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UNITED STATES SENTENCING COMMISSION
1331 PENNSYLVANIA AVENUE, NW
SUITE 1400
WASHINGTON, D.C. 20004
(202) 662-8800

William W. Wilkins, Jr. Chairman
Michael K. Block
Stephen G. Breyer
Helen G. Carrothers
George E. MacKinnon
Ilene M. Nagel
Benjamin F. Beer (ex officio)
Ronald L. Garner (ex officio)



Revised Report of the
WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES
AND HATE CRIME

January 16, 1990

Staff members:

David E. Anderson,
 coordinator

Dean Stowers

Melissa Selick

PROPOSED AMENDMENT TO §2G2.2

NEW GUIDELINE

§2G2.2 Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to Receive Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level: 15

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 4 levels; otherwise, if the material involved a minor under the age of 16 years, increase by 2 levels.

(2) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table at §2F1.1(b)(1) corresponding to the retail value of the material, but in no event less than 6 levels.

(3) If the defendant sexually abused a minor at any time prior to the commission of the offense, increase by 6 levels.

(c) Cross Reference

(1) If the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. §§1460, 2251(c)(1)(A), 2252.

Application Notes:

1. "Distribution" as used in this guideline includes production, transportation, mailing, and possession with intent to distribute.

2. Where the offense involved simple receipt or possession of a small amount of materials, a downward departure may be warranted if the court finds that the defendant has no prior history of sexually abusing children or engaging in other criminal conduct and that the defendant does not otherwise pose a threat to society. However, a downward departure would not be warranted where it is indicated that the level of defendant's involvement in the exploitation of children is greater than simple possession or receipt of materials on the occasion for which sentence is being imposed. Thus, for example, where there is reliable information indicating that the defendant has traded or otherwise exchanged materials previously, or that the defendant was in possession of a substantial amount of material, a departure would not be warranted.

3. Specific offense characteristic (b)(3) is intended to apply to all prior incidents of sexual abuse, including criminal "sexual acts" or "sexual contacts," as defined in 18 U.S.C. §2245, with persons under the age of 18, whether evidenced by conviction or other reliable information. Where the defendant has a previous conviction for an offense involving the sexual abuse of a minor, the adjustment under subsection (b)(3) is in addition to any points added to the criminal history score for a conviction in Chapter Four, Part A (Criminal History).

4. "Sexually Explicit Conduct," as used in this guideline, has the meaning set forth in 18 U.S.C. §2256.

5. The cross reference in (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, 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.

PROPOSED AMENDMENT TO 2G3.1

Note that this amendment is largely based on the Commission's proposed amendment published in June, 1989, a copy of which is attached.

NEW GUIDELINE

§2G3.1 Importing, Mailing, or Transporting Obscene Materials Involving Adults

(a) Base Offense Level:

- (1) 15, if the offense involved distribution for pecuniary gain;
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the offense level is determined under subsection (a)(1), increase by the number of levels from the table at §2F1.1(b)(1) corresponding to the retail value of the obscene matter.
- (2) If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, or material purporting to depict a person under the age of 18, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved material depicting persons actually under the age of 18, apply §2G2.2 (Transporting, Distributing, Receiving, Possessing with Intent to Sell, or Advertising to receive Material Involving the Sexual Exploitation of a Minor).

Commentary

Statutory Provisions: 18 U.S.C. §§1460-1463, 1465-1466, 1735, 1737.

Application Notes:

1. "Distribution" as used in this guideline includes production, transportation, mailing, and possession with intent to distribute.
2. "Material purporting to depict a person under the age of 18"

means photographs or other visual depictions of adults disguised or otherwise holding themselves out to be children.

3. Obscenity offenses may also be prosecuted under 18 U.S.C. §§1962, 1963 (RICO). §2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations) is applicable to offenses charged under those statutes and provides an offense level 19 except where the offense level applicable to the underlying racketeering activity is greater. If the defendant was convicted of an obscenity related offense under sections 1962 and 1963 of title 18, §2E1.1 should be applied.

THE COMMISSION'S PROPOSED REVISION OF §2G3.1
AS PUBLISHED JUNE 1989

§2G3.1 Offenses Involving Obscene Matter

(a) Base Offense Level:

- (1) [12][13][14][15][16], if the offense involved distribution for pecuniary gain;
- (2) [6][8], otherwise.

(b) Specific Offense Characteristics [(Apply the Greater):]

- (1) If the base offense level is determined under subsection (a)(1), increase by the number of levels from the table at §2F1.1(b)(1) corresponding to the retail value of the obscene matter.
- (2) If the base offense level is determined under subsection (a)(1), and the offense involved the defendant engaging in a pattern of distributing the obscene matter to persons under eighteen years of age, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved the visual depiction of a person under eighteen years engaging in or assisting another person to engage in sexually explicit conduct, apply § 2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor) as if the offense had involved transporting, receiving, or trafficking in material involving the sexual exploitation of a minor.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465-1466.

Application Notes:

1. "Distribution," as used in this guideline, includes production, transportation, and possession with intent to distribute, and shall be broadly construed.
2. Subsection (c)(1) includes circumstances in which a person under eighteen years, or a person pretending to be under eighteen years of age, is visually depicted engaging in or assisting another to engage in sexually explicit conduct.

PROPOSED AMENDMENT TO §2H1.1

NEW GUIDELINE

§2H1.1 Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights

(a) Base Offense Level (Apply the Greater):

(1) [15] [13]; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §241.

Application Notes:

1. [Leave as currently appears]

2. [Leave as currently appears]

Background: [Leave as currently appears]

§2H1.2 [Deleted] [See attached copy]

[ALTERNATIVE OPTION TO §2H1.1 AMENDMENT]

NEW GUIDELINE

§2H1.1 Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights

(a) Base Offense Level (Apply the Greater):

(1) 15, if the offense involved going in disguise to deprive of rights;

(2) 13, if the offense involved a conspiracy to deprive of rights; or

(3) 2 plus the offense level applicable to any

underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §241.

Application Notes:

1. [Leave as currently appears]
2. [Leave as currently appears]

Background: [Leave as currently appears]

§2H1.2 [Deleted] [See attached copy]]

PROPOSED AMENDMENTS TO §3A1.4

NEW GUIDELINE

**§3A1.4 VICTIM DUE TO RACE, COLOR, RELIGION, ALIENAGE, OR
NATIONAL ORIGIN OR ON ACCOUNT OF EXERCISE OF FEDERAL
RIGHTS**

If the offense--

(a) involved the infliction, or intended infliction, of any harm upon a victim because of the victim's status with respect to race, color, religion, alienage, or national origin; or

(b) was committed because of a victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States,

increase by 2 levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the offense guideline specifically incorporates this factor.

2. If the court determines that, under the circumstances of the offense, the race, color, religion, alienage, or national origin of the victim rendered the victim vulnerable under §3A1.1 (Vulnerable Victim), do not apply subsection (a) of this guideline.

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INTRODUCTION

The working group on child pornography, obscenity, and hate crimes ("working group") was established to carry forward the efforts which the Commission began when it initially published revisions of the guidelines covering obscenity offenses in March and June 1989. The working group is comprised of David E. Anderson, coordinator, Dean Stowers, and Melissa Selick. Additionally, Ken Roberts volunteered his valuable assistance to review cases.

