**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 2252A(A) and (B) provides:

any person who - -

knowingly receives or distributes - -

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

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either - -

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(B) knowingly possess any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty years (minimum of five years) and applicable fine when Defendant has no prior conviction. Minimum of fifteen and maximum of forty years when the Defendant has previously been convicted of specified sex crimes. Note: conviction under 18 U.S.C. § 2252A only carries a maximum ten year sentence and applicable fine for a first offender, mandatory minimum ten years/maximum twenty years for repeat offenders.

The Supreme Court struck down as unconstitutional former 18 U.S.C. § 2256(B) in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). In response, Congress revised the definition of “sexually explicit conduct” for those cases where the depiction of such conduct is “a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.” *See* 18 U.S.C. §§ 2256(B) and (B); *see also United States v. Williams*, 444 F.3d 1286, 1295-96 (11th Cir. 2006), *rev’d on other grounds*, 553 U.S. 285, 128 S. Ct. 1830 (2008). The Committee has incorporated those changes in this instruction and recommends giving this instruction in those cases where the alleged digital/computer pornography may not depict an actual person. For all other cases, the Committee recommends that Instruction 82.4A be given.

Note that 1998 amendment to § 2252A added subsections and allowing certain affirmative defenses.

*United States v. X-Citement Video, Inc.*, 513 U.S. 64, 111 S. Ct. 464 (1992) held that 18 U.S.C. § 2252 and requires proof of scienter as to the age of the performer. While the structure of § 2252A and is different (using “child pornography” instead of “visual depiction involving the use of a minor”), § 2252A and also contains as an element scienter the age of the performer. *See United States v. Acheson*, 195 F.3d 645, 653 (11th Cir. 1999), *overruled on other grounds by Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002) (the government must show not only that the individual received or distributed the material, but that he did so believing that the material was sexually explicit in nature and that it depicted a person who appeared to him to be, or that he anticipated would be, under 18 years of age).

Knowledge of the interstate nexus is not a required element of the crime. *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006).

In *United States v. Smith*, 459 F.3d 1276, 1296 n.17 (11th Cir. 2006), the Eleventh Circuit noted that the district court instructed the jury that answering the question whether conduct was “lascivious exhibition” involved consideration of “whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive, for example in a location or in a pose associated with sexual activity… and whether the depiction has been designed to elicit a sexual response in the viewer.”

The Eleventh Circuit quoted the dictionary definition of “lascivious” as “exciting sexual desires; salacious.” *United States v. Williams*, 444 F.3d 1286, 1299 (11th Cir. 2006), *rev’d on other grounds*, 553 U.S. 285, 128 S. Ct. 1830 (2008). The court also noted: “What exactly constitutes a forbidden “lascivious exhibition of the genitals or pubic area” and how that differs from an innocuous photograph of a naked child (e.g., a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete… While the pictures needn’t always be “dirty” or even nude depictions to qualify, screening materials through the eyes of a neutral fact finder limits the potential universe of objectionable images.” *Id*. The court further noted that most lower courts have embraced the six-factor “lascivious exhibition” test articulated in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986):

whether the focal point of the visual depiction is on the child’s genitalia or pubic area;

whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

whether the child is fully or partially clothed, or nude;

whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The *Dost* court also observed that “a visual depiction need not involve all of these factors to be a ‘lascivious exhibition of the genitals or pubic area.” The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.’” *Id*.