

Chapter 16.00

CHILD EXPLOITATION OFFENSES

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Introduction to Child Exploitation Elements Instructions

(current through August 1, 2016)

Chapter 16 includes elements instructions for selected child exploitation offenses based on the frequency of prosecution in the Sixth Circuit.

Instructions 16.05 and 16.06 are so similar to Instructions 16.07 and 16.08, respectively, as to warrant comment. Instructions 16.05 and 16.06 are based on § 2252(a), which prohibits various activities involving the *visual depiction of a minor engaging in sexually explicit conduct*. This subsection, enacted in 1990, requires that an actual minor be depicted in the material. In contrast, Instructions 16.07 and 16.08 are based on § 2252A(a), which prohibits various activities involving *child pornography*. This subsection, enacted in 1996, defines child pornography to include not just material that depicts actual minors but also to include images that are indistinguishable from that of a minor engaging in sexually explicit conduct and images that have been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct. Thus the definition of *child pornography* is broader than the definition of a *visual depiction of a minor engaging in sexually explicit conduct*, and Instructions 16.07 and 16.08 are commensurately broader than Instructions 16.05 and 16.06. In particular, Instruction 16.05 and Instruction 16.07, which both cover the conduct of *receiving* or *distributing* prohibited material, differ because Instruction 16.05 applies only to visual depictions of actual minors while Instruction 16.07 applies to the broader category of child pornography. Similarly, Instruction 16.06 and Instruction 16.08, which both cover the conduct of *possessing* or *accessing with intent to view* prohibited material, differ because Instruction 16.06 applies only to visual depictions of actual minors while Instruction 16.08 applies to the broader category of child pornography.

The instructions use either the term “minor” or “person under 18” based on the term used in the statute.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court held that the Child Pornography Prevention Act of 1996 was overbroad and unconstitutional under the First Amendment. Specifically, the Court struck down two provisions that dealt with a type of child pornography that included digitally-created images, often called virtual child pornography. *Ashcroft*, 535 U.S. at 256-57. In 2003, Congress responded by amending the statute.

Based on *Gonzales v. Raich*, 545 U.S. 1 (2005), the Sixth Circuit has rejected as-applied commerce clause challenges to child exploitation convictions. *See United States v. Bowers*, 594 F.3d 522 (6th Cir. 2010) (§§ 2251(a) and 2252(a)(4)(B)); *United States v. Chambers*, 441 F.3d 438 (6th Cir. 2006) (§§ 2252(a)(1), 2252(a)(4)(B), and 2423(a)).

16.01 SEXUAL EXPLOITATION OF CHILDREN: USING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(a))

(1) Count ____ of the indictment charges the defendant with using a minor to engage in sexually explicit conduct to produce a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant [employed] [used] [persuaded] [induced] [enticed] [coerced] a minor to [engage in] [assist another person to engage in] sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(B) Second: *[insert at least one from three options below]*.

[(i) That the defendant [knew] [had reason to know] that the visual depiction would be *[insert at least one from two options below]*

-[[transported] [transmitted] using any means or facility of interstate [foreign] commerce].

-[mailed].

[or]

[(ii) That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[or]

[(iii) That the visual depiction was *[insert at least one from two options below]*

- [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign]commerce]

- [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [A defendant “uses” a minor if he photographs the minor engaging in sexually explicit conduct.]

(B) The term “minor” means any person under the age of 18 years. [It is not necessary that the government prove that the defendant knew the person depicted [to be depicted] was a minor.]

(C) The term “for the purpose of” means that the defendant acted with the intent to create visual depictions of sexually explicit conduct, and that the defendant knew the character and content of the visual depictions.

(D) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]

[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

[(ii) bestiality];

[(iii) masturbation];

[(iv) sadistic or masochistic abuse];

[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(E) The term “producing” means making, creating, producing, directing, manufacturing, issuing, publishing, or advertising.]

[(F) The term “visual depiction” includes [*insert one or more from three options below*]:

– [undeveloped film and videotape].

– [data stored on computer disk or by electronic means which is capable of conversion into a visual image].

– [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format]].

[(G) The term “in interstate commerce” means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(H) The term “means or facility of interstate commerce” includes the internet or the telephone.]

[(I) The phrase “affecting” interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(J) The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

(3) [It is not necessary that the government prove that the defendant took the picture[s]].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of “producing any visual depiction” of the conduct. If the charge is based on the defendant acting for the purpose of “transmitting a live visual depiction” of the conduct, this instruction should be modified.

Bracketed paragraphs (2)(G), (2)(H), and (2)(I), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(B).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(J), the definition of computer, should be given only if that term is used under paragraph (1)(B) or (2)(F).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current through August 1, 2016)

This instruction is based on § 2251(a), which provides:

§ 2251. Sexual exploitation of children

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or

foreign commerce or mailed.

The basic conduct covered by this instruction is producing a visual image of a minor engaging in sexually explicit conduct.

The title of this instruction is drawn from § 2251(a) and *United States v. Hart*, 635 F.3d 850, 857 (6th Cir. 2011).

Paragraph (1), which states the elements, is based on § 2251(a). *See also* *United States v. Ogden*, 685 F.3d 600, 605 (6th Cir. 2012) (“All the government needed to prove for the [§ 2251(a)] charge was that [the defendant] induced the victim to engage in conduct to produce at least one explicit image.”)

The government need only prove that the person in the visual depiction was a minor at the time; the government need not prove that the defendant knew the victim’s age. *See* *United States v. Humphrey*, 608 F.3d 955, 962 (6th Cir. 2010) (“[K]nowledge of the victim’s age is neither an element of the offense nor textually available as an affirmative defense.”); *United States v. X-Citement Video*, 513 U.S. 64, 76 (1994) (quoting S. Conf. Rep. No. 96-601, p. 2 (1977)) (“§ 2251(a) [reflects] an intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.”).

Paragraph (1)(B) states the jurisdictional basis. The three options are drawn from § 2251(a). In *United States v. Tidwell*, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done the conduct. The panel stated, “[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur.” In addition, in proving the jurisdictional basis for § 2251(a), the government need not prove that the defendant’s individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress’s power. *United States v. Bowers*, 594 F.3d 522, 529 (6th Cir. 2010) (*citing* *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)). *See also* *United States v. Corp*, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant’s unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing* *Bowers*).

In paragraph (2)(A), the definition of “uses” is based on *United States v. Wright*, 774 F.3d 1085, 1089 (6th Cir. 2014) (stating that the “use” element is satisfied if a minor is photographed in order to create pornography). In paragraph (2)(B), the definition of “minor” is from § 2256(1). The government need not prove that defendant knew the person depicted or to be depicted was a minor, *see* *Humphrey*, *supra*. In paragraph (2)(C), the definition of “for the purpose of” is drawn from *United States v. Wright*, 2013 U.S. Dist. LEXIS 5691, 2013 WL 164096 at 7 (W.D. Mich. 2013), *affirmed*, 774 F.3d 1085 (6th Cir. 2014). In paragraph (2)(D), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(D)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011).

In bracketed paragraph (2)(E), the definition of “producing” is from § 2256(3). The words “making” and “creating” were added to the definition based on *Wright*, 774 F.3d at 1092, quoting *United States v. Fadl*, 498 F.3d 862, 866-67 (8th Cir. 2007). In paragraph (2)(F), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(H), the definition of “means or facility of interstate commerce” as including the internet and the telephone is based on *United States v. Fuller*, 77 F. App’x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(J), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists one but not all items the government is not required to prove. The government need not prove that the defendant took the pictures, *see Daniels* at 408. In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* *United States v. Hart*, 635 F.3d 850, 857 (6th Cir. 2011) (“A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct.”). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense—Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.02 SEXUAL EXPLOITATION OF CHILDREN: TRANSPORTING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(a))

(1) Count ____ of the indictment charges the defendant with transporting a minor with the intent that the minor engage in sexually explicit conduct to produce a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant transported a minor in or affecting interstate [foreign] commerce.

(B) Second: That the defendant acted with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(C) Third: [*insert at least one from three options below*].

[i] That the defendant [knew] [had reason to know] that the visual depiction would be [*insert at least one from two options below*]

-[[transported] [transmitted] using any means or facility of interstate [foreign] commerce].

