

Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998



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Sexual Predators Act Policy Team

**Pamela G. Montgomery, Chair
Kevin Blackwell
Keri Burchfield
John Butcher
Amie Clifford
Alan Dorhoffer
Paul Hofer
Krista Rubin
Deborah Stevens-Panzer**

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Sentencing Federal Sexual Offenders: Protection of Children from Sexual Predators Act of 1998

I. Introduction to the Team’s Charter and Overview of Issues

The Sexual Predators Act Policy Team (the team) is the latest in a series of Commission working groups charged with analyzing the guidelines concerning sex offenses against children. The team was chartered to assist the Commission in developing possible responses to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105-314 (“the Act”).¹ This Act contains both specific and general directives to the Commission to review relevant guidelines and, upon completion of the review, provide appropriate enhancements and otherwise increase penalties in certain circumstances, while ensuring “reasonable consistency” among the guidelines and avoiding “duplicative punishment.”²

A. Previous Commission Work

Several provisions of the Act, as well as aspects of legislation enacted in late 1996,³ appear, in part, to be congressional responses to recommendations made in the Commission’s last report to Congress on sex offenses against children, completed in June 1996.⁴ These include expanding the definition of crimes counted as “prior offenses” and increasing the statutory maximum penalties for repeat offenders, as well as directives to the Commission to add specific adjustments that the Commission had reported were then under consideration. Thus, the recent legislation may be understood as the latest installment in an ongoing dialog between Congress and the Commission, as they work together to improve sentencing in this area of special public concern.⁵

Previous Commission working groups have identified problems with several of the guidelines. Most notably for present purposes, prior analyses of 1992, 1994, and 1995 cases found that about half of the crimes sentenced under the statutory rape guideline (§2A3.2) involved aggravated conduct that falls outside the scope of cases for which the guideline was intended—namely, sexual conduct that would be legal, but for the age of the victim. The severe sentences mandated by guideline 2A3.1 for aggravated sexual abuse

¹ The original bill was introduced in the House of Representatives by Representative McCollum (R-FL) and in the Senate by Senator Hatch (R-UT) (Appendix A).

² P.L. 105-314 at § 507 (1) and (2).

³ See Amber Hagerman Child Protection Act of 1996, and the Child Pornography Act of 1996, P.L. 104-208 (from the Omnibus Consolidated Appropriations Act 1996).

⁴ U.S. Sentencing Commission, “Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties” (June 1996) [hereinafter the 1996 Report to Congress].

⁵ See Appendix E for a history of amendments to the “sex crimes” guidelines.

result in a large gap between sentences imposed under it (with a 1998 mean sentence of 152 months) and the relatively lenient sentences imposed for statutory rape, which, with a base offense level of just 15, averaged 19 months in 1998.⁶ This gap and other problems associated with the rape and statutory rape cases—which, at the time of the 1996 Report to Congress, mostly involved Native Americans in pathological family and social circumstances—appeared to contribute to many plea agreements involving statutory rape charges in circumstances that actually involved aggravated rape, and also to under use of the cross reference from the guideline for statutory rape (§2A3.2) to the guideline for aggravated rape (§2A3.1).

The 1996 Report to Congress outlined amendments that the Commission had already promulgated to address some of these problems, and also described several additional changes under active consideration, including raising the base offense level for the statutory rape guideline and adding some type of enhancement for crimes involving a pattern of criminal activity. Several different approaches to these problems were described. The Commission did not promulgate any further changes, however, in part because legislative developments overtook it. Revisions to penalties, including new mandatory minimums, were included in legislation in 1996.

B. New Problems Identified

The recent legislation points to a new set of problems with the statutory rape guideline (§2A3.2) and the guideline for promoting prostitution (§2G1.1). The growth of the Internet has resulted in mounting concern about its abuse by pedophiles as a means for identifying, contacting, and coercing children into sexual activity. Congress has created new criminal offenses largely by expanding Title 18 U.S.C. Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) to provide federal jurisdiction over these new types of crimes involving use of an interstate communication facility to coerce, entice, or transmit information about a minor for the purposes of engaging in prohibited sexual conduct. The Federal Bureau of Investigation has expanded its computer crimes unit investigating sex offenses against children, and as a result there are increases in the number and kind of offenders prosecuted and sentenced in the federal courts.

Based on a review of the legislative history, it seems that Congress has found the current guidelines inadequate to punish for these technological advancements. The recent Act directs that sentences should be increased for offenses involving the use of computers and for the knowing misrepresentation of the defendant's identity, which is particularly easy in cyberspace. Because of evidence that trading clubs of pedophiles exchanging child pornography were flourishing on the Internet, the Act also calls for redefinition of the guideline enhancement for distribution of child pornography to include distribution for a nonpecuniary interest. The Act also created several new crimes involving the distribution of obscenity to a minor, and the dissemination of identifying information about a minor, all in

⁶ See 1996 Report to Congress, pp. 22-24.

response to reports of abuses of the Internet by persons seeking sexual contact with children.

While these new crimes and aggravating circumstances are relatively easy to incorporate into the current guidelines, the Act also raises more fundamental issues that may call into question the adequacy of the current guideline structure. In particular, the Act calls for sentencing enhancements for offenders convicted under Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes) and directs the Commission to ensure that sentences are “appropriately severe and reasonably consistent.”⁷ As described further below, many Chapter 117 offenses (Transportation for Illegal Sexual Activity and Related Crimes) are currently treated by the guidelines through a “sorter” system involving the “Promoting Prostitution or Prohibited Sexual Conduct” guideline (§2G1.1) and cross-referencing to other guidelines based on the underlying conduct, most notably the statutory rape guideline.

Given the problems with the statutory rape guideline previously identified, and that it is increasingly used for an entirely new type of offense and offender, the Commission may wish to evaluate the adequacy of the current guideline 2G1.1 “sorter” system for sentencing the wide range of offenses and offenders now appearing in federal court. For example, is it possible for a single statutory rape guideline to accommodate cases ranging from (1) consensual sex that would be legal but for the age of the victim (the intended heartland of the current guideline), to (2) cases involving Native Americans and a wide range of both aggravating and mitigating circumstances, such as incest, alcoholism, family pathology, and the use of threats and force (which have historically been typical cases under the current guideline), and (3) to cases involving possible pedophiles detected while roaming the Internet (the cases of most apparent concern to Congress, and the type growing increasingly frequent)?

Finally, the Act includes a directive to the Commission that appears to adopt one version of a proposal in the Commission’s 1996 report, *i.e.*, that sexual abuse offenses involving a “pattern of activity” should receive a sizeable sentence enhancement. The 1996 Report to Congress discussed the pattern of activity adjustment as one possible response to two separate issues: (1) the inadequacy of punishment for many offenders sentenced under the statutory rape guideline, particularly offenses involving repeated acts, and (2) the need to identify the most dangerous offenders at high risk of recidivism so that they can be incapacitated with lengthy incarceration. A version of a “pattern of activity” adjustment was suggested as one method for identifying this high-risk group, although at the time of the 1996 Report to Congress the research literature was judged too inconclusive to base sentencing policy on predictions of dangerousness made from factors other than criminal history.⁸

⁷ Section 502(a) and (b).

⁸ See 1996 Report to Congress, p. 37.

Considerable research progress has been made since the 1996 Report to Congress, however, largely in response to the sexual predator civil commitment statutes enacted by several states. Several risk assessment instruments have been validated for use with sex offender populations. (See literature review in Appendix L.) The Commission may wish to re-evaluate whether this literature is relevant to federal sentencing policy and to the proper implementation of the pattern of activity enhancement directed by the Act.

The need to identify dangerous offenders appears to be the primary focus of the recent legislation. But the pattern of activity adjustment, depending on how it is implemented, could address either of the two issues described above. It seems unlikely, however, that a single adjustment could be drafted in a way that properly addresses both. The preliminary questions facing the Commission when deciding how to implement the directive are: What range of solutions are available for addressing the inadequacy of punishment for statutory rape cases and Chapter 117 cases? How might high-risk offenders best be identified and incapacitated? And to what problem is the pattern of activity adjustment best suited?

C. Format of the Report

After a general introduction to the recent legislation and the statutes and guidelines applying to sex offenses against children, this report identifies five Action Items addressing the two new crimes, the declaration of a policy of “zero tolerance” for child pornography, and three of the specific directives contained in the Act, including those pertaining to the definition of distribution of pornography, the use of a computer, and offenses involving misidentification. The last section of the report then contains two additional Action Items that briefly sketch a range of options for addressing the remaining specific directives contained in the Act more fundamental issues raised by the problems identified above.

II. The Sexual Predators Act

A. General Overview

The explosive growth of the Internet has created new opportunities for pedophiles to prey upon our nation's children. According to Congress, “[w]ith the advent of the ever-growing computer technology, law enforcement officials are discovering that criminals roam the Internet just as they roam the streets.”⁹

In the past few years, Congress has shown renewed interest in legislating against (1) the production and trafficking of child pornography, and (2) the enticement of minors to engage in prostitution or other illicit sexual activity.¹⁰ The Sexual Predators Act was a

⁹ H.R. Report 105-557, at 11 (1998).

¹⁰ The Sex Crimes Against Children Prevention Act of 1995 (SCACPA) created new prohibitions against child pornography and other sex crimes against children. Additionally, Congress in the

bipartisan effort to once again address these issues, and its enactment occurred after more than a year of hearings and debates in Congress, during which testimony was given by law enforcement officers and others on matters relating to Internet crime and safety on-line.¹¹ Congress was particularly concerned about "[r]ecent, highly publicized news accounts in which pedophiles have used the Internet to seduce or persuade children to meet them to engage in sexual activities [noting that y]ouths who have agreed to such meetings have been kidnaped, photographed for child pornography, raped, beaten, robbed, and worse."¹²

On October 30, 1998, the Sexual Predators Act was passed by Congress. The stated purpose of the Act was, *inter alia*, to protect children from sexual abuse and exploitation.

B. Directives in the Act to The Commission

Contained within the Sexual Predators Act are directives to the United States Sentencing Commission (Commission). Those directives are to review relevant guidelines, and promulgate guideline amendments:

- (1) to provide a sentencing enhancement for offenses under Chapter 117 of Title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines;
- (2) to provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;
- (3) to provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;

Telecommunications Act of 1996 created a new offense prohibiting the persuasion, inducement, enticement, or coercion of a minor to engage in prostitution or other prohibited sexual activity.

¹¹ H.R. Report 105-557, at 12-13.

¹² *Id.* at 12.

- (4) to provide for appropriate enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor¹³; and
- (5) to clarify that the term "distribution of pornography" applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest.¹⁴

In carrying out these directives, Congress has required the Commission to ensure reasonable consistency with other guidelines, and avoid duplicative punishment under the guidelines for substantially the same offense.

C. Other Provisions of the Act

In addition to the directives to the Commission, the Sexual Predators Act contained two new crimes: (1) transmittal of identifying information about minors for criminal sexual purposes¹⁵ and (2) distribution of obscene materials to minors.¹⁶ The Act also provided for increased penalties for some existing crimes that address sexual activity with minors and child pornography,¹⁷ and contained an explicit statement of Congress's "zero tolerance" for the possession of child pornography.¹⁸

III. Relevant Federal Statutes and Sentencing Guidelines

¹³ In its 1996 *Report to Congress: Sex Offenses Against Children*, the Commission indicated that it had under consideration an amendment to make the five level enhancement currently contained in the trafficking/receipt guideline 2G2.2(b)(4) applicable to §§2G2.1 (production) and 2G2.4 (possession) "if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." In addition, the Commission discussed an option of expanding the "pattern of activity" adjustment to the sexual abuse of a minor guideline, by providing for a five-level adjustment to §2A3.2. The Sexual Predators Act, however, directs the Commission to add the "pattern of activity" enhancement to all the sex crimes guidelines and transportation for prohibited sexual activity guidelines.

