

APPENDIX A

Decision United States Court Of Appeals First Circuit

United States Court of Appeals For the First Circuit

No. 22-1281

UNITED STATES,

Appellee,

v.

ANTHONY RIMAS,

Defendant - Appellant.

Before

Barron, Chief Judge,
Kayatta and Rikelman, Circuit Judges.

JUDGMENT

Entered: November 28, 2023

Defendant's counsel on appeal seeks to withdraw and has submitted a brief compliant with the tenets of Anders v. California, 386 U.S. 738 (1967). After careful review of the comprehensive brief, the underlying record including all pre-sentence reports, transcripts, sentencing memoranda, and the pro se supplemental brief submitted by the defendant, we agree that the appeal presents no non-frivolous or colorable issues. Furthermore, we agree that the appeal waiver is enforceable because the sentence falls squarely within the contours of the waiver clause, and the defendant has not demonstrated that application of the miscarriage-of-justice exception is warranted.

The claims raised in the defendant's pro se supplemental brief do not alter this conclusion.

To begin with, defendant raises a host of claims for the first time. However, even if the appeal waiver did not apply, defendant would have to meet the following conditions to meet the plain error standard: "First, there must be an error. Second, the error must be plain. Third, the error must affect 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" Greer v. United States, 141 S.Ct. 2090, 2096 (2021) (quoting Rosales-Mireles v. United States, 138 S.Ct. 1897, 1904-05 (2018)). If those provisos are met, an appellate court "may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial

proceedings.'" Greer, 141 S.Ct. at 2096-97; see United States v. Olano, 507 U.S. 725, 734-37 (1993); United States v. Fletcher, 56 F.4th 179, 185 (1st Cir. 2022). The defendant has failed to meet this standard.

The rest of the arguments in the pro se submission are similarly unavailing and "[t]o the extent these arguments were not waived, they are meritless." United States v. Boudreau, 58 F.4th 26, 33 n.3 (1st Cir. 2023).

Accordingly, counsel is permitted to withdraw, and the defendant's appeal is dismissed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Seth R. Aframe
Matthew Hunter
Anna Z. Krasinski
Kasey Weiland
John W. Van Lonkhuyzen
Anthony Rimas

APPENDIX B

Informa Pauperis Order Of The Court

United States Court of Appeals For the First Circuit

No. 22-1281

UNITED STATES,

Appellee,

v.

ANTHONY RIMAS,

Defendant - Appellant.

ORDER OF COURT

Entered: September 20, 2022

Defendant-appellant Anthony Rimas has filed a motion to proceed in forma pauperis ("IFP"), a motion to seal the financial affidavit offered in support of the IFP motion, and a motion for appointment of counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A ("CJA"). Additionally, Rimas' retained counsel from district court have filed a motion to withdraw. Upon consideration, Rimas' motion to proceed IFP on appeal is granted, and Rimas' motion for appointed counsel is granted. The Clerk of Court shall appoint CJA counsel to represent Rimas in this appeal.

The motion to withdraw filed by Attorney Anthony Bistany and Attorney Neil F. Faigel is resolved as follows: once newly appointed counsel has noticed an appearance, Attorneys Bistany and Faigel will be deemed withdrawn.

That leaves the motion to seal the IFP financial affidavit. This court's policy is to limit access to IFP affidavits to the parties to the case and to court personnel. Non-parties generally are not given access. With the motion to seal, Rimas fails to demonstrate that additional access restrictions are in order. Accordingly, the motion to seal is denied, and the affidavit will remain on file in the restricted status described above. See 1st Cir. R. 11.0(c)(2) (governing sealing in this court in the first instance); see also Fed. R. App. P. 2 (court may suspend operation of rules for "good cause").

By the Court:

Maria R. Hamilton, Clerk

United States Court of Appeals For the First Circuit

No. 22-1281

UNITED STATES,

Appellee,

v.

ANTHONY RIMAS,

Defendant - Appellant.