The potential scope of the material to be reviewed by the working group included Part G (offenses involving prostitution, sexual exploitation of minors, and obscenity), and Part H1 (civil rights) of Chapter 2 of the guidelines. The statutes covered by those guidelines include chapters 13 (civil rights), 71 (obscenity), 110 (sexual exploitation of minors), and 119 (transportation for illegal sexual activity) of title 18 as well as section 1328 of title 8 (importation of an alien for immoral purposes or prostitution) and section 3631 of title 42 (relating to discrimination in housing).

While the scope of the project was fairly broad (and could, potentially, have encompassed more guidelines and/or statutes), the working group, given the limited time available to complete its work, initially targeted offenses involving sexual exploitation of

children and obscenity as the area deserving of the greatest attention. The group also reviewed the civil rights guidelines and sentences imposed under them to determine whether any amendments are necessary.

The working group collected and reviewed all statutes relevant to the project. It also identified 107 guidelines cases involving pornography, obscenity, sex offenses, and hate crimes received by the Commission as of its last monitoring report. The working group reviewed all available cases. The working group also reviewed the legislative histories of more recent statutes, hotline reports concerning problems with the civil rights, obscenity, and sexual exploitation guidelines, and the earlier proposed obscenity guideline amendments and the comments which they generated.

This report is divided into three parts: child pornography offenses, obscenity offenses, and hate crimes. Additionally, there are two appendices to the report. Appendix A contains a description of each of the child pornography and obscenity cases reviewed by the group and a summary of the cases taken together. Appendix B contains those guidelines where an amendment is recommended as they would appear if such amendment were adopted.

I. CHILD PORNOGRAPHY OFFENSES

This section describes current Federal statutes prohibiting the sexual exploitation of children through the production of, or trafficking in, child pornography together with a description of sentencing guidelines currently in effect for such offenses. The report further discusses the legislative background of those statutes, describes the cases involving child pornography which have been sentenced under the guidelines, and provides recommendations for improving those guidelines.

Federal Child Pornography Statutes and Child Pornography Sentencing Guidelines

Two principle statutes, 18 U.S.C. §§2251 & 2252 make criminal a range of conduct relating to child pornography. Section 2251 is primarily directed at the production of child pornography and defines offenses which often constitute violations of state child sex abuse laws.¹ Offenders under §2251 will most often come into direct contact with the child victim and frequently molest them in some fashion.² In contrast, §2252 establishes the offense for the

¹ Due to the restrictive jurisdictional predicates of federal sex abuse statutes, it is unlikely that the conduct of a defendant which occurs during the course of the production of the child pornography could be prosecuted under Chapter 110 of Title 18.

² This is necessarily the case because an element of a §2251 offense is that the minor engage or assist another to engage in sexually explicit conduct, which conduct is then filmed or photographed. "Sexually explicit conduct" is a statutory term of art defined in 18 U.S.C. §2256 and encompasses a wide range of egregious sexual activity with the victim.

next link in the child pornography offender chain -- the transporter, distributor, and receiver of the material produced in violation of §2251. These individuals are those who mail material depicting the sexual exploitation of minors or those who receive the material. It is not necessary for the offender under §2252 to have any direct role in the production of the material, rather, all that is necessary is that the offender further the production of child pornography by distributing it beyond the production source or by creating a continued demand for its manufacture. Where the defendant is both the producer of the material and the distributor, he would be in violation of both statutes.

Guideline §2G2.1 provides a base offense level of 25 and a two level increase for offenses involving minors under 12.³ A special application note is provided to prevent grouping where there was more than one minor victim of the offense. Guideline §2G2.1 applies to offenses committed under 18 U.S.C. §2251 (Sexual Exploitation of Children), a statute which contains three separate subparagraphs defining a number of different offenses relating to the sexual exploitation of children through the production of sexually explicit material. The final paragraph sets forth the penalties for violations of the defined offenses.

³ This offense level is to be compared to §2A3.1 (Criminal Sexual Abuse) which carries a base offense level 27 and a 4 level increase for minors under 12, two levels for minors between 12 and 16, 2 levels if the defendant was the custodian of the victim, 4 levels each if the victim was abducted, made unconscious, seriously threatened or seriously injured.

Section 2251(a) makes criminal "[a]ny person who employs, ... entices, or coerces any minor to engage in, or who transports any minor ... with the intent that such minor engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct." Subsection (b) of §2251 further prohibits "[a]ny parent, legal guardian, or person having custody or control of a minor" from "knowingly" permitting that 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."⁴

Subsection (c) of §2251 sets forth two separate and distinct offenses. The offense defined in subsection (c)(1)(B) of §2251 involves a defendant printing or publishing a notice or advertisement offering to participate "in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct." The conduct which this provision encompasses borders on that covered under subsection (a)

⁴ It should be noted that an offense committed under §2251(b) may in certain instances be factually similar to an offense committed under §2251A(a)(1), an offense created by Congress in 1988 involving the sale or transfer of children by a parent or guardian and covered by guideline §2G2.3 (effective November 1, 1989). Those convicted under §2251A are subject to a 20 year minimum, a life maximum, and a base offense level 38. §2251A(a)(1) provides in relevant part that "[a]ny parent, legal guardian, or other person having custody or control of a minor who sells or otherwise transfers custody or control of such minor ... with knowledge that ... the minor will be portrayed in a visual depiction engaging in, or assisting another person to engage in, sexually explicit conduct" shall be imprisoned for not less than 20 years nor more than life. As of the data contained in MON 7/89 the Commission has not received any cases sentenced under §2251A.

and is in essence a specific form of the offense of solicitation. The offense defined in (c)(1)(A) reaches into the trafficking area by prohibiting the printing or publishing of notices or advertisements to receive materials depicting a minor engaging in sexually explicit conduct.

The penalty provisions of §2251 distinguish between first and subsequent offenders. First offenders are subject to a 10 year maximum term, while those convicted of a subsequent offense under the statute are subject to a mandatory minimum of 5 years and a maximum of 15 years. As currently written, the guideline does not itself recognize the mandatory minimum for second offenders, however, the base offense level 25 allows for the mandatory minimum to fall within the guideline range.

Section 2252 defines as unlawful the transport, shipping, mailing, receiving, distributing or reproduction for distribution of materials depicting minors engaging in sexually explicit conduct and provides for penalties identically structured as those in §2251, i.e., a 10 year maximum for first offenders, and a 5 year minimum and 15 year maximum for subsequent offenders. Guideline §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor) carries a base offense level of 13, provides a two level enhancement for prepubescent minors or those under the age of 12, and at least a 5 level increase if the offense involved distribution for pecuniary

gain. The guideline currently only applies to offenses committed under §2252, the principle statute prohibiting trafficking in child pornography.

Legislative Background of §§ 2251 and 2252 of Title 18

The 1977 Act

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from Federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. The first measure passed by Congress to expressly reach such conduct was the Protection of Children Against Sexual Exploitation Act of 1977. The 1977 Act had three basic purposes: 1) to prohibit interstate transportation of boy prostitutes⁵; 2) to prohibit the use of children in the production of sexually explicit materials; and 3) to provide increased penalties for trafficking in obscene materials depicting children.

