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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission
Public Hearing on Child Pornography Circuit Splits and Miscellaneous Proposed Amendments

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My name is Neil Fulton and I am the Federal Public Defender for the Districts of North Dakota and South Dakota. I am also as a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding Child Pornography Circuit Splits and Miscellaneous Proposed Amendments.

My written testimony addresses the Commission's proposed amendments to the child pornography guidelines regarding two general issues: (1) application of the vulnerable victim enhancement, and (2) the tiered enhancements for distribution in §2G2.2. Defenders will submit separate written comments on the Miscellaneous Proposed Amendments at a later date.

I. Vulnerable Victim

The Commission proposes amending the commentary in §2G2.1, §2G2.2 and §2G2.6 to provide an exception to the general rule that the vulnerable victim adjustment should not be applied if the offense guideline already provides an enhancement for age "unless the victim was unusually vulnerable for reasons unrelated to age." §3A1.1 comment (n.2). For these child pornography offenses, the Commission proposes recommending that courts apply the vulnerable victim adjustment in addition to the age-based enhancements "if the minor's extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12, and the defendant knew or should have known this."[1] We oppose this proposed amendment.

While we object to adding this commentary to any of the three guidelines, we begin with §2G2.2. To the extent the Commission views this issue as a circuit conflict that should be addressed to avoid unwarranted disparity, we caution that the proposed amendment does not guarantee decreased disparity and may actually increase it. Looking at data from FY 2005-FY 2014, the Ninth and Fifth Circuits – the circuits that take the approach the proposed amendment "generally adopts"[2] – applied the vulnerable victim adjustment under §3A1.1(b) to defendants sentenced primarily under §2G2.2 and who received an enhancement under §2G2.2(b)(2) for material that involved "a prepubescent minor or a minor who had not attained

[1] 81 Fed. Reg. 2295, 2306-7 (Jan. 15, 2016).

[2] 81 Fed. Reg. 2295, 2305 (Jan. 15, 2016).

the age of 12 years," at a higher rate than other circuits. Specifically, the rates during those years in the Ninth and Fifth Circuits were 6.9% and 5.6%, respectively. In comparison, none of the other circuits applied the adjustment in such cases at a rate above 0.4% (or in more than 5 cases in any one circuit), and several did not apply the adjustment in even one such case.[3] While the data does not indicate whether the vulnerable victim adjustment was based on the minor being "especially vulnerable compared to most minors under the age of 12" or on some other factor unrelated to age, it is nonetheless informative. The vast majority of circuits hardly, if ever, applied the vulnerable victim adjustment to these cases for any reason. In addition, within the two circuits that have the rule the Commission proposes, there has been significant variation among the districts in application rates of the vulnerable victim adjustment to defendants sentenced primarily under §2G2.2 and who received an adjustment under §2G2.2(b)(2). For example, in the Ninth Circuit, over half (8) of the districts, did not apply the vulnerable victim adjustment in such cases even one time during FY 2005-FY 2014, including Western Washington, the district in which the case of *United States v. Wright*, 373 F.3d 935 (9th Cir. June 15, 2004) originated.[4] The rates in other districts ranged from 4.4% to 17.8% during this time frame.[5] Similarly, in the Fifth Circuit, more than half (5) of the districts did not apply the vulnerable victim adjustment in a single one of these cases, and the rates in the remaining 4 districts ranged from 4.9% to 12.7%.[6] Thus, it appears that even in circuits that share the same rule the Commission proposes to "generally adopt[]," practices vary significantly from district to district. Expanding this rule to the other circuits carries the real risk of expanding disparate practices to those circuits that, as mentioned above, consistently do *not* apply this adjustment in these cases.

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[3] USSC, *FY 2005- FY 2014 Monitoring Dataset*. The adjustment was not applied in a single one of these cases in the First, Second, and Tenth Circuits. *Id.* The rate in the Third Circuit was 0.1%, the rate in Fourth Circuit was 0.4%, the rate in the Sixth Circuit was 0.15%, the rate in the Seventh Circuit was 0.12%, the rate in the Eighth Circuit was 0.22%, and the rate in the Eleventh Circuit was 0.14%. *Id.*

[4] *Id.* (Other districts in the Ninth Circuit that did not apply the vulnerable victim enhancement even one time to such cases during this time frame are: Southern District of California, Eastern District of Washington, District of Hawaii, District of Idaho, District of Nevada, District of Oregon, and the District of Guam.).

[5] *Id.* (The rate in the District of Arizona was 9.5%, the rate in the Northern District of California was 14.4%, the rate in the Eastern District of California was 17.5%, the rate in the Central District of California was 11.8%, the rate in the District of Alaska was 4.5%, and the rate in the District of Montana was 4.5%.).

[6] *Id.* (Districts that did not apply the vulnerable victim enhancement in these cases include: Eastern District of Texas, Eastern District of Louisiana, Western District of Louisiana, Northern District of Mississippi, Southern District of Mississippi. The rate in the Southern District of Texas was 4.9%, the rate in the Northern District of Texas was 7.9%, the rate in the Western District of Texas was 12.7%, and the rate in the Middle District of Louisiana was 5.3%.).

This concern is particularly strong in the context of §2G2.2, which already recommends sentences that courts have clearly and routinely determined to be too high, and fails to adequately distinguish among more and less culpable defendants. The proposed amendment exacerbates these problems.

