

Child Pornography Circuit Conflicts:

US Sentencing Commission / 2016 Amendments Effective November 1st

The Commission amended the child pornography guidelines to resolve circuit conflicts and inconsistent application of the guidelines in two areas. One part of the amendment addresses cases involving infants and toddlers, and the other addresses how to account for distribution of child pornography over peer-to-peer networks.

The guideline governing the trafficking, receipt, and possession of child pornography is amended to address distribution of child pornography using peer-to-peer networks. Based on testimony, public comment, and data analysis, the Commission determined that the 2-level distribution enhancement is appropriate only in cases in which the defendant knowingly engaged in distribution.

The amendment also revises §2G2.2(b)(3)(B) and commentary to clarify that the 5-level distribution enhancement applies “if the defendant distributed in exchange for any valuable consideration.” The new language is intended to account for the higher level of culpability when the defendant agrees with another person to knowingly distribute child pornography for the specific purpose of receiving something of value.

Valuable Consideration Can Mean:

- *Other child pornographic material;*
- *Preferential access to child pornographic material;*
- *Access to a child;*
- *Faster download speeds;*
- *Or any other benefit.*

The amendment makes the same changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

The child pornography guidelines at §§2G2.1 (Production) and & 2G2.2 (Trafficking / Receipt/Possession) are also amended to address offenses involving images of infants and toddlers. A 4-level increase now applies if the material portrays sadistic or masochistic conduct or other depictions of violence, OR, if the offense involves the sexual abuse or exploitation of an infant or toddler. In some courts, defendants with images of infants or toddlers also received a 2-level increase for vulnerable victim, based on infants’ and toddlers’ extreme vulnerability. Now that the

guideline has been amended to account specifically for images involving infants and toddlers, the additional 2-level increase for vulnerable victim no longer applies.

Quotable

“In fiscal year 2015, 2,003 (2.8%) of the 71,003 offenders sentenced in the federal system were sentenced with one of two child pornography guidelines or the obscenity guideline as their primary guideline.”

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts’ sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.