

## Chapter 10

### POST-CONVICTION ISSUES IN CHILD PORNOGRAPHY CASES

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This chapter addresses several post-conviction issues in child pornography cases: (1) supervised release; (2) assessment and treatment of child pornography offenders' sexual disorders (in prison and on supervision); and (3) sex offender registration and civil commitment procedures applicable to sex offenders (including some child pornography offenders). These issues are relevant to the Commission's study of child pornography offenders because the vast majority of offenders, even many of those sentenced to lengthy prison sentences, eventually will return the community after service of their prison sentences. As discussed below, effective supervision and treatment of offenders (as a condition of supervision) are important means of reducing recidivism<sup>1</sup> and promoting public safety.

#### A. SUPERVISED RELEASE IN CHILD PORNOGRAPHY CASES

This section discusses the relevant statutory and guideline provisions governing supervised release and provides an analysis of relevant data.

##### 1. *Statutory and Guideline Provisions*

##### a. Length of the Term of Supervision

The PROTECT Act of 2003 significantly increased supervised release terms in child pornography cases. For child pornography offenses committed before the enactment of the PROTECT Act, supervised release was governed by 18 U.S.C. § 3583(b), the general provision applicable to all federal offenses not carrying mandatory supervised release terms.<sup>2</sup> Section 3583(b) has no minimum term and one- to five-year maximum terms depending on the class of felony of which an offender was convicted. Before the PROTECT Act, all child pornography offenders without predicate convictions for sex offenses could be sentenced to a maximum of three years of supervised release because their offenses were either Class C or D felonies.<sup>3</sup> For offenses committed after the PROTECT Act, every child pornography offender sentenced to any amount of imprisonment for conviction of an offense in chapter 110, title 18, of the United States

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<sup>1</sup> The Commission's recidivism study of child pornography offenders is discussed in Chapter 11.

<sup>2</sup> See 18 U.S.C. § 3583(b); see also *United States v. Rivera-Maldonado*, 560 F.3d 16, 18 n.1 (1st Cir. 2009).

<sup>3</sup> See 18 U.S.C. §§ 3559(a) & 3583(b)(2). Before the PROTECT Act, production offenders without a predicate conviction for a sex offense were subject to a statutory maximum of 20 years of imprisonment and non-production offenders without predicate convictions faced five- or 15-year statutory maximum terms of imprisonment. See Chapter 1 at 4 n.26 (noting that, in cases of offenders without predicate sex convictions, pre-PROTECT Act statutory maximum terms of imprisonment were five years for possession offenses, 15 years for R/T/D offenses, and 20 years for production offenses). Except for offenders convicted of simple possession, child pornography offenders with predicate convictions for sex offenses, who were all Class B felons, could receive a maximum of five years of supervised release. See 18 U.S.C. § 3583(b)(1). Simple possession offenders with predicate convictions, who were class D felons, could receive three-year maximum terms of supervised release. See 18 U.S.C. § 3583(b)(2).

Code,<sup>4</sup> must serve a mandatory minimum term of five years of supervised release and can be sentenced up to a maximum term of lifetime supervision.<sup>5</sup>

Both before and after the PROTECT Act, provisions in the sentencing guidelines concerning supervised release have instructed judges to impose at least the statutory minimum term and — as a policy statement — have “recommended . . . the statutory maximum term of supervised release” for all defendants convicted of “a sex offense.”<sup>6</sup> The guidelines, consistent with the statutory definition in 18 U.S.C. § 3583(k), have defined “sex offense” to include all child pornography offenses in 18 U.S.C. §§ 2252 & 2252A.<sup>7</sup> As noted above, the PROTECT Act expanded the statutory maximum term of supervised release to lifetime supervision for all child pornography offenders. Therefore, the current guideline effectively recommends a lifetime term of supervised release for all child pornography offenders.