The national rate of within guideline sentences under §2G2.2 fell from 40% in FY 2010 to 29% in FY 2014.[7] The rate of below guideline sentences under §2G2.2, for reasons other than substantial assistance, has continued to increase. In FY 2014, this rate climbed to 66%, up from 55% in FY 2010.[8] In addition, findings from a recent study looking at both the "likelihood and magnitude" of sentences below the guideline recommended range, as well as the reasons judges give for these sentences, "suggest that judges believe that the guidelines for nonproduction child pornography offenses are overly harsh."[9] Indeed, the Commission has recognized that "the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior."[10] The proposed amendment would only further increase the guideline recommended range based on the content of an individual's collection of images, and thus exacerbate the problem of the guidelines recommending sentences that are too severe.

In addition, "several of the Commission's relevant sentencing enhancements tend to apply indiscriminately to all child pornography offenders, greatly increasing the recommended punishment range without reflecting an individual's heightened level of culpability."[11] The guideline thus fails to "guard against unwarranted similarities among sentences for defendants

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[7] Compare USSC, *2014 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2014) (*2014 Sourcebook*) *with* USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. 28 (2010) (*2010 Sourcebook*). This low rate appears to be persisting, with preliminary data from FY 2015 showing a rate of within guideline sentences at 28%. USSC, *Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2015 Data* tbl. 5 (2015) (*2015 Preliminary Data*).

[8] *Compare 2014 Sourcebook* tbl. 28 *with 2010 Sourcebook* tbl. 28. This rate appears to be continuing on an upward trajectory, with preliminary data from FY 2015 showing the rate of below guideline sentences for reasons other than substantial assistance climbing to 68%. *2015 Preliminary Data* tbl. 5.

[9] Kimberly A. Kaiser & Cassia Spohn, *Fundamentally Flawed? Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences*, 13 Criminoligy & Pub. Pol'y 22 (2014) (Courts are imposing sentences below the guideline recommended range "because of inherent disagreement with the severity of the sentences called for by the guidelines for the *typical offender* convicted of a nonproduction child pornography offense.").

[10] USSC, *Report to Congress: Federal Child Pornography Offenses* 321 (Dec. 2012) (*Child Pornography Report*).

[11] *United States v. R.V.*, 2016 WL 270257, *3 (E.D.N.Y. Jan. 21, 2016).

who have been found guilty of dissimilar conduct."[12] The Commission itself concluded: "as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability."[13] Indeed, "four of the six sentencing enhancements in §2G2.2 – those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels – now apply to most offenders and, thus, fail to differentiate among offenders in terms of their culpability."[14] For example, the specific offense characteristic in §2G2.2(b)(2) for material that involved a prepubescent minor – a term that was added in 1988 specifically to provide "an alternative measure to be used in determining whether the material involved an extremely young minor"[15] – or a minor who had not attained the age of 12 years applied in 95.9% of all cases in FY 2014.[16]

Defenders are concerned the proposed amendment would only make this problem worse. In our experience, the use of open peer-to-peer ("P2P") programs and networks – programs that are used by a significant majority of our clients[17] – results in our clients unintentionally and often unknowingly having a large number and variety of images on their computer, including at least one image involving a very young child. The Commission has recognized the "significant number of extremely young children depicted in child pornography today."[18] While the Commission was not able to code precise data regarding the ages of victims depicted in the child pornography cases it studied,[19] it cited data from a 2006 survey indicating that almost half (46%) of arrested child pornography possessors had at least one image of a child aged 3-5, and approximately 28% of arrested child pornography offenders had at least one image of a child

[12] *United States v. Dorvee*, 616 F.3d 174, 187 (2d. Cir. 2010).

[13] USSC, *Child Pornography Report*, at ii.

[14] USSC, *Child Pornography Report*, at iii.

[15] USSG App. C, Amend. 31, Reason for Amendment (June 15, 1988).

[16] USSC, *Use of Guidelines and Specific Offense Characteristics, Offender Based, Fiscal Year 2014* (2014).

[17] *See generally* USSC, *Child Pornography Report*, at 166 ("Offenders' use of P2P file-sharing programs to receive and distribute child pornography has steadily increased in recent years. By the first quarter of fiscal year 2012, 74.5 percent of §2G2.2 offenders who received child pornography used P2P programs to do so, and 85.3 percent who distributed child pornography used P2P programs to do so. The typical offender who used a P2P program used an 'open' program that did not involve two-way communication between the offender and others who participated in the P2P network.").

[18] USSC, *Child Pornography Report*, at 35.

[19] USSC, *Child Pornography Report*, at 85 n.76.

under the age of 3.[20] As a result, we fear that the proposed amendment would regularly apply and drive up recommended sentences even further without adding a factor that would meaningfully distinguish among defendants. This is particularly so because the proposed amendment, like the current troubling enhancements, would apply regardless of whether the defendant intended to possess, receive or distribute such images, or even knew he possessed, received or distributed such images. While the proposed amendment has a requirement that the defendant "knew or should have known" that the "minor's extreme youth and small physical size made the minor especially vulnerable," it does not expressly require that the defendant knew that he possessed, received or distributed images with such content. Finally, adding even more focus on the nature of the image is troubling because available research fails to show that the types of images possessed are relevant to the risk of committing another child pornography offense or a contact offense.[21]

Defenders propose that the commentary to §2G2.2 make clear that the vulnerable victim adjustment should *not* apply for reasons solely based on the minor being under the age of 12 or related factors that correlate with being under the age of 12.[22] If, however, the Commission declines to affirmatively guide courts against applying additional adjustments for especially vulnerable minors based on age or factors correlated with age, we recommend it take no action at all. As mentioned above, addressing this issue in the manner the Commission proposes will likely increase disparity more than would occur if the Commission stuck with the status quo.

