APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 15-2432 & 15-2447

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN D. GRIES and
JAMES MCCULLARS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis
Division. Nos. 1:11CR00191-010, -011 –
Sarah Evans Barker, Judge

ARGUED SEPTEMBER 23, 2016 –
DECIDED SEPTEMBER 20, 2017
AMENDED DECEMBER 7, 2017

Before RIPPLE, ROVNER, and SYKES, *Circuit judges.*

SYKES, *Circuit Judge.* For nearly a decade, John. Cries and James McCullars were active participants in a private online chat room frequented by pedophiles sharing large volumes of child pornography. They were

indicted for conspiracy to distribute child pornography, conspiracy to sexually exploit a child, and engaging in a child-exploitation enterprise. Other users of the chat room cooperated with investigators, pleaded guilty, and received sentencing consideration. The charges against Cries and McCullars proceeded to trial; several cooperators testified against them.

To convict Gries and McCullars of the enterprise offense, the government had to prove that they committed three or more crimes against children in concert" with three or more persons. 18 U.S.C. § 2252A(g)(2). The jury found them guilty on all charges.

At sentencing the parties and the judge overlooked an important point: The conspiracy counts are lesser-included offenses of the enterprise count. Instead of merging, those convictions and imposing sentence on the greater offense or lesser offenses alone, the judge imposed concurrent sentences on all three convictions. That error violates the Double Jeopardy Clause. *Rutledge v. United States*, 517 U.S. 292, 307 (1996). We reverse and remand with instructions to vacate the sentences on either the greater or lesser counts and enter new judgments accordingly. The remaining issues on appeal are meritless.

I. Background

For almost ten years, Cries and McCullars participated in an online conspiracy of pedophiles who shared large collections of child pornography and discussed the sexual exploitation of children. The group used password-protected chat rooms to privately communicate in real time and facilitate the exchange of massive personal libraries of child pornography. Collectively, the libraries contained thousands of files containing images depicting the violent sexual abuse of thousands of children. The tiles were encrypted, but members of the group shared passwords to give chatroom participants access to the contents. When a group member had new material to share, he would message others in the chat room, describe the contents of the file, and offer it for distribution.

Investigators estimated that at its peak the conspiracy included as many as 35 to 40 participants, but the government could identify only Cries, McCullars, and 11 other coconspirators. Most cooperated with investigators by handing over and decrypting their child-pornography collections. Cries also did so, but McCullars did not. Nine coconspirators pleaded guilty to a single count of engaging in a child-exploitation enterprise in violation of § 2252A(g)(2); they are serving prison terms ranging from 135 to 360 months.

A grand jury indicted Cries and McCullars on three counts: conspiracy to distribute and receive child pornography, 18 U.S.C. § 2252A(a)(2); conspiracy to sexually exploit a child, 18 U.S.C. §2251(d)(1)(A); and

engaging in a child-exploitation enterprise, § 2252A(g)(2). Cries was also charged separately with five additional counts of receiving child pornography. Three of their coconspirators agreed to testify for the government in exchange for favorable sentencing recommendations.

The charges against Cries and McCullars were tried to a jury over the course of a week. To convict them on the enterprise charge, the government had to prove beyond a reasonable doubt that each defendant committed at least three predicate crimes against children "in concert" with three other people. § 2252A(g)(2). The predicates included the conspiracies alleged in counts one and two, together with multiple separate acts of distributing, receiving, and advertising child pornography.

The jury found the defendants guilty on all counts. On the enterprise count, the jury found that Cries committed 10 predicate offenses, including the conspiracies charged in counts one and two. The jury found that McCullars committed 17 predicate crimes, including the two conspiracies.

Under the Sentencing Guidelines, Cries faced an advisory imprisonment range of 324 to 405 months. The judge imposed a sentence of 240 months on count one (conspiracy to distribute child pornography), 360 months on count two (the child-exploitation conspiracy), 360 months on the enterprise count, and 240 months on each separate conviction for receiving child pornography. The terms are concurrent, yielding an aggregate sentence of 360 months, the midpoint of the

advisory range. The guidelines recommended a life sentence for McCullars. The judge imposed a sentence of 240 months on count one, 360 months on count two, and life in prison on the enterprise count. Again these terms are running concurrently.

II. Discussion

Gries and McCullars raise three arguments on appeal. First, they contend that the separate sentences on the three counts of conviction violate the Double Jeopardy Clause because the conspiracies are predicates for, and thus lesser-included offenses of, the enterprise offense. Next, they argue that the government failed to prove an element of the conspiracy charged in count two—namely, that they "noticed" or "advertised" child pornography for distribution or exchange. § 2251(d)(1)(A). Finally, they argue that their sentences are unreasonably long.

The defendants failed to preserve the first two arguments, so our review is governed by the plain-error standard. Reversal is warranted only if a clear or obvious error in the proceedings below affected the defendants' substantial rights and the fairness, integrity, or public reputation of the judicial process. *United States v. Christian,* 673 F.3d 702, 708 (7th Cir. 2012).

A. Double Jeopardy

The defendants first argue that the conspiracy counts are lesser-included offenses of the enterprise

count, so imposing concurrent sentences on all three counts amounts to three separate punishments for the "same offense" in violation of the Fifth Amendment's Double Jeopardy Clause.[1] We agree.

It is well understood that two statutory violations are considered to be the same offense for purposes of double jeopardy when "one is a lesser included offense of the other." *Rutledge*, 517 U.S. at 297. The Supreme Court's decision in *Rutledge* is directly applicable to the double-jeopardy question presented here, though everyone apparently missed it in the district court. In *Rutledge* the defendant was charged with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and a coterminous continuing criminal enterprise ("CCE") count under 21 U.S.C. § 848 based on the same conduct. *Id*. at 294–95. He was convicted of both crimes and received concurrent life sentences. The question before the Court was whether the convictions and concurrent sentences violated the defendant's Fifth Amendment right not to be punished twice for the same offense. The Court held that it did and ordered the lower court to vacate the lesser count. *Id.* at 307.