The current guideline’s blanket recommendation of the statutory maximum — that is, lifetime — term of supervision for all child pornography offenders has been criticized because it was promulgated before the PROTECT Act raised the maximum term in child pornography cases from three years for most cases to a lifetime term for all cases.<sup>8</sup> Critics also have contended that the guideline’s categorical recommendation of a lifetime term of supervision fails to distinguish among offenders with respect to their levels of risk and corresponding need for lifetime supervision.<sup>9</sup> The Fifth Circuit has noted that the Commission’s policy statement recommending lifetime supervision for all child pornography offenders goes well beyond

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<sup>4</sup> Chapter 110 includes 18 U.S.C. §§ 2251, 2252, 2252A, and 2260 and, thus, covers all production and non-production child pornography offenses.

<sup>5</sup> See 18 U.S.C. § 3583(k); see also *United States v. Presto*, 498 F.3d 415, 417–18 (6th Cir. 2007) (discussing the PROTECT Act’s amendment to § 3583(k)). By contrast, offenders convicted of an obscenity offense in chapter 71 of title 18 but sentenced under the child pornography guidelines — of whom there were five such offenders in fiscal year 2010, see Chapter 6 at 146 n.58 — are subject to the ordinary statutory supervised release provisions in 18 U.S.C. § 3583(b) because the PROTECT Act did not affect obscenity offenses in chapter 71. See 18 U.S.C. § 3583(k) (not listing any obscenity offense in chapter 71 of title 18, see 18 U.S.C. §§ 1460 *et seq.*). The obscenity offenses in 18 U.S.C. § 1466A — which explicitly concern obscene images of “a minor engaging in sexually explicit conduct” and which have the same *imprisonment* ranges as comparable violations of 18 U.S.C. § 2252A, see 18 U.S.C. § 1466A(a), (b) — are not subject to the *supervised release* ranges applicable to § 2252A offenses.

<sup>6</sup> See USSG §§5D1.1(a)(1) (Imposition of a Term of Supervised Release) & 5D1.2(b) (Term of Supervised Release) (2011) (policy statement “recommend[ing]” the “statutory maximum term of supervised release” for all offenders convicted of “a sex offense”).

<sup>7</sup> USSG §5D1.2, comment. (n.1) (defining “sex offense” to include all child pornography offenses in 18 U.S.C. §§ 2252 & 2252A); see also 18 U.S.C. § 3583(k). The same policy statement and definition appeared in §5D1.2(c) and application note 1 of the pre-PROTECT guidelines. See USSG §5D1.2(c) (2002); see also §5D1.2, comment. (n.1) (2002).

<sup>8</sup> See *United States v. Apodaca*, 641 F.3d 1077, 1085–87 (9th Cir. 2011) (Fletcher, J., concurring); see also *United States v. C.R.*, 792 F. Supp. 2d 343, 519–20 (E.D.N.Y. 2011) (rejecting guideline’s recommendation for a lifetime term of supervised release for a non-production offender as “too severe and inhibitory of the total rehabilitation possible while defendant is still in his early twenties”).

<sup>9</sup> *Apodaca*, 641 F.3d at 1088 (Fletcher, J., concurring) (“The Commission defined the term ‘sex offense’ not by attempting to classify various types of sex offenders with respect to their relative risks of recidivism or their needs for ongoing supervision and treatment, but by adopting Congress’s definition of that term. . . . As the law now stands, Congress has permitted and the Sentencing Commission has recommended a lifetime term of supervised release for every child pornography offender. . . .”).

