

Appendix J

Cases: Pattern of Activity Involving Sexual Abuse or Sexual Exploitation of Minor

Appellate Court Cases:

In United States v. Nielssen, 136 F.3d 965 (4th Cir. 1998), the Fourth Circuit upheld the district court's five level enhancement under §2G2.2(b)(4). The appellate court concluded that the defendant had sexually molested his daughter and sister, and had taken sexually explicit photographs of his daughter. The court stated, "[t]he aforementioned conduct clearly constitutes 'two separate instances of the sexual abuse or sexual exploitation of a minor by the defendant.'" Id. at 971.

In United States v. Anderton, 136 F.3d 747 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 913 (1999), the Eleventh Circuit upheld the application of a five-level enhancement under §2G2.2(b)(4) to a husband and wife who were convicted under 18 U.S.C. § 2252(a)(2). The defendants contended that the activities supporting a pattern of activity enhancement were unrelated to the offense of conviction because they did not involve exploitation of a minor for the purpose of producing a visual depiction of sexually explicit conduct. The defendants argued that the amended commentary to §2G2.2(b)(4), which allowed consideration of acts of sexual abuse or exploitation that were not committed during the course of the offense or that did not result in a conviction, should not apply to them because their offenses were completed before November 1, 1996. The Court of Appeals, concluding the 1996 amendment was a clarifying amendment, stated, "[i]t is now well-settled in this circuit that 'the sentencing court should consider clarifying amendments when interpreting the guidelines, even when sentencing defendants convicted before the effective date of the amendments.'" Id. at 751, (quoting United States v. Howard, 923 F.2d 1500, 1504 (11th Cir. 1991)). Therefore, the district court was correct in using the testimony of numerous female witnesses who recounted incidents in which the defendants engaged in sexual conduct with them or attempted to induce them to have sex as the predicate acts necessary for the enhancement.

In United States v. Hamilton, No. 98-2806, 1999 WL 86053 (8th Cir. Feb. 2, 1999)(table text), the Eighth Circuit, in an unpublished case, upheld a pattern of activity enhancement for a defendant who had sexually abused the seven-year-old daughter of his live-in girlfriend on at least two separate occasions. The defendant had pled guilty to transportation and possession of child pornography in violation of 18 U.S.C. § 2252(a)(1) and (a)(4)(B).

DISTRICT COURT CASES: Summaries of Monitoring Data

The following cases received specific offense characteristic (b)(4) under guideline §2G2.2, "if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."

399466. Although charged with nine counts of transportation of child pornography, four counts of receiving child pornography and one count of possession of child pornography, the defendant pled guilty to only one count of transportation of child pornography. The defendant was sending and receiving pornographic pictures of pre-pubescent children over the Internet. And, while he was not involved in the creation of these pictures, and did not commit any sexual abuse of a minor during the instant offense, information was gathered for the presentence report that established that he had sexually abused his stepdaughter for a two year period, from the ages of ten to 12. The defendant was not criminally charged for this abuse, but this information was used as the basis for the application of the "pattern of activity" adjustment under §2G2.2. Defendant had no prior criminal record. Sentence: 36 months imprisonment.

396906. Defendant was charged with and pled guilty to one count of interstate transfer of visual depictions of minors engaging in sexually explicit conduct. The instant offense involved the defendant giving a computer disk to a co-worker that contained three files of child pornography pictures. During the investigation of the offense, a phone conversation between the co-worker and the defendant was taped. In that conversation, the defendant admitted having sexual contact with three children: a 14 year old relative (who was pregnant, and the defendant expressed concern about the paternity of the child), the daughter of a former girlfriend, and a friend of the former girlfriend's child who spent the night. The "pattern of activity" enhancement, however, was given to this defendant on the basis of other conduct. The defendant sexually molested his stepdaughter (who is under the age of 14) and videotaped the molestation on a number of occasions. The defendant's wife and mother of the victim also participated in the molestation and the videotaping. Defendant had no prior record, although he also had pending state charges related to his sexual contact with his stepdaughter. Sentence: 121 months imprisonment.