As a predicate to passage of the 1977 Act, the Congress found that child pornography and child prostitution had grown to be a "highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977). Further, hearings revealed "a close connection between child pornography and the equally outrageous use of young children

⁵ Interstate transportation of minor female prostitutes was then prohibited under the Mann Act.

as prostitutes." Id., at 7. Congress found that the typical boy victim of both pornography and prostitution related activities was between the ages of eight and seventeen and that, while "[i]n most situations the parents or foster parents are unaware of what their children are doing ... in some of the worst cases, the parents themselves lead the children into this depravity." Id., at 9. Congress further found that the sexual exploitation of children through prostitution and the production of pornography cause substantial harm both to the child victim and to society as a whole:

[The sexual exploitation of children] cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future. Indeed, such children often grow up in an adult life of drugs and prostitution. Even more tragic, however, is the fact that many adults who were molested as children tend to become child molesters themselves, thus continuing the vicious cycle.

Id.

Further, Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

[M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish

contact with other pedophiles, and even to establish liaisons with some of the child models.

Id., at 6.

Finally, Congressional policy as expressed in the Committee report on the 1977 Act rejected the notion that Federal enforcement efforts should be limited solely to large scale distributors of child pornography. To the contrary, the House Judiciary Committee was "pleased to note that in recent months federal authorities have begun a much more extensive crackdown on child pornography. For example, rather than just investigating large scale dealers in child pornography the Postal Service now investigates every complaint and every mail order advertisement for pornographic materials that depict children." Id., at 10.

The Act as it emerged from conference contained three major provisions. The first was to amend 18 U.S.C. 2423 to prohibit the interstate transportation of both male and female minors for prohibited sexual activities involving a commercial purpose.

Secondly, the Act contained two new sections to title 18 (sections 2251 and 2252) prohibiting the sexual exploitation of children in the production of pornographic materials and trafficking or receiving such materials. As contained in the 1977 Act, it was an element of the trafficking offense that the materials involved be "obscene."

The House and Senate versions of the 1977 Act contained conflicting penalty provisions. Under the Senate version, production offenses carried a maximum fine of \$10 thousand, a mandatory minimum term of imprisonment of 2 years and a maximum term of 10 years for a first offense; subsequent offenses carried a maximum fine of \$15 thousand and a mandatory minimum term of imprisonment of 5 years and a maximum term of 15 years. Trafficking offense carried the same maximum fine and maximum prison terms for first and subsequent offenses; mandatory minimum terms of imprisonment, however, were lowered to 1 year for a first offense and 2 years for subsequent offenses. The House version of the Act provided a maximum fine of \$10 thousand and a maximum term of imprisonment of 10 years. The House version did not distinguish between first and subsequent offenses, nor did it provide mandatory minimum terms of imprisonment.

The Conference version of the Act, which was ultimately passed, contained a compromise wherein first convictions for either trafficking or production offenses were subject to a maximum fine of \$10 thousand and a maximum prison term of 10 years and subsequent trafficking or production convictions were subject to a maximum fine of \$15 thousand, a maximum term of imprisonment of 15 years, and a mandatory minimum term of 2 years imprisonment.

Supreme Court Opinion In New York V. Ferber

In 1982 the Supreme Court, in New York v. Ferber, 458 U.S. 747, had occasion to rule on a New York statute prohibiting the distribution of child pornography. New York statute's prohibition was more sweeping than the version of 18 U.S.C. § 2252 contained in the Protection of Children Against Sexual Exploitation Act of 1977 inasmuch as it encompassed the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene." The Supreme Court upheld the statute from First Amendment attack and, per Justice White, based its decision on three considerations of relevance here.

First, the court found that "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling" and prevent that the of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Id., at 756-757. Further, the Court found that:

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of materials which requires the sexual exploitation of children is to be effectively controlled ... While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of

distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.

Id., at 759-760. Finally, the Court also noted that the "advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials." Id., at 761.

The Child Protection Act Of 1984

In response to the Supreme Court's decision in Ferber, Congress enacted the Child Protection Act of 1984. Among other things, the Child Protection Act removed the "obscenity" element from the trafficking offenses under 18 U.S.C. §2252 and extended the prohibition to production and trafficking in child pornography for non-commercial purposes. As the House Judiciary Report states:

Perhaps the most important limitation in existing law is the "commercial purpose" limitation. Those persons who use or entice children to engage in sexually explicit conduct for the purpose of creating child pornography do not violate [18 U.S.C. § 2251] unless their conduct is for pecuniary profit ... Since the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit, the Subcommittee found a need to expand the coverage of the Act by deleting the commercial purpose requirement.

H. Rep. No. 536, 98th Cong., 1st Sess., at 2 - 3 (1983). Further, Congress revisited the penalty provisions of sections 2251 and 2252 and increased the maximum fine amounts from \$10 thousand to \$100

thousand for a first offense and from \$15 thousand to \$200 thousand for subsequent offenses. Finally, the Child Protection Act also raised the age of protected persons from 16 to 18 years.

The 1986 Acts

The Congress again visited the issue of child pornography in 1986 following the release of the Final Report of the Attorney General's Commission on Pornography. The Report noted that a primary vehicle for the production and distribution of child pornography involved trade in materials created by child abusers and distributed informally to other child abusers:

A significant aspect of the trade in child pornography, and the way in which it is unique, is that a great deal of this trade involves photographs taken by child abusers themselves, and then either kept or informally distributed to other child abusers ... We have heard substantial evidence that both situational and preferential child molesters frequently take photographs of children in some sexual context. Usually with non-professional equipment, but sometimes in a much more sophisticated manner, child abusers will frequently take photographs of children in sexual poses or engaged in sexual activity, without having any desire to make commercial use of these photographs. At times the child abuser will merely keep the photograph as a memento, or as a way of recreating for himself the past experience. Frequently, however, the photograph will be given to another child abuser, and there is substantial evidence that a great deal of "trading" of pictures takes place in this manner.

Attorney General's Commission on Pornography, Final Report, at 406-407 (1986). The Attorney General's Commission made three unanimous findings of particular relevance here. First, the

Commission found that child pornography constitutes a "permanent record" of the sexual abuse visited upon the child and that such depictions "follow the child up to and through adulthood" causing harms which are "independent of the harms attendant to the circumstances in which the photographs were originally made." Id., at 411. Further, the Commission found that child pornography is often instrumental in the further molestation of children.

[T]here is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading especially a quite young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.

Id. Finally, the Commission also concluded that both commercial and non-commercial distribution of child pornography tended to promote or encourage the acts of child abuse portrayed in such materials. "If the sale or distribution of such pictures is stringently sanctioned, and if those sanctions are equally stringently enforced, the market may decrease, and this may in turn decrease the incentive to produce those pictures." Id., at 413. Thus, the Commission recognized that the demand for child pornography was a cause for its production, and that demand and supply of child pornography were closely related issues.

The 99th Congress enacted two laws of relevance here: the Child Sexual Abuse and Pornography Act of 1986 and the Child Abuse

Victim's Rights Act of 1986. In the Child Abuse Act of 1986, Congress enacted several provisions reflective of the concerns expressed by the Attorney General's Commission on Pornography. Congress sought to provide further sanctions against the sexual exploitation of children for non-commercial purposes by once again amending the Mann Act so that it would apply to the interstate transportation of children for prohibited sexual purposes regardless of whether the defendant had a commercial purpose. As the House Judiciary Committee report notes, "in the case of transportation for the purpose of participating in the production of child pornography materials, private (rather than commercial) exploitation is frequently the objective." H. Rep. No. 910, 99th Cong., 2d Sess., at 7. Congress also amended section 2251 of title 18 to prohibit advertisements knowingly made either for children to participate in the production of pornographic materials or for such materials. Penalties for these new offenses were the same as those available for child pornography production and trafficking offenses.