Under the familiar *Blockburger* test, if "the same act or transaction constitutes a violation of two distinct statutory provisions," the double-jeopardy inquiry asks "whether each provision requires proof of a fact which the other does not." *Blockburger v. United* States, 284

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[1] "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V.

U.S. 299, 304 (1932). A lesser-included offense nests within the greater offense and therefore flunks the *Blockburger* test. *Rutledge*, 517 U.S. at 297 ("In subsequent applications of the [*Blockburger*] test, we have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").

The Court began its analysis in *Rutledge* by noting that a conviction under the CCE statute requires proof that the defendant participated in a series of predicate drug crimes "in concert" with at least five other persons. *Id.* at 295; *see also* 21 U.S.C. § 848(c)(2)(A). The "in concert" element, the Court held, "requires proof of a conspiracy that would also violate § 846." 517 U.S. at 300. This "straightforward application of the *Blockburger* test" led. the Court to conclude that "conspiracy as defined in § 846 does not define a different offense from the CCE offense defined in § 848." *Id*. The Court also noted that the CCE crime "is the more serious of the two, and . . . only one of its elements is necessary to prove a § 846 conspiracy." *Id.* Accordingly, the Court held that a conspiracy to violate § 846 is a lesser-included offense of a factually coterminous § 848 enterprise crime and remanded with instructions to vacate the lesser conviction and its concurrent sentence. *Id.* at 307.

Although *Rutledge* involved two drug crimes found in Title 21, the Court's reasoning plainly applies in the analogous context of a child-exploitation enterprise. *See, e.g.*, *United States v. Wayerski*, 624 F.3d 1342, 1350–51 (11th Cir. 2010) (holding that under

Rutledge, a child-pornography conspiracy is a lesser-included offense of a child-exploitation enterprise under § 2252A(g)). Title 18 defines a child-exploitation enterprise as "a series of" offenses involving child victims, comprising "three or more separate incidents," and committed "in concert with three or more other persons." § 2252A(g)(2). The two conspiracies charged in this case—a child-pornography conspiracy and a child-exploitation conspiracy—served as predicates for the enterprise charge. The facts necessary to prove the two conspiracies were wholly incorporated into the enterprise count; the jury's verdict establishes as much. Applying *Rutledge*, then, the conspiracy offenses are lesser-included offenses of the enterprise count.

The government confesses the *Rutledge* error but argues that reversal is unwarranted because the error was not "obvious." We disagree. The *Rutledge* rule is clear, longstanding, and directly applicable. Because the conspiracies are lesser-included offenses of the enterprise crime, multiple sentences violate the Double Jeopardy Clause. The convictions on count one and two should have been merged with the enterprise conviction prior to the imposition of sentence. The remedy is a remand for the district judge to exercise her discretion, in the first instance, to vacate either the convictions on the greater offense or the convictions on the lesser-included offenses. *Lanier n United States*, 220 F.3d 833, 841 (7th Cir. 2000) ("[W]hen the presumption against double punishment requires invalidation of the conviction for either the greater or lesser offense, the choice of which conviction to vacate rests with the

sound discretion of the district court."); *United States v. Fischer*, 205 F.3d 967, 970 n.2 (7th Cir. 2000) ("[W]hen a defendant is convicted of an offense *and* a lesser-included offense, the district court should decide which conviction to vacate).

B. Sufficiency of the Evidence

The defendants also argue that the government failed to prove all of the elements of the child-exploitation conspiracy charged in count two. As relevant here, the crime of child sexual exploitation includes the act of knowingly publishing "any notice or advertisement" to "receive, exchange, buy, produce, display, distribute, or reproduce" child pornography. § 2251(d)(1)(A). The defendants argue that a "notice" or "advertisement" implies a public component, but the evidence established only that they used a private, password-protected chat room to exchange child pornography with a limited group of individuals.

As a preliminary matter, we note that the jury's special verdict is more than sufficient to support the § 2252A(g)(2) enterprise convictions even without the conspiracy predicates. The jury found that each defendant committed multiple predicate crimes against children. And the defendants do not challenge the sufficiency of the evidence supporting their convictions on the child-pornography conspiracy charged in count one. Still, on remand the judge may opt to vacate the greater rather than the lesser convictions as a remedy

for the *Rutledge* error, so we will proceed to decision on the challenge to count two.

On the merits, we can be brief. The phrase "any notice or advertisement" in § 2251(d) casts a wide net for this offense. The ordinary meaning of "notice" is a "warning or intimation of something." *Notice*, WEBSTER'S THIRD NEW INTERNATIONAL. DICTIONARY (ed. 2002); *see also Notice,* NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining "notice" as a "notification or warning of something"). In everyday parlance, the term is not limited to warnings or notifications disseminated to the general public, and nothing about the context in which it is used here suggests a more limited meaning. Indeed, the Tenth Circuit has expressly rejected the interpretation the defendants have advanced, *United States v. Franklin*, 785 F.3d 1365, 1367–69 (10th Cir. 2015), and we see no reason to disagree. The thousands of file-sharing messages posted in this password-protected online chat room are easily sufficient to support the § 2251(d) convictions.

C. Unreasonable Sentences?

In their final argument, Gries and McCullars maintain that their sentences are unreasonably long. In particular, they attack the judge's emphasis on the risk of recidivism. They also argue that their prison terms are excessive as compared to their coconspirators' sentences.