ORDER OF COURT

Entered: September 29, 2022
Pursuant to 1st Cir. R. 27.0(d)

Pursuant to this Court's September 20, 2022 order, Attorney John W. Van Lonkhuyzen is appointed as counsel under the guidelines of the Criminal Justice Act, 18 U.S.C. § 3006A.

Attorney Anthony Bistany and Attorney Neil F. Faigel are allowed to withdraw representation for the appellant. Attorney Bistany is directed to forward the case record to Attorney Van Lonkhuyzen at Verrill Dana LLP, 1 Portland Sq, PO Box 586, Portland, ME 04101-4054 and provide proof of such service to this court by **October 13, 2022**.

On or before **October 20, 2022**, Attorney Van Lonkhuyzen must file the docketing statement and a transcript order form, accompanied by a CJA 24 voucher, or a statement certifying that the transcript of all necessary proceedings has been produced and filed in the district court or has already been authorized for production in this court.

By the Court:

Maria R. Hamilton, Clerk

cc:

John W. Van Lonkhuyzen, Seth R. Aframe, Matthew Hunter, Anna Z. Krasinski, Kasey Weiland, Anthony Bistany, Anthony Rimas

APPENDIX C

Amendment 664

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Reason for Amendment: This amendment implements the directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108-21. This amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), and 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index).

First, the amendment consolidates §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), into one guideline, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised by judges, probation officers, prosecutors, and defense attorneys regarding difficulties in determining the appropriate guideline (§2G2.2 or §2G2.4) for cases involving convictions of 18 U.S.C. § 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

Section 103 of the PROTECT Act established five-year mandatory minimum terms of imprisonment for offenses related to trafficking and receipt of child pornography under 18 U.S.C. §§ 2252(a)(1)-(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increased the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. Furthermore, the PROTECT Act increased the statutory maximum penalty for possession offenses from five to ten years. As a result of these new mandatory minimum penalties and the increases in the statutory maxima for these offenses, the Commission increased the base offense level for these offenses.

The amendment provides two alternative base offense levels depending upon the statute of conviction. The base offense level is set at level 18 for a defendant convicted of the

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possession of child pornography under 18 U.S.C. § 2252(a)(4), 18 U.S.C. § 2252A(a)(5), or 18 U.S.C. § 1466A(b), and at level 22 for a defendant convicted of any other offense referenced to this guideline, primarily trafficking and receipt of child pornography. The Commission determined that a base offense level of level 22 is appropriate for trafficking offenses because, when combined with several specific offense characteristics which are expected to apply in almost every case (e.g., use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached or exceeded in almost every case by the Chapter Two calculations. The Commission increased the base offense level for possession offenses from level 15 to level 18 because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses. The amendment also provides a two-level decrease at §2G2.2(b)(1) for a defendant whose base offense level is level 22, whose conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor, and whose conduct did not involve an intent to traffic in or distribute the material. Thus, individuals convicted of receipt of child pornography with no intent to traffic or distribute the material essentially will have an adjusted offense level of level 20, as opposed to an offense level of level 22, for receipt with intent to traffic, prior to application of any other specific offense characteristics. The Commission's review of these cases indicated the conduct involved in such "simple receipt" cases in most instances was indistinguishable from "simple possession" cases. The statutory penalties for "simple receipt" cases, however, are the same as the statutory penalties for trafficking cases. Reconciling these competing concerns, the Commission determined that a two-level reduction from the base offense level of level 22 is warranted, if the defendant establishes that there was no intent to distribute the material.

The amendment also provides a new, six-level enhancement at §2G2.2(b)(3)(D) for offenses that involve distribution to a minor with intent to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than sexual activity.

The amendment also makes a number of changes to the commentary at §2G2.2, as follows.