Congress's decision to require a minimum mandatory five-year term of supervision for sex offenders.<sup>10</sup> Following the Third Circuit, the Fifth Circuit has held that a sentencing judge in a child pornography case commits reversible error by imposing a lifetime term “‘blindly and without careful consideration of the specific facts and circumstances of the case before it.’”<sup>11</sup>

b. Conditions of Supervision

Federal statutory and guideline provisions set forth several mandatory or discretionary conditions of supervised release applicable to sex offenders generally, including both production and non-production child pornography offenders.<sup>12</sup> A discussion of such conditions — including legal challenges by offenders — appears in the Commission's 2010 report, *Federal Offenders Sentenced to Supervised Release*.<sup>13</sup> Common conditions include psycho-sexual assessments and treatment (including the requirement of polygraph testing), outright bans or limitations on the use of computers and the Internet, and limitations on offenders' ability to be near children (including their own) without supervision.<sup>14</sup> Appellate courts generally have upheld such conditions as reasonable so long as they are “narrowly tailored” and are “reasonably related” to the effective supervision and rehabilitation of child pornography offenders based on specific facts in the record supporting the need for such conditions.<sup>15</sup>

For instance, due to the now nearly ubiquitous use of Internet-enabled computers to commit child pornography offenses, district courts often impose a condition of supervision that restricts a child pornography offender from using a computer or the Internet without the prior approval of the supervising probation officer. Circuit courts generally have upheld such restrictions, even those for a substantial period of time, if an offender did more than simply use an Internet-enabled computer to collect child pornography (either by distributing child pornography via a computer or by attempting to communicate with a minor for sexual purposes).<sup>16</sup> However, in cases where the record shows that an offender used a computer and the

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<sup>10</sup> *United States v. Alvarado*, 691 F.3d 592, 598 (5th Cir. 2012) (“Congress clearly contemplated that there would be instances where less than the maximum [*i.e.*, a lifetime term] would be reasonable.”).

<sup>11</sup> *Id.* at 598 & n.2 (citing *United States v. Kuchler*, 285 Fed. App'x 866, 870 n.2 (3d Cir. 2008)).

<sup>12</sup> *See* 18 U.S.C. § 3583(d) (requiring defendants convicted of qualifying sex offenses to register as sex offenders and permitting courts to order a condition allowing warrantless searches of such offenders' property, including computers, based solely on “reasonable suspicion” of unlawful conduct or other violation of supervised release); USSG §5D1.3(d)(7) (setting forth “recommended” conditions concerning treatment of sexual disorders, limitations on computer and Internet access, and searches of defendants' property, including their computers).

<sup>13</sup> The discussion of sex offender conditions appears on pages 20–27 of the supervised release report, available at [http://www.ussc.gov/Research/Research\\_Publications/Supervised\\_Release/20100722\\_Supervised\\_Release.pdf](http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf).

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.* at 21–22; *see, e.g., United States v. Albertson*, 645 F.3d 191, 197–99 (3d Cir. 2012) (holding that “a complete ban on the use of a computer and internet will rarely be” reasonable, except in cases where a defendant not only committed a child pornography offense using a computer and the Internet but also used or attempted to use them to communicate with a minor in a sexual manner); *United States v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005) (reversing broad Internet restriction where “the record is devoid of evidence that he has ever used his computer for anything beyond simply possessing child pornography”).

Internet solely to collect child pornography, some courts have considered a ban unreasonable because “such a ban renders modern life — in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website — exceptionally difficult.”<sup>17</sup>

c. Revocation of Supervised Release

The primary statute governing supervised release, 18 U.S.C. § 3583, provides that, if a sex offender (including a child pornography offender)<sup>18</sup> violates the conditions of supervised release by committing an enumerated sex offense (including another child pornography offense),<sup>19</sup> revocation of supervised release is mandatory.<sup>20</sup> In addition, the court must impose a mandatory minimum term of five years of imprisonment.<sup>21</sup> The statute’s use of the term “commit” does not require the offender to be convicted of a new sex offense in order for mandatory revocation and imprisonment to occur. A court need only find by a preponderance of the evidence that the offender committed a new sex offense while on supervised release.<sup>22</sup>

2. *Analysis of Supervised Release Data*

Even before the PROTECT Act, courts imposed terms of supervised release in virtually all child pornography cases in which a term of imprisonment was imposed. From 1992 through 2003, in both production and non-production cases, district courts imposed terms of supervised release in more than 98 percent of cases in which a term of imprisonment was imposed. In the pre-PROTECT Act cases, when the statutory maximum term of supervised release was three years for the vast majority of child pornography offenders, over 80 percent of child pornography offenders received three-year terms every year from 1992 until 2003.