District judges have broad discretion to prioritize and weigh the relevant sentencing factors under 18

U.S.C. § 3553(a). Appellate review for reasonableness is highly deferential; we will reverse only for an abuse of discretion. *United States v. Carter*, 538 F.3d 784, 789 (7th Cir. 2008). A reviewing court's "disagreement with how the judge weighted particular factors does not establish an abuse of discretion." *United States v. Reibet*, 688 F.3d 868, 871 (7th Cir. 2012). And because the challenged sentences fall within properly calculated guidelines ranges, the defendants face an additional high hurdle: Guidelines sentences are "entitled to a presumption of reasonableness." *United States v. Gripby*, 692 F.3d 778, 792 (7th Cir. 2012).

Giles and McCullars have not overcome the presumption of reasonableness. When it comes to weighing the relevant sentencing factors, the boundaries of the district judge's discretion are wide. *Reibel*, 688 F.3d. at 872. Here the judge touched on the most salient sentencing factors: the importance of protecting children from sexual exploitation, the need to deter the defendants and others from participating in the market for child pornography, the broad scope and lengthy duration of the criminal enterprise, the large number of people involved, the vast amount of pornography they exchanged, and the sheer depravity of the crime. Given the nature and scope of this criminal enterprise, the judge reasonably concluded that the risk of recidivism is high.

The argument that Gries and McCullars were treated more harshly than their coconspirators does nothing to rebut the presumption of reasonableness. *See Grigsby*, 692 F.3d at 793. Simply put, these

defendants were not similarly situated to the others; the other chat-room participants cooperated with investigators, pleaded guilty, and some testified for the government. *Sec United States v. Statham*, 581 F.3d 548, 556 (7th Cir. 2009). There is nothing unreasonable about imposing different sentences on differently situated members of a conspiracy.

REVERSED AND REMANDED
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APPENDIX B

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a child-exploitation enterprise. Other users of the chat room cooperated with investigators, pleaded guilty, and received sentencing consideration. The charges against Gries and McCullars proceeded to trial; several cooperators testified against them.

To convict Gries and McCullars of the enterprise offense, the government had to prove that they committed three or more crimes against children "in concert" with three or more persons. 18 U.S.C. § 2252A(g)(2). The jury found them guilty on all charges.

At sentencing the parties and the judge overlooked an important point: The conspiracy counts are lesser-included offenses of the enterprise count. Instead of merging those convictions with the enterprise conviction and imposing sentence on the greater offense alone, the judge imposed concurrent sentences on all three convictions. That error violates the Double Jeopardy Clause. *Rutledge v. United States*, 517 U.S. 292, 307 (1996). We reverse and remand with instructions to vacate the sentences on the conspiracy counts and enter new judgments accordingly. The remaining issues on appeal are meritless or need not be addressed.

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Investigators estimated that at its peak the conspiracy included as many as 35 to 40 participants, but the government could identify only Gries, McCullars, and 11 other coconspirators. Most cooperated with investigators by handing over and decrypting their child-pornography collections. Gries also did so, but McCullars did not. Nine coconspirators pleaded guilty to a single count of engaging in a child-exploitation enterprise in violation of § 2252A(g)(2); they are serving prison terms ranging from 135 to 360 months.

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II. Discussion

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The defendants failed to preserve the first two arguments, so our review is governed by the plain-error standard. Reversal is warranted only if a clear or obvious error in the proceedings below affected the defendants' substantial rights and the fairness, integrity, or public reputation of the judicial process. *United States v. Christian*, 673 F.3d 702, 708 (7th Cir. 2012).

A. Double Jeopardy

The defendants first argue that the conspiracy counts are lesser-included offenses of the enterprise count, so imposing concurrent sentences on all three counts amounts to three separate punishments for the "same offense" in violation of the Fifth Amendment's Double Jeopardy Clause.[1] We agree.

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[1] "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . . " U.S. CONST. amend. V.

It is well understood that two statutory violations are considered to be the same offense for purposes of double jeopardy when "one is a lesser included offense of the other." *Rutledge*, 517 U.S. at 297. The Supreme Court's decision in *Rutledge* is directly applicable to the double-jeopardy question presented here, though everyone apparently missed it in the district court. In *Rutledge* the defendant was charged with conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and a coterminous continuing criminal enterprise ("CCE") count under 21 U.S.C. § 848 based on the same conduct. *Id.* at 294–95. He was convicted of both crimes and received concurrent life sentences. The question before the Court was whether the convictions and concurrent sentences violated the defendant's Fifth Amendment right not to be punished twice for the same offense. The Court held that it did and ordered the lower court to vacate the lesser count. *Id.* at 307.

Under the familiar *Blockburger* test, if "the same act or transaction constitutes a violation of two distinct statutory provisions," the double-jeopardy inquiry asks "whether each provision requires proof of a fact which the other does not." *Blockburger v. United* States, 284 U.S. 299, 304 (1932). A lesser-included offense nests within the greater offense and therefore flunks the *Blockburger* test. *Rutledge*, 517 U.S. at 297 ("In subsequent applications of the [*Blockburger*] test, we have often concluded that two different statutes define the 'same offense,' typically because one is a lesser included offense of the other.").

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in this case—a child-pornography conspiracy and a child-exploitation conspiracy—served as predicates for the enterprise charge. The facts necessary to prove the two conspiracies were wholly incorporated into the enterprise count; the jury's verdict establishes as much. Applying *Rutledge*, then, the conspiracy offenses are lesser-included offenses of the enterprise count.

The government confesses the *Rutledge* error but argues that reversal is unwarranted because the error was not "obvious." We disagree. The *Rutledge* rule is clear, longstanding, and directly applicable. Because the conspiracies are lesser-included offenses of the enterprise crime, multiple sentences violate the Double Jeopardy Clause. The convictions on count one and two should have been merged with the enterprise conviction prior to the imposition of sentence. The remedy is a remand with instructions to vacate the convictions on the lesser counts. *Rutledge*, 517 U.S. at 307.