Due to the current problems with the guideline discussed above, Defenders oppose adding any enhancement, upward adjustment or invited upward departure based on the content of images – including the young age of minors – that would apply indiscriminately in a significant number of cases, and likely increase the rate of sentences imposed below the guidelines as well

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[20] USSC, *Child Pornography Report*, at 87 (citing Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics* 23 Sexual Abuse 22 (2011)). A later chapter in the *Child Pornography Report* indicates this 2006 study "found that approximately half of child pornography offenders possessed one or more images depicting the sexual abuse of a child under six years old," USSC, *Child Pornography Report*, at 312. But the Wolak study doesn't provide this exact information, instead indicating that 46% of child pornography possessors had at least one image of a child between the ages of 3 and 5, and 28% had at least one image of a child less than 3 years old, without specifying the total number or percentage of child pornography possessors with images of children under the age of six.

[21] *See* Statement of Deirdre D. von Dornum Before the U.S. Sentencing Comm'n, Washington, D.C., at 14-15 (Feb. 15, 2012).

[22] In the Issues for Comment, the Commission asks whether the commentary to Chapter Three should be revised to clarify how age enhancements in the guidelines interact with the vulnerable victim adjustment, specifically asking whether it should revise the commentary to provide "*unless the victim was unusually vulnerable for reasons not based on age per se*." Defenders question whether adding the words "per se" would bring clarity to the matter.

as exacerbate disparity. If, however, the Commission is going to take one of those steps, Defenders recommend it be in the form of an invited departure. We strongly oppose the addition of a tiered age enhancement. Ever-finer gradations in culpability are a prime driver of the "factor creep" that has led to undue complexity and severity in the guidelines.[23] And it would lead to additional litigation regarding the precise age of minors in images. We believe the proposed amendment – with the subjective standard of an "especially vulnerable minor" is better considered as a departure than an adjustment. *See, e.g.*, §2L2.1 comment. (n.2) (providing for an upward departure where "the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an *especially* serious type.") (emphasis added).[24]

The other two guidelines under consideration – §2G2.1 and §2G2.6 – are used much less frequently[25] and present many of the same issues discussed above. Defenders believe the Commission should not amend these guidelines as proposed either. As with §2G2.2, there is little reason to believe that addressing the issue as the Commission proposes will lead to consistent application. Looking at data from FY 2005- FY 2014, in the Ninth Circuit, which issued the 2004 *Wright* decision setting forth the rule the proposed amendment "generally adopts," it is notable that nine of the districts did not apply the vulnerable victim enhancement even one time in cases where the defendant was sentenced primarily under §2G2.1 and received an enhancement under §2G2.1(b)(1).[26] In addition, the data do not show that the guideline

[23] R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 Psychology, Law & Pub. Pol'y 739, 752 (2001) ("In every guideline amendment cycle, law and order policymakers, whether they be in Congress, at the Department of Justice, or on the Sentencing Commission, petition the Commission to add more aggravating factors as specific offense characteristics or generally applicable adjustments to account more fully for the harms done by criminals.").

[24] The guidelines define "sophisticated means" for purposes of the enhancement in §2B2.1 and some of the tax guidelines to mean "especially complex or especially intricate conduct." §2B1.1 comment. (n.9) Defenders have long complained that this enhancement is too ambiguous for meaningful application and should be eliminated from the guidelines, or at minimum included as a departure provision instead of a specific offense characteristic. *See* Statement of Michael Caruso Before the U.S. Sentencing Comm'n, Washington, D.C., at 13 (Mar. 12, 2015).

[25] During the past five years, there were only 42 defendants whose primary sentencing guideline was §2G2.6, and 1,433 under §2G2.1. USSC *FY 2010-2014 Monitoring Dataset*. By comparison, there were 8,348 defendants during this time frame whose primary guideline was §2G2.2. *Id.* Because §2G2.6 has been used so infrequently, we focus here on §2G2.1.

[26] USSC, *FY 2005- FY 2014 Monitoring Dataset* (District of Arizona, Eastern District of California, Central District of California, Southern District of California, District of Hawaii, District of Idaho, District of Nevada, District of Oregon, and Eastern District of Washington).

recommended sentences under §2G2.1 are too low. The rate of upward departures is low.[27] In addition, while not as extreme as §2G2.2, the "within range rate in production cases [under §2G2.1] has been steadily decreasing."[28] The rate at which sentences fall within the guideline recommended range has dropped from 55.6% in FY 2010 to 41.2% in FY 2014.[29] For the same reasons stated above, Defenders strongly urge the Commission not to add complexity to this guideline through a tiered enhancement based on age. If the Commission is going to do something to encourage courts to consider "especially vulnerable" minors in these cases, in light of data and the subjective nature of the inquiry, Defenders urge the Commission to incorporate the consideration as an invited departure, rather than as either a tiered enhancement or a Chapter Three adjustment.