In the Child Abuse Victim's Rights Act of 1986, finding that "the Federal Government lacks sufficient enforcement tools to combat concerted efforts to exploit children prescribed by Federal law," Congress again revisited the penalty provisions of sections 2251 and 2252 of title 18 and increased the mandatory minimum penalty for subsequent convictions under either statute from 2 to 5 years. Pub.L. 99-500, Title I, § 101(b) [Title VII, §§ 702,

704], Oct. 18, 1986, 100 Stat. 1783-75; Pub.L. 99-591, Title I, § 101(b) [Title VII, §§ 702, 704], Oct. 30, 1986, 100 Stat. 3341-74.

The current Federal statutes prohibiting the production of and trafficking in child pornography are based upon findings made by all three branches of the Federal government concerning the harmfulness of such activities both to the specific child victims involved and to society at large. Indeed, as of 1982, forty-seven states had statutes specifically directed at the problem of child pornography. Many of the specific activities which Congress sought to prohibit and many of the harms which it sought to avoid can in fact be seen in the cases which have been received by the Commission's monitoring unit.

Case Review and Technical Assistance Questions

In the preparation of this report, all cases received by the Commission as of its last monitoring report involving convictions for child pornography and obscenity offenses were identified and, except for five unavailable files, reviewed. Specifically, the case files reviewed involved convictions under 18 U.S.C. §§ 2251, 2251A, and 2252 (child pornography offenses); 1460 - 1468 (obscenity offenses); and, 2423 (interstate transportation of minors for unlawful sexual activity). A description of each of the cases reviewed together with a summary is attached as appendix A to this report.

49 cases were identified in all, 31 of which involved convictions under Federal child pornography statutes. Of these child pornography cases, about half (15) involved defendants who currently or previously engaged in the sexual abuse of children. None involved trafficking or production of child pornography for pecuniary gain. Typically, those convicted on production charges had photographed or video taped themselves during the course of sexually abusing a child. Trafficking cases generally involved individuals who informally traded child pornography through the mail for pleasure. Often, such offenders were themselves child abusers.

Ten of the cases reviewed involved convictions under Federal obscenity statutes. Four of those cases involved plea bargains whereby more serious child pornography counts were dropped. The remaining cases involved adult obscenity. Three cases involved convictions under 18 U.S.C. § 2324 for interstate transportation of a minor for unlawful sexual activity. Two of those cases also involved child pornography counts of conviction. The third involved the transportation and rape of a teenage boy.

The rate of departure was high. Fourteen of the forty-four cases reviewed (about 32 percent) involved departures and were almost evenly split between departures downward (8) and upwards (6). Over 34 percent of the cases involving convictions under §

~~§2G2.2. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor~~

~~(a) Base Offense Level: 13~~

~~(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) If the offense involved distribution, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event less than 5 levels.~~

~~Commentary~~

~~Statutory Provision: 18 U.S.C. § 2252.~~

~~Application Note:~~

~~1. "Distribution," as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.~~

~~Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31).~~

2252 were departures (9 out of 26) and were almost evenly split between departures downwards (5) and upwards (4). Of the five cases involving convictions under § 2251, two involved upwards departures and 1 involved a downwards departure. Of the ten cases involving obscenity cases, one involved a downward departure and there was also a downward departure in one of the three cases involving convictions under section 2324.

Finally, eight of the forty-four cases reviewed (about 18 percent) also involved express plea bargains down to lesser charges. Three involved reducing production charges under §2251 down to trafficking charges under §2252 (from a base offense level of 25 under § 2G1.1 to a base offense level of 13 under § 2G2.2); one involved reducing a production charge under §2251 down to a transportation of a minor charge under § 2423 (from a base offense level of 25 under § 2G1.1 to a base offense level of 16 under § 2G1.2); and four involved reducing trafficking charges under § 2252 down to obscenity charges under §§ 1461 and 1464 (from a base offense level of 13 under § 2G2.2 to a base offense level of 6 under § 2G3.1).

All of the calls received by the Technical Assistance Staff (TAS) pertaining to child pornography and obscenity offenses have also been reviewed. Specific TAS problems are mentioned in the discussions of the recommendations below as appropriate.

Recommendations

I. Abuse of Trust. Both calls received by the hotline and cases received by monitoring display confusion concerning whether the abuse of trust enhancement under § 3B1.3 applies where the defendant sentenced under § 2G2.1 is the parent or guardian of the child-victim or where the child-victim is in the lawful temporary custody of the defendant (e.g., defendant operates a day-care center). Further, in some cases the question of whether § 3B1.3 is applicable may have simply been ignored.

Abuse of trust in principle should be an aggravating factor in child pornography production cases under § 2G2.1 where the defendant is in a position of responsibility for the child. Such an aggravating factor currently appears under § 2A3.1(b)(3), the sexual abuse guideline. Further, § 2251(b) represents an aggravated form of a § 2251 violation as evidenced by the above discussion of legislative history and by the enactment in 1988 of § 2251A which prescribes against similar conduct. The most simple way to ensure that it is uniformly taken into account in appropriate cases would be to add a specific offense characteristic to § 2G2.1 which would provide the following adjustment where the offender is the parent, guardian, or otherwise properly responsible for the child:

If the defendant was the parent or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care or supervisory control of the defendant, increase by 2 levels.

The language of the characteristic is drawn from §§ 2251(b) and 2256.

Vulnerable Victim. Several courts have addressed the issue of whether, in cases involving the production of pornography, child-victims over the age of 12 are "unusually vulnerable due to age" under § 3A1.1. They have split over whether the offense guideline incorporates vulnerability as a factor.

Children over 12 are vulnerable and do deserve heightened protection. Indeed, Congress reached a similar conclusion when it raised the age level of the protected class of children under the child pornography statutes from 16 to 18 years in the Child Protection Act of 1984. The following revision, patterned after existing specific offense characteristics in § 2G1.2, would consistently provide such heightened protection to children under the age of 16:

If the offense involved a minor under the age of twelve years or a prepubescent minor, increase by 4 levels; otherwise, if the offense involved a minor under the age of 16 years, increase by 2 levels.

⁶ A copy of § 2G2.1 revised as recommended by this report is contained in appendix B.

⁷ A similar age distinction also appears in guideline § 2A3.1(b)(2).

Trafficking offenses: prior history of sexually abusing children. A substantial number of the cases (15 of 44) received by the Commission involve an offender who currently or at some time in the past has been involved in the sexual abuse of children. Typically, such conduct is not accounted for (or not adequately accounted for) in the defendant's criminal history score; nor are there other applicable offense characteristics or adjustments that are available to take such conduct into account. Of the cases received by the Commission as of its most recent monitoring report involving sexual abuse of children, one-third have resulted in upward departures while the rest have received guideline sentences at the top of the sentence range.

The failure of the guidelines to specifically account for past or present abuse of children is particularly troublesome. At least one court, when imposing sentence under the guidelines, voiced its frustration at being unable to make an upwards departure in a child pornography trafficking case where the defendant has sexually abused the same minor over a period of 5 years:

[The Sentencing Guidelines are] the law of the land at the present time and [have] been upheld by the United States Supreme Court ... This Court is ... of the opinion to generally abide by the guidelines with rare exceptions. Under the circumstances that I have present in this case, though an upward departure might be appropriate, and though the Court could strain to reach an upward departure, though the Court might have a strong inclination to sentence in a case like this far above that which is indicated for the guidelines, I

choose to impose the committed sentence in this case at the upper end of the guidelines ...