-[mailed].

[or]

[ii] That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[or]

[iii] That the visual depiction was [*insert at least one from two options below*]

- [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce]

- [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “minor” means any person under the age of 18 years.

(B) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]

[i] sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

[ii] bestiality];

[iii] masturbation];

[(iv) sadistic or masochistic abuse];

[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

(C) The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

[(D) The term "visual depiction" includes *[insert one or more from three options below]*:

- [undeveloped film and videotape].
- [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
- [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format]].

[(E) The term "in interstate commerce" means the [minor] [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(H) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

(3) [It is not necessary that the government prove that the defendant [knew the person transported [to be transported] was a minor] [took the picture[s]].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of “producing any visual depiction” of the conduct. If the charge is based on the defendant acting for the purpose of “transmitting a live visual depiction” of the conduct, this instruction should be modified.

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected.

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(H), the definition of computer, should be given only if that term is used to define visual depiction under paragraph (2)(D).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current through August 1, 2016)

This instruction is based on § 2251(a), which is quoted below. The basic conduct covered by this instruction is transporting a minor to produce a visual image of the minor engaging in sexually explicit conduct.

The title of this instruction is drawn from § 2251(a).

Paragraph (1), which states the elements, is based on § 2251(a).

The government need only prove that the person in the visual depiction was a minor at the time; the government need not prove that the defendant knew the victim’s age. See *United States v. Humphrey*, 608 F.3d 955, 962 (6th Cir. 2010) (“[K]nowledge of the victim’s age is neither an element of the offense nor textually available as an affirmative defense.”); *United States v. X-Citement Video*, 513 U.S. 64, 76 (1994) (quoting S. Conf. Rep. No. 96-601, p. 2 (1977)) (“§ 2251(a) [reflects] an intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.”).

In identifying the elements of the crime of transporting a minor, paragraphs (1)(A) and (1)(C) both include jurisdictional language, *i.e.*, language on proof related to interstate commerce. These two paragraphs are based on language in the statute that refers to interstate commerce in two distinct entries in the statute. The two entries in the statute are underlined below:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who

transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

In paragraph (1)(C), the three options are drawn from § 2251(a). In *United States v. Tidwell*, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done the conduct. The panel stated, “[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur.” In addition, in proving the jurisdictional basis for § 2251(a), the government need not prove that the defendant’s individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress’s power. *United States v. Bowers*, 594 F.3d 522, 529 (6th Cir. 2010) (*citing* *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)). *See also* *United States v. Corp*, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant’s unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing Bowers*).

The definitions in paragraph (2) are generally drawn from the statute. In paragraph (2)(A), the definition of minor is from § 2256(1). In paragraph (2)(B), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(B)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). In bracketed paragraph (2)(C), the definition of producing is from § 2256(3).

In paragraph (2)(D), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(F), the definition of “means or facility of interstate commerce” as including the internet and the telephone is based on *United States v. Fuller*, 77 F.App’x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(H), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists two but not all items the government is not required to prove. The government need not prove that defendant knew the person transported or to be transported was a

minor, *see Humphrey, supra*; that the defendant took the pictures, *see Daniels* at 408. In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* United States v. Hart, 635 F.3d 850, 857 (6th Cir. 2011) (“A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct.”). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.03 SEXUAL EXPLOITATION OF CHILDREN: PERMITTING A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT TO PRODUCE A VISUAL DEPICTION (Production, 18 U.S.C. § 2251(b))

(1) Count ____ of the indictment charges the defendant with permitting a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant was the [parent] [legal guardian] [person with custody or control] of a minor.

(B) Second: That the defendant permitted the minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct.

(C) Third: That the defendant knowingly permitted the minor to engage in such conduct.

(D) Fourth: [*insert at least one from three options below*].

[(i) That the defendant [knew] [had reason to know] that the visual depiction would be [*insert at least one from two options below*]

- [[transported] [transmitted] using any means or facility of interstate [foreign] commerce].
- [mailed].

[(ii) That the visual depiction was produced or transmitted using materials that were mailed, shipped, or transported in or affecting interstate [foreign] commerce by any means, including computer.]

[(iii) That the visual depiction was [*insert at least one from two options below*]

- [[transported] [transmitted] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce]
- [mailed].

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “minor” means any person under the age of 18 years.

[(B) The term “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.]

(C) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]

- [(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

[(ii) bestiality];
[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

(D) The term "producing" means producing, directing, manufacturing, issuing, publishing, or advertising.

(E) The term "visual depiction" includes *[insert one or more from three options below]*:
– [undeveloped film and videotape].
– [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
– [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

[(F) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(G) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(H) The phrase "affecting interstate [foreign] commerce" means having at least a minimal effect upon interstate [foreign] commerce.]

[(I) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

- (3) [It is not necessary that the government prove that the defendant [took the picture[s]].
(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the charge is based on the defendant acting for the purpose of “producing any visual depiction” of the conduct. If the charge is based on the defendant acting for the purpose of “transmitting a live visual depiction” of the conduct, this instruction should be modified.

Bracketed paragraph (2)(B), the definition of custody and control, should be given only if that term is used in paragraph (1)(A).

Bracketed paragraphs (2)(F), (2)(G), and (2)(H), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(D).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

Bracketed paragraph (2)(I), the definition of computer, should be given only if that term is used under paragraph (1)(D)(ii) or paragraph (2)(E).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current through August 1, 2016)

This instruction is based on § 2251(b), which provides:

§ 2251. Sexual exploitation of children

...

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished as provided under subsection (e) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

The basic conduct covered by this instruction is permitting a minor to engage in sexually explicit conduct to produce a visual image.

The title of the instruction is drawn from § 2251(b).

The list of elements in paragraph (1) is derived from § 2251(b) with slight adjustments to the language for consistency. *See also* United States v. Lawrence, 391 F. App'x 480, 483 (6th Cir. 2010) (unpublished).

Paragraph (1)(D) states the jurisdictional basis. The three options are drawn from § 2251(b). Two cases decided under § 2251(a) (see Inst. 16.01) are helpful. In *United States v. Tidwell*, 1990 U.S. App. LEXIS 19798, at *6 (6th Cir. 1990) (unpublished), the panel held that if the jurisdictional basis for the action is mailing or transporting the visual depiction in interstate or foreign commerce, the defendant need not have personally done that conduct. The panel stated, “[T]he United States is not *required* by the statute to prove that *either* of these defendants actually mailed or transported the materials; the United States need only prove that *someone* actually transported or mailed the material, *or* that the defendants knew or should have known that such mailing or transportation would occur.” In addition, in proving the jurisdictional basis for § 2251(a), the court has held that the government need not prove that the defendant’s individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress’s power. *United States v. Bowers*, 594 F.3d 522, 529 (6th Cir. 2010) (citing *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)) *See also* *United States v. Corp*, 668 F.3d 379, 385 & n.1 (6th Cir. 2012) (holding that defendant’s unconditional guilty plea to § 2251(a) count waived his Commerce Clause challenge but stating that the challenge would fail on the merits, *citing Bowers*).

The definitions in paragraph (2) are primarily drawn from the statute. In paragraph (2)(A), the definition of “minor” is from § 2256(1). In paragraph (2)(B), the definition of “custody or control” is from § 2256(7). In paragraph (2)(C), the definition of “sexually explicit conduct” is from § 2256(2). For the definition in (2)(B)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). In paragraph (2)(D), the definition of producing is from § 2256(3). In paragraph (2)(E), the definition of visual depiction is from § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(G), the definition of “means or facility of interstate commerce” as including the internet or the telephone is based on *United States v. Fuller*, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. In paragraph (2)(I), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1).

