of issues that [Betty] found himself in to indicate problems in his life." As to sentence disparities—which Betty did not raise during the sentencing hearing—the district court's "correct calculation of the Sentencing Guidelines' range and imposition of a below-Guidelines sentence means that it necessarily considered the need to avoid unwarranted disparities." *United States v. Seymour*, 94 F.4th 679, 687 (7th Cir. 2024). We have affirmed far longer sentences for defendants "involved in producing child pornography, even where the victims were not molested in the process." *United States v. Klug*, 670 F.3d 797, 801 (7th Cir. 2012) (collecting cases). We can recognize the district court's consideration of the relevant arguments, thus, it adequately explained Betty's sentence. *Patel*, 921 F.3d at 670.

Accordingly, we AFFIRM the judgment of the district court.

E-FILED
Thursday, 10 September, 2020 12:26:05 PM
Clerk, U.S. District Court, ILCD

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA
v.
Daniel A Betty

JUDGMENT IN A CRIMINAL CASE

Case Number: 20-20001-001

USM Number: 22977-026

Elisabeth Pollock
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1, 2, 3 & 4

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §2251(a) and (e)	Sexual Exploitation of a Child	9/23/2019	1
18 USC §2251 (a) and (e)	Sexual Exploitation of a Child	9/26/2019	2
18 USC §2422(b)	Enticement of a Minor	10/6/2019	3

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.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must 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 restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/8/2020
Date of Imposition of Judgment

s/ James E. Shadid
Signature of Judge

James E. Shadid, U.S. District Judge
Name and Title of Judge

9-10-20
Date

Appendix B

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §2252A(a)(2)(A) & (b)(1)	Receipt of Child Pornography	9/29/2019	4

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Counts 1, 2 and 3: 264 months on each count;
Count 4: 240 months;
all counts to be served concurrently with each other.

☑ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant serve his sentence at FCI Sandstone. It is further recommended that he serve his sentence in a facility that will allow him to participate in a Sex Offender Treatment Program and maximize his exposure to educational and vocational opportunities.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services 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 UNITED STATES MARSHAL

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Counts 1-4: 15 years, on each count, to be served concurrently with each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☑ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. The defendant shall not knowingly leave the federal judicial district without the permission of the court.

2. You shall report to the probation office in the district to which you are released within 72 hours of release from custody. You shall report to the probation officer in a reasonable manner and frequency as directed by the court or probation officer.

3. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking his Fifth Amendment privilege against self-incrimination.

4. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

5. The defendant shall permit a probation officer to visit him at home or any other reasonable location between the hours of 6 a.m. and 11 p.m., unless investigating a violation or in case of emergency. The defendant shall permit confiscation of any contraband observed in plain view of the probation officer.

6. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

7. The defendant shall attempt to secure regular and lawful employment, unless excused by the probation office for schooling, training, or other acceptable reasons. The defendant shall keep the probation officer advised of any changes in his employment status.

8. As directed by the probation officer, the defendant shall participate in a psychological and behavioral testing, evaluation, and assessment program for the treatment and monitoring of sex offenders and a sex-offender group and/or individual counseling program. The defendant shall comply with all of the requirements and restrictions of such programs. The defendant shall submit to physiological testing, including polygraph and plethysmograph testing, as directed by the treatment provider. The defendant shall pay for such services, if financially able, as directed by the U.S. Probation Office.

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

ADDITIONAL SUPERVISED RELEASE TERMS

9. You shall not knowingly associate with; have verbal, written, telephonic, or electronic communication with; or have physical contact with any individual under the age of 18 except: (1) in the presence of an adult who is aware of the nature of your background and current offense, and who has been approved by the U.S. Probation Office; (2) in the course of normal commercial business; or (3) in other cases of unintentional and incidental contact.

10. You shall not knowingly receive, transmit, have under your control, or view, any material that depicts illegal sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) and (B).

11. You shall participate with the U.S. Probation Office's Computer and Internet Monitoring Program (CIMP) during your term of supervision. The monitoring program will start as soon as possible after your supervision term begins. You shall sign the rules of the Computer Internet and Monitoring Program and comply with the conditions of this program. During this time, you shall install filtering software on any computer you possess or use which will monitor access to websites that depict sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) and (B). You shall allow the U.S. Probation Office unannounced access to any computer you possess or use to verify that the filtering software is functional. You shall pay for the cost of the filtering software, if financially able, as directed by the U.S. Probation Office.

12. If there is reasonable suspicion to believe that you are in violation of a condition of supervised release related to the receipt, transmission, or possession of any illegal material that depicts sexually explicit conduct, or any violation of the Computer and Internet Monitoring Program, or any violation of his sex offender treatment program, you shall submit to the search of your person, automobile, and property under your control by the U.S. Probation Office. You shall also allow the U.S. Probation office to conduct periodic unannounced examinations between the hours of 6:00 a.m. and 11:00 p.m., unless investigating a violation or in case of an emergency, of your computer equipment, Internet capable devices, similar electronic devices, related computer peripherals, which may include retrieval and copying of all data from your device to ensure compliance with this condition, and/or removal of such equipment for the purpose of conducting a more thorough inspection.

13. You shall not knowingly use the Internet or visit any website, including chat rooms or bulletin boards, to view material depicting sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) and (B).

14. You shall register with the state sex offender registration agency in any state where you reside, are employed, carry on a vocation, or are a student, as directed by the probation office.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$ 0.00	$ 0.00	$ 0.00

☑ The determination of restitution is deferred until 11/9/2020 . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Daniel A Betty
CASE NUMBER: 20-20001-001

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
all property as listed in the indictment.

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	Docket No. 20-cr-20001
Plaintiff,	
vs.	Peoria, Illinois
	September 8, 2020
DANIEL A. BETTY,	10:10 a.m.
Defendant.	

RECORD OF PROCEEDINGS
CHANGE OF PLEA HEARING
BEFORE THE HONORABLE JAMES E. SHADID
UNITED STATES DISTRICT JUDGE

THE APPEARANCES

ELHAM PEIRSON, ESQ.
Assistant U.S. Attorney
318 S. Sixth Street
Springfield, IL 62701
On behalf of the Plaintiff

ELISABETH R. POLLOCK, ESQ.
Assistant Federal Defender
300 W. Main Street
Urbana, IL 61801
On behalf of the Defendant

Nancy Mersot, CSR, RPR
Former U.S. Court Reporter
1311 N. Hickory Hills
Germantown Hills, IL 61548

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

Nancy Mersot, CSR-RPR
nancymersot@gmail.com
(309) 369-2790

(In open court, 10:10 a.m.)

THE COURT: All right. Good morning, everybody.

This is the *United States v. Daniel Betty*, present in open court with Miss Pollock in 20-20001.

Miss Peirson present for the government.

This matter is set for sentencing today pursuant to a plea previously tendered.

Are the parties ready to proceed?

MS. PEIRSON: Yes, Your Honor.

MS. POLLOCK: Yes, Your Honor.

MS. PEIRSON: Your Honor, I believe that this one was one where the plea has not been officially tendered. This was during the height of the pandemic when we're trying to combine court cases, so I believe that Mr. Betty will enter an open plea first, followed by a sentencing hearing.

THE COURT: Oh, I'm sorry. Plea and sentence, yes, that's correct. My mistake. Okay.

And are the parties ready to proceed to with that?

MS. PEIRSON: Yes, Your Honor.

MS. POLLOCK: Yes, Your Honor.

THE COURT: In that regard then, Mr. Betty, will you please stand and raise your right hand.

And I ask you now that you can stay there because the microphone is there now. Okay.

(The defendant was sworn.)

EXAMINATION

BY THE COURT:

Q. Okay. Mr. Betty, you're now sworn. I am going to ask you a number of questions about pleading guilty. If at any time you need a moment with Miss Pollock, please ask for it. If at any time you don't hear me or understand my question, please let me know. Okay?