B. Sufficiency of the Evidence

The defendants also argue that the government failed to prove all of the elements of the child-exploitation conspiracy charged in count two. As relevant here, the crime of child sexual exploitation includes the act of knowingly publishing "any notice or advertisement" to "receive, exchange, buy, produce, display, distribute, or reproduce" child pornography. § 2251(d)(1)(A). The defendants argue that a "notice" or "advertisement" implies a public component, but the evidence established only that they used a private,

password-protected chat room to exchange child pornography with a limited group of individuals.

We have no need to address this question of statutory interpretation. The conspiracy convictions must be vacated, and the jury's special verdict is more than sufficient to support the § 2252A(g)(2) enterprise convictions even without the conspiracy predicates. The jury found that each defendant committed multiple predicate crimes against children.

C. Unreasonable Sentences?

In their final argument, Gries and McCullars maintain that their sentences are unreasonably long. In particular, they attack the judge's emphasis on the risk of recidivism. They also argue that their prison terms are excessive as compared to their coconspirators' sentences.

District judges have broad discretion to prioritize and weigh the relevant sentencing factors under 18 U.S.C. § 3553(a). Appellate review for reasonableness is highly deferential; we will reverse only for an abuse of discretion. *United States v. Carter*, 538 F.3d 784, 789 (7th Cir. 2008). A reviewing court's "disagreement with how the judge weighted particular factors does not establish an abuse of discretion." *United States v. Reibel*, 688 F.3d 868, 871 (7th Cir. 2012). And because the challenged sentences fall within properly calculated guidelines ranges, the defendants face an additional high hurdle: Guidelines sentences are "entitled to a presumption of reasonableness." *United States v. Grigsby*, 692 F.3d 778, 792 (7th Cir. 2012).

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The argument that Gries and McCullars were treated more harshly than their coconspirators does nothing to rebut the presumption of reasonableness. *See Grigsby*, 692 F.3d at 793. Simply put, these defendants were not similarly situated to the others; the other chat-room participants cooperated with investigators, pleaded guilty, and some testified for the government. *See United States v. Statham*, 581 F.3d 548, 556 (7th Cir. 2009). There is nothing unreasonable about imposing different sentences on differently situated members of a conspiracy.

REVERSED AND REMANDED
WITH INSTRUCTIONS.

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of Indiana

UNITED STATES OF AMERICA

v.

JAMES MCCULLARS

Date of Original Judgment: 6/18/2015
(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 1:11CR00191-011
USM Number: 29737-001

David Mejia*
Defendant's Attorney

*Items identified with an asterisk denotes changes

Reason for Amendment:

☒ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant
☐ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☒ was found guilty on count(s) 3* after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 §2252A(g)(2)	Child Pornography Enterprise	05/16/2012	3

The defendant is sentenced as provided in pages 2 through 8 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) 1 and 2 are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If

ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

September 11, 2018
Date of Imposition of Sentence:

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

[SEAL] 9/25/2018
Date

IMPRISONMENT*

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **360 months**.

☒ The court makes the following recommendations to the Bureau of Prisons: The defendant be designated to FCI Talladega, Alabama.

☒ 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 .

☐ 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

SUPERVISED RELEASE*

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

MANDATORY CONDITIONS

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 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 conditions listed below.

CONDITIONS OF SUPERVISION*

1. You shall report to the probation office in the judicial district to which you are released within 72 hours of release from the custody of the Bureau of Prisons.

2. You shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3. You shall permit a probation officer to visit you at a reasonable time at home or another place where the officer may legitimately enter by right or consent, and shall permit confiscation of any contraband observed in plain view of the probation officer.

4. You shall not knowingly leave the judicial district without the permission of the court or probation officer.

5. You shall answer truthfully the inquiries by the probation officer, subject to your 5th Amendment privilege.

6. You shall not meet, communicate, or otherwise interact with a person you know to be engaged, or planning to be engaged, in criminal activity. You shall report any contact with persons you know to be convicted felons to your

probation officer within 72 hours of the contact.

7. You shall reside at a location approved by the probation officer and shall notify the probation officer at least 72 hours prior to any planned change in place or circumstances of residence or employment (including, but not limited to, changes in who lives there, job positions, job responsibilities). When prior notification is not possible, you shall notify the probation officer within 72 hours of the change.

8. You shall not own, possess, or have access to a firearm, ammunition, destructive device or dangerous weapon.

9. You should notify the probation officer within 72 hours of being arrested, charged, or questioned by a law enforcement officer.

10. You shall maintain lawful full time employment, unless excused by the probation officer for schooling, vocational training, or other reasons that prevent lawful employment.

11. You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

12. As directed by the probation officer, you shall notify third parties who may be impacted by the nature of the conduct underlying your current or prior offense(s) of conviction and/or shall permit the probation officer to make

such notifications and/or confirm your compliance with this requirement.

13. You shall make a good faith effort to follow instructions of the probation officer necessary to ensure compliance with the conditions of supervision.

14. You shall not have *unsupervised* meetings, activities, or visits, or intentional communications with any minor unless they have been disclosed to the probation officer and approved by the court. You shall not have *supervised* meetings, activities, visits, or intentional communications with any minor unless they have been approved by the probation officer. Before you may request approval for such meetings, activities, visits, or intentional communications (unsupervised or supervised), you must notify the person(s) having custody of any such minors) about the conviction in this case and the fact that you are under supervision.

15. You shall not be employed in any position or participate as a volunteer in any activity that involves unsupervised meetings, intentional communications, activities, or visits with minors except as disclosed to the probation officer and approved by the court.