II. Distribution

The Commission proposes amending two of the tiered distribution enhancements in §2G2.2(b)(3), subsection (b)(3)(F) and subsection (b)(3)(B), to respond to differences among the circuits in applying these enhancements, particularly in cases involving peer-to-peer (P2P) file-sharing programs or networks.[30] Defenders support these amendments as steps in the right direction, and encourage the Commission to do more to reform the sentencing scheme based on empirical evidence to ensure that sentences recommended by the guidelines are fair and just, and consistent with the purposes of sentencing. We also urge the Commission to specify in the commentary that mere use of P2P programs or networks is not sufficient to trigger any of the distribution enhancements. While the Commission may be reluctant to reference a certain type of technology in the commentary, it is important to do so here because of the pervasiveness of P2P file-sharing programs in non-production child pornography offenses and the apparent confusion about how they operate.

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[27] The rate of sentences above the guideline recommended range was 2.5% in FY 2014, down from 4.8% in FY 2010. USSC, *Interactive Sourcebook*, Sentences Relative to the Guideline Range. *See also 2015 Preliminary Data* (showing an above guideline rate of 2.2% in FY 2015).

[28] USSC, *Child Pornography Report*, at 255.

[29] USSC, *Interactive Sourcebook*, Sentences Relative to the Guideline Range. *See also 2015 Preliminary Data* (showing a within guideline rate of 42.5%).

[30] The Commission has recognized this as an area where, even absent Congressional action, it can amend the guidelines to "better reflect" the sentencing factors it believes would "provide for more proportionate punishments." Specifically, the Commission can amend §2G2.2(b) "to reflect… recent changes in technology (*e.g.*, revisions of the enhancements in §2G2.2(b)(3) and (6), which concern distribution and use of a computer, to reflect offenders' use of modern computer and Internet technologies such as P2P file-sharing programs)." USSC, *Child Pornography Report*, at xviii-xix.

Before addressing the details of each proposed amendment, we offer some general background that informs our position on the amendments. The base offense level for those convicted of distributing child pornography is set at 22, 4-levels higher than that for persons convicted of possession. §2G2.2(a)(2). All "distributors" whether convicted of distribution or not, are excluded from the 2-level reduction in §2G2.2(b)(1) even when the defendant did not intend to distribute, and are subject to a 2- to 7-level enhancement under §2G2.2(b)(3). One or the other of these two distribution enhancements that the Commission proposes amending applied to almost 60% (59.4%) of guideline calculations under §2G2.2 during fiscal year 2014.[31] This rate is significantly higher than in 2010, when it was less than 40% (37.9%).[32]

As noted in the previous section, few sentences under §2G2.2 fall within the range recommended by the guideline. It is too harsh[33] and "no longer adequately distinguishes among offenders based on their degrees of culpability."[34] The Commission has acknowledged that one reason for this is a dramatic change "in the computer and Internet technologies the typical non-production offenders use."[35] "[M]ost of the enhancements in §2G2.2, in their current or antecedent versions, were promulgated when offenders typically received and distributed child pornography in printed form using the United States mail."[36] Now, however, the vast majority of individuals who receive and distribute child pornography use P2P programs.[37] And based on the Commission's study of 2010 data, almost three-quarters (72.4%) of individuals who distributed child pornography using P2P file-sharing programs "solely used an 'open' P2P program (*e.g.*, LimeWire)," meaning there was "no two-way communication between the

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[31] USSC, *Use of Guidelines and Specific Offense Characteristics, Guideline Calculation Based, Fiscal Year 2014* (2014).

[32] USSC, *Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2010* (2010).

[33] *See* discussion, *supra* at p. 3.

[34] USSC, *Child Pornography Report*, at ii.

[35] *Id.*

[36] *Id.*, at 313.

[37] *Id.*, at 166. The Commission found that the rate at which individuals who received and distributed child pornography use P2P programs has "steadily increased in recent years." *Id.* Looking at a random sample of non-production offenses sentenced in 2002, "*none* involved the use of P2P file-sharing programs." *Id.* at 155. By 2010, a special coding project by the Commission determined that 56.1% of defendants who received child pornography used P2P programs to do so, and 73.8% of defendants who distributed child pornography used P2P programs to do so. *Id.* at 148-50. By the first quarter of 2012, the percentages were even higher according to another Commission coding project, which determined that 74.5% of defendants who received child pornography used P2P programs to do so, and 85.3% of defendants who distributed child pornography used P2P programs to do so. *Id.* at 154. Given this trajectory it would not be unreasonable to assume that now in 2016 the rates are higher still.

offender who distributed and the persons who obtained images or videos from the offender's computer."[38] Because of how P2P programs operate, "a simple possessory crime evolves into a distribution offense."[39]

Many different P2P programs are available to users, including LimeWire, ARES, and uTorrent among others.[40] They often have a default setting to share everything that is downloaded as soon as the program is installed, and opting out of the default requires individuals to have a certain level of sophistication with configuring software on their computers.[41] Some programs "automatically reset[ ] themselves to sharing mode every time the computer is used, requiring you to turn off 'sharing' each time you boot up."[42] A user is not required to share any files to use the P2P programs.[43] Programs can encourage sharing either by providing faster downloading for those who share, and/or or punishing "freeloaders," who do not share, with restrictions on downloading.[44] In addition, the programs can begin to share a partial file even

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[38] *Id.* at 150-51.

[39] *United States v. Strayer*, 2010 WL 2560466, *12 (D. Neb. 2010).

[40] *See, e.g.*, https://en.wikipedia.org/wiki/Comparison_of_file_sharing_applications.

