

APPENDIX A: PANEL DECISION OF THE NINTH CIRCUIT

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LORENZO ELIAS MENDEZ,
Defendant-Appellant.

No. 20-30007

D.C. No.
1:18-cr-02037-SMJ-1

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Salvador Mendoza, Jr., District Judge, Presiding

Argued and Submitted December 6, 2021
Seattle, Washington

Filed June 7, 2022

Before: M. Margaret McKeown, Morgan Christen, and
Eric D. Miller, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Criminal Law

The panel affirmed a conviction under 18 U.S.C. § 2251(a), which criminalizes the conduct of any person who “employs, uses, persuades, induces, entices, or coerces” a minor “to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct.”

The defendant, who placed Wi-Fi cameras in the eye of a stuffed animal and surreptitiously filmed a teenage girl masturbating, argued that the evidence was insufficient to support his conviction because he taped the minor surreptitiously and did not cause her “to engage in” sexually explicit conduct. The appeal centered on whether the defendant “used” his minor victim to engage in sexually explicit conduct by taping her in her bedroom, without her knowledge or participation.

The panel did not need to resolve whether the standard of review is *de novo* or plain error because there was no error, plain or otherwise. Applying the broad interpretation of § 2251(a) adopted in *United States v. Laursen*, 847 F.3d 1026 (9th Cir. 2017), the panel wrote that the active conduct that is required is that of the perpetrator, not the target of the visual depiction; that the defendant’s placement of hidden cameras in a teenage girl’s bedroom is active conduct in the heartland of a statute criminalizing the production of child

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

pornography; and that the “use” element is satisfied whenever a minor is the subject of the photography.

The panel concluded that the evidence was therefore sufficient under 18 U.S.C. § 2251(a) and (e) to support the conviction for attempting to “use” a minor “to engage in . . . sexually explicit conduct” for the purpose of producing a visual depiction of that conduct.

The panel addressed the defendant’s other challenges to his conviction and sentence in a concurrently filed memorandum disposition.

COUNSEL

Gilbert H. Levy (argued), Law Office of Gilbert H. Levy, Seattle, Washington, for Defendant-Appellant.

Alison L. Gregoire (argued), Assistant United States Attorney; Joseph H. Harrington, Acting United States Attorney; United States Attorney’s Office, Spokane, Washington; for Plaintiff-Appellee.

OPINION

McKEOWN, Circuit Judge:

Lorenzo Mendez placed Wi-Fi cameras in the eye of a stuffed animal and surreptitiously filmed a teenage girl masturbating. Prosecutors charged Mendez under a statute that criminalizes the conduct of any person who “employs, uses, persuades, induces, entices, or coerces” a minor “to engage in . . . sexually explicit conduct for the purpose of

producing any visual depiction of such conduct.” 18 U.S.C. § 2251(a). Based on a careful reading of our precedent, along with the weight of authority from six of our sister circuits, we conclude that Mendez’s conduct falls within the ambit of § 2251(a).

BACKGROUND

While living with his girlfriend and her fourteen-year-old daughter, Mendez hid cameras in the eye of a stuffed animal, then placed the stuffed animal in the girl’s bedroom. Video footage recovered by police officers spanned six months in 2018 and showed the girl in various states of undress. Several videos showed her masturbating. The victim testified that when she realized that the stuffed animal had a camera in it, she threw it into the backyard because it made her feel “disgusted.” While searching Mendez’s home and car, police found several Wi-Fi enabled cameras, “wiggle eyes” similar to those in the stuffed animal, batteries for the cameras, and instructions for connecting the cameras to a Wi-Fi network.

Mendez was convicted by a jury on count one of the indictment, which charged him with attempting to violate Subsections (a) and (e) of 18 U.S.C. § 2251:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor 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), . . .

(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,

Mendez appeals, arguing that the evidence was insufficient to support his conviction because he taped the minor surreptitiously and did not cause her “to engage in” explicit sexual conduct.¹ The parties dispute whether the standard of review is *de novo* or plain error, but we need not resolve the dispute because there was no error, plain or otherwise, and therefore Mendez cannot prevail either way. The statute encompasses Mendez’s surreptitious filming “to produce a visual depiction” of the minor engaged in “sexually explicit conduct.”

ANALYSIS

The key question is whether Mendez’s conduct falls within the statutory language that makes it a federal crime to employ, use, persuade, induce, entice, or coerce a minor “to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” 18 U.S.C. § 2251(a). The statute also has an interstate or foreign commerce requirement that may be satisfied either by creating the images using materials transported in or affecting interstate commerce or by knowing (or having reason to know) that the images will be transported or transmitted in interstate commerce. *Id.* § 2251(a). By definition, “sexually explicit conduct” includes “masturbation” and “lascivious exhibition” of intimate body

¹ Mendez raises several other challenges to his conviction and sentence that are addressed in a memorandum disposition filed concurrently with this opinion.

parts. *Id.* § 2256(2)(A)(iii), (v). There is no doubt that the visual depictions of the minor fall within this definition. Nor is there any serious defense to the charge that Mendez produced the images in an effort to transmit them in interstate commerce.² The appeal centers on whether Mendez “used” his minor victim to engage in sexually explicit conduct by taping her in her bedroom, without her knowledge or participation. The government does not suggest that Mendez employed, persuaded, induced, enticed, or coerced his victim—leaving only the question of “use.”

We have long understood § 2251(a) to criminalize “the inducement of children into sexual conduct for the purpose of creating visual depictions of that conduct.” *United States v. Smith*, 795 F.2d 841, 845 (9th Cir. 1986). But the words of the statute are broader than inducing, persuading, enticing, or coercing. Congress also included “employs” or “uses.” Those terms must be given effect, and their meaning is not limited to luring.

We recently addressed the meaning of “use” in *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017). We explained that the dictionary definition of “use” is “to put into action or service,” “to avail oneself of,” or to “employ.” *Id.* (citation omitted). Emphasizing the similarities between “use” and “employ,” we reasoned that although the minor took the nude, pornographic “selfies,” Laursen “used or employed” his victim “to produce sexually explicit images” by telling her that “the two ‘looked good together’ and that

² The evidence showed that Mendez possessed a Chinese-made camera purchased over the internet and shipped from another state. This evidence was sufficient to satisfy the alternative requirement that the “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.” § 2251(a).

