

Chapter 2

STATUTORY AND GUIDELINE PROVISIONS IN CHILD PORNOGRAPHY CASES

This chapter provides an overview of penal statutes, the applicable sentencing guideline provisions, and relevant case law concerning the statutes and guidelines in child pornography cases. As discussed below, the current sentencing scheme in child pornography cases generally divides offenders into two groups for sentencing purposes: (1) those offenders who produced child pornography or engaged in acts directly related to production, such as advertising for minors to appear in child pornography (hereafter “production” offenses), and (2) those offenders who possessed, distributed, or engaged in other acts related to the collection of child pornography but who did not produce it (hereafter “non-production” offenses). The current sentencing scheme usually punishes offenders who committed production offenses more severely than offenders who committed non-production offenses.¹ The penalty ranges for child pornography offenders depend on the statutory range of punishment (including any mandatory minimum penalties that may be applicable) as well as the guideline ranges. This chapter will first address penal statutes related to child pornography offenses and next address the sentencing guidelines concerning such offenses.

A. FEDERAL STATUTES CONCERNING CHILD PORNOGRAPHY

1. *Overview of Federal Child Pornography Penal Statutes*

Several statutory provisions in chapter 110 of title 18 of the United States Code proscribe a variety of acts related to the production,² advertising,³ distribution,⁴ transportation (including

¹ See Chapter 9 at 253 (Figure 9–3) (comparing average sentences over time in production and non-production cases).

² 18 U.S.C. §§ 2251(a), (b), (c), (d)(1)(B) & (e) and 2260(a). Unless otherwise stated, all statutory citations in this report are to the current version of the statutes included in WEST’S FEDERAL CRIMINAL CODE AND RULES (2012).

³ Section 2251 prohibits two types of advertising related to child pornography. Section 2251(d)(1)(B) makes it unlawful to advertise for minors to *participate* in child pornography, while section 2251(d)(1)(A) makes it unlawful to advertise child pornography itself. The guidelines treat the former as a production offense and the latter a non-production offense. See USSG §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), comment. (backg’d) (“Statutory Provisions,” including 18 U.S.C. § 2251(d)(1)(B)); USSG §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), comment. (backg’d) (“Statutory Provisions,” including 18 U.S.C. § 2251(d)(1)(A)). Section 2252A(a)(3) also prohibits the “advertis[ing]” or “promot[ing]” of child pornography. 18 U.S.C. § 2252A(a)(3).

⁴ 18 U.S.C. §§ 2252(a)(2) & (a)(3), 2252A(a)(2), (a)(3), (a)(4) & (a)(6) and 2260(b). Sections 2252 and 2252A also prohibit the *sale* of child pornography, thus broadly encompassing any type of distribution, whether commercial or non-commercial. In addition, §§ 2252, 2252A and 2260(b) each prohibit the possession of child pornography with the intent to distribute it (in different circumstances). See 18 U.S.C. §§ 2252(a)(3)(B), 2252A(a)(4)(B), & 2260(b). The sentencing guideline provisions related to child pornography use the terms “trafficking” and “distribution” interchangeably. See, e.g., USSG §2G2.2(b)(1). For simplicity’s sake, this report uses the term “distribute” to refer

by shipping or mailing),⁵ importation,⁶ receipt,⁷ solicitation,⁸ and possession⁹ of child pornography, as well as related “morphing”¹⁰ offenses, including attempted acts and conspiracies to commit all such acts.¹¹ An additional statute in chapter 71 of title 18, § 1466A, prohibits possession, receipt, distribution, and production of “obscene visual representations of the sexual abuse of children”; its violation is considered a child pornography offense for sentencing purposes.¹² There is a significant amount of overlap among these statutory provisions in chapters 71 and 110.¹³

A further discussion of these various offenses, including a discussion of their applicable statutory penalty ranges — divided into production and non-production offenses — appears below. Initially, the next section discusses the statutory definition of “child pornography.”

2. Definition of “Child Pornography”

“Child pornography” is defined by statute as any “visual depiction” of an actual minor or a computer-generated image that “is indistinguishable from[] that of a minor” who is “engaging in sexually explicit conduct,” “including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means.”¹⁴ “Sexually explicit conduct” includes vaginal and anal intercourse, oral sex,

to all types of distribution, commercial and non-commercial, as well as possession with the intent to distribute. *Cf.* 21 U.S.C. § 841(a)(2) (treating distribution of drugs and possession with intent to distribute drugs as equivalent offenses).

⁵ 18 U.S.C. §§ 2252(a)(1) and 2252A(a)(1).

⁶ 18 U.S.C. § 2260(b).

⁷ 18 U.S.C. §§ 2252(a)(2) and 2252A(a)(2).

⁸ 18 U.S.C. § 2252A(a)(3).

⁹ 18 U.S.C. §§ 2252(a)(4) and 2252A(a)(5). An offender also violates § 2252A(a)(5) by “knowingly accessing” an image of child pornography on the Internet with “intent to view” it. *See United States v. Shiver*, 305 F. App’x 640, 642 n.4 (11th Cir. 2008) (discussing the October 2008 amendment to § 2252A(a)(5), which expanded the concept of “possession” beyond physical possession).

¹⁰ 18 U.S.C. § 2252A(a)(7). This statutory provision proscribes the production with intent to distribute or distribution of “child pornography that is an adapted or modified depiction of an identifiable minor.” *Id.*

¹¹ *See* 18 U.S.C. §§ 2251(d)(1)(A) & (e), 2252(a) & (b), 2252A(a) & (b), and 2260(b) & (c).

¹² *See* USSG App. A (referencing violations of 18 U.S.C. § 1466A to USSG §2G2.2). Prosecutors also occasionally bring obscenity charges under other statutory provisions in chapter 71 when the offenses in fact involved images that would qualify as child pornography. *See* 18 U.S.C. §§ 1461 *et seq.* Such offenses, if they involved the obscene depiction of minors, are subject to the guidelines’ child pornography provisions rather than the guideline applicable to obscenity depicting adults. *See, e.g.,* USSG §2G3.1(c) (cross-reference from obscenity guideline to child pornography guideline). In fiscal year 2010, no cases that were sentenced under §2G2.2 involved convictions under § 1466A, while a total of five cases sentenced under §2G2.2 involved convictions under other obscenity statutes (18 U.S.C. §§ 1462, 1465, or 1470). *See* Chapter 6 at 146 n.58.

¹³ *Compare, e.g.,* 18 U.S.C. § 2252(a)(4) (making it an offense to “knowingly possess” any matter that contains a “visual depiction” of a minor engaging in “sexually explicit conduct”), *with* 18 U.S.C. § 2252A(a)(5) (making it an offense to “knowingly possess . . . an image of child pornography”).

¹⁴ 18 U.S.C. § 2256(8). This definition of “child pornography” is limited to offenses in 18 U.S.C. § 2252A, although a comparable definition appears in § 2252, the other major child pornography statute. The definition

masturbation, bestiality, “sadistic or masochistic abuse,” and the “lascivious exhibition of the genitals or pubic area.”¹⁵ “Lascivious exhibition” is not defined by statute, but “virtually all”¹⁶ of the federal courts to have addressed the issue have applied a well-established six-prong legal standard in deciding whether a particular image of a minor qualifies as “lascivious.”¹⁷

3. Production Offenses¹⁸

Congress has criminalized the production of child pornography (including aiding and abetting production, such as providing one’s child to another to use in production) and the related act of advertising for minors to participate in the production of child pornography.¹⁹ An offender violates the production statute regardless of whether he intended to profit from or distribute the

applicable to § 2252A goes beyond § 2252 by including a “visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. § 2256(8)(C). Thus, the only material difference is that § 2252A encompasses “morphed” computer-generated sexually explicit images that involve an actual minor, while § 2252 is limited to unaltered images of actual minors. *See* Holly H. Krohel, *Dangerous Discretion: Protecting Children By Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 631 n.45 (2011); *see also* Stephen L. Bacon, *A Distinction Without a Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027, 1042 n.84 (2011); *United States v. Miller*, 527 F.3d 54, 64 n.10 (3d Cir. 2008) (quoting *United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004); observing that §§ 2252 and 2252A are “materially identical” in terms of their prohibitions on receipt and possession of child pornography). Prosecutions based on such “morphed” child pornography are rare. *See* Chapter 6 at 146 n.58.

