**20.23 Sexual Exploitation of Child—Possession of**

**Child Pornography** **(18 U.S.C. § 2252(a)(4)(B))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with possession of child pornography in violation of Section 2252(a)(4)(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, the defendant knowingly possessed [books] [magazines] [periodicals] [films] [video tapes] [matters] that the defendant knew contained [a] visual depiction[s] of [a] minor[s] engaged in sexually explicit conduct;

Second, the defendant knew [each] [the] visual depiction contained in the [[books] [magazines] [periodicals] [films] [video tapes] [matters]] [[was of] [showed]] [a] minor[s] engaged in sexually explicit conduct;

Third, the defendant knew that production of such [a] visual depiction[s] involved use of a minor in sexually explicit conduct; and

Fourth, [each] [the] visual depiction had been

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

*or*

[produced using material that had been [[mailed] [shipped] [transported]] [[using any means or facility of interstate commerce] [in or affecting interstate commerce]] by any means including by computer].

“Visual depiction” includes undeveloped film and video tape, and data stored on a computer disk or data stored by electronic means and capable of conversion into a visual image. *See* 18 U.S.C. § 2256(5).

A “minor” is any person under the age of 18 years. 18 U.S.C. § 2256(1).

“Sexually explicit conduct” means actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person. *See* 18 U.S.C. § 2256(2).

“Producing” means producing, directing, manufacturing, issuing, publishing, or advertising. 18 U.S.C. § 2256(3).

**Comment**

Before 1998, 18 U.S.C. § 2252(a)(4) required the possession of at least three visual depictions before an offense had occurred. As part of the Protection of Children from Sexual Predators Act of 1998, Congress amended § 2252(a) to prohibit possession of one visual depiction. At the same time, Congress added 18 U.S.C. § 2252(c), which provides an affirmative defense when, under certain circumstances, the defendant possessed “less than three matters containing any visual depiction.” If such a defense has been raised, care should be taken in revising the instruction so that the jury is not confused.

The definitions of “minor,” “sexually explicit conduct,” “producing,” and “visual depiction” are derived from 18 U.S.C. § 2256(1), (2), (3), and (5), respectively. Interstate or foreign commerce is defined by 18 U.S.C. § 10. “Matter” is a physical medium capable of containing images, such as a computer hard drive or disk. *United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997).

*See Lacy*, 119 F.3d at 748 (jury instruction for possession of child pornography must include as element whether defendant knew “matter” in question contained unlawful visual depictions; such depiction may be “produced” when defendant downloads visual depictions from Internet); *see also United States v. Romm,* 455 F.3d 990, 1002-05 (9th Cir. 2006) (addressing adequacy of jury instructions regarding “visual depiction” and “knowing possession”).

*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”).

*Free Speech Coalition v. Reno*, 198 F.3d 1083, 1087-97 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

The statute was unconstitutionally applied to a mother who possessed a family photo showing herself and her young daughter exposed because the photo was meant entirely for personal use, no economic or commercial use was intended, and such possession had no connection with, or effect on, the national or international commercial child pornography market. *United States v. McCoy*, 323 F.3d 1114, 1132 (9th Cir. 2003). *But see* *McCalla*, 545 F.3d at 756 (holding that any reasoning in *McCoy* relying on local nature of activity was overruled by *Gonzalez v. Raich*, 545 U.S. 1 (2005)).

Expert testimony (*e.g.*, that the images were not computer generated) is not required for the government to establish that the images depicted an actual minor. *United States v. Salcido*, 506 F.3d 729, 733-34 (9th Cir. 2007).

The simultaneous possession of different materials containing offending images at a single time and place constitutes a single violation of the statute. *United States v. Chilaca*, 909

F.3d 289, 295 (9th Cir. 2018).

Possession of materials involving the sexual exploitation of minors under § 2252(a)(4)(B) may be, but is not necessarily, a lesser included offense of distribution of such materials under § 2252(a)(2). *See United States v. McElmurry*, 776 F.3d 1061, 1063-65 (9th Cir. 2015). However, possession is always a lesser included offense of receiving child pornography, because “[i]t is impossible to ‘receive’ something without, at least at the very instant of ‘receipt,’ also ‘possessing’ it.” *United States v. Davenport*, 519 F.3d 940, 943-44 (9th Cir. 2008). When possession is charged along with either receipt or distribution, the court should ensure that the “separate conduct” requirement under the Double Jeopardy Clause has been satisfied.  *See* *generally* *United States v. Teague*,722 F.3d 1187, 1190-93 (9th Cir. 2013). This could be done either with an appropriate instruction directing that separate conduct be found or by providing the jury with a special verdict form that requires the jury to identify the conduct supporting each conviction.  *See* *id.* at 1193.

*See* Model Instruction 20.18 Sexual Exploitation of Child (18 U.S.C. § 2251(a)) for the factors to consider regarding a “lascivious exhibition of the anus, genitals, or pubic area of any person” as contained in the statutory definition of “sexually explicit conduct.”

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