‘he wanted to take pictures.’” *Id.* (emphasis removed). We held that “active conduct alone suffices to sustain a conviction under § 2251(a).” *Id.* at 1033. But the active conduct that is required is that of the perpetrator, not the target of the visual depiction.

Here, as in *Laursen*, Mendez did not necessarily induce the minor’s sexually explicit conduct. But he did place hidden cameras in a teenage girl’s bedroom—active conduct in the heartland of a statute criminalizing the production of child pornography.

Laursen drew upon and expressly approved the “rulings of our sister circuits, which have broadly interpreted the ‘use’ element of the statute.” *Id.* As *Laursen* explained, the Second Circuit has long held that the “use” element of § 2251(a) is satisfied “whenever a minor is the subject of the photography.” *Id.* (citing *United States v. Sirois*, 87 F.3d 34, 42 (2d Cir. 1996)). The Sixth and Eighth Circuits have followed suit, *Laursen* noted, because both circuits agreed “that this element is ‘fully satisfied for the purposes of the child pornography statute if a child is photographed in order to create pornography.’” *Id.* (quoting *United States v. Wright*, 774 F.3d 1085, 1090 (6th Cir. 2014)); accord *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007). *Laursen* also approvingly noted the First Circuit’s decision in *Ortiz-Graulau*, which similarly held that “the statutory definition of ‘use’ is met when a defendant makes a minor the subject of a visual depiction by intentionally photographing the minor engaging in sexually explicit conduct.” *Id.* (quoting *Ortiz-Graulau v. United States*, 756 F.3d 12, 18–19 (1st Cir. 2014)). Although not cited in *Laursen*, we note that the Fourth Circuit has also seemingly interpreted “use” consistent with these cases. See *United States v. Engle*, 676 F.3d 405, 418 n.9 (4th Cir. 2012) (“A defendant ‘uses’

a minor for purposes of § 2251(a) if he photographs the minor engaging in sexually explicit conduct to create a visual depiction of such conduct.” (quoting *United States v. McCloud*, 590 F.3d 560, 566 (8th Cir. 2009)).

Following *Laurson*, the Tenth Circuit affirmed the § 2251(a) conviction of a defendant who secretly videotaped his minor victim while she showered and used the toilet. *United States v. Theis*, 853 F.3d 1178, 1180–82 (10th Cir. 2017). The Tenth Circuit noted that “nearly every circuit to address this issue has recognized that the ‘uses’ element ‘is met when a defendant intentionally films or photographs a minor’s sexually explicit conduct.’” *Id.* at 1182 (quoting *Ortiz-Graulau*, 756 F.3d at 18). The court emphasized the broad meaning of the word “use” and concluded that § 2251(a) does not require “a causal relationship between a defendant’s actions and the minor’s sexually explicit conduct.” *Id.*

More recently, the D.C. Circuit took up the task of interpreting § 2251(a) and (e). In *United States v. Hillie*, the court considered Hillie’s conduct in secretly producing two videos in which the minor’s genitals and pubic area were visible. 14 F.4th 677 (D.C. Cir. 2021). Concluding that the bedroom videos depicted the minor “engaged in ordinary grooming activities, some dancing, and nothing more,” the D.C. Circuit rejected the government’s claim that the minor was engaged in “sexually explicit conduct” and vacated the conviction. *Id.* at 688–89. The opinion focused extensively on the definition of “sexually explicit conduct,” an issue we do not need to confront. Nonetheless, almost anticipating the facts in our case, the court explained:

If a defendant, knowing that a minor masturbates in her bedroom, surreptitiously hides a video camera in the bedroom and

films her doing so, then he uses or employs, i.e., avails himself of, a minor to engage in sexually explicit conduct (with herself) with the intent that she engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

Id. at 693–94. This interpretation is consistent with that of the cases cited with approval in *Laurson*.

We take note that the circumstances of the minor-adult relationship in these other cases did not mirror the situation in *Laurson*. Nor do the facts in *Laurson* map onto the surreptitious photographing that took place here. Thus, writing on a clean slate, some of us might interpret § 2251(a) differently by, for example, concluding that the statutory language requires the perpetrator to *cause* the minor to “to engage in sexually explicit conduct.” We do not have that leeway, however, because of the broad interpretation of § 2251(a) adopted in *Laurson*. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (“As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.” (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part))).

Nor is our view changed by a recent Seventh Circuit decision that confronted a completely different question of interpretation—namely, whether the sexually explicit conduct needs to be that of the minor. *United States v. Howard*, 968 F.3d 717, 721 (7th Cir. 2020). The court’s answer was yes. There, the offender masturbated over a sleeping child. *Id.* at 719. The Seventh Circuit explained

that the “six verbs that appear in the statute—‘employs, uses, persuades, induces, entices, or coerces’—all describe means by which an exploiter might accomplish the end of having a child engage in sexually explicit conduct in order to capture a visual image of it.” *Id.* at 721–22. Noting that *Howard* was an “odd” case, the court held that the government must prove that the offender took one of the listed actions to “cause *the minor* to engage in sexually explicit conduct for the purpose of creating a visual image of that conduct.” *Id.* at 721.. But our precedent forecloses this interpretation. As explained, we read the statute as focusing on the conduct of the perpetrator—not the minor—and our decision in *Laurson* holds that the “use” element is satisfied “whenever a minor is the subject of the photography.” 847 F.3d at 1033 (citation omitted).

The evidence was sufficient under § 2251(a) and (e) to support Mendez’s conviction for attempting to “use” a minor “to engage in . . . sexually explicit conduct” for the purpose of producing a visual depiction of that conduct. § 2251(a).

AFFIRMED.

APPENDIX B: ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LORENZO ELIAS MENDEZ,

Defendant-Appellant.

No. 20-30007

NOV 14 2022

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

D.C. No.

1:18-cr-02037-SMJ-1

Eastern District of Washington,
Yakima

ORDER

Before: McKEOWN, CHRISTEN, and MILLER, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and for rehearing en banc. The petition, Docket No. 67, is denied.