¹⁴ In the 1996 Report to Congress, the Commission also noted that it had under consideration an amendment that would clarify the definition of "distribution" of pornography. Such an amendment would provide that distribution for either money or a non-pecuniary interest would receive the five-level enhancement. *Report to Congress: Sex Offenses Against Children* (1996) at 40-41.

¹⁵ 18 U.S.C. § 2425 (Supp. 1998) (providing for five-year statutory maximum term of imprisonment).

¹⁶ 18 U.S.C. § 1470 (Supp. 1998) (providing for ten-year statutory maximum term of imprisonment).

¹⁷ *E.g.*, 18 U.S.C. §§ 2244, 2247, 2422, 2423, 2426 (Supp. 1998).

¹⁸ 18 U.S.C. § 2252 (Supp. 1998). The statute now prohibits the knowing possession of one or more books, magazines, periodicals, films, video tapes, or other materials containing a visual image, if producing the image involved the use of a minor engaging in sexually explicit conduct; and such visual depiction is of such conduct. The statute previously prohibited the possession of three or more items containing depictions of child pornography.

The congressional directives to the Commission were in the context of the federal statutory crimes¹⁹ relating to sexual abuse and exploitation of minors, transportation for purposes of prohibited sexual activity, and child pornography. It is therefore necessary to briefly review those crimes and the guidelines that will need to be amended in order to meet the congressional mandate.

A. Sexual Abuse

1. Statutes

There are five general federal sexual abuse crimes: aggravated sexual abuse, 18 U.S.C. § 2241; sexual abuse, § 2242; sexual abuse of a minor or a ward, § 2243; abusive contact, § 2244; and traveling in interstate or foreign commerce to engage in a sexual act with a juvenile, § 2423(b).²⁰ The maximum statutory penalties under these sexual abuse statutes range from six months to life imprisonment, with repeat offenders subject to additional punishment.²¹

Prior to the Sexual Predators Act, a defendant convicted of the sexual abuse crimes under 18 U.S.C. §§ 2241-2243, who had one or more prior federal or state convictions relating to aggravated sexual abuse, sexual abuse or abusive contact, was subject to double the maximum statutory penalties under 18 U.S.C. § 2247 (1994).²² The Sexual Predators Act expanded the scope of prior convictions which result in the doubling of the maximum statutory penalties. The definition of prior convictions now also includes offenses under (1) chapter 117 (transportation for illegal sexual activity), (2) chapter 110 (production/trafficking/possession of child pornography), and (3) similar state offenses.

2. Guideline Provisions

There are four guidelines that deal directly with federal sexual abuse offenses: §2A3.1 (rape), §2A3.2 (statutory rape), §2A3.3 (rape of a ward), and §2A3.4 (abusive sexual contact). These guidelines will need to be amended in some form to satisfy the congressional directives.

¹⁹ While the federal government continues to enact sex crimes legislation, state governments prosecute the vast majority of sex offenders. Federal authority over sex crimes, as with all types of crime, is limited by the Constitution. Federal jurisdiction is generally based on (1) specific constitutional grants of authority, such as Congress's authority to regulate interstate or foreign commerce or (2) federal interests in specified pieces of property, such as military posts, national parks, or Native American reservations. This limited scope of federal jurisdiction is reflected in the small number of federal sex offenses cases prosecuted and the types of cases prosecuted.

²⁰ See Appendix M for definitions of the various sex offenses.

²¹ See Appendix C for a complete listing of the statutory minimum (if any) and the statutory maximum for the sexual abuse and pornography offenses.

²² On a defendant's second conviction under 18 U.S.C. § 2241(c), the court must impose a mandatory life sentence.

a. §2A3.1 (Rape)

Guideline
2 A 3 . 1
applies to
defendants
convicted of
rape as
defined by
18 U.S.C.
§§ 2241-
2242.

Guideline
2A3.1²³

Base offense level: **27**

Specific offense characteristics:

(1) whether the offense was a more aggravated rape as defined by 18 U.S.C. § 2241(a) or (b) (four-level increase);

(2) age of victim (four-level increase if victim under the age of 12 years; two-level increase if victim between ages of 12 and 16 years);

(3) victim being in custody or care of defendant, or in a correctional facility (two-level increase);

(4) injury to the victim (four-level increase if victim sustained permanent or life-threatening injury; two-level increase if serious bodily injury; three-level increase if degree of injury between those two types of injuries); and

(5) abduction of the victim (four-level increase).

²³ The guideline was set to correspond to the standard for rape at 18 U.S.C. § 2242: "Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping) or (2) engages in a sexual act with another person if that other person is (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." See Appendix D for a complete listing of all specific offense characteristics, cross-references, and special instructions of the "sex crimes" guidelines.

Although, there is no specific offense characteristic or application note regarding a general “pattern of behavior of activity of sexual abuse or exploitation,” Application Note 4 provides that an upward departure may be warranted if the defendant was convicted of multiple acts; Application Note 6 provides that an upward departure may be warranted if the defendant had a prior conviction for similar conduct. The congressional directive to provide an enhancement for a “pattern of activity of sexual abuse or exploitation of a minor,” may cause the Commission to re-evaluate this approach; especially since a review of 126 cases²⁴ sentenced under this guideline in 1998 indicates that 27 (22%) defendants had prior convictions for sexual offenses, and 63 (50.0%) offenders abused the victim more than once.

The guideline also does not currently include enhancements for the other factors upon which the latest congressional directives focus: misrepresentation of the defendant’s identity or use of a computer in connection with a sexual offense against a minor. However, one of the cases sentenced under this guideline did involve two of the relevant factors. In that particular case a defendant used a computer to misrepresent his identity to entice a minor to engage in a prohibited sexual act.

Table 1
Summary Statistics for Rape Guideline (§2A3.1)

	1998	1997	1996
Number of Cases	127 ²⁵	141	98
Mean Sentence	152 months	140 months	145 months
Upward Departures	11	7	3
Downward Departures	24 (18.9%)	34 (24.1%)	25 (25.5%)
Criminal History I	72 (56.7%)	82 (58.2%)	56 (57.1%)
Criminal History II	21	16	16
Criminal History III	15	24	13
Criminal History IV	7	7	5
Criminal History V	3	5	1
Criminal History VI	10	7	7
Native American	75 (59%)	86 (61%)	69 (70.4%)

²⁴ The policy development team read and analyzed all cases in which there was complete information. The case totals differ from those in the general monitoring file upon which Table 1 is based.

²⁵ One case did not have complete sentencing information, but had complete demographic information.

White	34	28	18
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As noted in Table 1, in fiscal year 1998, 127 defendants were sentenced under the rape guideline and received average sentences of 152 months. Because federal jurisdiction for sexual offenses is limited to the territorial and maritime jurisdiction of the United States, 59 percent of the offenders sentenced under this guideline are Native American.

A review by the team of the 126 cases sentenced in 1998 reveals the following information about the victims²⁶:

- Victims' ages: 8 months to 17 years old.
- In 50 cases (39.4%), the victim was in the, care, custody, or supervisory control of the defendant. Several of the defendants were either the father, uncle, or other relative of the defendant.

There were 11 upward departures and 24 downward departures. The most frequent reasons for a downward departure were "pursuant to a plea agreement" (30.0%) and "isolated incident/aberrant behavior" (17.4%). In comparison, the most frequent reasons for upward departures were "extreme conduct" (33.3%) and "inadequate criminal history category" (23.3%). (See Appendix B for more detailed statistical information.)

b. §2A3.2 (Statutory Rape)

Guideline 2A3.2 applies in those cases in which the defendant has been convicted of statutory rape or attempted statutory rape. According to the commentary to the statutory rape guideline, it was written to apply to sexual conduct that is lawful but for the age of the victim. Experience has shown, however, that the guideline is being used to sentence many offenders convicted of Chapter 117 offenses for enticing children to engage in sexual conduct. The inadequacy of the penalties provided by the statutory rape guideline for offenders who have used the Internet to identify, contact, and coerce children into sexual activity has been the subject of congressional scrutiny and criticism. (See discussion of Action Item #6.)

Guideline 2A3.2

Base offense level: **15**

Specific offense characteristic: two-level increase if the victim was in the custody, care or control of the defendant.

²⁶ All victim information in the report is based on the team's case coding project.

A 1992 Commission study showed that approximately 50 percent of the cases sentenced under the statutory rape guideline (§2A3.2) involved conduct more appropriately punished under the rape guideline (§2A3.1).²⁷ Some cases involved sexual conduct that would be unlawful even if the victim were an adult, such as incest (typically prosecuted under State law; see *also* 18 U.S.C. § 1153), physical force, placing the victim in fear (which is punishable under 18 U.S.C. § 2242), or some other indication of lack of consent on the victim's part. Few of the cases sentenced under the guideline could be termed consensual sexual conduct.²⁸ Subsequent studies in 1996 and 1998 confirmed this information. In 1998, 44.6 percent of the cases would have more appropriately been sentenced under the rape guideline (§2A3.1).

As noted in the discussion of the criminal sexual abuse guideline above, prosecutors may be reluctant to subject defendants to sentences that seem too severe. Also, prosecutors may encounter proof problems in trying child sexual abuse cases. The victims tend to be very young. Approximately 45 percent of the child victims of sex crimes are under the age of 10. Additionally, the abuse may have occurred years before it was detected, making it difficult for the young victim to recall all relevant details. Therefore, prosecutors often agree to bring a lesser charge, including a stipulation to the less serious guideline, in exchange for the opportunity to present the evidence of aggravating conduct using the lower preponderance standard of proof at sentencing. A review of telephone inquiries to the Commission and relevant appellant case law also indicate that practitioners have difficulty interpreting the statutory language which defines the type of conduct that requires the use of the more serious guideline.

Like the rape guideline, the statutory rape guideline does not provide a general enhancement for a pattern of activity of child sexual abuse or the production of child pornography. However, the statutory rape guideline does contain two application notes providing that an upward departure may be warranted if the defendant either (1) transported persons in furtherance of a commercial scheme including, *inter alia*, for the purpose of prostitution, or (2) had a prior conviction for similar conduct.

The Commission in 1996, as a result of its study of the cases sentenced under the statutory rape guideline, stated in a report to Congress²⁹ that it was exploring several options for enhancing sentences based on a pattern of activity involving the sexual exploitation of a minor. The "pattern of activity" directive appears to be in response to the Commission's 1996 Report to Congress.

²⁷ U.S. Sentencing Commission, Child Sex Offense Working Group Report (1992).

²⁸ Following the 1992 study, the Commission added a cross reference to §2A3.2 that would direct courts to sentence defendants under the more severe rape guideline (§2A3.1). An analysis conducted in response to the Sex Crimes Against Children Protection Act in 1996 indicated, however, that the cross-reference was not being used as intended. According to information presented by probation officers in the presentence reports, among the cases sentenced under the guideline in 1996, 61 percent involved conduct that could merit a sentence under §2A3.1.