Paragraph (3) lists one but not all items the government is not required to prove. The government need not prove that defendant took the pictures, *see Daniels* at 408. In addition, the court has said that in proving interstate commerce, the government need not prove that the defendant acted for a commercial purpose. *Bowers* at 529. These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. *See* § 2251(e); *see also* *United States v. Hart*, 635 F.3d 850, 857 (6th Cir. 2011) (“A person violates 18 U.S.C. § 2251 if he or she attempts to persuade a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct.”). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2251(e) do not require an overt act, *see* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

**16.04 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS:
TRANSPORTING OR SHIPPING A VISUAL DEPICTION (18 U.S.C. § 2252(a)(1))**

(1) Count ____ of the indictment charges the defendant with [transporting] [shipping] a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

- (A) First: That the defendant knowingly [transported] [shipped] a visual depiction.
- (B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.
- (C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.
- (D) Fourth: That the defendant knew that the visual depiction was of a minor engaging in sexually explicit conduct.
- (E) Fifth: That the defendant [transported] [shipped] the visual depiction [*insert at least one from two options below*]
 - [using any means or facility of interstate [foreign] commerce]
 - [using any means in or affecting interstate [foreign] commerce, including by computer or mails.]

(2) Now I will give you more detailed instructions on some of these terms.

- (A) The term “visual depiction” includes [*insert one or more from three options below*]:
 - [undeveloped film and videotape].
 - [data stored on computer disk or by electronic means which is capable of conversion into a visual image].
 - [data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].
- (B) The term “minor” means any person under the age of 18 years.
- (C) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]
 - [(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
 - [(ii) bestiality];
 - [(iii) masturbation];
 - [(iv) sadistic or masochistic abuse];
 - [(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a

place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term “in interstate commerce” means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term “means or facility of interstate commerce” includes the internet or the telephone.]

[(G) The phrase “affecting” interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(3) The government is not required to prove that [the defendant knew that a means or facility of interstate commerce would be used when he [transported] [shipped] the images] [the defendant was involved in any way in the production of the visual depiction].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through August 1, 2016)

This instruction is based on § 2252(a)(1), which provides:

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

. . . shall be punished

In paragraph (1), the elements in paragraphs (A) and (E) are drawn from the statute and *United States v. Chambers*, 441 F.3d 438, 449 (6th Cir. 2006).

The elements in paragraphs (1)(B) and (1)(C) (that the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images. In *United States v. Farelly*, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farelly* court cited with approval *United States v. Fuller*, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also United States v. Halter*, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D) (that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct) is based on *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers."

In paragraph (1)(E), the interstate commerce element is drawn from § 2252(a)(1).

As for the definitions in paragraph (2), the definition of “visual depiction” in paragraph (2)(A) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(B), the definition of “minor” is from § 2256(1). In paragraph (2)(C), the definition of “sexually explicit conduct” is from § 2256(2). To define the phrase “sadistic or masochistic abuse” in subparagraph (2)(C)(iv), the Sixth Circuit has held that the term “sadistic” in the context of child pornography “involves the depiction of a sexual act that is ‘likely to cause pain in one so young.’” *United States v. Fuller*, 77 F. App’x 371, 384 (6th Cir. 2003) (unpublished) (*quoting* *United States v. Lyckman*, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in (2)(C)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). In paragraph (2)(D), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of “means or facility of interstate commerce” as including the internet and the telephone is based on *United States v. Fuller*, 77 F. App’x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant “knowingly” transport or ship the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). As to the jurisdictional bases in paragraph (1)(E), no mens rea is required. The Sixth Circuit explained:

The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is “jurisdictional.” See *United States v. Feola*, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers, id.* (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); and *United States v. Fuller*, 77 F. App’x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction).

This statute also criminalizes attempts and conspiracies. *See* § 2252(b)(1) and (2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, *see* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic

Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

**16.05 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS:
RECEIVING, DISTRIBUTING, OR REPRODUCING FOR DISTRIBUTION A VISUAL
DEPICTION (18 U.S.C. § 2252(a)(2))**

(1) Count ____ of the indictment charges the defendant with [receiving] [distributing] [reproducing for distribution] a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [received] [distributed] [reproduced for distribution] a visual depiction.

(B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

(C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.

(D) Fourth: That the defendant knew that the visual depiction was of a minor engaging in sexually explicit conduct.

(E) Fifth: That the visual depiction [*insert at least one from two options below*]

[i] was [received] [distributed]

--[using any means or facility of interstate [foreign] commerce]

--[using the mail]

--[by shipping or transporting in or affecting interstate [foreign] commerce]

--[containing materials that had been mailed, or shipped or transported in interstate commerce, by any means including by computer]

or

[ii] was reproduced

--[using any means or facility of interstate [foreign] commerce]

--[in or affecting interstate [foreign] commerce by any means including by computer or through the mails]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “visual depiction” includes [*insert one or more from three options below*]:

--[undeveloped film and videotape].

--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].

--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(B) The term “minor” means any person under the age of 18 years.

(C) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]

[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

[(ii) bestiality];

[(iii) masturbation];

[(iv) sadistic or masochistic abuse];

[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child’s genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term “in interstate commerce” means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(F) The term “means or facility of interstate commerce” includes the internet or the telephone.]

[(G) The phrase “affecting” interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

(3) [The government is not required to prove that [the defendant knew that a means or facility of interstate commerce [had been] [would be] used when he [received] [distributed] [reproduced] the images] [the defendant was involved in any way in the production of the visual depiction].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if that term is used in the jurisdictional option selected for paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current as of August 1, 2016)

This instruction is based on § 2252(a)(2), which provides:

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if—

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

. . . shall be punished

In paragraph (1), the element in paragraph (A) is drawn from § 2252(a)(2) and *United States v. Chambers*, 441 F.3d 438, 449 (6th Cir. 2006) (construing § 2252(a)(1) (transporting or shipping) (see Inst. 16.03)).

The elements in paragraphs (1)(B) and (1)(C) (that the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to *Ashcroft v. Free Speech Coalition*, 535

U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images. In *U.S. v. Farelly*, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farelly* court cited with approval *United States v. Fuller*, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also* *United States v. Halter*, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D), that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct, is based on *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers."). *See also* *United States v. Szymanski*, 631 F.3d 794, 799 (6th Cir. 2011) ("[D]efendant convicted of receiving child pornography must have known, not just that he was receiving *something*, but that what he was receiving was child pornography."). The defendant's knowledge is established for purposes of § 2252(a) if "he is aware that his receipt of the illegal images is practically certain to follow from his conduct." *United States v. Ogden*, 685 F.3d 600, 604 (6th Cir. 2012) (interior quotation marks and citations omitted).

In paragraph (1)(E), the interstate commerce element is drawn from § 2252(a)(2).

For the definitions in paragraph (2), the definition of "visual depiction" in paragraph (2)(A) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(B), the definition of "minor" is from § 2256(1). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). To define the phrase "sadistic or masochistic abuse" in subparagraph (2)(C)(iv), the Sixth Circuit has held that the term "sadistic" in the context of child pornography "involves the depiction of a sexual act that is 'likely to cause pain in one so young.'" *United States v. Fuller*, 77 F. App'x 371, 384 (6th Cir. 2003) (unpublished) (*quoting* *United States v. Lyckman*, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in subparagraph (2)(C)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011).

In paragraph (2)(D), the bracketed definition of computer is based on 18 U.S.C § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on *United States v. Fuller*, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant “knowingly” receive, distribute or reproduce for distribution the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). *See also Szymanski, quoted supra.* As to the jurisdictional bases in paragraph (1)(E), no mens rea is required. As the Sixth Circuit explained in the context of § 2252(a)(1) (shipping) (see Inst. 16.03):

The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is “jurisdictional.” *See United States v. Feola*, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers, id.* (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); and *United States v. Fuller*, 77 F. App’x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction).

This statute also criminalizes attempts and conspiracies. *See* § 2252(b)(1) and (2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, *see Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

**16.06 MATERIAL INVOLVING THE SEXUAL EXPLOITATION OF MINORS:
POSSESSING A VISUAL DEPICTION (18 U.S.C. § 2252(a)(4)(B))**

(1) Count ____ of the indictment charges the defendant with possessing a visual depiction of a minor engaged in sexually explicit conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly possessed one or more [books] [magazines] [periodicals] [films] [video tapes] [other matter] containing a visual depiction.

(B) Second: That the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct.

(C) Third: That the visual depiction was of a minor engaging in sexually explicit conduct.

(D) Fourth: That the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct.

(E) Fourth: That the visual depictions [*insert at least one from the three options below*]
--[had been mailed].
--[had been [shipped] [transported] using any means or facility of interstate commerce or in or affecting interstate [foreign] commerce].
--[were produced using material that had been mailed, shipped or transported in interstate [foreign] commerce by any means including computer].