**APPENDIX C: RELEVANT FEDERAL STATUTES AND SENTENCING
GUIDELINES**

TABLE OF CONTENTS

18 U.S.C. § 2251	13a
18 U.S.C. § 2251A.....	16a
18 U.S.C. § 2252	18a
18 U.S.C. § 2252A.....	21a
18 U.S.C. § 2260	27a
18 U.S.C § 2260A.....	28a
18 U.S.C. § 2422	29a
18 U.S.C. § 2423	30a
U.S.S.G. § 2G1.3.....	32a
U.S.S.G. § 2G2.2.....	34a
U.S.S.G. § 4B1.5	37a

18 U.S.C. § 2251. Sexual exploitation of children

Total defendants charged under § 2251 in 2021: 603.*

Mean sentence for defendants convicted under § 2251 in 2021: 355.48 months (excluding five life sentences).

Statutory text:

(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

* For all figures this appendix, see Bureau of Justice Statistics, *Federal Criminal Case Processing Statistics*, <http://www.bjs.gov/fjsrc/tsec.cfm> (last visited Mar. 2, 2023).

United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

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

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

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

- (A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or
- (B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct;

shall be punished as provided under subsection (e).

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

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

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

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

See also 18 U.S.C. § 2256(2)(A)(v) (defining “sexually explicit conduct,” as used in § 2251, to include the “lascivious exhibition of the anus, genitals, or pubic area of any person”).

18 U.S.C. § 2251A. Selling or buying of children

Total defendants charged under § 2251A in 2021: 172.

Mean sentence for defendants convicted under § 2251A in 2021: 323.85 months (excluding one life sentence).

Statutory text:

(a) Any parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor, or offers to sell or otherwise transfer custody of such minor either--

- (1) with knowledge that, as a consequence of the sale or transfer, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or
- (2) with intent to promote either--
 - (A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or
 - (B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(b) Whoever purchases or otherwise obtains custody or control of a minor, or offers to purchase or otherwise obtain custody or control of a minor either--

- (1) with knowledge that, as a consequence of the purchase or obtaining of custody, the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct; or
- (2) with intent to promote either--
 - (A) the engaging in of sexually explicit conduct by such minor for the purpose of producing any visual depiction of such conduct; or

- (B) the rendering of assistance by the minor to any other person to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct;

shall be punished by imprisonment for not less than 30 years or for life and by a fine under this title, if any of the circumstances described in subsection (c) of this section exist.

(c) The circumstances referred to in subsections (a) and (b) are that--

- (1) in the course of the conduct described in such subsections the minor or the actor traveled in or was transported in or affecting interstate or foreign commerce;
- (2) any offer described in such subsections was communicated or 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 mail; or
- (3) the conduct described in such subsections took place in any territory or possession of the United States.

See also 18 U.S.C. § 2256(2)(A)(v) (defining “sexually explicit conduct,” as used in § 2251A, to include the “lascivious exhibition of the anus, genitals, or pubic area of any person”).

18 U.S.C. § 2252. Certain activities relating to material involving the sexual exploitation of minors

Total defendants charged under § 2252 in 2021: 301.

Mean sentence for defendants convicted under § 2252 in 2021: 101.5 months.

Statutory text:

(a) Any person who--

(1) knowingly transports or ships 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 mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of

interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if--

- (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- (ii) such visual depiction is of such conduct; or

(4) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

- (i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
- (ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking

of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

- (2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if any visual depiction involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of Title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, 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 10 years nor more than 20 years.

(c) Affirmative defense.--It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

- (1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and
- (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--
 - (A) took reasonable steps to destroy each such visual depiction; or
 - (B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

See also 18 U.S.C. § 2256(2)(A)(v) (defining "sexually explicit conduct," as used in § 2252, to include the "lascivious exhibition of the anus, genitals, or pubic area of any person").

18 U.S.C. § 2252A. Certain activities relating to material constituting or containing child pornography

Total defendants charged under § 2252A in 2021: 1058.

Mean sentence for defendants convicted under § 2252A in 2021: 113.29 months (excluding one life sentence).

Statutory text:

(a) Any person who--

(1) knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes--

(A) any child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

(3) knowingly--

(A) reproduces any child pornography for distribution through the mails, or 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

(B) advertises, promotes, presents, distributes, or solicits through the mails, or using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

- (ii) a visual depiction of an actual minor engaging in sexually explicit conduct;
- (4) either--
 - (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or
 - (B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;
- (5) either--
 - (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or
 - (B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or 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 that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;
- (6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct--

- (A) that has been mailed, shipped, or 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;
- (B) that was produced using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer; or
- (C) which distribution, offer, sending, or provision is accomplished using the mails or any means or facility of interstate or foreign commerce,

for purposes of inducing or persuading a minor to participate in any activity that is illegal; or

- (7) knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor.

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

- (2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if any image of child pornography involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be fined under this title and imprisoned for not more than 20 years, or if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, 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 10 years nor more than 20 years.

- (3) Whoever violates, or attempts or conspires to violate, subsection (a)(7) shall be fined under this title or imprisoned not more than 15 years, or both.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

- (1) (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

- (2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense.--It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

- (1) possessed less than three images of child pornography; and

- (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) Admissibility of evidence.--On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) Civil remedies.--

- (1) In general.--Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).
- (2) Relief.--In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including--
 - (A) temporary, preliminary, or permanent injunctive relief;
 - (B) compensatory and punitive damages; and
 - (C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(g) Child exploitation enterprises.--

- (1) Whoever engages in a child exploitation enterprise shall be fined under this title and imprisoned for any term of years not less than 20 or for life.
- (2) A person engages in a child exploitation enterprise for the purposes of this section if the person violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons.

See also 18 U.S.C. § 2256(8) (defining “child pornography” to mean any visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, and which is of a minor engaging in sexually explicit conduct); 18 U.S.C. § 2256(2)(B)(iii) (defining “sexually explicit conduct,” as used in § 2256(8), to include the “graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person”); 18 U.S.C. § 2256(2)(A)(v) (defining “sexually explicit conduct,”

as used in § 2252A, to include the “lascivious exhibition of the anus, genitals, or pubic area of any person”).

18 U.S.C. § 2260. Production of sexually explicit depictions of a minor for importation into the United States

Total defendants charged under § 2260 in 2021: 6.

Mean sentence for defendants convicted under § 2260 in 2021: 360 months.