As Figure 10–1 below shows, the average terms of supervised release for child pornography offenders rose dramatically in the years following the PROTECT Act.<sup>23</sup>

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<sup>17</sup> United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003).

<sup>18</sup> This statutory provision applies to “a defendant required to register under the Sex Offender Registration and Notification Act [SORNA],” which necessarily includes all defendants convicted of child pornography offenses under chapter 110 of title 18, United States Code. *See infra* notes 89–99 and accompanying text.

<sup>19</sup> A mandatory condition of supervision for all federal offenders is that they “not commit another Federal, State, or local crime during the term of supervision . . . .” 18 U.S.C. § 3583(d). Section 3583(k) supplements this standard provision in sex offenders’ cases.

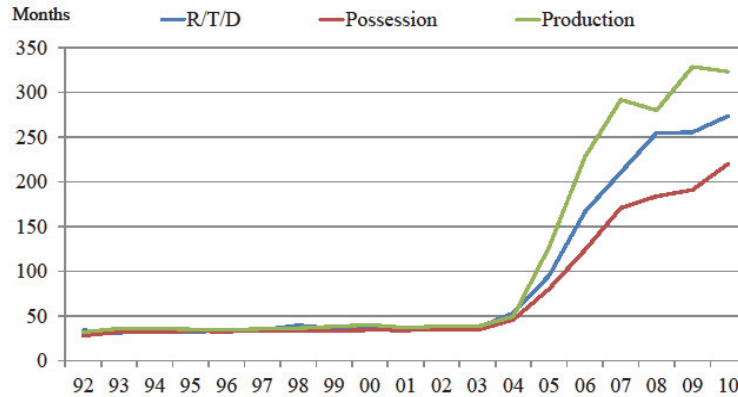
<sup>20</sup> 18 U.S.C. § 3583(k).

<sup>21</sup> *Id.*

<sup>22</sup> *See* United States v. Cunningham, 607 F.3d 1264, 1267–68 (11th Cir. 2010) (holding that supervised release revocation hearings are governed by the preponderance standard; further holding that revocations can be based on a district judge’s finding of new criminal conduct and need not be based on a new criminal conviction); *see also* 18 U.S.C. § 3583(e)(3) (preponderance standard governs revocation hearings).

<sup>23</sup> Consistent with the Commission’s treatment of lifetime terms in data analyses of prison sentence length, lifetime terms of supervision were treated as 470 months for purposes of computing the average term of supervision. Lifetime terms of supervised release were excluded entirely from calculation of average terms of supervised release

**Figure 10-1**  
**Child Pornography Offense Characteristics:**  
**Mean Months of Supervised Release**  
**Fiscal Years 1992-2010**



Note: Lifetime supervision following release from prison is treated as 470 months for computation purposes.  
 SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Table 10–1 below compares fiscal year 2010 supervised release data concerning child pornography offenders to data concerning federal offenders generally. Child pornography offenders — both production and non-production offenders — received terms of supervision in a larger percentage of cases than federal offenders generally and also received significantly longer average terms of supervision. As shown in Table 10–1, 100 percent of offenders convicted of receipt, transportation, or distribution (R/T/D) offenses or production offenses and 96.9 percent of offenders convicted of possession received terms of supervised release, compared to 82.7 percent of all federal offenders sentenced to a term of supervised release in fiscal year 2010.<sup>24</sup> In fiscal year 2010, the average term of supervised release imposed for defendants convicted of production was 323.0 months; the average term imposed for defendants convicted of R/T/D offenses was 273.7 months; and the average term imposed for offenders convicted of possession was 220.3 months. By comparison, the average term of supervised release for federal offenders generally in fiscal year 2010 was 42.6 months.<sup>25</sup>

for all offenders in the Commission’s 2010 report on supervised release because only a small percentage of all federal offenders receive such terms and inclusion of lifetime terms would thus skew the analysis. See U.S. SENT’G COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 50 (2010). In this report, however, lifetime terms of supervised release were included in the data analysis because a significant percentage of such offenders receive lifetime terms (see Figure 10–2, *infra*). Excluding life terms entirely from the analysis in this report would substantially underreport the actual average term of supervised release for this offense.