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) The term “visual depiction” includes [*insert one or more from three options below*]:
--[undeveloped film and videotape].
--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].
--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term “minor” means any person under the age of 18 years.

(D) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]
[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
[(ii) bestiality];

[(iii) masturbation];
[(iv) sadistic or masochistic abuse];
[(v) lascivious exhibition of the genitals or pubic area of a person. In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(E) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(F) The term "in interstate commerce" means the [visual depiction] [production or transmission materials] crossed [would cross] a state line.]

[(G) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(H) The phrase "affecting" interstate [foreign] commerce means having at least a minimal effect upon interstate [foreign] commerce.]

[(3) The government is not required to prove that [the defendant knew that a means or facility of interstate commerce [had been] [would be] used when he possessed the images] [the defendant was involved in any way in the production of the visual depiction] [the defendant viewed the visual depictions] [the defendant's individual conduct substantially affected interstate commerce].

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction assumes that the conduct charged is possessing a visual depiction. If the conduct charged is accessing with intent to view, the instruction should be modified.

Bracketed paragraph (2)(E), the definition of computer, should be given only if that term is used in either paragraph (1)(E) or (2)(B).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected for paragraph (1)(E).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(i).

If the first bracketed option in paragraph (3) is used, it should be tailored to fit the particular jurisdictional element charged.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(Current through August 1, 2016)

This instruction is based on § 2252(a)(4)(B), which provides:

§ 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who—

(4) . . .

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; . . .

shall be punished

In paragraph (1), the element in paragraph (A) is drawn from § 2252(a)(4)(B), *United States v. Wise*, 278 F. App'x 552, 560 (6th Cir. 2008) (unpublished), and *United States v. Chambers*, 441 F.3d 438, 449 (6th Cir. 2006) (construing § 2252(a)(1) (transporting or shipping) (see Inst. 16.03)). In paragraph (1)(A), the term “other matter” includes electronic storage media, *see Wise, supra*.

The elements in paragraphs (1)(B) and (1)(C) (that the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct) respond to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250-55 (2002), where the Supreme Court held based on the First Amendment that a defendant cannot be convicted for the creation of computer-generated images.

In *U.S. v. Farelly*, 389 F.3d 649 (6th Cir. 2004), the court affirmed a conviction against an *Ashcroft* challenge in part because the trial court gave an instruction requiring the jury to find that the minor was a real person rather than a computer-created representation of a person. *Id.* at 653. The court further stated that the question of whether the images were virtual or real was a question of fact that the government had the burden of proving, but that *Ashcroft* did not impose any special or heightened evidentiary burden for the government's proof. *Id.* at 653-54. The *Farelly* court cited with approval *United States v. Fuller*, 77 F. App'x 371, 380 (6th Cir. 2003) (unpublished) (evidence sufficient where no contrary evidence was offered to show that visual depictions were virtual or computer-generated and jury viewed the images in question). *See also United States v. Halter*, 259 F. App'x 738, 741 (6th Cir. 2008) (unpublished) (jury can distinguish images of actual children from simulated children).

The element in paragraph (1)(D), that the defendant knew the visual depiction involved a minor engaging in sexually explicit conduct, is based on *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly "extends both to the sexually explicit nature of the material and to the age of the performers." However, this element may be called into question by *United States v. Szymanski*, 631 F.3d 794, 800 (6th Cir. 2011) (stating in dicta that the possession offense of § 2252(a)(4)(B) lacks the knowing scienter requirement included in the receipt offense of § 2252(a)(2)) (*citing United States v. Malik*, 385 F.3d 758, 760 (7th Cir. 2004)).

In paragraph (1)(E), the jurisdictional element is based on the statute and on *Wise, supra*, *citing Chambers, supra* at 451.

For the definitions in paragraph (2), the definition of "visual depiction" in paragraph (2)(B) is from 18 U.S.C. § 2256(5). For defining whether a visual depiction qualifies as sexually explicit conduct, size and image quality are not relevant. *United States v. Daniels*, 653 F.3d 399, 408 (6th Cir. 2011). In paragraph (2)(C), the definition of "minor" is from § 2256(1). In paragraph (2)(C), the definition of "sexually explicit conduct" is from § 2256(2). To define the phrase "sadistic or masochistic abuse" in subparagraph (2)(D)(iv), the Sixth Circuit has held that the term "sadistic" in the context of child pornography "involves the depiction of a sexual act that is 'likely to cause pain in one so young.'" *United States v. Fuller*, 77 F. App'x 371, 384 (6th Cir. 2003) (unpublished) (*quoting United States v. Lyckman*, 235 F.3d 234, 238-39 (5th Cir. 2000)). For the definition in subparagraph (2)(D)(v) of "lascivious exhibition of the genitals or pubic area," the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). In paragraph (2)(E), the bracketed definition of computer is based on 18 U.S.C. § 2256(6) and 18 U.S.C. § 1030(e)(1). In paragraph (2)(G), the definition of "means or facility of interstate commerce" as including the internet and the telephone is based on *United States v. Fuller*, 77 F. App'x 371, 378-79 (6th Cir. 2003) (unpublished).

Regarding the mens rea, the statute requires that the defendant "knowingly" possess the visual depiction as listed in paragraph (1)(A). As noted above, the Supreme Court held in *X-Citement Video* that the mens rea of knowingly extends also to the sexually explicit nature of the material and to the age of the performers, as reflected in paragraph (1)(D). As to the jurisdictional

bases in paragraph (1)(E), no mens rea is required. As the Sixth Circuit explained in the context of § 2252(a)(1) (shipping) (see Inst. 16.04):

The scienter requirement, however, does not extend to the fact that the materials which were knowingly shipped, traveled through interstate or foreign commerce. That is, the government is not required to prove that the defendant knew that channels of interstate commerce would be utilized when he shipped the images; rather, that fact in the statute is “jurisdictional.” See *United States v. Feola*, 420 U.S. 671, 676-77, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975).

United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006).

Paragraph (3), which lists items the government need not prove, is based on *Chambers*, *id.* (government need not prove that the defendant knew the channels of interstate commerce would be utilized when he shipped the images); *United States v. Fuller*, 77 F. App'x 371, 380 n.10 (6th Cir. 2003) (unpublished) (government need not prove that the defendant was involved in any way in the production of the visual depiction); *United States v. Edmiston*, 324 F. App'x 496, 498 (6th Cir. 2009) (unpublished) (“actually viewing the materials is not an element of the crime”); and *United States v. Bowers*, 594 F.3d 522, 529-30 (6th Cir. 2010) (*citing* *Gonzales v. Raich*, 545 U.S. 1, 23 (2005)) (in proving the jurisdictional basis for § 2252(a)(4)(B), the government need not prove that the defendant's individual conduct substantially affected interstate commerce because the class of activities regulated is within Congress's power). These provisions should be used only if relevant.

This statute also criminalizes attempts and conspiracies. See § 2252(b)(1) and (2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252(b) do not require an overt act, see *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes an affirmative defense in subsection 2252(c) which provides:

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant--

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof--

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

This defense should be included in the instructions if raised by the defendant.

16.07 RECEIVING OR DISTRIBUTING CHILD PORNOGRAPHY (18 U.S.C. § 2252A(a)(2))

(1) Count ____ of the indictment charges the defendant with [receiving] [distributing] any [child pornography] [material that contained child pornography]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [received] [distributed] any [child pornography] [material that contained child pornography].

(B) Second: That the defendant knew that the material [was] [contained] child pornography.

(C) Third: That the [child pornography] [material that contained child pornography] was
[insert at least one from the two options below.]

[i] mailed.]

[ii] using any means or facility of interstate [foreign] commerce, shipped or transported in or affecting interstate [foreign] commerce by any means, including by computer.]

(2) Now I will give you some more detailed instructions on some of these terms.

(A) The term “child pornography” means any visual depiction, including any [photograph] [film] [video] [picture] [computer or computer-generated image or picture] whether [made] [produced] by [electronic] [mechanical] [other means] of sexually explicit conduct where *[insert one or both from the options below]*

[i] The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct.]

[ii] The visual depiction had been [created] [adapted] [modified] to appear that an identifiable minor was engaging in sexually explicit conduct.]