Statutory text:

(a) Use of minor.--A person who, outside the United States, 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 with the intent that the 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, intending that the visual depiction will be imported or transmitted into the United States or into waters within 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(b) Use of visual depiction.--A person who, outside the United States, knowingly receives, transports, ships, distributes, sells, or possesses with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct (if the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct), intending that the visual depiction will be imported into the United States or into waters within a distance of 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

(c) Penalties.--

- (1) A person who violates subsection (a), or attempts or conspires to do so, shall be subject to the penalties provided in subsection (e) of section 2251 for a violation of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in that subsection.
- (2) A person who violates subsection (b), or attempts or conspires to do so, shall be subject to the penalties provided in subsection (b)(1) of section 2252 for a violation of paragraph (1), (2), or (3) of subsection (a) of that section, including the penalties provided for such a violation by a person with a prior conviction or convictions as described in subsection (b)(1) of section 2252.

See also 18 U.S.C. § 2256(2)(A)(v) (defining “sexually explicit conduct,” as used in § 2260, to include the “lascivious exhibition of the anus, genitals, or pubic area of any person”).

18 U.S.C § 2260A. Penalties for registered sex offenders

Total defendants charged under § 2260A in 2021: 7.

Mean sentence for defendants convicted under § 2260A in 2021: 222 months.

Statutory text:

Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section 1201, 1466A, 1470, 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision. The sentence imposed under this section shall be consecutive to any sentence imposed for the offense under that provision.

18 U.S.C. § 2422. Coercion and enticement

Total defendants charged under § 2422 in 2021: 142.

Mean sentence for defendants convicted under § 2422 in 2021: 156.42 months (excluding one life sentence).

Statutory text:

(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.

See also 18 U.S.C. § 2427 (defining “sexual activity for which any person can be charged with a criminal offense,” as used in § 2422, to include the production of child pornography, as defined in § 2256(8)); 18 U.S.C. § 2256(8) (defining “child pornography” to mean any visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, and which is of a minor engaging in sexually explicit conduct); 18 U.S.C. § 2256(2)(B)(iii) (defining “sexually explicit conduct,” as used in § 2256(8), to include the “graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person”).

18 U.S.C. § 2423. Transportation of minors

Total defendants charged under § 2423 in 2021: 91.

Mean sentence for defendants convicted under § 2423 in 2021: 130.26 months (excluding two life sentences).

Statutory text:

(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) with a person under 18 years of age that would be in violation of chapter 109A 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) with a person under 18 years of age; or

(3) production of child pornography (as defined in section 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.

See also 18 U.S.C. § 2256(8) (defining "child pornography" to mean any visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, and which is of a minor engaging in sexually explicit conduct); 18 U.S.C. § 2256(2)(B)(iii) (defining "sexually explicit conduct," as used in § 2256(8), to include the "graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person").

U.S.S.G. § 2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

- (1) 34, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
- (2) 30, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
- (3) 28, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
- (4) 24, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.
- (4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.
- (5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, § 2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

See also Application Note 5 ("The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2)."); 18 U.S.C. § 2256(2)(v) (defining "sexually explicit conduct," as used in U.S.S.G. § 2G1.3(c)(1), to include the "lascivious exhibition of the anus, genitals, or pubic area of any person").

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

(a) Base Offense Level:

- (1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
- (2) 22, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.
- (2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.
- (3) (Apply the greatest):
 - (A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.
 - (B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.
 - (C) If the offense involved distribution to a minor, increase by 5 levels.
 - (D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.
 - (E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

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

- (4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by 4 levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.
- (7) If the offense involved--
 - (A) at least 10 images, but fewer than 150, increase by 2 levels;
 - (B) at least 150 images, but fewer than 300, increase by 3 levels;
 - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
 - (D) 600 or more images, increase by 5 levels.

(c) Cross Reference

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

See also Application Note 7 ("The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct. ... 'Sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256(2)."); 18 U.S.C. § 2256(2)(v)

(defining "sexually explicit conduct," as used in U.S.S.G. § 2G1.3(c)(1), to include the "lascivious exhibition of the anus, genitals, or pubic area of any person").

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

(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

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

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

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

Offense Statutory Maximum	Offense Level
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32
(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12.

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

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

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

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

See also Application Note 2 (“For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.”); Application Note 3 (“For the purposes of Subsection (a) ... ‘[s]ex offense conviction’ (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography.”); Application Note 4 (“For purposes of subsection (b), ‘prohibited sexual conduct’ means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. ‘Child pornography’ has the meaning given that term in 18 U.S.C. § 2256(8).”); 18 U.S.C. § 2426(b)(1) (“the term ‘prior sex offense conviction’ means a conviction for an offense ... under this chapter, chapter 109A, chapter 110, or section 1591”); 18 U.S.C. § 2256(8) (defining “child pornography,” as used in U.S.S.G. § 4B1.5, to mean any visual depiction the production of which involves the use of a minor engaging in sexually explicit conduct, and which is of a minor engaging in sexually explicit conduct).

APPENDIX D: RELEVANT STATE STATUTES AND COURT DECISIONS**TABLE OF CONTENTS**

Alabama.....	40a
Arkansas.....	41a
California.....	42a
Colorado.....	43a
Connecticut.....	44a
Washington, D.C.	45a
Florida.....	46a
Kentucky.....	47a
Louisiana.....	49a
Michigan.....	50a
Mississippi.....	51a
Missouri.....	52a
Nebraska.....	53a
New Hampshire.....	54a
New York.....	55a
Rhode Island.....	56a
South Dakota.....	57a
Texas.....	58a
Wisconsin.....	59a

Alabama**Relevant Statutes:**

ALA. CODE § 13A-12-191 (prohibiting the dissemination or public display of “any obscene matter containing a visual depiction of a person under the age of 17 years engaged in any act of ... genital nudity, or other sexual conduct”)

ALA. CODE § 13A-12-192 (prohibiting the possession and possession with intent to disseminate “any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of ... genital nudity, or other sexual conduct”)

ALA. CODE § 13A-12-196 (prohibiting parents and guardians from allowing their children, wards, or dependents under the age of 17 years to engage in the production of “any obscene matter containing a visual depiction of such child, ward, or dependent ... engaged in any act of ... genital nudity, or other sexual conduct”)

ALA. CODE § 13A-12-197 (prohibiting the production of “any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of ... genital nudity, or other sexual conduct”)

ALA. CODE § 13A-12-190(12) (defining “genital nudity,” as used in §§ 13A-12-191, 13A-12-192, 13A-12-196, 13A-12-197, to mean “[t]he lewd showing of the genitals or pubic area”)

Relevant Court Decision:

Poole v. State, 596 So.2d 632, 640 (Ala. Crim. App. 1995) (holding that the term “lewd showing of the genitals or pubic area,” set forth in § 13A-12-190(12), refers to the defendant’s act of exhibiting a minor’s genitals on film, or to the visual depiction that the defendant has produced, possessed, disseminated, etc., citing *Wiegand*)

Arkansas**Relevant Statutes:**

ARK. CODE ANN. § 5-27-303(a) (prohibiting the employment, use, persuasion, inducement, enticement, or coercion of “any child to engage in ... any sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct”)

ARK. CODE ANN. § 5-27-303(b) (prohibiting parents and guardians from permitting their children or wards from “engag[ing] in or to assist[ing] any other person to engage in sexually explicit conduct for the purpose of producing any visual or print medium depicting the sexually explicit conduct”)

ARK. CODE ANN. § 5-27-304 (prohibiting the possession, solicitation, viewing, advertisement, sale, distribution, transportation, display, and receipt for the purpose of sale or distribution of “any visual or print medium depicting a child participating or engaging in sexually explicit conduct”)

ARK. CODE ANN. § 5-27-302(4)(E) (defining “sexually explicit conduct,” as used in §§ 5-27-303 and 5-27-304, to include the “[l]ewd exhibition of ... [t]he genitals or pubic area of any person”)

Relevant Court Decisions:

Cummings v. State, 110 S.W.3d 272, 278 n.1, 278–79 (Ark. 2003) (holding that the term “lewd exhibition of the genitals,” set forth in § 5-27-302(4)(E), refers to the defendant’s act of exhibiting a minor’s genitals on film, or to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Dost*); *see also George v. State*, 189 S.W.3d 28, 35–36 (Ark. 2004)

California

Relevant Statutes:

CAL. PENAL CODE §§ 311.1, 311.2(b)–(d) (prohibiting the possession, preparation, and importation for sale or distribution of visual depictions of any “person under the age of 18 years personally engaging in or personally simulating sexual conduct”)

CAL. PENAL CODE § 311.3(a) (prohibiting the production and exchange of any image “that depicts a person under the age of 18 years engaged in an act of sexual conduct”)

CAL. PENAL CODE § 311.4(b)–(c) (prohibiting the promotion, employment, use, persuasion, inducement, and coercion of minors “to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing any ... [visual depiction] of sexual conduct by a minor”)

CAL. PENAL CODE § 311.10 (prohibiting the advertisement for sale or distribution of “any obscene mater ... that ... depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct”)

CAL. PENAL CODE § 311.11 (prohibiting the possession and control of any image that “depicts a person under 18 years of age personally engaging in or simulating sexual conduct”)

CAL. PENAL CODE § 311.3(b)(5) (defining “sexual conduct,” as used in § 311.3(a), to include the “[e]xhibition of the genitals or pubic or rectal area of any person for the purpose of sexual stimulation of the viewer”)

CAL. PENAL CODE § 311.4(d)(1) (defining “sexual conduct,” as used in §§ 311.1, 311.2(b)–(d), 311.4(b)–(c), 311.10, and 311.11, to include the “[e]xhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer”)

Relevant Court Decisions:

People v. Kongs, 37 Cal. Rptr. 2d 327, 334–35 (Cal. Ct. App. 1994) (holding that the term “exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer,” set forth in § 311.4, refers to the defendant’s act of exhibiting a minor’s genitals on film, or to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Wiegand and Dost*); see also *People v. Spurlock*, 8 Cal. Rptr. 3d 372, 374–81 (Cal. Ct. App. 2003) (holding that the term “exhibition of the genitals or pubic or rectal area of any person for the purpose of sexual stimulation of the viewer,” set forth in § 311.3, refers to the defendant’s act of exhibiting a minor’s genitals on film, or to the visual depiction that the defendant has produced, citing *Kongs*)

Colorado

Relevant Statutes:

COLO. REV. STAT. § 18-6-403(3)(a) (prohibiting the inducement, enticement, authorization, and cause of “a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material”)

COLO. REV. STAT. § 18-6-403(3)(b) (prohibiting the production, promotion, advertisement, distribution, transportation, and transfer of “any sexually exploitative material”)

COLO. REV. STAT. § 18-6-403(3)(b.5) (prohibiting the viewing, possession, and control of “any sexually exploitative material for any purpose”)

COLO. REV. STAT. § 18-6-403(3)(c) (prohibiting the possession with the intent to sell or distribute “any sexually exploitative material”)

COLO. REV. STAT. § 18-6-403(3)(d) (prohibiting the inducement, enticement, authorization, and cause of “a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance”)

COLO. REV. STAT. § 18-6-403(2)(j) (defining “sexually exploitative material,” as used in § 18-6-403(3), to include any “visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct”)

COLO. REV. STAT. § 18-6-403(2)(e) (defining “explicit sexual conduct,” as used in § 18-6-403(2)(j), to include “erotic nudity”)

COLO. REV. STAT. § 18-6-403(2)(d) (defining “erotic nudity,” as used in § 18-6-403(2)(e), as “the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved”)

Relevant Court Decision:

People ex rel. T.B., 445 P.3d 1049, 1058–60 (Colo. 2019) (holding that the term “erotic nudity,” as defined in § 18-6-403(2)(d), refers to the defendant’s act of exhibiting the minor’s genitals on film, or to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Dost*)

Connecticut**Relevant Statutes:**

CONN. GEN. STAT. § 53a-196c (prohibiting the importation of “child pornography”)

CONN. GEN. STAT. §§ 53a-196d through 53a-196f (prohibiting the possession of “child pornography”)

CONN. GEN. STAT. § 53a-193(13) (defining “child pornography,” as used in §§ 53a-196c through 53a-196f, to mean “any visual depiction ... of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct”)

CONN. GEN. STAT. § 53a-193(14) (defining “sexually explicit conduct,” as used in § 53a-193(13), to include the “lascivious exhibition of the genitals or pubic area of any person”)

Relevant Court Decision:

State v. Sawyer, 225 A.3d 668, 676–77 (Conn. 2020) (holding that the term “lascivious exhibition of the genitals or pubic area of any person,” set forth in § 53a-193(14), refers to the visual depiction that the defendant has possessed or imported; citing *Wiegand* and *Dost*)