¹⁵ 18 U.S.C. § 2256(2). As noted above, federal law also prohibits certain acts related to “obscene” photographic and non-photographic visual representations of minors engaged in sexually explicit conduct. *See, e.g.*, 18 U.S.C. § 1466A(a)(2)(A) (outlawing possession, receipt, or distribution of a “visual depiction . . . that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex”).

¹⁶ *United States v. Williams*, 444 F.3d 1286, 1299 n.62 (11th Cir. 2006) (“Virtually all lower courts that have addressed the meaning of ‘lascivious exhibition’ have embraced the widely followed ‘Dost’ test . . .”), *rev’d on other grounds*, 553 U.S. 285 (2008).

¹⁷ The six-prong standard was first announced in *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff’d sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert denied*, 484 U.S. 856 (1987). The “Dost factors” are: “(1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.” *Dost*, 636 F. Supp. at 832.

¹⁸ In the Commission’s recent report to Congress on mandatory minimum statutory penalties, the Commission explained that, for purposes of data analysis in that report, the Commission treated child pornography production offenses as “sexual abuse” offenses rather than “child pornography” offenses. *See* U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 295 (Oct. 2011) (“Such bifurcation is appropriate because . . . [production offenses] involve actual or intended sexual *contact* with a victim, while [what are commonly known as] child pornography offenses concern the possession, receipt, transportation, or distribution of sexually-oriented *images* of children.”) (emphasis in original). However, in this report, production and non-production offenses both are referred to as “child pornography” offenses, although throughout this report the two larger types of child pornography offenses usually are examined separately.

¹⁹ 18 U.S.C. § 2251(a), (b), (d)(1)(B) & (e).

child pornography that he produced; the statute is violated even if an offender produced child pornography solely for “personal use.”²⁰

Upon conviction of any of these production offenses, an offender faces a mandatory minimum term of 15 years of imprisonment and a maximum of 30 years.²¹ Defendants with predicate state or federal convictions for prior sex offenses²² face higher minimums and maximums (25-year mandatory minimum penalty and 50-year maximum penalty if the defendant has one prior conviction for a sex offense; 35-year mandatory minimum penalty and maximum of life imprisonment if the offender has two or more prior convictions for a sex offense).²³ In addition to the recidivist enhancement provisions in § 2251(e), a defendant convicted of production of child pornography involving a victim 16 years of age or younger who committed the production offense after having been convicted of a prior sex offense also involving a victim 16 years or younger faces a mandatory sentence of life imprisonment under 18 U.S.C. § 3559(e).²⁴

4. *Non-Production Offenses*

The four primary non-production offense types are distribution, transportation (including shipping or mailing), receipt, and possession of child pornography.²⁵

a. *Distribution and Transportation*

Sections 2252 and 2252A prohibit distribution or transportation of child pornography regardless of whether the defendant had a commercial or non-commercial purpose (*e.g.*, a distribution offense occurred if a defendant knowingly used a “peer-to-peer” file-sharing program²⁶ and thereby provided others access to his child pornography files without an expectation of anything in return).²⁷ The offense of transportation (including shipping or

²⁰ *See, e.g.*, *United States v. Poulin*, 631 F.3d 17, 20–21 (1st Cir. 2011).

²¹ 18 U.S.C. § 2251(a), (d)(1)(B) & (e).

²² Such enumerated predicate sex offenses include prior convictions for sex trafficking of children, obscenity offenses, sexual abuse of adults or children, and child pornography offenses. 18 U.S.C. § 2251(e).

²³ 18 U.S.C. § 2251(e). Notably, in contrast to the statutory enhancements for drug-trafficking offenders who have prior felony drug convictions, *see* 28 U.S.C. § 851, the enhancement provision for recidivist sex offenders who are convicted of child pornography offenses in chapter 110 of title 18 of the United States Code does not require the prosecution to file an information alleging the existence of a defendant’s prior conviction for a sex offense. Rather, the statutes require courts to sentence a defendant within the enhanced statutory ranges if there is adequate proof of a predicate conviction for a sex offense. *See, e.g.*, *United States v. Schmeltzer*, 960 F.2d 405, 408 (5th Cir. 1992) (holding that the statutory enhancement in § 2252(b) is mandatory and does not require any action by the prosecutor to be effective upon proof of a defendant’s predicate conviction for a sex offense).

²⁴ *See United States v. Gallenardo*, 579 F.3d 1076, 1082–83 (9th Cir. 2009) (holding that enhancement under § 3559(e), where applicable, trumps the lesser enhancement under § 2251(e)); *United States v. Moore*, 567 F.3d 187, 190–91 (6th Cir. 2009) (same).

²⁵ *See* Chapter 6 at 146 (Figure 6-14).

²⁶ Peer-to-peer (“P2P”) file-sharing programs are discussed in Chapter 3 at 48–53.

²⁷ *See United States v. Holston*, 343 F.3d 83, 85–86 (2d Cir. 2003); *see also United States v. Williams*, 553 U.S. 285, 296 (2008) (“[I]n much Internet file sharing of child pornography each participant makes his files available for free to other participants.”).

mailing) of child pornography does not require that the defendant intended to distribute it to another person.²⁸ Nevertheless, the vast majority of offenders convicted of transportation in fact distributed to another person.²⁹

b. Receipt and Possession

“[P]ossessors, unless they fabricate their own [child] pornography, are also receivers” at some earlier point in time.³⁰ A conviction for receipt, however, requires proof beyond a reasonable doubt that a defendant *knowingly* came into possession of child pornography at the time that the image or video was received.³¹ Courts have held that a defendant’s knowing possession of child pornography does not by itself establish that the defendant previously knowingly received it.³² Nevertheless, in the vast majority of non-production child pornography cases today, as a reflection of the manner in which offenders typically receive child pornography using their computers (*e.g.*, with P2P file-sharing programs or from commercial websites), legally sufficient proof exists that offenders knowingly received the child pornography found in their possession.³³

c. Penalties for Non-Production Offenses

The statutory penalty ranges for non-production offenses vary in severity depending on both the act involved and the defendant’s prior criminal record. Advertising child pornography carries a mandatory minimum penalty of 15 years of imprisonment unless a defendant has one or

²⁸ See, *e.g.*, *United States v. Fore*, 507 F.3d 412, 415 (6th Cir. 2007); *United States v. Burgess*, 576 F.3d 1078, 1102 (10th Cir. 2009). As explained below, unlike simple possession, transportation of child pornography is punished with a five-year mandatory minimum prison sentence.

²⁹ See Chapter 7 at 189 n.72.

³⁰ See *United States v. Richardson*, 238 F.3d 837, 839 (7th Cir. 2001) (Posner, J.).

³¹ See *United States v. Myers*, 355 F.3d 1040, 1042 (7th Cir. 2004).