393614. Defendant was originally indicted for Internet coercion and enticement of minor for sexual activity; interstate travel for sexual activity with a juvenile (2 counts); coercion of an individual to travel in interstate commerce for illegal sex; interstate receipt of child pornography; and possession of child pornography. Defendant pled to a one count information charging interstate receipt of child pornography. The instant offense involved the defendant downloading a total of 12 child pornography images from the Internet. Investigation revealed that the defendant has sexually abused at least two children, and for this reason, the "pattern of activity" specific offense characteristic was applied. The first victim was 14 years old. The defendant made contact with the victim over the Internet and then traveled across state lines to engage in a prohibited sex act with the juvenile male. The

defendant was a suspect in an additional sexual assault case involving another teenage male. This abuse went on for three years. The defendant has no prior criminal record, although state charges are pending for the two sexual assaults of a minor. Sentence: 87 months imprisonment.

391358. Defendant was indicted for coercing a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct, interstate transportation of child pornography via computer, possession of child pornography, and criminal forfeiture. The defendant pled guilty to the counts of interstate transportation and possession of child pornography. The instant offense was discovered during a sting operation. Defendant sent sexually explicit images of himself and images of child pornography to an undercover agent over the Internet. Defendant wanted the undercover agent (posing as a 15 year old male) to photograph and videotape himself, and then send these images to the defendant. Defendant revealed that he had traveled to Canada and had sex with a 17 year old male he met over the Internet (defendant maintained that this meeting was consensual). Defendant also revealed that he had sent a "quick cam" to a 16 year old male in Texas. The "quick cam" was used by the defendant and the 16 year old victim for the purposes of sending sexually explicit images over the Internet. Over 5,000 child pornography files were contained on seven zip drive disks seized from the defendant. Defendant had no prior criminal record. Sentence: 48 months imprisonment.

382692. Defendant was charged with, and pled guilty to, one count of transportation of child pornography and one count of possession of child pornography. The instant offense involved the defendant receiving and sending images of child pornography over the Internet. There is no indication that the defendant was involved in the production of child pornography. In a related case, the defendant is charged with sexually assaulting his girlfriend's daughter, who is under seven years of age. The behavior in the related case was the basis for the "pattern of activity" adjustment under §2G2.2. Sentence: 51 months imprisonment.

382408. Defendant was charged with and pled to one count of possession of materials depicting a minor engaging in sexually explicit conduct. Defendant possessed numerous graphic images of pre-pubescent minors engaged in sexual acts. Defendant received these images via the Internet; he was not involved in the production of child pornography. The instant offense was discovered as a result of a state investigation of the defendant for sexually molesting two 12 year old boys. Defendant was convicted by the state for this conduct and received 32 months imprisonment. Sentence: 41 months imprisonment.

381804. Defendant responded to an advertisement in a newsletter for sexually explicit videotapes. The advertisement was actually an undercover operation by the Postal Inspection Service. A postal inspector made a controlled delivery of the videotapes to the defendant, and shortly thereafter, the inspectors entered the defendant's home with a search warrant. The inspectors found several boxes containing child pornography. The defendant was in possession of photographs, written materials, and videotapes. Defendant was eventually charged with, and pled guilty to, one count of receiving and distributing child

pornography. The defendant had one prior conviction for attempted sexual abuse, which was the result of an undercover sting operation. Sentence: 51 months imprisonment.

376001. Defendant, using the Internet, contacted a 13 year old male (who was actually a witness/civilian). The defendant sent child pornography over the Internet to the victim and arranged to meet this 13-year old for the purposes of engaging in sexual activity with him. Defendant traveled across state lines to do so and brought 56 computer diskettes with him that contained numerous child pornography files. Defendant was arrested for two counts of interstate transportation of child pornography, one count of possession of child pornography, and one count of traveling in interstate commerce for the purpose of engaging in a sexual act with a minor. The defendant pled guilty to the two counts of transporting child pornography in interstate commerce. Although Defendant had zero criminal history points, Defendant received the "pattern of activity" enhancement because he had sexually abused his adopted son for approximately four to five years. There is no indication that the defendant was involved in the production of child pornography. Sentence: 87 months imprisonment.