Washington, D.C.**Relevant Statutes:**

D.C. CODE § 22-3102(a) (prohibiting the use of minors in “sexual performance[s]” and the promotion of “sexual performance[s]” by minors)

D.C. CODE § 22-3102(b) (prohibiting the attendance, transmission, and possession of “sexual performance[s]” by minors)

D.C. CODE § 22-3101(6) (defining “sexual performance,” as used in § 22-3102, as “any performance or part thereof which includes sexual conduct by a person under 18 years of age”)

D.C. CODE § 22-3101(3) (defining “performance,” as used in § 22-3101(6), as “any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition”)

D.C. CODE § 22-3101(5)(E) (defining “sexual conduct,” as used in § 22-3101(6), to include the “[l]ewd exhibition of the genitals”)

Relevant Court Decision:

Green v. United States, 948 A.2d 554, 562 n.10, 562–64 (D.C. 2008) (holding that the term “lewd exhibition of the genitals,” set forth in § 22-3101(5)(E), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Dost*)

Florida**Relevant Statutes:**

FLA. STAT. § 827.071(2) (prohibiting the employment, authorization, and inducement of “a child to engage in a sexual performance”)

FLA. STAT. § 827.071(3) (prohibiting the production, direction, and promotion of “any performance which includes sexual conduct by a child”)

FLA. STAT. § 827.071(4) (prohibiting the possession with intent to promote “any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, includes child pornography”)

FLA. STAT. § 827.071(5)(a) (prohibiting the possession, control, and intentional viewing of “a photograph, motion picture, exhibition, show, representation, image, data, computer depiction, or other presentation which, in whole or in part, ... include[s] child pornography”)

FLA. STAT. § 827.071(1)(b) (defining “child pornography,” as used in § 827.071(2)–(5), to include “[a]ny image depicting a minor engaged in sexual conduct”)

FLA. STAT. § 827.071(1)(l) (defining “sexual conduct,” as used in § 827.071(1)(b), to include the “actual or simulated lewd exhibition of the genitals”)

Relevant Court Decision:

State v. Brabson, 7 So.3d 1119, 1120–25 (Fla. Dist. Ct. App. 2008) (holding that the term “actual or simulated lewd exhibition of the genitals,” set forth in § 827.071(1)(l), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Dost*)

Kentucky

Relevant Statutes:

KY. REV. STAT. ANN. § 531.310 (prohibiting the employment, authorization, or inducement of a minor to engage in a “sexual performance”)

KY. REV. STAT. ANN. § 531.320 (prohibiting the production, direction, and promotion of “any performance which includes sexual conduct by a minor”)

KY. REV. STAT. ANN. § 531.335 (prohibiting the possession, control, and viewing of “any matter which visually depicts an actual sexual performance by a minor person”)

KY. REV. STAT. ANN. § 531.340 (prohibiting the importation and distribution of “any matter portraying a sexual performance by a minor”)

KY. REV. STAT. ANN. § 531.350 (prohibiting the promotion for sale of “any matter portraying a sexual performance by a minor”)

KY. REV. STAT. ANN. § 531.360 (prohibiting the advertisement of “matter portraying a sexual performance by a minor”)

KY. REV. STAT. ANN. § 531.370 (prohibiting the employment and use of minors to distribute “material portraying a sexual performance by a minor”)

KY. REV. STAT. ANN. § 531.300(6) (defining “sexual performance,” as used in §§ 531.30, 531.335–531.370, to mean “any performance or part thereof which includes sexual conduct by a minor”)

KY. REV. STAT. ANN. § 531.300(5) (defining “performance,” as used in §§ 531.300(6) and 531.320, to mean “any play, motion picture, photograph[,] ... dance[,] ... [or] other visual representation exhibited before an audience”)

KY. REV. STAT. ANN. § 531.300(4)(b) (defining “sexual conduct by a minor,” as used in §§ 531.300(6) and 531.320, to include the “willful or intentional exhibition of the genitals”)

Relevant Court Decision:

Purcell v. Commonwealth, 149 S.W.3d 382, 389, 391–93 (Ky. 2004) (construing “sexual conduct by a minor” to include “willful or intentional exhibition of the genitals” “only when such exhibition is lewd”; recognizing that “the language ‘willful and intentional exhibition’ obviously refers to the conduct of the victim, not the defendant”; yet holding that the jury should consider “the photographer’s intent and

the intended reaction of the expected viewer, in determining whether a particular image is a 'lewd exhibition,'" citing *Wiegand*; and approving use of the *Dost* factors to determine whether the image that the defendant has produced, possessed, distributed, etc., is, itself, a lewd exhibition of a minor's genitals")

Louisiana**Relevant Statutes:**

LA. STAT. ANN. § 14:81.1(A)(1) (prohibiting the production, promotion, advertisement, distribution, and possession of “pornography involving juveniles”)

LA. STAT. ANN. § 14:81.1(B)(8) (defining “pornography involving juveniles,” as used in § 14:81.1(A)(1), to mean “any photograph, videotape, film, or other reproduction, whether electronic or otherwise, of any sexual performance involving a child under the age of seventeen”)

LA. STAT. ANN. § 14:81.1(B)(10) (defining “sexual performance,” as used in § 14:81.1(B)(8), to mean “any performance or part thereof that includes actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals or anus”)

Relevant Court Decision:

State v. Roberts, 796 So.2d 779, 785–87 (La. Ct. App. 2001) (holding that the term “lewd exhibition of the genitals or anus,” set forth in § 14:81.1(B)(10), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Dost* and *Wiegand*)

Michigan

Relevant Statutes:

MICH. COMP. LAWS § 750.145c(2) (prohibiting the persuasion, inducement, enticement, coercion, and authorization of “a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material”; also prohibiting the production, copying, financing, and attempted production, copying, and financing of “child sexually abusive material”)

MICH. COMP. LAWS § 750.145c(3) (prohibiting the distribution, promotion, and receipt of “child sexually abusive material”)

MICH. COMP. LAWS § 750.145c(4) (prohibiting the possession of “child sexually abusive material”)

MICH. COMP. LAWS § 750.145c(1)(o) (defining “child sexually abusive material,” as used in §§ 750.145c(2), 750.145c(3), 750.145c(4), to mean “any depiction ... which is of a child or appears to include a child engaging in a listed sexual act”)

MICH. COMP. LAWS § 750.145c(1)(n) (defining “child sexually abusive activity,” as used in § 750.145c(2), to mean “a child engaging in a listed sexual act”)