³² See *United States v. Miller*, 527 F.3d 54, 63 (3d Cir. 2008) (observing that a “person may come to knowingly possess a computer file without ever knowingly receiving it”); see also *United States v. Ehle*, 640 F.3d 689, 698 (6th Cir. 2011) (“Congress viewed an individual’s ‘knowingly possessing’ child pornography as a separately punishable offense where the same individual had not also ‘knowingly received’ the same child pornography”). Knowing receipt is typically proved with direct evidence (*e.g.*, using a credit card and email address directly linked to his name, a defendant purchased a subscription to a website that exclusively provided videos or images of child pornography or ordered child pornography through the mail). See, *e.g.*, *United States v. Wilder*, 526 F.3d 1, 7–9 (1st Cir. 2008). Occasionally, the prosecution will be required to prove knowing receipt with circumstantial evidence when there is no admission by the defendant or forensic evidence that he knowingly downloaded child pornography from the Internet or knowingly received the images via email or regular mail or through a peer-to-peer file-sharing program. “[C]ourts, confronting this question, have deemed at least four factors relevant to this inquiry: (1) whether images were found on the defendant’s computer [or otherwise in his residence or place of employment] . . . ; (2) the number of images of child pornography that were found . . . ; (3) whether the content of the images was evident from their file names, . . . ; and (4) defendant’s knowledge of and ability to access the storage area for the images” *Miller*, 527 F.3d at 67 (citations and internal quotation marks omitted).

³³ See Chapter 6 at 145–46, 147 n.60. If the defendant did knowingly receive the child pornography, then his possession of the images is a lesser-included offense of receipt. See *Ehle*, 640 F.3d at 698–99 (holding that, when the defendant has knowingly received child pornography, his possession of the same images is a “lesser-included offense” of receipt for purposes of the Double Jeopardy Clause) (citing Third and Ninth Circuit cases in support of this proposition); *cf.* *Ball v. United States*, 470 U.S. 856 (1985) (holding that possession of drugs is a lesser-included offense of knowingly receiving the same drugs for purposes of double jeopardy analysis).

more predicate convictions for a sex offense (which would raise the mandatory minimum penalty to 25 years in the case of one prior sex conviction or 35 years in the case of two or more prior sex convictions).³⁴ The offenses of receipt (or solicitation), transportation (including mailing or shipping), distribution, and possession with the intent to distribute or sell child pornography each carry a mandatory minimum term of five years of imprisonment and a maximum term of 20 years.³⁵ If a defendant has a prior federal or state conviction for one or more enumerated sex offenses,³⁶ the penalty range increases to a mandatory minimum term of 15 years and a maximum term of 40 years of imprisonment.³⁷ There is a separate punishment range for distribution of (as well as production with intent to distribute) a “morphed” image of an actual, identifiable minor appearing to engage in sexually explicit conduct. Such “morphing” offenses carry a statutory maximum punishment of 15 years of imprisonment but carry no statutory mandatory minimum penalty.³⁸

The current statutory range of imprisonment for possession is zero to ten years of imprisonment if an offender possessed child pornography depicting a minor 12 years of age or older who was not then prepubescent and zero to 20 years of imprisonment if an offender possessed child pornography depicting a prepubescent minor or a minor under 12 years of age.³⁹ Defendants with predicate convictions for sex offenses face a statutory imprisonment range of ten to 20 years for a possession offense (whatever the age or sexual development of the minors depicted).⁴⁰

Statutory ranges of punishment for the obscenity offenses in chapter 71 of title 18 of the United States Code, which are occasionally applied to defendants who possess, receive, transport, or distribute sexually child pornography, vary. Offenses involving possession, receipt, or distribution of “obscene visual representations of the sexual abuse of children” carry the same “penalties provided in section 2252A(b)” for equivalent offenses involving child pornography.⁴¹ Other obscenity offenses in chapter 71 do not carry a mandatory minimum penalty and have a

³⁴ 18 U.S.C. § 2251(d)(1)(A), (e).

³⁵ 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

³⁶ Essentially the same list of enumerated predicate sex offenses applies for enhancement in non-production cases as in production cases — including prior convictions for child pornography and sexual abuse of a child. *See, e.g.*, 18 U.S.C. § 2252(b)(1) & (2).

³⁷ *See id.*

³⁸ 18 U.S.C. § 2252A(a)(7), (b)(3).

³⁹ 18 U.S.C. §§ 2252(b)(2) & 2252A(b)(2). Until late 2012, the statutory maximum penalty for all possession offenses was ten years (for offenders without a predicate conviction for a sex offense). *See* Chapter 1 at 4–5. Because the fact that a minor was prepubescent or under 12 years of age raises the statutory maximum sentence, that fact must be proved to a jury beyond a reasonable doubt (or admitted by a defendant in pleading guilty) in order for a court to impose a sentence of imprisonment in excess of ten years. *See* *Appendi v. New Jersey*, 530 U.S. 466 (2000).

⁴⁰ *See id.*

⁴¹ 18 U.S.C. § 1466A(a) & (b). Violations of § 1466A are also thus subject to the same enhancements provided in § 2252A for defendants with predicate convictions for sex offenses.

statutory maximum penalty of five or ten years of imprisonment depending on which statute applies.⁴²

5. *Summary of Statutory Penalty Ranges*

Table 2–1 summarizes the statutory penalty ranges for the most common types of offenses involving child pornography or sexually obscene images of children.

**Table 2–1
Child Pornography Statutory Penalty Ranges**

Production			Receipt/Distribution/ Transportation		Possession		Obscenity	
No Prior Sex Conviction	Prior Sex Conviction	> 1 Prior Sex Conviction	No Prior Sex Conviction	Prior Sex Conviction	No Prior Sex Conviction	Prior Sex Conviction	18 U.S.C. § 1466A	18 U.S.C. §§ 1461 <i>et seq.</i>
15 to 30 years	25 to 50 years	35 years to life	5 to 20 years	15 to 40 years	0 to 10 years or 0 to 20 years (depending on age of victim)	10 to 20 years	Mirrors penalties in CP statutes	0 to 5 years or 0 to 10 years (varies by statute)

6. *Differing Penalties for Receipt and Possession*

In 1977, Congress originally enacted legislation solely targeting commercial trafficking of child pornography. That statute prohibited distribution and receipt in connection with the sale of child pornography and provided the same penalty range for both offenses.⁴³ The statute did not prohibit simple possession of child pornography, apparently due to Congress’s concern that the First Amendment might protect such simple possession (at least in one’s home).⁴⁴ In 1984, Congress amended the statute to remove the requirement that the distribution or receipt occur in connection with a commercial transaction.⁴⁵ In 1988, based on the growing popularity of the personal computer and its increasing use in the trafficking of child pornography, Congress amended the statute to specifically address an offender’s use of a computer in the distribution, transportation, or receipt of child pornography.⁴⁶

⁴² See 18 U.S.C. §§ 1461, 1462, 1463, 1465, 1466, & 1470.

⁴³ See Chapter 1 at 4 & n.22.

⁴⁴ See *United States v. Williams*, 444 F.3d 1286, 1291 (11th Cir. 2006) (“In *Stanley v. Georgia*, [394 U.S. 557 (1969),] the Court held that privacy interests protect the right to possess obscene materials in one’s own home, but subsequently clarified [in *United States v. Orito*, 413 U.S. 139, 141 (1973)] that this sanction does not extend to the distribution or receipt of obscenity, which may be regulated on interstate commerce grounds even if the transportation is for the recipient’s personal use. Against this backdrop, Congress passed its first child pornography legislation, the Protection of Children against Sexual Exploitation Act, in 1977.”), *overruled on other grounds*, 553 U.S. 285 (2008).

