

2. Application of Subsection (b)(4).—Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. 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)(4) 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)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

4. Cross Reference at Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly to include 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.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.’

D. Production Offenses Under § 2G2.1

Section 2G2.1(a) is amended by striking “27” and inserting “[30][32][34][35][36]”.

Section 2G2.1(b) is amended in subdivision (1) by striking “victim” and inserting “minor”; by redesignating subdivisions (2) and (3) as subdivisions (6) and (7), respectively; and by inserting after subdivision (1) the following:

‘(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by [2][4] levels.

(3) If the offense involved the commission of a sexual act or sexual contact, increase by 2 levels.

(4) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by [2][4] levels.

(5) If the offense involved distribution, increase by [2][5][7] levels.”

Section 2G2.1(b) is amended in subdivision (7), as redesignated by this amendment, by striking “Internet-access device” and inserting “interactive computer service”.

Section 2G2.1 is amended by redesignating subsection (c) as

subsection (d); and by inserting after subsection (b) the following:

“(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.”.

The Commentary to § 2G2.1 captioned “Statutory Provisions” is amended by striking “(a), (b), (c)(1)(B)”.

The Commentary to § 2G2.1 captioned “Application Notes” is amended by striking Notes 1, 2, 3, and 4 in their entirety and inserting the following:

“1. Definitions.—For purposes of this guideline:

‘Conduct described in 18 U.S.C. 2241(a) or (b)’ is: Using force against the minor; threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the minor unconscious; or 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.

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

‘Distribution’ means any act, including production, transportation, and possession with intent to distribute, 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)).

‘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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

‘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).

‘Sexually explicit conduct’ has the meaning given that term in 18 U.S.C. 2256.

2. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(6) 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 child and not simply to the legal status of the defendant-child relationship.

(B) Inapplicability of Enhancement.—If the adjustment in subsection (b)(6) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).”;

by redesignating Note 5 as Note 3; by inserting after Note 3, as redesignated by this amendment, the following:

“4. Special Instruction at 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.”; and by redesignating Note 6 as Note 5.

The Commentary to § 2G2.1 captioned “Application Notes” is amended in Note 3, as redesignated by this amendment, by inserting before “The enhancement in subsection” the following:

“Application of Subsection (b)(7)(A).—

(A) Misrepresentation of Participant’s Identity.—

by striking “(3)(A)” each place it appears and inserting “(7)(A)”; by striking “Subsection (b)(3)(B)(i) provides” and inserting:

“(B) Use of a Computer or an Interactive Computer Service.— Subsection (b)(7)(b)(i) provides”; by striking “(b)(3)(B)(i) is intended” and inserting “(b)(7)(B)(i) is intended”; and