16. You shall not participate in unsupervised meetings, intentional communications, activities, or visits with persons you know to be a registered sex offender or to have been convicted of a felony sex offense involving an adult or minor, including any child

pornography offense, except as disclosed to the probation officer and approved by the court. This condition is not intended to prevent you from participating in treatment programs or religious services with felons in such programs/services so long as the activity has been disclosed as described above.

17. You shall submit to the search by the probation officer of your person, vehicle, office/business, residence, and property, including any computer systems and hardware or software systems, electronic devices, telephones, and Internet-enabled devices, including the data contained in any such items, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or be underway involving you and that the area(s) to be searched may contain evidence of such violation or conduct. Other law enforcement may assist as necessary. You shall submit to the seizure of contraband found by the probation officer. You shall warn other occupants these locations may be subject to searches.

18. You shall not possess any child pornography or visual depictions of child erotica or nude minors. Any such material found in your possession shall be considered contraband and will be confiscated by the probation officer.

19. You shall participate in a program of treatment for sexual disorders, including periodic polygraph examinations, as directed by the

probation officer. The treatment provider should determine the type and timing of such polygraph examinations. The court authorizes the release of the presentence report and available psychological evaluations to the treatment provider, as approved by the probation officer.

20. You shall consent, at the direction of the probation officer, to having installed on your computer(s). telephone(s). electronic devices, and any hardware or software, systems to monitor your use of these items. Monitoring will occur on a random and/or regular basis. You will warn other occupants or users of the existence of the monitoring hardware or software. To promote the effectiveness of this monitoring, you shall disclose in advance all cellular phones, electronic devices, computers, and any hardware or software to the probation officer and may not access or use any undisclosed equipment.

21. You shall pay the costs associated with the following imposed conditions of supervised release/probation, to the extent you are financially able to pay: sexual disorder assessment, treatment, physiological testing, and computer monitoring systems. The probation officer shall determine your ability to pay and any schedule of payment.

I understand that I and/or the probation officer may petition the Court to modify these conditions, and the final decision to modify these terms lies with the Court. If I believe these conditions are being enforced

unreasonably, I may petition the Court for relief or clarification; however, I must comply with the directions of my probation officer unless or until the Court directs otherwise. Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the condition of supervision.

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

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/ Date
Designated Witness

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

	Assessment	JVTA Assessment[1]
TOTALS	$100.00*	

Fine	Restitution
	$50,000.00

☐ The determination of restitution is deferred until. 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[2]	Restitution Ordered	Priority or Percentage
(REDACTED)	$25,000.00	$25,000.00	1
(REDACTED)	$25,000.00	$25,000.00	1
Totals	$50,000.00	$50,000.00	

☐ Restitution amount ordered pursuant to plea agreement $

---

[1] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

[2] 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.

☐ 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
☐ fine ☐ restitution is modified as follows:

_____

APPENDIX D

UNITED STATES DISTRICT COURT

Southern District of Indiana

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 1:11CR00191-011
JAMES MCCULLARS	USM Number: 29737-001
	Kenneth L. Riggins Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☒ was found guilty on count(s) 1, 2 and 3 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252A(a)(2)	Conspiracy to Distribute and Receive Child Pornography	4/12/2012	1
18 U.S.C. § 2251(d)(1)(A)	Conspiracy to Sexually Exploit a Child	4/12/2012	2
18 U.S.C. § 2252A)(g)(2)	Child Pornography Enterprise	4/12/2012	3

The defendant is sentenced as provided in pages 2 through 5 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.

6/18/2015
Date of Imposition of Judgment

6/29/2015 Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

IMPRISONMENT

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

240 months on Count 1:
360 months on Count 2; and
Life on Count 3, all to be served concurrently.

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

☒ 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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Life

Life on each of Counts 1, 2, and 3, all be to served concurrently

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.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a tine 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 conditions listed below.

CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

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

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

14) The defendant shall submit to the search of his person, vehicle. office/business. residence and property, including computer systems and Internet-enabled devices, whenever the probation officer has a reasonable suspicion that a violation of a condition of supervision or other unlawful conduct may have occurred or he underway involving the defendant. Other law enforcement may assist as necessary. The defendant shall submit to the seizure of any contraband that is found, and should forewarn other occupants or users that the property may be subject to being searched.

15) The defendant shall not possess or use a computer. including any Internet-enabled device, unless approved by the probation officer. If approved, the defendant agrees to comply with the Computer Restriction and Monitoring Program as directed by the probation officer. The defendant is responsible for the costs associated with the monitoring program. The defendant shall advise the probation officer of all computers available for his use. The defendant shall warn other users of the existence of the monitoring software placed on the computer(s). Any computer or Internet-enabled device may he considered contraband and subject to confiscation.

16) The defendant shall participate in a program of treatment for sexual disorders and shall comply with the rules of the treatment program. The defendant shall pay a portion of the costs in accordance with his ability to pay. The Court authorizes the release of the presentence report and available psychological records to the treatment provider. as approved by the probation officer.

17) The defendant shall submit to routine polygraph examinations, as directed by the probation officer.

18) The defendant shall not possess any pornography, erotica or nude images if the same is detrimental to his treatment progress as determined by the treatment provider. Any such material found in the defendant's possession shall be considered contraband and may be confiscated by the probation officer.

19) The defendant shall not have unsupervised contact with a minor child unless approved by the Court. Supervised contact with a minor child must he approved in advance by the probation officer.

20) The defendant shall not be employed in any position or participate as a volunteer in any activity that involves contact with minors except as approved by the probation officer.

21) The defendant shall register as a sex offender with the appropriate authorities of any state in which he resides, is employed, or attends school

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

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

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Office/ Designated Witness Date

CRIMINAL MONETARY PENALTIES

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

	Assessment	**Fine**	**Restitution**
TOTALS	$ 300.00	$	$ 50,000

☐ The determination of restitution is deferred until _____. 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 non-federal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]	[redacted]	$25,000.00	
[redacted]	[redacted]	$25,000.00	
TOTALS	$ $50,000.00	$ $50,000.00	

☐ 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 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:

---

* 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.