²⁹ 1996 Report to Congress, p. 40.

A review of the cases sentenced under the statutory rape guideline reveals that many of them involve a repetitive pattern of abuse.³⁰ For example, 24 defendants (36.9%) abused the same victim on more than one occasion. Many of the defendants were family members who had access and opportunity to abuse the victim for several years. In *United States v. Big Medicine*, 73 F.3d 994 (10th Cir. 1995), the defendant was convicted of 18 U.S.C. § 2243(a) and sentenced under §2A3.2 for having sexual intercourse with and impregnating his 15-year-old stepdaughter. In that case, the defendant admitted to having had sex with his stepdaughter on approximately 75 occasions over a period of four years, beginning when the victim was 12 years old. In another case, *United States v. Chatlin*, 51 F.3d 869 (9th Cir. 1995), the defendant impregnated his 13-year-old stepdaughter. The court sentenced the defendant under §2A3.2 but departed upward on the basis of the defendant's repetitive conduct, extreme conduct and extreme psychological harm to the victim. The appellate court affirmed the reasons given as a basis for the departure, but reversed the district court's decision on the degree of the departure.

Additionally, the guideline does not currently include enhancements for the other factors upon which the latest congressional directives focus: misrepresentation of the defendant's identity or use of a computer in connection with a sexual offense against a minor. A review of the cases sentenced under the statutory rape guideline reveals, however, that several of them involved the sentencing factors upon which the latest congressional directives focus. For example, a review of the cases reveals that:

- Twenty (30.8%) defendants used a computer to contact the victim.
- Three (4.6%) of the defendants misidentified themselves, each using a computer.
- The misidentification of the defendant's identity was for the purpose of traveling to *meet* the child victim, not to *transport* the victim, which is the focus of the legislative directive.³¹

³⁰ See Appendix I for more data on the pattern of activity of sexual abuse or sexual exploitation issue. Appendix J contains (1) summaries of key appellate court decisions interpreting "pattern of activity," and (2) summaries of district court cases applying the five-level "pattern of activity" enhancement in guideline 2G2.2.

³¹ See Appendix H for more data on the misrepresentation of identity issue.

Table 2
Summary Statistics for Statutory Rape Guideline (§2A3.2)

	1998	1997	1996
Number of Cases	65	45 ³²	38
Mean Sentence	19 months	22 months	19 months
Upward Departures	3	2	2
Downward Departures	9 (13.8%)	4 (8.9%)	7 (18.4%)
Criminal History I	42 (64.6%)	30 (65.2%)	29 (74.4%)
Criminal History II	11	5	4
Criminal History III	6	5	0
Criminal History IV	4	1	4
Criminal History V	0	3	0
Criminal History VI	2	2	2
Native American	32 (49.2%)	37 (80.4%)	29 (74.4%)
White	25	5	5

As shown in Table 2, in fiscal year 1998, 65 defendants were sentenced under the statutory rape guideline, receiving mean sentences of 19 months imprisonment. Of the offenders sentenced under this guideline, 49.2 percent were Native American.³³ The percentage of Native American offenders is significantly reduced from 1997 and 1996 when the percentage of Native Americans was 80.4 percent and 74.4 percent, respectively. The growing number of white defendants, 5 in 1996, 5 in 1997, and 25 in 1998, reflects the growing number of transportation for illegal sexual activity offenses sentenced under the statutory rape guideline.

A review of the cases reveals the following information about the victims:

- Victims' ages : 5 years old to 16 years old.

³² One case did not have complete sentencing information, but had complete demographic information.

³³ As previously noted, federal jurisdiction for most sexual offenses against children is limited to the territorial and maritime jurisdiction of the United States, e.g., Indian reservations.

- < 3 of the 73 victims were under the age of 12, and In nine cases (13.8%), the victim was in the custodial care of the defendant.³⁴ Several of the defendants were either the father, uncle, or other relative of the defendant.

Although most of the offenders are in Criminal History Category I, four defendants (6.2%) had prior convictions for sexual offenses, and several of the cases involved the abuse of multiple victims.

There were three upward departures and nine downward departures. The upward departures were based on “extreme psychological injury,” risk of future conduct based on prior conduct or record, and on a finding that the cases were not representative of the heartland. The most frequent reason for a downward departure was “isolated incident/aberrant behavior” (nine cases/33.3%). (See Appendix B for more detailed statistical information.)

c. §2A3.3 (Sexual Abuse of a Ward Guideline)

Guideline 2A3.3 applies in cases in which the defendant has been convicted of criminal sexual abuse, or attempted criminal sexual abuse, of a ward.

Guideline 2A3.3

<p>Base offense level: 9</p> <p>Specific Offense characteristics: None</p>

These cases typically involve sexual relations between prison guards and male prison inmates. All of the cases involved adult victims.

³⁴ Several of the cases sentenced under §2A3.2 involved incest. Many of the defendants were either the father, uncle, or other relative of the victim. Incest cases were frequently convicted under 18 U.S.C. § 2243(a), (sexual abuse of a minor). The guideline was intended to apply, however, to conduct that would be lawful but for the age of the victim. In *United States v. Passi*, 62 F.3d 1278 (10th Cir. 1995), the defendant was convicted under 18 U.S.C. § 2243(a) for sexually molesting his biological daughter who became pregnant as a result of the molestation. The court affirmed a cross-reference from guideline 2A3.2 to guideline 2A3.1 on the grounds that the case involved incest, which was not intended to be sentenced under the sexual abuse of a minor guideline since it was not otherwise lawful conduct. A review of the cases sentenced under §2A3.2 suggests that some incest cases prosecuted under 18 U.S.C. § 2243(a) might be prosecuted under more serious sexual abuse statutory provisions, inasmuch as the offense involves placing the victim in fear. However, if, in fact, incest cases are being appropriately prosecuted under § 2243(a) and sentenced under §2A3.2, it may be that §2A3.2 has not adequately captured the seriousness of this type of offense conduct.

While there are no specific offense characteristics that can result in an increase to the base offense level, there is an application note that provides for an upward departure for a prior conviction for similar conduct. Although the congressional directive focuses on a pattern of activity involving the sexual abuse or exploitation of a minor, the Commission could consider adding a broader enhancement to this particular guideline to deal with the repetitive abuse of a prison inmate or other ward. A review of the seven cases sentenced under this guideline reveals that six cases (85.7%) involved abusing the victim more than once. None of the other factors that are the focus of the legislative directives were present in the cases sentenced under this guideline.

Table 3
Summary Statistics for Sexual Abuse of a Ward Guideline (§2A3.3)

	1998	1997	1996
Number of Cases	7	8	1
Mean Sentence	2 months	6 months	0 months
Upward Departures	0	0	0
Downward Departures	0 (0.0%)	0 (0.0%)	0 (0.0%)
Criminal History I	7 (100.0%)	7 (87.5%)	1 (100.0%)
Criminal History II	0	0	0
Criminal History III	0	0	0
Criminal History IV	0	1	0
Criminal History V	0	0	0
Criminal History VI	0	0	0
Native American	0	2	0
White	1 (15.3%)	4 (50.0%)	1 (100.0%)

As shown in Table 3, in fiscal year 1998, seven defendants were sentenced under guideline 2A3.3, receiving a mean sentence of 2 months. (See Appendix B for more detailed statistical information.)

d. §2A3.4 (Abusive Sexual Contact Guideline)³⁵

Guideline 2A3.4 applies in those cases in which the defendant has been convicted of abusive sexual contact or attempted abusive sexual contact.³⁶

Guideline 2A3.4

Base offense level: **10, 12 or 16** (depending upon the means by which the offense was committed)

Specific offense characteristics:

(1) victim under the age of 12 years (four-level increase except that, if resulting offense level is less than 16, increase to level 16);

(2) victim between 12 and 16 years of age (two-level increase if base offense level determined under §2A3.4(a)(1) or (2)); and

(3) being in the care, custody or control of the defendant (two-level increase).

Although there is no specific offense characteristic or application note regarding a general “pattern of behavior of activity of sexual abuse or exploitation,” the Commission has provided that an upward departure may be warranted if the defendant has a prior conviction for similar conduct (see Application Note 5). In light of the congressional directive to provide an enhancement for a “pattern of activity of sexual abuse or exploitation of a minor,” the Commission may want to reconsider this approach. For example, seven (12.5%) defendants had prior convictions for sexual offenses. Nineteen defendants (33.9 %) abused the victim more than once.

Additionally, the guideline does not currently include enhancements for the other factors upon which the latest congressional directives focus, *i.e.*, misrepresentation of the defendant’s identity, or use of a computer in connection with a sexual offense against a minor. None of the other factors that are the focus of the legislative directives are present in the cases involving the sexual touching of a minor.

³⁵ Guideline 2A3.4 is not specifically listed in the directives as one of the guidelines that the Commission must amend. However to insure consistency and proportionality, the Commission may want to apply the enhancements to §2A3.4, as well.

³⁶ The terms “sexual act” and “sexual contact” are defined at 18 U.S.C. § 2246. (See Appendix M.)

Table 4
Summary Statistics for Abusive Sexual Contact Guideline (§2A3.4)

	1998	1997	1996
Number of Cases	57	48 ³⁷	56
Mean Sentence	19 months	21 months	19 months
Upward Departures	5	3	2
Downward Departures	6 (10.5%)	5 (10.4%)	8 (14.3%)
Criminal History I	35 (61.4%)	36 (73.5%)	42 (75.0%)
Criminal History II	13	6	5
Criminal History III	7	3	7
Criminal History IV	0	0	0
Criminal History V	2	3	2
Criminal History VI	0	1	0
Native American	37 (64.9%)	39 (79.6%)	44 (78.6%)
White	11	6	9

As shown in Table 4, in fiscal year 1998, 57 defendants were sentenced under the abusive sexual contact guideline, with a mean sentence of 19 months. Of the offenders sentenced under this guideline, 64.9 percent were Native American.³⁸ The percentage of Native American offenders is reduced from 1997 and 1996 when the percentage of Native Americans was 79.6 percent and 78.6 percent, respectively.

A review of the cases reveals the following information about victims:

- Victims' ages: two years old to 17 years old
 < 34 children under 12 years old

³⁷ One case did not have complete sentencing information, but had complete demographic information.

³⁸ As previously noted, federal jurisdiction for most sexual offenses against children is limited to the territorial and maritime jurisdiction of the United States, e.g., Indian reservations.

- In 27 cases (47.4%), the victims were in the custody, care, or control of defendant:

There were five upward departures and six downward departures. Many of the cases involved a combination of departure factors. One of the most frequently cited reasons (26.7%) for a downward departure was “isolated incident/aberrant behavior.” The most frequent reason (40.0%) for upward departure was “inadequacy of the criminal history category.” (See Appendix B for more detailed statistical information.)

B. Transportation for Illegal Sexual Activity

1. Statutes

Several of the transportation for illegal sexual activity statutes³⁹ prohibit the promotion of prostitution and other illicit sexual conduct. The statutory maximum sentences for these offenses range from five to 15 years imprisonment.⁴⁰ Because federal criminal jurisdiction outside federally controlled territories or enclaves generally depends on a connection to interstate or foreign commerce, these prostitution-type offenses usually involve transportation, travel, or coercion or inducement to travel. However, other statutes promulgated under the Transportation for Illegal Sexual Activity Chapter prohibit using means of commerce such as the mail or the Internet to induce or coerce a minor to participate in prostitution or other prohibited sexual activity.⁴¹

The Sexual Predators Act increased the statutory maximum sentence for several offenses and added the inchoate offense of "attempt" to the scope of several crimes. The Act also created a new offense at 18 U.S.C. § 2425 prohibiting the use of interstate facilities to transmit identifying information about a minor for criminal sexual purposes.

