

**CHILD SEX OFFENSE
WORKING GROUP REPORT**

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CHILD SEX OFFENSE WORKING GROUP REPORT

I. INTRODUCTION

The 101st Congress has directed that "[t]he United States Sentencing Commission . . . amend existing guidelines for sentences involving sexual crimes against children, including offenses contained in chapter 109A of title 18, so that more substantial penalties may be imposed if the Commission determines current penalties are inadequate." Public Law 101-647, §321. In response to this mandate, the Child Sex Offense Working Group has conducted a study of the sentences imposed pursuant to the following sentencing guidelines:

1. U.S.S.G. §2A3.1 Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse
2. U.S.S.G. §2A3.2 Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts
3. U.S.S.G. §2A3.3 Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts
4. U.S.S.G. §2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact
5. U.S.S.G. §2A4.1 Kidnapping, Abduction, Unlawful Restraint
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8. U.S.S.G. §2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic
9. U.S.S.G. §2G2.3 Selling or Buying of Children for Use in the Production of Pornography
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11. U.S.S.G. §2G2.5 Recording Offenses Involving the Production of Sexually Explicit Materials
12. U.S.S.G. §2G3.1 Importing, Mailing, or Transporting Obscene Matter

The working group has reviewed case files from the Commission's monitoring unit, literature on child pornography and child sexual abuse, appellate case law, legislative history, previous amendments to the guidelines, and information from the Commission's technical assistance and evaluation units.

The report contains a brief description of each guideline, its statutory penalties and pertinent legislative history, previous amendments and case analysis. Under each guideline, we have identified issues for consideration by the Commission. The working group has also provided a summary of the data from the evaluation and technical assistance units, tables on the data from the monitoring unit, and a synopsis of relevant case law.

The working group has noted some minor inconsistencies in language between guidelines where an amendment may be appropriate. Additionally, the Commission may wish to consider adding cross references or specific offense characteristics to some guidelines to more appropriately reflect the seriousness of the harm. Several guidelines warrant further study because of the limited number of cases sentenced under those guidelines to date. Other guidelines appear to be working as intended.

II. PRESENTATION OF DATA - CHILD SEX OFFENSE GUIDELINES

PART A - OFFENSES INVOLVING CRIMINAL SEXUAL ABUSE AND KIDNAPPING OF MINORS

§2A3.1. Criminal Sexual Abuse: Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

A. Discussion of Guideline and Statutory Provisions

Section 2A3.1 applies to convictions for aggravated sexual abuse, 18 U.S.C. § 2241, the most serious federal sex offense, and to convictions for sexual abuse, 18 U.S.C. § 2242. These provisions were codified as part of the Sexual Abuse Act of 1986. These two statutes prohibit engaging in "sexual acts" in the special maritime and territorial jurisdiction of the United States or a federal prison in circumstances involving force or threats or the administering of a drug, intoxicant or other similar substance. Subsection (c) of 2241 makes it an offense to knowingly engage in a sexual act with a person under 12 years old, or attempt to do so. It proscribes noncoercive conduct in

which "older more mature persons take advantage of others whose capability to make judgments about sexual activity has not matured."¹ Aggravated sexual abuse carries a statutory maximum term of life imprisonment and a fine. Sexual abuse has a maximum penalty of 20 years and a fine.

Section 2A3.1 has a base offense level of 27 and "represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement [of 4 levels] is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon."² The guideline also provides for a 2-level enhancement if the victim is less than 16 years old and a 4-level enhancement where the victim is less than 12 years old. Thus, if the defendant committed aggravated sexual abuse by force with a child less than 12, his offense level would be 35 rather than 27. Offense level 35 requires a sentence of at least 18 years imprisonment for a first offender, unless the court finds factors justifying a downward departure. In one of the most serious child sex crimes contemplated, abduction and forcible rape of a child under 12 in the custody or care of the defendant, where the victim suffers permanent or life threatening injury, the offense level would be 45. An offense level of 45 requires a sentence of life imprisonment without parole, even for a first offender.³

B. Amendments to §2A3.1

Section 2A3.1 was amended on two occasions: **November 1, 1989, and November 1, 1991.** (See Appendix A.)

C. Case Analysis

The child sex offense working group reviewed 45 of the 47 cases⁴ sentenced pursuant to U.S.S.G. §2A3.1 during fiscal year 1990. Twenty-eight of the cases involved child victims. Of those 28 cases, 25 of them were sentenced in the lowest three ranges: eleven of the cases were in the lower end of guideline range, thirteen at the bottom of the range, and one below the guideline range. There were no upward departures. (See Appendix B.) The sentences ranged from a low of 72 months to a high of 300 months.

¹Legislative History, P.L. 99-654 p. 6195.

²Background commentary to §2A3.1.

³These calculations do not take Chapter Three Adjustments into consideration.

⁴Two cases were unavailable.

In eleven of the cases, the defendant was either a parent or other relative of the victim. The victims' ages ranged from six to 17. In one of the cases, an eight year old victim contracted gonorrhea from her assailant. The defendant's guideline range was 87-108 months, and the court sentenced him to 87 months imprisonment. Six of the defendants engaged in an on-going pattern of sexual abuse with the victim. In another case, the defendant sexually abused his niece for three years. She was nine years old when the offense was discovered. The defendant's guideline range was 135-168 months, and the court sentenced him to 135 months imprisonment.

Twenty-two of the defendants were in Criminal History Category I, four in Criminal History Category II, and two in Category IV.

D. Issues for Consideration

There is inconsistency in the language of the 1991 amendment to §2G1.2(b)(4), where it added a specific offense characteristic "if the defendant was a parent, relative, or legal guardian of the minor involved in the offense or if the minor was otherwise in the custody or supervisory control of the defendant, increase by 2 levels." and §2A3.1(b)(3), where the enhancement only applies if the victim was in the "custody, care, or supervisory control of the defendant." The limitation in §2A3.1(b)(3) would not apply to a non-custodial parent who sexually abuses his child. Neither enhancement seems to apply to the live-in boyfriend or common-law husband of the victim's mother. This inconsistency also exists in §2A3.2 (b)(1), and §2A3.4(b)(3).

§2A3.2. Criminal Sexual Abuse of Minor (Statutory Rape) or Attempt to Commit Such Acts

A. Discussion of Guideline and Statutory Provisions

As originally enacted in 1986, 18 U.S.C. § 2243(a) applied to behavior in which the participants voluntarily and willingly engaged. The statutory maximum penalty was five years until 1990 when Congress raised the statutory maximum to 15 years. The Commentary to U.S.S.G. §2A3.2 states that "[t]his section applies to sexual acts that would be lawful but for the age of the victim." The base offense level is 15 with a 2-level increase if the victim was in the custody, care, or supervisory control of the defendant.

B. Amendments to §2A3.2

Section 2A3.2 was amended on two occasions: **November 1, 1989, and November 1, 1991.** (See Appendix A.)

C. Case Analysis

A review of all cases sentenced under §2A3.2 from the monitoring unit reveals that the offense conduct in more than one-half of the 18 cases involved forcible rape, six of the cases involved an ongoing pattern of sexual abuse lasting from several months to 12 years, and eight of the cases involved male family members abusing young girls and boys. Very few of the cases could be termed as noncoercive sexual conduct. One defendant participated in a gang rape, and another defendant impregnated his 13 year old daughter.

Over 70 percent of the sentences were in the upper end of the range, top of the range, and above the range. Two sentences were downward departures, and four sentences were upward departures. (See Appendix B.) The two downward departures involved fathers abusing their daughters. One defendant forcibly raped his 15 year old daughter and had allegedly raped her two years prior to the instant offense. The court departed from a guideline range of 24-30 months to a sentence of 60 months probation. The departure was part of the plea agreement. One defendant abused his daughter for several years and impregnated her. The court departed from a guideline range of 30-37 months to a sentence of 60 months probation, with the first six months in a jail-type facility. The departure was based on the need for family counseling. In one of the four upward departure cases, the PSR indicated that the defendant abused his daughter for 12 years, beginning when she was three years old. The court departed from a guideline range of 21-27 months to a sentence of 60 months, the statutory maximum. In another upward departure case, the defendant had sexual contact with his stepbrother for more than ten years, starting when the child was five or six years old. The court departed from a guideline range of 18-24 months to a sentence of 30 months. The third upward departure case involved a kidnapping where the defendant raped the victim five times before releasing her. The court departed from a guideline range of 18-24 months to a sentence of 27 months. In making the departure, the sentencing court noted that the guideline applied to consensual acts, but that the case did not involve consensual sex, and that the guideline only accounts for one sexual assault. In the fourth upward departure case, a 19 year old raped a 13 year old girl. The court departed upward from a guideline range of 24-30 months to a sentence of 40 months because of the extreme psychological injury to the victim. She considered committing suicide.