A. Okay.

Q. You're going to need to speak into the microphone -- we have a court reporter remotely -- so that she can hear you.

Will you state your full name, please.

A. Daniel Betty.

Q. How old are you?

A. 28.

Q. Where were you born?

A. Madison, Illinois.

Q. Can you read and write?

A. Yes.

Q. Are you in good health?

A. Yes.

Q. Are you under the influence of any drugs or alcohol at that time?
A. Only prescribed.
Q. What kind and what's the prescription?
A. Wellbutrin, Abilify, and Remeron.
Q. And that is for what?
A. It is for anxiety and depression.
Q. Are you taking the prescribed dosage?
A. Yes.
Q. Is there anything about the medication that makes it so you do not understand what you're doing today?
A. No.
Q. Have you received a copy of the indictment, which is the written charges made against you?
A. Yes.
Q. Have you had a chance to go over those charges with Miss Pollock?
A. Yes.
Q. Have you had a chance to go over your case in full with Miss Pollock?
A. Yes.
Q. Are you satisfied with Miss Pollock to this point?
A. Yes.

Q. Is anyone forcing you to enter into a plea of guilty?
A. No.
Q. Has anyone threatened you to get you to do so?
A. No.
Q. Has anyone made any promises or assurances of any kind to get you to plead guilty?
A. No.
Q. Are you pleading guilty of your own free will because you are guilty?
A. Yes.
Q. You will be pleading guilty to a felony offense, and if your plea is accepted and you're adjudged guilty of that offense, such adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of a firearm.

Do you understand that?

A. Yes.
Q. The charges against you are as follows:

Count 1 alleges sexual exploitation of a child. On or about September 26, 2019, in Macon and Champaign Counties, in the Central District of Illinois, and elsewhere, that you knowingly used,

persuaded, induced, enticed, and coerced a minor to engage in sexually explicit conduct; and attempted to do so for the purpose of producing any visual depiction of such conduct, knowing and having reason to know that said visual depiction would be transported and transmitted using any means or facility of interstate and foreign commerce in and effecting interstate and foreign commerce; and said visual depiction was produced and transmitted using materials that had been mailed, shipped, and transported in and effecting interstate and foreign commerce by any means, including by computer; and said visual depiction was actually transported and transmitted using any means and facility of interstate and foreign commerce in and effecting the same.

Do you understand the charges in Count 1?

A. Yes.

Q. Count 2 alleges that on September 24, 2019, and September 26, 2019, in Macon and Champaign Counties, in the Central District of Illinois, and elsewhere, the count of sexual exploitation of a child occurred when you knowingly used, persuaded, induced, enticed, and coerced a minor to engage in sexually explicit conduct; and attempted to do so for the

purpose of producing any visual depiction of such conduct, knowing, and have reason to know, that said visual depiction would be transported and transmitted using any means or facility of interstate and foreign commerce in and effecting interstate and foreign commerce; said visual depiction was produced and transmitted using materials that had been mailed, shipped, and transported in and effecting interstate and foreign commerce by any means, including by computer; and said visual depiction was actually transported and transmitted using any means and facility of interstate and foreign commerce in and effecting the same.

Do you understand that charge?

A. Yes.

Q. Count 3 charges enticement of a minor. That on or between September 23, 2019, and October 6, 2019, in Macon and Champaign Counties, in the Central District of Illinois, you knowingly -- you used a facility and means of interstate commerce, the internet and cell phone, to knowingly persuade, induce, and entice an individual, who you believed had not attained the age of 18 years, to engage in any sexual activity for which any person can be

charged with a criminal offense, to wit aggravated criminal sexual abuse.

Do you understand that charge?

A. Yes.

Q. Count 4 is receipt of child pornography. Alleges that on or about September 29, 2019, in Macon County, in the Central District of Illinois, that you knowingly received child pornography, as defined by United States Code, including visual depictions of minors engaging in sexually explicit conduct; said child pornography having been shipped or transported using any means or facility of interstate or foreign commerce, including by computer.

Do you understand that?

A. Yes.

Q. There's also a forfeiture notice as part of the indictment in Counts 1 through 4 that realleges all of them; that you will forfeit to the United States all matters as set forth in 2(a), (b), and (c), and in paragraph 3 that references that paragraph 2, subparagraphs (a), (b), and (c), but is not limited to video recorders; accessories; computers; cameras; hardware, such as monitors; central processing units; keyboards; computer programs; software;

computer storage devices, such as disk drive units, disks, tapes, hard disk drives, peripherals, modems, and other telephonic and acoustical equipment, printers, contents of memory data contained in; and through the aforementioned, hardware and software tools, equipment manuals, and documentation as listed: the black Samsung S10 mobile phone, an SD card, and SD card reader, Apple iPad, computer processing unit tower, a USB dongle, and two Xbox gaming consoles.

Do you understand that?

A. Yes.

Q. The possible penalties pursuant to statute for Counts 1 and 2, sexual exploitation of a minor, is a minimum of 15 years, a maximum of 30 years in prison; a maximum of $250,000 fine; a maximum lifetime supervised release; mandatory $100 special assessment; a $5,000 special assessment under United States Code if you're not indigent; a $50,000 special assessment under United States Code.

For Count 3, enticement of a minor, it's a minimum of ten years and a maximum of life term of imprisonment; a maximum of $250,000 fine; a maximum lifetime supervised release; mandatory $100 special assessment; a $5,000 special assessment under United

States Code if you're not indigent.

Count 4, receipt of child pornography. It's a minimum of five years and a maximum of 20 years in prison; a maximum of $250,000 fine; a maximum lifetime of supervised release; a mandatory $100 special assessment; a $5,000 special assessment if not indigent; and the $35,000 special assessments.

Do you understand the possible penalties pursuant to statute?

A. Yes.

Q. You have a right to persist in your plea of not guilty and proceed to trial by judge or by jury.

If by jury, 12 citizens will be selected by you and Miss Pollock and Miss Peirson, and they would hear all of the evidence in the case, and they could not convict you of any of these counts unless they were convinced beyond a reasonable doubt of each of the elements of the offense against you.

Do you understand that?

A. Yes.

Q. If you had a trial by judge, I would make that determination. There would be no jury trial.

Do you understand that?

A. Yes.

Q. At either trial you are afforded the assistance

of counsel at every stage of the proceedings; and if you cannot afford an attorney, one would be appointed for you at no cost to you.

You have a right to confront and cross-examine the witnesses against you.

You have a right to call witnesses to testify for you.

You have a right to testify for yourself, if you wish.

You have a right to choose not to testify.

If you chose not to testify, no inference of guilt could be drawn from that and that could not be used against you.

Do you understand that?

A. Yes.

Q. Do you understand that by pleading guilty you would be waiving these rights and there would be no trial?

A. Yes.

THE COURT: I will ask Miss Peirson please for a factual basis.

MS. PEIRSON: Yes, Your Honor.

I know the Court has reviewed the PSR, which goes into greater detail, so I am going to just briefly summarize.

The facts of this case include that in early October, the mother of a minor victim reported to police that a sexual assault had taken place upon her 14-year-old daughter, and the law enforcement began to investigate.

The minor purported that she had met an individual who turned out to be an adult on an application that was designed for teenagers. The application advertises that it targets teenagers between the ages of 13 and 19. And she met an individual who went by the screen name "Drake" who portrayed himself as a 17-year-old male from Decatur, Illinois.

The two began chatting through this application. The Drake solicited sexually explicit images from her, and eventually the two agreed to meet in West Side Park in Champaign, Illinois, on April 6, 2019. While this individual was driving to meet, he confessed that he wasn't 17 but actually 19. And she agreed with him anyway and they engaged in vaginal sexual intercourse.