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 _____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C ☐ D ☐ E, or ☐ G below; or

B ☒ Payment to begin immediately (may be combined ☐ C, ☐ D, or ☐ G 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 ☐ If this case involves other defendants, each may be held jointly and severally liable for

payment of all or part of the restitution ordered herein and the Court may order such payment in the future. The victims' recovery is limited to the amount of loss, and the defendant's liability for restitution ceases if and when the victims receive full restitution.

G ☐ 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 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 and corresponding payee, if appropriate.

Defendant Name	Case Number	Joint & Several Amount

☐ 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: See attached page.

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

ADDITIONAL FORFEITED PROPERTY

1. Any visual depiction, book, magazine, periodical, film, videotape, or other matter which contains child pornography;

2. any real property used or intended to be used to commit or to promote the commission of the offenses. This includes the entire residence and property located at 3114 Adonna Drive, NW in Huntsville, Alabama;

3. any personal property used or intended to be used to commit or to promote the commission of the offenses. This includes all computers, storage media, cameras, and electronic equipment taken from him or his residence by law enforcement officers during the investigation of these offenses;

4. any property, real or personal, constituting or traceable to gross profits or other proceeds from the offenses.

APPENDIX E

H.R. Rep. No. 910, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5952, 1986 WL 31957, H.R. REP. 99–910 (Leg.Hist.) P.L. 99–628, CHILD SEXUAL ABUSE AND PORNOGRAPHY ACT OF 1986 DATES OF CONSIDERATION AND PASSAGE
House September 29, 1986
Senate October 18, 1986
House Report (Judiciary Committee) No. 99–910, Sept. 27, 1986 [To accompany H.R. 5560]
Cong. Record Vol. 132 (1986)
No Senate Report was submitted with this legislation.

HOUSE REPORT NO. 99–910

September 27, 1986

The Committee on the Judiciary, to whom was referred the bill (H.R. 5560) to amend title 18 of the United States Code to ban the production and use of advertisements for child pornography or solicitations for child pornography, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * * *

SUMMARY OF THE BILL

The bill closes a loophole regarding interstate transportation of children for the purpose of producing child pornography to cover transportation even if no commercial purpose exists.

The bill prohibits advertising—to buy or sell child pornography, to offer or seek children for sex acts for the purpose of producing child pornography, or to participate with children in sex acts for the purpose of producing child pornography.

The bill defines the term 'visual depiction' to include undeveloped film and videotape.

The bill rewrites the Mann Act ('White Slave Traffic') to eliminate its anachronistic features and to make it gender neutral. It also deletes the commercial purpose requirement in prohibited transportations in 18 U.S.C. 2423.

BACKGROUND

Of all of the crimes known to our society, perhaps none is more revolting than the sexual exploitation of children, particularly for the purpose of producing child pornography. These terrible crimes have long been a concern of the Committee on the Judiciary which developed the original legislation banning this activity in the 95th Congress.

More recently the Subcommittee on Crime has continued to examine the seriousness of this problem.[1]

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[1] See Hearings before the Subcommittee on Crime of the House Committee on the Judiciary on H.R. 3062 and related bills relating to Protection of Children Against Sexual Exploitation, June 16, 1983, Serial No. 138, 98th Cong. 1st sess.; and Hearings before the Subcommittee on Crime of the House Committee on the Judiciary on Implementation of the Child Protection Act, August 14, 1986, 99th Cong. 2d sess.

The production and distribution of child pornography continues to be a serious problem. Senator William V. Roth, Jr. (Delaware), who chaired hearings investigating child pornography and pedophilia by the Permanent Subcommittee on Investigations of the Senate Committee on Government Affairs in 1984 and 1985, testified before the Subcommittee that there may be as many as one half million children and adolescents who are the victims of sexual abuse annually.[2] Senator Roth shared with the Committee a 76 page Draft Report of the Permanent Subcommittee on Investigations on 'Child Pornography and Pedophilia' that demonstrates the continuation of widespread distribution of child pornography and included the Subcommittee's conclusions and recommendations.[3]

THE 1978 LEGISLATION

In the 95th Congress, Public Law 95–225 was enacted, adding Chapter 110, 'Sexual Exploitation of Children', to title 18, United States Code. This chapter created a Federal felony offense of sexual exploitation of children. The offense consisted of inducing persons under the age of 16 to engage in explicit sexual conduct

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[2] Statement of Senator William V. Roth, Jr. at the Hearings before the Subcommittee on Crime of the House Committee on the Judiciary on Implementation of the Child Protection Act, August 14, 1986, 99th Cong. 2d sess.

[3] Hearings of the Senate Permanent Subcommittee on Investigations on Child Pornography and Pedophilia. November 29–30, 1984, S. Hrg. 98–1277, Part 1, 98th Cong. 2d sess.; February 21, 1985, S. Hrg. 99–18, Part 2, 99th Cong. 1st sess.

for the purpose of filming or photographing the conduct and shipping the product in interstate commerce.

Chapter 110, as originally enacted, also prohibited the commercial distribution of obscene child pornography depicting such sexual conduct by minors.

Finally, it amended one section of what is popularly known as the Mann Act (Chapter 117 of title 18). This section, 18 U.S.C. 2423, previously was an enhancement penalty provision for 'white slave' traffic if the female being transported was a minor. The amendment extended coverage to minor males as well as females, and, in lieu of prohibiting such transportation for 'prostitution or other immoral purposes', prohibits transportation for prostitution or any 'commercially exploited' explicit sexual conduct.