[41] *See, e.g.*, *United States v. Martinez*, Cr. 12-122-RMP (E.D. Wash.), Stipulated Facts, Dkt. No. 70 (filed Apr. 18, 2013), at 2, 4-5; *Arista Records LLC v. Lime Group LLC*, 1:06-cv-05936 GEL (S.D.N.Y.), Declaration of Dr. Steven Gribble in Support of Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Dkt. No. 147 (filed Sept. 26, 2008), at ¶20 ("When LimeWire is first installed, a new folder (called "Shared") is created on behalf of the user and is automatically designated for sharing. By default, all files that are downloaded by LimeWire are automatically placed in the Shared folder."). *See also United States v. R.V.*, 2016 WL 270257, *21 (E.D.N.Y. Jan. 21, 2016) ("A crucial aspect of peer-to-peer file-sharing is that the default setting for these networks is that downloaded files are placed in the user's 'shared' folder, which allows others in the network to access the files. A user must affirmatively change his network setting to disable this sharing feature."). On this and other aspects of how P2P file-sharing programs and networks operate, Defenders have learned a great deal from forensic examiners within the Federal Defender community. If Commissioners have questions about how these programs operate, Defenders would be happy to facilitate a hearing or meeting with forensic investigators in our organization. *See, e.g.*, USSC, Public Hearing on Federal Child Pornography Crimes (including witness Gerald R. Grant, Digital Forensics Investigator, Office of the Federal Public Defender for the Western District of New York) (Feb. 15, 2012).

[42] Brown University, *Use P2P Filesharing Software Safely & Legally*, https://www.brown.edu/information-technology/knowledge-base/index.php?q=article/1292.

[43] *See* Stipulated Facts in *Martinez*, *supra* note 41, at 3 ("a user is not required to share files to use the P2P network"); Gibbs Declaration in *Arista Records*, *supra* note 41, at ¶20.

[44] *See R.V.*, 2016 WL 270257, at *21 ("The network is designed to encourage sharing by providing faster downloading if the user allows sharing."); Stipulated Facts in *Martinez*, *supra* note 41, at 2-3 ("Some P2P software gives each user a rating based on the number of files the user is contributing to the network. This rating affects the user's ability to download files. Thus, the more files a user is sharing from his/her "My Shared Folder", the higher the user's rating, the greater his/her ability is to download other user's

before a single complete image has been downloaded.[45] Simply due to actions by a computer program that a defendant may or may not understand are happening, not because of any deliberate intent on the part of the defendant to distribute child pornography, or even any affirmative act, a defendant may be deemed to have distributed images for purposes of guideline enhancements.

What this means for defendants who are sentenced under this guideline is best illustrated with an example of a scenario that Defenders see, with slight variations, on a regular basis. We recently represented a twenty-year-old who lived with his parents. For our purposes here, we'll call him Greg. This kid was struggling in general, and it would have been a challenge for him to live independently. During an interrogation by law enforcement when they executed a search warrant, Greg was asked what the file-sharing programs on his computer did. He answered, "you can download stuff." Law enforcement explained that LimeWire has "a torrent built into it," and Greg asked, "[w]hat's a torrent? That's just a search?" Law enforcement then challenged Greg about moving files and Greg responded, "Well maybe no, you can't even like move the files. They're just on. Whenever you have like the LimeWire they're just on the screen. I don't know where to go, to like, I don't know where they're saved at. Or if they're saved on the computer or not." Greg was charged with both possession and distribution. For trial, we hired an expert to explain to the jury how LimeWire, the P2P program our client used, operates. The expert explained that the unspoken default in LimeWire is sharing, and that to turn off the default sharing settings, an individual would have to be comfortable with configuring software and make the effort to do it, working through many screens and clicks. At the end of the trial, the jury acquitted our client of distribution. At sentencing, however, the government asked for a five-level enhancement under §2G2.2(b)(3)(B), and the court imposed a two-level enhancement under §2G2.2(b)(3)(F). His total offense level was 31, and with no criminal

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files. This rating system is intended to encourage users to 'share' their files, thus propagating the P2P network."); Gibbs Declaration in *Arista Records*, *supra* note 41, at ¶49 ("Peer-to-peer networks rely on the contribution of content, network bandwidth, and storage by their constituent peers in order to provide a useful and scalable service. Peers that choose to consume resources without contributing any can degrade the performance and scalability of a peer-to-peer network. Accordingly, many P2P protocols and clients are engineered with anti-freeloading mechanisms to combat this problem.").

[45] *See* Adam Pash, *A Beginner's Guide to BitTorrent*, Lifehacker (Aug. 3, 2007), http://lifehacker.com/285489/a-beginners-guide-to-bittorrent ("Because BitTorrent breaks up and distributes files in hundreds of small chunks, you don't even need to have downloaded the whole file before you start sharing."); Parul Sharma et al., *Performance Analysis of BiTorrent Protocol*, IEEE (2013) (describing BitTorrent protocol including that "users connected to each other directly to upload and download portions of a large file (called as a piece) from other peers who have also downloaded the file or parts of it"). Forensic examiners within the Federal Defender Organization confirm that BitTorrent is not unique in this regard and other P2P programs operate in a similar manner.

history points, his guideline recommended range was 108-135 months. The court imposed a sentence of 60 months.