Eventually, law enforcement identified the user as of the Drake account as the defendant. And through photo ID as well as through serving some subpoenas to the application itself, they secured a

search warrant for his residence. And on November 13, 2019 -- I'm sorry, I can't find the specific date, Your Honor -- but they did obtain a search warrant for his residence and interviewed him after reviewing the conversation history between this individual and the minor and learning that there were other purported minors that he was chatting with.

Specifically, as related to Count 1 of the indictment, there was an incident where the Drake account asks Minor 1 to shave her pubic hair. She initially says that she won't, and then later on says that she did, and then he requests that she send him a picture of her vaginal area with the shaved pubic hair.

On September 29th -- this is the factual basis for Count 4 -- the Drake account acknowledges having received the picture of her shaved pubic area, and that image was located on the minor's device.

Count 2 is another sexual exploitation of a minor charge. Here the defendant requested that the minor send a picture depicting two fingers inserted into her vagina, and, specifically, saying, "Can I see you put two fingers in that little

pussy," and she did and sent a picture to him.

Count 3, the factual basis for that is the meeting that occurred on October 6, 2019, at West Side Park where he encouraged her to meet him and the two met and engaged in vaginal sexual intercourse.

When the officers -- I'm sorry -- this was November 22, 2019 -- served a search warrant at Mr. Betty's residence, they seized multiple electronic devices, and those are the devices that are listed in the indictment for the notice of forfeiture.

He indicated that the last time he met anyone through this Spot-A-Friend app, and he was familiar with it, was when he was 19 years old. Agents were later able to confirm that the app was only around for the past few years, and Mr. Betty was 28 years old. So he was clearly not being honest with the agents.

And that is basically the factual basis for Counts 1 through 4.

THE COURT: Miss Pollock, do you believe the government can produce that evidence at trial?

MS. POLLOCK: They would be able to, Your Honor, yes.

BY THE COURT:
Q. Mr. Betty, did you hear what I was just told?
A. Yes.
Q. Are those facts correct?
A. There was one misconception. I was 27 years old at that time.
Q. You were 27?
A. Yes.
Q. All right. Thank you. Otherwise, they are correct?
A. Yes.
Q. And are they in part the basis for your plea of guilty?
A. Yes.
Q. Okay. Your sentence will ultimately be determined by a combination of advisory sentencing guidelines, possible authorized departures from those guidelines, and other sentencing factors.

In anticipation of your plea, a Presentence Report was prepared. You and the government have had a chance to review that and challenge the reported facts, and there is, in fact, one objection or two to address.

So after your initial advisory guideline range has been determined, I have the authority in

some circumstances to depart upward or downward from that range, and will also examine other statutory sentencing factors under 18 3553(a) that may result in the imposition of a sentence that is either greater or lesser than the advisory guideline sentence.

Do you understand that?

A. Yes.

Q. The mandatory supervised release period that I indicated also has its own terms and conditions. Any violation of those terms and conditions could result in your supervised release period being revoked and you being imprisoned for all or part of that time without any credit for time previously served.

Do you understand that?

A. Yes.

Q. Do you have any questions at all at this time about the charges against you?

A. No.

Q. About the possible penalties?

A. No.

Q. About your rights to a trial?

A. No.

Q. About the fact that you won't have a trial if

you plead guilty?
A. No.
Q. Do you have any questions at all about the consequences of your plea?
A. No.
THE COURT: With that in mind, do the parties believe that there is anything else that needs to be addressed before I ask Mr. Betty how he pleads?
MS. PEIRSON: No, Your Honor.
MS. POLLOCK: No, Your Honor.
THE COURT: How do you plead, sir, to Count 1, sexual exploitation of a minor?
THE DEFENDANT: Guilty.
THE COURT: To Count 2, sexual exploitation of a minor?
THE DEFENDANT: Guilty.
THE COURT: To Count 3, enticement of a minor?
THE DEFENDANT: Guilty.
THE COURT: And Count 4, receipt of child pornography?
THE DEFENDANT: Guilty.
THE COURT: I find that you are fully competent and capable of entering an informed plea;

that you are aware of the nature of the charges and the consequences of the plea. The plea of guilty to each count is a knowing and voluntary one supported by an independent basis in fact containing each of the essential elements of the offense.

The plea as to each count is accepted and you are now adjudged guilty of that offense.

(End of change of plea hearing, 10:27 a.m.)

*****

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Nancy Mersot Date: June 25, 2024

Court Reporter

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	Docket No. 20-cr-20001
Plaintiff,	
vs.	Peoria, Illinois
	September 8, 2020
DANIEL A. BETTY,	10:28 a.m.
Defendant.	

RECORD OF PROCEEDINGS
SENTENCING HEARING
BEFORE THE HONORABLE JAMES E. SHADID
UNITED STATES DISTRICT JUDGE

THE APPEARANCES

ELHAM PEIRSON, ESQ.
Assistant U.S. Attorney
318 S. Sixth Street
Springfield, IL 62701
On behalf of the Plaintiff

ELISABETH R. POLLOCK, ESQ.
Assistant Federal Defender
300 W. Main Street
Urbana, IL 61801
On behalf of the Defendant

Nancy Mersot, CSR, RPR
Former U.S. Court Reporter
1311 N. Hickory Hills
Germantown Hills, IL 61548

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

(In open court, 10:28 a.m.)

Are the parties ready to proceed to sentencing?

MS. POLLOCK: Yes, Your Honor.

MISS PEIRSON: Yes, Your Honor.

THE COURT: A Presentence Report was prepared. There are a couple of objections to address.

Are the parties ready to proceed to address those?

MISS PEIRSON: Yes, Your Honor.

MS. POLLOCK: Yes, Your Honor.

THE COURT: Miss Pollock, you're referencing page 18, paragraph 68 which gives us a five-level enhancement for engaging in a pattern of criminal activity. You also reference page 19, paragraph 78, and that is, as I understand it, the same. Your objection indicates that this is an engagement of -- well, this is impermissible double counting.

Would you like to be heard further?

MS. POLLOCK: Your Honor, the objection is straight forward. I understand what the state of the law is in the Seventh Circuit.

In this case, the five-level enhancement are based on two separate instances of conduct, which

include the sending of a photo over the application, and also the engagement of a sexual act. So I don't think it's disputed that this entire indictment is based on one parse of conduct starting in September of 2019 and ending in October of 2019 involving several conversations between Mr. Betty and minor victim one. There is no separate victim. There is no separate occurrence of sexual activity. But under the definition of the guidelines, it counts as a prior act of sexual misconduct with a minor to solicit a photograph.

So, under the definition as the guideline currently reads, he has a 15-year mandatory minimum on Counts 1 and 2 for the exploitation, which is the requesting and sending of those photographs; and then he also has a ten-year to life minimum on Count 3 relating to the enticement that accompanied that conversation; and in addition to those three counts not being able to group together under the guidelines, he gets three additional levels for them not grouping; and then he gets a five-level enhancement for basically the same conduct that underlies the initial charges.

So, although it may be a technically correct application of the guidelines, what we see here is

the tendency of the Sentencing Commission over the last decade to enhance sentences and enhance and enhance and enhance them where it doesn't necessarily make sense to do so. There's no dispute that this is the same victim, same course of conduct. It was not with any other victim. There was nothing more than those two photos exchanged and then the meet, and they found with that eight levels added to his guideline range to the point that Mr. Betty, who has no criminal history whatsoever, is looking at life under the guidelines for a first offense. That's absurd.

THE COURT: All right. It sounds to me as if though the objection is beyond -- is toward -- or is toward an argument for variance or departure as it seems whether, like it or not, the application of the plus five is appropriate given the 2G2.2 definition in application notes of Pattern of Activity Involving Sexual Abuse or Exploitation of a Minor means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred during the course of the events, involved the same minor or resulted in a conviction for such conduct.

So, would that be a fair statement as well?

MS. POLLOCK: That would be fair, Your Honor.