Ten of the defendants were in Criminal History Category I, four in Criminal History Category II, three in Criminal History Category III, and one in Criminal History Category VI. Twelve of the sentences involved guilty pleas, and six followed trials.

D. Issues for Consideration

Since Congress raised the statutory maximum penalty for 18 U.S.C. § 2243(a) in 1990 from five years to 15 years, the Commission may want to consider providing a cross

reference or a specific offense characteristic to more appropriately reflect the seriousness of the harm in cases prosecuted under 18 U.S.C. § 2243(a) and sentenced under §2A3.2.

Also, there exists an inconsistency in language involving the 2-level enhancement, "if the victim was in the custody, care, or supervisory control of the defendant." (See §2A3.1 D. Issues for Consideration.)

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

A. Discussion of Guideline and Statutory Provisions

This guideline applies to convictions for criminal sexual abuse of a "person in official custody," 18 U.S.C. § 2243(b). The statutory maximum penalty is one year imprisonment. The base offense level is 9. The guideline does not have any specific offense characteristics.

B. Amendments to §2A3.3

Section 2A3.3 was amended on one occasion: **November 1, 1989.** (See Appendix A.)

C. Case Analysis

The Commission has received too few reports for analysis of sentencing data for Sexual Abuse of a Ward. The monitoring unit does not have any data on §2A3.3 for fiscal year 1990.

D. Issues for Consideration

The Commission may want to monitor this statute over the next few years to determine the number and types of offenders sentenced under this guideline before taking any action.

§2A3.4. Abusive Sexual Contact

A. Discussion of Guideline and Statutory Provisions

Section 2A3.4 applies to convictions for abusive sexual contact, 18 U.S.C. § 2244. This statute, like the others promulgated pursuant to the Sexual Abuse Act of 1986, has

limited federal jurisdiction and proscribes conduct involving "sexual contact" rather than a "sexual act." "Sexual contact" is defined by the statute as the "intentional touching" of certain private areas "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."⁵ The statutory maximum penalties are ten years imprisonment if the conduct would violate 18 U.S.C. § 2241;⁶ three years imprisonment if the conduct would violate 18 U.S.C. § 2242; two years imprisonment if the conduct would violate subsection (a) of 18 U.S.C. § 2243; and six months imprisonment if the conduct would violate subsection (b) of 18 U.S.C. § 2243.

The base offense level for a sentence pursuant to §2A3.4 is 16, if the offense is committed by means set forth in 18 U.S.C. § 2241 (a) or (b); 12, if the offense is committed by the means set forth in 18 U.S.C. § 2242; and 10, otherwise. The guideline also provides a 4-level enhancement if the victim is under twelve, and a 2-level enhancement if the victim was at least 12 but under the age of 16. A 2-level enhancement is provided if the victim was in the custody, care, or supervisory control of the defendant. The background commentary suggests a 6-level downward departure in cases of consensual sexual contact, "[i]f the defendant and the victim are similar in sexual experience."⁷ If a defendant knowingly engaged or caused sexual contact by force with a child under 12, by means set forth in 18 U.S.C. § 2241(a) or (b), the offense level would be 20, and the guideline range for a first offender would be 33-41 months.⁸

B. Amendments to §2A3.4

Section 2A3.4 was amended on two occasions: **November 1, 1989 and November 1, 1991.** (See Appendix A.)

C. Case Analysis

The child sex offense working group reviewed all of the available cases sentenced under U.S.S.G. §2A3.4 during fiscal year 1990.⁹ Thirty of the 34 cases had child victims. Eight cases involved "penetration" rather than "contact," and nine of the defendants were either parents or relatives of the victims. The average age of the victims was seven years

⁵18 U.S.C. § 2245(3).

⁶The maximum penalty was raised from five years to ten years in 1988.

⁷Background Commentary to §2A3.4.

⁸This calculation does not take Chapter Three Adjustments into consideration.

⁹One of the cases was unavailable.

old, with 18 of the victims between two and seven years old. Six of the cases involved multiple victims.

The sentences ranged from probation to 60 months imprisonment. Three of the sentences were downward departures and five of the sentences were upward departures. In one case the court made a downward departure from a guideline range of 10-16 months to a sentence of six months imprisonment based on the defendant's diminished capacity. In another case, as part of the plea agreement, the court made a downward departure from a guideline range of 24-30 months to a sentence of five years probation. In the third downward departure case, the court departed from a guideline range of two to eight months to a sentence of five years probation. In making the departure the court noted the "difficulties and traumas of proof of sexual abuse of very young children" and the lack of adequate prison facilities and programs to deal with pedophiles.

Another court made an upward departure from a guideline range of 21-27 months to a sentence of 36 months imprisonment where the defendant sexually abused his seven year old daughter. The departure was based on the victim being under 12 and inadequate criminal history category. In another case, the court made an upward departure from a guideline range of four to ten months to a sentence of 24 months where the defendant fondled six year old twin brothers, based on the psychological effect of the crime on the victims. In a third case, the court departed from a guideline range of 24-30 months to a sentence of 41 months imprisonment where the defendant was involved in an ongoing pattern of molesting two eight year old girls. The departure was based on the extreme psychological injury to the victims (§5K2.3) and the unusual heinousness of the conduct (§5K2.8). In the fourth case, the court departed from a guideline range of six to 12 months and imposed a 36-month sentence where the defendant fondled three girls aged 10, 12, and 16 years old.

D. Issues for Consideration

Since Congress has raised the statutory maximum penalty for 18 U.S.C. § 2244(a)(1) from five years to ten years, the Commission may want to consider providing a cross reference or a specific offense characteristic to more appropriately reflect the seriousness of the harm in cases prosecuted under 18 U.S.C. § 2244(a)(1) and sentenced under §2A3.4.

Also, there exists an inconsistency in the language involving the 2-level enhancement, "if the victim was in the custody, care, or supervisory control of the defendant." (See §2A3.1 D. Issues for Consideration.)

§2A4.1. Kidnapping

A. Discussion of Guideline and Statutory Provisions

Section 2A4.1 applies to convictions for kidnapping, abduction, and other forms of unlawful restraint, pursuant to 18 U.S.C. §§ 115(b), 351(b)(d), 1201, 1203, 1751(b), and other statutes. The most serious offense carries a statutory penalty of life imprisonment.

The guideline has a base offense level of 24 and includes a 6-level enhancement if there was a ransom demand or a demand upon the government. To protect child victims, the guideline provides a 3-level enhancement if the victim was sexually exploited, and another 3-level enhancement if the victim was a minor who, in exchange for money or other consideration, was placed in the custody or care of another person who did not have legal right to the minor.

B. Amendments

Section 2A4.1 was amended on two occasions: **November 1, 1989, and November 1, 1991.** (See Appendix A.)

C. Case Analysis

The Child Sex Offense working group did not review cases sentenced pursuant to U.S.S.G. §2A4.1 because the enhancements for child victims will not be effective until November 1991.

D. Issues for Consideration

The Commission may want to continue studying cases sentenced under this guideline before taking any action.

**PART G - OFFENSES INVOLVING CHILD PROSTITUTION, SEXUAL
EXPLOITATION OF MINORS AND CHILD PORNOGRAPHY**

**§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited
Sexual Conduct**

A. Discussion of Guideline and Statutory Provisions

Section 2G1.2 applies to convictions for transportation of minors for purposes of prostitution or prohibited sexual conduct, 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423. The statutory maximum penalty is ten years or a fine, or both.

Section 2G1.2 has a base offense level of 16. An enhancement of 4 levels is provided if the offense involved the use of physical force or coercion by threats or drugs or in any manner. The guideline also provides a 4-level enhancement if the victim is under twelve, and a 2-level enhancement if the victim was at least 12 but has not attained the age of 16. The guideline includes a Special Instruction to treat each victim transported as if the conduct was charged in a separate count of conviction. Application Note 1 instructs that multiple counts involving the transportation of different victims are not to be grouped together under §3D1.2; thus units are to be assigned. The guideline also has a cross reference to U.S.S.G. §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

B. Amendments to §2G1.2

Section 2G1.2 has been amended on three occasions: **November 1, 1989, November 1, 1990, and November 1, 1991.** (See Appendix A.)