In light of the problems with the guidelines punishing too harshly and failing to distinguish among individuals based on culpability, Defenders have encouraged the Commission to focus on cases where the defendant has engaged in conduct with the specific intent of making child pornography widely available to others as demonstrated by the method of distribution.[46] And Defenders have indicated that unless the Commission significantly lowers the base offense levels under §2G2.2, and eliminates use of enhancements for computer use, the types of images, and number of images or videos, we cannot support any enhancements for certain methods of distribution.[47] Without meaningful reform of the current guideline, too many individuals will receive sentences greater than necessary to satisfy the purposes of sentencing. That said, as Defenders testified before the Commission in 2012, the guideline could better distinguish individuals with different degrees of culpability by narrowly targeting methods of distribution that demonstrate they knowingly and intentionally focused their activities on distributing child pornography.[48] For example, where a defendant: (1) *created* a closed private network and then shared files for the purpose of distributing child pornography; (2) set up, maintained, or moderated a server, website, blog, or hosting area specifically for the purpose of distributing child pornography; (3) charged a fee to distribute child pornography; or (4) introduced a new image to the Internet.[49]

Against this backdrop, we support the proposed amendments as an improvement over the status quo. But we caution that these changes still fall far short of the reform needed to repair this badly broken guideline. In its Issues for Comment, the Commission asks whether it should "change any other enhancements in (b) from an 'offense involved' approach to a 'defendant based' approach," and if so, whether it should require a "culpable state of mind." As with the proposed amendment to the 2-level enhancement, we believe many of the enhancements would be improved by making them "defendant based" and requiring a culpable state of mind, and encourage the Commission to make such changes. But those changes should not be viewed as a substitute for the real reform that is needed to this guideline.

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[46] *See* Statement of Deirdre D. von Dornum Before the U.S. Sentencing Comm'n, Washington, D.C., at 19 (Feb. 15, 2012).

[47] *Id.*

[48] *Id.* at 20.

[49] *Id.*

A. The 2-Level Distribution Enhancement at Subsection (b)(3)(F)

The Commission proposes amending §2G2.2(b)(3)(F) to "generally adopt[]" the approach of the Second, Fourth and Fifth Circuits, by making clear the enhancement requires "knowing" distribution by the defendant.[50] Defenders support this amendment as an improvement to the current version which does not explicitly identify the requisite mens rea for this enhancement. We urge the Commission, however, to at minimum also require that the distribution be intentional before it can apply on top of an already higher base offense level where a defendant has been convicted of knowing distribution, or even without a conviction for distribution in cases where a defendant has not exhibited a deliberate attempt to distribute, or even taken an affirmative act to distribute child pornography.[51] This could be accomplished by amending §2G2.2(b)(3)(F) to read: If the defendant knowingly and intentionally distributed, ~~Distribution~~ other than distribution described in subdivisions (A) through (E), increase by 2 levels. To meaningfully distinguish among more and less culpable defendants, this enhancement should be reserved for those individuals who are actively seeking to distribute child pornography. Individuals who commit lower-level offenses, that is, those who passively distribute through operation of default settings on a computer program, and who have made no affirmative act, should not face an increased recommended sentence, particularly when they are virtually certain to get a number of other enhancements that go hand-in-hand with P2P file sharing programs (e.g., a 2-level increase for use of a computer at §2G2.2(b)(6), a 4-level increase for material that portrays sadistic or masochistic conduct at §2G2.2(b)(4), and a 2-level increase for material that involved a prepubescent minor or a minor who had not attained the age of 12 years at §2G2.2(b)(2)).[52]

The Commission also should include a note in the commentary specifying that use of a P2P file-sharing program or network is not enough on its own to satisfy the knowledge requirement.[53] When the Commission conducted its special coding project regarding child

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[50] 81 Fed. Reg. 2295, 2306 (Jan. 15, 2016). The Commission proposes a similar change to §2G2.1(b)(3). Defenders similarly support that change as a step in the right direction.

[51] As indicated above, we think it is more appropriate to focus on specific methods of distribution, rather than relying on the current problematic tiered enhancements, but if the Commission declines to do that, it should at least limit application of this enhancement to intentional distribution.

[52] Should the Commission amend the guideline as proposed to address the vulnerable victim adjustment, we fear defendants who used P2P programs will receive that upward adjustment as well.

[53] In the Issues for Comment, the Commission asks whether there should be a "bright-line rule that use of a file sharing program qualifies for the 2-level enhancement, even in cases where the defendant was in fact ignorant that use of the program would result in files being shared to others." 81 Fed. Reg. 2295, 2307 (Jan. 15, 2016). If there is any bright-line to be drawn here, it is in the opposite direction, that mere use of a file-sharing program is not a sufficient basis to enhance a sentence, precisely because the defendant may in fact be ignorant that use of the program would result in files being shared to others.

pornography offenses sentenced in 2010, and looked at distribution, it specifically "excluded cases as involving knowing distribution when a court found that a defendant who had used a P2P file-sharing program either 'opted out' of the P2P program or unwittingly 'opted in' to the P2P program."[54] These exclusions are appropriate and the Commission should make clear that the knowledge requirement requires an "independent finding of knowledge"[55] that cannot be based solely on use of a P2P file-sharing program. We fear that absent clear language in the commentary, some courts may conclude that the government needs only to prove that the defendant "knowingly used LimeWire because the capability of the software to share files with others is self-evident" and need not prove that the defendant "knew he would be sharing images with others by using LimeWire."[56]