Transcript of Sentencing Hearing at 19, United States v. Toler, 2:88-00020 (S.D. W.Va.). Moreover, as detailed above, Congress has repeatedly stressed that involvement with child pornography is closely related to the sexual abuse of children in that such materials provide incentive and encouragement to child abusers. The Supreme Court, in reviewing similar legislation at the state level, characterized the link between trafficking in child pornography and instances of sexual abuse of children as providing a compelling reason for state action. So too, the Attorney General's Commission on Pornography found that the link between child sexual abuse and child pornography was strong and insidious.

Our cases tend to show that in many instances, those who are involved with child pornography have a history of sexually abusing children. It seems clear that public policy favors considering such offenders as posing a severe threat to the public safety and our cases suggest that judges consider sexual abuse of children as a most important sentencing consideration in child pornography cases.

The following is a proposed specific offense characteristic to be inserted in subsection (b) of § 2G2.2 which would take into account past incidents of sexual abuse of children:

If the defendant sexually abused a minor at any time prior to the commission of the offense, increase by 6 levels.

That specific offense characteristic would be accompanied by the following application note:

Specific offense characteristic (b)(3) is intended to apply to all prior incidents of sexual abuse, including criminal "sexual acts" or "sexual contacts," as defined in 18 U.S.C. § 2245, with persons under the age of 18, whether evidenced by conviction or other reliable information. Where the defendant has a previous conviction for an offense involving the sexual abuse of a minor, the adjustment under subsection (b)(3) is in addition to any points added to the criminal history score for a conviction in Chapter Four, Part A (Criminal History).

The adjustment provides an increase of 6 levels. That particular increase is selected for several reasons. First, it provides sentence ranges within the range of sentences to which courts have departed -- between 36 and 60 months. Secondly, a parallel was sought in other areas of criminal law where the Commission drew a distinction between similar crimes which are distinguished primarily by a sexual component. Assault is such an area. There, the Commission provided a 7 level distinction between the base offense levels for aggravated assault (20) and criminal sexual assault (27). A 6 level increase here roughly mirrors that distinction. Finally, the harms caused to the child-victims of sexual abuse may be compared in severity to permanent bodily injury

which is generally a 6 level enhancement throughout the guidelines. See, e.g., §§ 2A2.1, 2A2.2, 2B3.1, and 2B3.2.

It may appear problematic to include a specific offense characteristic concerning prior conduct in a chapter two guideline; and certainly the form of such an adjustment to capture such conduct is secondary to its substantive impact. Yet, there is precedent for including such offender characteristics within chapter two of the guidelines. See, e.g., §§ 2L1.1, 2L1.2.

It should also be emphasized that policymakers and sentencing courts both agree that the conduct in question has a substantial bearing on determining the severity of the offense conduct in a given case, the extent to which public safety is jeopardized, and the appropriate type and extent of punishment. Moreover, it seems clear from both the legislative background, the Report of the Attorney General's Commission on Pornography, and the cases received by the Commission, that whether a child pornography offender has a record of sexually abusing minors is a consideration within the heartland of child pornography cases.

Trafficking offenses: statutory minimum as guideline maximum.
Subsequent offenders under section 2252 are subject to a mandatory minimum term in prison of 5 years. Under § 2G2.2, however, that term is unreachable except in the most unusual cases. As a result, the statutory minimum sentence becomes the guideline maximum

sentence. Yet the statute, by providing both a mandatory minimum and an increased maximum term of imprisonment for subsequent offenses, suggests that penalties for subsequent offenders should be graduated. Further, the existence of the five year minimum penalty for subsequent offenders can be taken as evidence of the severity of the offense as viewed by Congress.

That the guideline should effectively ignore the sentencing scheme for subsequent offenders is troublesome. Congress gave careful consideration to the penalty provisions of section 2252. When first enacted in 1977, penalties where the subject of House-Senate conflict which was resolved in Conference with a 2 year mandatory minimum and an available 15 year maximum term of imprisonment. Congress returned to the issue of penalties for subsequent offenders when it increased fines under section 2252 in 1984. The current 5 year mandatory minimum sentence for subsequent offenders was enacted in 1986 when the Congress again visited the issue of child pornography and sexual abuse.

One way to provide for sentences at the mandatory minimum sentence would be, together with other revisions recommended in this report, to increase the base offense level of § 2G2.2 from 13 to 15. Taken together, those changes would insure that most sentences for repeat offenders would be at or above the mandatory minimum level and would better insure that the severity of the offense as indicated by the statutory penalty structure was

reflected for all offenders under the guideline. An alternative approach, though one with greater impact on the structure of the guidelines generally, would be to provide a separate, substantially higher base offense level for repeat offenders.

Trafficking offenses: advertising for pornographic materials.

Section 2251(c)(1)(A) prohibits persons from advertising to receive child pornography. Currently, this statute is covered under § 2G2.1 as a production offense punishable at a base offense level of 25. The offense conduct, however, is more closely related to the trafficking offenses proscribed under section 2252 and punished under § 2G2.2. The statutory index to the guidelines manual as well as the statutory provisions section of the guideline commentaries to §§ 2G2.1 and 2G2.2 should be revised to reference section 2251(c)(1)(A) under the trafficking guideline.

Trafficking offenses: controlled departures for first offenders without prior child pornography involvement. On several occasions, courts have departed downwards in child pornography cases involving first offenders who have little or no previous involvement with pornography. Typically, such offenders have no prior criminal history, have never had any sexual involvement with minors, and were not in possession of large amounts of child pornography at the time of arrest. One such case involved a defendant living in an isolated rural environment and receiving

such materials through the mails; another involved an invalid suffering from a degenerative muscular disease.

The following proposed application note to § 2G2.2 provides guidance concerning when a downward departure is appropriate and when it is not:

Where the offense involved simple receipt or possession of a small amount of materials, a downward departure may be warranted if the court finds that the defendant has no prior history of sexually abusing children or engaging in other criminal conduct and that the defendant does not otherwise pose a threat to society. However, a downward departure would not be warranted where it is indicated that the level of the defendant's involvement in the exploitation of children is greater than simple possession or receipt of materials on the occasion for which sentence is being imposed. Thus, for example, where there is reliable information indicating that the defendant has traded or otherwise exchanged materials previously, or that the defendant was in possession of a substantial amount of materials, a departure would not be warranted.

Miscellaneous Recommendations Related To Child Pornography

I. §2G1.1 and §2G1.2: Coercion By Drugs. Guidelines §2G1.1(b)(1) and §2G1.2(b)(1) contain language relating to coercion which is facially unclear and which has caused problems in application as evidenced by hotline calls and cases reviewed in house. The current language states: "If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels."⁸ Clearly, "coercion by ... drugs or

⁸ Application note 3 in both guidelines apparently tries to clear up the difficulty, however, it too is difficult to interpret in that it speaks of "negat[ing] the voluntariness of the behavior

in any manner" is an unusual use of the word "coercion." The difficulty of this language is confirmed by hotline calls in the few cases where the scope of this characteristic has been applied, and a sentencing reviewed in preparation of this report.⁹ In that instance¹⁰ a 16 year old boy was transported interstate and sexually abused by the defendant after the boy became intoxicated and disoriented due to the use of alcohol and a stimulant chemical inhaler called RUSH. Neither the probation officer nor the court applied the 4 level increase for coercion because the language was ambiguous.

