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FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 14 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CRAIG ALLEN MORGENSTERN,

Defendant-Appellant.

No. 20-35322

D.C. Nos. 2:19-cv-00058-WFN  
2:14-cr-00161-WFN-1

Eastern District of Washington,  
Spokane

ORDER

Before: RAWLINSON and BRESS, Circuit Judges.

The motion (Docket Entry No. 7) to file an oversized request for a certificate of appealability is granted. The request for a certificate of appealability (Docket Entry No. 10) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

**DENIED.**

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Eastern District of Washington,  
Spokane

ORDER

Before: IKUTA and MILLER, Circuit Judges.

Appellant's motion for an extension of time (Docket Entry No. 17) is granted. Appellant's motion for reconsideration (Docket Entry No. 18) is deemed timely and is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

*JAE*  
*DIRECT APPEAL  
NO PLEA*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CRAIG ALLEN MORGENSTERN,  
Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
725 Fed. Appx. 546; 2018 U.S. App. LEXIS 5239  
No. 16-30177

February 5, 2018\*\*, Submitted Seattle, Washington

\*\* The panel unanimously concludes this case is suitable for decision without oral argument.

See Fed. R. App. P. 34(a)(2)(C).

**[March 1, 2018, Filed]**

**Notice:**

**PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING  
THE CITATION TO UNPUBLISHED OPINIONS.**

**Editorial Information: Prior History**

{2018 U.S. App. LEXIS 1}Appeal from the United States District Court for the Eastern District of Washington. D.C. No. 14-CR-00161-WFN. Wm. Fremming Nielsen, Senior District Judge, Presiding.

**Disposition:**

AFFIRMED.

**Counsel**

For UNITED STATES OF AMERICA, Plaintiff - Appellee: James A. Goeke, Assistant U.S. Attorney, United States Attorney's Office, Eastern District of Washington, Spokane, WA; Stephanie Joyce Lister, Assistant U.S. Attorney, [COR NTC Assist US Attorney] USSP - OFFICE OF THE U.S. ATTORNEY, Spokane, WA.

For CRAIG ALLEN MORGENSTERN, Defendant - Appellant: Bryan Paul Whitaker, Attorney, Bryan P. Whitaker, Attorney at Law, Spokane, WA.

**Judges:** Before: GOULD and PAEZ, Circuit Judges, and MCSHANE, \*\*\* District Judge.

**CASE SUMMARY** Defendant's convictions for aggravated sexual assault, production of child pornography, and transportation with intent to engage in sexual contact with a child were affirmed since there was sufficient evidence, and he was not deprived of his right to a fair trial.

**OVERVIEW: HOLDINGS:** [1]-There was sufficient evidence to support defendant's convictions for aggravated sexual abuse of a child; [2]-The jury was properly instructed as to the definition of sexual acts and any argument that they may have confused that definition with the standard for sexually explicit conduct required for conviction of the production of child pornography counts was not supported by the record; [3]-There was insufficient evidence of sedation to support his convictions for aggravated sexual assault; [4]-There was sufficient evidence to support venue or the eight counts of aggravated sexual assault; [5]-The trial court did not err by failing to exclude the victims' parents from the courtroom during the trial; [6]-An alleged sleeping juror and alleged inadequate deliberations not deprive him of a fair trial.

**OUTCOME:** Convictions affirmed.

LexisNexis Headnotes

**Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt**  
**Evidence > Procedural Considerations > Weight & Sufficiency**

In reviewing a challenge to the sufficiency of the evidence to support a verdict in a criminal case, a court asks whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

**Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > Elements**

A violation of 18 U.S.C.S. § 2241(c), aggravated sexual abuse of a child, occurs when a person engages in a sexual act with a person under the age of 16. Sexual act is defined as contact between the mouth and penis, or the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. 18 U.S.C.S. § 2246(2)(B) and (D).

**Criminal Law & Procedure > Jurisdiction & Venue > Venue**

**Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review**

A district court's venue determination is reviewed de novo.

**Criminal Law & Procedure > Jurisdiction & Venue > Venue**

**Evidence > Procedural Considerations > Burdens of Proof > Allocation**

**Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence**

The government must establish proper venue by a preponderance of the evidence.