THE 1984 AMENDMENTS

On May 21, 1984, Public Law 98–292 (H.R. 3635, H. Rept. 98–536) was enacted, making several changes to correct short-comings identified in the first few years of implementation of chapter 110, and taking into account a landmark Supreme Court decision (*New York* v. *Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982)). Chapter 110 had been enacted under the assumption that distributors who had no role in the direct child abuse (recruiting for the activity to be filmed, and the filming and production) could only be prosecuted if the material in question were obscene under the Supreme Court's obscenity rulings, most

notably *Miller* v. *California*. (413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)).

In *Ferber*, the Supreme Court ruled that such child pornography material is entitled to no First Amendment protection, and that obscenity need not be proven. The Court reasoned that all persons involved in distribution of such materials are necessary links back to the original acts of child abuse, and can be prosecuted for such abuse. (The case upheld a New York statute similar to chapter 110, but which did not require proof of obscenity.)

The *Ferber* decision prompted one of the amendments made in the 1984 amendments, namely the elimination of the obscenity requirement.

A second change was to eliminate the requirement that interstate distribution be for purpose of sale; experience revealed that much if not most child pornography material is distributed through an underground network of pedophiles who exchange the material on a non-commercial basis, and thus no sale is involved.

A third change was to raise the age of protection of children from such activities from those under 16 to those under 18 years of age which made these cases much easier to prosecute.

Other changes included permitting wiretaps in investigations, increasing fine levels, and authorizing criminal and civil forfeiture of property involved in these offenses.

These changes were signed into law on May 21, 1984. (P.L. 98–292). Since enactment of the Child Protection Act of 1984, enforcement of the law against the sexual exploitation of children has increased dramatically.

During the 6 years and 4 months between January 1, 1978 and May 20, 1984, there were a total of 69 individuals indicted and 65 individuals convicted of violating chapter 110 of title 18. In the 28 months from May 21, 1984 through September 26, 1986, 274 individuals have been indicted and 214 individuals have been convicted of violating chapter 110 of title 18 according to cases reported to the Department of Justice so far.[4] It is likely that the actual number is higher. The Committee is very pleased with the substantially increased enforcement of this chapter that these statistics represent.

SUBCOMMITTEE ACTION

On August 14, 1986, the Subcommittee on Crime held an oversight hearing on the implementation of chapters 110 and 117 of title 18. Testimony was heard from the Department of Justice, from the U.S. Postal Inspection Service which does much of the investigative work involved in implementing these statutes, and from Senator William V. Roth, Jr., Chairman of the Senate Permanent Subcommittee on Investigation,

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[4] Telephone conversation between Don Nicholson, Criminal Division, U.S. Department of Justice and Staff of the Subcommittee on Crime, September 26, 1986.

which did an extensive investigation of child pornography in this Congress.

On September 19, 1986, Representative William J. Hughes introduced H.R. 5560, the 'Child Sexual Abuse and Pornography Act of 1986'.

On September 24, 1986, H.R. 5560 was marked up by the Subcommittee on Crime. An amendment offered by Representative Bill McCollum was adopted to delete the commercial purpose requirement and to further modernize section 2423 of title 18, United States Code, with its greater penalties for transportation of minors in interstate or foreign commerce for the purpose of prostitution or illegal sexual activity. A quorum being present, the bill, as amended, was ordered favorably reported to the full committee as a single amendment in the nature of a substitute.

COMMITTEE ACTION

On September 25, 1986, the Committee on the Judiciary, a quorum being present, approved the amendment in the nature of the substitute and ordered the bill favorably reported to the House by a voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The short title is the 'Child Sexual Abuse and Pornography Act of 1986'.

SECTION 2. AVERTISING OFFENSES RELATED TO SEXUAL EXPLOITATION OF CHILDREN

This section creates two new offenses. First, it prohibits anyone from knowingly making, printing or publishing, or causing to be made, printed or published, any notice or advertisement seeking or offering to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct.

Second, it prohibits anyone from knowingly making, printing or publishing, or causing to be made, printed or published, any notice or advertisement seeking or offering participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct. This prohibits a person from advertising that he wishes to participate in sex acts with minors for the purpose of producing visual depictions. It prohibits a child, or an agent for a child, from advertising the child's availability for sex acts for the purpose of producing pornography, and it prohibits a person from advertisting to recruit children for sex acts for the purpose of producing pornography.

These offenses are committed when the actor knows or has reason to know that the notice or advertisement will be transported in interstate or foreign commerce or mailed; or the notice or advertisement is

transported in interstate or foreign commerce or mailed.

The government must prove that the defendant knew the character of the visual depictions as depicting a minor engaging in sexually explicit conduct but need not prove that the defendant actually knew the person depicted was in fact under 18 years of age or that the depictions violated Federal law.

The advertising of child pornography has been a very serious problem. There are a number of magazines and newsletters which serve to advertise the availability of child pornography or to offer children to participate in sexually explicit conduct. Control of advertising of this type was the first recommendation of the Senate Permanent Subcommittee on Investigations.[5] The advertisement itself need not be a visual depiction, nor it must be obscene for a conviction to be sustained. The Committee believes that this comports with the first amendment.[6]

A recent technological phenomenon, computer 'bulletin boards,' have been discovered to be used to offer pornography for sale or exchange or to advertise the

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[5] Investigation Report on 'Child Pornography and Pedophilia,' Senate Permanent Subcommittee on Investigations, pp. 66–67, (1986 Draft).

[6] *See* Memorandum—'Advertising Prohibitions Under the Comstock Act' [18 U.S.C. Section 1461], by Rita Ann Reimer, Legislative Attorney, American Law Division, July 14, 1986 in Hearings before the Subcommittee on Crime of the House Committee on the Judiciary on Implementation of the Child Protection Act, August 14, 1986, 99th Cong. 2d sess.

availability of children for sexual exploitation.[7] Use of a computer bulletin boards for such notices, since they are a means of interstate commerce, would also be prohibited by this section.