⁴⁵ See Chapter 1 at 4 & n.23.

⁴⁶ *Williams*, 444 F.3d at 1291 (“Congress first addressed the connection between child pornography and emerging computer technology in the Child Protection and Obscenity Enforcement Act of 1988, which prohibited the use of

Shortly after the Supreme Court held that the First Amendment does not prohibit the criminalization of simple possession of child pornography in 1990,⁴⁷ Congress added simple possession to the list of prohibited activities.⁴⁸ Congress punished possession less severely than the other offenses listed in the 1990 version of the statute; the statutory penalty range for receipt remained the same as the penalty range for distribution.⁴⁹ In the PROTECT Act of 2003, Congress increased the statutory penalty ranges for all types of child pornography offenses and also created new five-year mandatory minimum penalties for receipt and distribution offenses; however, Congress did not add a mandatory minimum penalty for possession offenses (except for defendants with predicate convictions for a sex offense).⁵⁰ Finally, in the Child Protection Act of 2012, Congress raised the statutory maximum term of imprisonment for possession from ten to 20 years if an offender possessed child pornography depicting a minor under 12 years of age or who was prepubescent.⁵¹ Congress, however, did not add a mandatory minimum penalty.

The legislative history concerning Congress's decision to punish possession less severely than the closely related offense of receipt⁵² is sparse. No legislative findings, committee reports, or relevant floor statements by sponsors clearly reflect Congress's reasons for the different penalties for receipt and possession in either the 1990 legislation initially criminalizing possession (as a separate act from receipt) or the PROTECT Act of 2003 (which added a mandatory minimum for receipt and distribution but not possession).⁵³ The history of related legislation issuing a directive to the Commission concerning guideline penalties for receipt and

computers to transport, distribute, or receive child pornography.”), *overruled on other grounds*, 553 U.S. 285 (2008).

⁴⁷ See *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁴⁸ *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1088 (9th Cir. 1999) (“In 1990 the Supreme Court decided *Osborne v. Ohio* Soon thereafter, the Child Protection Restoration and Penalties Enhancement Act of 1990 was passed . . . [which] criminalized the possession of . . . child pornography.”) (internal citations omitted).

⁴⁹ See Chapter 1 at 4 & n.26 (originally providing a statutory range of imprisonment of zero to 15 years for receipt and distribution and zero to five years for possession).

⁵⁰ See *id.* (creating a five to 20 year statutory range for receipt and distribution and a zero to ten year range for possession).

⁵¹ P. L. 112–206, 126 Stat. 1490 (Dec. 7, 2012).

⁵² See *United States v. Richardson*, 238 F.3d 837, 839–40 (7th Cir. 2001) (Posner, J.) (finding the distinction between child pornography receipt and possession offenses to be “tenuous” and “puzzl[ing]” because “possessors, unless they fabricate their own [child] pornography, are also receivers [at some earlier point in time]”). As the Supreme Court has recognized in an analogous context, “proof of illegal receipt of a firearm necessarily includes proof of illegal possession of that weapon.” *Ball v. United States*, 470 U.S. 856, 862 (1985) (emphasis in original).

⁵³ A key sponsor of the 1990 legislation in the Senate, Senator Thurmond, stated that: “Under current law, it is a crime to knowingly transport, distribute, receive or reproduce any child pornography which has traveled in interstate or foreign commerce. Unfortunately, those who simply possess or view this material are not covered by current law. This bill addresses this insufficiency because those who possess and view child pornography encourage its continual production and distribution.” 136 CONG. REC. S4728–02, S4730 (daily ed. Apr. 10, 1990) (statement of Sen. Thurmond). In reviewing this legislative history, the Sixth Circuit concluded that “the crime of ‘knowingly possessing’ child pornography was meant as a gap-filling provision, targeting those who ‘possessed’ child pornography without having also [knowingly] ‘received’ the same child pornography.” *United States v. Ehle*, 640 F.3d 689, 699 (6th Cir. 2011); see also *id.* at 698 (noting that the lesser penalty range for possession “may reflect Congress’s determination that merely ‘knowingly possessing’ certain child pornography is less blameworthy than ‘knowingly receiving’ (and along with it, ‘knowingly possessing’) other child pornography”).

possession, however, offers some insight into Congress’s intent for punishing receipt more severely (*i.e.*, on par with distribution) than simple possession.

After Congress’s creation of the offense of possession of child pornography in 1990, the Commission created a new sentencing guideline for possession (USSG §2G2.4) with a lower penalty range than the existing guideline (USSG §2G2.2) that, until then, had covered both receipt and distribution. The Commission also moved receipt offenses from §2G2.2 to the new §2G2.4 (which generally had lower penalty ranges) based on the Commission’s belief that receipt was more akin to possession than distribution.⁵⁴ Congress soon thereafter responded by enacting legislation — in the form of an amendment to a postal appropriations bill — that directed the Commission to remove receipt offenses from §2G2.4 and again refer receipt offenses to §2G2.2. Senator Helms from North Carolina, who along with Senator Thurmond from South Carolina had offered the amendment to the appropriations bill in the Senate, voiced his criticism of the Commission’s decision to include receipt offenses in the new §2G2.4:

[T]he receipt offense should not be classified with the possession offense. Prosecutors usually obtain convictions for receipt of child porn based on reverse-stings [using the U.S. mails⁵⁵]. And experts say it is very difficult to prove trafficking and therefore they use the receipt offense more often. Furthermore, a person who purchases and receives child porn is actively supporting the child porn industry. The Department of Justice concurs that receipt should [be punished more severely than possession].⁵⁶

The Department’s letter, which Senator Helms offered into the record, stated in relevant part that: “The Department strongly believes that receipt of child pornography should be grouped with trafficking violations and not with the new possession offense. Reducing sanctions for receiving child pornography would send the wrong message to those who may consider violating the law.”⁵⁷

Representative Wolf, the amendment’s chief sponsor in the House, called attention to a congressional staff memorandum in support of the amendment that echoed some of Senator Helms’s remarks concerning why receipt should be punished more severely than possession. In particular, that memorandum contended that, in view of the law enforcement practices then prevailing in child pornography investigations (*i.e.*, “reverse-stings” using the U.S. mails), it

⁵⁴ See USSG, App. C, amend. 372 (Nov. 1, 1991); see also U.S. SENT’G COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 18–19 (2009).

⁵⁵ Such a “reverse-sting” operation typically involved an undercover law enforcement official’s mailing an advertisement for child pornography to a suspect, who responded with a request for child pornography (which was delivered to the suspect in a “controlled delivery”). See, e.g., *United States v. Weber*, 923 F.2d 1338 (9th Cir. 1990) (describing such a “reverse sting” operation in a child pornography case); *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994) (same).

⁵⁶ 137 CONG. REC. S10323 (daily ed. July 18, 1991) (statement of Senator Helms).