(B) The term “visual depiction” includes *[insert one or more from three options below]*:

--[undeveloped film and videotape].

--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].

--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term “sexually explicit conduct” means actual or simulated *[insert one or more from five options below]*

- [(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];
- [(ii) bestiality];
- [(iii) masturbation];
- [(iv) sadistic or masochistic abuse];
- [(v) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term "in interstate commerce" means the [child pornography] [material that contained child pornography] crossed [would cross] a state line.]

[(F) The term "means or facility of interstate commerce" includes the internet or the telephone.]

[(G) The phrase "affecting interstate [foreign] commerce" means having at least a minimal effect upon interstate [foreign] commerce.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used under paragraph (1)(C)(ii) or (2)(A).

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(C).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(I).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current as of August 1, 2016)

This instruction is based on § 2252A(a)(2), which provides:

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who— . . .

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; . . . shall be punished

In paragraph (1), the elements listed in paragraphs (A) and (C) are based on the statute, § 2252A(a)(2)(A) and (B). The element in paragraph (1)(B), that the defendant knew that the pornographic images were of children, is based on *United States v. Stout*, 509 F.3d 796, 799 (6th Cir. 2007) (*citing* *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

In paragraph (2), the definitions are drawn primarily from a statute, § 2256. The definition of child pornography in paragraph (2)(A) is based on § 2256(8), and the subparagraphs (i) and (ii) are based on statutory subsections (8)(A) and (8)(C), respectively. Subsection 2256(8)(B) is not included as an option because subsections (8)(A) and (8)(C) will cover most of the prosecutions and because the constitutionality of subsection (8)(B) has not been addressed. See Eighth Circuit Instruction 6.18.2252 Notes on Use No. 6. The definition of visual depiction in paragraph (2)(B) is based on § 2256(5). In paragraph (2)(C), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(C)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). The definition of computer in paragraph (2)(D) is based on § 2256(6), which refers to 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of “means or facility of interstate commerce” as including the internet or the telephone is based on *United States v. Fuller*, 77 F.App’x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce,

such as an interstate private delivery service, the instruction should be modified. Other definitions may be required depending on the definition of child pornography used; these additional definitions are provided in § 2256.

The Sixth Circuit has not identified any facts that the government need not prove to convict a defendant of receiving or distributing child pornography under § 2252A(a)(2). However, under the analogous statute prohibiting receiving or distributing visual depictions of a minor engaging in sexually explicit conduct, § 2252(a)(2), the court has identified some facts the government need not prove. These facts are collected and discussed in Instruction 16.05(3) and the accompanying commentary.

The term “any” in paragraphs (1) and (1)(A) is drawn from the statute, § 2252A(a)(2)(A) and (B). In the context of § 2252(a)(2) (see Inst. 16.04), the Sixth Circuit defined that term as one or some, regardless of sort, quantity, or number, and so concluded that “any” includes a single instance. *See United States v. Moore*, 916 F.2d 1131, 1137 n.12 (6th Cir. 1990). The instruction does not include this definition of “any” for the routine case, but it may be added if the issue is raised by the facts.

Convictions for both “knowingly receiving child pornography, 18 U.S.C. §§ 2252A(a)(2)(A), and knowingly possessing the same child pornography, 18 U.S.C. §§ 2252A(a)(5)(B)” violate the Double Jeopardy Clause. *United States v. Ehle*, 640 F.3d 689, 694-95 (6th Cir. 2011) (internal quotation marks omitted). The court reasoned that “possessing child pornography is a lesser-included offense of receiving the same child pornography, meaning the two statutes proscribe the same offense.” *Id.* at 695 (internal quotations omitted) (*citing* *Rutledge v. United States*, 517 U.S. 292, 297 (1996)).

This statute also criminalizes attempts and conspiracies. *See* § 2252A(b)(1); *see also* *United States v. Studabaker*, 578 F.3d 423 (6th Cir. 2009) (“This indictment included three charges: (1) that Studabaker attempted to and did knowingly receive images of child pornography shipped and transported in interstate and foreign commerce.”). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252A(b) do not require an overt act, *see* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes affirmative defenses in subsections 2252A(c) and (d) as follows:

- (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--
 - (1)
 - (A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
 - (B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

- (1) possessed less than three images of child pornography; and
- (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--
 - (A) took reasonable steps to destroy each such image; or
 - (B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

These affirmative defenses should be included in the instructions if raised by the defendant.

16.08 POSSESSING OR ACCESSING CHILD PORNOGRAPHY (18 U.S.C. § 2252A(a)(5))

(1) Count ____ of the indictment charges the defendant with [possessing] [accessing] any [child pornography] [material that contained child pornography]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [possessed] [accessed with intent to view] any [book] [magazine] [periodical] [film] [videotape] [computer disk] [material] that contained an image of child pornography.

(B) Second: That the defendant knew that the material [was] [contained] child pornography.

(C) Third: *[insert one or both from two options below]*

[(i) The [possession] [accessing with intent to view] was *[insert at least one from three options below]*

-[in the special maritime and territorial jurisdiction of the United States.]

-[on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government.]

-[in the Indian country.]

[(ii) The image of child pornography was *[insert at least one from three options below]*

-[mailed.]

-[[shipped] [transported] using any means or facility of interstate [foreign] commerce or in or affecting interstate [foreign] commerce

by

any means, including by computer.]

-[produced using materials that had been mailed, or shipped or transported in or affecting interstate [foreign] commerce by any

means,

including by computer.]]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “child pornography” means any visual depiction, including any [photograph] [film] [video] [picture] [computer or computer-generated image or picture] whether [made] [produced] by [electronic] [mechanical] [other means] of sexually explicit conduct where *[insert at least one from the two options below]*

[(i) The production of such visual depiction involved the use of a minor engaging in sexually explicit conduct.]

[(ii) The visual depiction had been [created] [adapted] [modified] to appear that an identifiable minor was engaging in sexually explicit conduct.]

(B) The term “visual depiction” includes [*insert one or more from three options below*]:

--[undeveloped film and videotape].

--[data stored on computer disk or by electronic means which is capable of conversion into a visual image].

--[data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format].

(C) The term “sexually explicit conduct” means actual or simulated [*insert one or more from five options below*]

--[(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex];

--[(ii) bestiality];

--[(iii) masturbation];

--[(iv) sadistic or masochistic abuse];

--[(v) lascivious exhibition of the genitals or pubic area of a person.

In deciding whether an exhibition is lascivious, you may consider these six factors: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer. This list is not exhaustive, and an image need not satisfy any single factor to be deemed lascivious. Instead, you must determine whether the visual depiction is lascivious based on its overall content. It is for you to decide the weight or lack of weight to be given any of these factors.]

[(D) The term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.]

[(E) The term “in interstate commerce” means the [material that contained] child pornography crossed [would cross] a state line.]

[(F) The term “means or facility of interstate commerce” includes the internet or the telephone.]

[(G) The phrase “affecting interstate [foreign] commerce” means having at least a minimal effect upon interstate [foreign] commerce.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Bracketed paragraph (2)(D), the definition of computer, should be given only if that term is used in the instruction.

Bracketed paragraphs (2)(E), (2)(F), and (2)(G), which give definitions for jurisdictional terms, should be given only if the specific term is used in the jurisdictional option selected in paragraph (1)(C).

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(I).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current through August 1, 2016)

This instruction is based on § 2252A(a)(5), which provides:

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who— . . .

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; . . . shall be punished

In paragraph (1), the elements listed in paragraphs (A) and (C) are based on the statute, § 2252A(a)(5)(A) and (B). The element in paragraph (1)(B), that the defendant knew that the pornographic images were of children, is based on *United States v. Stout*, 509 F.3d 796, 799 (6th Cir. 2007) (*citing* *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)). If the term “Indian country” in paragraph (1)(C)(i) is used, the definition may be found in 18 U.S.C. § 1151.