While it may surprise some,[57] many of our clients use programs they may or may not know are considered to be "file-sharing" programs, yet do not understand how these programs operate. And our clients are not alone in not understanding how these programs operate. Even elite universities do not assume that users are aware of the file sharing capabilities of the programs and warn: "Even if you do not intend to engage in infringing activity, installing P2P software on a computer can easily end up sharing unintended files (copyrighted music or even sensitive documents) with other P2P users, and you may then be personally responsible for the legal and financial consequences of illegal file sharing on your computer."[58] When individuals do not understand how the programs operate, it is difficult for them to 'opt out' of the sharing settings of the program, particularly when sharing is often a default setting, and changing it requires individuals to have a level of sophistication with configuring software on their computer, which many of our clients – as well as the rest of us – do not. Our clients who do not understand how the programs operate are not as culpable as, and should not be punished at levels

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[54] USSC, *Child Pornography Report*, at 147 n.61.

[55] *United States v. Baldwin*, 743 F.3d 357, 361 (2d Cir. 2015).

[56] *United States v. Conner*, 521 F. App'x 493, 499 (6th Cir. 2013).

[57] *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010) ("ignorance is entirely counterintuitive").

[58] Yale University, *Illegal File Sharing*, http://its.yale.edu/secure-computing/security-standards-and-guidance/data-and-application-security/illegal-file-sharing. *See also* Cornell University, *Filesharing Risks*, http://www.it.cornell.edu/policies/copyright/filesharing/ ("If you have P2P file-sharing applications installed on your computer, you may be sharing copyrighted works without even realizing it. Even if you do not intend to engage in infringing activity, installing P2P software on a computer can easily result in you unintentionally sharing files."); New York University, *Peer-to-Peer Security*, https://www.nyu.edu/life/resources-and-services/information-technology/it-security-and-policies/p2p-security.html ("Be aware: some applications for downloading music, movies and other files actually turn your computer into a server, allowing it to be used for distributing copyrighted material.").

identical to, individuals who have taken intentional and affirmative steps to distribute child pornography.

But even when our clients have a basic understanding of how file-sharing programs work, and even when they have taken steps they believe will prevent sharing, they may still unwittingly share material from their computers, either because they do not fully understand all of the complexities of the program they are using, or because the program has actually tricked them. These clients are also less culpable than individuals who have taken intentional and affirmative steps to distribute child pornography, and their punishment should reflect that. Again, outside the context of child pornography, universities warn their highly educated users:

> While peer-to-peer (P2P) software and filesharing networks may be wonderfully useful, there are a lot of "gotcha's"….The P2P program itself may be the problem. Some automatically resetting themselves to sharing mode every time the computer is used, requiring you to turn off 'sharing' each time you boot up. The instructions could be wrong or misleading, so that even when you think you've turned sharing off, you may not have done so…. Changes you make to the default settings of the "save" or "shared" folder might cause you to share folders and subfolders you don't want to share.[59]

In addition to the programs' "gotcha's," many of our clients do not understand that if they move images out of the default folder as soon as they have been downloaded, it is too late to prevent sharing.[60] As discussed above, by default, many of the programs start uploading partial files, before a complete image has been downloaded.

In light of the many issues with the use of P2P file-sharing programs and networks, it is imperative that the Commission make clear that knowledge of distribution cannot be inferred based solely on the use of a P2P program. It is also critical that the government bear the burden of proving knowledge. The apparent burden-shifting approach of the Eighth Circuit – under which "a fact-finder may reasonably infer that the defendant knowingly employed a file sharing

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[59] Brown University, *Use P2P Filesharing Software Safely & Legally*, https://www.brown.edu/information-technology/knowledge-base/index.php?q=article/1292. *See also* Federal Trade Commission, *Peer-to-Peer File-Sharing Software Developer Settles FTC Charges* (Oct. 11, 2011) (Frostwire settled FTC charges that it "misled consumers about which downloaded files from their desktop and laptop computers would be shared with a file-sharing network.").

[60] *See generally United States v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (5-level enhancement applied where defendant was initially investigated after Danish authorities found "a partially downloaded file containing child pornography had been downloaded to the computer from an Internet Protocol (IP) address that was traced to" defendant).

program for its intended purpose" "[a]bsent *evidence* of ignorance"[61] is untenable because it gives even more power to the prosecution. To prove "ignorance" will often require the defense to engage in an expensive and time-consuming forensic analysis, which frequently is not even an option for the defense since prosecutors will leverage charges to discourage such investigations, e.g., take a plea offer off the table or file a superseding indictment with a charge that carries a five-year mandatory minimum sentence when the defense seeks to conduct an independent forensic examination.

