

for offenses under 18 U.S.C. § 2251 also provides more flexibility for the courts to depart upward from the guideline in particularly egregious cases and makes production a more serious offense than trafficking or receipt. This approach was supported by the Department of Justice in its public comment on the amendments to §2G2.1 that were proposed by the Commission this year.

Second, the Commission recommends that Congress adopt a more uniform approach toward repeat sexual offenders, modeled after 18 U.S.C. § 2247(d). Under the current guidelines and the amendments submitted to Congress in 1996, some repeat offenders will receive guideline ranges that extend above the currently authorized statutory maximum penalties. For example, an offender convicted of production of pornography involving minors under the age of 12 will receive an offense level of 31 (BOL 27 + 4 level adjustment for victim age). If the offender's criminal history score places him in category IV, V or VI, the top of the recommended guideline range would be 188, 210, or 235 months, respectively -- well above the 180-month authorized statutory maximum.

In addition, the approach in 18 U.S.C. § 2247 appears superior to §§ 2251(d) and 2252(b)(1) since it allows both prior federal and state offenses of like kind to trigger the higher statutory maximum. Currently, the higher maximum penalty applies only to pornography offenders with prior federal convictions for sex crimes. In contrast, 18 U.S.C. § 2247 provides for up to a doubling of the statutory maximum for persons with prior federal *or state* sexual abuse crimes. Permitting prior state convictions to count toward increasing the statutory maximum appears justified in order to permit lengthier incarceration of offenders who have shown an increased risk of recidivism, regardless of the forum in which those previous offenses were prosecuted.

The § 2247 approach also avoids imposing mandatory minimum penalties, such as are found in §§ 2251(d) and 2252(b)(1). Such mandatory minimums hinder proportionate sentencing tailored to the individual circumstances of a case, the kind of circumstances that the guidelines take into account. They also prevent judges from departing from mandated minimums in unusual cases that present circumstances not anticipated or inadequately considered by the Commission or by Congress.⁴⁸

3. Amendments currently under consideration by the Commission

After undertaking the analysis required by the SCACPA, the Commission is evaluating whether additional modifications to the guidelines covering sex offenses against children may be necessary. The particular options pursued will depend on several factors, including congressional action on pending legislation that may affect the operation of the guidelines in this area, and on the results of public hearings and comments received on the proposals put forward in the next amendment cycle. Options under consideration are described below.

⁴⁸ For a full discussion of problems created by such legislation, see U.S. SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES (1991).

a. Expand the “pattern of activity” adjustment to possession and production of pornography cases and to the sexual abuse of a minor guideline

One option is to make applicable to §§2G2.1 (production) and 2G2.4 (possession) the five-level enhancement currently contained in the trafficking/receipt guideline 2G2.2(b)(4) “if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.” The incidence of sexual abuse or exploitation of a minor is prevalent in child pornography production and possession cases as well as child pornography distribution and receipt cases. In addition, the application note that suggests an upward departure in cases that involve actual abuse or exploitation of minors that is not adequately accounted for by the pattern adjustment should be made more generally applicable throughout the pornography guidelines. Application of the enhancement or the upward departure helps ensure lengthier incarceration for offenders convicted of pornography offenses who have engaged in actual abuse of a minor and not only trafficking or possession of pornography depicting such abuse.

In addition, the Commission is exploring three options for increasing punishment for offenders convicted of sexual abuse of a minor. Sentencing under the sexual abuse guidelines is complicated by several factors, however. First, as discussed in the report, the guideline range for aggravated sexual abuse under §2A3.1 is perceived as too high for a significant portion of cases. Conversely, when such cases are sentenced under the sexual abuse of a minor guideline, 2A3.2, the offense level is perceived as too low. The key is to bridge this gap without encouraging undercharging. Second, under current guidelines, if a defendant was not previously convicted of sexual abuse, the punishment does not adequately reflect ongoing or repetitive abusive conduct. Third, many sexual abuse cases involve intra-familial abuse, evidentiary difficulties, and other complicating factors that are not easily taken into account through the application of hard and fast rules. Flexibility and deference to the sentencing judge’s superior feel for a case appears warranted.