2. Guideline Provisions

Guideline 2G1.1 applies to defendants convicted of one of the numerous transportation for illegal sexual activity statutes. However, through the use of cross-references, many of the cases are sentenced under other guidelines, such as the statutory rape guideline (§2A3.2).

³⁹ *E.g.*, 18 U.S.C. §§ 2421, 2422, 2423(a); 8 U.S.C. § 1328.

⁴⁰ See Appendix F for the mean sentence lengths imposed for these types of offenses.

⁴¹ 18 U.S.C. § 2422(b).

Guideline 2G1.1

Base offense level: **17**

Specific offense characteristics :

(1) the use of physical force or coercion by any means (four-level increase);

(2) the age of the victim (nine-level increase if the victim is under the age of 12 years; seven-level increase if the victim is between the ages of 12 and 16 years; and five-level increase if victim is 16 or 17 years old); and

(3) if the specific offense characteristic relating to age applies and the defendant was either a parent, legal guardian, relative, custodian or caretaker of the victim (two-level increase).

There are no specific offense characteristics or application notes related to the factors that are the focus of the latest congressional directives: “pattern of activity,” misrepresentation of a defendant’s identity, or use of a computer in connection with a sexual offense against a minor.

Guideline 2G1.1 serves two purposes. First, it is the primary guideline for offenses involving the transportation or coercion of minors for purposes of prostitution. The base offense level and specific offense characteristics are geared for this purpose.

Second, §2G1.1 serves as a “sorter.” Since the jurisdiction-based statutes cover a broad range of conduct, cross-references allow these offenses to be sentenced under the guideline most appropriate for the underlying conduct. Many of the transportation for illegal sexual activity cases are sentenced via cross-reference to one of the sexual abuse guidelines. The Commission has, however, designated the sexual abuse guidelines (§§2A3.1-3.4) as the primary guidelines for convictions of “Travel with intent to engage in a sexual act with a juvenile” (18 U.S.C. § 2423(b)).

Table 5
Summary Statistics for Promotion of Prostitution
and other Prohibited Sexual Conduct (2G1.1)

	1998	1997	1996
Number of Cases	32 ⁴²	15	12
Mean Sentence	17 months	12 months	33 months
Upward Departures	2	0	2
Downward Departures	3 (9.4%)	3 (20.0%)	1 (8.3%)
Criminal History I	25 (75.8%)	11 (73.3%)	8 (66.7%)
Criminal History II	3	2	2
Criminal History III	4	2	1
Criminal History IV	0	0	0
Criminal History V	1	0	0
Criminal History VI	0	0	1
Native American	0	0	0
White	22 (66.7%)	6 (40.0%)	2

As shown in Table 5, in fiscal 1998, 40 defendants were sentenced under the transportation for prostitution guideline and received a mean sentence of 17 months.

A review of the 32 cases sentenced under the guideline in 1998 reveals that three cases would have been more appropriately sentenced under another guideline because they did not involve prostitution. For example, one case involved a defendant who had a sexual relationship with his 14-year-old girlfriend. Another case involved a defendant who sexually abused several boys from the Czech republic whom he sponsored for U.S. citizenship. The third case involved a defendant who transported a minor across state lines to sexually abuse him.

⁴² One case did not have complete sentencing information, but had complete demographic information.

In 1998, 17 other cases were cross-referenced out of §2G1.1 to various guidelines. Nine of those cases were sentenced under the rape guideline and two under the statutory rape guideline. (See Appendix B for more detailed statistical information.)

C. Pornography and Obscenity

1. Statutes

Federal pornography statutes prohibit the sexual exploitation of a minor through the production, distribution, trafficking, and possession of child pornography. 18 U.S.C. § 2251, *et seq.* These statutes criminalize the employment, use, persuasion, inducement, enticement, or coercion of any minor to engage in sexually explicit conduct in order to make pictures. *Id.* The statutory penalties range from probation to life imprisonment. *Id.*

The federal obscenity statutes prohibit the mailing, selling, importing, broadcasting, or distribution of obscene materials. 18 U.S.C. § 1460, *et seq.* The statutory maximum sentences for these offenses range from two years to ten years imprisonment. *Id.*

The Sexual Predators Act created a new criminal offense prohibiting the transfer or distribution of obscene materials to a minor; the statutory maximum term of imprisonment for commission of this new crime is ten years. 18 U.S.C. § 1470 (Supp. 1998).

2. Guideline Provisions

There are three guidelines under which most defendants convicted of federal pornography offenses are sentenced: §§2G2.1 (production of child pornography guideline), 2G2.2 (trafficking and receipt of child pornography guideline), and 2G2.4 (possession of child pornography guideline).

Obscenity offenses are generally sentenced under §§2G3.1 (importing, mailing, or transporting obscene matter) and 2G3.2 (obscene telephone communications for a commercial purpose; broadcasting obscene material).

a. §2G2.1 (Production of Child Pornography Guideline)

Guideline 2G2.1 addresses sexual exploitation of minors by the production of sexually explicit visual or printed material, custodians permitting children to engage in sexually explicit conduct, and advertisement for minors to engage in production of pornography.

Guideline 2G2.1

Base offense level: **27**

Specific offense characteristics:

(1) the age of the victim (four-level increase if the victim is under the age of 12 years; two-level increase if the victim is between the ages of 12 and 16 years);

(2) the relationship between the defendant and victim (two-level increase if the defendant was the parent, relative, legal guardian or custodian of victim); and

(3) a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material (two-level increase).

None of the directives expressly apply to this guideline. However, in 1996, in addition to implementing the directives contained in SCACPA, the Commission added a two-level increase if a computer was used to solicit participation in sexually explicit conduct by or with a minor for the purposes of producing a visual depiction of the conduct. The Commission may decide to expand the computer enhancement to comply with the directives in the Sexual Predators Act. (See Directives 2 and 3.)

Table 6
Summary Statistics for Production of Child Pornography Guideline (§2G2.1)

	1998	1997	1996
Number of Cases	43	29	15
Mean Sentence	119 months	89 months	95 months
Upward Departures	5 (11.6%)	0 (0.0%)	3 (20.0%)
Downward Departures	3	2	2
Criminal History I	30 (69.8%)	21 (72.4%)	9 (60.0%)
Criminal History II	3	4	2
Criminal History III	7	2	2
Criminal History IV	2	1	1
Criminal History V	0	1	0
Criminal History VI	1	0	1
Native American	0	0	0
White	43 (100.0%)	26 (89.7%)	13 (86.7%)

As shown in Table 6, in 1998, 43 defendants were sentenced under the production of pornography guideline and received a mean sentence of 119 months. There were five upward departures and three downward departures. (See Appendix B for more detailed statistical information.)

b. §2G2.2 (Pornography Trafficking Guideline)

Guideline 2G2.2 addresses trafficking in material involving the sexual exploitation of a minor; receiving, transporting, shipping, or advertising material involving the sexual exploitation of a minor; and possessing material involving the sexual exploitation of a minor with intent to traffic. This guideline has several provisions relevant to the directives of the Sexual Predators Act.⁴³

⁴³ The trafficking/receipt guideline takes a very different approach to determining punishment than §2G2.1 just discussed. Although the base offense is significantly lower (level 17 in contrast to level 27 for production of child pornography), guideline 2G2.2 has a number of very significant enhancements that can more than double the base offense level.

“Pattern of Activity of Sexual Abuse or Exploitation of a Minor”

Although, the pornography trafficking/receipt guideline provides for a five-level enhancement for defendants who engaged in a “pattern of activity involving the sexual abuse or exploitation of a minor,” a review of case files, hotline calls, and appellate case law shows that this enhancement is being interpreted inconsistently. Several questions arise regarding the scope of the pattern of activity that is to be considered, including: does it include prior convictions or only activity that did not result in a conviction; and is the enhancement limited to behavior that is part of the defendant’s relevant conduct for the offense of conviction, or can it include conduct from many years ago outside the scope of relevant conduct?

Questions also arise regarding the type of conduct that triggers the enhancement. Most courts appear to give the enhancement only if the defendant had a pattern of sexually abusing a minor or actually exploiting a minor through taking pictures or filming videotapes. However, a review of the cases sentenced under the child pornography trafficking guideline reveals that courts do not always make the adjustment in cases involving repeated sexual abuse. At least one district court, however, has given the adjustment based on the defendants repeated trading of pornographic pictures. The defendant appealed the issue to the First Circuit, which held that the term “sexually exploited” as used in §2G2.2 does not include the computer transmission of child pornography. In addition, the appellate court held that the pattern of activity of sexual abuse or sexual exploitation must relate to the offense of conviction. Thus, prior convictions or uncharged incidents of sexual abuse cannot alone trigger the enhancement. *United States v. Chapman*, 60 F.3d 894 (1st Cir. 1995).⁴⁴

“Distribution” of Pornography

The pornography trafficking guideline also includes a five-level increase if the offense involved distribution. Application Note 1 states that “‘Distribution,’ as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.” One interpretation of this provision is that it indicates the Commission’s intent to severely punish those involved in the commercial aspects of child pornography. Many cases sentenced under this guideline involve trading clubs or other barter types of exchanges. The congressional directive “to clarify the definition of distribution of pornography to include pecuniary and non-pecuniary gain” is in response to the Commission’s statement in the 1996 Report to Congress that it was considering providing the five-level enhancement for both distribution for pecuniary and non-pecuniary distribution.

⁴⁴ In response to the second part of this ruling and other evidence of inconsistent and overly limited application of the adjustment, the Commission sent Congress an amendment to clarify the meaning of “pattern of activity” and ensure increased punishment for all offenders who engage in a pattern of sexual exploitation of children. (See 1996 Report to Congress.)

Computer Enhancement

The pornography trafficking guideline also includes a two-level enhancement if a computer was used for the transmission of the material or a notice or advertisement of the material. This provision was made in response to a directive in the SCAPCA of 1995. The Commission may decide to expand the computer enhancement to provide an increase if the defendant uses a computer or knowingly misrepresents his identity with the intent to entice, persuade or induce a child to engage in a prohibited sexual act. (See Directives 2 and 3.)

Table 7
Summary Statistics for Trafficking in Material
Involving the Sexual Exploitation of a Minor (§2G2.2)

	1998	1997	1996
Number of Cases	149	157	98
Mean Sentence	25 months	20 months	21 months
Upward Departures	2	5	6
Downward Departures	42 (28.2%)	37 (23.6%)	15 (15.3%)
Criminal History I	127 (85.2%)	137 (87.3%)	85 (86.7%)
Criminal History II	16	9	8
Criminal History III	4	9	4
Criminal History IV	1	2	1
Criminal History V	1	0	0
Criminal History VI	0	0	0
Native American	1	1	1
White	140 (94.0%)	150 (94.9%)	93 (94.9%)

As shown in Table 7, in fiscal year 1998, 149 defendants were sentenced under the pornography trafficking guideline and received a mean sentence of 25 months. There were two upward departures and 42 downward departures. (See Appendix B for more detailed statistical information.)

c. §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)

Guideline 2G2.4 addresses possession of materials depicting a minor engaged in sexually explicit conduct.