The amendment adds several definitions, including definitions of "computer," "image," and "interactive computer service," to provide greater guidance for these terms and uniformity in application of the guideline. The amendment also broadens the "use of a computer" enhancement at §2G2.2(b)(5) in two ways. First, the amendment expands the enhancement

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to include an "interactive computer service" (e.g., Internet access devices), as defined in 47 U.S.C. § 230(f)(2). The Commission concluded that the term "computer" did not capture all types of Internet devices. Thus, the amendment expands the definition of "computer" to include other devices that involve interactive computer services (e.g., Web-Tv). In addition, the amendment broadens the enhancement by explicitly providing that the enhancement applies to offenses in which the computer or interactive computer service was used to obtain possession of child pornographic material. Prior to this amendment, the enhancement only applied if the computer was used for the transmission, receipt or distribution of the material.

The PROTECT Act directly amended §§2G2.2 and 2G2.4 to create a specific offense characteristic related to the number of child pornography images. That specific offense characteristic provides a graduated enhancement of two to five levels, depending on the number of images. However, the congressional amendment did not provide a definition of "image," which raised questions regarding how to apply the specific offense characteristic. This amendment defines the term "image" and provides an instruction regarding how to apply the specific offense characteristic to videotapes. Application Note 4 states that an "image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8) and instructs that each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered one image. Furthermore, the application note provides that each video, video-clip, movie, or similar recording shall be considered to have 75 images for purposes of the specific offense characteristic. Application Note 4 also provides two possible grounds for an upward departure (if the number of images substantially underrepresents the number of minors or if the length of the videotape or recording is substantially more than five minutes). Because the image specific offense characteristic created directly by Congress in the PROTECT Act essentially supercedes an earlier directive regarding a specific offense characteristic relating to the number of items (see Pub. L. 102-141 and Amendment 436), the Commission deleted the specific offense characteristic for possessing ten or more child pornographic items (formerly §2G2.4(b)(3)). This deletion avoids potential litigation regarding issues of "double counting" if both specific offense characteristics were retained in the guideline.

In response to the increase in the use of undercover officers in child pornography investigations, the amendment expands the definition of "minor." "Minor" is defined as (1) an individual who had not attained the age of 18 years; (2) an individual, whether fictitious or not,

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who a law enforcement officer represented to a participant (A) had not attained the age of 18 years, and (B) could be provided to a participant for the purposes of engaging in sexually explicit conduct; or (3) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

The amendment also makes clear that distribution includes advertising and posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material. In response to a circuit conflict, the amendment adds an application note to make clear that the specific offense characteristic for material portraying sadistic or masochistic conduct applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material. The circuit courts have disagreed regarding whether a defendant must have specifically intended to receive the sadistic or masochistic images. Some circuit courts have required that the defendant must have intended to receive these images. See United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995); United States v. Tucker, 136 F.3d 763 (11th Cir. 1998). The Seventh Circuit has held that this specific offense characteristic is applied based on a strict liability standard, and that no proof of intent is necessary. See United States v. Richardson, 238 F.3d 837 (7th Cir. 2001). The Commission followed the Seventh Circuit's holding that the enhancement applies regardless of whether the defendant specifically intended to possess, receive, or distribute such material.

Second, section 103 of the PROTECT Act increased the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to the production of child pornography under 18 U.S.C. § 2251. In response, the amendment increases the base offense level at §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) from level 27 to level 32. A base offense level of level 32 is appropriate for production offenses because, combined with the application of several specific offense characteristics that are expected to apply in almost all production cases (e.g., age of the victim), this base offense level will ensure that the 15 year mandatory minimum (180 months) will be met in by the Chapter Two calculations almost every case.

The amendment adds three new specific offense characteristics that are associated with the production of child pornography. The amendment provides, at §2G2.1(b)(2), a two-level

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increase if the offense involved the commission of a sex act or sexual contact, or a four-level increase if the offense involved a sex act and conduct described in 18 U.S.C. § 2241(a) or (b) (*i.e.*, the use of force was involved). The Commission concluded that this type of conduct is more serious than the production of a picture without a sex act or the use of force, and therefore, a two- or four-level increase is appropriate. The amendment also adds a two-level increase if the production offense also involved distribution. The Commission concluded that because traffickers sentenced at §2G2.2 receive an increase for distributing images of child pornography, an individual who produces and distributes the image(s) also should be punished for distributing the item. Lastly, the amendment adds a new, four-level increase if the offense involved material portraying sadistic or masochistic conduct. Similar to the distribution specific offense characteristic, the Commission concluded that, because §2G2.2 contains a four-level increase for possessing, receiving or trafficking these images, the producers of such images also should receive comparable additional punishment.