C. Case Analysis

The child sex offense working group reviewed eight of the nine cases¹⁰ sentenced pursuant to U.S.S.G. §2G1.2 during fiscal year 1990. Seven of the cases involved pleas. Two cases were sentenced at the lower end of the guideline range, three at the top of the range, and one was a departure above the range. Another case, prosecuted pursuant to the Assimilative Crimes Act, was sentenced at the statutory maximum penalty. The sentences ranged from one year to 25 years. Two of the victims were young boys; the other victims were girls. In one case, the defendant transported a neighbor's ten year old son across the country, forcing the child to have sexual relations with him. The

¹⁰One case was unavailable.

defendant's guideline range was 27-33 months, and the court sentenced him to 33 months imprisonment. In another case, the victim's mother's common-law husband sexually abused the child for several years. The court departed from a guideline range of 188-235 months to a sentence of 300 months imprisonment, based on the psychological injury to the victim and the cruel and heinous nature of the offense.

D. Issues for Consideration

The 1991 Amendment to U.S.S.G. §2G1.2(c)(2) which provides a cross reference to U.S.S.G. §2A3.1 if the offense involved attempted or actual criminal sexual assault should significantly increase the penalties for these offenses. Section 2A3.1 starts with a base offense level of 27 compared to the base offense level of 16 for U.S.S.G. §2G1.2.

§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

A. Discussion of Guideline and Statutory Provisions

Section 2G2.1 applies to convictions for sexual exploitation of minors by producing visual or printed material, 18 U.S.C. § 2251. The guideline also covers convictions of custodians who permit a minor to engage in sexually explicit conduct, and of those who advertise for minors to engage in such activity. The statutory maximum penalty is ten years. If the defendant, however, has a prior conviction under this section, the statute provides for a penalty of not less than five years nor more than fifteen.

Section 2G2.1 has a base offense level of 25, and provides for a 4-level enhancement if the offense involved a minor under 12 and a 2-level enhancement if minor had not attained the age of 16. It also includes a 2-level enhancement if the defendant was a parent, relative, or legal guardian of the minor or the minor was in the custody, care, or supervisory control of the defendant. A Special Instruction provides for the consideration of all minors whether or not they are contained in a separate count of conviction. If the real offense behavior involves more than one minor, the conduct involving each minor should be considered as if contained in a separate count of conviction, and units applied for each such count.

B. Amendments to §2G2.1

Section 2G2.1 was amended on three occasions: November 1, 1989, November 1, 1990, and November 1, 1991. (See Appendix A.)

C. Case Analysis

The child sex offense working group reviewed six of the eight cases¹¹ sentenced pursuant to §2G2.1 in fiscal year 1990. The sentences ranged from one year and a day to 70 months. One case was sentenced below the range, two at the bottom of the range, two in the lower end of the range, and one in the upper end of the range. There were no upward departures. Five of the cases involved controlled mailings to the defendants, after they sent slides or film of children involved in sexually explicit conduct to processors for development. In the sixth case, the defendant produced a pornographic video and solicited a 15 year old girl to engage in sexually explicit conduct for a video. The court did not apply the Chapter Three vulnerable victim adjustment because it was "unclear whether the defendant knew or should have known that the victim was vulnerable because of age." In one case, a search of the defendant's home revealed 35,000 pornographic photos. Many of the photos were of the defendant having sex with male children aged six to 17. The four photos involved in the count of conviction showed the defendant with boys over 12. The defendant had a prior arrest for child pornography.

Three of the victims were male and three were females. The victims ranged from eight to 17.¹² All of the cases were guilty pleas. The one downward departure was a case where the defendant solicited his 11 and 12 year old male cousins to engage in sexually explicit activity and then took 19 photos of them. The court departed from a guideline range of 87-108 months to a sentence of one year and one day because of the lack of a "commercial aspect." The court found that the defendant was not a production source of child pornography.

D. Issues for Consideration

This guideline appears to be working as intended. The Commission may want to continue studying the cases sentenced under this guideline before taking any action.

¹¹Two cases were unavailable.

¹²A few of the ages were unknown.

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor;
Receiving, Transporting, Advertising, or Possessing Material Involving the
Sexual Exploitation of a Minor with Intent to Traffic

A. Discussion of Guideline and Statutory Provisions

Section 2G2.2 applies to convictions pursuant to 18 U.S.C. §§ 2251(c)(1)(A), 2252. The statutory maximum penalty is ten years.

The guideline has a base offense level of 13 and includes a 2-level enhancement if the minor is under 12 and a 4-level enhancement if the offense involved material that portrays sadistic or masochistic conduct and other depictions of violence. The guideline also provides for an enhancement based on the table at §2F1.1 corresponding to the retail value of the material. The guideline provides a cross reference to the child pornography production guideline (§2G2.1).

B. Amendments

Section 2G2.2 has been amended on three occasions: **June 15, 1988, November 1, 1990, and November 1, 1991.** (See Appendix A.)

C. Case Analysis

In light of the congressional initiative to amend this guideline,¹³ the working group did not make a case analysis. However, Congress has ordered a study of the amended guideline, to be completed within six months, comparing sentences under the guideline, as Congress has directed it to be amended, with sentences under the previous guideline. The Commission should note that it is very unlikely that an adequate number of defendants will be sentenced under this guideline over the next six months to provide Congress with a meaningful study.

D. Issues for Consideration

For consistency with other guidelines, (e.g., §§2G1.2 and 2G2.1), the Commission may consider increasing the 2-level enhancement to 4 levels for children under 12 and adding a 2-level enhancement for minors under 16.

¹³Amendment language pursuant to the new legislation will be considered under a separate agenda item.

§2G2.3. Selling or Buying of Children for Use in the Production of Pornography

A. Discussion of Guideline and Statutory Provisions

Section 2G2.3 covers convictions pursuant to 18 U.S.C. § 2251A, which prohibits the buying or selling of a minor for use in sexually explicit pornography. The statute has a mandatory minimum penalty of 20 years.

The guideline has a base offense level of 38. There are no specific offense characteristics.

B. Amendments

Section 2G2.3 was a newly created guideline effective November 1, 1989. (See Appendix A.)

C. Case Analysis

There have been too few cases to conduct a meaningful analysis for those sentenced pursuant to §2G2.3. There were no cases reported to monitoring during fiscal year 1990.

D. Issues for Consideration

The Commission may want to monitor this statute over the next few years to determine the number and types of offenders sentenced under this guideline before taking any action.

§2G2.4. Receipt or Possession of Material Depicting a Minor Engaged in Sexually Explicit Conduct

Section 2G2.4 is a new guideline effective November 1, 1991. (See Appendix A.) The guideline applies to non-trafficking convictions under 18 U.S.C. § 2252. The offense carries a statutory maximum penalty of ten years for receipt or transportation, five years for simple possession. Congress has indicated that the new guideline should be amended to raise the base offense level and to put "receipt" offenses with trafficking offenses. The senior staff has a proposal to meet the congressional mandate.

§2G2.5. Recording Offenses Involving the Production of Sexually Explicit Materials

Section 2G2.5 is a new guideline effective November 1, 1991. (See Appendix A.) The guideline applies to convictions pursuant to 18 U.S.C. § 2257. Congress created this new statute in response to a concern for the growing problem with pornography. The statutory maximum penalty is two years. For subsequent convictions the maximum penalty is not more than five years or less than two years.

The guideline has a base offense level of 6 with cross references to other guidelines if the offense conduct involved an effort to conceal the production of child pornography (§2G2.1) or trafficking in child pornography (§2G2.2).

§2G3.1. Importing, Mailing, or Transporting Obscene Matter

A. Discussion of Guideline and Statutory Provisions

Section 2G3.1 applies to convictions for 18 U.S.C. §§ 1460-63, 1465-66, and other statutes. The statutory maximum penalty is five years.

The guideline has a base offense level of 6 and includes a 4-level enhancement if the material portrays sadistic or masochistic conduct or other depictions of violence. The guideline provides for an enhancement based on the table in §2F1.1, corresponding to the retail value of the material. Cross references to trafficking in child pornography (§2G2.2) and possession of child pornography (§2G2.4) are provided.

B. Amendments

Section 2G3.1 was amended on three occasions: November 1, 1989, November 1, 1990, and November 1, 1991. (See Appendix A.)