<sup>24</sup> “Possession” offenders include five offenders convicted of obscenity offenses involving sexual images of minors. Of the 874 offenders who were convicted of possession, 27 (3.1%) were not sentenced to terms of supervised release; all received sentences of probation.

<sup>25</sup> The data contained in Table 10–1 concern the terms *imposed* at sentencing and do not reflect the average amount of supervised release *served* by offenders. Sentencing courts can revoke or terminate terms of supervised release

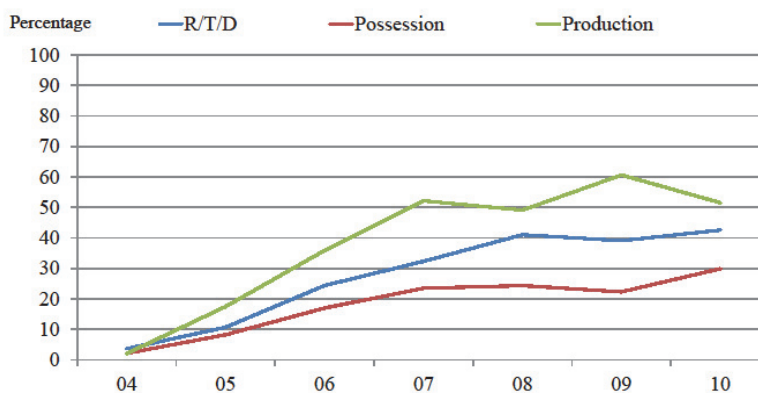
**Table 10-1**  
**Offenders Sentenced to a Term of Supervised Release**  
**Comparison of All Child Pornography Offenders**  
**Fiscal Year 2010**

	Prison Term Imposed			Supervised Release Imposed		Average Prison (months)	Average Supervised Release (months)
	Total	N	%	N	%	Months	Months
<b>All Offenses</b>	83,946	74,660	88.9	68,699	81.8	50.1	42.6
<b>Non-Production CP</b>							
R/T/D	813	813	100.0	813	100.0	129.2	273.7
Possession	902	875	97.0	874	96.9	62.9	220.3
<b>Production CP</b>	207	207	100.0	207	100.0	267.1	323.0

Note: "Prison Term Imposed" includes all offenders who received prison only or prison/community confinement split sentence.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 10–2 below demonstrates the growth in the number of lifetime terms of supervised release for production and non-production offenders after the PROTECT Act was enacted.