⁵⁷ *Id.* at S10330.

often was easier for law enforcement to catch child pornography distributors in the act of receipt rather than in the act of distribution.⁵⁸ Congress enacted the appropriations bill with the amendment that required the Commission to remove receipt offenses from §2G2.4.⁵⁹

7. *Related Sex Crimes: “Enticement” and “Travel” Offenses*

Two other federal sex offenses, which typically involve offenders’ use of the Internet to facilitate or attempt to facilitate illegal sexual activity with real or perceived minors (including undercover law enforcement officers pretending to be minors), warrant a brief discussion, as they occur concomitantly with the commission of many child pornography offenses.⁶⁰ First, if an offender used the Internet to “entice” or attempt to entice a person under 18 years of age to engage in sexual activity for which the defendant could be charged with a sex crime under federal or state law (including, but not limited to, rape or statutory rape), the offender is subject to a mandatory minimum penalty of ten years of imprisonment and a maximum term of life imprisonment.⁶¹ Second, if an offender traveled across state lines with the intent to have sex with a child under 12 years of age, the offender is subject to a mandatory minimum prison sentence of 30 years and maximum term of life imprisonment.⁶² If an offender traveled in interstate or foreign commerce with the intent to have “any illicit sexual contact” with a minor under 18 years of age but over 12 years of age, the offender is not subject to a mandatory minimum penalty but is subject to a maximum term of imprisonment of 30 years.⁶³

⁵⁸ 137 CONG. REC. H6740 (daily ed. Sept. 24, 1991) (statement of Rep. Wolf) (“Virtually all enforcement [of the child pornography laws] is accomplished through sting operations conducted through the mails. As a result, most offenders (even active distributors) are caught in the act of receiving child pornography out of their mail box. . . . [D]istributors [who are apprehended] are likely to be caught in the act of receipt.”) (quoting staff memorandum).

⁵⁹ See P.L. 102–141, § 632, 105 Stat. 834, 876 (Oct. 28, 1991); see also USSG, App. C, amend. 436 (Nov. 27, 1991).

⁶⁰ See Chapter 7 at 181 (Table 7–1) (noting that, in fiscal year 2010, 102 child pornography offenders committed concomitant “travel” offenses and 124 committed concomitant “enticement” offenses).

⁶¹ 18 U.S.C. § 2422(b).

⁶² 18 U.S.C. § 2241(c)

⁶³ 18 U.S.C. § 2423(b) & (e).

B. CHILD PORNOGRAPHY SENTENCING GUIDELINES

1. Sections 2G2.1 and 2G2.2

Sentencing guidelines for child pornography offenses are found in Chapter Two, Part G, Subpart 2 (Sexual Exploitation of a Minor) of the *Guidelines Manual*. This report focuses on §2G2.1, which addresses offenses related to production of child pornography,⁶⁴ and §2G2.2, which addresses non-production child pornography offenses (including receipt, transportation, and distribution (R/T/D) offenses and possession).⁶⁵ The evolving nature of the non-production child pornography guidelines during the past three decades is recounted in detail in the Commission's 2009 report, *The History of the Child Pornography Guidelines*.⁶⁶ The current versions of §§2G2.1 and 2G2.2, including their commentary, are reproduced in Appendix B of this report.

Section 2G2.1 has a base offense level of 32 and six enhancements for different aggravating factors primarily related to the nature of the images produced (the type of sexual acts perpetrated upon victims and the ages of the victims depicted in the images), whether defendants distributed the images, and the relationship between the defendants and victims.⁶⁷ Under the guidelines, defendants convicted of non-production offenses such as possession, receipt, and distribution of child pornography offenses are cross-referenced to §2G2.1 if their actual conduct involved production and if the sentencing range resulting from the application of §2G2.1 exceeds the range resulting from application of §2G2.2.⁶⁸

Section 2G2.2, which covers non-production offenses, has a two-tiered system for assigning a base offense level to a defendant based on the nature of the most serious statute of conviction. If a defendant is convicted of simple possession of child pornography,⁶⁹ a

⁶⁴ Section 2G2.1 covers child pornography production offenses, *see* 18 U.S.C. §§ 2251(a)–(c) and 2260(a), as well as offenses related to the commercial sex trafficking of minors (*e.g.*, child prostitution). *See* 18 U.S.C. § 1591. *See* USSG §2G2.1, comment. (backg'd) (Statutory Provisions). The latter is considered a “child pornography” offense only if the defendant convicted under § 1591 also photographed or videotaped a minor in a sexually explicit manner (*e.g.*, for advertising purposes in a child sex trafficking ring). In fiscal year 2010, there were four such § 1591 cases sentenced under §2G2.1. *See* Chapter 9 at 251.

⁶⁵ As noted in Chapter 1, for non-production offenses committed before November 1, 2004, defendants convicted only of possession offenses were sentenced under the former USSG §2G2.4, while defendants convicted of R/T/D offenses were sentenced under the prior version of USSG §2G2.2. Offenders convicted of any type of non-production offense committed on or after November 1, 2004, are sentenced under the current version of §2G2.2. *See* Chapter 1 at 2 n.13.

The other guidelines in Subpart 2 are USSG §§2G2.3 (Selling or Buying Children for Use in the Production of Pornography); 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Mail); and 2G2.6 (Child Exploitation Enterprises). No cases were sentenced under any of these three guidelines in fiscal year 2010. Section 2G2.6 is briefly discussed below.

⁶⁶ That report traces the history of the guidelines for distribution, transportation, receipt, and possession offenses, noting the nine different times that those guidelines have been amended since they first went into effect in 1987. *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 54, at 7–54.

⁶⁷ *See* USSG §2G2.1(b). The enhancements are discussed in Chapter 9 at 261–62.

⁶⁸ *See* USSG §2G2.2(c)(1).

⁶⁹ 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

“morphing” offense,⁷⁰ or possession of an “obscene” image of a minor engaged in sexually explicit conduct under 18 U.S.C. § 1466A(b), the defendant’s base offense level is 18.⁷¹ A defendant convicted of receipt, transportation (including shipping or mailing), importation, or distribution has a base offense level of 22.⁷² The offense level of a defendant convicted of receipt will be reduced by 2 levels if the court finds that the defendant’s actual conduct was limited to receipt or solicitation of child pornography and that he “did not intend to traffic in, or distribute” any child pornography.⁷³

Section 2G2.2 thus differentiates offenders’ starting points in calculating their offense levels by dividing them into three primary groups: (1) those convicted of simple possession (offense level 18);⁷⁴ (2) those convicted of receipt who did not intend to distribute (offense level 20); and (3) those convicted of receipt but who intended to distribute as well as all those convicted of distribution or transportation (offense level 22).⁷⁵ When an offender is convicted only of simple possession, his relevant conduct⁷⁶ does not play a role in increasing his base offense level from level 18 to level 20 or 22, even if the court finds that the defendant in fact knowingly received or distributed child pornography. A court’s findings concerning the defendant’s relevant conduct does play a role in increasing an offender’s offense level based on the specific offense characteristics set forth in §2G2.2(b)(2)–(b)(7) and in reducing some defendants convicted of receipt from base offense level 22 to level 20 under §2G2.2(b)(1).

Section 2G2.2 contains six enhancements based on aggravating circumstances related to the nature of the images possessed (the age of the victims depicted and whether the sexual acts depicted involved sadistic or masochistic acts or violence), the number of images possessed, whether a defendant used a computer, whether the defendant distributed child pornography, and whether the defendant previously engaged in a “pattern of activity” involving the “sexual abuse or exploitation of a minor.”⁷⁷ Those enhancements are discussed further in Chapter 6.⁷⁸

⁷⁰ 18 U.S.C. § 2252A(a)(7).

⁷¹ USSG §2G2.2(a)(1).

⁷² USSG §2G2.2(a)(2).

⁷³ USSG §2G2.2(b)(1). Such a defendant’s “base offense level” is 22 and the 2-level reduction under §2G2.2(b)(1) is a “specific offense characteristic.” Nevertheless, judges and attorneys who handle child pornography cases often refer to three different base offense levels (22, 20, and 18). In this report, the Commission instead will refer to the three different “starting points” of 22, 20, or 18.

⁷⁴ If a defendant is convicted of a “morphing” offense, he also will receive a base offense level of 18 under USSG §2G2.2(a)(1), just as if he had been convicted of possession. No defendants in fiscal year 2010 were convicted of morphing offenses. *See* Chapter 6 at 146 n.58.