THE COURT: Okay. So, I don't believe the government needs to respond on this.

The Court will adopt the government and defendant's position in that regard. But Miss Pollock clearly has reserved the right to argue it as it pertains to sentencing.

So with that in mind, does that address all of the objections that you have as to the sentencing guideline calculations.

MS. POLLOCK: It does, Your Honor.

THE COURT: All right. I will adopt the Presentence Report this day then; would have us start with a total offense level 43; Criminal History Category I.

Guideline range for Counts 1 and 2 then would be -- actually because of the mandatory -- the statutory maximum would be 360 months, otherwise it would be life.

Count 3 is life based on a 43 and 1.

Count 4 is 240 months based upon the statutory maximum of 20 years.

Supervised release would be five years to

life on each Counts 1 through 4.

Ineligible for probation.

$50,000 fine to $250,000 fine.

Restitution is not applicable.

And a special assessment of $400.

Do the parties agree that given my ruling that those are the guideline provisions?

MS. POLLOCK: Yes, Your Honor.

MISS PEIRSON: Yes, Your Honor.

THE COURT: Okay. Any further additions or corrections to be offered to the Presentence Report?

MS. POLLOCK: No, Judge.

MISS PEIRSON: No, Your Honor.

THE COURT: Any formal evidence from either side? The Court has received the defendants sentencing exhibits, which is Document 19, and Defendant's 21, which was the mitigation report.

Any other formal evidence from either side?

MS. POLLOCK: Not from me, Your Honor.

MS. PEIRSON: Your Honor, I believe the father of the victim is available by video and participating in the hearing today. He did submit a victim impact statement that he asks that I read aloud to the Court with the Court's permission.

THE COURT: You may.

MS. PEIRSON: Daniel, you came into my family's life and destroyed it. You hurt my daughter in a way no man ever should have done. She is no -- she no longer has trust for others and now sees all the deception and lies.

I hope in your punishment you can see the pain you put us through. Between doctors' visits and counseling to deal with law enforcement and lawyers, you changed our lives forever. I hope you realize what you did wrong. I know your family has to be dealing with the pain as well, and your wife, I'm sure you turned their world upside down, too. The amount of people you hurt for a quick hook-up, was it really worth it?

I hope through your punishment you learn to change your ways and lead a better life.

And that's from Matthew Barker, Your Honor.

THE COURT: Would you spell his last name, please.

MISS PEIRSON: B-A-R-K-E-R.

THE COURT: All right, sir, you're listening. Thank you.

Thank you, Miss Peirson.

Okay. Any formal evidence from the defense?

MS. POLLOCK: No, Your Honor.

THE COURT: Argument as to sentencing alternatives. And feel free to stay at your desk or go to the podium if you like.

MS. POLLOCK: Your Honor, the government's position is that the defendant has earned a lengthy sentence here. The government recognizes, however, that the defendant did spare this victim and her family the pain and the difficulty of enduring a trial. He did not challenge the evidence and accepted responsibility, and I think that his sentence should reflect that acceptance of responsibility even though the guidelines don't account for it based on the number of enhancements he has.

With that said, the government was concerned a bit about the psychological report that defense counsel tendered to the Court for consideration, and the idea that along with the letters in support of the defendant trying to make this appear as if this conduct was unknowing or somehow painting the defendant as anything but a perpetrator here.

He clearly went on a website, on an application that was designed for teenagers. He misrepresented his age in order to become more attractive to a teenage minor. He manipulated that

minor into sending sexually explicit pictures that could now be circulated on the internet forever. He engaged in a sex act with a minor, and there is no coincidence here that shortly after that sexual assault, this minor attempted to take her own life and has been struggling through counseling since this incident.

The victim's family has some financial out-of-pocket expenses that have incurred as a result of this incident, specifically related to the hospital stay for the victim and her continued counseling. They did not -- they were not able to provide me those receipts in advance of this hearing, so I will ask that the Court reserve the issue of restitution for 60 days and allow them an opportunity to submit those receipts, and then I'll follow up with a motion to the Court, whether it's agreed or we need to set it for a hearing. I will discuss that with Miss Pollock after the sentencing. But this has been impactful to their family, and I think that the sentence needs to reflect the seriousness of the offense and the fact that this victim is going to be spending a great deal of time, if not her lifetime, recovering from this incident.

And so I'd ask the Court to impose a lengthy

sentence as well as a lengthy term of supervised release. Fifteen years of supervised release I think following the term of imprisonment is sufficient, but not greater than necessary, to allow Mr. Betty to complete treatment, particularly with his mental health issues, and complete sex offender treatment to internalize the conduct here.

The government is not seeking any additional fines to be imposed and would like those resources to be used for restitution to the victim if they are able to submit the supporting documents.

Thank you, Your Honor.

THE COURT: Thank you.

Miss Pollock?

MS. POLLOCK: Thank you, Your Honor.

I'm not in the business of victim blaming, and I am in no way, shape, or form attempting to do that right now, this is just as a pre-cursor; but I do want to be clear that the incident that happened with Mr. Betty and minor victim one was not the only thing going on in her life, and I don't believe that Mr. Betty is fully personally responsibile for what she's suffering right now. He is certainly a part of it. But my understanding, having reviewed the discovery, is that she has several psychological

issues that predated her knowing Mr. Betty and that her family had been dealing with with her over quite a period of time before this incident.

So, Mr. Betty clearly accepted responsibility for his conduct and his role in causing her pain and her suffering. But I just want it to be clear -- and Miss Peirson can correct me if I'm wrong -- but that she was suffering from pretty severe psychological issues before this incident that Mr. Betty was not aware of based on his communication with her on the application.

So, we don't object to the government requesting an additional 60 days to discuss the restitution issue. I will be happy to work with Miss Peirson on that.

With regard to the sentencing argument, Your Honor, I think you're pretty aware of my preview that I gave Your Honor to the objections to the Presentence Report. But the fact of the matter is that Mr. Betty has never even been arrested before. It's his first time ever really being in trouble. And the purpose of the psychological examination was not to claim that Mr. Betty has any level of insanity or that he does not have responsibility for his criminal action. The purpose of the

psychological exam was to try to explain how and why Daniel Betty got to the point that he committed this offense, because everybody who engages in this type of behavior has got something wrong with them and we need to know in order to fix it. In order to stop this from ever occurring again, he needs to understand what's wrong with him and so does the Court and so does his treatment provider.

So the fact that we had him psychologically examined, the purpose was how to discern how a guy who has no criminal record and had a good job and was married ended up in the position where he perpetrated an offense like this, and I think the psychological report does a lot to show us how and why this happened.

He has suffered from major depressive disorder for a good chunk of his adult life and it was untreated. He and his wife -- Your Honor, if you've seen the pictures -- I did submit the photos for review. I didn't feel the need to file them with the Court. But holy God, the house was covered in dog feces and urine, and they were not caring for themselves physically or for the home. They both -- he and his wife suffer from pretty severe psychological disorders. And if -- you know, it's

interesting reading the psychological report about this Autism Spectrum Disorder, because, you know, it is not something that can be easily diagnosed in high functioning individuals who appear to have high IQs and be able to do well in school and to maintain a job, but that doesn't mean that it is not anything. And in fact for him, he met his wife on a dating application because that's the only way that he felt comfortable interacting with people and that is as a result of his ASC. And then once he was in the relationship and things went terribly south with his and his wife's mental health, he turned again to the internet to satisfy some of that loneliness. Now, that is not an excuse, and I'm not saying it is an excuse, but it is certainly explanatory as to how somebody like Daniel Betty ends up in federal court.