MICH. COMP. LAWS § 750.145c(1)(i) (defining “listed sexual act,” as used in §§ 750.145c(1)(o) and § 750.145c(1)(n), to include “erotic nudity”)

MICH. COMP. LAWS § 750.145c(1)(h) (defining “erotic nudity,” as used in § 750.145c(1)(i), to mean “the lascivious exhibition of the genital, pubic, or rectal area of any person”)

Relevant Court Decisions:

People v. Riggs, 604 N.W.2d 68, 71–73 (Mich. Ct. App. 1999) (holding that the term “lascivious exhibition of the genital, pubic, or rectal area of any person,” set forth in § 750.145c(1)(i), refers to the visual depiction that the defendant has produced, possessed, disseminated, etc.); *see also People v. Heidenreich*, No. 315366, 2014 WL 2795867, at *3 & n.19 (Mich. Ct. App. June 19, 2014) (same, citing *Wiegand*)

Mississippi**Relevant Statutes:**

MISS. CODE ANN. § 97-5-33(1) (prohibiting the inducement and authorization of “any child to engage in sexually explicit conduct ... for the purpose of producing any visual depiction of such conduct”)

MISS. CODE ANN. § 97-5-33(2) (prohibiting the visual depiction of “a child engaging in sexually explicit conduct”)

MISS. CODE ANN. § 97-5-33(3) (prohibiting the transportation and receipt of any “visual depiction of an actual child engaging in sexually explicit conduct”)

MISS. CODE ANN. § 97-5-33(4) (prohibiting the receipt with intent to distribute, distribution for sale, sale, and attempted sale of any “visual depiction of an actual child engaging in sexually explicit conduct”)

MISS. CODE ANN. § 97-5-33(5) (prohibiting the possession of any “visual depiction of an actual child engaging in sexually explicit conduct”)

MISS. CODE ANN. § 97-5-31(b)(v) (defining “sexually explicit conduct,” as used in § 97-5-33, to include the “[l]ascivious exhibition of the genitals or pubic area of any person”)

Relevant Court Decision:

Hood v. State, 17 So.3d 548, 555–56 (Miss. 2009) (holding that the term “lascivious exhibition of the genitals or pubic area of any person,” set forth in § 97-5-31(b)(v), refers to the visual depiction that the defendant has produced, possessed, disseminated, etc., citing *Wiegand* and *Dost*)

Missouri**Relevant Statutes:**

MO. REV. STAT § 573.023 (prohibiting the production of “obscene material with a minors or child pornography”)

MO. REV. STAT §§ 573.025 and 573.035 (prohibiting the possession with intent to promote and promotion of “child pornography”)

MO. REV. STAT § 573.037 (prohibiting the possession of “child pornography”)

MO. REV. STAT § 573.010(4) (defining “child pornography,” as used in §§ 573.023, 573.025, 573.035, and 573.037, to include “any visual depiction ... of sexually explicit conduct where ... [t]he production of such visual depiction involves the use of a minor engaging in sexually explicit conduct ... [and] [s]uch visual depiction ... is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct”)

MO. REV. STAT § 573.010(21)(e) (defining “sexually explicit conduct,” as used in § 573.010(4), to include the “lascivious exhibition of the genitals or pubic area of any person”)

Relevant Court Decision:

State v. Cerna, 522 S.W.3d 373, 379–80 (Mo. Ct. App. 2017) (holding that the term “lascivious exhibition of the genitals or pubic area of any person,” set forth in § 573.010(21)(e), refers to the visual depiction that the defendant has produced, possessed, disseminated, etc., citing *Dost*)

Nebraska**Relevant Statutes:**

NEB. REV. STAT. § 28-1463.03(1) (prohibiting the production of “any visual depiction of sexually explicit conduct which has a child other than the defendant as one of its participants or portrayed observers”)

NEB. REV. STAT. § 28-1463.03(2) (prohibiting the purchase, rent, sale, delivery, distribution, display for sale, advertisement, trading, and provision of “any visual depiction of sexually explicit conduct which has a child other than the defendant as one of its participants or portrayed observers”)

NEB. REV. STAT. § 28-1463.03(3) (prohibiting the employment, forcing, authorization, inducement, and cause of “a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers”)

NEB. REV. STAT. § 28-1463.03(4) (prohibiting parents and guardians from allowing their children, wards, or dependents to engage “in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers”)

NEB. REV. STAT. § 28-1463.02(5)(e) (defining “sexually explicit conduct,” as used in § 28-1463.03, to include “erotic nudity”)

NEB. REV. STAT. § 28-1463.02(3) (defining “erotic nudity,” as used in § 28-1463.02(5)(e), to mean “the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved”)

Relevant Court Decision:

State v. Smith, 873 N.W. 2d 169, 193–94 (Neb. 2016) (holding that the term “erotic nudity,” as defined in § 28-1463.02(3), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Wiegand* and *Dost*)

New Hampshire

Relevant Statutes:

N.H. REV. STAT. ANN. § 649-A:3 (prohibiting the procurement, possession, control, and importation of “any visual representation of a child engaging in sexually explicit conduct”)

N.H. REV. STAT. ANN. § 649-A:3-a (prohibiting the sale, exchange, transfer, publishing, exhibiting, and possession with intent to sell, exchange or transfer “any visual representation of a child engaging in sexually explicit conduct”)

N.H. REV. STAT. ANN. § 649-A:3-b (prohibiting the production, manufacture, and direction of any “visual representation of a child engaging in or being engaged in sexually explicit conduct”; also prohibiting the participation in “that portion of such visual representation that consists of a child engaging in or being engaged in sexually explicit conduct”)

N.H. REV. STAT. ANN. § 649-A:2(III) (defining “sexually explicit conduct,” as used in §§ 649-A:3, 649-A:3-a, and 649-A:3-b, to include “any lewd exhibitions of the buttocks [or] genitals”)

Relevant Court Decision:

State v. Lopez, 27 A.3d 713, 716–17 (N.H. 2011) (holding that the term “lewd exhibition[] of the buttocks [or] genitals,” set forth in § 649-A:2(III), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Wiegand* and *Dost*)

New York**Relevant Statutes:**

N.Y. PENAL LAW § 263.05 (prohibiting the employment, authorization, and inducement of “a child less than seventeen years of age to engage in a sexual performance”; also prohibiting parents and guardians from allowing their minor wards to participate in a sexual performance)