In paragraph (2), the definitions are drawn primarily from a statute, § 2256. The definition of child pornography in paragraph (2)(A) is based on § 2256(8), and subparagraphs (i) and (ii) are based on statutory subsections (8)(A) and (8)(C), respectively. Subsection 2256(8)(B) is not included as an option because subsections (8)(A) and (8)(C) will cover most of the prosecutions and because the constitutionality of subsection (8)(B) has not been addressed. See Eighth Circuit Instruction 6.18.2252 Notes on Use No. 6. The definition of visual depiction in paragraph (2)(B) is based on § 2256(5). In paragraph (2)(C), the definition of sexually explicit conduct is from § 2256(2). For the definition in (2)(C)(v) of “lascivious exhibition of the genitals or pubic area,” the court identified the six listed factors in *United States v. Brown*, 579 F.3d 672, 680 (6th Cir. 2009); *see also* *United States v. Daniels*, 653 F.3d 399, 407 (6th Cir. 2011). The definition of computer in paragraph (2)(D) is based on § 2256(6), which refers to 18 U.S.C. § 1030(e)(1). In paragraph (2)(F), the definition of “means or facility of interstate commerce” as including the internet or the telephone is based on *United States v. Fuller*, 77 F. App’x 371, 378-79 (6th Cir. 2003) (unpublished). If the evidence supports a different facility of interstate commerce, such as an interstate private delivery service, the instruction should be modified. Other definitions may be required depending on the definition of child pornography used; additional definitions are provided in § 2256.

The Sixth Circuit has not identified any facts that the government need not prove to convict a defendant of possessing child pornography under § 2252A(a)(5). However, under the analogous statute prohibiting possessing visual depictions of a minor engaging in sexually explicit conduct, § 2252(a)(4)(B), the court has identified some facts the government need not prove. These facts are collected and discussed in Instruction 16.06(3) and the accompanying commentary.

The term “any” in paragraphs (1) and (1)(A) is drawn from the statute, § 2252A(a)(5)(A) and (B). In the context of § 2252(a)(2) (see Inst. 16.04), the Sixth Circuit defined that term as one or some, regardless of sort, quantity, or number, and so concluded that “any” includes a single instance. *See* *United States v. Moore*, 916 F.2d 1131, 1137 n.12 (6th Cir. 1990). The instruction does not include this definition of “any” for the routine case, but it may be added if the issue is raised by the facts.

Convictions for both “knowingly receiving child pornography, 18 U.S.C. §§ 2252A(a)(2)(A), and knowingly possessing the same child pornography, 18 U.S.C. §§ 2252A(a)(5)(B)” violate the Double Jeopardy Clause. *United States v. Ehle*, 640 F.3d 689, 694-95 (6th Cir. 2011) (internal quotation marks omitted). The court reasoned that “possessing child pornography is a lesser-included offense of receiving the same child pornography, meaning the two statutes proscribe the same offense.” *Id.* at 695 (internal quotations omitted) (*citing* *Rutledge v. United States*, 517 U.S. 292, 297 (1996)).

This statute also criminalizes attempts and conspiracies. *See* § 2252A(b)(2). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2252A(b) do not require an overt act, *see* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense—Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The statute includes affirmative defenses in subsections 2252A(c) and (d) as follows:

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

(1)

(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 14 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) Affirmative defense. It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant--

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof--

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

These affirmative defenses should be included in the instructions if raised by the defendant.

16.09 COERCION AND ENTICEMENT: PERSUADING A MINOR TO ENGAGE IN PROSTITUTION OR UNLAWFUL SEXUAL ACTIVITY (18 U.S.C. § 2422(b))

(1) Count ____ of the indictment charges the defendant with persuading a minor to engage in [prostitution] [unlawful sexual activity]. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [persuaded] [induced] [enticed] [coerced] an individual under the age of 18 to engage in [prostitution] [unlawful sexual activity].

(B) Second: That the defendant used [the mail] [a means or facility of interstate [foreign] commerce] to do so.

(C) Third: That the defendant knew the individual was under the age of 18.

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert definition for the term(s) used at the end of paragraph (1)(A)*]

--[“Prostitution” means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.]

--[“Unlawful sexual activity” includes _____ [*describe underlying criminal offense*].]

(B) “Using a means or facility of interstate commerce” includes using the internet or the telephone.

(3) [It is not necessary that the government prove that the sexual activity occurred.]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

If the indictment charges unlawful sexual activity under paragraph (2)(A) and that offense has an age standard of less than 18 years, substitute the younger age or age range in paragraphs (1)(A) and (1)(C).

If the government alleges jurisdiction under the special maritime and territorial jurisdiction of the United States under § 2422(b), paragraph (1)(B) should be modified.

If the charge is based on an attempted violation of § 2422(b), an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. Attempt liability is discussed further in the commentary below.

If interstate commerce is an issue in the case, a more detailed definition of that term may be required. See, e.g., Inst. 15.05(2)(F)(I).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through August 1, 2016)

This instruction is based on § 2422(b), which provides:

§ 2422. Coercion and enticement

...

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

In paragraph (1), the elements are based on § 2422(b) and *United States v. Hart*, 635 F.3d 850, 855 (6th Cir. 2011). For paragraph (1)(B), which states the jurisdictional requirement, the statute also covers situations when the defendant acted within the special maritime and territorial jurisdiction of the United States. See § 2422(b). If the government alleges this jurisdictional basis, paragraph (1)(B) should be modified. Element (1)(C), that the defendant knew the victim was under 18, is based on *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994), in which the Court held that the scienter requirement of knowingly in § 2252(a) extended both to the sexually explicit nature of the material and to the age of the performers.

In paragraph (2)(A), the definition of prostitution is drawn from Seventh Circuit Pattern Criminal Instruction 18 U.S.C. § 2422(b) Enticement of a Minor – Elements, Committee Comment (2012 ed.). The definition of unlawful sexual activity is based on the statute; *see also* *United States v. Hart*, 635 F.3d 850, 855 (6th Cir. 2011). “Unlawful sexual activity” includes the production of child pornography as defined in subsection 2256(8), *see* § 2427. In paragraph (2)(B), the definition of using a means or facility of interstate commerce as including the internet or the telephone is based on *United States v. Fuller*, 77 F. App’x. 371, 378-79 (6th Cir. 2003) (unpublished).

Paragraph (3), which states that the government need not prove that the sexual act occurred, is based on *United States v. Fuller*, 77 F. App’x 371, 378 (6th Cir. 2003) (unpublished). This provision should be used only if relevant.

An augmented unanimity instruction on the underlying unlawful sexual activity is not required. The court explained:

Because 18 U.S.C. § 2422(b) criminalizes persuasion and the attempt to persuade, the government is not required to prove that the defendant completed or attempted to complete any specific chargeable offense. The government need only prove, and the jury unanimously agree, that the defendant attempted to persuade a minor to engage in sexual activity that would have been chargeable as a crime if it had been completed. . . . There is no requirement under 18 U.S.C. § 2422(b) that they had to unanimously agree on the specific type of unlawful sexual activity that he would have engaged in.

United States v. Hart, 635 F.3d 850, 855-56 (6th Cir. 2011).

This statute also makes it a crime to attempt to violate § 2422(b). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on attempt, the government need not prove that the defendant intended to actually engage in sexual activity but only that the defendant intended to persuade the minor to do so. *See* United States v. Hughes, 632 F.3d 956, 961 (6th Cir. 2011) (*citing* United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000)). *See also* United States v. Fuller, 77 F. App'x 371, 378 (6th Cir. 2003) (unpublished) (discussing the addition of attempt language to the statute in 1998). Similarly, if the charge is based on attempt, the government need not prove that the individual the defendant attempted to entice was actually under the age of 18. *See* United States v. Hart, 635 F.3d 850, 855 (6th Cir. 2011) (stating that the defendant had to believe the victim was less than 18); *see also Fuller* at 378 (citations omitted):

[A] defendant may be charged with knowingly attempting to persuade, induce, entice, or coerce a minor to engage in sexual activity even though he is mistaken as to the true age of the person with whom he admittedly communicated. Several courts have specifically held that a defendant may be convicted of attempted persuasion or enticement of a minor even though the defendant had been communicating with an adult FBI agent posing as a minor.

