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March 30, 2009

Honorable Richard H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

**Re: Comments on Proposed Amendments to the Undue Influence of a Minor
Enhancement in §§2A3.2 and 2G1.3**

Dear Judge Hinojosa,

Thank you for the opportunity to provide public comment from the Federal Public and Community Defenders on the Commission's proposal to amend the undue influence enhancement found at §§2A3.2 and 2G1.3 in order to resolve a three-way circuit split between the Sixth, Seventh and Eleventh Circuits.

At the public hearing on March 17, 2009, we submitted written testimony on this issue, which is attached and incorporated as part of this public comment. In that testimony, we recommended that the Commission amend the undue influence enhancement in §2G1.3 to clarify that the enhancement should not be applied in any case in which there is no sexual act involving an actual minor, which is the same approach that the Seventh Circuit took and is listed as Option Three in the proposed amendments. This approach is the most consistent with the plain language of the enhancement and commentary. Option Three is also the best policy choice because it draws a clear line between those defendants who merely commit the base offense – that is, those who manifest an intent to cause a minor to engage in sexual acts – and those whose conduct is more harmful because they caused a minor to engage in sexual conduct by overbearing the minor's will.

While we believe that Option Three is the soundest approach and is the most consistent with the language and purpose of the enhancement, we also recognize that the Commission may wish to allow courts the flexibility to apply the enhancement in cases involving an actual minor where the contemplated sexual act falls short of completion. If that is the case, we recommend that the Commission adopt Option Two, which follows the approach taken by the Sixth Circuit. That option retains the enhancement's focus on the victim and retains the integrity of the enhancement's language. Specifically, under Option Two, courts could still "closely consider

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
March 30, 2009

the facts of the case to determine whether [the defendant's] influence over the minor compromised the voluntariness of the minor's behavior," *see* §2G1.3, comment. (n. 3(B)), even if that influence was not consummated in a sexual act. Option Two gives proper scope to the enhancement by keeping it connected to the increased emotional harm suffered by minors whose will has been overborne and who are at least poised to act involuntarily, as well as ensuring it is applied only in cases where the defendant took the additional step of actually overcoming the minor's will in order to achieve his or her criminal purpose.

Option One goes too far because it permits the enhancement to apply in cases involving undercover agents posing as minors. In contrast to Option Two, this approach would require courts to ignore both the enhancement's plain language and the fact-bound inquiry called for by its commentary. Indeed, substituting "law enforcement agent" for the word "minor" as used in the enhancement renders the inquiry absurd; in "sting" cases, a defendant could never be found to have "unduly influenced a [law enforcement agent] to engage in prohibited sexual conduct," because a court could never honestly find that the defendant's "influence over the [law enforcement agent] compromised the voluntariness of the [law enforcement agent's] behavior."

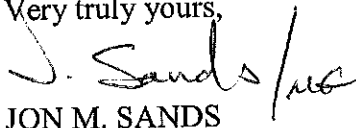
Option One also represents unsound policy because it unmoors the enhancement from the harm it was intended to punish – overcoming a minor's free will *not* to engage in sexual conduct. Determining whether undue influence occurred is a highly fact-intensive inquiry that depends on the nature and characteristics of the minor in question, as well as on the manner in which the minor interacted with the defendant. This is why the commentary recommends that courts "closely consider the facts of the case" in determining whether the influence actually "compromised the voluntariness of the minor's behavior." USSG §2G1.3, comment. n.(3)(B). Allowing law enforcement to shape the facts renders them artificial and unreliable, because the agent will always structure the minor's characteristics and manipulate the conversations with the defendant in such a way as to show an undue influence. The truth is that the agent intends all along to allow the defendant to "overcome" his or her will, and thus exerts a level of control over the conversation that would not otherwise exist. The Commission should not advise courts to enhance sentences based on a manipulated legal fiction rather than actual fact.

In our written testimony, we also recommended that the Commission remove the undue influence enhancement entirely from §2A3.2, and amend Application Note 1 to §2A3.2 to delete subparts (B) and (C) from the definition of "minor." We urge the Commission to consider taking these steps to simplify §2A3.2 now that it no longer applies to any type of offense other than statutory rape.