371641. Twenty years before the crimes were reported, the defendant took pornographic pictures of his two sisters-in-law during their pre-pubescent years, in addition to sexually molesting them. He was found to be in possession of videotapes, photographs, and computer images depicting minors engaging in illegal sexual activity. Defendant pled guilty to one of the three counts of possession of child pornography against him. The defendant had no prior criminal record. Sentence: 6 months imprisonment.

366351. The defendant engaged in communications with an undercover officer over the Internet for the purpose of trading child pornography tapes. He was arrested after he retrieved the videotapes sent to him by the undercover officer. The defendant pled guilty to receipt of child pornography. Based upon evidence the defendant sexually abused his 13 year old sister-in-law and his son, who is a pre-pubescent minor, he was found to have engaged in a pattern of activity involving the sexual abuse of a minor. Sentence: 42 months imprisonment.

363162. Defendant was involved in the production and trafficking of child pornography videotapes. Pornographic pictures of various minors that were seized were found to have been taken at the defendant's residence; also recovered in the defendant's home was a videotape of the defendant and his co-defendant sexually molesting a 16-year old male. Defendant was found guilty of conspiracy to receive and possess child pornography, receipt of child pornography, possession of child pornography, and criminal forfeiture. He had no prior criminal record. Sentence: 37 months imprisonment.

359225. The defendant's 16 year old stepdaughter reported that the defendant had been forcing her to engage in sexual activity with him for the past two years. The victim reported that the defendant had also photographed her during these encounters, and was sending these pictures over the Internet. In addition to these pictures, evidence established that the defendant was receiving and transmitting other child pornography images over the

Internet. The defendant pled guilty to a two count indictment charging one count of receipt of child pornography and one count of possession of child pornography. The defendant had one prior conviction for procuring a person to do lewd acts. Sentence: 57 months imprisonment.

360500. The defendant downloaded child pornography files over the Internet, and possessed numerous visual images of children engaged in sexual acts. He was found guilty at trial of two counts of transportation of visual depictions of minors engaging in sexually explicit conduct, one count of receipt of child pornography, and one count of possession of child pornography. In addition to the defendant's own report of a prior allegations of sexual misconduct involving his children, there were an anonymous, unsubstantiated report that the defendant's two children were sexually acting out with one another and an unsubstantiated report of sexual misconduct arising from a medical examination revealing that the defendant's two year old daughter had vaginal infections and crabs on her eyebrows and eyelids. According to the presentence report, the pattern of activity adjustment was applied in this case due to the defendant's repeated acts of receiving and possession child pornography. He had no prior criminal record. Sentence: 9 months imprisonment.

357072. Defendant received child pornography images over the Internet, engaged in conversations over the Internet with child pornography producers, and specifically requested poses and conduct from the minor victims. Defendant was charged with, and pled guilty to, conspiracy to engage in certain activities related to the sexual exploitation of children, and certain activities relating to material involving the sexual exploitation of children. The defendant received the pattern of activity enhancement because of specific suggestions he made in regard to sexually exploiting the victims. The defendant had no prior record, and there was no indication that the defendant had ever engaged in sexual acts with a minor. Sentence: 51 months imprisonment.

350925. For a period of approximately two months, the defendant sent numerous pictures depicting child pornography via computer transmission to two individuals he believed were 17 and 14 years old. During e-mail conversations with the 14 year old (who was actually an undercover FBI agent), the defendant stated that some of the pornographic images he had sent to the agent were taken after he had committed sexual acts with the children in the photographs. The defendant was charged with nine counts of transportation of child pornography and one count of possession of child pornography; he pled guilty to three counts of transportation of child pornography. Evidence of other activity considered during sentencing included his prior conviction for lewd and lascivious conduct upon a child, a report that he had been molesting a 15-year-old female, and reports from the defendant's two half-sisters that he had sexually molested them when they were children. The defendant was also being investigated for allegations that he sexually molested his four year old daughter. Sentence: 57 months imprisonment.