**Figure 10-2**  
**Child Pornography Offenders**  
**Sentenced to Lifetime Supervision**  
**Fiscal Years 2004-2010**

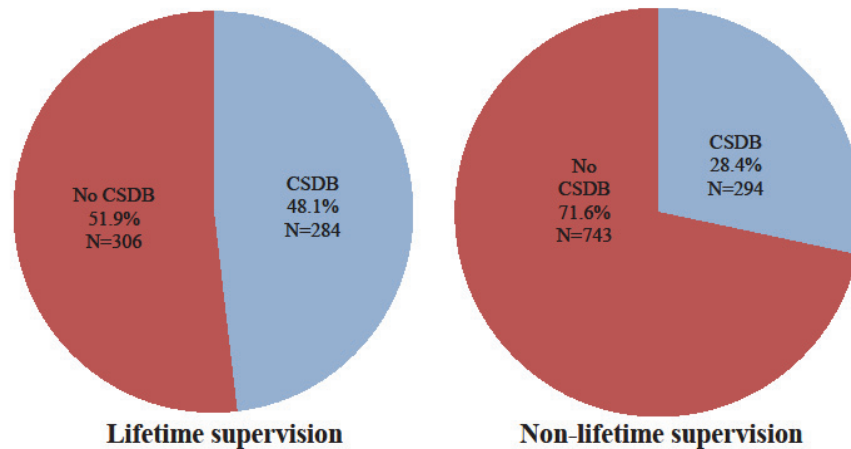


Note: Lifetime supervision following release from prison became the statutory maximum supervision term for offenses committed on or after April 30, 2003 following passage of the PROTECT Act of 2003.  
 SOURCE: U.S. Sentencing Commission, 2004-2010 Datafile, USSCFY04-10.

under certain circumstances, *see* 18 U.S.C. § 3583(e), so the length of the term imposed is not necessarily the same as the length of the term served. Meaningful data on the average term of supervision *served* by child pornography offenders sentenced after the PROTECT Act of 2003 are not yet available because relatively few offenders have been released and had the opportunity to serve extended terms of supervision.

Sentencing data suggest that judges who impose lifetime terms of supervision in non-production cases do so in part in response to an offender's history of criminal sexually dangerous behavior ("CSDB").<sup>26</sup> Fiscal year 2010 non-production cases in which offenders received a lifetime term of supervision had a significantly higher rate of CSDB than cases in which offenders received less than lifetime terms (48.1% compared to 28.4%), as shown in Figure 10–3 below.

**Figure 10-3**  
**Non-Production Offense Characteristics:**  
**CSDB by Lifetime and Non-Lifetime Supervision**  
**Fiscal Year 2010**



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10. Of the 590 cases, twenty-four cases excluded in which a prison term was not ordered.

## **B. EVALUATION AND TREATMENT OF CHILD PORNOGRAPHY OFFENDERS' SEXUAL DISORDERS**

Psycho-sexual treatment is a recommended condition of supervision for all child pornography offenders.<sup>27</sup> Many offenders also receive treatment in federal prison before being released on supervision. This section first describes the psychological evaluation and treatment of child pornography offenders. It next specifically addresses the closely related topic of risk assessment of offenders.

<sup>26</sup> Criminal sexually dangerous behavior is discussed in Chapter 7.

<sup>27</sup> See USSG §5D1.3(d)(7)(A) (special condition of supervised release for sex offenders, including all child pornography offenders, requires "the defendant to participate in a program . . . for the treatment and monitoring of sex offenders").

## 1. Treatment Generally

According to many experts, the typical sex offender who presents with a sexual disorder, including pedophilia, cannot be “cured” (*i.e.*, his psychiatric disorder cannot be entirely eradicated).<sup>28</sup> However, according to the Center for Sex Offender Management (“CSOM”), a project funded by the United States Department of Justice, Office of Justice Programs,<sup>29</sup> some recent studies show that appropriate “treatment interventions . . . are associated with lower rates of recidivism — some of them very significant.”<sup>30</sup> For that reason, “treatment is an essential component of a comprehensive sex offender management system.”<sup>31</sup>

Experts disagree about how to measure the effectiveness of treatment programs. Debates have ensued about such issues as the metric used (recidivism versus changes in sexually deviant beliefs), the proper sample size, whether treatment alone (as opposed to treatment in conjunction