SECTION 3. TRANSPORTATION OF CHILDREN FOR PURPOSES OF SEXUAL EXPLOITATION

Currently the offense of transporting a minor across state lines for the purpose of having the minor participate in prohibited sexual conduct (18 U.S.C. 2423, chapter 117 of title 18) is prosecutable only if the prohibited sexual conduct will be commerically exploited. This is not a problem in regard to the conduct for which section 2423 was originally intended—prostitution—since commercial purpose is an element of prostitution. However, in the case of transportation for the purpose of participating in the production of child pornography materials, private (rather than commercial) exploitation is frequently the objective, and thus section 2423 cannot now be successfully invoked.

To address this problem, this section amends section 2251 of title 18 (chapter 110) directly since the gap in coverage relates directly to transportation for the purpose of producing child pornography. Naturally, this amendment does not contain a commercial requirement.

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[7] Investigation Report on 'Child Pornography and Pedophilia,' Senate Permanent Subcommittee on Investigations, pp. 21–23, (1986 Draft).

SECTION 4. CLARIFICATION OF MEANING OF VISUAL DEPICTION

The original 1978 legislation contained a definition of 'visual depiction', which include undeveloped film within the definition. In the 1984 amendments, the defined term 'visual or print medium' (which term was replaced in the offenses by the term 'visual depiction') was dropped as a defined term since it was felt that a definition was no longer necessary. The bill defines the term 'visual depiction' to include express coverage of undeveloped film and videotape to facilitate prosecutions involving such media, at the recommendation of the U.S. Postal Inspection Service. The Committee intends that any visual depiction of sexually explicit conduct that can be retrieved by electromagnetic, chemical or other means shall also be included in the terms 'visual depiction'. The Committee approves of the holding of the U.S. Court of Appeals for the Ninth Circuit in rejecting the argument that the term 'visual depiction' does not include undeveloped film (*U.S.* v. *James E. Smith*, 795 F. 2d 841, 846–7 (9th Cir. July 29, 1986).

SECTION 5. MANN ACT AMENDMENTS

Subsection (a)

A common term for the condition of women compelled to work as prostitutes in the early 20th century was 'white slavery.' The Act of June 25, 1910, based on legislation introduce by Representative James R.

Mann of Illinois (1856–1922), has been codified as sections 2421 and 2422 of title 18.

This subsection replaces the current chapter heading for chapter 117, 'White Slave Traffic' with a more descriptive and appropriate heading: 'Transportation For Illegal Sexual Activity and Related Crimes.'

Subsection (b)

The Mann Act (sections 2421–2422, and section 2424 of title 18, U.S.C.) now applies only to offenses involving the transportation of females. The problem of the sexual exploitation of young males is equally as serious. This section rewrites these sections to make gender neutral. The section also deletes obsolete terminology (e.g. 'compel her to give herself up to the practice of prostitution, or to give herself up to debauchery,').

The change in section 2421 also substitutes for the phrase 'for any other immoral purpose' as a purpose for the transportation which violates the section, the more precise standard of 'with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense.'

Under this language, the offense is transporting any person for illegal sexual activity under any applicable law—Federal, State or local. This is a more appropriate standard for a Federal offense than the current vague standard of 'immoral purpose,' under which the transportation can be an offense even when

the conduct for which the transportation takes place (such as non-commercial sex between consenting unmarried adults) violates no law in any of the jurisdictions involved in the travel. This change reflects a proper recognition of community standards regarding acceptable sexual behavior, in that Federal law would, in effect, apply those standards.

The amendment also deletes an unnecessary paragraph relating to one who 'procures or obtains any ticket or tickets . . . to be used' for the interstate transportation. This conduct would constitute aiding and abetting the commission of this offense and thus a person who engages in such conduct would be treated as a violator of the Mann Act offenses by section 2 of title 18 of the United States Code relating to principals. This language in 18 U.S.C. 2421 is superfluous.

Similarly, sections 2422 and 2423 are rewritten in modern form and the commercial purpose requirement is deleted from section 2423.

Subsection (c)

The amendments in this subsection amended section 2424 of title 18 to make it gender neutral.

COMMITTEE APPROVAL

On September 25, 1986, a quorum being present, the Committee on the Judiciary ordered favorably reported to the House H.R. 5560, as amended, as a single amendment in the nature of a substitute.

OVERSIGHT FINDINGS

The Committee makes no oversight findings with respect to this legislation other than those included in the text of this report.

In regard to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Operations.

NEW BUDGET AUTHORITY

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, H.R. 5560 creates no new budget authority or increased tax expenditures for the Federal Government.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

FEDERAL ADVISORY COMMITTEE ACT OF 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

COST ESTIMATE

In regard to clause 7 of rule XIII of the Rules of the House of Representatives, the Committee agrees with the cost estimate of the Congressional Budget Office.

STATEMENT OF THE CONGRESSIONAL BUDGET OFFICE

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate of H.R. 5560.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 26, 1986.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5560, the Child Sexual Abuse and Pornography Act of 1986, as ordered reported by the House Committee on the Judiciary, September 25, 1986. CBO estimates that enactment of this bill would result in no significant cost to the federal government, and in no cost to state or local governments.

H.R. 5560 would make illegal the advertising for child pornography and the interstate transportation of

any minor for the purpose of producing child pornography, prostitution or any sexual activity for which any person can be charged with a criminal offense. Currently the interstate transportation of minors is illegal only when it is for prostitution or for prohibited sexual conduct that will be commercially exploited. This bill also makes a number of technical changes to the Mann Act (regarding transportation for illegal sexual activity and related crimes) to eliminate anachronistic features and to make it gender neutral.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

ROSEMARY MARCUSS
(For Rudolph G. Penner).