United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

February 13, 2012

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Comments Related to February 15, 2012 Hearing on Federal Child Pornography Offenses

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following input relevant to the Commission's upcoming hearing on sentencing for federal child pornography offenses. As explained below, these crimes evoke strong emotions – and understandably so. We at the PAG offer our perspective on how these crimes should be punished – a perspective informed by in-depth familiarity with the facts and circumstances of those prosecuted for such offenses, viewed in the context of sentencing for the entirety of federal crimes. We look forward to working with the Commission on this and other topics in the coming months.

A. Child Pornography Offenders Differ in Their Levels of Culpability

One of the fundamental problems with the child pornography guideline is that it does not distinguish offenders with differing levels of culpability. In fact, it does the opposite. Because many of its specific offense characteristics apply to virtually every offender, guideline recommendations often approach or exceed the statutory maximum for all offenders – regardless of real differences in criminal history and offense conduct.

Based on the application rates for §2G2.2's specific offense characteristics, it is fair to assume that in 2010, the mine-run child pornography offender used a computer (96.2%), possessed images of prepubescent minors or minors under the age of twelve (95.6%) and images of violence (73.6%), and possessed 600 images or more (66.9%).[1] These enhancements alone combine to raise the base offense level by

[1] *See* USSC, *Use of Guidelines and Specific Offense Characteristics Fiscal Year*

13 levels to a minimum offense level of 31 for first offenders with no aggravating factors that would set them apart from the average offender. For this reason, a greater percentage of child pornography offenses are sentenced below the recommended guideline range than any other offense type.[2]

Prosecutors and judges are not taking these actions because they feel that child pornography is a non-serious offense. It is because, even after a full appreciation of the harms caused by the crime, they cannot rely on the guidelines recommendation to give even a rough approximation of a sentence that serves the purposes of sentencing.

In our experience, most child pornography offenders are first offenders with no prior contacts with the criminal justice system and nothing in their background to suggest that they are a danger to children or anyone else.[3] Forensic review of their computers often shows that whatever child pornography they possessed made up a small part of a much larger collection of adult pornography, suggesting that these offenders are more generally interested in pornography itself and not children.[4] The images are typically received through online searches or as part of peer-to-peer Internet networks, and often consist of the same images being recycled,

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2010 at 36-37 ("*2010 Guidelines' Use*").

2 In 2011, prosecutors recommended a below-guideline sentence in 17.7% of child pornography cases. *See* USSC, *Preliminary Quarterly Data Report, 4th Quarter Release through Oct. 31, 2011* at Table 5. Although this percentage is less than the percentage of government-recommended below-guideline sentences across all offense types, 83% of the prosecutor-driven below-guideline recommendations in the child pornography context were for reasons other than substantial assistance, compared to only 16.7% for all offense types. *See id.* at Tables 1 & 5. Another 47.9% of child pornography cases received below-guideline sentences from the courts, for a total below-guideline percentage of 65.5%, almost 50% higher than the below-guideline rate for all offense types. *Id.*

3 *See United States v. Cruikshank*, 667 F. Supp. 2d 697, 701 (S.D. W.V. 2009) (describing court's experience that most child pornography offenders "have no prior criminal history[,] . . . healthy family lives and productive careers").

4 *See, e.g., United States v. Grober*, 624 F.3d 592, 595 (3rd Cir. 2010) (noting that the child pornography that the defendant possessed was "among an even larger collection of adult pornography").

belying the notion that the exchange of child pornography necessarily and automatically encourages further production for financial gain.[5]

On rare occasion, we do see offenders who have actively participated in the creation of child pornography for financial gain. Similarly, there are, on occasion, offenders guilty of child pornography offenses whose offense conduct includes attempts to induce minors to engage in sex acts. But the current guideline's enhancements – particularly the enhancements for use of a computer, and the number and nature of images – do not meaningfully distinguish between these offenders and run-of-the-mill offenders who, while clearly guilty of possessing or receiving child pornography, lack any truly aggravating characteristics.[6]