C. Case Analysis

A review of 28 of the 30 cases¹⁴ sentenced pursuant to U.S.S.G. §2G3.1 during fiscal year 1990 showed that twelve of the cases involved child pornography. Eleven of the defendants received sentences at the bottom of the guideline range. Ten defendants received a sentence of probation, and two were imprisoned. All of the defendants were in criminal history category I. Eleven cases involved undercover sting operations where

¹⁴One case was unavailable and the presentence report was missing from the other case.

the defendants were targeted by agents and specifically ordered explicit child pornographic materials. In the other case, the defendant sold an explicit child pornographic tape to undercover agents.

D. Issues for Consideration

The above-mentioned congressional directive requires that the Commission amend this guideline to increase the base offense level from 6 to 10. The senior staff has proposed language which will be discussed under a separate agenda item.

III. SUMMARY OF EVALUATION DATA

The Commission's evaluation unit conducted interviews in 12 federal district court sites. Of the several questions asked of the respondents, the child sex offense working group examined the following questions:

- (1) Are there any specific guidelines that are problematic for you?
- (2) What changes would you most like to see made in the guideline system?
- (3) How do the guidelines fit into your sense of what is an appropriate sentence?

Nine respondents commented that child sex offense guidelines were problematic, needed changes or did not fit into their sense of an appropriate sentence. Of the nine respondents, four of 49 judges, one of 75 assistant U.S. attorneys, and four of 66 U.S. probation officers noted that the child sex offense guidelines needed improvement.

For example, three judges, all from the same district, suggested the Commission reduce the penalty for receipt of child pornography. Another judge stated that the guidelines for sex offenses against children were "ridiculously" low.

Of the four probation officers that commented on child sex offenses, two mentioned child pornography and two commented on child sexual abuse. For example comments on child pornography included: "The guideline for receipt of child pornography is vague and it doesn't cover all conduct;" Another indicated, "when an offender is no threat to society, there should be some flexibility." The other two probation officers commented on child sexual assault. One stated, "the reduction is problematic if offender and minor have similar sexual histories." The "reduction" refers to an instruction in the background commentary to §2A3.4, to a structured downward departure. Another indicated, "it is difficult to determine which guideline applies for

sexual assault of minors" and recommended sentences for sexual assault and violent cases in general be raised.

Finally, one assistant U.S. attorney suggested the penalties for child pornography were very high and that judges tend to make downward departures.

IV. SUMMARY OF HOTLINE CALLS PERTAINING TO CHILD SEX OFFENSES

PART A - CRIMINAL SEXUAL ABUSE

TAS received a total of twenty-three calls. Seven calls in 1989, 10 calls in 1990, and six in the first half of 1991. Questions include the following: "How to apply the guidelines to the real offense behavior using the available cross reference?" "Can we include dismissed conduct?" "How do we account for a victim contacting venereal disease as a result of sexual assault?" "Can vulnerable victim due to young age be used even if age is considered in the guideline?" and finally, "Can an enhancement for abuse of trust be applied?" Four callers requested possible reasons for upward departure.

The majority of the callers were looking for ways to enhance the sentence.

PART G - OFFENSES INVOLVING PROSTITUTION, SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY

TAS received a total of eight calls. Five calls in 1989 and three calls in 1991 on offenses involving transportation of minors for prostitution, child pornography, and sexual exploitation of a minor. Most of the inquiries involved requests for further definition. For example, "What constitutes coercion under §2G1.2? or, "Is abuse of trust taken into consideration through the base offense level in §2G2.1?" or "How do we determine if the material involved a prepubescent minor under §2G2.2 (b)(1)?" One caller requested direction on how to depart upward in a sexual abuse case where the victim suffered serious psychological harm. Finally, another caller requested assistance on how to group multiple counts of transportation of minor.

Overall, we have received few calls since the November 1, 1990 amendments.

V. APPENDICES

APPENDIX A

**USSC AMENDMENT ACTION TO THE CHILD SEX OFFENSE
GUIDELINES SINCE NOVEMBER 1, 1987**

**PART A - OFFENSES INVOLVING CRIMINAL SEXUAL ABUSE AND
KIDNAPPING OF MINORS**

**§2A3.1. Criminal Sexual Abuse, Attempt or Assault with the Intent to Commit
Criminal Sexual Abuse**

November 1, 1989: Section 2A3.1 was amended to clarify that the enhancement of 4 levels is to be applied only if it meets the criteria set forth in the statute at 2241(a) or (b). The means set forth in 18 U.S.C. § 2241(a) or (b) are "by using force against the victim; by threatening or placing the victim," The commentary was amended at Note #2 to further define the criteria set forth in the statute, to provide an example, and to add the following sentence at the end of the Note: " This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim." It also provided a 3-level intermediate adjustment for degree of bodily injury. (SEE AMENDMENT #91 AND #92 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2A3.1 was amended to include an application note that instructs that if an enhancement from subsection (b)(3) applies (i.e., if the victim was in the custody, care, or supervisory control of the defendant, was a corrections employee, or a person held in the custody of a correctional facility), do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

**§2A3.2. Criminal Sexual Abuse of Minor (Statutory Rape) or Attempt to Commit
Such Acts**

November 1, 1989: Section 2A3.2 was amended to clarify that the relevant factor was the age of the victim, and provided a more specific reference to the underlying statute. (SEE AMENDMENT #93 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2A3.2 was amended to provide an increase to conform to similar enhancements in other guidelines. This amendment increased the enhancement from 1 to 2 levels if the victim was in the custody, care, or supervisory control of the defendant. Additionally, Application Note 2 was added to instruct that if such an enhancement applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

The title to this guideline was amended and a more specific statutory provision was provided. Specifically, the language "Statutory Rape" that followed "a Ward" was deleted. (SEE AMENDMENT #94 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

§2A3.4. Abusive Sexual Contact

November 1, 1989: Section 2A3.4 was amended by the deletion of the entire guideline and commentary to make the offense levels under this guideline consistent with the structure of related guidelines (e.g., §2A3.1, §2A3.2) and to reflect the increased maximum sentences for certain conduct, most notably enhanced punishment for victimization of minors and children. It provided a 1-level increase to the base offense level if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) and a 2-level increase if the offense was committed by the means set forth in 18 U.S.C. § 2242. It also added a 4-level enhancement if the victim had not attained the age of twelve years and a 2-level enhancement if the victim had attained the age of twelve years, but had not attained the age of 16 years. (SEE AMENDMENT #95 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2A3.4 was amended to conform to similar enhancements under other guidelines. This amendment added a 2-level enhancement if the victim was in the custody, care, or supervisory control of the defendant. Additionally, Application Note 3 was added to instruct that if the new enhancement applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

November 1, 1989: Section 2A4.1 was amended to provide a 3-level intermediate adjustment for the degree of bodily injury. (SEE AMENDMENT #96 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL).

November 1, 1991: Guideline §2A4.1 was amended to implement the congressional directive in Section 401 of the Crime Control Act of 1990. The following specific offense characteristics were added: 1) a 3-level enhancement if the victim was sexually exploited; 2) a 3-level enhancement if the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim; and 3) an increase based on the offense level for any underlying offense from Chapter Two. The amendment also provided a cross reference to the first degree murder guideline (§2A1.1) if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111.

**PART G - OFFENSES INVOLVING CHILD PROSTITUTION, SEXUAL
EXPLOITATION OF MINORS AND CHILD PORNOGRAPHY**

**§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited
Sexual Conduct**

November 1, 1989: Section 2G1.2 was amended to clarify the specific offense characteristic at §2G1.2(b)(1). Under §2G1.2(b)(1), "drugs or otherwise" was deleted and "threats or drugs or in any manner" was inserted. The amendment also deleted "conduct" wherever it appeared and inserted "offense" to conform to other guidelines. In addition, the amendment included a special instruction for the application of the multiple count rules in cases involving the transportation of more than one person. This amendment was designed to account for all victims of the offense and was not limited to victims named in the count of conviction. For enhancement purposes the guideline will now require the application of units for each victim via the multiple count grouping rules pursuant to §3D1.2. (SEE AMENDMENT #159 AND #160 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1990: Guideline 2G1.2 was amended to clarify application of the multiple count rules (see November 1, 1989 amendment above). In addition, a cross-reference to §2G2.1 was provided if the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. (SEE AMENDMENT #323 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2G1.2 was amended to provide a 2-level enhancement if the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant. Application Note 6 instructs that if such an enhancement applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill). This amendment also added cross references to §2A3.1 (Criminal Sexual Abuse; Attempt or Assault With Intent to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts), or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) to sanction for any underlying offense.