Guideline 2G2.4

Base offense level: **15**

Specific offense characteristics:

(1) material involving a prepubescent minor or minor under the age of 12 years (two-level increase);

(2) offenses involving ten or more books, magazines, films, and the like containing a visual depiction involving the sexual exploitation of a minor (two-level increase); and

(3) the use of a computer to possess material (two-level increase).

The Sexual Predator’s Act established a “zero tolerance” policy for possession of child pornography by prohibiting the knowing possession of *any* book, magazine, film, video disk, or any other material containing an image of child pornography. Although Congress did not provide any directives regarding this new “zero tolerance” policy, the Commission may want to amend the possession of child pornography guideline to reflect the increased emphasis on prosecuting these offenses. (See Action Item #3.)

Table 8
Summary Statistics for Possession of Materials Depicting a Minor
Engaged in Sexually Explicit Conduct (§2G2.4)

	1998	1997	1996
Number of Cases	95	76	41
Mean Sentence	18 months	11 months	10 months
Upward Departures	3	1	1
Downward Departures	24 (22.0%)	21 (27.6%)	6 (14.6%)
Criminal History I	80 (84.2%)	71 (93.4%)	36 (87.8%)
Criminal History II	6	2	2
Criminal History III	7	1	3
Criminal History IV	1	2	0
Criminal History V	0	0	0
Criminal History VI	1	0	0
Native American	2	0	0
White	89 (93.7%)	73 (96.1%)	37 (90.2%)

In fiscal year 1998, 95 cases were sentenced under this guideline. The mean sentence was 18 months. There were three upward departures and 24 downward departures. (See Appendix B for more detailed statistical information.)

**d. §2G3.1 (Importing, Mailing, or Transporting
Obscene Matter)**

Guideline 2G3.1 addresses the importation, mailing or transporting of obscene materials.

Guideline 2G3.1

Base offense level: **10**

Specific offense characteristics relating to:

(1) distribution for pecuniary gain (increase depends upon retail value of materials, but in no event by less than five levels);
and

(2) possession of material portraying sadistic or masochistic conduct or other depictions of violence (four-level increase).

Table 9
Summary Statistics for Importing, Mailing,
or Transporting Obscene Matter (§2G3.1)

	1998	1997	1996
Number of Cases	3	5	6
Mean Sentence	10 months	12 months	5 months
Upward Departures	0	0	0
Downward Departures	1 (33.3%)	0 (0.0%)	0 (0.0%)
Criminal History I	2 (66.7%)	4 (80.0%)	3 (50.0%)
Criminal History II	0	1	3
Criminal History III	0	0	0
Criminal History IV	0	0	0
Criminal History V	0	0	0
Criminal History VI	1	0	0
Native American	0	0	0
White	3 (100.0%)	5 (100.0%)	6 (100.0%)

In fiscal year 1998, three cases were sentenced under this guideline. The mean sentence was 10 months. There were no upward departures and one downward departure. (See Appendix B for more detailed statistical information.)

e. **§2G3.2 (Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material)**

Guideline 2G3.2 addresses obscene telephone communications for a commercial purpose and the broadcasting of obscene materials.

Guideline 2G3.2

Base offense level: **12**

Specific offense characteristics relating to:

(1) the age of the person who received the telephonic communication or the time at which the broadcast was made (four-level increase if person receiving telephonic communication is less than 18 years of age or the broadcast occurred between 6:00 a.m. and 11:00 p.m.); and

(2) the volume of commerce attributable to the defendant (if six plus the offense level from the table at §2F1.1(b) corresponding to volume of commerce is greater than the offense level as determined otherwise under this guideline, then increase to that level).

In fiscal year 1998, no cases were sentenced under this guideline.

IV. Action Items

Action Item #1: How should the Commission respond to the creation of the new offense of Prohibiting Transfer of Obscene Materials to a Minor?

1. Discussion

The Sexual Predators Act created a new offense prohibiting the transfer of obscene materials to a minor. *Id.* §401 (codified at 18 U.S.C. § 1470 (Supp. 1998)). The statute prohibits the knowing transfer of, or attempt to transfer, obscene matter to an individual who is not yet 16 years old, by means of the mail or any facility or means of interstate or foreign

commerce. The maximum term of imprisonment is, without consideration of any possible enhancement provided elsewhere for recidivism, ten years. *Id.*

The legislative history reflects Congress's concern that

“pedophiles often send child pornography and obscene materials to minors for the purpose of desensitizing the child to obscene behavior and to entice the child to believe that such sexual activities are ‘normal.’ Law enforcement officials have testified before the Subcommittee on Crime that the sending of child pornography and obscene materials is often the *modus operandi* of many pedophiles who cruise the Internet seeking to build relationships with minors to victimize them.”⁴⁵

The legislative history further indicates that the Act does not target those in the pornography business but those who are trying to lure children to be victimized.⁴⁶

The element of “knowing” may distinguish offenses under this section from the types of conduct prohibited by the Child Online Protection Act (COPA). COPA prohibited the establishment of websites where minors might view obscenity, a concern similar to the broadcast of obscene programs that run a risk of exposing minors to obscenity.

This new offense seems most appropriately sentenced under §2G3.1 (Importing, Mailing or Transporting Obscene Material). The other obscenity guideline, 2G3.2, applies more directly to commercial enterprises which broadcast obscenity. The means of transport, whether through the mail or Internet, should not be a determining factor of the appropriate guideline.

2. Options

The Commission can implement the statutory change by amending the statutory index to reference the new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Material). The Commission should also promulgate a specific offense characteristic in §2G3.1 for the knowing distribution of obscene materials to persons under 18. The specific offense characteristic could be similar to the enhancement in §2G3.2 (Broadcasting Obscene Material), which addresses obscene telephonic communication received by a minor less than 18 years old or made during a time when a minor was likely to receive it.

⁴⁵ H.R. No. 105-557 at 19 (1996).

⁴⁶ *Id.*

Action Item #2: How should the Commission respond to the creation of the new offense of Prohibiting Transmittal of Identifying Information about a Minor for Criminal Sexual Purposes?

1. Discussion

The Sexual Predators Act contained a second new offense which prohibits the use of the mail or any facility or means of interstate or foreign commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage or solicit anyone to engage in prohibited sexual activity. *Id.* §101 (codified at 18 U.S.C. § 2425 (Supp. 1998)). The maximum term of imprisonment is, without consideration of any possible enhancement provided elsewhere for recidivism, five years. *Id.*

At this point, there is no data available to the Commission as to what type of cases will be prosecuted under this new statute, *i.e.*, whether the typical case prosecuted under this statute will be based upon harassment, prostitution, or pornography, etc. The paucity of information makes it difficult to determine the “heartland” of offenses. The legislative history indicates that the statute was promulgated in response to an incident in Illinois where a disgruntled neighbor listed the child’s name and address on the Internet and stated that she was interested in having sex with men. The perpetrator placed messages on the Internet (14 different news groups) saying in very vulgar terms that a neighbor’s 9-year-old daughter was having sex with him and that she wanted to have sex with other men. The message also said that she had pictures for sale and that men should call her 24 hours a day. The family was advised by the police to move because of their fear that she could be raped, abducted, or even killed.⁴⁷

2. Options

The Commission can implement the statutory change by amending the statutory index to reference the new offense to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) or §2A6.1 (Threatening or Harassing Communication).⁴⁸

A review of the two guidelines indicates that §2A6.1 may be the most appropriate. Offenses currently referenced to §2A6.1 concern threatening or harassing communications. The guideline provides specific offense characteristics concerning: (1) intent to carry out the

⁴⁷ Child Protection and Sexual Predator Act of 1998: hearings before the Subcomm. on Crime, the House Comm. on the Judiciary, 105th Cong. 122 (1998) (testimony of Deborah Niemann-Boehle).

⁴⁸ Guideline 2A6.1 (Threatening or Harassing Communications) is the provision used to sentence defendants convicted of making obscene or harassing phone calls under 47 U.S.C. § 233(a)(1)(c)-(e). These provisions are similar, but not identical, to the new offense codified at 18 U.S.C. § 2425.

threat, (2) if the offense involved two or more threats, (3) if the offense involved the violation of a court protection order, or (4) a decrease if the offense did not involve (1), (2) or (3) and the offense involved a single instance with little or no deliberation. The types of offenses indexed to this guideline involve a variety of behaviors; however, the common theme of the offenses is the threatening nature of the communications. The conduct embodied in the new law concerns placing identifying information about a minor, such as on the internet, for the purpose of enticing, encouraging, offering or soliciting any person to engage in any sexual activity. The type of information that could be placed on the Internet, and the resulting conduct could be considered as threatening or harassing to the minor victim, as well as to the minor's family members. The minor, who is the subject of the identifying information, may be placed in physical danger or certainly harassed or threatened via the telephone or other manner.

A cross-reference from §§2A6.1 to 2G1.1 may be appropriate in cases where the purpose of the posting of information was solely for the promotion of illegal sexual activity or prostitution.

Offenses referenced to §2G1.1 concern promoting prostitution and other prohibited sexual conduct. Although the new offense is listed in Chapter 117, like many of the other crimes referenced to guideline 2G1.1, the harm in the new offense appears to be more like harassment rather than a commercial scheme of pandering or prostitution. Guideline 2G1.1 seems to address those individuals who are seeking to gain financially from transmitting the identifying information about the minor. The prohibited conduct outlined under the new statute does not have a commercial or pecuniary focus.

A specific offense characteristic providing an enhancement if a minor was the victim of the offense would need to be added to guideline 2A6.1 if ultimately chosen by the Commission.

Another option is to defer action until the Commission receives more information on the type of offenses subject to the new statute.

Action Item #3: How should the Commission respond to Congress's change in the possession of child pornography statutes that express a "Zero Tolerance" for Possession of Child Pornography?

1. Discussion

A clear statement of "zero tolerance for possession of Child Pornography" was one of the centerpieces of the Sexual Predators Act. Congress eliminated the provision that allowed individuals to possess up to two books containing any number of pictures of child pornography. The current statute prohibits the "knowing possession of any book, magazine, film, video tape,

computer disk, or any other material containing an image of child pornography.”⁵⁶ Congress did not provide any directives regarding this statutory change.

The possession of child pornography guideline, 2G2.4, has a specific offense characteristic that provides for a two-level increase “if the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor.”⁵⁷ This specific offense characteristic was added to the *Guidelines Manual* effective November 27, 1991. At that time, a defendant could only be charged with possession of child pornography if the defendant possessed three or more books or similar items containing a visual depiction of sexual exploitation of a minor.

While addressing the “zero tolerance” policy for possession of child pornography, the Commission could also amend the guideline to clarify whether a computer graphics file is an item.

The Second, Seventh, Eighth, and Ninth Circuits all have held that an individual computer file is an “item” within the meaning of §2G2.4(b)(2). See *United States v. Demeritt*, 196 F.3d 138 (2d Cir. 1999); *United States v. Fellows*, 157 F.3d 1197 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 133 (1999); *United States v. Hall*, 142 F.3d 988 (7th Cir. 1998); *United States v. Wind*, 128 F.3d 1276 (8th Cir. 1997). These courts have held that computer files, like books, magazines, and video tapes, are discrete containers for visual depictions capable of being separately manipulated and distributed. Thus, the computer files, and not the disk or disks on which such files are stored, are “items” within the meaning of §2G2.4(b)(2).

