**20.21 Sexual Exploitation of Child—Notice or Advertisement**

**Seeking or Offering** **(18 U.S.C. § 2251(d))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with sexual exploitation of a child in violation of Section 2251(d) 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 knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Third, the [[notice] [advertisement]] [[sought] [offered]]

[to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction, if the production of the visual depiction utilized [*name of victim*] engaging in sexually explicit conduct and such visual depiction is of such conduct; and]

*or*

[participation in any act of sexually explicit conduct [[by] [with]] [*name of victim*] for the purpose of producing a visual depiction of such conduct; and]

[Fourth, the defendant knew or had reason to know that the [notice] [advertisement] would be transported [using any means or facility of interstate commerce] [in or affecting interstate commerce] by any means including by computer or by mail.]

*or*

[Fourth, the [notice] [advertisement] was transported [using any means or facility of interstate commerce] [in or affecting interstate commerce] by any means including by computer or by mail.]

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

In this case, “producing” means [*producing 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).

“Notice” and “advertisement” are not defined in the statute, but what constitutes a notice or advertisement is a factual question, not a legal one. *See United States v. Brown*, 859 F.3d 730, 736-37 (9th Cir. 2017) (holding Sixth Amendment violated when trial court precluded defendant from arguing that charged postings, encrypted and on closed, password-protected online bulletin board, did not constitute notice or advertisement). One-to-one communication can satisfy the notice requirement under 18 U.S.C. § 2251(d)(1). *See United States v. Cox*, 963 F.3d 915, 922 (9th Cir. 2020).

*See United States v. McCalla*, 545 F.3d 750, 756 (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 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).

Under 18 U.S.C. § 2251(d)(1)(A) “[t]here is no requirement that a defendant personally produce child pornography in order for criminal liability to attach.” *United States v. Williams*, 659 F.3d 1223, 1225 (9th Cir. 2011).

*Revised Dec. 2020*