**§2G2.1 Sexually Exploiting a Minor by Production of Sexually Explicit Visual or
Printed Material; Custodian Permitting Minor to Engage in Sexually
Explicit Conduct; Advertisement for Minors to Engage in Production**

November 1, 1989: Section 2G2.1 was amended to clarify that multiple counts involving different minors are not grouped under §3D1.2. (SEE AMENDMENT #161 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1990: Section 2G2.1 was amended at subpart (b)(1) to provide a 4-level enhancement if the offense involved a minor under the age of 12 years, or a 2-level enhancement if the minor was under the age of 16 years. A 2-level enhancement was provided in subsection (b)(2) if the defendant abused a position of trust in exploiting a minor. In addition, a special instruction was added to clarify application of the multiple count rules (see November 1, 1989 amendment above). (SEE AMENDMENT #324 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2G2.1 was amended to clarify that if the enhancement under subsection (b)(2) applies (i.e., if the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant), do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor;
Receiving, Transporting, Advertising, or Possessing Material Involving the
Sexual Exploitation of a Minor with Intent to Traffic

June 15, 1988: Guideline 2G2.2 was amended at §2G2.2(b)(1) by inserting "a prepubescent minor or". This provided an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown. (SEE AMENDMENT #31 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1990: Guideline 2G2.2 was amended to provide a 4-level enhancement if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence. In addition, a cross reference to §2G2.1 was provided if the offense involved the defendant causing, transporting, permitting, offering, or seeking by advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. A new application note was added that instructed if the defendant sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the instant offense, an upward departure is warranted. (SEE AMENDMENT #325 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2G2.2 was amended by changing the title, §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor), to §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor With Intent to Traffic). The title was amended to reflect that offenses involving receipt of materials depicting a minor engaged in sexually explicit conduct without intent to traffic are no longer covered under this guideline. Such

offenses are now covered under §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct).

§2G2.3 Selling or Buying of Children for Use in the Production of Pornography

Section 2G2.3 was a newly created guideline effective November 1, 1989 that covered the new offense in Section 7512 of the Anti-Drug Abuse Act of 1988. The new guideline included a base offense level of 38. (SEE AMENDMENT #162 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

§2G2.4 Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

Section 2G2.4 was a newly created guideline effective November 1, 1991, in response to the Crime Control Act of 1990. The Crime Control Act created a new offense of possession of more than three items of child pornography, and increased the penalties for sale or possession with intent to sell child pornography. The new guideline included a base offense level of 10, with a 2-level enhancement if the material involved a prepubescent minor or a minor under the age of twelve years. Additionally, the guideline added a cross reference to §2G2.1 or §2G2.2.

§2G2.5 Recordkeeping Offenses Involving the Production of Sexually Explicit Materials

Section 2G2.5 was a newly created guideline effective November 1, 1991, in response to provisions of the Crime Control Act of 1990 that criminalized certain conduct related to recordkeeping requirements in the production of pornography. This guideline included a base offense level of 6 for recordkeeping offenses involving the production of sexually explicit materials. Two cross references to §2G2.1 or §2G2.2 were added to sanction for the underlying offense behavior.

§2G3.1 Importing, Mailing, or Transporting Obscene Matter

November 1, 1989: The "Statutory Provisions" was amended by deleting "§§1461-1465" and inserting "§§1460-1463, 1465-1466". This made the guideline more comprehensive and to conform to the Statutory Provisions to the revision of §2G3.2 (Obscene or Indecent Telephone Communications) (SEE AMENDMENT #163 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1990: Section 2G3.1 was amended to provide a cross reference to §2G2.2 if the offense involved transporting, distributing, receiving, or possessing material involving the sexual exploitation of a minor to ensure that the penalties for such offenses adequately reflect their seriousness. It deleted a cross reference to Part E (Offenses Involving Criminal Enterprises and Racketeering). (SEE AMENDMENT #326 IN APPENDIX C OF THE 1990 GUIDELINES MANUAL.)

November 1, 1991: Section 2G3.1 was amended to provide a cross reference to §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct) if the defendant received or possessed such materials involving minors.

APPENDIX B

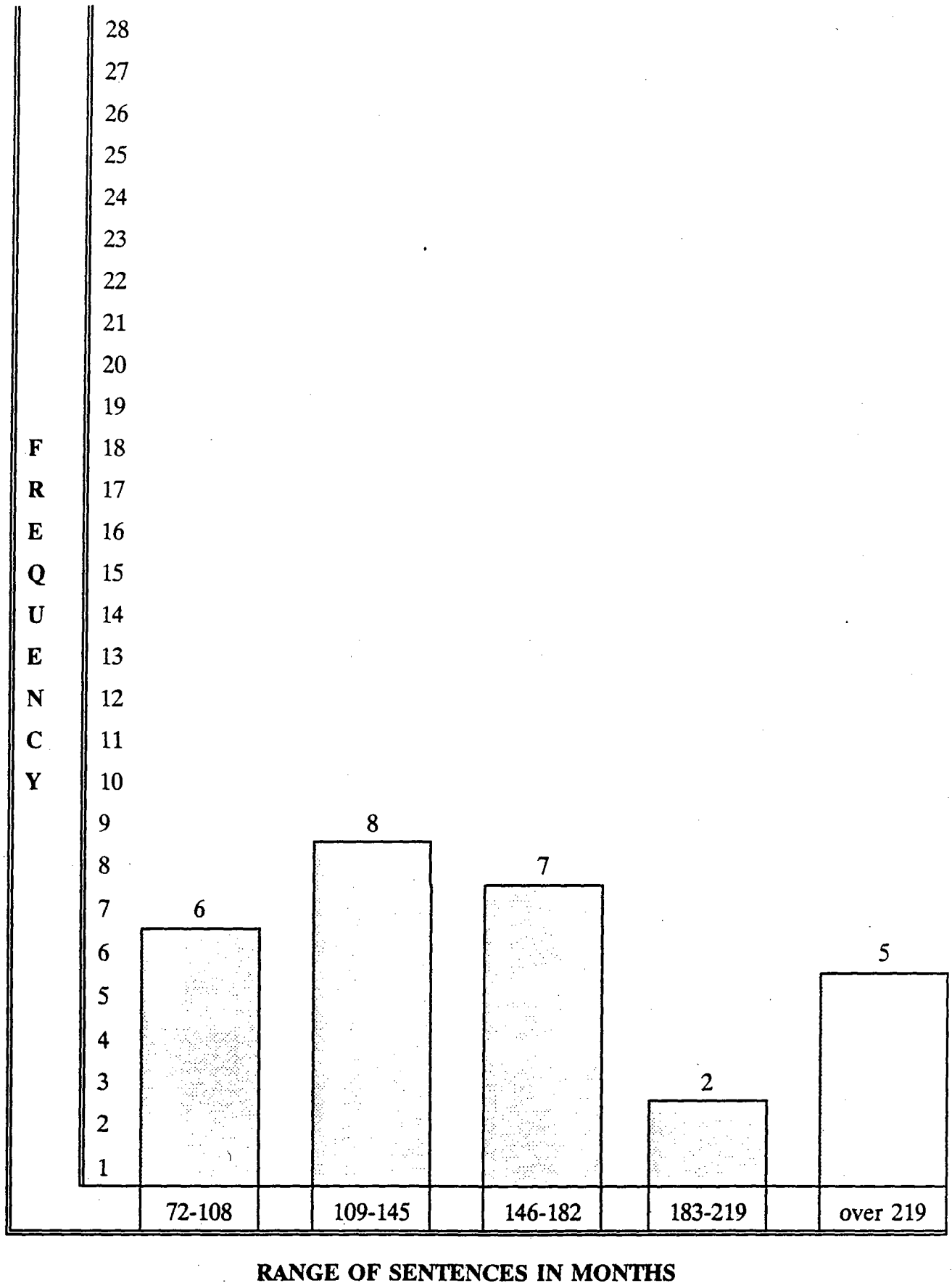
Application of §2A3.1 - Criminal Sexual Abuse, Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

Guideline §2A3.1	TOTAL	
	Number	Percent
Total	28	100%
Below the range	1	4%
Bottom of the range	13	46%
Lower end of the range**	11	39%
Upper end of the range	2	7%
Top end of the range	1	4%
Above the range	0	0%

*Includes cases greater than the guideline minimum and less than or equal to the mid-point of the guideline range as established by the Court.