In *United States v. Roman*, 795 F.3d 511 (6th Cir. 2015), the court construed attempt liability under § 2422(b) to cover situations where the defendant communicated only with an adult intermediary and not with a minor child “if the defendant’s communications with that intermediary are intended to persuade, induce, entice or coerce the minor child’s assent to engage in prohibited sexual activity.” *Id.* at 516. The court explained, “We recognize that it is not sufficient to allege or prove that a defendant intended to persuade an adult intermediary to cause a child to engage in sexual activity. The gravamen of the attempt offense under § 2422(b) is the intention to achieve the minor’s assent.” *Id.* at 512.

16.10 TRANSPORTING A MINOR WITH INTENT THAT THE MINOR ENGAGE IN CRIMINAL SEXUAL ACTIVITY (18 U.S.C. § 2423(a))

(1) Count ____ of the indictment charges the defendant with knowingly transporting a minor with intent that the minor engage in criminal sexual activity. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly transported an individual.

(B) Second: That the individual transported was under 18 years of age.

(C) Third: That the defendant intended the individual to engage in [prostitution] [criminal sexual activity].

(D) Fourth: That the transportation was in interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert definition for the term(s) used in paragraph (1)(C)*]

--[“Prostitution” means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.]

--[“Criminal sexual activity” includes _____ [*describe underlying criminal offense*].]

[(B) The term “in interstate commerce” means the defendant transported the individual across a state line.]

[(3) The government is not required to prove the defendant knew that the person transported was a minor.]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Paragraph (1)(D) covers one option on jurisdiction, but the statute includes as well transportation in any “commonwealth, territory, or possession of the United States” The instruction does not include this as an option for the usual case, but the court should include it if appropriate on the facts.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through August 1, 2016)

This instruction covers the offense of transporting a minor with intent that the minor engage in criminal sexual activity. That offense is defined in 18 U.S.C. § 2423(a), which provides:

(a) Transportation with intent to engage in criminal sexual activity. A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

The elements of the crime identified in paragraph (1) are based on this statute. *See also* United States v. Chambers, 441 F.3d 438, 450 (6th Cir. 2006) (listing the elements of § 2423(a) as applicable to the facts of that particular case).

In paragraph (2)(A), the definition of prostitution is drawn from Seventh Circuit Pattern Criminal Instruction 18 U.S.C. § 2423(a) Transportation of Minors with Intent to Engage in Criminal Sexual Activity – Elements, Committee Comment (2012 ed.). The definition of criminal sexual activity is based on the statute; *see also* United States v. Wise, 278 F. App'x 552, 559-60 (6th Cir. 2008) (unpublished) (referring to “sexual activity . . . for which any person could be charged with a crime”).

Paragraph (3), stating that the government need not prove that the defendant knew the person transported was a minor, is based on United States v. Daniels, 653 F.3d 399, 409-10 (6th Cir. 2011) (“[T]he context of § 2423(a) dictates that the government did not need to prove that [defendant] knew SD was a minor.”). This provision should be used only if relevant.

This statute also makes it a crime to attempt or conspire to violate § 2423(a). *See* § 2423(e). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2423(e) do not require an overt act, *see* Whitfield v. United States, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

16.11 TRAVELING WITH INTENT TO ENGAGE IN ILLICIT SEXUAL CONDUCT (18 U.S.C. § 2423(b))

(1) Count ____ of the indictment charges the defendant with traveling with intent to engage in illicit sexual conduct. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant traveled [in interstate commerce] [into the United States].

(B) Second: That the defendant did so with intent to engage in illicit sexual conduct.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “illicit sexual conduct” includes

[(1) a sexual act with a person under 18 years of age that would consist of *[describe crime from 18 U.S.C. §§ 2241, 2242, 2243, or 2244 alleged in the indictment].*]

or

[(2) any commercial sex act with a person under 18 years of age. A commercial sex act is any sex act for which anything of value is given to or received by any person.]

[(B) The term “in interstate commerce” means the defendant traveled across a state line.]

[(3) The government is not required to prove that the defendant took any steps to entice, coerce, or persuade the person under 18 years of age to engage in sexual conduct.]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Notes

Paragraph (1)(A) covers two options on the defendant’s travel, but the statute includes as well a third option stating that the defendant is a “United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce.” The instruction omits this third option because it arises infrequently, but the court should include it if appropriate in the case.

Paragraph (2)(A)(1), which provides the first definition for illicit sexual conduct, uses the term “a sexual act.” The instruction does not define this term, but if the issue is raised in the case, the court should use the definition in 18 U.S.C. § 2246(2).

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary
(current through August 1, 2016)

This instruction covers the offense of traveling with intent to engage in illicit sexual conduct. That offense is defined in 18 U.S.C. § 2423(b), which provides:

(b) Travel with intent to engage in illicit sexual conduct. A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

The two elements of the crime identified in paragraph (1) are based on the statute, and they adopt the court's approach in *United States v. DeCarlo*, 434 F.3d 447, 456 (6th Cir. 2006). In *DeCarlo*, the court described the crime using two elements and a multi-part definition of illicit sexual conduct.

In paragraph (1)(A), the language requiring the defendant to travel "in interstate commerce" or "into the United States" is based on the statute, § 2423(b), quoted above. The statute includes as a third option that the defendant is a "United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce." The instruction omits this third option because it arises infrequently, but the court should include it if the issue is raised in the case.

In the introductory language of paragraph (1) and in paragraph (1)(B), the instruction uses the phrase "with intent to" rather than the statutory phrase "for the purpose of" based on *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) (explaining that § 2423(b) requires "an intent to" engage in sexual conduct) and *DeCarlo, supra* at 456 (explaining that under § 2423(b), the government had to prove that the defendant "intended to engage" in illicit sexual conduct).

In paragraph (2)(A), the two definitions of illicit sexual conduct are drawn from § 2423(f), which provides:

(f) Definition. As used in this section, the term "illicit sexual conduct" means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

The options for defining illicit sexual conduct in paragraphs (2)(A)(1) and (2)(A)(2) are based on subsections (f)(1) and (f)(2), respectively.

For the first definition of illicit sexual conduct, paragraph (2)(A)(1) uses the term “sexual act.” As quoted above, § 2423(f)(1) refers to the definition of “sexual act” in § 2246. Subsection 2246(2) provides:

(2) the term "sexual act" means--

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person

The instruction does not include these definitions of sexual act for the usual case, but the court should include a definition if the issue is raised by the facts.

Subsection 2423(f)(1) provides that to qualify as illicit sexual conduct, the sexual act must be an act “that would be in violation of chapter 109A” Chapter 109A Sexual Abuse includes four statutes defining offenses, 18 U.S.C. §§ 2241, 2242, 2243, and 2244. In paragraph (2)(A)(1), the instruction indicates in an italicized note to the court that it should describe how the defendant’s conduct alleged in the indictment would consist of a violation of §§ 2241 to 2244. *See, e.g., Wise, supra at 559* (stating the evidence was sufficient because the defendant’s conduct would have violated § 2243(a)).

For the second definition of illicit sexual conduct, which is based on § 2423(f)(2), paragraph (2)(A)(2) uses the term “commercial sex act” and defines it as “any sex act, on account of which anything of value is given to or received by any person.” *See* § 1591(e)(3).

For paragraph (3), which provides that the government need not prove that the defendant took any steps to entice, coerce, or persuade the minor to engage in sexual conduct, see *United States v. Hughes*, 632 F.3d 956, 961 (6th Cir. 2011) (stating that § 2423(b) requires the defendant to travel with the intent to engage in sexual conduct, but does not require an element of enticement or coercion). *Cf.* Inst. 16.09 Coercion and Enticement: Persuading a Minor to Engage in Prostitution or Unlawful Sexual Activity (18 U.S.C. § 2422(b)) (providing that the defendant must persuade, induce, entice, or coerce a minor to engage in sexual activity). The provision in paragraph (3) should be used only if relevant.

This statute also makes it a crime to attempt or conspire to violate § 2423(b). *See* § 2423(e). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 2423(e) do not require an overt act, *see Whitfield v. United States*, 543 U.S.

209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense—Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

Section 2423(g) provides as follows:

(g) Defense. In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.

The text of the instruction does not refer to this defense, but if the prosecution is based on the definition of illicit sexual conduct involving a commercial sex act as defined in paragraph (2)(A)(2), and the defense is raised in the case, the court should include an instruction on the defense. In that case, the court may also include a definition of the term preponderance, *see, e.g.*, Inst. 6.05(4).