B. The Child Pornography Guideline Enhancements Should Better Distinguish Offenders On The Basis Of Relative Culpability

It is the PAG's position that the guidelines should be modified to distinguish between an offender who possesses, views, or receives child pornography, on the one hand, and an offender who produces child pornography or attempts to arrange a meeting with a child, on the other. The vast majority of child pornography offenders do not abuse children. A soon-to-be-published study followed 72 individuals who received outpatient sex offender treatment after being charged with or convicted of a child pornography offense; after four years, none of the individuals had been arrested for a contact offense.[7] Another study followed 231 child

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5 As noted by the Fifth Circuit, images of one minor's sexual abuse "have emerged in numerous child pornography cases since 1998." *See United States v. Wright*, 639 F.3d 679, 681 (5th Cir. 2011), *rehearing en banc granted*, __ F.3d __, 2012 WL 248828 (5th Cir. Jan. 25, 2012).

6 One would expect that a case involving attempts to lure a minor into sexual conduct would be prosecuted for that more serious conduct. Unfortunately, the child pornography guidelines often result in higher sentences for child pornography than for actually attempting to abuse a child. *Accord United States v. Dorvee*, 616 F.3d 174, 187 (2nd Cir. 2010).

7 *See* Wollert, R. Waggoner, J., and Smith, J. *Federal Child Pornography Offenders (CPOs) Do Not Have Florid Offense Histories and Are Unlikely to Recidivate*, to be published in The Sex Offender, Vol.1, edited by Barbara K. Schwartz and © by Civic Research Institute, Inc. ("Wollert et al., *Federal CPOs*").

pornography offenders for six years; only 2 of those people (0.8%) committed a contact offense.[8]

The enhancements that relate to the images possessed – both the nature or type of images and their volume – punish typical offenders as though they committed aggravated child pornography offenses, when in fact their offenses reflect no truly aggravating conduct. In 2010, two-thirds of child pornography offenders had their sentences raised by five offense levels for number of images alone.[9] Given the online climate of file sharing programs such as Gigatribe, offenders often receive far more images than they requested or intended to receive.[10] Other programs such as peer-to-peer networks offer unlimited access to another user's files. Many offenders end up with large amounts of material that they never actually view and did not want. Forensic review of our clients' computers frequently shows child pornography files that were never opened, or that were opened, quickly reviewed and deleted. The guidelines' focus on number of images thus mistakes quantity for culpability and fails to recognize real differences in the viewing habits and intent of individual defendants.

Similarly, the enhancements for images of prepubescent minors and for violence do not correlate in practice to offenders with higher culpability or whose offenses involved greater harm. Three out of four child pornography offenders received an enhancement for violent images and virtually all (95.6%) received an enhancement for images of a prepubescent child.[11] There may be some instances where the quantity of images of violence or prepubescent children, when combined with the searching, viewing and storing habits of the defendant, suggest a true fixation and thus properly serve to aggravate the crime, but the current guideline wholly fails to draw these types of distinctions.

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8 Endrass, Jerome, et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC Psychiatry 43 (2009).

9 *See* USSC, *2010 Guidelines' Use* at 37.

10 *See, e.g., United States v. Maguire*, 436 Fed. Appx. 74, 78 (3rd Cir. 2011) (noting district court's observation that "number of images doesn't reflect intent any longer, because the click of the mouse can result in many more images than anybody ever really perhaps wanted").

11 *See* USSC, *2010 Guidelines' Use* at 37.

The distribution enhancements likewise treat offenders with clear differences in culpability as though they are the same. "Because of the nature of peer-to-peer file sharing programs, a simple possessory crime evolves into a distribution offense as soon as someone accesses a shared file."[12] Many peer-to-peer network users do not fully understand how they work, and thus higher culpability cannot be assumed merely from participation in them.[13] The distribution enhancements should be reserved for the truly culpable distributors – those who make large amounts of child pornography available to others for financial gain and those who distribute newly-produced images.