Guideline §2A3.1	TOTAL	
	Number	Percent
Criminal History Category Total	28	100%
I	22	79%
II	4	14%
III	0	0%
IV	2	7%
V	0	0%
VI	0	0%

DISTRIBUTION OF SENTENCES



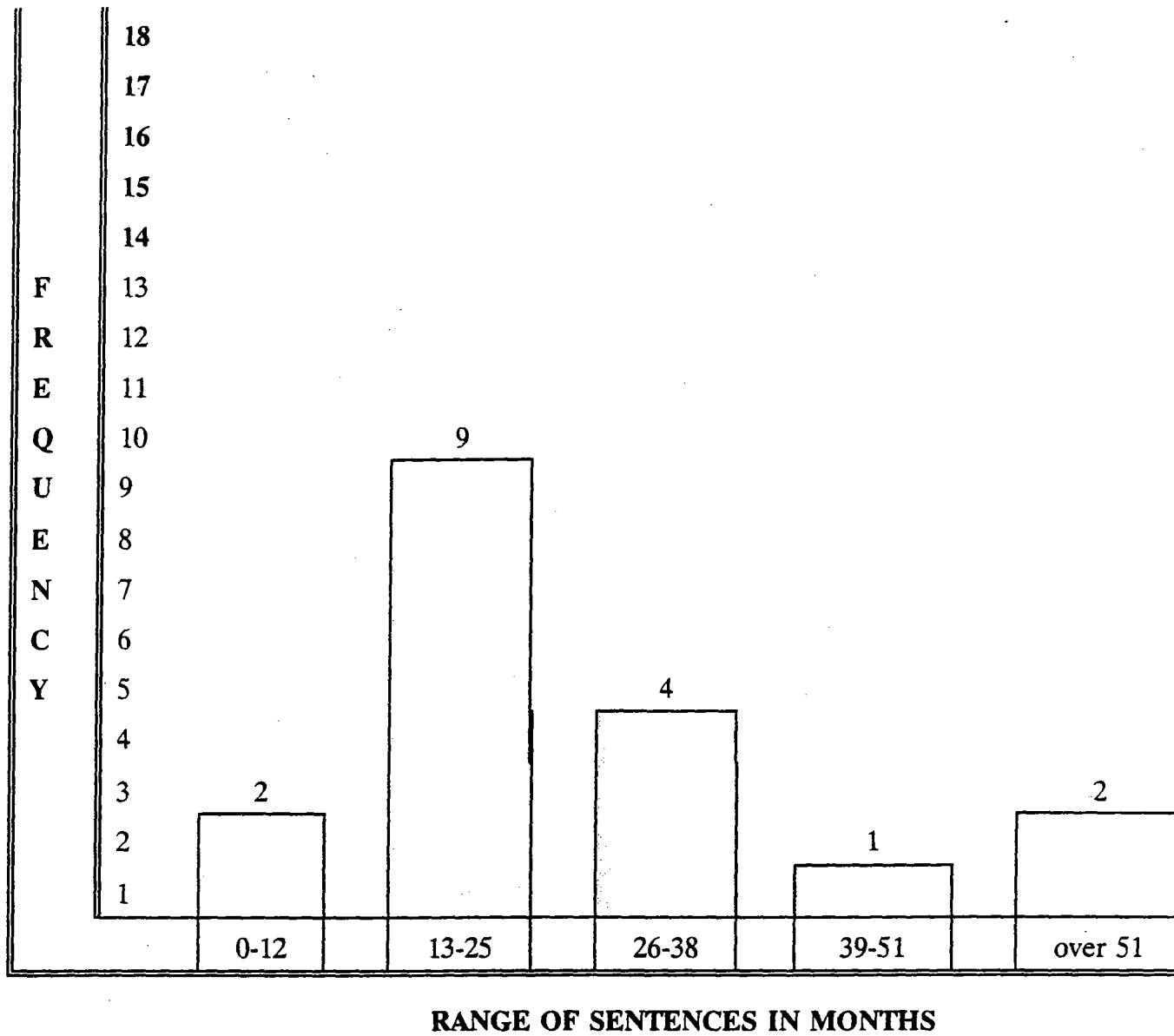
Application of §2A3.2 - Criminal Sexual Abuse of Minor (Statutory Rape) or Attempt to Commit Such Acts

Guideline §2A3.2	TOTAL	
	Number	Percent
Total	18	100%
Below the range	2	11%
Bottom of the range	1	6%
Lower end of the range*	2	11%
Upper end of the range	2	11%
Top end of the range	7	39%
Above the range	4	22%

*Includes cases greater than the guideline minimum and less than or equal to the mid-point of the guideline range as established by the Court.

Guideline §2A3.2	TOTAL	
	Number	Percent
Criminal History Category		
Total	18	100%
I	10	55%
II	4	22%
III	3	17%
IV	0	0%
V	0	0%
VI	1	6%

DISTRIBUTION OF SENTENCES



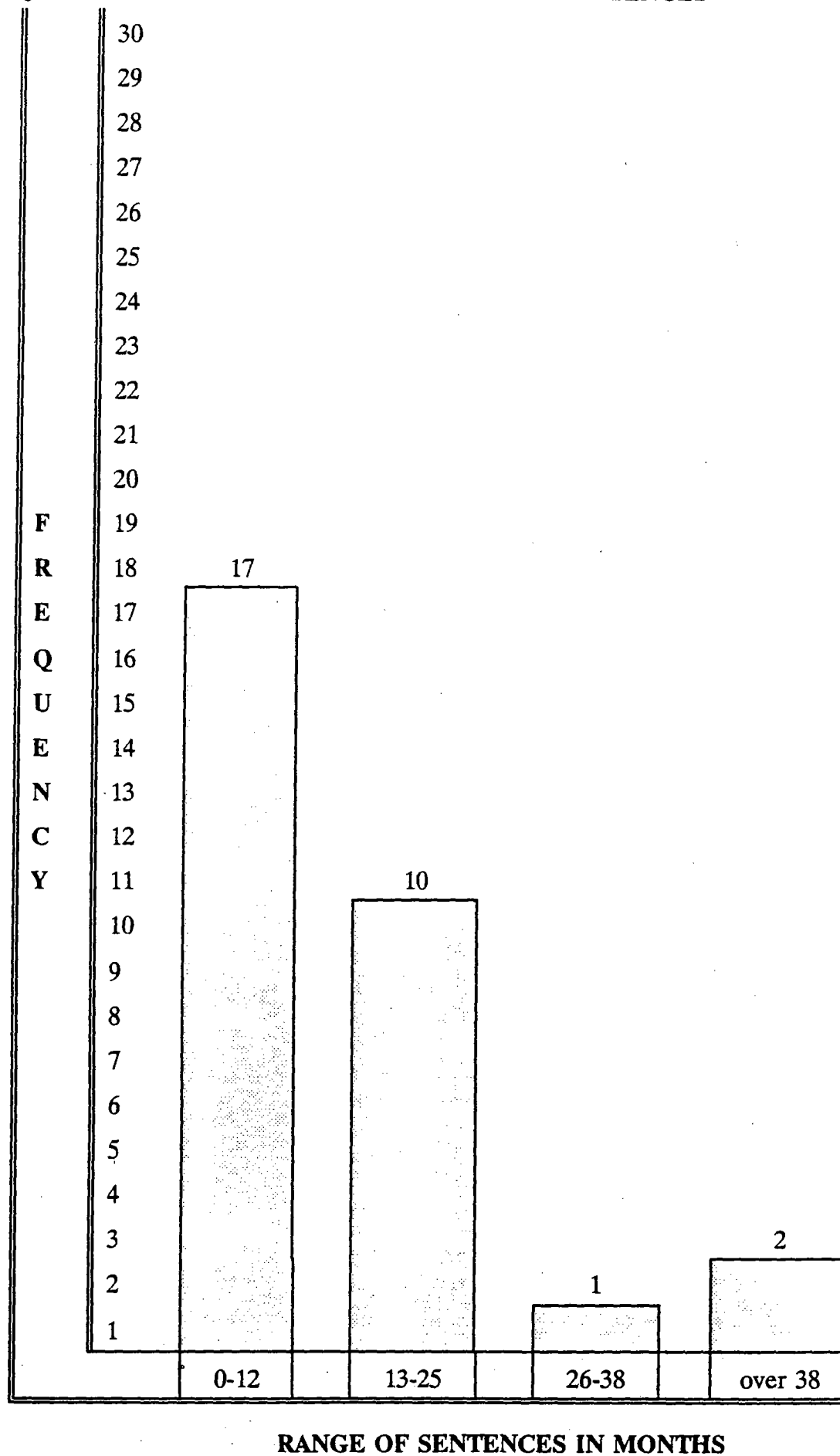
Application of §2A3.4 - Abusive Sexual Conduct

Guideline §2A3.4	TOTAL	
	Number	Percent
Total	30	100%
Below the range	3	10%
Bottom of the range	7	23%
Lower end of the range*	3	10%
Upper end of the range	3	10%
Top end of the range	9	30%
Above the range	5	17%

*Includes cases greater than the guideline minimum and less than or equal to the mid-point of the guideline range as established by the Court.