16.12 SEX TRAFFICKING (18 U.S.C. § 1591(a)(1))

(1) Count ____ of the indictment charges the defendant with sex trafficking [of children] [by force, fraud or coercion]. For you to find the defendant guilty of this offense, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly [recruited] [enticed] [harbored] [transported] [provided] [obtained] [maintained] [*insert person identified in the indictment*].

(B) Second, that the defendant [knew] [recklessly disregarded] the fact that [*insert at least one of the two options below*]

-- [[force] [threats of force] [fraud] [coercion] would be used to cause [*insert person identified in the indictment*] to engage in a commercial sex act]

or

--[[*insert person identified in the indictment*] was under 18 years old and would be caused to engage in a commercial sex act].

(C) Third, that the offense was [in] [affected] interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

[(A) The term “coercion” means [*insert one or more from three options below*]

– [threats of harm to or physical restraint against any person]

– [any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person]

– [the abuse or threatened abuse of law or the legal process].]

[(B) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.]

[(C) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.]

[(D) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.]

[(E) The phrase “the offense was in interstate [foreign] commerce” means that the offense involved the crossing of a state [national] line.

[(F) The phrase “the offense affected interstate [foreign] commerce” means that the prohibited [recruiting] [enticing] [harboring] [transporting] [providing] [obtaining] [maintaining] of [*insert person identified in the indictment*] had at least a minimal connection with interstate [foreign] commerce. This means that the [recruiting] [enticing] [harboring] [transporting] [providing] [obtaining] [maintaining] of [*insert person identified in the indictment*] had some effect upon interstate [foreign] commerce.]

[(G) The phrase “interstate commerce” means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase “foreign commerce” means commerce between any state, territory or possession of the United States and a foreign country.] [The term “commerce” includes, among other things, travel, trade, transportation and communication.]]

[(3)(A) The government is not required to prove that [the defendant knew [*insert person identified in the indictment*]] was under 18 years old if the defendant had a reasonable opportunity to observe [*insert person identified in the indictment*].]

[(3)(B) To establish that the offense was in or affected interstate commerce, the government need not prove that [[*insert person identified in the indictment*] was transported across a state line] [the idea of sex trafficking was formed in one state and then carried out in a different state].]

(4) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Paragraph (1)(A) omits the statutory language “by any means” for the usual case but it may be added if relevant.

Paragraph (1)(B) omits the statutory language “or any combination of such means” for the usual case but it may be added if relevant.

Paragraph (1)(C) assumes that jurisdiction is based on the phrase “in or affecting interstate or foreign commerce.” If jurisdiction is based on the “special maritime and territorial jurisdiction of the United States,” the instruction may be modified.

Bracketed paragraphs (2)(B) and (2)(C), which provide the statutory definitions for the terms “serious harm” and “abuse or threatened abuse of the law or legal process” respectively, should be tailored to fit the fact of the case.

In paragraph (2), the bracketed definitions should be used only if relevant.

In paragraph (3), the bracketed items that the government need not prove should be used only if relevant.

Brackets indicate options for the court. Bracketed italics are notes to the court.

Committee Commentary (current through August 1, 2016)

This instruction covers the offense of sex trafficking of children or by force, fraud or coercion. That offense is defined in 18 U.S.C. § 1591(a)(1), which provides:

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person;

. . .

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished

The elements of the crime identified in paragraph (1) are based on §1591(a)(1). In paragraph (1)(C), the language requiring that “the offense” was in or affected interstate or foreign commerce is based on *United States v. Flint*, 2008 U.S. Dist. LEXIS 86765 at 3 (E.D. Mich. 2008), *aff’d*, 394 F. App’x 273 (6th Cir. 2010).

In paragraph (2)(A), the definition of “coercion” is drawn verbatim from § 1591(e)(2). One definition of coercion uses the term “serious harm,” which is defined in paragraph (2)(B) based on § 1591(e)(4). Another definition of coercion uses the term “abuse or threatened abuse of law or the legal process,” which is defined in paragraph (2)(C) based on § 1591(e)(1). In paragraph (2)(D), the term “commercial sex act” is defined based on § 1591(e)(3).

In paragraphs (2)(E) and (2)(F), the definitions of “in” or “affected” commerce presumes that the commerce involved is “interstate” commerce, and the bracketed term “foreign” should be substituted or added if warranted by the facts.

In paragraph (2)(F), the definition of affected interstate commerce as requiring “at least a minimal connection” with interstate commerce is drawn from the instructions approved in *United States v. Gros*, 824 F.2d 1487, 1494 (6th Cir. 1987) in the context of the offense of possessing five or more false identification documents under § 1028(a)(3). To use plain English, the instruction substitutes the word “connection” for “nexus” and substitutes “at least” for “no more than.” *See also* *United States v. Willoughby*, 742 F.3d 229, 240 (6th Cir. 2014) (stating in § 1591(a) case that phrase “affecting commerce” indicates Congress’ intent to regulate to the outer limits of its authority under the commerce clause).

The Sixth Circuit has decided one case on whether the government presented sufficient evidence of an effect on commerce under § 1591. In *Willoughby*, an effect on commerce was established by (1) the defendant’s purchase for the victim of clothes and condoms manufactured out-of-state; (2) the defendant’s use of a Chinese-made cell phone in furtherance of sex-trafficking; and (3) Congress’ conclusion that in the aggregate, sex-trafficking substantially affects interstate and foreign commerce, *see* 22 U.S.C. § 7101(b)(12). The court also noted parenthetically that Congress has the power to regulate the instrumentalities of commerce, and a cell phone is such an instrumentality. *Willoughby*, 742 F.3d at 240.

In addition, panels of the Sixth Circuit have twice concluded that the government proved a sufficient effect on commerce under § 1591. *See* *United States v. Tutstone*, 525 F. App’x 298, 303 (6th Cir. 2013) (unpublished) (effect sufficient where defendant used cell phone involving parts and towers manufactured internationally; cell phone calls may have been routed across state lines; call data were routed to a billing gateway in another state; and any calls that were wire-tapped were routed across state lines to Quantico, Virginia) and *United States v. Flint*, 394 F. App’x 273, 277 (6th Cir. 2010) (unpublished) (effect sufficient where defendant drove victim from Ohio to Michigan to engage in prostitution; in Michigan, the victim did engage in prostitution, the defendant purchased drugs, clothing, hair extensions and fake nails for the victim, and the defendant rented a hotel room that served out-of-state travelers).

Paragraph (3) lists items the government need not prove. The option in paragraph (3)(A) (that the government need not prove that the defendant knew the victim was under 18 years old if the defendant had a reasonable opportunity to observe the victim) is adapted from § 1591(c). The options under paragraph (3)(B) that the government need not prove to establish jurisdiction based on commerce are based on *United States v. Flint*, 394 F. App’x 273, 277 and 278 (6th Cir. 2010) (unpublished).

The mens rea stated in paragraph (1)(B), that the defendant knew or recklessly disregarded the fact that the victim would be caused to engage in a commercial sex act, does not require that the defendant be certain as to the future act. *See* *United States v. Tutstone*, 525 F. App’x 298, 304-05 (6th Cir. 2013) (unpublished) (*quoting* *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010)).

It is also a crime to attempt or conspire to violate § 1591. *See* 18 U.S.C. §§ 1594(a) (attempt) and 1594(c) (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled using the instructions in Chapter 3

Conspiracy with one caveat. Conspiracies under § 1594(c) do not require an overt act, *see* *Whitfield v. United States*, 543 U.S. 209, 213-14 (2005) (holding that when Congress omits an explicit reference to an overt act in a conspiracy statute, it dispenses with that requirement), so Instruction 3.01A Conspiracy to Commit an Offense–Basic Elements should be modified to omit paragraph (2)(C). All other references to overt acts should be deleted as well.

The punishment for this crime is a mandatory minimum term of 10 years in prison. See § 1591(b)(2). This mandatory minimum is increased to 15 years if the defendant used force, fraud or coercion, or if the victim was under 14 years old. See § 1591(b)(1). Any fact that triggers a mandatory minimum penalty constitutes an element of the offense and must be submitted to the jury and proved beyond a reasonable doubt. *Alleyne v. United States*, 133 S. Ct. 2151 (2013). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).