**Criminal Law & Procedure > Jurisdiction & Venue > Venue**

**Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Children > Elements**

Aggravated sexual abuse of a child is a continuing offense. Venue for a continuing offense is proper if an essential conduct element of the offense begins in, continues into, or is completed in the charging district. The essential conduct elements of aggravated sexual abuse are crossing a state line with intent to engage in a sexual act with a child and engaging in or attempting to engage in a sexual act with a child.

**Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof**

**Criminal Law & Procedure > Witnesses**

A crime victim has the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. 18 U.S.C.S. § 3771(a)(3).

**Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial**

**Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > New Trial**

**Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Juror Misconduct**

An appellate court reviews for abuse of discretion a district court's denial of a motion for a new trial due

to juror misconduct.

**Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial  
Evidence > Procedural Considerations > Burdens of Proof > Allocation**

The presence of a sleeping juror during trial does not, *per se*, deprive a defendant of a fair trial. Rather, a defendant asserting that a sleeping or absent juror deprived him of a fair trial must demonstrate actual prejudice.

## Opinion

{725 Fed. Appx. 548} MEMORANDUM\*

Appellant Craig Allen Morgenstern raises several challenges to his convictions for Aggravated Sexual Assault, Production of Child Pornography, and Transportation with Intent to Engage in Sexual Contact with a Child. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We affirm.

Morgenstern's first assignment of error is that there was insufficient evidence to support his convictions for Aggravated Sexual Abuse of a Child. "In reviewing a challenge to the sufficiency of the evidence to support a verdict in a criminal case, we ask 'whether, {2018 U.S. App. LEXIS 2} after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Lukashov, 694 F.3d 1107, 1118 (9th Cir. 2012) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

A violation of 18 U.S.C. § 2241(c), Aggravated Sexual Abuse of a Child, occurs when a person engages in a "sexual act" with a person under the age of 16. "Sexual act" is defined as contact between the mouth and penis, or "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. §§ 2246(2)(B), (D).

The overwhelming evidence of "sexual acts" presented at trial was sufficient evidence for a trier of fact to find beyond a reasonable doubt that Morgenstern committed Aggravated Sexual Abuse of a Child. See *Lukashov*, 694 F.3d at 1118-19. The jury was properly instructed as to the definition of "sexual acts" and any argument that they may have confused that definition with the standard for "sexually explicit conduct" required for conviction of the Production of Child Pornography counts is not supported by the record.

Morgenstern's second assignment of error is that there was insufficient evidence of sedation to support his convictions for Aggravated Sexual Assault. In addition to expert testimony, evidence presented at trial showed that the victims appeared to be asleep during the abuse. Person A was not aware the abuse occurred until investigators showed him pictures of Morgenstern abusing him. There was evidence that Morgenstern placed sedatives in the hot chocolate he gave some of the victims. Morgenstern provided some {725 Fed. Appx. 549} boys with pills and liquor at a hotel room. Images showed three seemingly unconscious boys being abused in the same hotel room. A rational jury could have concluded beyond a reasonable doubt that the victims in each relevant count were sedated.

Morgenstern's third assignment of error is that there was insufficient evidence to prove venue in the Eastern District of Washington for the eight counts of Aggravated Sexual Assault. The district court's

## A09CASES

venue determination is reviewed *de novo*. See *United States v. Gonzalez*, 683 F.3d 1221, 1224 (9th Cir. 2012). The government must establish proper venue by a preponderance of the evidence. See *id.*

Aggravated Sexual Abuse of a Child is a continuing offense. See *Lukashov*, 694 F.3d at 1121. “[V]enue for a continuing offense is proper if an ‘essential conduct element’ of the offense begins in, continues{2018 U.S. App. LEXIS 4} into, or is completed in the charging district.” *Id.* at 1120-21 (quoting 18 U.S.C. § 3237(a) and *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280, 119 S. Ct. 1239, 143 L. Ed. 2d 388 (1999)). The essential conduct elements of aggravated sexual abuse are: “(1) crossing a state line, (2) with intent to engage in a sexual act with a child, and (3) engaging in or attempting to engage in a sexual act with a child.” *Id.* at 1121.

A rational jury could reasonably infer that Morgenstern travelled from Washington to Mississippi bringing cameras, tripods, and video games he did not play with a motivating purpose of sexually abusing Person A. Morgenstern’s argument that he travelled to Mississippi for work ignores the human ability and propensity to act in light of multiple motives and purposes.” *Id.* at 1118. Similarly, a rational jury could conclude Morgenstern travelled to an amusement park in Idaho with a motivating purpose of abusing the three brothers in a hotel room.