As always, we very much appreciate the opportunity to submit comments on these and all of the Commission's proposed amendments. We look forward to continue working with the Commission on all matters related to federal sentencing policy.

Honorable Ricardo H. Hinojosa
United States Sentencing Commission
March 30, 2009

Very truly yours,



JON M. SANDS
Federal Public Defender, District of Arizona
Chair, Federal Defender Sentencing Guidelines
Committee

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
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**Written Statement of Jon Sands
Chair, Federal Defender Sentencing Guidelines Committee**

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2009**

March 17-18, 2009

Re: Influencing a Minor

Thank you for the opportunity to provide this testimony on behalf of the Federal Public and Community Defenders on the proposal to amend the undue influence enhancement found at §§2A3.2 and 2G1.3 to resolve a three-way circuit split between the Sixth, Seventh and Eleventh Circuits. We encourage the Commission to adopt Option Three and, in addition, to remove the undue influence enhancement from §2A3.2.

1. The Undue Influence Enhancement

The undue influence enhancement provides for a four-level increase in §2A3.2 and a two-level increase in §2G1.3 if “a participant . . . unduly influenced the minor to engage in prohibited sexual conduct.” See U.S.S.G. §§2A3.2(b)(2)(B)(ii), 2G1.3(b)(2)(B). Both guidelines instruct courts to “closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior.” See U.S.S.G. §§2A3.2, cmt. n. 3(B), 2G1.3, cmt. n. 3(B). Both guidelines also set forth a “rebuttable presumption” that a participant “unduly influenced the minor to engage in prohibited sexual conduct” in any case where the participant is at least 10 years older than the minor. *Id.* The guidelines justify this presumption “because of the substantial difference in age between the participant and the minor.” *Id.*

The undue influence enhancement has been in effect in substantially the same form since November 1, 2000. See U.S.S.G., App. C, Amend. 592 (2000).¹ It was created as part of a series of amendments to the sex offense guidelines following passage of the Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 502-07, 112 Stat. 2974, 2980-82 (1998) (“the Act”). See *id.* The enhancement was intended to apply in cases where the defendant “took active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim’s behavior was compromised.” See U.S.S.G., App. C, Amend. 592 (2000). The purpose was to distinguish between statutory rape and other types of cases in which a

¹ The Commission last amended §2A3.2’s enhancement in 2004, raising the enhancement from two levels to four levels. U.S.S.G., App. C, Amend. 664 (Nov. 1, 2004). The only other changes to §2A3.2(b)(2)(B) since 2000 have been that the Commission renumbered the paragraphs, substituted the term “minor” for “victim,” and removed the reference to facilitating travel or transportation of a minor after those cases were transferred to §2G1.3.

minor voluntarily agreed to engage in sexual conduct, and cases in which the minor's will was overcome by the defendant's manipulations. As the Commission explained:

Despite the fact that §2A3.2 nominally applies to consensual sexual acts with a person who had not attained the age of 16 years, Commission data indicated that many of the cases sentenced under §2A3.2, directly or via a cross reference from §2G1.1, involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person. Analysis of these cases revealed conduct such as coercion, enticement, or other forms of undue influence by the defendant *that compromised the voluntariness of the victim's behavior* and, accordingly, increased the defendant's culpability for the crime.

Id. (emphasis added). Focusing on the effect of the defendant's conduct on the victim's behavior, the enhancement was written in the past tense to address precisely those circumstances where the participant "unduly influenced" the minor and "compromised the voluntariness of the minor's behavior." See U.S.S.G. §§2A3.2(b)(2)(B) & cmt. n.5, 2G1.1(b)(4)(B) & cmt. n.7 (2001) (emphases added).²