One area of concern with §2G2.4(b)(2) is that it produces some incongruities in guidelines application. When the relevant unit of measurement is the “container” and not the visual depiction itself, a defendant’s storage of the depictions dictates whether the enhancement applies, regardless of how the term “item” is construed. For example, under the current guideline, a defendant who possessed ten books containing one proscribed image each would receive the enhancement, while a defendant who possessed one book with a thousand images would not receive the two-level increase. Similarly, a defendant who possessed ten computer files containing one proscribed image each would receive the enhancement, whereas, a defendant who possessed one computer file with thousands of images would not. The Commission may wish to address this action item while considering the directives from the Sexual Predators Act.

In 1998, 52 (54.7%) of the 95 cases sentenced under this guideline received the two-level enhancement for possession of ten or more items containing child pornography under

⁵⁶ 18 U.S.C. § 2252(a)(4); 18 U.S.C. § 2252(A)(5).

⁵⁷ §2G2.4(b)(2).

§2G2.4(b)(2). Twenty-four of the 95 cases received a downward departure in 1998, the most common reason cited being “general mitigating circumstances.” (See Appendix B for more information.)

2. Options

The Commission can implement the statutory change through an amendment to the possession of child pornography guideline (§2G2.4) by either: (1) an increase in the base offense level to express the overall increased seriousness of the offense; or (2) a decrease in the number of pornographic items that triggers the two-level enhancement. In expressing its “Zero Tolerance” for the possession of child pornography, Congress did not increase the statutory maximum. Therefore, the Commission may consider neither of these options necessary.

Action Item #4: How should the Commission respond to the directive to promulgate amendments to clarify that the term "distribution of pornography" applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest?

1. Discussion

The Sexual Predators Act directs the Commission to review the guidelines relating to the distribution of pornography and clarify that the term "distribution of pornography" applies to the distribution of pornography for "monetary remuneration or for non-pecuniary interest." According to the legislative history, Congress was particularly concerned about evidence showing that child molesters often use child pornography to entice minors to engage in sexual activity. The legislation targets pedophiles who use and distribute child pornography to lure children into sexual encounters. Evidence suggests that child pornography is often sent to children as a means to establish a relationship with children for the purpose of later victimizing them. The adult uses the materials to convince the child that the behavior is acceptable, even desirable; the material desensitizes the child, lowering his/her inhibitions; some of the sessions progress to sexual activities involving the child; photos or home movies are taken of the activity and finally the nude pornographic material is used to lure more child victims and also to keep the victim from talking about the experience.⁵⁸

In addition to the directive to the Commission, Congress created a new statute prohibiting “using the mail or any facility of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States to knowingly transfer obscene materials

⁵⁸ H.R. 4497.

to minors.”⁵⁹ During debate on the Act, Congressman Granger emphasized that the purpose of the bill was two-fold: (1) to keep pornography out of the sight of children, and (2) to keep our children out of the reach of sexual predators. One of the purposes of this directive is to emphasize the significance of other harms caused by trafficking in child pornography, beyond the financial gain to the defendant. The directive and the statutory provision target those not necessarily in the business of selling or transferring obscene material, but those who are attempting to seduce or lure children so that they may be victimized. Congress also noted the importance of allowing law enforcement to discover child sex offenders before they are able to victimize an actual child.

The distribution of pornography enhancement in guideline 2G2.2(b)(2) provides: "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 by less than five levels." Application Note 1 states that "distribution" for purposes of that particular guideline includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

Implementing this directive would also resolve a circuit conflict. Four circuits have examined whether the district court erred in imposing the enhancement for distribution of pornography where there was no finding that the offense involved pecuniary gain. The Second, Fifth, and Sixth Circuits have held that pecuniary gain is not necessary to receive the enhancement.⁶⁰ The Second and Sixth Circuits upheld enhancements where child pornography was traded over the Internet. The Fifth Circuit upheld an enhancement where sexually explicit pictures were sent to a minor for the purpose of enticing the minor to have sex with the offender/defendant. The Seventh Circuit, however, while in *United States v. Black*, 116 F.3d 198 (7th Cir.), *cert. denied*, 522 U.S. 934 (1997), defined distribution of pornography narrowly to require some type of pecuniary gain, did state that pecuniary gain is a broad concept itself, and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration. A more detailed discussion of these cases can be found in Appendix L.

2. Options

The Commission can implement the directive to clarify that the term "Distribution of Pornography" applies to the distribution of pornography for monetary remuneration, as well as a non-pecuniary interest by amending the application note in guideline §2G2.2. The application note should emphasize that the five-level enhancement applies in cases where the defendant

⁵⁹ 18 U.S.C. § 1470.

⁶⁰ *United States v. Lorge*, 166 F.3d 516 (2nd Cir.), *cert. denied*, 522 U.S. 875 (1999); *United States v. Canada*, 110 F.3d 260 (5th Cir.), *cert. denied*, 118 S. Ct. 195 (1997); *United States v. Hibbler*, 159 F.3d 233 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1278 (1999). See Appendix L for case summaries.

receives a pecuniary gain and in those cases where the defendant trades child pornography to adults or uses it to entice a child to participate in illegal sexual activities.

Action Item #5: How should the Commission implement the congressional directives to provide an enhancement if, with the intent to induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity, the defendant (1) used a computer, or (2) knowingly misrepresented his/her actual identity?

1. Discussion

The legislative history indicates that one of the main purposes of the legislation was to make clear the public's intolerance of child stalking on the Internet. The bill is a response to the horrifying threat of sex crimes against children, particularly crimes against children facilitated by the Internet.⁶¹ According to Congressman McCollum, the "proliferation of home computers and the virtually limitless access to children facilitated by such computers requires a tough penalty."⁶² He also noted that "[t]he anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. Perfect strangers can reach into the home and befriend a child."⁶³ He expressed concern about the number of sexual predators who go into chat rooms for periods of time often pretending to be other children. "What they are doing is gaining the confidence of this child, without the child realizing that it is an adult on the other end, let alone a pedophile."⁶⁴

Again, the original bill included a provision that would have prohibited any contact via a computer with a child, with the intent to engage in sexual activity. The directives regarding sentencing enhancements for (1) misrepresentation of identity, and (2) use of a computer to

⁶¹ 144 Cong. Rec. 75 H.4491 (1998).

⁶² An earlier version of the legislation included a three-year mandatory minimum for using a computer or any facility of interstate or foreign commerce to entice or coerce a minor to engage in illegal sexual activity. At the hearings held by the Subcommittee on Crime, prosecutors cited numerous cases in which pedophiles received two- to three-year sentences for luring children over the Internet to engage in sexual acts. Congress did not look favorably upon the need to request upward departures. The "Commission should make sure penalties are adequate-particularly in light of the increased maximum sentences for these crimes." The Department of Justice urged that Congress give the Commission a directive to make an enhancement rather than create the three-year statutory mandatory minimum sentence.

⁶³ H.R. 105-557, at 12 (1998).

⁶⁴ 144 Cong. Rec. 75 H.4497 (1998).

persuade, entice, coerce, or facilitate the transport of a child for prohibited sexual conduct appear to be substitutes for the broader statutory prohibition.

A review of the cases indicates that misidentification of the offender is often accomplished via the computer. The anonymity of the computer allows offenders to manipulate the child. Of the 259 cases analyzed, 23 (8.9 percent) involved an offender who used a computer to persuade, induce, coerce, entice or facilitate a child into engaging in prohibited sexual activity. In 18 of the 23 computer cases, law enforcement agents posed as minors as part of unrelated sting operations. Law enforcement agents initiated three of these 18 “sting” operations after the offender made an initial approach to a child victim.

The use of a computer is already a specific offense characteristic under the pornography guidelines providing for a two-level increase. (See §§2G2.1, 2G2.2, and 2G2.4.)

2. Options

The Commission can implement the directives in a number of ways. However, regardless of the option chosen by the Commission, the amendment(s) would need to be repeated in each of the relevant sexual abuse guidelines, including §§2A3.1-2A3.3; and 2G1.1. The Commission may also wish to consider an amendment to the abusive sexual contact guideline (§2A3.4) in order to maintain consistency among the guidelines.

- The Commission can promulgate a specific offense characteristic for use of a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;
- The Commission can promulgate a specific offense characteristic for misidentification of the defendant’s identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;
- The Commission can promulgate an application note containing an encouraged upward departure for either or both factors; and
- The Commission can promulgate one specific offense characteristic that combines the computer enhancement with the enhancement for “misrepresentation of defendant’s identity.” (See Part IVC, *infra*). If the Commission chooses to combine the specific offense characteristic for use of a computer with the enhancement for misrepresentation of identity, an offender’s sentence would be increased if either factor were present in the case.

V. Additional Action Items

This part of the report presents action items to address some of the fundamental issues facing the Commission regarding the problem of sex crimes against children. The federal, state, and local initiatives to battle child pornography on the Internet, and the increased resources targeted to insure children's safety from sexual predators using the Internet and commercial on-line services, highlights the seriousness of this issue.

In 1998 Congress appropriated \$10.0 million to enhance the FBI's ongoing "Innocent Images" initiative. This nationwide investigation into child pornography is coordinated by the Baltimore, Maryland, field office. The successful prosecution of these cases depend upon identifying and analyzing evidence seized from computers and other media that is used to store illegal images and pictures. The investigations target those who distribute and exchange child pornography on-line and those who recruit children for illicit sexual activity. Investigators go on-line posing as either young children or as sexual predators to identify people who are victimizing children. This FBI initiative focuses on individuals who indicate a willingness to travel for the purposes of having sex with a child. From 1995-1998, "Innocent Images" has resulted in 328 search warrants, 62 consent searches, 162 indictments, and 184 convictions.⁶⁵

The directive to ensure that the sentences for these transportation offenses under Chapter 117 are "appropriately severe and reasonably consistent," and the directive to enhance sentences for a "pattern of activity of sexual abuse and sexual exploitation" provide the Commission an opportunity to evaluate its approach to the sentencing of these types of cases.

⁶⁵ Child Pornography on the Internet and the Sexual Exploitation of Children: Hearings before the Senate Appropriations Subcommittee, Washington, D.C. March 10, 1998 (testimony of Louis J. Freeh, Director, Federal Bureau of Investigation) (See Appendix N).

Action Item #6: How should the Commission respond to the directive to promulgate amendments to provide a sentencing enhancement for offenses under Chapter 117 of Title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines?

1. Discussion

The legislative debate surrounding the Sexual Predators Act highlighted public concern about the low sentences received for convictions under 18 U.S.C. § 2423 (transportation of a minor with intent to engage in illegal sexual activity and travel with intent to engage in sexual act with a juvenile). During the hearings before the Subcommittee on Crime, the House heard of numerous cases

"in which pedophiles received only a two- to three-year sentence for luring children over the Internet to engage in sexual acts. In one particular case . . . the U.S. Attorney asked the judge to depart from the guidelines because the penalties available to the judge were too low. The Committee report indicates its concern that such requests have been necessary and believes that the Sentencing Commission should review the guidelines to make sure penalties for these horrendous crimes are adequate, particularly in light of the increased maximum sentences for these crimes established in this Act."⁶⁶

To address some of the concerns expressed during the legislative hearings, Congress in the Sexual Predators Act expanded the scope of the transportation statute to cover cases in which either the offender travels to, or transports the minor for the purpose of producing child pornography.⁶⁷ Currently, most of the statutes involving transportation for prohibited sexual activity (*i.e.*, those contained in Chapter 117 of Title 18 relating to transportation for illegal Sexual Activity and related crimes and the one Title 8 offense of importation of an alien

⁶⁶ H.R. Rep. No. 105-557 at 22. As part of the Sexual Predators Act, Congress increased the statutory maximum term of imprisonment under 18 U.S.C. § 2423(a) and (b) from "not more than ten years" to "not more than 15 years."