The following amendment to §§ 2G1.1 and 2G1.2 would make clear the proper and apparent intended scope of the characteristic in both adult and child transportation cases:

If the offense involved incapacitation by use of drugs or alcohol, force, or threat of force or other forms of coercion, increase by 4 levels.

The new specific offense characteristic would be accompanied by the following application note reflecting the scope of the amended characteristic:

of the person transported."

⁹ Two calls were received by hotline on §2G1.2 and one call on §2G1.1. Two calls related to the scope of the coercion characteristic. This is not insignificant because as of MON789 only 3 prostitution cases have been received by the Commission.

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"Incapacitation by use of drugs or alcohol" applies where the ability of the person being transported to appraise or control their conduct was substantially impaired by drugs or alcohol.

The language of the amendment and application note is partially drawn from statutory language found in 18 U.S.C. §2241(b), Aggravated Sexual Abuse. The application note in §2G1.1 would also contain the following language recognizing that for adults, as opposed to children, the increase will not generally be proper if the person voluntarily took the drug or alcohol:

In the case of transportation involving an adult, rather than a child, this characteristic generally will not apply where the alcohol or drug was voluntarily taken.

The point of this distinguishing language is to reflect the appropriateness of applying the factor where a child voluntarily takes a drug or alcohol and then is sexually abused at a point in time when their ability to appraise or control their conduct is substantially impaired. If a child is sexually abused under such circumstances, this should be an aggravating factor. However, adults stand in different circumstances with respect to their ability to understand the potential effect of taking drugs or alcohol voluntarily, and a defendant should not generally receive an enhanced sentence under such circumstances. If the drug or alcohol was involuntarily administered, then the aggravating factor

would apply if the person's ability to control their conduct was substantially impaired.

II. Clarification of Grouping Rules Under §§ 2G1.1, 2G1.2, and 2G2.1: §§2G1.1 and 2G1.2 contain "special instructions" concerning the application of the multiple count rules as well as application notes concerning multiple counts. In addition, § 2G2.1 contains an application note concerning the treatment of multiple child victims in pornography production cases although it lacks a special instruction in the guideline itself. The Technical Assistance staff has raised the valid concern that the current special instruction language does not necessarily effectuate the intent of the Commission in amending these provisions during the 1988-1989 amendment season. Further, since §2G2.1 addresses multiple counts in the commentary but not in the guideline itself, the treatment of the issue is inconsistent through part G.¹¹

¹¹ Last year the Commission promulgated an amendment providing the following "special instruction" as part of guidelines §§ 2G1.2 and 2G2.2 in lieu of adopting a table to account for the numbers of adults or children transported for purposes of unlawful sexual activity.

Special Instruction

(1) If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

The following application note language should clearly provide for systematic and uniform application of the anti-grouping, pseudo-count rule in §§ 2G1.1 and 2G1.2:

For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, then each such individual shall be treated as if contained in a separate count of conviction.

Additionally, § 2G2.1 should be amended to provide consistent treatment of multiple victims.

The proposed application note would treat the following situations identically:

1. The defendant is convicted of multiple counts of transporting numerous prostitutes on the same or different occasions;
2. The defendant is convicted of a single count of transporting several prostitutes on the same occasion;
3. The defendant is convicted of a single count of transporting a single prostitute on one occasion, although on that same occasion the defendant transported other prostitutes.

A fourth situation which would not be covered by the amendment would be where the defendant transported several prostitutes on different occasions as part of the same course of conduct or common

directed. The amendment addresses this problem by cross referencing to §2G2.1 in appropriate cases as follows:

- (1) If the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1.

II. OBSCENITY OFFENSES

This report marks the third time in which the Commission has reviewed its guidelines covering sentences imposed under Federal obscenity statutes. Below is a description of the recent efforts which the Commission has made in revising its current obscenity guidelines and the comment which those efforts have prompted followed together with recommended changes to the Commission's most recent proposed revision of its obscenity guidelines.¹⁵

Administrative Background on Obscenity Guideline Amendments

On March 3, 1989, the Commission, in response to the obscenity provisions of the Anti-Drug Abuse Act of 1988, published proposed revisions of guidelines §2G3.1 (Importing, Mailing, or Transporting Obscene Matter) and §2G3.2 (Obscene or Indecent Telephone Communications) together with a new guideline covering broadcasts of obscene materials.

§2G3.1, as in effect at the time of the March proposals, covered the following 4 statutes under Chapter 71 of Title 18:

¹⁵ In the course of preparing this report, all cases involving counts of conviction of obscenity offenses which have been received by the Commission as of its last monitoring report were reviewed. There were 10 cases in all; 4 involving child pornography (as discussed above), and the remainder involving adult pornography. See, Appendix A.

- §1461 mailing obscene matter. The offense carries penalties up to five years for a first offense and up to 10 years for subsequent offenses;
- §1462 importation or transportation of obscene matter by a common carrier in interstate or foreign commerce. The offense carries penalties of up to 5 years for a first offense and 10 years for subsequent offenses;
- §1463 mailing indecent matter on wrapper or envelopes. The offense carries penalties of up to 5 years imprisonment; and,
- §1465 transportation of obscene matter in interstate transportation for sale or distribution. The offense carries of up to 5 years imprisonment.

Sections 7521 and 7526 of the Anti-Drug Abuse Act of 1988 added to title 18 two new substantive offenses related to the distribution of obscene materials. Section 7521 creates the new offense of "engaging in the business of selling or transferring obscene matter" and provides for penalties of up to 5 years imprisonment. Section 7526 creates the new offense of "possession with intent to sell, and sale, of obscene matter within the special maritime and territorial jurisdiction of the United States and on indian lands." It provides penalties of up to 2 years imprisonment.

The revisions to §2G3.1 proposed in March 1989 responded to the new statutes by including an amendment to subsection (b)(2) by eliminating the upward adjustment for offenses which "involve an act related to distribution for pecuniary gain" and substituting

in its stead a more restrictive and narrowly drawn increase for defendants "engaged in the business of selling or distributing obscene matter." Further, the revised guideline would limit the upward adjustment for offenses involving materials which depict sadomasochistic conduct to those instances where the "defendant distributed or possessed with intent to distribute" such materials. Finally, the proposed revision to §2G3.1 eliminated the cross reference to the RICO guidelines for obscenity offenses involving organized crime or otherwise involving a criminal enterprise.

The Anti-Drug Abuse Act of 1988 also included provisions concerning obscene broadcasts and obscene telephone communications. Under section 7523 of the Act, making obscene broadcasts "by means of cable television or subscription services on television" is prohibited and those who do so are subject to a maximum prison term of 2 years. Under section 7524 of the Act, obscene telephone communications "to any person" "for commercial purposes" are also prohibited and those who make such communications are likewise made subject to a maximum prison term of 2 years.

The March 1989 proposed amendment to §2G3.2 (relating to obscene telephone communications) responded to the new provisions by including two new specific offense characteristics. One provided a four level increase for offenses involving sadomasochistic conduct; the other provided a two level increase where an individual under 18 years old received the communication.

It was a defense to the application of that latter adjustment, however, that the defendant "took reasonable action to prevent access by persons less than 18 years of age or relied on such action by the telephone company."