C. The Commission Should Address Aggravating Factors Directly

We urge the Commission to avoid the temptation to continue to tinker with indirect ways to enhance sentences under the child pornography guidelines in order to capture more culpable or harmful offenders. Punishing offenders for the types of technology they use or the company they keep would merely repeat the mistakes of the past because although such conduct might suggest higher culpability, then again it might not. There are some truly aggravating facts in some child pornography cases, for example, producing child pornography, making money from the sale of child pornography, and using child pornography in order to help facilitate a contact sex offense on a minor. The Commission should focus on enhancing sentences for these offenders directly, and not cast about for other facts that might or might not apply to these people and that will not distinguish them from other offenders.

With respect to past conduct, Chapter Four already enhances sentences for prior offenders; there is no data-driven or purpose-driven reason to double-count that one fact in this context by adding a criminal history enhancement to Chapter Two. Moreover, it would likely not have a meaningful impact on sentences, because most child pornography offenders are first offenders with no prior contact with the criminal justice system.

Enhancing sentences for past conduct that did not rise to the level of a criminal conviction, or enhancing sentences for possible future conduct, is anathema to our system of justice, and for good reason. Sentencing rules based on speculation about what the person may have done in the past or may do in the

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12 *United States v. Strayer*, 2010 WL 2560466, *12 (D. Neb. June 24, 2010).

13 *See* Federal Trade Commission, *Staff Report: Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues* at 11 (2005).

future are inherently and fundamentally flawed.[14] And speculation is truly the word for it; despite widespread fear that child pornography offenders are also contact offenders, the available data do not and, to our knowledge, never have supported that fear.[15] Moreover, wading into this area would be treacherous for the Commission, which lacks the tools for predicting, at the wholesale level, individuals who will commit a future sex crime and individuals who will not.

D. Sentences for Child Pornography Offenses Should Be Driven by the Purposes of Sentencing and Empirical Data

Sentences for child pornography offenses should be driven by the same considerations that drive all federal sentences, that is, how to achieve just punishment, adequate deterrence, public protection, and rehabilitation in the most effective manner.

There is no reason to preclude child pornography offenders from receiving probation and other forms of non-prison punishment. As a group, they have very low recidivism rates. They also suffer far harsher collateral consequences than other offenders, including shame and humiliation arising from the nature of the crime, the stigma of being a registered sex offender, and work and residency restrictions that are so severe and pervasive that our clients sometimes cannot reside with their own families. For child pornography offenders in need of sex offender treatment, probation or community confinement may be a sentence that will better protect the public because, in our experience, sex offender treatment in the Bureau of Prisons is so inadequate as to render it non-existent.[16] There is no empirical support for categorically precluding that option for these low-risk offenders.

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14 The idea of punishing individuals for things they might do later has been the stuff of science fiction for generations. *See, e.g.,* Phillip K. Dick, The Minority Report and Other Classic Stories (Citadel 2002) (originally published in 1956); *see also* George Orwell, Nineteen Eighty-Four (Plume 2003) (originally published in 1949) (featuring Thought Police whose job it is to uncover and punish "thought crimes")

15 *See* Wollert et al, *Federal CPOs* (listing studies).

16 Given the nature of sex offender treatment and the fact that BOP uses statements made in the course of treatment against inmates in civil commitment petitions, most BOP inmates cannot safely participate in treatment even if it was otherwise available.