To address and balance these concerns, the Commission is exploring several different ways to expand the “pattern of activity” adjustment to the sexual abuse guidelines. The Commission could provide for a five-level adjustment in §2A3.2. This would ensure substantially increased punishment for repetitive acts. Case analysis suggests that this adjustment, as modified by the 1996 amendments to §2G2.2, would apply in a substantial majority of sexual abuse cases. Alternatively, the same “pattern of activity” standard might be used as a basis for upward departure rather than as a mandatory five-level adjustment. Such a departure would allow the court to consider any acts of sexual abuse committed by the defendant, whether or not the abuse resulted in conviction, involved more than one victim, or occurred as part of the offense of conviction. The Commission may also consider increasing the base offense level of this guideline.

b. Clarify the definition of “distribution” of pornography

Currently, §2G2.2 provides for at least a five-level enhancement if the offense involved distribution. Application Note 1 to §2G2.2 states that distribution “includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to

distribute.” It is unclear whether Application Note 1 was intended to limit the enhancement to distribution for pecuniary gain, and the Department of Justice reports that the application note is sometimes read as being inapplicable to non-pecuniary distribution. The definition could be amended to clarify that both distribution for money and other distribution, for example, as part of a barter or trading network, should receive the five-level enhancement.

c. Consolidate the trafficking/receipt and possession guidelines

As described in the report at Section B.4, defendants convicted of receiving child pornography receive higher sentences than defendants charged with possession, even if they engage in substantially similar conduct. The Commission is considering an amendment to consolidate the trafficking/receipt guideline (§2G2.2) and the possession guideline (§2G2.4). The current trafficking/receipt guideline has a base offense level of 15, and the current possession guideline has a base offense level of 13, both of which will be increased by two levels effective November 1, 1996, subject to congressional disapproval. Consolidation could be accomplished by collapsing the possession and trafficking/receipt guidelines into one guideline. The consolidated guideline would have the higher base offense level of the pre-consolidation trafficking/receipt guideline, but a two-level downward adjustment would apply if the case involved the receipt or possession of fewer than 10 items with no intended distribution. Under this approach, sentences for certain receipt cases would be two levels lower than they would be under the amended guidelines submitted to Congress this year.

In 1991, the Commission reported similar concerns about the disparity between receipt and possession sentences and it amended the guidelines so that receipt cases were sentenced under the possession guideline. But this amendment was overridden by Congress through enactment of Section 632 of Public Law 102-141, the Treasury, Postal Service and General Government Appropriations Act of 1992. The Commission was directed to increase base offense levels for trafficking and receipt (§2G2.2) (from level 13 to level 15) and for possession (§2G2.4) (from level 10 to level 13). The instruction also provided that §2G2.4 shall apply only to offense conduct involving simple possession. Offenses involving receipt and trafficking were to be sentenced under the new higher offense levels prescribed by §2G2.2. The Commission promulgated the mandated amendments, which took effect November 27, 1991. Because Congress has previously directed the Commission to sentence receipt cases under the trafficking guideline rather than the possession guideline, additional legislation may be needed for the Commission to make the changes being considered here.

Despite this statutory history, several factors lead the Commission to conclude that the present approach to the sentencing of receipt and possession cases should be reevaluated. First, there still appears to be disparity in the sentencing of substantially similar crimes, and there is some indication that judges may be trying to avoid such disparity. Second, in response to the Congressional directive in SCACPA, the Commission has already proposed a two-level increase in the base offense level for all trafficking, receipt and possession cases (proposed to be effective November 1, 1996 subject to Congressional disapproval). Thus, even though the consolidation being considered would decrease offense levels (and therefore sentences) in some receipt cases by two levels, offense levels would not drop below where they are now pending the increase

proposed to take effect in November. In effect, the consolidation would nullify the two-level increase proposed to take effect November 1, 1996, and keep certain receipt sentences at their current level while allowing trafficking and possession sentences to increase. Third, the consolidation approach recommended here will actually increase the punishment for some possession cases by making the specific offense characteristics, now available for receipt, available for possession as well. In particular, the specific offense characteristics of §2G2.2 would also apply to possession cases. These include a two-level enhancement for sadistic or masochistic material and the five-level adjustment if the defendant engaged in a pattern of activity of sexual abuse or exploitation.