Finally, the Commission also published a proposed new guideline to cover the new statute prohibiting broadcast of obscene materials on cable or subscription television.

The Commission received comment in response to the proposals that was strongly critical of the existing guidelines as well as the proposals. No favorable comments were received. For example, Robert Peters, an attorney representing the Manhattan-based Morality in Media commented that under the current and proposed versions of §2G3.1, probationary sentences were inappropriately available for repeat obscenity offenders and that the "engage in the business" standard of proposed distribution adjustment in subsection (b)(1) was more restrictive than any statutory standard applicable to the underlying offenses punished by the guideline. Further, Peters pointed out that neither proposed §2G3.2 or proposed §2G3.3 took into account the commercial nature of the conduct against which the statutes covered by those guidelines were directed and, thus, did not provide penalties sufficient to provide an adequate deterrent effect.¹⁶

¹⁶ Letter to Chairman Wilkins, April 5, 1989.

Comment was also received by Benjamin W. Bull, General Counsel to Citizens for Decency Through Law, an organization of state and local prosecutors and other law enforcement officials headquartered in Phoenix, Arizona. Bull commented that the proposed revisions "are so lenient they will be ineffective," and "tak[e] the teeth out of" Federal obscenity statutes. Bull "urge[d] this Commission to reconsider its proposed guidelines ... and increase considerably the penalties for violations of these important federal laws."¹⁷

Congressman Thomas J. Bliley, Ranking Minority Member of the Select Committee on Children, Youth, and Families, voiced concern "about an apparent indifference regarding obscenity crimes reflected in the sentencing guidelines," and complained that the proposals were overly lenient. Further, he noted that, with respect to §2G3.2, Congress had repealed the taking "reasonable action to prevent access" by children defense and questioned whether it was appropriate for the Commission to resurrect that defense in the guidelines.¹⁸

Finally, the Commission also received comment from Senator Jesse Helms stating that the obscenity guidelines were too lenient and amounted to "scarcely more than a slap on the wrist."¹⁹

¹⁷ Letter to Chairman Wilkins, April 6, 1989.

¹⁸ Letter to Chairman Wilkins, April 13, 1989.

¹⁹ Letter to Chairman Wilkins, April 10, 1989.

In response to these and other negative comments, the Commission declined to promulgate any of the proposed obscenity guideline amendments. Instead, it promulgated a revision of §2G3.2 which covered both obscene broadcasts and obscene telephone communications. Specifically, the Commission voted to increase the base offense level from 6 to 12 to reflect the commercial nature of the conduct; provided a 4 level specific offense characteristic increase where the telephone communication was received by a minor or where the broadcast was made at a time where minors were likely to be present; and provided for graduated upward adjustments under the fraud table for offenses involving a large volume of commerce attributable to the defendant.

With respect to §2G3.1, the Commission decided to defer immediate action and instead consider emergency amendments to the guideline.²⁰ The Commission did, however, amend the commentary to that guideline captioned "statutory provisions" to include a reference to the two new statutes created by the Anti-Drug Abuse Act of 1988.

On June 5, 1989, the Commission published a proposed emergency guideline amendment to §2G3.1. Under the amendment, the guideline would have two base offense levels: one applicable to offenses

²⁰ As noted above, the proposed amendments to §2G3.1 were intended to respond to new obscenity provisions contained in the Anti-Drug Abuse Act of 1988. For that reason, it appeared that the Commission's emergency guideline promulgation authority was potentially applicable.

involving "distribution for pecuniary gain," and another applying to all other cases. The Commission did not set specific offense levels. Rather, it sought comment on whether the base offense level for distribution for pecuniary gain should fall between level 12 and level 16 (and, if so, where) and whether the base offense level for non-commercial obscenity offenses should level 6 or level 8.

The proposed amendment would also have eliminated the specific offense characteristic for offenses involving materials depicting sadomasochistic conduct and would have replaced it with a 4 level increase for offenses where "the defendant engag[ed] in a pattern of distributing the obscene mater to persons under eighteen years of age." Finally, the amendment eliminated the RICO cross reference and substituted a cross reference to the child pornography guidelines for cases involving materials depicting a minor engaging in sexually explicit conduct. Under a proposed application note, that cross reference would be applied to materials which were produced using "a person pretending to be under eighteen years of age."

This amendment was also subject to largely critical commentary. Much of the criticism was procedural. The Justice Department,²¹ the American Civil Liberties Union (ACLU),²² the

²¹ Letter to Chairman Wilkins from Commissioner Saltzburg, June 30, 1989.

Federal Defender Advisory Committee,²³ and the American Bar Association²⁴ were all critical of the process employed by the Commission and questioned whether the proposed use of the emergency guideline promulgation authority was appropriate in this instance. Both the ACLU and the Federal Defender Advisory Committee questioned whether the obscenity provisions of the Anti-Drug Abuse Act provided a sufficient policy basis and the ABA suggested that "the danger exists that the Commission may be viewed as using the new statute as a pretext" to effect unrelated changes to the guideline.

The Commission again received comments from Citizens for Decency through Law (now renamed "Children's Legal Foundation")²⁵ and Morality in Media.²⁶ Both organizations criticized the proposed amendment as being ineffective. Morality in Media urged the Commission to promulgate a guideline providing a base offense level of 18 for obscenity offenses involving distribution for pecuniary gain. Senator Jesse Helms submitted comment recommending

²² Comments, submitted July 5, 1989.

²³ Letter to Chairman Wilkins from Lucien B. Campbell, July 3, 1989.

²⁴ Letter to Chairman Wilkins from Samuel J. Buffone, July 5, 1989.

²⁵ Letter to Chairman Wilkins from Alan E. Sears, June 30, 1989.

²⁶ Letter to Chairman Wilkins from Robert Peters, [undated].

a base offense level for obscenity offenses involving pecuniary gain of 16.²⁷

The Justice Department, per Commissioner Saltzburg, provided lengthy comments on the policy aspects the proposed obscenity amendments. The Department recommended that the base offense level be between 12 and 14 for offenses involving pecuniary gain and 8 otherwise. It questioned the value of invoking the fraud table in obscenity cases because the "government must prove the obscenity of each item of pornography at issue. It is unlikely that the charged material will ever be very high in retail value, unless in an unusual case the defendant is found to have ship numerous copies of the same film or magazine."

The Department strongly opposed the elimination of the specific offense characteristic for materials involving sadomasochistic conduct "since violent pornography has an especially harmful effect upon society." It was also critical of the new offense characteristic for a pattern of distributing to minors. According to the Department, distribution to minors is not "a factor in obscenity prosecutions which normally concern interstate distribution to undercover officers or adult bookstores." Finally, the Department endorsed the cross reference to the child pornography guidelines for those offenses which involve sexually explicit depictions of children. It expressed

²⁷ Letter to Chairman Wilkins, June 30, 1989.

reservations, however, on including cases which involve "pseudo-child pornography" under those guidelines and suggested that such materials be subject to a 2 level specific offense characteristic under § 2G3.1.

In response both to the criticism of its proposed use of its emergency guideline authority and criticism of the policy implications of the amendments, the Commission again voted not to promulgate amendments to §2G3.1.

Recommendations

The revision of § 2G3.1 published by the Commission in June represents its most recent consensus on how that guideline should be restructured. Based upon the comments received in response to the June proposal, the following changes to that proposal are offered.