⁶⁷ 18 U.S.C. § 2427. The guidelines already take into account cases where the offender travels to or transports a minor for the purpose of producing child pornography. The guidelines use a cross reference in the promoting prostitution guideline (§2G1.1) to the production of child pornography guideline (§2G2.1)

for an immoral purpose) are referenced, for sentencing purposes, to §2G1.1 in Appendix A of the *United States Sentencing Commission Guidelines Manual*. Section 2423(b) offenses (travel with intent to engage in sexual act with a juvenile) are referenced to the sexual abuse guidelines. Moreover, the review of the cases sentenced in 1998 also established that most defendants convicted under the "travel" or "commerce" type of statutes are sentenced under a guideline other than §2G1.1 because prostitution is rarely the purpose of the travel.

As a result of the cross-reference requirements, many of the cases involving the transportation of a minor for illegal sexual activity should ultimately be sentenced under the sexual abuse guidelines (§§2A3.1-3.4).⁶⁸ A significant concern of prosecutors and Congress has been the sentencing of defendants convicted of the enticement and transportation of minors for prohibited sexual conduct under §2A3.2, the guideline for statutory rape. Guideline 2A3.2 was intended to apply to defendants who engaged in consensual sex with an underage partner. The statutory rape guideline was not intended to apply in cases with victims under the age of 12 years, or if force, violent threats, or incapacitating intoxicants were used.⁶⁹ Furthermore, §2A3.2 encourages an upward departure if the criminal sexual act is in furtherance of a commercial scheme.

In an effort to simplify the guidelines, the Commission, in 1996, eliminated §2G1.2, the guideline for the transportation of a minor for prohibited sexual conduct and combined it with Guideline 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).⁷⁰ The former Guideline 2G1.2 had a base offense level of 16, with enhancements for force or coercion, age of the victim, and for the minor being in the care, custody, or control of the defendant. Guideline 2G1.2 also contained cross-references to §2G2.1 if the offense involved the production of child pornography, and to §2A3.1 if the offense involved criminal sexual abuse or its attempt. Finally, if the offense did not involve a listed cross-reference or prostitution, the courts were instructed to apply §2A3.2 or §2A3.4, as appropriate. Thus, it operated much the same way as the current guideline for the Chapter 117 offenses by sorting the cases to the guideline for the underlying sexual conduct.

⁶⁸ As demonstrated by the letter of Scott Woodward, First Assistant United States Attorney for the Northern District of Oklahoma, sentencing a defendant under §2A3.2 does not necessarily result in sentences that address the actual conduct involved and the harm done to child victims. (See Appendix G.) This concern may need to be reviewed by the Commission now or at some point in the future.

⁶⁹ In reviewing the cases, the Team noted several cases in which the sentencing court used §2A3.2, even though it was not applicable.

⁷⁰ See Amendment 538.

2. Options

The problem of inadequate punishment for Chapter 117 offenses highlighted by the Congressional directive can be addressed in a number of ways, ranging from relatively minor additions to existing guidelines⁷¹ to a more substantial restructuring of the way these convictions are indexed in the Statutory Index, cross-referenced, and sentenced. Because the *Guidelines Manual* does not contain a guideline specific to Chapter 117 convictions, care must be taken to consider the effects of any changes made on the range of cases sentenced under the affected guidelines. The directive instructs the Commission to ensure both the appropriate severity of punishment and the reasonable consistency of the guidelines.

- The Commission may decide that the other enhancements directed by the Act, such as the enhancements for use of a computer and misrepresentation of the defendant's identity, may result in the appropriate increase in punishment for Chapter 117 offenses contemplated by this directive. Data show that most of the offenses involving Chapter 117 offenses are sentenced under these sexual abuse guidelines.
- The Commission could amend the statutory rape guideline (§2A3.2) to add a broader range of aggravating specific offense characteristics. The inadequacy of punishment under the statutory rape guideline has been the focus of concern, both of the Commission and of Congress. Some of the factors that might be considered for specific offense characteristics include:
 - < An adjustment for coercion or enticement by threats or drugs or in any manner that negates the voluntariness of the victim's behavior. This adjustment is similar to one now found in guideline 2G1.1 (Promoting Prostitution) and in former guideline 2G1.2.
 - < An adjustment if the defendant is more than 10 years older than the victim. This adjustment would likely apply to the Internet cases of greatest concern to Congress.
 - < An adjustment for incest. The adjustment would apply to some of the aggravated cases discussed in the Commission's 1996 Report to Congress.

⁷¹ Congress has directed the Commission to amend the sexual abuse guidelines, 2A3.1-2A3.3, and 2G1.1 (promotion of prostitution). The Commission may also wish to consider amending the abusive sexual contact guideline 2A3.4 to maintain consistency among the guidelines.

- The Commission might consider increasing the base offense level for guidelines 2G1.1 (Promoting Prostitution) and 2A3.2(Statutory Rape). This adjustment would apply to many of Chapter 117 convictions, in particular those for which punishment is not now severe due to application of legally and technically inapplicable guidelines.
- The Commission may also want to rethink the guidelines' current treatment of Chapter 117 offenses, particularly their indexing to guideline 2G1.1 and cross-referencing to the sexual abuse and exploitation guidelines. Experience may prove that the types of offenses and offenders convicted under Chapter 117 are largely of a different type than those offenders who have historically been sentenced under the guidelines for sexual abuse and exploitation guidelines. Designing guidelines to adequately punish a wide range of offenders convicted under different statutes may prove difficult. If so, the Commission might want to develop a guideline specific to Chapter 117 offenses, either by amending the current promoting prostitution guideline (§2G1.1) or developing a new guideline.

Action Item #7 How should the Commission implement the directive to promulgate amendments to the sexual abuse guidelines so as to increase penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor?

1. Discussion

In its 1996 Report to Congress, the Commission stated that it was considering adding the pattern of activity enhancement contained in the child pornography trafficking guideline (§2G2.2) to the other pornography guidelines (§§2G2.1, 2G2.3, 2G2.4). The Commission also stated that it also had under consideration the addition of a pattern of activity adjustment to the statutory rape abuse guideline (§2A3.2). The 1996 Report to Congress identified a number of factors that a pattern of activity adjustment could address: (1) the inadequacy of punishment, particularly under guideline 2A3.2, for offenses involving multiple acts of abuse or other aggravating factors such as incest or abuse over a long period of time, and (2) the need to identify for lengthy imprisonment those offenders who present a high risk of future offending.

The text and legislative history of the Sexual Predators Act do not differentiate or choose among these concerns, although Congress has been especially concerned with the incapacitation of dangerous sexual predators. The legislative history for the Sexual Predators

Act indicates that Congress targeted "serial rapists"⁷² with changes to the authorized statutory maximum for repeat sexual abuse offenders.

Determining the purpose and scope of the "pattern of activity" enhancement is a key policy decision for the Commission. Does the Commission want an incapacitation model for serious sexual predators? Or, does the Commission want to provide for incremental punishment for increased harm caused by multiple acts of sexual abuse or sexual exploitation? Or, does the Commission want both? To provide some context for this decision, the staff reviewed the guideline provisions in the child pornography trafficking guideline that relate to this issue. The child pornography trafficking guideline (§2G2.2) has: (1) a five-level adjustment, and (2) an encouraged upward departure provision for a "pattern of activity of sexual abuse or sexual exploitation of a minor." Key questions that the Commission must consider in determining the scope of a pattern of activity enhancement for child sex offenses are: (1) should the multiple acts of sexual misconduct considered under the enhancement relate only to the offense of conviction and relevant conduct, include only prior convictions, or include other conduct not directly related to the offense of conviction that did not result in a conviction; (2) what types of conduct (*i.e.*, rape, production of pornography, enticing minors to engage in prohibited sexual conduct) should be considered under the enhancement; and (3) what types of offenders (*i.e.*, only pedophiles?) should be subject to the enhancement?

a. Scope of Conduct for Pattern of Activity of sexual abuse or exploitation of a minor: Relevant Conduct, Prior Convictions, or other unconvicted conduct?

The various guidelines provisions take basically three different approaches to the issue of the scope of conduct. The Commission must decide if any of these approaches is appropriate for the sexual abuse crimes or if another approach is preferable. All three approaches allow the court to increase the defendant's sentence if the defendant has committed more than one act of sexual abuse or sexual exploitation. All three approaches allow the courts to increase the defendant's sentence if the abusive or exploitative conduct involved one or more victims.

The first approach, based solely on a prior conviction, is found in the sexual abuse guidelines (§§2A3.1-2A3.4). Each guideline contains an application note encouraging an upward departure "if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense." This application note was added to the *Guidelines Manual* effective November 1, 1995,⁷³ to address a provision of the Violent Crime Control and Law Enforcement Act of 1994, which doubled the authorized maximum term of imprisonment for

⁷² Congressional Record, 105th Congress, 2d Session, H.4491.

⁷³ Appendix C, Amendment 511.

repeat offenders of sexual abuse violations (18 U.S.C. § 2247). This departure provision only permits consideration of multiple acts that were prior convictions similar to the instant offense.

The second approach found in Application Note 4 in the rape guideline (§2A3.1) expressly provides that a departure may be warranted "if the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2, or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same or different victims." This provision permits consideration of multiple acts of sexual abuse that are related to the offense of conviction. It is broader than relevant conduct because under the sexual abuse guidelines the court cannot look to a common course of conduct or a common scheme or plan in determining the appropriate sentence.

The third approach is the pattern of activity adjustment found in the child pornography guideline (§2G2.2). This guideline provides for a five-level enhancement "if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." "Pattern of activity," as defined in this guideline, applies to "two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same or different victims, or (C) resulted in a conviction for such conduct." In 1996 the Commission expanded the definition of the multiple acts of sexual abuse or sexual exploitation of the defendant to include not only conduct related to the instant offense but prior conduct that may or may not have resulted in a conviction. Prior to the clarification of this definition in 1996,⁷⁴ two circuits had held the application of the pattern of activity enhancement must relate to the offense of conviction, not to prior conduct.⁷⁵ This approach encompasses the broadest scope of conduct.

In creating a pattern of activity adjustment for the sexual abuse guidelines and promotion of prostitution guideline, the Commission may want the scope of conduct that triggers application of a pattern of activity enhancement to include conduct that did not result in a conviction. The current encouraged upward departure provisions in the sexual abuse guidelines are inadequate to capture the scope of conduct envisioned by the directive and the statutory change. A review of the legislative history shows that although Congress targeted "serial rapists" with its repeat offender statutory increases, it was also concerned about illicit sexual conduct that did not result in conviction. As one congressman noted during debate on the bill, "We cannot pretend that a sexual offense against a child is an isolated act. Most of the time, it is a pattern of behavior."⁷⁶

⁷⁴ Appendix C, Amendment 537.

