**20.18 Sexual Exploitation of Child**

**(18 U.S.C. § 2251(a))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with sexual exploitation of a child in violation of Section 2251(a) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [*name of victim*] was under the age of eighteen years;

Second, the defendant

[[employed] [used] [persuaded] [induced] [enticed] [coerced]] [*name of victim*] to take part in sexually explicit conduct]

*or*

[had [*name of victim*] assist any other person to engage in sexually explicit conduct]

*or*

[transported [*name of victim*] [[across state lines] [in foreign commerce] [in any Territory or Possession of the United States]] with the intent that [*name of victim*] engage in sexually explicit conduct]

[for the purpose of producing a visual depiction of such conduct] [for the purpose of transmitting a live visual depiction of such conduct]; and

Third,

[the defendant knew or had reason to know that the visual depiction would be transported or transmitted across state lines or in foreign commerce or mailed.]

*or*

[the visual depiction was produced or transmitted using materials that had been mailed, shipped, or transported across state lines or in foreign commerce, including by computer.]

*or*

[the visual depiction was actually transported or transmitted across state lines or in foreign commerce using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.]

In this case, “sexually explicit conduct” means [*specify statutory definition*].

In this case, “producing” means [*specify statutory definition*].

In this case, “visual depiction” means [*specify statutory definition*].

**Comment**

“Sexually explicit conduct” is defined in 18 U.S.C. § 2256(2).

“Producing” is defined in 18 U.S.C. § 2256(3).

“Visual depiction” is defined in 18 U.S.C. § 2256(5).

This instruction does not address that portion of the statute that prohibits “transmitting a live visual depiction.” If that is the charge before the court, this instruction should be modified accordingly.

Knowledge of the age of the minor victim is not an element of the offense. *United States v. U.S. Dist. Ct.*, 858 F.2d 534, 538 (9th Cir. 1988); *see also United States v. X–Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) (“[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . . .”) (dicta). *But see* Instruction 20.24 (Sexual Exploitation of a Child—Defense of Reasonable Belief of Age).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(a). For a definition of computer, *see* 18 U.S.C. §§ 1030(e)(1) and 2256(6).

*See United States v McCalla*, 545 F.3d 750, 753-56 (9th Cir. 2008) (holding that applying § 2251(a) to noncommercial intrastate production did not violate Commerce Clause; Congress had broad interest in preventing interstate sexual exploitation of children and it was rational for Congress “to conclude that homegrown child pornography affects interstate commerce”).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually abuse or exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed “involve” such sexual exploitation by the producer. The defendant must also have been “directly involved in the actual sexual abuse or exploitation of minors.” *See United States v. Kemmish*, 120 F.3d 937, 941-42 (9th Cir. 1997).

The term “used” in the second element of this instruction means “to put into action or service,” “to avail oneself of,” or “[to] employ.” *United States v. Laursen*, 847 F.3d 1026, 1032 (9th Cir. 2017) (internal quotations omitted); *see also* *United States v. Boam*, 69 F.4th 601 (9th Cir. 2023) (surreptitious bathroom recordings that capture a minor’s genitals can constitute “use” of minor); *United States v. Mendez*, 35 F.4th 1219 (9th Cir. 2022) (surreptitious filming of minor engaged in sexually explicit conduct satisfies “use” element).

The third element of this instruction reflects § 2251(a)’s three alternative grounds for federal jurisdiction. Only the first of the three grounds requires a particular mental state of the defendant. The “knows or has reason to know” language from the statute’s first jurisdictional clause does not impute a knowledge requirement to the other two clauses. *United States v. Sheldon*, 755 F.3d 1047, 1049-50 (9th Cir. 2014) (testimony at trial that video recorder used in Montana was manufactured in China sufficient to satisfy jurisdictional element of § 2251(a)).

With respect to “lascivious exhibition of the anus, genitals, or pubic area of any person” as contained in the statutory definition of “sexually explicit conduct,” when determining whether a picture or image is sexually explicit conduct, a jury may consider as a starting point the following 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. *United States v. Perkins*, 850 F.3d 1109, 1121 (9th Cir. 2017) (quoting *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff’d sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)).

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