2. *The Circuit Split*

In the first appellate case interpreting the undue influence enhancement, the Eleventh Circuit held that it applies in cases where an undercover officer poses as a fictitious minor and also applies in cases involving no illegal sex acts (e.g., attempts). See *United States v. Root*, 296 F.3d 1222, 1233-34 (11th Cir. 2002). The defendant in *Root* was sentenced to 40 months imprisonment under §2A3.2 for attempting to persuade an undercover officer posing as a minor to engage in criminal sexual activity and traveling to meet the officer in violation of 18 U.S.C. §§ 2422(b) and 2423(b).³ On appeal, the court affirmed application of the undue influence enhancement, holding that an offender could be found to have "unduly influenced the victim to engage in illegal sexual acts" even though no one had engaged in illegal sexual acts and the "victim," being an undercover officer, had not actually been influenced at all. *Id.* at 1234. In so holding, the court relied heavily on Application Note 1's definition of the term "victim," which included undercover law enforcement officers, rather than on the plain language of the enhancement. *Id.* at 1233. With regard to the rebuttable presumption of undue influence, the court noted that the presumption applied even in a case involving a sting operation so long as the "hypothetical" minor at issue was more than 10 years younger than the defendant. *Id.* at 1235.

² Amendment 592 also clarified that a "victim" under §2A3.2 included an undercover officer. It did not, however, suggest that an undercover officer could substitute for a minor who had been "unduly influenced" and "compromised" by the defendant.

³ Offenses under 18 U.S.C. §§ 2422(b) and 2423(b) are now both referred to §2G1.3. Had the defendant been convicted today of the exact same conduct, he would have had a minimum offense level of 32 and a guideline range of 121 to 151 months.

A year later, the Seventh Circuit rejected *Root* because it “ignored the plain meaning of ‘unduly influenced’ and ‘was compromised,’ and ignored the clear language of the commentary requiring a court to closely consider the voluntariness of the victim’s behavior.” *United States v. Mitchell*, 353 F.3d 552, 561 (7th Cir. 2003). “[A]n honest reading of the plain language of the guideline” and the commentary led the court to reject the argument that the enhancement could apply in attempt cases, holding instead that “the offender must have succeeded in influencing or compromising” and that “the enhancement cannot apply where the offender and the victim have not engaged in illicit sexual conduct.” *Id.* at 556-57. It also rejected the notion that the enhancement could apply in a sting operation involving an undercover agent instead of an actual minor. The court noted that the language of the enhancement focused on the victim’s conduct, and thus even if the court assumed that the undercover officer was the “victim” under the guideline, the undue influence enhancement could not apply unless that officer had been unduly influenced to engage in prohibited sexual conduct. *Id.* at 557, 559. If it were to hold otherwise, the court noted that it would be virtually impossible for any defendant to overcome the rebuttable presumption of influence because “the government controls every fact of the minor from her age to her mental state. . . . The Sentencing Commission surely cannot have contemplated that the rebuttable presumption can be made irrebuttable by the manipulations of the government.” *Id.* at 560-61.

Two years later, the Sixth Circuit agreed that “the undue influence enhancement “is not applicable in cases where the victim is an undercover agent representing himself to be a child under the age of sixteen.” *United States v. Chriswell*, 401 F.3d 459, 469 (6th Cir. 2005). Like the Seventh Circuit, the Sixth Circuit relied on the enhancement’s plain language and the victim-focused inquiry contemplated by the commentary. *Id.* at 469. It also agreed with the Seventh Circuit that applying the enhancement’s rebuttable presumption to cases involving an undercover agent “renders the presumption irrebuttable.” *Id.* at 469-70. Unlike the Seventh Circuit, however, the Sixth Circuit left open the possibility that the enhancement could apply in an attempt case involving an actual minor. *Id.* at 470.

3. *The Proposed Options*

The Commission proposes three options for amending §§2A3.2 and 2G1.3 to resolve this circuit split. Option One would follow the Eleventh Circuit by explicitly permitting application of the undue influence enhancement to cases involving neither prohibited sexual conduct nor an actual minor, meaning all sting operation cases. Option Two would follow the Sixth Circuit and preclude application of the enhancement where the “minor” was actually an undercover officer, but would permit it in other types of attempt cases that involve actual minors but no prohibited sexual conduct. Option Three would follow the Seventh Circuit and require both an actual minor and actual sexual conduct before advising courts to apply the undue influence enhancement

