

cross reference requires application of § 2G2.2 if the offense “involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic)”. In *Sromalski*, the appellate court found that in cases involving possession of child pornography where receipt can be shown, the cross reference at § 2G2.4(c)(2) applies only if the receipt involved the intent to traffic. Thus, under the Seventh Circuit’s interpretation of the guidelines, convictions for receipt of child pornography (which do not require proof of an intent to traffic) are sentenced under § 2G2.2, but convictions for possession of child pornography, even where receipt can be shown, are sentenced under § 2G2.4 unless there is proof of receipt with an intent to traffic. The proposed amendment provides an option that clarifies that the cross reference should be applied without regard to whether or not there was offense conduct that involved receipt with an intent to traffic.

In addition, the proposed amendment makes the following clarifying and conforming changes to § 2G2.4 in response to changes made to § 2G2.2:

(1) Expands use of a computer enhancement at § 2G2.4(b)(3) to include “interactive computer services”.

(2) Provides a definition of “computer”.

(3) Provides a definition of “image” for purposes of applying the enhancement at § 2G2.4(b)(5).

(4) Makes clear that, for purposes of the cross reference at § 2G2.4(c)(1), the definition of “minor” includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

#### C. Consolidation of §§ 2G2.2 and 2G2.4

This part of the proposed amendment consolidates §§ 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), and 2G2.4 (Possession of

Materials Depicting a Minor Engaged in Sexually Explicit Conduct, into one guideline, § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners regarding difficulties in determining the appropriate guideline (§ 2G2.2 or § 2G2.4) for cases involving convictions of 18 U.S.C. 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

This proposed consolidation provides two options for the base offense level. Option One provides alternative base offense levels of (1) level [15][18][20] if (A) the conduct was limited to the possession, receipt, or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; (2) level [22][24][26] for all other offenses. Option Two provides three alternative base offense levels of (1) level [15][18][20] if the defendant’s conduct was limited to the possession of material involving the sexual exploitation of a minor without an intent to traffic in, or distribute, such material; (2) level [20][22][24] if (A) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (3) level [22][24][25][26] for all other offenses sentenced at this guideline. The proposed consolidation would subject § 2G2.4 cases to enhancements if the offense involved distribution or if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. Currently, these enhancements do not exist in § 2G2.4

#### D. Production Offenses Under § 2G2.1

Section 103 of the PROTECT Act increases the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to production of child pornography under 18 U.S.C. 2251. This section also increases the statutory maximum term of imprisonment for these offenses from 20 to 30 years. As a result, this proposed amendment increases the base offense level in § 2G2.1 from level 27 to level [30][32][34][35][36] to reflect the new 15

year mandatory minimum term of imprisonment. Furthermore, the proposed amendment adds a number of enhancements that may be associated with the production of child pornography. The addition of these enhancements also helps to maintain the proportionality between these offenses and offenses covered under § 2G2.2. The proposed enhancements increase the offense level if the offense involved any of the following: (1) Material that portrays sadistic or masochistic conduct; (2) the commission of a sexual act or sexual contact; (3) conduct described in 18 U.S.C. 2241(a) or (b); and (4) distribution.

The proposed amendment also adds to the commentary of § 2G2.1 definitions of “sexual act”, “sexual contact”, “sexually explicit conduct”, “computer”, “interactive computer service”, “minor”, and “distribution”.

#### II. Travel and Transportation Cases

This proposed amendment creates a new guideline, § 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under Chapter 117 of title 18, United States Code (Transportation for Illegal Sexual Activity and Related Crimes). Currently, Chapter 117 offenses, primarily 18 U.S.C. 2422 (coercion and enticement) and 2423 (transportation of minors), are referenced by Appendix A to either § 2G1.1 or § 2A3.2. Offenses under 18 U.S.C. 2422 and 2423(a) (transportation with intent to engage in criminal sexual activity) are referenced to § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct) but are cross referenced from § 2G1.1 to § 2A3.2 (Statutory Rape) to account for underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. 2423(b) (travel with intent to engage in sexual act with a juvenile) are referenced to § 2A3.1, § 2A3.2, or § 2A3.3, but most are sentenced at § 2A3.2. Until recently, the majority of cases sentenced under § 2A3.2 were statutory rape cases that occurred on Federal property (e.g. military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline were coercion, travel, and transportation offenses.