⁷⁵ If a defendant is convicted of importation, he also will receive a base offense level of 22 under USSG §2G2.2(a)(2), just as if he had been convicted of transportation or distribution. No defendants in fiscal year 2010 were convicted of importation. *See* Chapter 6 at 146 n.58.

⁷⁶ *See* USSG §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) (discussing “relevant conduct” under the guidelines’ sentencing scheme).

⁷⁷ *See* USSG §2G2.2(b).

⁷⁸ *See* Chapter 6 at 137–41.

2. *Recurring Legal Issues Concerning Enhancements in Child Pornography Cases*

In applying §2G2.2, courts have addressed certain recurring legal issues concerning enhancements that actually or potentially apply in a significant percentage of child pornography cases. Two major interpretative issues concerning enhancements in §2G2.1(b) and §2G2.2(b), which are relevant to topics discussed in subsequent parts of this report, are addressed here. In addition, a third potentially relevant enhancement in a subsequent part of the *Guidelines Manual*, USSG §3A1.1(b), also is briefly discussed below.

The first issue is whether, and to what extent, an offender’s use of a “peer-to-peer” (“P2P”) file-sharing program to share child pornography with others qualifies as “distribution” under §§2G2.1(b)(3) or 2G2.2(b)(3).⁷⁹ Guideline commentary defines “distribution” as meaning “any act, including possession with the intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor[,] . . . includ[ing] posting [such] material . . . on a website for public viewing but [] not includ[ing] the mere solicitation of such material by a defendant.”⁸⁰ Consistent with this definition, every court of appeals that has addressed the issue has held that a defendant’s knowing use of a P2P file-sharing program that allows others to have access to child pornography files on the defendant’s computer qualifies as “distribution” even if the defendant only made his illegal files available to strangers on the P2P network.⁸¹ Put another way, the distribution enhancement applies even if a defendant did not *intend* to distribute so long as he possessed *knowledge* that, by participating in a P2P file-sharing program whereby he could access others’ files, he was making his child pornography files accessible to others in the P2P network.⁸² The Eighth Circuit explicitly has presumed that a defendant who used a P2P program that made his illegal files accessible to others in the P2P network *knowingly* did so, absent “concrete evidence of ignorance” on the defendant’s part.⁸³ The Tenth Circuit has held that the 2-level enhancement in §2G2.2(b)(3)(F) for simple distribution applies to a defendant who used a P2P program that made his child pornography files accessible to others in the network even when there was no evidence that the defendant *knowingly* shared his files with others.⁸⁴

⁷⁹ P2P programs are discussed in Chapter 3 at 48–53.

⁸⁰ USSG §2G2.1 (comment.) (n.1); USSG §2G2.2 (comment.) (n.1).

⁸¹ *See, e.g.*, United States v. Bolton, 669 F.3d 780, 782–83 (6th Cir. 2012); United States v. Spriggs, 666 F.3d 1284, 1287 (11th Cir. 2012); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009); United States v. Geiner, 498 F.3d 1104, 1111 (10th Cir. 2007); United States v. Carani, 492 F.3d 867, 876 (7th Cir. 2007); *cf.* United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) (holding that a defendant’s “passive” file-sharing of child pornography images via a LimeWire P2P file-sharing program was sufficient to establish “knowing distribution” under 18 U.S.C. § 2252(a)(2)); United States v. Budziak, 697 F.3d 1105, 1109 (9th Cir. 2012) (same).

⁸² United States v. Ramos, 695 F.3d 1035, 1041 (10th Cir. 2012).

⁸³ United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010); United States v. Glasgow, 682 F.3d 1107, 1110 (8th Cir. 2012) (same); *see also* United States v. Durham, 618 F.3d 921 (8th Cir. 2010) (holding that, because the defendant proved that he did not knowingly make his child pornography accessible to others in the P2P group and, instead did so inadvertently, the distribution enhancement was improper).

⁸⁴ *See* United States v. Ray, 699 F.3d 1172, 1177–78 (10th Cir. 2012) (holding that the guideline enhancement, unlike the penal statutes outlawing distribution of child pornography, is a “strict liability” provision and does not require proof of any *mens rea* to apply).

The Eighth, Tenth, and Eleventh Circuits have taken inconsistent positions concerning the related issue of whether a defendant’s knowing use of a P2P file-sharing program by itself qualifies for the 5-level enhancement under §2G2.2(b)(3)(B) as distribution “for the receipt, or expectation of receipt, of a thing of value” (other than for “pecuniary gain”) or, instead, only qualifies for the 2-level enhancement under §2G2.2(b)(3)(F) for simple distribution.⁸⁵ The Tenth Circuit has held (and no other circuit has disagreed) that, if a defendant knowingly “opts in” to a P2P file-sharing program in order to gain access to more files or receive faster downloads than he would if he had not “opted in” to the file-sharing feature of the program, such a defendant warrants the 5-level enhancement.⁸⁶

The second recurring issue is what qualifies as “sadistic or masochistic conduct or other depictions of violence” within the meaning of §§2G2.1(b)(4) and 2G2.2(b)(4) — a phrase not specifically defined within the guidelines. Courts have applied this phrase to a variety of conduct. In addition to sexual bondage of minors and use of weapons in a sexual context,⁸⁷ certain sexual acts themselves are deemed “inherently” sadistic by most courts. The 11 federal circuit courts to have addressed the issue to date have held that an image or video that portrays the vaginal or anal penetration of a prepubescent minor by an adult male or with an object for sexual purposes is sufficient evidence by itself for the enhancement. Most such courts have reasoned that such sexual penetration is “*per se*” sadistic or violent and that a court does not need expert medical testimony to support its conclusion that the enhancement applies in such a case.⁸⁸

⁸⁵ Compare *United States v. Griffin*, 482 F.3d 1008, 1013 (8th Cir. 2007) (“Griffin admitted that he downloaded child pornography files from Kazaa, knew that Kazaa was a [P2P] file-sharing network, and knew that, by using Kazaa, other Kazaa users could download files from him. By introducing these admissions into evidence, the government met its burden of establishing that Griffin expected to receive a thing of value — child pornography — when he used the file-sharing network to distribute and access child pornography files.”), with *Geiner*, 498 F.3d at 1111 (“We agree that Mr. Geiner did not expect to access images and other files in exchange for allowing other network users to access his files. Although other courts have held that, by sharing files on a file-sharing network, a defendant necessarily expects to receive a ‘thing of value’ (*i.e.*, access to other users’ files), [citing *Griffin*, *supra*], we do not think the language of U.S.S.G. §2G2.2(b)(3)(B) permits such a broad interpretation.”); *United States v. Vadnais*, 667 F.3d 1206, 1209–10 (11th Cir. 2012) (same); *but cf.* *United States v. Ultsch*, 578 F.3d 827 (8th Cir. 2009) (“[W]hether a defendant qualifies for the five-level enhancement must be decided on a case-by-case basis, with the government bearing the burden of proving that the defendant expected to receive a thing of value [*e.g.*, another participant’s files] when he used the file-sharing software.”).

⁸⁶ *Geiner*, 498 F.3d at 1111.

⁸⁷ See, *e.g.*, *United States v. Hoey*, 508 F.3d 687, 692 n.3 (1st Cir. 2007).