With 3553(a) factors, first we have to look at the nature and circumstances of the offense. I think that my statement in regard to 4B1.5 application was pretty clear that this is a single course of conduct with a single victim. And in almost every single case that would be enough to not have that five-level enhancement apply. But because of the definition of sexual abuse, which includes the taking of a photograph, he gets these five extra

levels even though it was one meeting and two pictures. And as I previously stated, because of the way the grouping guidelines work, he has three extra levels; that is an eight-level increase based on a single course of conduct and a single victim. And that is not -- I don't agree with everything that the Sentencing Commission does, but in these two circumstances the guidelines have rationed it up over the years without a lot of empirical evidence. So you have somebody like Daniel Betty who has never been in trouble in his life who has some pretty severe psychological disorders, and the guidelines are telling you to send him to prison for the rest of his life, which as I said before, is completely absurd.

If you took the five-level enhancement off of him -- this guy is 28 years old -- life in prison is a little extreme, but even if you took the five levels off from that pattern enhancement he still -- his guidelines range instead of being a 43 with a Criminal History Category of I, he would be a 38 at a Criminal History Category of I, which is the bottom of the guideline range of 235 months, which is just shy of 20 years. Now 15 is the minimum. Why isn't that a good enough sentence for Daniel

Betty to serve? Twenty years of his life gone in a blink because of his first mistake? Now, it is a hell of a mistake, but still, I mean, that just shows you the draconian nature of the applications of these guidelines. I don't think there is anybody that can argue that 15 or 20 years in prison for a 28-year-old man with these issues is too much or too little. It's, frankly, appropriate given the nature and circumstances of the offense.

So when you take into account that he's going to need psychological therapy and sex offender treatment, which can be provided in the Bureau of Prisons. He also has an extraordinarily supportive family, as noted by the letters of support that were filed and by their presence in the courtroom today.

Why isn't 15 to 20 years enough? I think it is. I think the 3553(a) factors are quite clear based on who he is as a person and the nature of his offense which is three weeks of his life. Three weeks of his life making the worst decision ever and he is going to pay for it and he knows he is going to pay for it. But there is no reason for a life sentence. There is nothing wrong with 15 to 20 years of imprisonment with a man with this history and these characteristics with his family and his

psychological disorder. And that's what we request, Judge.

I have no problem with any of the conditions of supervised release as proposed by the probation office in the presentence report. We consent to those and waive the reading of the justifications.

THE COURT: Those are paragraphs 129 through 142. Have you gone over those with Mr. Betty?

MS. POLLOCK: Yes, I have, Your Honor.

THE COURT: Do you think he understands what's expected of him?

MS. POLLOCK: Yes, he does.

THE COURT: And do you think he requires any further reading or explanation?

MS. POLLOCK: I do not, Your Honor.

THE COURT: Mr. Betty, at this time you can a make a statement, if you wish.

THE DEFENDANT: Thank you, Your Honor, for allowing me the opportunity to express myself to the Court.

I'd like to say I take full responsibility for my actions. I am facing a prison sentence --

THE COURT: Sir, I know you might be as well be nervous. I am going to ask you to please slow down a little bit so that the court reporter can

take down what you're saying.

THE DEFENDANT: Okay. But where do you want me to start?

THE COURT: Wherever you are comfortable.

THE DEFENDANT: Thank you for allowing me the opportunity to express myself to the Court, Your Honor. I'd like to say I am ready to take full responsibility for my actions by facing a prison sentence and having my freedoms revoked.

I understand that I have affected many people, including the victim, their family, and my family with embarrassment and shame, and the potential threat I could have been or was.

To the victim, I would like to apologize for any emotional trauma this has caused them and their family. I never intended to cause any harm.

During the crime I was at a low point in my life. I got caught up in the moment and instead of thinking about the effects and consequences of my actions. I just wasn't thinking.

During my time in jail I've been entirely out of my element. My actions have caused me to lose my wife, my pet, my house, my job, my vehicles, and most important the respect of my family. That is not the kind of life that I wished to live.

I finally used my prison sentence to further my education, take the SOP courses, go to counseling, as well as work in the UNICOR so not as to be a financial strain on my family.

I want to change my behavior to be a better person, the person that my friends and family see me as and know I am and be able to have and support a family of my own one day. I hope that in time everyone involved can forgive me and find peace to some degree.

My actions have caused me to lose everything I hold dear to me to some disagree, if not entirely. I sincerely apologize for my actions and I know that I won't be a repeat offender.

At this time I'd like to thank my family for their help and support and for showing up today. That's all.

THE COURT: Thank you, Mr. Betty. Did you hear me ask Miss Pollock if she has gone over paragraphs 129 through 142, which these are proposed conditions of supervised release, which I would be imposing; have you gone over those?

THE DEFENDANT: Yes.

THE COURT: Do you believe that you understand what is expected of you?

THE DEFENDANT: Yes.
THE COURT: Do you believe you require any further reading or explanation or summary of them?
THE DEFENDANT: No.
THE COURT: Okay. Mr. Barker, if you're still on, and you can unmute, did you hear Mr. Betty's statement?
MR. BARKER: Yes, Your Honor.
THE COURT: And were you able to hear the apology?
MR. BARKER: Yes, Your Honor.
THE COURT: How is your daughter doing today?
MR. BARKER: She's doing all right. I can't be with her because of COVID right now.
THE COURT: And you -- correct. And I understand that you have it and that's why we allowed you to participate by audio and video.
MR. BARKER: Yes, Your Honor.
THE COURT: Okay. How are you doing?
MR. BARKER: I am doing fine.
THE COURT: All right. I appreciate your statement today. Thank you.
Okay. As well, the Court having considered all of the information before me, which includes the

Presentence Report, the sentencing guideline calculations, the mitigation report, the defendant's exhibits, the letters in support, the victim statement as read by Miss Peirson, the arguments of counsel, the statement of Mr. Betty, the factors in 3553, I believe the following sentence is sufficient but not greater than necessary to comply with the purpose of the Act.

Clearly, this is conduct that maybe one who would have looked at Mr. Betty sometime before it occurred may not have predicted that he could find himself in this position. On the other hand, there were clearly a number of issues that he found himself in to indicate problems in his life. With that same regard, and Miss Pollock appropriately, but very respectfully, addressed the issues that maybe the young lady victim was incurring of her own; however, it would seem to me that on apps like this where people are seeking each other out, even if it's legal as Mr. Betty met his wife on this app, that there would be people that were encountering issues of their own, and it wouldn't be a stretch to imagine that a young lady, like the 14-year-old victim in this case might be; and that then she would be in a position, because of whatever issues

she was encountering in her life, that she would be in a position to be taken advantage of by someone like -- as it turns out in this case, Mr. Betty -- who was seeking to take advantage of somebody, a minor in particular.

It's not unfair to be characterized, as Miss Peirson did, as a perpetrator, and a manipulator, likely predator. And when you encounter then someone like the 14-year-old, clearly her life, was sad, can contribute and compound all of the stresses and issues that she faced. Furthermore, now compounding that to cause health and financial issues for her parents.

So a significant sentence is appropriate. The guidelines call for life. I think that life is -- will not be an appropriate sentence here. I think the statute is more in line with an appropriate sentence. Count 1 and 2 would have a sentencing range of 15 to 30 years. Count 3 would be 10 to life, and Count 4 would have 5 to 20. And I say that because, even though appropriately assessed, paragraph 59 assesses two points for using the app to induce and entice; paragraph 60 applies another enhancement of two points for using the app to facilitate. There are other enhancements as

well, but then paragraph 68 enhances by five points for engaging in a pattern of criminal activity for the enticement.

So, as Miss Pollock points out, it is basically the same conduct for which he is being enhanced in different manners, so I am factoring that in.

I am factoring in as well the 3553 factors as to the nature and circumstance of the offense, which I have already characterized as manipulative, predatory, perpetrating, but that his history and characteristics of the defendant, Mr. Betty, who has no prior criminal history. So the sentence is imposed to provide just punishment, protect the public from further crimes, still provide Mr. Betty with educational and vocational training in the most effective manner. I believe a sentence of 264 months to the Bureau of Prisons is within what would be the guideline range if without the five-point enhancement, but yet is also within the middle of the statutory amounts for Counts 1 and 2. So 264 months on Counts 1, 2, and 3 to run concurrent with each other.