Whether on probation or supervised release, when child pornography offenders are in the community, they are closely monitored and their freedom is greatly restricted. The U.S. Probation Office utilizes myriad tools to control the conduct of this class of offenders, including random searches of their residences, vehicles, computers and phone records; bans on the possession of any form of sexually explicit material; bans on loitering in places children frequent, including parks, zoos, and public swimming areas; bans on speaking to persons under the age of 18; electronic monitoring and surveillance of both the offender and his or her computers, personal data assistants, electronic games, and phones; sex offender registration requirements; residency, employment and Internet restrictions; and the requirement to participate in sex offender treatment. These tools are most effective when tailored to fit the individual. The best role for the Commission in this area is to alert judges to their availability; judges can then determine which tool or combination of tools would best serve the purposes of sentencing in each individual case.

The harms of producing and circulating child pornography are real. In our experience, however, different types of child pornography and different types of victim experiences undermine the effectiveness of a generalized approach. Typically, we see the harms associated with circulating child pornography appropriately recognized and reflected through prosecution and conviction, through post-*Booker* sentencing decisions, and through ongoing monitoring and restrictions. We also believe that it is appropriate for the law to recognize the greater harm associated with the actual production of child pornography, and with being the first to distribute newly-produced child pornography.

In assessing the appropriate types of punishment for child pornography offenses, it is critically important for the Commission to recognize that these offenders are not necessarily or even likely pedophiles. Many of our child pornography clients are driven more by curiosity and a fixation on pornography than by a sexual interest in children, and few are classified by psychiatric evaluators as true pedophiles.[17] Moreover, the available data are clear that even

[17] Many of our child pornography clients suffer from obsessive-compulsive disorders, which may drive them to be more interested in collecting, organizing and categorizing child pornography than in actually viewing its content. *Accord United States v. Henderson*, 649 F.3d 955, 957 (9th Cir. 2011) (discussing defendant's obsessive-compulsive need to "search out, collect and catalogue entire sets of documents, memorabilia, and information," which "may have resulted in his accumulating more and more diverse types of child pornography than he may have otherwise acquired").

pedophiles (whether child pornography offenders or not) can be effectively treated so as to reduce the likelihood that they will commit a contact sex offense against children or a child pornography offense.[18]

The role of sentencing in the context of child pornography offenses should be the same as in all other offenses: to ensure as much as possible that each offender is justly punished and adequately deterred, that the public is protected, and that the offender is rehabilitated. Unlike many offenses, child pornography does not appear to be driven by a commercial market in the sense that the product is created because people will later buy it. To the contrary, the United Nations Office on Drugs and Crime found that "in most cases, the images are generated as a result of the abuse, rather than the abuse being perpetrated for the purpose of selling images."[19] This fact is reflected by our experiences; the majority of our cases deal with people who received images by way of sharing or trading, not through purchases. Thus, it does not appear that viewing, possessing or receiving child pornography encourages its production or otherwise fuels a "market."

For those tempted to view, possess or receive child pornography, the certainty of prosecution and conviction is likely a far more effective deterrent than the length of the custodial portion of the sentence. For our clients, the sentences they face – though shockingly long – typically pale in comparison to the collateral consequences of their convictions, particularly the public and private shame they experience, the destruction of their families, and the ongoing registration and residency requirements. Simply put, the ripple effects of a child pornography conviction are farther reaching and longer-lasting than any sentences they carry.

E. Conclusion

We in the PAG and in the defense bar more generally are members of communities across the nation. We are parents, aunts, uncles, brothers and sisters, and we were once children. We share the outrage and horror that any child might be subjected to the torture of sexual abuse, and wish just as fervently to ensure that all children are protected from that risk. But we also recognize the need for our

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18 *See, e.g.,* Washington State Institute for Public Policy, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* at 5-6 (2006) (finding "cognitive-behavioral therapy for sex offenders on probation significantly reduces recidivism").

19 *See* United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* at 18 (2010).

criminal justice system to be rational, effective and fair. The current sentencing regime for child pornography offenses fails this test. We commend the Commission for its willingness to investigate ways to reform sentences in this area to better reflect true culpability and achieve justice, and are grateful for the opportunity to assist its work in this area.

Sincerely,

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