4. The Commission Should Adopt Option Three Because It Satisfies the Enhancement's Language and Purpose

Option Three fully adheres to the enhancement's language and stated purpose.⁴ The undue influence enhancement distinguishes – and was intended to distinguish – between cases in which a minor voluntarily agreed to engage in prohibited sexual conduct, and cases in which the defendant unduly influenced the minor to engage in prohibited sexual conduct, thereby rendering the minor's participation "involuntary." Both types of conduct are criminal, but the Commission rationally decided that the latter involved conduct that was more culpable – and thus subject to an "enhanced" penalty – because it involved both engaging in prohibited sexual conduct with a minor *and* overcoming the minor's will to do so. Option Three properly limits the enhancement's application to cases involving precisely the type of harm that renders these cases worse than the typical case involving prohibited (albeit consensual) sexual contact with a minor.

5. The Commission Should Reject Option One Because It Does Not Require the Existence of an Actual Minor.

We recommend that the Commission reject Option One, which would permit application of the enhancement in every case, regardless of whether the case involved an actual minor. Indeed, it would permit application of the enhancement to cases in which the alleged "minor" is a figment of an undercover agent's imagination.

This approach is unsatisfactory because it unmoors the undue influence enhancement from its language. As the Sixth and Seventh Circuits have already held, the language of the enhancement clearly requires the existence of an actual minor – "an actual target of influence." *See Mitchell*, 353 F.3d at 558. For this, an undercover agent is no substitute. Indeed, even under the revised language proposed in Option One, a court would need to "closely consider the facts of the case to determine whether a participant's influence over the [undercover officer] compromised the voluntariness of the [undercover officer's] behavior." The answer to that inquiry, if honestly given, should always be no. *See Chriswell*, 401 F.3d at 469 ("[a]n undercover law enforcement officer who is not at all persuaded in thought or deed, . . . cannot be 'unduly influenced'"); *United States v. Hamm*, 281 F.Supp.2d 929, 929 (W.D. Ky. 2003) (refusing to apply enhancement because "whenever a sting operation is involved or a federal agent poses as an underage person, it will not be possible to obtain proof of undue influence").

Without an actual minor, courts seeking to apply the enhancement must engage in a highly speculative analysis. Permitting law enforcement to define the minor's attributes allows for too much "manipulation of defendant's sentencing exposure during the investigation phase," which is "a significant source of continuing disparity in the federal system." *See U.S. Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of*

⁴ Preferably, the enhancement would be completely removed from §2A3.2. *See* Part 7, *infra*.

Sentencing Reform (Nov. 2004) at 82; *see also Mitchell*, 353 F.3d at 561 (noting that a defendant could overcome the rebuttable presumption of undue influence “if [the fictional minor] had previously had many affairs with older men or had been involved in the sex industry . . . but no police officer would ever create a fictional victim with such a profile”).

On the other hand, using an “average minor” approach requires an inquiry that necessarily turns on hypotheticals, is far removed from the close consideration of the facts advised by the commentary, and threatens unwarranted disparity in application. *Compare Hamm*, 281 F.Supp.2d at 929 (enhancement inapplicable because “[o]ne cannot merely speculate how a defendant’s action may have affected the average fourteen year old”) with *United States v. Hatton*, 2009 WL 507506, *4 (W.D. La. Feb. 26, 2009) (enhancement applies even though the defendant “did not actually exercise undue influence” because “the facts would have constituted undue influence had the victim been fourteen and not an undercover officer”); *see also United States v. Yilmazel*, 256 Fed. Appx. 297, 299 (11th Cir. 2007) (affirming enhancement in undercover sting because “while there was not *actual* undue influence, Yilmazel’s conduct would have constituted undue influence if there had been a real victim”) (emphasis in original); *United States v. Panfil*, 338 F.3d 1299, 1299-1300, 1303 (11th Cir. 2003) (noting, without explanation, that district court “could properly have considered Panfil’s conduct, *in toto*, to find that Panfil unduly influenced the victim” where the “victim” was an agent pretending to be a minor, but that the enhancement was not given).