B. The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

The Commission proposes amending §2G2.2(b)(3)(B) to clarify that the 5-level distribution enhancement should apply only where "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, such as other child pornographic material, preferential access to child pornographic material, or access to a child."[62] Defenders support this amendment, with a few changes, as an important step in the right direction. We recommend that at minimum, the proposed commentary be revised, as follows:

> the defendant agreed with another person 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, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

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[61] *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010). The law in the Eighth Circuit is a little opaque on both the 2- and 5-level enhancements. *See, e.g., United States v. Durham*, 618 F.3d 921, 927 (8th Cir. 2010) (in a case where the Court of Appeals determined there was "concrete evidence of ignorance," interpreting *Dodd* as reaffirming "the government retains the burden to prove the enhancement on a case-by-case basis," "[d]espite the new requirement placed upon the defendant" to provide "concrete evidence of ignorance"). *See also United States v. Bastion*, 603 F.3d 460, 467 (8th Cir. 2010) (Colloton, J., concurring) (noting "[w]e have tried to 'clarify,'" "but probably have not sufficiently narrowed some of [the] language and reasoning" in *United States v. Griffin*, 482 F.3d 1008, 1012-13 (8th Cir. 2007) which provides "some support" for the government's position that the 5-level enhancement applies "if a defendant installs a file-sharing software program on his computer, knows that the program allows both the distribution and the receipt of computer files, and then distributes and receives images containing child pornography through use of the software"). In our experience in the Eighth Circuit, probation and the government are likely to pursue one of the distribution enhancements, and usually the 5-level, in cases involving P2P software based solely on the defendant's use of the software without any apparent distinction between what is required for the 5-level as opposed to the 2-level enhancement. It then falls to the defense to present "concrete evidence of ignorance."

[62] 81 Fed. Reg. 2295, 2306 (Jan. 15, 2016).

This is a severe enhancement and should be reserved for the most serious distribution cases. This 5-level enhancement is on par with the enhancement for distribution for pecuniary gain of $40,000, and at the very least should be limited to similarly serious conduct.[63] It should not apply simply because of agreements with software related to passive sharing, and should, at minimum, be limited to those who go so far as to make a quid pro quo agreement with another person. The quid pro quo agreement with another person demonstrates both intent and determination to distribute that is different from the passive distribution involved in the average use of P2P programs.

Defenders also recommend that the commentary specify both that (1) mere installation and use of a P2P program is not alone sufficient for application of this enhancement,[64] and (2) it is not appropriate to apply the enhancement where the only valuable consideration the defendant received was faster download speeds. While adding the language "with another person" as we propose above *should* address both of those issues, in light of the confusion over how P2P programs operate and the prevalent role the programs play in non-production child pornography enhancements, we urge the Commission to clearly address these issues in the commentary.

Mere installation and use of a P2P program should be specifically excluded from the 5-level enhancements for all of the same reasons it should be excluded from the 2-level enhancements, only amplified because the enhancement is so much more severe. As one judge explained: "Applying the full 5-level enhancement in all P2P cases does not adequately distinguish among offenders who fall into a broad range of culpability. At one end of the spectrum are offenders for whom sharing via a P2P network is simply incidental to their use of the network, and who may not even fully understand that they are distributing. At the other end are users who are not only consciously sharing, but are taking steps to facilitate the distribution of child pornography."[65] Because some appear to assume –incorrectly – that in every case where a defendant uses a P2P program, he has agreed to distribute,[66] it is imperative for the

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[63] *See* §2G2.2(b)(3)(A) & §2B1.1(b)(1). Yet another problem with the current tiered enhancements is that the same 5-level enhancement applies whether a defendant's pecuniary gain is $2 or $40,0000.

[64] In the Issues for Comment, the Commission asks whether there should be a "bright-line rule that use of a file sharing program qualifies for the 5-level enhancement." 81 Fed. Reg. 2295, 2307 (Jan. 15, 2016). As with the 2-level enhancement, there should be a bright-line rule drawn here, but it should be in the opposite direction, providing that mere installation and use of a file-sharing program is not a sufficient basis to enhance a sentence by 5 levels.

[65] *United States v. Abraham*, 994 F. Supp. 2d 723, 735 (D. Neb. 2013).

[66] *See, e.g., United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015) (applying the 5-level enhancement because "[b]y using this software… the user agrees to distribute the child pornography on his computer in exchange for additional child pornography.").

commentary to clarify the issue and explicitly indicate that courts should not apply this 5-level enhancement in every case where a defendant uses a P2P program.

We also ask the Commission to make clear in the commentary that a defendant should not receive a 5-level enhancement for using a P2P program or network where the defendant has taken some action (or allowed default settings to remain) in order to obtain faster download speeds.[67] As discussed above, to operate efficiently, P2P programs and networks depend on people sharing, and some pressure people to share either by rewarding them with faster download speeds if they do share or punishing them with slower speeds if they do not. It is appropriate to exclude from this significant 5-level enhancement defendants who respond to that pressure and do not take the steps necessary to prevent sharing. Such conduct is not as serious as actively reaching an agreement with another person for a quid pro quo exchange, or to provide material in exchange for $40,000. This 5-level enhancement should be reserved for the most serious distributors.[68]

Finally, an even better approach for appropriately limiting application of this severe enhancement to the more serious offenses, and helping the guideline draw real distinctions between more and less culpable defendants, would require not only an agreement with another person, but also that the agreement involved the introduction of a new image that has not been previously available to others. We urge the Commission to consider this more meaningful change to the guidelines.

[67] Under the current guideline, the 5-level enhancement has been applied for this reason. *See, e.g., United States v. Geiner*, 498 F.3d 1104, 1112 (10th Cir. 2007) (holding that the 5-level enhancement applied where the defendant "distributed child pornography with the expectation that he would receive a thing of value, that is, faster downloading capabilities enable him to obtain child pornography more easily and efficiently").

[68] In the Issues for Comment, the Commission asks: "If the Commission were to make revisions to the tiered distribution enhancement in §2G2.2, should the Commission make similar revisions to §2G3.1?" Defenders support applying the proposed changes to §2G3.1 as well, particularly with the changes we suggest regarding intent and agreement with "another person."