240 months is the guideline range on Count 4, and that would also run concurrent with Counts 1,

2, and 3.

I believe supervised release of 15 years is appropriate under the circumstances as well, and you will serve that term of 15 years of supervised release.

I will find no ability to pay a fine, so no fine is imposed.

While on supervised release not commit another federal, state, or local crime.

Not possess a controlled substance.

Submit to one drug test within 15 days of release from imprisonment and at least two thereafter as directed by probation.

Cooperate in the collection of DNA as directed by probation or the Bureau of Prisons. In addition, I have carefully considered paragraphs 129 through 142. I believe that they are proper and each is an appropriate and necessary part of the sentence and will maximize the possibility that the defendant will successfully complete his term of supervised release. There are no objections to those. Further reading has been waived. I order that those conditions be made part of this sentence.

I will continue the matter for 60 days for the parties to submit either an agreed order as to

restitution or to ask for a restitution hearing.

Special assessment of $400 is imposed payable immediately.

I will order all proceeds forfeited to the United States derived from the conduct under Counts 1 through 4 and then would be included in a preliminary forfeiture order.

Is there a recommendation as to sentencing -- a place to serve the sentence?

Miss Pollock?

MS. POLLOCK: Yes. Your Honor, at FCI Sandstone in Minnesota.

THE COURT: Sandstone?

MS. POLLOCK: Sandstone, a lower security facility.

THE COURT: And that's in Minnesota?

MS. POLLOCK: Yes.

THE COURT: Any objection to that, Miss Peirson?

MISS PEIRSON: No, Your Honor.

THE COURT: I will recommend you serve your sentence in a facility at FCI Sandstone in Minnesota, if possible.

And I recommend you serve it at a facility that allows you to participate in a sex offender

treatment program and maximize your exposure to educational and vocational opportunities.

And the Court having considered all of the information before it also included, what I failed to mention, the victim statement, I think, of Mr. Barker.

With that in mind, is there anything else before I give appeal rights?

MS. POLLOCK: No, Your Honor.

MISS PEIRSON: No, Your Honor.

THE COURT: All right. Mr. Betty, you do have appeal rights. You have 14 days to do so or ask Miss Pollock to do so on your behalf. Thank you.

We'll be in recess.

(Hearing concludes, 10:57 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Nancy Mersot Date: May 20, 2024

Court Reporter

E-FILED
Wednesday, 08 January, 2020 09:47:26 AM
Clerk, U.S. District Court, ILCD

FILED
JAN 07 2020
CLERK OF THE COURT
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Criminal No. 20-CR-20001
v.	)	
	)	Title 18, United States Code, Sections
	)	2251(a) and (e); 2422(b);
DANIEL A. BETTY,	)	2252A(a)(2)(A) and (b)(1); and
	)	2253 and 2428.
Defendant.	)	

INDICTMENT

COUNT ONE
(Sexual Exploitation of a Child)

THE GRAND JURY CHARGES:

On or about September 26, 2019, in Macon and Champaign Counties, in the Central District of Illinois, and elsewhere, the defendant,

DANIEL A. BETTY,

knowingly used, persuaded, induced, enticed and coerced a minor to engage in sexually explicit conduct, and attempted to do so, for the purpose of producing any visual depiction of such conduct, the defendant knowing and having reason to know that said visual depiction would be transported and transmitted using any means or facility of interstate and foreign commerce and in and affecting interstate and foreign commerce, and said visual depiction was produced and transmitted using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, and said visual depiction was actually transported

and transmitted using any means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce.

All in violation of Title 18, United States Code, Sections 2251(a) and (e).

COUNT TWO
(Sexual Exploitation of a Child)

THE GRAND JURY FURTHER CHARGES:

On or between September 24, 2019 and September 26, 2019, in Macon and Champaign Counties, in the Central District of Illinois, and elsewhere, the defendant,

DANIEL A. BETTY,

knowingly used, persuaded, induced, enticed and coerced a minor to engage in sexually explicit conduct, and attempted to do so, for the purpose of producing any visual depiction of such conduct, the defendant knowing and having reason to know that said visual depiction would be transported and transmitted using any means or facility of interstate and foreign commerce and in and affecting interstate and foreign commerce, and said visual depiction was produced and transmitted using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, and said visual depiction was actually transported and transmitted using any means and facility of interstate and foreign commerce and in and affecting interstate and foreign commerce.

All in violation of Title 18, United States Code, Sections 2251(a) and (e).

COUNT THREE
(Enticement of a Minor)

THE GRAND JURY FURTHER CHARGES:

On or between September 23, 2019 and October 6, 2019, in Macon and Champaign Counties, in the Central District of Illinois, and elsewhere,

DANIEL A. BETTY,

the defendant herein, used a facility and means of interstate commerce, the Internet and a cellular telephone, to knowingly persuade, induce, and entice an individual who he believed had not attained the age of 18 years to engage in any sexual activity for which any person can be charged with a criminal offense, to wit, Aggravated Criminal Sexual Abuse, in violation of Illinois statute 720 ILCS 5/11-1.60(d).

All in violation of Title 18, United States Code, Sections 2422(b).

COUNT FOUR
(Receipt of Child Pornography)

THE GRAND JURY FURTHER CHARGES:

On or about September 29, 2019, in Macon County, in the Central District of Illinois, the defendant,

DANIEL A. BETTY,

knowingly received child pornography, as defined in Title 18, United States Code, Sections 2256(8)(A) and (B), including visual depictions of minors engaging in sexually explicit conduct, said child pornography having been shipped or transported using any means or facility of interstate or foreign commerce, including by computer.

All in violation of Title 18, United States Code, Sections 2252A(a)(2)(A) and (b)(1).

FORFEITURE NOTICE

1. The charge contained in Counts One through Four are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures, pursuant to the provisions of Title 18, United States Code, Sections 2253 and 2428.

2. For his engagement in the violations alleged in Count One through Four,

DANIEL A. BETTY,

defendant herein, shall forfeit to the United States, pursuant to Title 18, United States Code, Sections 2253 and 2428, all interest in:

a. Any visual depictions or other matter containing such visual depictions which were produced, transported, mailed, shipped, received, or possessed as alleged in Count One through Four of this Indictment;

b. Any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from the offenses alleged in Count One through Four of this Indictment; and

c. Any property, real or personal, used or intended to be used to commit or promote the commission of the offenses alleged in Count One through Four of this Indictment.

3. The property referenced in paragraph 2, subparagraphs a, b, and c above includes, but is not limited to, video recorders and accessories, cameras, computer hardware, such as monitors, central processing units, keyboards, computer programs, software, computer storage devices, such as disk drive units, disks, tapes, hard disk drives/units, peripherals, modems and other telephonic and acoustical equipment,

printers, contents of memory data contained in and through the aforementioned hardware and software, tools, equipment, manuals and documentation for the assembly and use of the aforementioned hardware and software, including the specific equipment listed:

- Black Samsung S10+ mobile phone
- SD card and SD card reader
- Apple iPad
- Computer processing unit tower
- USB dongle
- Two Xbox gaming consoles

All pursuant to Title 18, United States Code, Sections 2253 and 2428.

A TRUE BILL,

s/ Foreperson

FOREPERSON

s/ Gregory Gilmore for

JOHN C. MILHISER
UNITED STATES ATTORNEY
EMP

UNITED STATES SENTENCING COMMISSION

GUIDELINES MANUAL 2018



WILLIAM H. PRYOR JR.
Acting Chair

RACHEL E. BARKOW
Commissioner

CHARLES R. BREYER
Commissioner

DANNY C. REEVES
Commissioner

DAVID RYBICKI
Commissioner, *Ex-officio*

PATRICIA K. CUSHWA
Commissioner, *Ex-officio*

This document contains the text of the *Guidelines Manual* incorporating amendments effective November 1, 2018, and earlier.