Indeed, shifting the focus away from the harm to the victim and toward the defendant’s intent, as Option One would require courts to do, so broadens the reach of the enhancement that courts following this approach have even applied it to defendants caught up in stings where the undercover agent did not pretend to be a minor, and the defendant did not otherwise attempt to communicate directly with any minor, fictional or otherwise. *See, e.g., United States v. Vance*, 494 F.3d 985, 995-96 (11th Cir. 2007) (affirming application of undue influence enhancement in undercover sting operation although defendant believed he was communicating with a business that arranged for American tourists to engage in sexual conduct with minors in Costa Rica because “the enhancement is directed at the defendant’s intent, rather than any actual harm caused to a genuine victim”). The Commission should reject Option One because sentences should be based on fact, not fiction. *Mitchell*, 353 F.3d at 561 (“We can only know if a real fourteen-year-old girl would be influenced if we, in fact, have a real fourteen-year-old girl on the receiving end of the influence.”).

6. *The Commission Should Reject Option Two Because It Does Not Require that Any Minor Actually Be Unduly Influenced*

Unlike Option One, Option Two would not apply the enhancement to cases involving undercover agents pretending to be minors. It would, however, permit the enhancement to apply in cases in which the defendant did not engage in sexual conduct with the minor. This approach, too, is unsatisfactory, as it ignores the commentary’s instruction that courts focus on “whether a participant’s influence over the minor

compromised the voluntariness of the minor's behavior." See U.S.S.G. §2A3.2, comment. n.3(B); § 2G1.3, cmt. n.3(B) (emphasis added); *Mitchell*, 353 F.3d at 556 ("[t]he only way to make the language applicable in the case of an attempt is to use a grammatical shoehorn").

It also shifts the court's focus away from the special harm to the victim that the enhancement was promulgated to punish and, in the process, recommends enhanced penalties simply for committing the base offense. The intent to engage in prohibited sexual conduct with a minor is an essential element of every offense referred to §§2A3.2 and 2G1.3. See, e.g., 18 U.S.C. § 2243(a) (knowingly engaging in a sexual act with a minor between the ages of 12 and 15); § 1591(a) (knowingly recruiting, enticing, harboring, transporting, providing, detaining or maintaining any minor knowing or recklessly disregarding the minor will be caused to engage in a commercial sex act); § 2421 (transporting a person with intent they engage in sexual activity); § 2422 (persuading, inducing, enticing, or coercing a minor to engage in criminal sexual activity), § 2423 (traveling or transporting a minor with intent to engage in criminal sexual activity with the minor); § 2425 (transmitting information about a minor with intent to entice, encourage, offer or solicit criminal sexual activity). Similarly, most cases sentenced under §2G1.3 at least require the government to prove that the defendant persuaded, induced, enticed or coerced a minor to engage in sexual conduct, or at least attempted to do so. See, e.g., 18 U.S.C. §§ 2422, 2425.

The undue influence enhancement was intended to increase sentences in cases involving more than an intent to engage in sexual conduct with a minor, whether manifested through persuasion, coercion, inducements, enticements, or other conduct. It was intended to apply only to those cases in which the defendant's persuasion actually caused a minor to engage in *involuntary* sexual conduct. See U.S.S.G., App. C, Amend. 592 (2000). Yet, courts that apply the undue influence enhancement to attempt cases typically point to nothing more than the base offense conduct to support the enhancement. See, e.g. *United States v. Barnett*, 260 Fed. Appx. 206, 207-08 (11th Cir. 2007) (affirming application of enhancement because defendant failed to overcome presumption of influence where he was convicted of enticing a minor to engage in sexual activity and the fictional minor was more than 10 years younger); *Root*, 296 F.3d at 1235-36 (affirming application of enhancement, in part, because defendant "used persuasive powers to influence" fictional minor). It makes sense to hold a defendant criminally liable if, for example, he attempted to persuade a minor to engage in sexual activity and failed (whether because the minor rejected the defendant, the "minor" was an undercover agent, or for some other reason). That the defendant can be convicted under 18 U.S.C. § 2422 and subject to sentencing under §2G1.3 for such conduct does not mean, however, that he should also be subject to an enhanced sentence for the same conduct – particularly when the harm that the enhancement seeks to punish never actually occurred.