Third, this amendment creates a new guideline, §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), to specifically address offenses under chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Prior to the amendment, chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (Coercion and Enticement) and 2423 (Transportation of Minors), were referenced by Appendix A (Statutory Index) to either §2G1.1 or §2A3.2. Offenses under 18 U.S.C. §§ 2422 and 2423(a) (Transportation with Intent to Engage in Criminal Sexual Activity) are referenced to §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct), but are then cross referenced from §2G1.1 to §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) in order to account for certain underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. § 2423(b) (Travel with Intent to Engage in Sexual Act with a Juvenile) are referenced to §2A3.1, §2A3.2, or §2A3.3, but most are sentenced at §2A3.2. Until recently, the majority of cases sentenced under §2A3.2 were statutory rape cases that occurred on federal property (*e.g.*, military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline

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were coercion, travel, and transportation offenses. The creation of a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from §2A3.2 will permit the Commission to more appropriately tailor that guideline to actual statutory rape cases. Furthermore, travel and transportation cases have a different statutory penalty structure than § 2243(a) statutory rape cases.

Prior to the amendment, §2A3.2 provided alternative base offense levels of (1) level 24 for a chapter 117 violation with a sexual act; (2) level 21 for a chapter 117 violation with no sexual act (e.g., a sting case); or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. §§ 2422(a) and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. The PROTECT Act, however, did not increase the statutory maximum penalty, nor did the Act add a mandatory minimum, for 18 U.S.C.

§ 2243(a) offenses.

This new guideline has a base offense level of level 24 to account for the new mandatory minimum terms of imprisonment established by the PROTECT Act. The new guideline provides six specific offense characteristics to provide proportionate enhancements for aggravating conduct that may occur in connection with these cases. The guideline contains enhancements for commission of a sex act or commercial sex act, use of a computer, misrepresentations of identity, undue influence, custody issues, and involvement of a minor under the age of 12 years. The amendment also provides three cross references to account for certain more serious sexual abuse conduct, including a cross reference if the offense involved conduct described in 18 U.S.C. § 2241 or § 2242. Furthermore, the amendment makes conforming changes to §2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct) as a result of the creation of the new travel guideline. Section 2G1.1 is expected to apply primarily to adult prostitution cases because of the creation of §2G1.3.

Fourth, section 521 of the PROTECT Act created a new offense at 18 U.S.C. § 2252B (Misleading Domain Names on the Internet). Section 2252B(a) prohibits the knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity. Offenses under this subsection are punishable by a maximum term of imprisonment of two years. Section 2252B(b) prohibits the knowing use of a

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misleading domain name with the intent to deceive a minor into viewing material that is harmful to minors, with a maximum term of imprisonment of four years. The amendment refers the new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include "Misleading Domain Names", and provides a two-level enhancement at §2G3.1(b)(2), if "the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors." In addition, the amendment also provides enhancements for the following conduct: (1) distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; and (2) use of a computer or interactive computer service. Finally, the amendment adds §2G3.1 to the list of guidelines at subsection (d) of §3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are ongoing or continuous in nature. The amendment makes other minor technical changes to the commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

Fifth, in response to a circuit conflict, this amendment adds a condition to §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) permitting the court to limit the use of a computer or an interactive computer service for sex offenses in which the defendant used such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete prohibitions on computer use and Internet access (see United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (same)), but other circuit courts have upheld restrictions on computer use and Internet access with probation officer permission (see United States v. Fields, 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); United States v. Walser, 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release. See United States v. Paul, 274 F.3d 155 (5th Cir. 2001)

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(upholding complete ban on Internet use).