Morgenstern’s fourth assignment of error is that the trial court erred by failing to exclude the victims’ parents from the courtroom during the trial. As crime victims, however, the parents had “[t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would{2018 U.S. App. LEXIS 5} be materially altered if the victim heard other testimony at that proceeding.” 18 U.S.C. § 3771(a)(3); *In re Mikhel*, 453 F.3d 1137, 1139 (9th Cir. 2006) (per curiam).

The parents’ testimony at trial consisted of establishing the ages of their children and describing each family’s general relationship with Morgenstern. Neither parent testified to witnessing any abuse. The government’s case rested largely on photographic and video evidence taken from Morgenstern’s hard drives. Considering the evidence against Morgenstern and each parent’s actual testimony, there is no evidence either parent materially altered testimony by remaining in the courtroom during the trial.

Finally, Morgenstern argues that a sleeping juror and inadequate deliberations deprived him of a fair trial. We review for abuse of discretion the district court’s denial of a motion for a new trial due to juror misconduct. *United States v. Murphy*, 483 F.3d 639, 642 (9th Cir. 2007).

The jury was presented with an overwhelming amount of digital evidence that depicted Morgenstern performing sexual acts on the victims. No defense was presented at trial Morgenstern was not denied a fair trial based on the length of the jurors’ deliberations.

*THE SUFFICIENT TIME TO SLEEP AND REST IS NOT A DEFENSE*  
At a hearing on Morgenstern’s motion for a new trial, the trial judge concluded there was no evidence a specific juror{2018 U.S. App. LEXIS 6} fell asleep and, even if he did, it was for a {725 Fed. Appx. 550} brief moment. We agree with the district court that under the circumstances, Morgenstern was not deprived of a fair trial. “[T]he presence of a sleeping juror during trial does not, per se, deprive a defendant of a fair trial.” *United States v. Olano*, 62 F.3d 1180, 1189 (9th Cir. 1995) (*Olano II*).

Rather, a defendant asserting that a sleeping or absent juror deprived him of a fair trial must demonstrate actual prejudice. See *id.* at 1189-90 (discussing *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), abrogated on other grounds by *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016)).

Considering the overwhelming evidence of Morgenstern’s guilt, and the fact that the evidence

presented while the juror was allegedly sleeping was not helpful to Morgenstern's defense, Morgenstern cannot demonstrate prejudice.1See *Springfield*, 829 F.2d at 864.

**AFFIRMED.**

#### **Footnotes**

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)(C).

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\*

This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1

While the juror was allegedly sleeping, the prosecution's expert anesthesiologist testified about sedative effects of drugs like benzodiazepine.

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

1 Jun 23, 2020  
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12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON  
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16 UNITED STATES OF AMERICA,  
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18 Plaintiff,  
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20 -vs-  
21 CRAIG ALLEN MORGENSTERN,  
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23 Defendant.

24 No. 2:14-CR-0161-WFN  
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27 ORDER RE: MOTION FOR  
28 TRANSCRIPTS AT GOVERNMENT  
EXPENSE

12 Pending before the Court is Defendant's Motion for Transcripts at Government  
13 Expense. ECF No 226. It appears that Defendant intended this request to be heard by the  
14 Ninth Circuit as it pertains to his pending appeal. This Court does not have jurisdiction  
15 during an appeal. The Court notes, however, that the bulk of the transcripts have already  
16 been created and are available on the docket. Additionally, the Defendant was found to be  
17 indigent and has been incarcerated since then. ECF No. 92. The Court has reviewed the  
18 file and Defendant's Motion and is fully informed. Accordingly,

19 **IT IS ORDERED** that Defendant's Motion for Transcripts at Government Expense,  
20 filed May 27, 2020, ECF No. 226, is **DENIED AS MOOT**.

21 The District Court Executive is directed to file this Order and provide copies to  
22 counsel **AND TO pro se** Defendant.

23 **DATED** this 23rd day of June, 2020.