Guideline §2A3.4	TOTAL	
	Number	Percent
Criminal History Category Total	30	100%
I	20	67%
II	4	13%
III	4	13%
IV	1	3%
V	0	0%
VI	1	3%

DISTRIBUTION OF SENTENCES



RANGE OF SENTENCES IN MONTHS

Application of §2G1.2 - Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

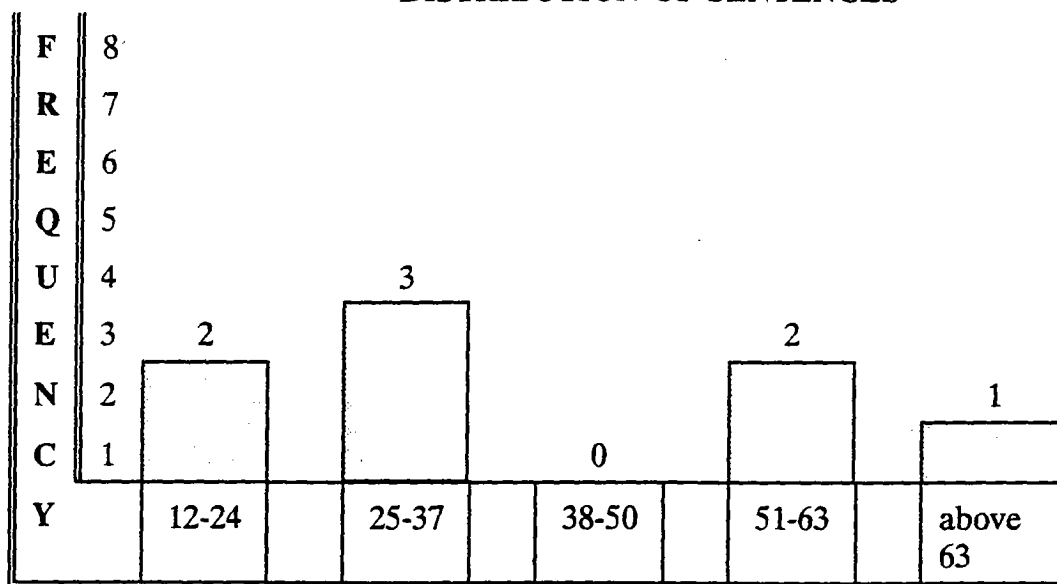
Guideline §2G1.2	TOTAL	
	Number	Percent
Total	8	100%
Below the range	1	12%
Bottom of the range	1	12%
Lower end of the range*	2	25%
Upper end of the range	0	0%
Top end of the range	3	38%
Above the range	1	12%

*Includes cases greater than the guideline minimum and less than or equal to the mid-point of the guideline range as established by the Court.

Guideline §2G1.2	TOTAL	
	Number	Percent
Criminal History Category		
Total	8	100%
I	4	50%
II	2	25%
III	1	13%
IV	0	0%
V	0	0%
VI	1	13%

§2G1.2

DISTRIBUTION OF SENTENCES



RANGE OF SENTENCES IN MONTHS

Application of §2G2.1 - Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

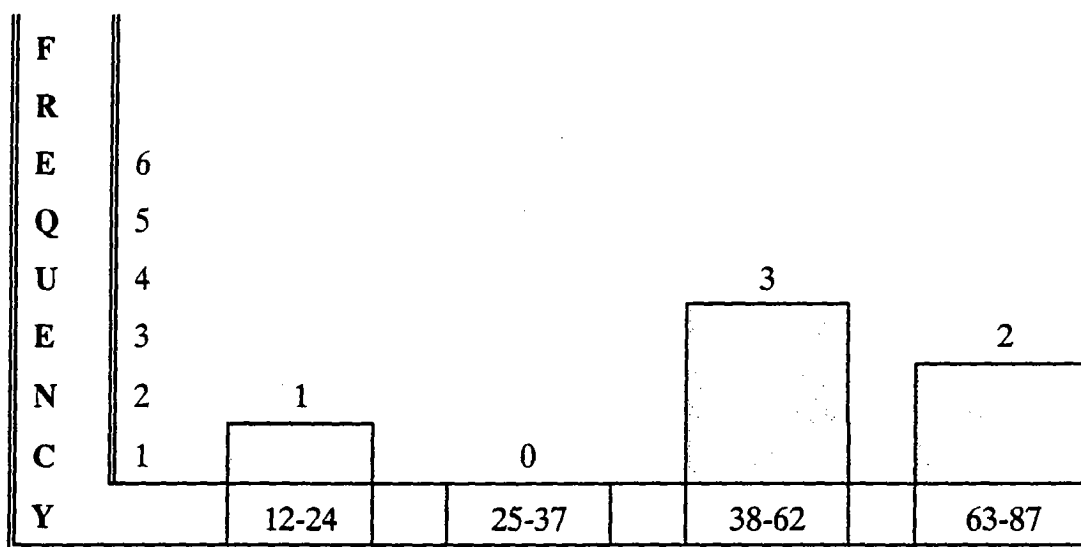
Guideline §2G2.1	TOTAL	
	Number	Percent
Total	6	100%
Below the range	1	16.6%
Bottom of the range	2	33.3%
Lower end of the range*	2	33.3%
Upper end of the range	1	16.6%
Top end of the range	0	0%
Above the range	0	0%

*Includes cases greater than the guideline minimum and less than or equal to the mid-point of the guideline range as established by the Court.

Guideline §2G2.1	TOTAL	
	Number	Percent
Criminal History Category		
Total	6	100%
I	6	100%
II	0	0%
III	0	0%
IV	0	0%
V	0	0%
VI	0	0%

§2G2.1

DISTRIBUTION OF SENTENCES



RANGE OF SENTENCES IN MONTHS

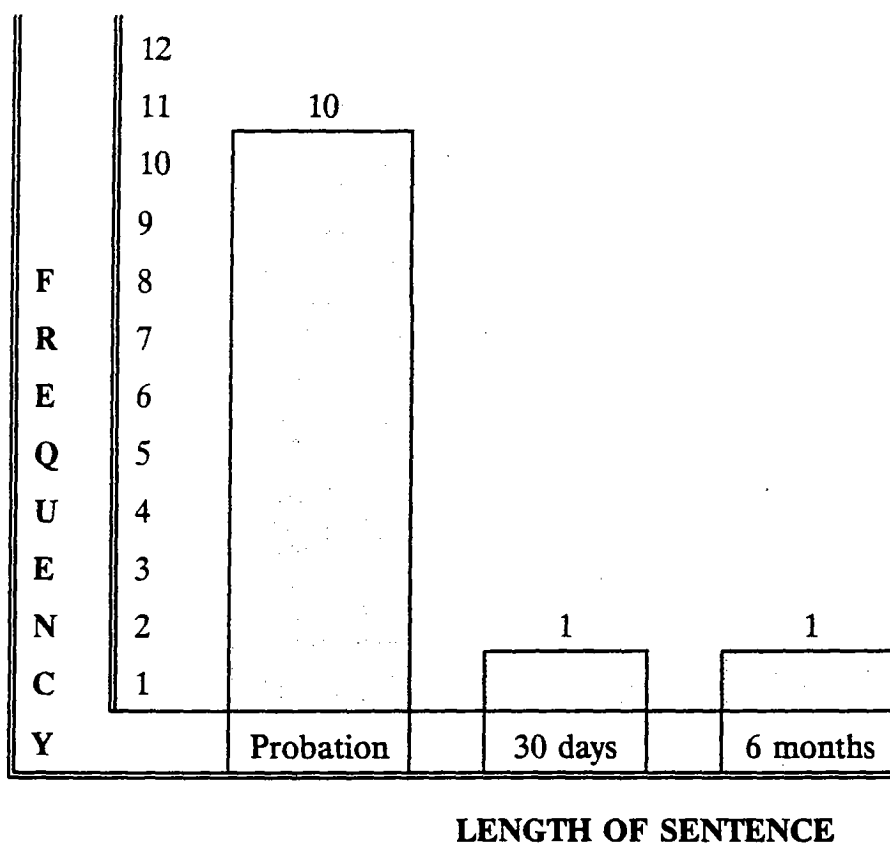
Application of §2G3.1 - Importing, Mailing, or Transporting Obscene Matter