⁷⁵ See *United States v. Surratt*, 87 F.3d 814 (6th Cir. 1996); *United States v. Chapman*, 60 F.3d 894 (1st Cir. 1995). See also *United States v. Nielssen*, 136 F.3d 965 (4th Cir. 1998) (amendment 537 is clarifying, and therefore, can be applied retroactively).

⁷⁶ H.R. 105-394 at 4514.

b. Types of Conduct Considered under Pattern of Activity enhancement: Sexual abuse, production of child pornography, enticement of minors to engage in prohibited sexual conduct?

The types of conduct that trigger the sentence increases varies from guideline to guideline. The current encouraged upward departure provisions in the sexual abuse guidelines (§§2A3.1-2A3.4) allow the court to increase sentences for prior convictions similar to the offense of conviction, specifically, other criminal sexual abuse, statutory rape, criminal sexual abuse of a ward, or abusive sexual conduct crimes. Excluded from this list are prior convictions for transportation offenses, as defined under chapter 117 (unless the court finds that the conduct is similar to the instant offense), and prior sentences for production, trafficking, or possession of child pornography offenses. To conform to the new statutory provisions regarding the types of offenses that trigger an increased statutory penalty, the Commission would need to amend the application notes encouraging an upward departure.

The child pornography trafficking guideline (§2G2.2) allows courts to increase a defendant's sentence for multiple acts of rape, statutory rape, sexual exploitation of a minor (pornography offenses), abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. Specifically excluded from this list of offenses is trafficking in child pornography.⁷⁷

In creating a pattern of activity adjustment for the sexual abuse guidelines and promotion of prostitution guideline, the Commission may want the types of conduct or offenses that trigger application of a pattern of activity enhancement to include (1) the Chapter 117 offenses, such as enticement and transportation of minors to engage in prohibited sexual conduct, and (2) the Chapter 110 offenses, such as production and trafficking in child pornography.

c. What types of offenders should the pattern of activity enhancement target?

Unless a defendant is a career offender,⁷⁸ convicted of one of the sexual abuse offenses, or convicted of trafficking in child pornography, the guidelines do not provide for a sentence increase for repeat sex offenders. The Commission may want to expand the applicability of the pattern of activity enhancement to include defendants sentenced under other guidelines. One way to accomplish that goal is to establish a new guideline similar to the criminal livelihood guideline in Chapter Four. (§4B1.3) (See Discussion of Options below.)

It is clear from increased statutory penalties and the enhancements and departure provisions in the *Guidelines Manual* that Congress and the Commission have targeted repeat

⁷⁷ §2G2.2, comment. (n.1).

⁷⁸ A career offender is defined at Guideline 4B1.1.

offenders of sexual abuse and sexual exploitation crimes for higher punishment than a defendant who has only committed one such act. However, research and experience show that not all offenders who engage in multiple acts of sexual abuse or sexual exploitation are at equal or high risk for recidivism. As reported in Appendix K, research indicates that offenders with a sexual preference for children and other psychopathy, who have victimized multiple victims (especially from outside the family) are at higher risk to commit similar acts in the future. As reported in the literature review, experts claim that prediction of risk can be performed with a reasonable degree of confidence at the time of sentencing using well-validated diagnostic tools.

The Commission may also want to consider whether a pattern of activity adjustment should apply to defendants who have a pattern of sexually abusing adults as well as children. To do so may expand the definition of a sexual predator.

Resolution of these three questions, *i.e.*, scope of conduct, types of offenses, and types of offenders, will allow the Commission to identify the specific factors for inclusion in an enhancement for pattern of activity that will satisfy the congressional directive.

2. Options

The team has identified three types of responses to this directive: (1) encouraged upward departure provision, (2) specific offense characteristics, and (3) criminal history override. There are various ways to implement each of the options.

Option 1: Encouraged Upward Departure Provision

The Commission could implement the statutory directive regarding pattern of activity of sexual abuse and exploitation of minors by amending the sexual abuse guidelines (§§2A3.1-3.4) and the promotion of prostitution guideline (§2G1.1) by conforming the definition of a "prior sex offense" that warrants an encouraged upward departure to the amended repeat offender provision.⁷⁹ The repeat offender provision subjects an individual to twice the otherwise

⁷⁹ Prior to the 1998 directive, Congress in The Violent Crime Control and Law Enforcement Act of 1994 doubled the maximum statutory penalties for a defendant convicted under 18 U.S.C. §§ 2241-2243 and who has one or more prior federal or state convictions relating to aggravated sexual abuse, sexual abuse, or abusive sexual contact. In response to the 1994 statutory penalty change and directive, the Commission amended guidelines 2A3.1-3.4 to provide for an encouraged upward departure "if the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense." The Commission reasoned that although the sexual abuse guidelines did not have an enhancement for repeat offenders, "Chapter Four (Criminal History and Criminal Livelihood) does include a determination of the seriousness of the defendant's record based upon prior convictions. §4A1.1. Section 4B1.1 (Career Offender) also provides substantially enhanced penalties for offenders who engage in a crime of violence (including forcible sexual offenses) or controlled substance trafficking offenses, having been sentenced previously on two or more occasions for offenses of either type." The Commission also relied upon the encouraged upward departure provisions in § 4A1.3 (Adequacy of Criminal History category) to support its actions of "strengthening the sexual offense guidelines by expressly listing as a basis for upward departure the fact

authorized statutory maximum for a prior sex offense conviction and gives the district court more room to depart. The Commission's 1996 Report to Congress urged Congress to increase the statutory penalties to allow for the guideline enhancements to work and to allow room for departures in appropriate circumstances.⁸⁰

In addition to conforming the definition of a “prior sex offense” to that of the new repeat offender provision, the Commission could expand the scope of the current encouraged upward departure in the sexual abuse guidelines to include the defendant's past conduct that did not result in a conviction.

Although a revised departure provision is one way to address the directive, it arguably does not seem to fully comply with the language in the directive to provide an “enhancement.” An amended upward departure provision could be, however, one part of a multi-faceted approach to address the pattern of activity directive.

Option 2: Specific Offense Characteristics

The Commission could implement the directive by amending the sexual abuse guidelines (§§2A3.1-3.4) and the promotion of prostitution guideline (§2G1.1) by adding the pattern of activity enhancement found in the child pornography trafficking guideline (§2G2.2). There are several difficulties with that approach. First, placing the pattern of activity enhancement in the sexual abuse guidelines may result in a different type of offender qualifying for the adjustment. Second, the magnitude of the adjustment may not be appropriate for an offender who is convicted of the more serious sexual assault offenses with their higher punishment levels. The Commission, in making a five-level enhancement in the child pornography trafficking guideline, sought to greatly increase the sentence of a defendant who was only convicted of trafficking in child pornography, but evidence supported a finding that he had actually sexually assaulted a child or taken pornographic pictures of a child.

The current five-level enhancement in the child pornography trafficking guideline (§2G2.2) applies to offenders who are convicted of trafficking in child pornography and who also have engaged in a pattern of actual abuse or exploitation of a child. The interest in child pornography indicates a sexual interest in children, and the actual sexual abuse shows that this interest is not limited to fantasy. (A pattern of trafficking in child pornography alone does not qualify an offender for the enhancement.) If the same definition were applied to the sexual abuse guidelines, the actual abuse is clear, but the additional indication of a sexual interest in children, while no doubt present in some cases, will not be as certain. Some cases sentenced under the sexual abuse guidelines may not reflect a propensity for pedophilia, as the victim(s) are chosen based on their availability.

the defendant has a prior sentence for conduct similar to the instant sexual offense.”

⁸⁰ 1996 Report to Congress, pp. 38-39.

A review of the cases indicates that the majority of cases under the sexual abuse guidelines would qualify for the pattern of activity adjustment if it were moved verbatim from §2G2.2. For example, the typical or “heartland” case sentenced under the statutory rape guideline (§2A3.2) involves multiple acts of sexual abuse.

The Commission could also implement the directive by amending the sexual abuse guidelines (§§2A3.1-3.4) and the promotion of prostitution guideline (§2G1.1) by redefining the current pattern of activity enhancement found in the child pornography trafficking guideline (§2G2.2). While the directive describes only a pattern of “sexual abuse or exploitation” there may be reasons to include (1) Chapter 117 offenses, such as travel or coercion, and (2) the Chapter 110 offenses, such as production and trafficking in child pornography, as evidence of a dangerous propensity.⁸¹

The team also reviewed the pattern of activity enhancement in Guideline 2A6.2 (Stalking or Domestic Violence). In the stalking or domestic violence guideline, a two-level enhancement is warranted for “a pattern of activity involving stalking, threatening, harassing or assaulting the same victim.” Application Note 1 states that this definition means any combination of two or more events, whether the conduct resulted in a conviction or not. The Commission may choose to provide a similar enhancement to the relevant guidelines, substituting the applicable sexual abuse and sexual exploitation offenses for the “stalking, threatening or harassing” language.

Any specific offense characteristic added to the sexual abuse guidelines or the promotion of prostitution guideline would need to be carefully crafted to target the appropriate type of conduct and type of offender. It would also be necessary to ensure that double-counting for the same conduct does not occur when there are multiple counts of conviction.⁸²

Option 3: Criminal History “Override”

Previous Commission research has established that the offenders who appear to be high-risk repeat offenders are prosecuted under a range of statutes and sentenced under a wide variety of guidelines. The growth of Internet-based investigation is likely to accelerate

⁸¹ In 1996, the Commission determined that repeated acts of trafficking, receipt, or possession of child pornography should not be included in the definition of pattern of activity of sexual abuse or sexual exploitation of a minor.

⁸² Under guideline 3D1.1, multiple counts of conviction sentenced under §§2G1.1 (promoting prostitution), 2G2.1 (production of child pornography), and all the sexual abuse offenses are not grouped together. The appellate courts have found that multiple counts of convictions sentenced under the child pornography trafficking guideline also do not group. See *United States v. Hibbler*, 159 F.3d 233, 237 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1278 (1999); *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir.), *cert. denied*, 522 U.S. 1066 (1998); and *United States v. Ketcham*, 80 F.3d 789, 792 (3d Cir. 1996). Thus, multiple counts of convictions can add as much as five offense levels in determining the appropriate sentence.

this trend. It may be beneficial to place the enhancement for pattern of activity in Chapter Four instead of Chapter Two, so that it is located with the other guidelines that attempt to identify high-risk recidivists.

A stand-alone guideline has the advantage of making it easier to clarify the purpose of the guideline, and to carve out a “heartland” of cases that the guideline is intended to cover. The specific types of conduct to which this enhancement would apply must be determined by the Commission. This option can be implemented in a variety of ways.

For example, the Commission may wish to promulgate a new guideline in Chapter Four, analogous to §4B1.3 (Criminal Livelihood) to punish sexual predators. If this adjustment is located in Chapter Four, the courts would be able to apply this criminal history “override” to a wide variety of defendants (not just those convicted of sexual abuse or trafficking in child pornography), but to all defendants sentenced under the guidelines. The Commission could make the new provision similar to the criminal livelihood provision by allowing the court to consider all prior criminal conduct, not just prior convictions.⁸³ The Commission could, however, limit the application of this criminal history “override” to defendants who have prior convictions for certain types of sexual abuse crimes.

⁸³ Guideline 4B1.3 calls for an offense level of 13 (before application of acceptance of responsibility) for a defendant who “commits an offense as part of pattern of criminal conduct engaged in as a livelihood”.