I. New base offense level for offenses involving distribution for pecuniary gain. The Commission's June proposal contained a new base offense level for offenses involving pecuniary gain and sought comment on where the appropriate level should be between 12 and 16. The Commission received suggestions, largely based upon the perception of the increased severity of offenses involving distribution for pecuniary gain, ranging between 12 - 14 on the low end (by the Department of Justice) and 18 on the high end (by Morality in Media).

It should also be noted that offenders involved in distribution of obscenity for pecuniary gain may be prosecuted as participants in a criminal enterprise under 18 U.S.C. § 1962 and be subject to a base offense level of 19 under § 2E1.1 (Unlawful conduct relating to racketeer influenced and corrupt organizations) as opposed to a level 11 for the same conduct under current § 2G3.1. Many obscenity prosecutions involving distribution for pecuniary gain are apt to involve conduct which could also be prosecuted as a criminal enterprise (e.g., distribution of obscenity through an adult book store or video rental establishment). The decision whether or not to charge obscenity distribution offenses under RICO may not always be an accurate proxy for the relative severity of the offense. Thus, though it may be unwarranted to equate non-enterprise-charged distribution for pecuniary gain offenses with those that have been so charged, the Commission may nevertheless wish to reduce the disparity of results for such cases under § 2G3.1 and § 2E1.1.

The Commission may wish to consider establishing a new base offense level under § 2G3.1 for obscenity offenses involving distribution for pecuniary gain of 15. That level is squarely within the range of suggestions received from experts in the field who responded to the June publication. Further, increasing the base offense level to 15 for such cases would significantly reduce purely charge based disparities between distribution cases brought

under RICO and those not while recognizing that, on the whole, the latter category of cases may involve more serious offense conduct.

II. Retain sadomasochistic specific offense characteristic from current guideline. The Commission received sharp criticism for deleting the four level enhancement for offenses involving materials depicting sadomasochistic activities and other forms of sexual violence. Should the Commission decide to re-publish its June amendment, the adjustment for materials depicting sexual violence should be retained.

III. Add a specific offense characteristic for pseudo-child pornography. In its June proposal, a cross-reference to § 2G2.2 (trafficking in child pornography) was provided for obscenity cases involving materials which depict children. That cross-reference also applied to pseudo-child pornography; that is, obscene materials featuring adult actors disguised or pretending to be children. In its comments, the Justice Department endorsed enhanced penalties where the materials purport to depict children. It did not view such offenses as being as serious, however, as true child pornography offenses and therefore suggested that providing a specific offense characteristic in § 2G3.1 would be more appropriate than sentencing pseudo-child pornography cases under § 2G2.2.

The following revision of current subsection (b)(2) of § 2G3.1 would effect that change (new language underscored):

If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, or material purporting to depict a person under the age of 18, increase by 4 levels.

That characteristic would be accompanied by the following application note.

"Material purporting to depict a person under the age of 18" means photographs or other visual depictions of adults disguised or otherwise holding themselves out to be children.

III. Add cross-reference to § 2G2.2. Child pornography offenses may often be prosecuted under obscenity statutes as well. Several cases have been received by the Commission where that, in fact, has happened. See, Appendix A. The following cross-reference to be added to § 2G3.1 would direct courts to apply § 2G2.2 to obscenity offenses involving materials depicting children.

(c) Cross Reference

(1) If the offense involved material depicting persons actually under the age of 18, apply § 2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor; Importing, Mailing, or Transporting Obscene Material Involving a Minor).

IV. Explain relationship between RICO and Obscenity guidelines. Both the Commission's March and June proposals deleted

the cross reference to the RICO guidelines contained in the current version of §.2G3.1. The relationship between the two guidelines may nevertheless be confusing. The following application note may be of assistance to probation officers in applying these guidelines.

Obscenity offenses may also be prosecuted under 18 U.S.C. §§ 1962, 1963 (RICO). § 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations) is applicable to offenses charged under those statutes and provides an offense level of 19 except where the offense level applicable to the underlying racketeering activity is greater. If the defendant was convicted of obscenity related offenses under sections 1962 and 1963 of title 18, § 2E1.1 should be applied.

III. HATE CRIMES

In this section, two proposed revisions to the guidelines are put forward which are more limited in scope than the revisions suggested in the areas of child pornography and obscenity. The first proposed revision corrects what appears to be a redundancy between §§ 2H1.1 and 2H1.2. The second addresses the area of crimes generally which are motivated by the victim's race, religion, color, or place of national origin.

In preparation of this report, those cases which were received by the Commission as of its last monitoring report involving convictions under Federal civil rights statutes were reviewed. Few cases were found and those involved widely disparate offense conduct.²⁸ The Commission may wish to await further experience under the guidelines before considering any major revisions to part H.

Inconsistent Treatment of Violations of 18 U.S.C. §241. 18 U.S.C. §241 sets forth two different offenses. The first occurs when "two or more persons" going in "disguise on the highway, or on the premises of another, with intent to prevent or hinder" the

²⁸ 20 cases involving civil rights were identified among the cases received by the Commission as of its most recent monitoring report. Of these, one was unavailable. Because of the prevalence of co-defendants among the sample, however, the remaining cases in fact represented only 11 separate criminal transactions.

free exercise of federally-guaranteed rights. The second encompasses conspiracies of two or more to "injure, oppress, threaten, or intimidate" a person in the free exercise of federally-guaranteed rights. The statute provides identical penalties for both offenses: a maximum penalty of 10 years imprisonment which is increased to a life imprisonment where death results. Except for the "in disguise" requirement, the offenses are virtually indistinguishable with respect to the conduct which they make criminal.

The guidelines, however, treat the offenses under two separate guidelines and provide an offense level of 15 for the offense of going in disguise and a 13 for conspiring to interfere with civil rights. Facially these offenses appear virtually indistinguishable, and should be subsumed under one guideline. This can be easily accomplished by deleting §2H1.2 and adding "Conspiracy to Interfere with Civil Rights" to the title of §2H1.1.

Offenses Motivated By The Victim's Race, Religion, Color, or Place of National Origin. Nowhere in the guidelines is there an adjustment to aggravate punishment for offenses, other than civil rights offenses, which are motivated by the victim's race, color, religion, or place of national origin. Public policy is squarely against discrimination based upon such factors and crimes which are motivated by the victim's ethnicity or creed are particularly heinous. The Commission may wish, as a matter of policy, to amend

Chapter 3 of the guidelines to provide an adjustment upwards for such offenses. The following proposed amendment would accomplish that goal.

**§3A1.4 VICTIM DUE TO RACE, COLOR, RELIGION, ALIENAGE,
OR NATIONAL ORIGIN OR ON ACCOUNT OF EXERCISE
OF FEDERAL RIGHTS**

If the offense--

(a) involved the infliction, or intended infliction, of any harm upon a victim because of the victim's status with respect to race, color, religion, alienage, or national origin; or

(b) was committed because of a victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States,

increase by 2 levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the offense guideline specifically incorporates this factor.

2. If the court determines that, under the circumstances of the offense, the race, color, religion, alienage, or national origin of the victim rendered the victim vulnerable under §3A1.1 (Vulnerable Victim), do not apply subsection (a) of this guideline.

The 2 level increase provided in the proposed amendment follows the pattern set in the civil rights guidelines, §§ 2H1.1 et seq., which provide for a 2 level increase over the offense level applicable to the underlying offense.