Guideline §2G3.1	TOTAL	
	Number	Percent
Total	12	100%
Below the range	0	0%
Bottom of the range	11	92%
Lower end of the range	0	0%
Upper end of the range	0	0%
Top end of the range	1	8%
Above the range	0	0%

Guideline §2G3.1	TOTAL	
	Number	Percent
Criminal History Category Total	12	100%
I	12	100%
II	0	0%
III	0	0%
IV	0	0%
V	0	0%
VI	0	0%

§2G3.1

DISTRIBUTION OF SENTENCES



APPENDIX C

CHILD SEX OFFENSE CASE LAW

§2A3.1 Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

Eighth Circuit

United States v. Arcoren, 929 F.2d 1235 (8th Cir. 1991). The district court did not err in making a two-level enhancement pursuant to U.S.S.G. §2A3.1(b)(2)(B) where the victim was under the age of 16. According to the circuit court "[n]othing in section 2A3.1(b)(2)(B) even suggests that there is an implied exception to the two-level increase where the victim was less than sixteen years old if the defendant believed that the victim was at least sixteen. If the Sentencing Commission had intended such an exception, it presumably would have specifically so provided, as Congress did in 18 U.S.C. section 2243."

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

Eighth Circuit

United States v. Morin, 935 F.2d 143 (8th Cir. 1991). Defendant pleaded guilty to two counts of abusive sexual contact with his seven year old niece. The district court applied an upward departure for significant physical injury pursuant to U.S.S.G. §5K2.2, for extreme psychological injury pursuant to U.S.S.G. §5K2.3, and for the victim's young age. The circuit court reversed the sentence because circumstances supporting physical or psychological injury were not supported by the record. The circuit court remanded for resentencing based on the victim's age since U.S.S.G. §2A3.4 had been recently amended to require a four-level increase in the base offense level if the victim were under twelve.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

Fourth Circuit

United States v. Depew, 932 F.2d 324 (4th Cir. 1991). The district court did not err in sentencing the appellant, convicted of conspiracy to kidnap and conspiracy to exploit a minor in a sexually explicit film, pursuant to U.S.S.G. §2X1.1 with cross references to U.S.S.G. §§2A4.1 and 2A1.1. The circuit court rejected the appellant's argument that the district court treated him as if he had completed the kidnapping and murder. The appellant's argument overlooked the three-level reduction provided by U.S.S.G. §2X1.1(b)(1) for his unsuccessful attempt. According to the circuit court,

"[a]ppellant also overlooks that his crime was conspiracy to kidnap which included the kidnapping, torture, sexual abuse and eventual murder of an innocent young victim. The guidelines are based on relevant conduct and the extent of the appellant's crime is not reflected by the simple application of the kidnapping guideline."

Fifth Circuit

United States v. De La Rosa, 911 F.2d 985 (5th Cir. 1990), cert. denied, 111 S. Ct. 2275 (1991). The court upheld a two-level increase pursuant to U.S.S.G. §2A4.1(b)(3) for having "otherwise used" a dangerous weapon when appellant waved a gun in the air and threatened accomplices not to go to the police. The brandishing of the gun and the threat allowed appellant to intimidate others and cross the border without police pursuit.

United States v. Rocha, 916 F.2d 219 (5th Cir. 1990). The district court did not err in imposing both a six-level enhancement for kidnapping when a ransom demand was made and a four-level enhancement for kidnapping to facilitate the commission of another crime. U.S.S.G. §2A4.1 does not state that these enhancements are mutually exclusive. In any case, the guidelines are explicit when double counting is forbidden. See e.g., Guidelines §§3A1.1 Application Note 2 and 3A1.2 Application Note 3.

Seventh Circuit

United States v. White, 903 F.2d 457 (7th Cir. 1990). Defendant committed two kidnappings in furtherance of his escape from lawful custody. District court was thus correct in applying a four-level increase under U.S.S.G. §2A4.1(b)(5). Application of U.S.S.G. §2A4.1(b)(5)(A) to defendant did not result in double penalty even though his status as an escaped prisoner was considered in determining the criminal history category under U.S.S.G. §4A1.1(e) because the escape factor under U.S.S.G. §4A1.1(e) applies to any and all crimes committed during an escape, whereas an adjustment for kidnapping to facilitate an escape under U.S.S.G. §2A4.1(b)(5)(A) applies only where a kidnapping is part of a course of conduct that actually contributes to the success of the escape itself. -- The district court properly refused to provide defendant with a one-level reduction for release of his victims within 24 hours. Defendant's first victim rolled out of a car travelling on the highway at approximately 55 m.p.h., and his second victim was left bound in a motel room. These facts do not fall under the interpretation of "released" found in Application Note 5.

Eleventh Circuit

United States v. Gaddy, 894 F.2d 1307 (11th Cir. 1990). Defendant, convicted of kidnapping, killed victim within 30 days of kidnap, but body was not found until after

30 days elapsed. District court properly applied 4-level enhancement for failure to release victim within 30 days, particularly since court chose not to depart due to death of victim pursuant to U.S.S.G. §5K2.1.

**Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and
Obscenity**

**§2G1.2 Transportation of a Minor for the Purpose of
Prostitution or Prohibited Sexual Conduct**

First Circuit

United States v. Ellis, 935 F.2d 385 (1st Cir. 1991). The district court did not err in making an upward departure from a guideline range of 188-235 months to a sentence of 300 months imprisonment for the appellant, convicted of three counts of knowingly transporting a minor under the age of 18 to engage in illegal sexual activity, where he sexually abused his stepdaughter and caused her extreme psychological injury. The evidence showed that the abuse began shortly after the appellant was released from prison when his victim was five-years old. The circuit court found that the departure was not based simply on the victim's age, which was incorporated into the guidelines, but "on the extreme psychological harm inflicted on the victim as a result of the [appellant's] extreme conduct. Not only did [appellant] continuously assault [the victim], his abuse took particularly degrading and insulting forms."

Second Circuit

United States v. Altman, 901 F.2d 1161 (2d Cir. 1990). Where the defendant drugged his victims, making them physically and mentally more vulnerable to sexual exploitation, it was proper to adjust defendant's sentence by two levels for the vulnerability of the minor victims. The court noted that it would not have been proper to enhance under U.S.S.G. §3A1.1 for the age of the victim, since both the sexual exploitation offenses include the age of the victim.

**§2G2.1 Sexually Exploiting a Minor by Production of
Sexually Explicit Visual or Printed Material**

Second Circuit

United States v. Altman, 901 F.2d 1161 (2d Cir. 1990). See §2G1.2.

§2G2.2

Transporting, Receiving, or Trafficking in
Material Involving the Sexual Exploitation of a
Minor

First Circuit

United States v. Studley, 907 F.2d 254 (1st Cir. 1990). The court vacated a downward departure where the factors in appellant's case were not "atypical." As a basis for departure, the trial court found (1) that the appellant did not pose a threat to community, (2) that appellant was in a "posture of rehabilitation," and (3) the Bureau of Prisons had no facilities for treatment of people who have committed "this type of offense." In this case, the appellant pleaded guilty to receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). The presentence report described defendant as a healthy male who worked as a draftsman for a nationally known corporation and who had no prior criminal record. The appellant expressed great remorse for his criminal behavior and accepted full responsibility for his actions. The appellant also took a polygraph examination which helped buttress his claim that he was not a child molester. Though the court recognized the trial court's "sense of compassion and pragmatism" in sentencing the appellant, the court held that the trial court cannot depart when the guidelines have taken the principal sentencing factors into account. The trial judge is "not . . . at liberty to depart, regardless of whether the judge's independent consideration of those factors reasonably differs from the commission." Citing United States v. Aguilar-Pena, 887 F.2d 347, 353 (1st Cir. 1989) the court stated "[j]udicial dissatisfaction alone, no matter how steeped in real world wisdom can not be enough to trigger departures, lest the system crumble."