CHAPTER ONE

INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A — INTRODUCTION AND AUTHORITY

Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the Guidelines Manual describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the Guidelines Manual as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission ("Commission") when it promulgated the initial set of guidelines and therefore provides a useful reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic pur-

poses of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal

justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity — sentencing every offender to five years — destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness

of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an

eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts)* list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (*See* USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit

the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover — unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they

will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ." 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed "single acts of aberrant behavior" at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (*See* USSG App. C, amendment 603.)

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead

to sentences of life imprisonment — sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (*e.g.*, separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely.

Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (*e.g.*, 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. CONTINUING EVOLUTION AND ROLE OF THE GUIDELINES

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission "the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose" of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States v. Booker*, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness

in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). *See* 28 U.S.C. §§ 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita v. United States*, 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita*, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

> [T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. § 3553(a) . . . . The provision also tells the sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with" the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 347–48 (emphasis in original). The Court concluded that "[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[,]" *id.* at 348, and that the Commission's process for promulgating guidelines results in "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice." *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court "first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines

range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita*:

> The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. at 350; *see also Booker*, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); *Gall*, 552 U.S. at 46 ("[E]ven though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.").

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. § 994(x), the Commission publishes guideline amendment proposals in the *Federal Register* and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. § 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission's ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), "Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders 'at or near' the statutory maximum." *Id.* at 103; 28 U.S.C. § 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks

to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court's determination of an appropriate sentence in any particular case.

3. AUTHORITY

§1A3.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 67, 68, and 271); November 1, 1990 (amendment 307); November 1, 1992 (amendment 466); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 2000 (amendments 602 and 603); October 27, 2003 (amendment 651); November 1, 2008 (amendments 717 and 725); November 1, 2014 (amendment 789); November 1, 2018 (amendment 813).

PART B — GENERAL APPLICATION PRINCIPLES

§1B1.1. Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

(A) "***Abducted***" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.

(B) "***Bodily injury***" means any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.

(C) "***Brandished***" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

(D) "***Court protection order***" means "protection order" as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).

(E) "***Dangerous weapon***" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

(F) "***Departure***" means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure.

"***Downward departure***" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "***Depart downward***" means grant a downward departure.

"***Upward departure***" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "***Depart upward***" means grant an upward departure.

(G) "***Destructive device***" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).

(H) "***Firearm***" means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.

(I) "***Offense***" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "***instant***" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, an offense before a state court involving the same underlying conduct).

(J) "***Otherwise used***" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.

(K) "***Permanent or life-threatening bodily injury***" means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.

(L) "***Physically restrained***" means the forcible restraint of the victim such as by being tied, bound, or locked up.

(M) "***Serious bodily injury***" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

2. Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.

   The term "***includes***" is not exhaustive; the term "***e.g.***" is merely illustrative.

3. The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.

4. (A) **Cumulative Application of Multiple Adjustments within One Guideline.—**The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A) – (E)) are not added together.

(B) **Cumulative Application of Multiple Adjustments from Multiple Guidelines.**—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.

5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.

6. **Use of Abbreviated Guideline Titles.**—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The court must impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a "***variance***". *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as "sentences imposed under the framework set out in the Guidelines").

Historical Note	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 1); November 1, 1989 (amendments 69–72 and 303); November 1, 1990 (amendment 361); November 1, 1991 (amendment 388); November 1, 1993 (amendment 497); November 1, 1997 (amendments 545 and 546); November 1, 2000 (amendments 591 and 601); November 1, 2001 (amendment 617); October 27, 2003 (amendment 651); November 1, 2003 (amendment 661); November 1, 2006 (amendment 684); November 1, 2010 (amendment 741); November 1, 2014 (amendment 789); November 1, 2018 (amendment 805).

Extraneous Text Redacted

Extraneous Text Redacted

§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) **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.

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)(A).**—Subsection (b)(3)(A) 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)(A) 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), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):

(i) 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: (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) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

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.

Historical Note	Effective November 1, 2004 (amendment 664). Amended effective November 1, 2007 (amendment 701); November 1, 2009 (amendments 732 and 737); November 1, 2018 (amendment 812).

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2. SEXUAL EXPLOITATION OF A MINOR

§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

(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.

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.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 161); November 1, 1990 (amendment 324); November 1, 1991 (amendment 400); November 1, 1996 (amendment 537); November 1, 1997 (amendment 575); November 1, 2000 (amendment 592); May 1, 2001 (amendment 612); November 1, 2001 (amendment 627); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2009 (amendments 733, 736, and 737); November 1, 2016 (amendment 801).

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

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

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(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 or for the purpose of transmitting a live 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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), 2260(b). 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.

"***Distribution for pecuniary gain***" means distribution for profit.

"***The defendant distributed in exchange for any valuable consideration***" means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

"***Distribution to a minor***" means the knowing distribution to an individual who is a minor at the time of the offense.

"***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.

"***Pattern of activity involving the sexual abuse or exploitation of a minor***" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"***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 abuse or exploitation***" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. **Application of Subsection (b)(3)(F).**—For purposes of subsection (b)(3)(F), 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.

3. **Application of Subsection (b)(4)(A).**—Subsection (b)(4)(A) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.

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 conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

6. **Application of Subsection (b)(7).—**

   (A) **Definition of "Images".**—"***Images***" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

   (B) **Determining the Number of Images.**—For purposes of determining the number of images under subsection (b)(7):

      (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

      (ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

7. **Application of Subsection (c)(1).—**

(A) **In General.**—The cross reference in subsection (c)(1) 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 or for the purpose of transmitting live any visual depiction of such conduct.

(B) **Definition.**—"***Sexually explicit conduct***" has the meaning given that term in 18 U.S.C. § 2256(2).

8. **Cases Involving Adapted or Modified Depictions.**—If the offense involved material that is an adapted or modified depiction of an identifiable minor (*e.g.*, a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

9. **Upward Departure Provision.**—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 31); November 1, 1990 (amendment 325); November 1, 1991 (amendment 372); November 27, 1991 (amendment 435); November 1, 1996 (amendment 537); November 1, 1997 (amendment 575); November 1, 2000 (amendment 592); November 1, 2001 (amendment 617); April 30, 2003 (amendment 649); November 1, 2003 (amendment 661); November 1, 2004 (amendment 664); November 1, 2009 (amendments 733 and 736); November 1, 2016 (amendment 801).

Extraneous Text Redacted

PART D — MULTIPLE COUNTS

Introductory Commentary

This Part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply 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. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.

The rules in this Part seek to provide incremental punishment for significant additional criminal conduct. The most serious offense is used as a starting point. The other counts determine how much to increase the offense level. The amount of the additional punishment declines as the number of additional offenses increases.

Some offenses that may be charged in multiple-count indictments are so closely intertwined with other offenses that conviction for them ordinarily would not warrant increasing the guideline range. For example, embezzling money from a bank and falsifying the related records, although legally distinct offenses, represent essentially the same type of wrongful conduct with the same ultimate harm, so that it would be more appropriate to treat them as a single offense for purposes of sentencing. Other offenses, such as an assault causing bodily injury to a teller during a bank robbery, are so closely related to the more serious offense that it would be appropriate to treat them as part of the more serious offense, leaving the sentence enhancement to result from application of a specific offense characteristic.

In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct, this Part provides rules for grouping offenses together. Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines. In essence, counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.

Some offense guidelines, such as those for theft, fraud and drug offenses, contain provisions that deal with repetitive or ongoing behavior. Other guidelines, such as those for assault and robbery, are oriented more toward single episodes of criminal behavior. Accordingly, different rules are required for dealing with multiple-count convictions involving these two different general classes of offenses. More complex cases involving different types of offenses may require application of one rule to some of the counts and another rule to other counts.