⁸⁸ See *United States v. Groenendal*, 557 F.3d 419, 425–26 (6th Cir. 2009) (“[T]he First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have found that images involving penetrative sex between a prepubescent child and an adult male are *per se* sadistic. . . . “[W]e hold today that penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies the application of [USSG] § 2G2.2(b)(4).”) (emphasis in original); *Hoey*, 508 F.3d at 691 (“We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently ‘sadistic’ or similarly ‘violent’ under the terms of section 2G2.2(b)(4).”) (citing decisions of the Second, Fifth, Eighth, Tenth, and Eleventh Circuits) (citations omitted); *United States v. Bellflower*, 390 F.3d 560, 562 (8th Cir. 2004) (holding that “images involving the sexual penetration of a minor girl by an adult male and images of an adult male performing anal sex on a minor girl or boy are *per se* sadistic or violent within the meaning of U.S.S.G. § 2G2.2(b)(4)”) (emphasis in original); *accord* *United States v. Maurer*, 639 F.3d 72, 78–81 & n.5 (3d Cir. 2011); *United States v. Holt*, 510 F.3d 1007, 1011 (9th Cir. 2007); *United States v. Myers*, 355 F.3d 1040, 1043–44 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1143–44 (10th Cir. 2003); *United States v. Osborn*, 35 F. App’x 61, 62 (4th Cir. 2002); *cf.*

Application Note 2 following §2G2.2 expressly provides that: “Subsection (b)(4) applies . . . regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute [sadistic, masochistic, or sexually violent] images.”⁸⁹ Thus, all circuit courts that have addressed the issue since the application note was added in 2004⁹⁰ have concluded that the enhancement is a “strict liability” provision; a defendant’s ignorance that he possessed such images does not prevent application of the enhancement.⁹¹

Although not a specific offense characteristic in §§2G2.1 or 2G2.2, the 2-level “vulnerable victim” enhancement in §3A1.1(b), according to the Ninth Circuit, applies to child pornography cases — both cases sentenced pursuant to §2G2.1 and cases sentenced pursuant to §2G2.2 — when there is sexual abuse of “very young children” depicted in the child pornography at issue.⁹² The Ninth Circuit has rejected arguments that application of the vulnerable victim enhancement is impermissible “double counting” in cases that also receive the “sadistic” enhancement or the enhancement for a victim who is prepubescent or under 12 years of age.⁹³ Neither any other circuit court nor the Commission has addressed this specific issue. In view of the significant number of extremely young victims depicted in child pornography today,⁹⁴ this issue may arise in other circuits in the future.

United States v. Lyckman, 235 F.3d 234, 238–39 (5th Cir. 2000) (“[T]he sexual penetration of a young girl by an adult male is certainly no less painful, either physically or emotionally, to such a young child than the insertion of a foreign object. That being so, it was certainly reasonable for the district court to infer that the conduct depicted by the photographs caused the children pain, physical or emotional or both, and therefore constitutes sadism or violence within the meaning of the guideline.”). The D.C. Circuit is the only circuit court not to have addressed the issue to date. The Commission examined the ten child pornography cases in the District of Columbia from fiscal year 2010 which applied §2G2.2(b)(4). Several such decisions applied §2G2.2(b)(4) in cases where the only possible sadistic or violent images in the case that were mentioned in the presentence report were ones that portrayed an adult male’s sexual penetration of a pre-pubescent minor. No case involved a court’s refusal to apply the enhancement to such an image.

⁸⁹ USSG §2G2.2, comment. (n.2).

⁹⁰ See USSG App. C, amend. 664 (Nov. 1, 2004).

⁹¹ See, e.g., *Maurer*, 639 F.3d at 80; *United States v. Freeman*, 578 F.3d 142, 146 (2d Cir. 2009); see also *United States v. Richardson*, 238 F.3d 837, 840 (7th Cir. 2001) (reaching the same conclusion before the 2004 amendment).

⁹² See, e.g., *United States v. Lynn*, 636 F.3d 1127, 1138–39 (9th Cir. 2011).

⁹³ *United States v. Wright*, 373 F.3d 935, 943 (9th Cir. 2004) (“Most children under 12 are well beyond the infancy and toddler stages of childhood during which they are the most vulnerable. The guideline adjusting for victims under 12 does not take these especially vulnerable stages of childhood into account, so there is no double-counting of age in considering infancy or the toddler stage as an additional vulnerability. Though the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having ‘attained the age of twelve years’”); *Holt*, 510 F.3d at 1012 (“[T]he sadistic conduct enhancement accounts for the pleasure necessarily experienced by the perpetrator, while the vulnerable victim enhancement accounts for the inability of the victim to resist sexual abuse. Because the two enhancements account for these distinct wrongs, it was proper, and no abuse of discretion, for the district court to apply both to the challenged criminal conduct.”).

⁹⁴ See Chapter 4 at 85–87; Chapter 9 at 266.

C. ADDITIONAL SENTENCING ENHANCEMENTS FOR CERTAIN CHILD PORNOGRAPHY OFFENDERS

In addition to providing for recidivist enhancements in the above-mentioned statutes⁹⁵ and guidelines,⁹⁶ both Congress and the Commission have provided for further enhanced penalties for certain other child pornography offenders — with respect to both the scope of the child pornography offense and the offender’s history of committing sexual offenses prior to committing the offense of conviction.

In 18 U.S.C. § 2252A(g), Congress has provided for enhanced penalties for a “child exploitation enterprise,” an offense that, upon conviction, carries a mandatory minimum of 20 years and a maximum term of life imprisonment.⁹⁷ That statute defines that type of criminal enterprise as including violations of the child pornography penal statutes in chapter 110 (except for record-keeping offenses) “as part of a series of felony violations constituting three or more separate incidents and involving more than one victim” when the defendant “commits those offenses in concert with three or more other persons.”⁹⁸ Although rarely applied,⁹⁹ that statute appears to apply broadly to a person engaging in at least three separate acts of advertising, distribution, transportation, or receipt of child pornography in concert with at least three others, without regard to whether those acts resulted in a prior conviction.¹⁰⁰

The corresponding sentencing guideline for violations of § 2252A(g) is USSG §2G2.6 (Child Exploitation Enterprises). It has a base offense level of 35 and includes some specific offense characteristics similar to those that appear in §§2G2.1 and 2G2.2.¹⁰¹ Assuming two common specific offense characteristics in child pornography cases were to apply — a victim under 12 years old and the defendant’s use of a computer, resulting in a combined 6-level

⁹⁵ See, e.g., 18 U.S.C. § 2252(b)(1) & (2) (increased mandatory minimum penalties for child pornography offenders with predicate convictions for sex offenses).

⁹⁶ See, e.g., USSG §2G2.2(b)(5) (providing for a 5-level increase in an offender’s base offense level for a “pattern of activity involving the sexual abuse or exploitation of a minor”); see also *id.*, comment. (n.1) (defining “pattern of activity” as including “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 [child pornography] offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.”).

⁹⁷ 18 U.S.C. § 2252A(g)(1).

⁹⁸ 18 U.S.C. § 2252A(g)(2).

⁹⁹ In fiscal year 2010, no defendants were convicted of an offense under this statute.

¹⁰⁰ See *United States v. Wayerski*, 624 F.3d 1342, 1348 (11th Cir. 2010) (“The defendants’ activity here satisfied the predicate offenses for § 2252A(g) because it violated at a minimum the prohibitions of 18 U.S.C. § 2251(d)(1), concerning the advertisement of child pornography, and 18 U.S.C. § 2252A(a)(1) and (2), concerning the transportation and receipt of child pornography, which are Chapter 110 offenses covered in the child exploitation enterprise statute. The offenses involved much more than three separate instances and more than one victim, and they occurred in concert with more than three people. Indeed, the defendants do not suggest that their own conduct falls outside the reach of § 2252A(g.)”); see also *United States v. McGarity*, 669 F.3d 1218 (11th Cir. 2012) (appeal of conspirators of defendants in *Wayerski*).