24  
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27 WM. FREMMING NIELSEN  
28 SENIOR UNITED STATES DISTRICT JUDGE

06-19-20

ORDER

APPENDIX D

## Rule 29. Motion for a Judgment of Acquittal

**(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

**(b) Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

**(c) After Jury Verdict or Discharge.**

**(1) Time for a Motion.** A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

**(2) Ruling on the Motion.** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

**(3) No Prior Motion Required.** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

**(d) Conditional Ruling on a Motion for a New Trial.**

**(1) Motion for a New Trial.** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

**(2) Finality.** The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

**(3) Appeal.**

**(A) Grant of a Motion for a New Trial.** If the court conditionally grants a motion

for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

**(B) Denial of a Motion for a New Trial.** If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

**Rule 52. Harmless and Plain Error.**

**(a) Harmless error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

**(b) Plain error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

## § 2241. Aggravated sexual abuse

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

(1) by using force against that other person; or

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

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

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

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

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

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

(B) engages in a sexual act with that other person;

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

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

penalty is imposed, the defendant shall be sentenced to life in prison.

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

## **§ 2244. Abusive sexual contact**

**(a) Sexual conduct in circumstances where sexual acts are punished by this chapter [18 USCS §§ 2241 et seq.].** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate—

(1) subsection (a) or (b) of section 2241 of this title [18 USCS § 2241] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title [18 USCS § 2242] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title [18 USCS § 2243] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title [18 USCS § 2243] had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title [18 USCS § 2241] had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

**(b) In other circumstances.** Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

**(c) Offenses involving young children.** If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section.

## § 2245. Offenses resulting in death

**(a) In general.** A person who, in the course of an offense under this chapter [18 USCS §§ 2241 et seq.], or section 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425], murders an individual, shall be punished by death or imprisoned for any term of years or for life.

## **§ 2246. Definitions for chapter**

As used in this chapter [18 USCS §§ 2241 et seq.]—

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means—

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency; and

## **§ 2251. Sexual exploitation of children**

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

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

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

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

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

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

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

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

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

shall be punished as provided under subsection (e).

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

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

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

**(e)** Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591 [18 USCS § 1591], chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 18 USCS §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117 [18 USCS §§ 2251 et seq., 18 USCS §§ 1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

## **§ 2421. Transportation generally**

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

### **(b) Requests to prosecute violations by State Attorneys General.**

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

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

## § 2422. Coercion and enticement

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

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

## **§ 2423. Transportation of minors**

### **(a) Transportation with intent to engage in criminal sexual activity.**

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

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

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

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

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

**(f) Definition.** As used in this section, the term "illicit sexual conduct" means—

(1) a sexual act (as defined in section 2246 [18 USCS § 2246]) with a person under 18 years of age that would be in violation of chapter 109A [18 USCS §§ 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

(2) any commercial sex act (as defined in section 1591 [18 USCS § 1591]) with a person under 18 years of age; or

(3) production of child pornography (as defined in section 2256(8) [18 USCS § 2256(8)]).

**(g) Defense.** In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by clear and convincing evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

**§ 2427. Inclusion of offenses relating to child pornography in definition of sexual activity for which any person can be charged with a criminal offense**

In this chapter [18 USCS §§ 2421 et seq.], the term “sexual activity for which any person can be charged with a criminal offense” includes the production of child pornography, as defined in section 2256(8).

## **§ 3006A. Adequate representation of defendants**

### **(a) Choice of plan.**

Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

**(1) Representation shall be provided for any financially eligible person who—**

**(A) is charged with a felony or a Class A misdemeanor;**

**(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title [18 USCS § 5031];**

**(C) is charged with a violation of probation;**

**(D) is under arrest, when such representation is required by law;**

**(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;**

**(F) is subject to a mental condition hearing under chapter 313 of this title [18 USCS §§ 4241 et seq.];**

**(G) is in custody as a material witness;**

**(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;**

**(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or**

**(J) is entitled to the appointment of counsel under section 4109 of this title [18 USCS § 4109].**

**(2) Whenever the United States magistrate [United States magistrate judge] or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who—**

**(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or**

**(B) is seeking relief under section 2241, 2254, or 2255 of title 28.**

**(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:**

**(A)** Attorneys furnished by a bar association or a legal aid agency.

**(B)** Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

**(b) Appointment of counsel.** Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) and appears without counsel, the United States magistrate [United States magistrate judge] or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate [United States magistrate judge] or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate [United States magistrate judge] or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

**(c) Duration and substitution of appointments.** A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate [United States magistrate judge] or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate [United States magistrate judge] or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate [United States magistrate judge] or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate [United States magistrate judge] or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

**(d) Payment for representation.**

**(1)** Hourly rate. Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding \$60 per hour for time expended in court or before a United States magistrate [United States magistrate judge] and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines

that a higher rate of not in excess of \$75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate [judge] and for time expended out of court. The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1986, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate [United States magistrate judge] or the court, and the costs of defending actions alleging malpractice of counsel in furnishing representational services under this section. No reimbursement for expenses in defending against malpractice claims shall be made if a judgment of malpractice is rendered against the counsel furnishing representational services under this section. The United States magistrate or the court shall make determinations relating to reimbursement of expenses under this paragraph.

