



PROTECT

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United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

Comment on Proposed Amendments Regarding Child Pornography and Related Issues

To Whom it May Concern:

Thank you for the opportunity to provide comment on your proposed amendments to the U.S. Sentencing Guidelines, published January 15th. Our comments are outlined below.

Amendment 5: Child Pornography Circuit Conflicts

2-Level Enhancement for Distribution:

Our Position: We strongly disagree with the Commission's proposed change, which would result in predictable harm to children.

"In 2011, it was estimated that 57 percent of global Internet traffic was P2P traffic. **The very existence and purpose of P2P networks is to share digital content**, and there is an active academic and community-level discourse criticizing P2P users who download but do not share. Some P2P networks encourage sharing by offering faster download for sharers or even mandate sharing in some circumstances." [emphasis ours]

Report to Congress: Child Pornography Offenses
U.S. Sentencing Commission, Dec. 2012, p. 51

We will not debate the legal question here of whether it should be assumed that criminals who search for, download, install and use *file-sharing* software to participate in large networks of child pornography distributors understand that they are engaged in sharing files; nor whether new complexities in internet software might make it ever more unrealistic for prosecutors to prove user intent; nor whether the degree of understanding and intent of a child pornography offender who is actively engaged in file-sharing should matter at all.

Debating this question is precisely what federal prosecutors have done in federal courts across the U.S., with, as the Commission notes, mixed results.

Our point is simpler: faced with federal circuit court rulings that fall on both sides of this debate, the U.S. Sentencing Commission has taken the path of least resistance. It has chosen the wrong side, which will result in danger to children. The Commission's proposed policy will clearly ensure that prosecution of defendants who traffic in child rape recordings is much more difficult, with predictable results.

If this change is made to the Guidelines, advocates for children will have no choice but to pursue new federal legislation to strengthen the law and clarify Congressional intent with regard to child pornography distribution and related crimes (legislation that will likely diminish judicial discretion).

5-Level Enhancement for Distribution:

Our Position: We strongly disagree with the Commission's proposed change, which would result in predictable harm to children.

Again, faced with circuit court rulings that fall on both sides of the same issue, the Commission has chosen the easiest and weakest route.

Rather than adopt the Fifth Circuit's position that "when the defendant knowingly uses file sharing software, the requirements for the 5-level enhancement are generally satisfied," the Commission proposes a quaint definition: that "the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person..."

This proposed policy is willfully unresponsive to the realities of today's child pornography market, where huge networks of internet users consciously join together to share anonymously and copiously in ways the average internet user can barely understand. The Commission knows better:

"...The rapidly evolving nature of the Internet renders impossible any definitive attempt to describe the technology used in current child pornography offenses."

Report to Congress: Child Pornography Offenses
U.S. Sentencing Commission, Dec. 2012, p. 47

"Impersonal distribution involves 'offenders operating alone without direct contact with other[s]' **and not requiring specific directed action to share child pornography** beyond installing the software, choosing to permit sharing of the user's files, and running the P2P network. [emphasis ours]"

Report to Congress: Child Pornography Offenses
U.S. Sentencing Commission, Dec. 2012, p. 52

To elaborate on the Commission's own points above, the nature of peer-to-peer file-sharing is that it is conducted through vast, anonymous barter networks, using highly automated protocols. To make reality even more complex and nuanced, some widely used file-sharing systems (e.g., BitTorrent) retrieve a *single image* for a user in *fragments from multiple other, anonymous users* throughout the world. This makes the burden of proving that a defendant "agreed to an exchange with another person," a stretch.

The complex and counter-intuitive software being used today to barter child pornography makes it extremely challenging for prosecutors to prove the subjective understanding a dim-witted trader might have had about his activities. What virtually all peer-to-peer traders *do understand*, however, is that they are part of an online community of other like-minded perpetrators, engaged in illegal "**file-sharing**" of child abuse images. That should be enough.

