**20.19 Sexual Exploitation of Child—Permitting or Assisting**

**by Parent or Guardian** **(18 U.S.C. § 2251(b))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with sexual exploitation of a child in violation of Section 2251(b) 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 was a [parent] [legal guardian] [person having custody or control] of [*name of victim*];

Third, the defendant knowingly permitted [*name of victim*] to [engage in sexually explicit conduct] [assist any other person to engage in sexually explicit conduct] for the purpose of producing a visual depiction of such conduct; and

Fourth,

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

*or*

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

*or*

[the visual depiction was actually mailed or transported across state lines or in foreign commerce.]

*or*

[the visual depiction affected interstate commerce.]

The term “custody or control” includes temporary supervision over or responsibility for a minor, whether legally or illegally obtained.

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).

“Custody or control” is defined in 18 U.S.C. § 2256(7).

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.

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b). 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).

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