(2) Maximum amounts. For representation of a defendant before the United States magistrate [United States magistrate judge] or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$7,000 for each attorney in a case in which one or more felonies are charged, and \$2,000 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed \$5,000 for each attorney in each court. For representation of a petitioner in a non-capital habeas corpus proceeding, the compensation for each attorney shall not exceed the amount applicable to a felony in this paragraph for representation of a defendant before a judicial officer of the district court. For representation of such petitioner in an appellate court, the compensation for each attorney shall not exceed the amount applicable for representation of a defendant in an appellate court. For representation of an offender before the United States Parole Commission in a proceeding under section 4106A of this title [18 USCS § 4106A], the compensation shall not exceed \$1,500 for each attorney in each proceeding; for representation of an offender in an appeal from a determination of such Commission under such section, the compensation shall not exceed \$5,000 for each attorney in each court. For any other representation required or authorized by this section, the compensation shall not exceed \$1,500 for each attorney in each proceeding. The compensation maximum amounts provided in this paragraph shall increase simultaneously by the same percentage, rounded to the nearest multiple of \$100, as the aggregate percentage increases in the maximum hourly compensation rate paid pursuant to paragraph (1) for time expended since the case maximum amounts were last adjusted.

(3) Waiving maximum amounts. Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate [United States magistrate judge] if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or

senior circuit judge.

**(4) Disclosure of fees.**

**(A) In general.** Subject to subparagraphs (B) through (E), the amounts paid under this subsection for services in any case shall be made available to the public by the court upon the court's approval of the payment.

**(B) Pre-trial or trial in progress.** If a trial is in pre-trial status or still in progress and after considering the defendant's interests as set forth in subparagraph (D), the court shall—

(i) redact any detailed information on the payment voucher provided by defense counsel to justify the expenses to the court; and

(ii) make public only the amounts approved for payment to defense counsel by dividing those amounts into the following categories:

(I) Arraignment and or plea.

(II) Bail and detention hearings.

(III) Motions.

(IV) Hearings.

(V) Interviews and conferences.

(VI) Obtaining and reviewing records.

(VII) Legal research and brief writing.

(VIII) Travel time.

(IX) Investigative work.

(X) Experts.

(XI) Trial and appeals.

(XII) Other.

**(C) Trial completed.**

(i) In general. If a request for payment is not submitted until after the completion of the trial and subject to consideration of the defendant's interests as set forth in subparagraph (D), the court shall make available to the public an unredacted copy of the expense voucher.

(ii) Protection of the rights of the defendant. If the court determines that defendant's interests as set forth in subparagraph (D) require a limited disclosure, the court shall disclose amounts as provided in subparagraph (B).

**(D) Considerations.** The interests referred to in subparagraphs (B) and (C) are—

- (i) to protect any person's 5th amendment right against self-incrimination;
- (ii) to protect the defendant's 6th amendment rights to effective assistance of counsel;
- (iii) the defendant's attorney-client privilege;
- (iv) the work product privilege of the defendant's counsel;
- (v) the safety of any person; and
- (vi) any other interest that justice may require, except that the amount of the fees shall not be considered a reason justifying any limited disclosure under section 3006A(d)(4) of title 18, United States Code [18 USCS § 3006A(d)(4)].

**(E) Notice.** The court shall provide reasonable notice of disclosure to the counsel of the defendant prior to the approval of the payments in order to allow the counsel to request redaction based on the considerations set forth in subparagraph (D). Upon completion of the trial, the court shall release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court. If there is an appeal, the court shall not release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court until such time as the appeals process is completed, unless the court determines that none of the defendant's interests set forth in subparagraph (D) will be compromised.