Sting operations are themselves simply one form of attempt. The Sixth Circuit recognized this, but chose to leave open the possibility that the enhancement might be appropriately applied in some future attempt case involving an actual minor. See *Chriswell*, 401 F.3d at 470. We do not believe, however, that attempt cases involving

actual minors are likely to occur. In fact, we are unaware of any case applying the undue influence enhancement for an attempt involving an actual minor.

Current research tells us that the vast majority of online sexual solicitations of minors do not involve the circumstances contemplated by the undue influence enhancement. A task force created by 49 attorneys general to investigate the problem of sexual solicitation of children online recently found that “the image presented by the media of an older male deceiving and preying on a young child does not paint an accurate picture of the nature of the majority of sexual solicitations and Internet-initiated offline encounters.” See Berkman Center for Internet and Society at Harvard University, *Enhancing Child Safety & Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States* (Dec. 31, 2008) at 16, available at <http://cyber.law.harvard.edu/pubrelease/isttf/>. Rather, “cases involving Internet-related child exploitation . . . typically involved post-pubescent youth who were aware that they were meeting an adult male for the purpose of engaging in sexual activity.” *Id.* at 4.

A study of criminal cases in which adult sex offenders were arrested after meeting young victims online found that victims were adolescents and few (5%) were deceived by offenders claiming to be teens or lying about their sexual intentions. . . . Interviews with police indicate that most victims are underage adolescents who know they are going to meet adults for sexual encounters and the offenses tended to fit a model of statutory rape involving a post-pubescent minor having nonforcible sexual relations with an adult, most frequently adults in their twenties..

Id. at 16. Instead of the large age disparities contemplated by the undue influence enhancement, “other peers and young adults account for 90%-94% of [online sexual] solicitations in which approximate age is known.” *Id.* at 13. And less than one in three sexual solicitations of minors involves any attempt at offline contact. *Id.* at 13-14. It makes sense, then, to enhance sentences for defendants who go further than most and actually succeed in inducing involuntary sexual conduct.

As a policy matter, the guidelines should not be written to take into account every possibility, but instead should be focused on the harm they seek to punish. Here, courts should not be advised to enhance a defendant’s sentence for overcoming a minor’s will through undue influence unless the minor’s will was actually overcome.

7. *The Commission Should Remove the Undue Influence Enhancement and the Definition of “Minor” in §2A3.2*

In addition to seeking comments on the proposed options, the Commission seeks comment regarding the current application of the undue influence enhancement. We recommend that the Commission remove the enhancement entirely from §2A3.2. As reflected by the Commission’s request for comment and our experience, cases sentenced under §2A3.2 typically involve straightforward statutory rape cases. Cases involving

coercion or enticement of a minor rising to the level of an undue influence are no longer sentenced under §2A3.2, but instead go to §2G1.3 or to one of its cross-referenced guidelines. The undue influence enhancement in §2A3.2 cases, at best, functions as a relic; at worst, it is used to inappropriately increase sentences in cases far removed from the special harm it seeks to punish. Compare *United States v. Castellon*, 213 Fed. Appx. 732, 737 (10th Cir. 2007) (affirming undue influence enhancement where defendant was 26 years older than minor even though minor was fifteen, had a practice of initiating contact with strange men over the Internet and through text messages, repeatedly initiated contact with defendant, and actively sought out and pursued a relationship with defendant) with *United States v. Bitsilly*, 386 F.Supp.2d 1192, 1192-93, 1196-97 (D. N.M. 2005) (refusing to apply enhancement in statutory rape case despite twenty-year age difference and fifteen-year-old minor's pregnancy, where minor and her family "glowingly" acknowledged the consensual nature of the relationship).

The Commission should also amend Application Note 1 to §2A3.2 to delete subparts (B) and (C) from the definition of "minor." Subpart (B) includes in the definition of "minor" "an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years and (ii) could be provided for the purposes of engaging in sexually explicit conduct." Subpart (C) includes "an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years." Both definitions are no longer relevant to §2A3.2, since it now applies only to statutory rape offenses.