¹⁰¹ See USSG §2G2.6(b)(1)–(4).

increase¹⁰² — a defendant’s offense level would be 41 (38 after full credit for acceptance of responsibility under §3E1.1). Further assuming Criminal History Category I (the typical Criminal History Category for child pornography offenders),¹⁰³ the corresponding sentencing range would be 235–293 months,¹⁰⁴ although, as noted above, the statutory minimum penalty is 240 months (20 years).

Section 4B1.5 of the sentencing guidelines (Repeat and Dangerous Sex Offenders) applies to certain defendants convicted of production of child pornography who have at least one predicate sex conviction¹⁰⁵ or who engaged in a “pattern of activity involving prohibited sexual conduct” (but need not have been convicted of such conduct). Subsection (a) of this guideline, which covers recidivist sex offenders, provides for an offense level of either 34 or 37 depending on whether the producer has one or two predicate sex convictions.¹⁰⁶ Such an offender also receives a minimum Criminal History Category of V.¹⁰⁷ With full credit for acceptance of responsibility, such an offender would have a minimum guidelines range of 180–210 months (offense level 31, Criminal History Category V)¹⁰⁸ or 235–293 months (offense level 34, Criminal History Category V).

Section 4B1.5(b), which applies if subsection (a) does not apply (*e.g.*, the offender was not convicted of the conduct constituting a “pattern of activity”), results in a 5-level enhancement to the otherwise applicable offense level in applying Chapter Two child pornography guidelines. Unlike §4B1.5(b), §4B1.5(a) does not have a separate base offense level and, instead, adds additional levels to a production offender’s base offense level if the offender engaged in a “pattern of activity,” as defined in §4B1.5(b). For purposes of §4B1.5(b), a “pattern of activity involving prohibited sexual conduct” is defined as sexual abuse of a child (including prior acts of producing child pornography) or distributing child pornography where the defendant also had a prior *conviction* for distributing child pornography.¹⁰⁹ This “pattern of activity” enhancement is broader than the “pattern of activity” enhancement in §2G2.2(b)(5), in that the former includes distribution of child pornography as predicate activity but the latter does not. In cases where a defendant is convicted of both an offense related to the sexual abuse of a

¹⁰² See USSG §2G2.6(b)(1) (4-level increase for minor under 12 years of age) & (b)(4) (2-level increase for use of a computer).

¹⁰³ See Chapter 6 at 143.

¹⁰⁴ See USSG Ch. 5, Pt. A (Sentencing Table).

¹⁰⁵ The predicate sex convictions include a state or federal conviction for sexual abuse of a minor, trafficking of minors for sexual purposes, and production of child pornography (but not child pornography offenses only related to distribution, receipt, or possession). See USSG §4B1.5, comment. (n.2).

¹⁰⁶ A producer with one predicate sex conviction faces a statutory maximum of 50 years under 18 U.S.C. § 2251(e) and a corresponding base offense level of 34 under USSG §4B1.5(a)(1)(B)(ii). A producer with two or more predicate sex convictions faces a statutory maximum of life imprisonment under 18 U.S.C. § 2251(e) and a corresponding base offense level of 37 under §4B1.5(a)(1)(B)(i).

¹⁰⁷ USSG §4B1.5(a)(2).

¹⁰⁸ Although the low end of that guideline range is 168 months, the statutory mandatory minimum penalty is 180 months, see 18 U.S.C. § 2251(e), which becomes the low end of the guidelines range under USSG §5G1.1(c)(2) (Sentencing on a Single Count of Conviction).

¹⁰⁹ USSG §4B1.5, comment. (n.4).

minor (including production of child pornography) *and* a child pornography offense sentenced under §2G2.2 and the multiple convictions result in an enhanced offense level under USSG §§3D1.4 (Determining the Combined Offense Level), the application of the two different 5-level enhancements under USSG §§2G2.2(b)(5) and 4B1.5(b) is not improper double-counting.¹¹⁰

D. STATE CRIMINAL PENALTIES FOR CHILD PORNOGRAPHY OFFENSES

Although this report is concerned with federal child pornography cases, brief mention should be made of criminal offenses and corresponding penalties in the state systems. As a recent commentator has observed:

States have . . . significantly increased their penalties [for child pornography offenses during the same time period that Congress and the United States Sentencing Commission have done so at the federal level]. All fifty states have specific provisions criminalizing the possession of child pornography, and thirty states have increased the penalties available for possession of child pornography since criminalizing it. The pattern of increasing penalties appears to be getting stronger, as twenty-eight of those increases have occurred since 2000, nineteen have occurred since 2005, and four states have increased the penalties associated with the possession of child pornography multiple times in the past twenty years.¹¹¹

Although some states, like the federal system, provide for harsher statutory penalties for production and distribution of child pornography than for simple possession, other states provide the same statutory ranges of punishment for possession as they do for other child pornography offenses, including production of child pornography.¹¹²

A summary of all states' current child pornography penal statutes is contained in Appendix F. That appendix shows the differing penalty ranges for child pornography offenses among the states.

E. CONCLUSION

A review of the statutory and guideline penalty provisions in child pornography cases yields the following primary conclusions:

- The three main statutory penalty ranges in federal child pornography cases today are 15 years to life imprisonment for production offenses, five to 15 years for

¹¹⁰ See *United States v. Rothenberg*, 610 F.3d 621, 623–28 (11th Cir. 2010).

¹¹¹ Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857–60 & nn.12–15 (2011) (citing child pornography statutes from all 50 states). As noted in footnote 12 of this article, virtually all the states now treat simple possession as a felony, some provide for mandatory minimum prison terms even for possession. See *id.* at 857 n.12; see also Krohel, *supra* note 14, at 672 n.339 (“Many states have mandatory minimums in place for possession of child pornography.”) (citing statutes in Alabama, Arizona, Arkansas, Georgia, Louisiana, and Mississippi).

¹¹² See Hessick, *supra* note 111, at 863–65 & nn.36–39 (citing statutory provisions in several states).

receipt, transportation, and distribution (R/T/D) offenses, and zero to ten or 20 years for possession offenses (depending on the age and sexual maturity of the victims depicted in the images possessed). Higher penalty ranges apply to defendants with predicate convictions for sex offenses.

- The guideline penalty ranges for these three main offense types vary as well. Production offenders are sentenced under §2G2.1 and face a base offense level of 32. R/T/D offenders face a base offense level of 22 (although offenders who only received and had no intent to distribute are eligible for a 2-level reduction). Offenders only convicted of possession have a base offense level of 18. Offenders sentenced under either §§2G2.1 or 2G2.2 also face up to six potential enhancements for a variety of aggravating factors.
- All eleven circuit courts that have addressed the issue have held that an image depicting the sexual penetration of a prepubescent minor is by itself sufficient evidence of sadistic, masochistic, or otherwise violent sexual conduct to warrant a 4-level enhancement under §§2G2.1(b)(4) and 2G2.2(b)(4).
- All federal circuit courts to have addressed the issue have held that a defendant's knowing use of a peer-to-peer (P2P) file-sharing program in a manner that makes his child pornography files accessible to others in the P2P network is sufficient evidence to establish "distribution" for purposes of the 2-level enhancements in §§2G2.1(b)(3) & 2G2.2(b)(3)(F). The federal circuit courts are divided on the issue of whether such knowing P2P file-sharing by itself warrants a 5-level enhancement under §2G2.2(b)(3)(B).
- Penalties in the state courts for child pornography offenses, although they have generally increased in recent years, vary greatly in terms of severity.