In addition, this amendment makes §5D1.2 (Term of Supervised Release) consistent with changes made by the PROTECT Act regarding the applicable terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

Sixth, section 401(i)(2) of the PROTECT Act directs the Commission to "amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses" under sections 2243(b) (Sexual Abuse of a Ward), 2244(a)(4) (Abusive Sexual Contact), and 2244(b) (Sexual Contact with a Person without that Person's Permission) of title 18, United States Code. This amendment makes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address this directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the commentary to make the definitions in these guidelines consistent with definitions in the pornography guidelines.

Seventh, the amendment increases the base offense level at §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) from level 27 to level 30 to maintain proportionality between this guideline and §2G2.1, the production of child pornography guideline, the base offense level of which was raised to level 32 by this amendment. Furthermore, the amendment adds the term "interactive computer service" to the computer enhancement in §2A3.1.

Eighth, the amendment increases the offense levels for two specific offense characteristics at §2A3.2. The amendment increases the custody, care, or supervisory control enhancement from two to four levels at §2A3.2(b)(1), and changes §2A3.2(b)(3), which involves the misrepresentation or undue influence by the defendant, from a two- to a four-level increase. The Commission concluded that an increase in the magnitude of these enhancements is appropriate because of the seriousness of such conduct. The amendment also deletes the alternative base offense level of level 21 or level 24 because these cases will be referenced to the new travel guideline at §2G1.3.

Ninth, in response to section 401 of the PROTECT Act, the amendment increases the base

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offense level at §2A3.3 (Criminal Sexual Abuse of a Ward) from level 9 to a level 12. Although 18 U.S.C. § 2243(b) offenses have only a one-year statutory maximum term of imprisonment, the Commission determined that these offenses were serious in nature and deserved punishment near that statutory maximum.

Finally, the amendment increases the alternative base offense levels in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) to level 20, 16, or 12, depending on the conduct involved in the offense. Prior to the amendment, these base offenses levels were level 16, 12, or 10. Base offense level 20 applies if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b). Base offense level 16 applies if the offense involved conduct described in 18 U.S.C. § 2242, and base offense level 12 applies for all other cases sentenced at this guideline. The Commission concluded that these increases were appropriate to account for the serious conduct committed by the defendant and to maintain proportionality with other Chapter Two, Part A guidelines.

Effective Date: The effective date of this amendment is November 1, 2004.

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Chapter Two, Part G, Subpart 2, is amended by striking §2G2.2 and its accompanying commentary as follows:

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

- (a) Base Offense Level: 17
- (b) Specific Offense Characteristics
 - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
 - (2) (Apply the Greatest) If the offense involved:
 - (A) 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) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
 - (C) Distribution to a minor, increase by 5 levels.
 - (D) 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.
 - (E) Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels.
 - (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
 - (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

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(5) If a computer was used for the transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.

(6) 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, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1)-(3), 2260.

Application Notes:

1. For purposes of this guideline—

'Distribution' means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.

'Distribution for pecuniary gain' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable

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consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

'Distribution to a minor' means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

'Minor' means an individual who had not attained the age of 18 years.

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

such conduct.

'Prohibited sexual conduct' has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. 'Sexual abuse or exploitation' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

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

2. If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Prior convictions taken into account under subsection (b)(4) are also counted for purposes of

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determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

3. The cross reference in subsection (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Background: Section 401(i)(1)(C) of Public Law 108-21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.", and inserting the following:

"§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), or § 2252A(a)(5).

(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) If the offense involved:

(A) 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

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material, but by not less than 5 levels.

- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
- (C) Distribution to a minor, increase by 5 levels.
- (D) 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) 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) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, 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, 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

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visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

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

'Distribution' means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

'Distribution for pecuniary gain' means distribution for profit.

'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

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

'Interactive computer service' has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

'Minor' means (A) an individual who had not attained the age of 18 years; (B) an individual,

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

- (i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.
- (ii) Each video, video-clip, movie, or similar recording shall be considered to have 75 images. If the length of the recording is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

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

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

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