N.Y. PENAL LAW § 263.10 (prohibiting the production, direction, and promotion of “any obscene performance which includes sexual conduct by a child less than seventeen years of age”)

N.Y. PENAL LAW § 263.11 (prohibiting the possession and control of “any obscene performance which includes sexual conduct by a child less than sixteen years of age”)

N.Y. PENAL LAW § 263.15 (prohibiting the production, direction, and promotion of “any performance which includes sexual conduct by a child less than seventeen years of age”)

N.Y. PENAL LAW § 263.16 (prohibiting the possession and control of “any performance which includes sexual conduct by a child less than sixteen years of age”)

N.Y. PENAL LAW § 263.00(1) (defining “sexual performance,” as used in §§ 263.05, to mean “any performance or part thereof which ... includes sexual conduct by a child less than seventeen years of age”)

N.Y. PENAL LAW § 263.00(4) (defining “performance,” as used in §§ 263.05, 263.10, 263.11, 263.15, 263.16, and 263.00(1), to mean “any play, motion picture, photograph[,] dance[] ... [or] any other visual representation exhibited before an audience”)

N.Y. PENAL LAW § 263.00(3) (defining “sexual conduct,” as used in §§ 263.10, 263.11, 263.15, 263.16, and 263.00(1), to include the “lewd exhibition of the genitals”)

Relevant Court Decision:

People v. Horner, 752 N.Y.S.2d 147, 149–51 (N.Y. App. Div. 2002) (holding that the term “lewd exhibition of the genitals,” set forth in § 263.00(3), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Wiegand* and *Dost*)

Rhode Island**Relevant Statutes:**

R.I. GEN. LAWS § 11-9-1.3(a) (prohibiting the production, transportation, reproduction, and possession of “child pornography”)

R.I. GEN. LAWS § 11-9-1.3(c)(1) (defining “child pornography,” as used in § 11-9-1.3(a), to mean “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where ... [t]he production of such visual depiction involves the use of a minor engaging in sexually explicit conduct[,] [and] [s]uch visual depiction is a digital image, computer image, or computer-generated image of a minor engaging in sexually explicit conduct”)

R.I. GEN. LAWS § 11-9-1.3(c)(6)(v) (defining “sexually explicit conduct,” as used in § 11-9-1.3(c)(1), to include the “[g]raphic or lascivious exhibition of the genitals or pubic area of any person)

Relevant Court Decision:

State v. Hansen, 272 A.3d 1020, 1049–53 (R.I. 2022) (holding that the term “lascivious exhibition of the genitals,” set forth in § 11-9-1.3(c)(6)(v), refers to the visual depiction that the defendant has produced, possessed, distributed, etc., citing *Wiegand* and *Dost*)

South Dakota**Relevant Statutes:**

S.D. CODIFIED LAWS § 22-24A-3 (prohibiting the production, possession, and distribution of “any visual depiction of a minor engaging in a prohibited sexual act”)

S.D. CODIFIED LAWS § 22-24A-2(16) (defining “prohibited sexual act,” as used in § 22-24A-3, to include the “actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner”)

Relevant Court Decision:

State v. Dubois, 746 N.W.2d 197, 208–09 (S.D. 2008) (holding that the term “actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner,” set forth in § 22-24A-2(16), refers to the visual depiction that the defendant has produced, possessed, disseminated, etc., citing *Dost*)

Texas**Relevant Statutes:**

TEX. PENAL CODE ANN. § 43.25(b) (prohibiting the employment, authorization, and inducement of “a child younger than 18 years of age to engage in sexual conduct or a sexual performance”)

TEX. PENAL CODE ANN. § 43.25(d) (prohibiting the production, direction, and promotion of “a performance that include sexual conduct by a child younger than 18 years of age”)

TEX. PENAL CODE ANN. § 43.26 (prohibiting the possession and access with intent to view of “visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct”)

TEX. PENAL CODE ANN. § 43.25(a)(1) (defining “sexual performance,” as used in § 43.25(b), to mean “any performance or part thereof that includes sexual conduct by a child younger than 18 years of age”)

TEX. PENAL CODE ANN. § 43.25(a)(3) (defining “performance,” as used in §§ 43.25(d) and 43.25(a)(1), to mean “any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons”)

TEX. PENAL CODE ANN. § 43.25(a)(2) (defining “sexual conduct,” as used in §§ 43.25(b), 43.25(d), 43.26, and 43.25(a)(1), to include the “lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola”)

Relevant Court Decision:

Romo v. State, __ S.W.3d __, __, 2022 WL 2136707, at *2–3 (Tex. Crim. App. 2022) (holding that the term “lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola,” set forth in § 43.25(a)(2), refers to the visual depiction or performance that the defendant has produced, promoted, or possessed, citing *Dost* and *Wiegand*)

Wisconsin**Relevant Statutes:**

WIS. STAT. ANN. § 948.05(1)(a) (prohibiting the use, persuasion, inducement, enticement, and coercion of “any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct”)

WIS. STAT. ANN. § 948.05(1)(b) (prohibiting the recording or display of “a child engaged in sexually explicit conduct”)

WIS. STAT. ANN. § 948.05(1)(b)(1m) (prohibiting the production, performance in, profit from, promotion, importation, reproduction, advertisement, sale, distribution, and possession with intent to sell or distribute of “any recording of a child engaged in sexually explicit conduct”)

WIS. STAT. ANN. § 948.12(1m) (prohibiting the possession and access with intent to view of “any ... recording of a child engaged in sexually explicit conduct”)

WIS. STAT. ANN. § 948.12(2m) (prohibiting the exhibition and playing of “a recording of a child engaged in sexually explicit conduct”)

WIS. STAT. ANN. § 948.01(7)(e) (defining “sexually explicit conduct,” as used in §§ 948.05 and 948.12, to include the “[l]ewd exhibition of intimate parts”)

Relevant Court Decision:

State v. Petrone, 468 N.W.2d 676, 688 (Wis. 1991) (holding that the term “[l]ewd exhibition of intimate parts,” set forth in § 948.01(7)(e), refers to the visual depiction that the defendant has produced, possessed, disseminated, etc., citing *Wiegand*), *overruled in part on other grounds by State v. Green*, 681 N.W.2d 479, 489 n.7 (Wis. 2004)