**(F) Effective date.** The amendment made by paragraph (4) shall become effective 60 days after enactment of this Act [enacted Nov. 26, 1997], will apply only to cases filed on or after the effective date, and shall be in effect for no longer than 24 months after the effective date.

**(5) Filing claims.** A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate [United States magistrate judge] and the court, and to each appellate court before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate [United States magistrate judge] and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate [United States magistrate judge], the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate [United States magistrate judge], the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

**(6) New trials.** For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

**(7) Proceedings before appellate courts.** If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title

**(e) Services other than counsel.**

(1) Upon request. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate [United States magistrate judge] if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.

(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed \$800 and expenses reasonably incurred.

(B) The court, or the United States magistrate [United States magistrate judge] (if the services were rendered in a case disposed of entirely before the United States magistrate [United States magistrate judge]), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds \$800.

(3) Maximum amounts. Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed \$2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate [United States magistrate judge] if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) Disclosure of fees. The amounts paid under this subsection for services in any case shall be made available to the public.

(5) The dollar amounts provided in paragraphs (2) and (3) shall be adjusted simultaneously by an amount, rounded to the nearest multiple of \$100, equal to the percentage of the cumulative adjustments taking effect under section 5303 of title 5 [5 USCS § 5303] in the rates of pay under the General Schedule since the date the dollar amounts provided in paragraphs (2) and (3), respectively, were last enacted or adjusted by statute.

**(f) Receipt of other payments.** Whenever the United States magistrate [United States magistrate judge] or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so

authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

**(g) Defender organization.**

(1) Qualifications. A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

**(2) Types of defender organizations.**

(A) Federal Public Defender Organization. A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States Attorney for the District where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization. A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to

provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(3) Malpractice and negligence suits. The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this subsection, or a Community Defender Organization established under this subsection which is receiving periodic sustaining grants, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.

**(h) Rules and reports.** Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

**(i) Appropriations.** There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, including funds for the continuing education and training of persons providing representational services under this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

**(j) Districts included.** As used in this section, the term "district court" means each district court of the United States created by chapter 5 of title 28 [28 USCS §§ 81 et seq.], the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.

## **§ 3553. Imposition of a sentence**

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[:]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**(b) Application of guidelines in imposing a sentence.**

(1) In general [Caution: In *United States v. Booker* (2005) 543 US 220, 160 L Ed 2d 621, 125 S Ct 738, the Supreme Court held that 18 USCS § 3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with the requirements of the Sixth Amendment and therefore must be severed and excised from the Sentencing Reform Act of 1984.] . Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.

[(A)] Sentencing. In sentencing a defendant convicted of an offense under section 1201 [18 USCS § 1201] involving a minor victim, an offense under section 1591 [18 USCS § 1591], or an offense under chapter 71, 109A, 110, or 117 [18 USCS §§ 1460 et seq., 2241 et seq., 2251 et seq., or 2421 et seq.], the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating 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 greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a 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 lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

**(c) Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28 [28 USCS § 994(w)(1)(B)], except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,[] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**(d) Presentence procedure for an order of notice.** Prior to imposing an order of notice pursuant to section 3555 [18 USCS § 3555], the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

**(e) Limited authority to impose a sentence below a statutory minimum.** Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

**(f) Limitation on applicability of statutory minimums in certain cases.** Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 USCS § 848]; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

**(g) Definition of violent offense.** As used in this section, the term "violent offense" means a crime of violence, as defined in section 16 [18 USCS § 16], that is punishable by imprisonment.

## **§ 3583. Inclusion of a term of supervised release after imprisonment**

**(a) In general.** The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].

**(b) Authorized terms of supervised release.** Except as otherwise provided, the authorized terms of supervised release are—

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

**(c) Factors to be considered in including a term of supervised release.** The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

**(d) Conditions of supervised release.** The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to

confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [18 USCS § 3583(g)] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)];

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)]; and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) [18 USCS § 3563(b)] and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) [28 USCS § 3563(b)(10)] shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) [18 USCS § 3583(e)(2)] and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

**(e) Modification of conditions or revocation.** The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted

by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

**(f) Written statement of conditions.** The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

**(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.** If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title [18 USCS § 921], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

**(h) Supervised release following revocation.** When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that

the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

**(i) Delayed revocation.** The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

**(j) Supervised release terms for terrorism predicates.** Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.

**(k)** Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 1594(c), 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

## § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may

appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**(h)** A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.