The Commission's proposal will inevitably result in less time served by criminals with a sexual interest in children, which will inevitably result in more children being preyed upon by those offenders, during the time they should have been incarcerated.

After all, as the Commission's own 2012 Report to Congress makes clear, a growing body of research shows that a minimum of one third of possessors of child abuse images are contact offenders (USSC presentencing report research), while the actual rate of dual offending appears to be at least 55%.

Offenses Involving Unusually Young and Vulnerable Minors

Our Position: We agree with and thank the Commission for its position that "application of the age enhancement does not preclude application of the vulnerable victim adjustment."

Discussion:

Just as federal and state sexual assault penalties traditionally distinguish between 17-year-old victims and prepubescent victims, we believe it is appropriate to distinguish between 12-year old victims and infants or toddlers.

Based upon a decade of working closely with both federal and state lawmakers on child exploitation statutes, we are confident that these distinctions reflect an almost universal legislative consensus and intent. There is no doubt they also reflect public opinion and values.

Legislative and judicial attitudes on this subject generally have not kept pace with the reality of child sexual exploitation crimes. A 2015 U.S. Department of Justice-funded survey of law enforcement—as well as Congressional testimony in 2006, 2007 and 2008—makes clear that a large portion of possessors of child abuse material collect images of extremely young children being abused and that the imagery being trafficked has been getting more sadistic.

Moreover, there is a great deal of evidence that abusers are targeting pre-verbal children in order to decrease their chances of being reported and successfully prosecuted. The Commission is correct in supporting this enhancement.

Amendment 2: Conditions of Probation and Compassionate Release

Compassionate Release

Our Position: The caregiver provision should be changed to exclude offenders who have committed child abuse and exploitation crimes, other sex offenses, or other crimes against vulnerable populations.

We have no objection to compassionate release for certain elderly and ill prisoners, which could contribute to more rational use of scarce correctional resources, in addition its humane benefits.

However, the Commission proposes provisions for compassionate release upon “the death or incapacitation of the family member caregiver of the defendant’s child” or “the incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.”

Opinions differ on the proper purpose of prisons, ranging from corrections/rehabilitation to punishment or deterrence. In our view, the highest and best use of expensive and limited prison space is to remove predatory individuals from access to potential victims. No greater priority exists for incarceration than individuals known to be dangerous to children.

The proposed caregiver provision is reminiscent of the old “breadwinner” argument that kept many child predators and domestic violence perpetrators out of jail and prison. We suggest a simple modification to fix the proposed policy: exclude inmates from compassionate release who have been convicted of a crime against a child, including child pornography crimes, or any sex crime against an adult, which would be evidence of a predatory nature. Sending them back into the home to be around children or become “caregivers” of children would be reckless.

Conditions of Probation

Our Position: Persons convicted of sexual abuse, human trafficking or sexual exploitation against a child should be prohibited from living with children while on probation.

There are few things more totalitarian that government can do to an individual than to deprive him of his liberty and force him to live in the brutal and dangerous environment that exists in our prisons today. *One of those things* is to force a child to live with a pedophile or other sexually dangerous adult. When that happens—as it does every day in America—a child’s home becomes her prison.

As a matter of public policy, social service agencies typically operate with pressure to “reunify” families in the aftermath of child abuse, treating child sexual abuse as a type of social dysfunction. A large industry of attorneys, social workers and psychologists is dedicated to facilitating family reunification in one way or another.

However, no such practice should be manifested in federal sentencing guidelines.

Every offender convicted of federal sex or human trafficking crimes might have received a sentence of incarceration. In that event, every aspect of his life would be tightly controlled and restricted—resulting in removal of all contact from children—and such draconian control would be unremarkable.

Allowing sexual predators on probation to have private access to children while under federal correctional control is beyond the pale and should be prohibited categorically.

Thank you again for the opportunity to comment on these proposed amendments.

Grier Weeks

A handwritten signature in blue ink that reads "Grier Weeks". The signature is written in a cursive, flowing style.

Executive Director