Some offenses, *e.g.*, racketeering and conspiracy, may be "composite" in that they involve a pattern of conduct or scheme involving multiple underlying offenses. The rules in this Part are to be used to determine the offense level for such composite offenses from the offense level for the underlying offenses.

Essentially, the rules in this Part can be summarized as follows: (1) If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (*e.g.*, theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct *(e.g.*, many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole. (2) When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the most serious offense in that group. (3) As

to other offenses (*e.g.*, independent instances of assault or robbery), start with the offense level for the most serious count and use the number and severity of additional counts to determine the amount by which to increase that offense level.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 121); November 1, 2007 (amendment 707).

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:

(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.

(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.

(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

(b) Exclude from the application of §§3D1.2–3D1.5 the following:

(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. *See* Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

Commentary

Application Notes:

1. **In General.**—For purposes of sentencing multiple counts of conviction, counts can be (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.

2. Subsection (b)(1) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) 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, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count

covered by subsection (b)(1) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. *See* §5G1.2(a).

Unless specifically instructed, subsection (b)(1) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (*i.e.*, the statute does not otherwise require a term of imprisonment to be imposed). *See, e.g.*, 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 348); November 1, 1998 (amendment 579); November 1, 2000 (amendment 598); November 1, 2005 (amendments 677 and 680); November 1, 2007 (amendment 707).

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. Subsections (a)–(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. *See* §3D1.1(b)(1); *id.*, comment. (n.1).

2. The term "***victim***" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group "counts involving substantially the same harm."

3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

   When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

   Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. (5) The defendant is convicted of three counts of unlawfully bringing aliens into the United States, all counts arising out of a single incident. The three counts are to be grouped together. *But*: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts *are not* to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offenses occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (*e.g.*, robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

   When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the car he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. *But*: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts *are not* to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example, the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

   Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

   A cross reference to another offense guideline does not constitute "a specific offense characteristic . . . or other adjustment" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be

applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; *see* §3D1.3(b). The "same general type" of offense is to be construed broadly.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. The five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involves a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. *But*: (9) The defendant is convicted of three counts of bank robbery. The counts *are not* to be grouped together, nor are the amounts of money involved to be added.

7. A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count; conversely, all counts may form a single Group.

8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. **Example:** The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group"). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are distinct victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constituting a single transaction or occurrence? Existing case law may provide some guidance as to what constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note	Effective November 1, 1987. Amended effective June 15, 1988 (amendment 45); November 1, 1989 (amendments 121, 253–256, and 303); November 1, 1990 (amendments 309, 348, and 349); November 1, 1991 (amendment 417); November 1, 1992 (amendment 458); November 1, 1993 (amendment 496); November 1, 1995 (amendment 534); November 1, 1996 (amendment 538); November 1, 1998 (amendment 579); November 1, 2001 (amendments 615, 617, and 634); November 1, 2002 (amendment 638); January 25, 2003 (amendment 648); November 1, 2003 (amendment 656); November 1, 2004 (amendments 664 and 674); November 1, 2005 (amendments 679 and 680); November 1, 2007 (amendment 701).

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)–(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

Commentary

Application Notes:

1. The "***offense level***" for a count refers to the offense level from Chapter Two after all adjustments from Parts A, B, and C of Chapter Three.

2. When counts are grouped pursuant to §3D1.2(a)–(c), the highest offense level of the counts in the group is used. Ordinarily, it is necessary to determine the offense level for each of the counts in a Group in order to ensure that the highest is correctly identified. Sometimes, it will be clear that one count in the Group cannot have a higher offense level than another, as with a count for an attempt or conspiracy to commit the completed offense. The formal determination of the offense level for such a count may be unnecessary.

3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines, use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome.

4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under §3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* §5K2.5 (Property Damage or Loss).

Background: This section provides rules for determining the offense level associated with each Group of Closely Related Counts. Summary examples of the application of these rules are provided at the end of the Commentary to this Part.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 257 and 303); November 1, 2001 (amendment 617); November 1, 2004 (amendment 674).

§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.

Commentary

Application Notes:

1. Application of the rules in §§3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determined in accordance with §3D1.3.

2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment

through a more complicated mathematical formula; that approach was not adopted because of its complexity.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1990 (amendment 350).

§3D1.5. Determining the Total Punishment

Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

Commentary

This section refers the court to Chapter Five (Determining the Sentence) in order to determine the total punishment to be imposed based upon the combined offense level. The combined offense level is subject to adjustments from Chapter Three, Part E (Acceptance of Responsibility) and Chapter Four, Part B (Career Offenders and Criminal Livelihood).

Historical Note	Effective November 1, 1987.

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Concluding Commentary to Part D of Chapter Three

Illustrations of the Operation of the Multiple-Count Rules

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

1. Defendant A was convicted of four counts, each charging robbery of a different bank. Each would represent a distinct Group. §3D1.2. In each of the first three robberies, the offense level was 22 (20 plus a 2-level increase because a financial institution was robbed) (§2B3.1(b)). In the fourth robbery $21,000 was taken and a firearm was displayed; the offense level was therefore 28. As the first three counts are 6 levels lower than the fourth, each of the first three represents one-half unit for purposes of §3D1.4. Altogether there are 2 1/2 Units, and the offense level for the most serious (28) is therefore increased by 3 levels under the table. The combined offense level is 31.

2. Defendant B was convicted of four counts: (1) distribution of 230 grams of cocaine; (2) distribution of 150 grams of cocaine; (3) distribution of 75 grams of heroin; (4) offering a DEA agent $20,000 to avoid prosecution. The combined offense level for drug offenses is determined by the total quantity of drugs, converted to converted drug weight (using the Drug Conversion Tables in the Commentary to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking)). The first count translates into 46 kilograms of converted drug weight; the second count translates into 30 kilograms of converted drug weight; and the third count translates into 75 kilograms of converted drug weight. The total is 151 kilograms of converted drug weight. Under §2D1.1, the combined offense level for the drug offenses is 24. In addition, because of the attempted bribe of

the DEA agent, this offense level is increased by 2 levels to 26 under §3C1.1 (Obstructing or Impeding the Administration of Justice). Because the conduct constituting the bribery offense is accounted for by §3C1.1, it becomes part of the same Group as the drug offenses pursuant to §3D1.2(c). The combined offense level is 26 pursuant to §3D1.3(a), because the offense level for bribery (20) is less than the offense level for the drug offenses (26).

3. Defendant C was convicted of four counts arising out of a scheme pursuant to which the defendant received kickbacks from subcontractors. The counts were as follows: (1) The defendant received $1,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received $1,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received $1,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received $1,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is $4,000, which results in an offense level of 9 under either §2B1.1 (assuming the application of the "sophisticated means" enhancement in §2B1.1(b)(10)) or §2B4.1. Since these two guidelines produce identical offense levels, the combined offense level is 9.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 303); November 1, 1990 (amendment 350); November 1, 1991 (amendment 417); November 1, 1995 (amendment 534); November 1, 2001 (amendment 617); November 1, 2009 (amendment 737); November 1, 2011 (amendment 760); November 1, 2014 (amendment 782); November 1, 2015 (amendment 796); November 1, 2018 (amendment 808).

Extraneous Text Redacted

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

(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.

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.

Historical Note	Effective November 1, 2001 (amendment 615). Amended effective April 30, 2003 (amendment 649); November 1, 2003 (amendment 661); November 1, 2007 (amendment 701).

CHAPTER FIVE

DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

Historical Note	Effective November 1, 1987.

PART A — SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

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

Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "***Life***" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 270); November 1, 1991 (amendment 418); November 1, 1992 (amendment 462); November 1, 2010 (amendment 738).