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<sup>28</sup> See, e.g., William Marshall, *Appraising Treatment Outcomes with Sexual Offenders*, in *SEXUAL OFFENDER TREATMENT* 268 (W. Marshall et al., eds., 2006) (stating that sex offender “treatment [can] reduce, but unfortunately not eliminate, the number of future victims”); Belinda Brooks-Gordon, *Psychological Interventions for Treatment of Adult Sex Offenders: Treatment Can Reduce Reoffending Rates but Does not Provide a Cure*, 333 *BMJ* [formerly known as *BRITISH MEDICAL JOURNAL*] 5 (2006); U.S. DEPT. OF JUSTICE, NAT’L INSTITUTE OF CORRECTIONS, *QUESTIONS AND ANSWERS ON ISSUES RELATED TO THE INCARCERATED MALE SEX OFFENDER* 5–6 (Oct. 1988), (available at <http://static.nicic.gov/Library/007404.pdf>) (stating that “[s]ex offenders are not cured” but noting that “[s]ome, but not all, sex offenders can be treated successfully”). One possible exception to the general rule that sexual disorders cannot be cured involves rare offenders whose sexual disorders are related to a physical abnormality in their brains that can be permanently altered through medical treatment. These rare offenders do appear capable of being “cured.” See, e.g., David Eagleton (a professor of neuroscience at Baylor College of Medicine), *The Brain on Trial*, *THE ATLANTIC* (July 2011) (recounting the case of a man who, at the age of 40, first began to collect child pornography and engage in child molestation but who permanently discontinued such sexual deviancy after surgical removal of “massive tumor in his orbitofrontal cortex”).

<sup>29</sup> The CSOM is a federally-funded private entity jointly created in 1996 by DOJ’s Office of Justice Programs, the National Institute of Corrections, and the State Justice Institute. Its mission includes providing “useful, current, and accessible information” to government officials and private treatment providers who manage sex offenders. See “About CSOM,” <http://www.csom.org/about/about.html> (last visited Oct. 26, 2012).

<sup>30</sup> CSOM, *Sex Offender Treatment in the Context of Supervision: Effectiveness of Sex Offender Treatment (“Review of the Research”)*, [http://www.csom.org/train/supervision/long/04\\_02\\_02.html](http://www.csom.org/train/supervision/long/04_02_02.html) (last visited Oct. 26, 2012) (discussing several studies of the effectiveness of treatment of sex offenders); see also U.K. MINISTRY OF JUSTICE NAT’L OFFENDER MANAGEMENT SERVICE, *WHAT WORKS WITH SEX OFFENDERS?* 1 (2010) (“Large-scale research indicates that sex offenders who receive treatment, in both prison and community settings, have a lower sexual reconviction rate than those who do not receive treatment.”); R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 *CRIM. JUST. & BEHAV.* 865 (2009) (meta-analysis of studies on the efficacy of sex offender treatment programs; finding that the unweighted mean recidivism rate for the treatment group was almost half of that for sex offenders not treated); PEGGY HEIL & KIM ENGLISH, CAL. DEP’T OF CORR. AND REHAB., *PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION* 1 (2007) (“While the efficacy of sex offender treatment remains a debated topic, many studies show that treatment participation is correlated with lower officially recorded recidivism rates.”) (citing numerous recidivism studies). Some experts believe that sex offenders who are psychopaths will not respond favorably to treatment. See, e.g., Michael Seto & H.E. Barbaree, *Psychopathy, Treatment Behavior, and Sexual Offender Recidivism*, 14 *J. INTERPERSONAL VIOLENCE* 1235 (1999).

<sup>31</sup> CSOM, *The Comprehensive Approach to Sex Offender Management*, at 5 (Nov. 2008), [http://www.csom.org/pubs/Comp\\_Approach\\_Brief.pdf](http://www.csom.org/pubs/Comp_Approach_Brief.pdf) (last visited Oct. 26, 2012).



with other factors) reduces recidivism, and what conclusions may be drawn given the low base rate of *known* — versus actual — recidivism generally.<sup>32</sup>

Treatment of sex offenders, including child pornography offenders, has several goals. The larger goal is preventing recidivism, including sexual recidivism (*i.e.*, the commission of a new sex offense, including a new child pornography offense). Subsidiary treatment goals include addressing criminogenic needs, reducing or eliminating distorted beliefs about sexuality, fostering acceptance of responsibility by offenders, and developing empathy for victims.<sup>33</sup> Experts in the field agree that effective treatment requires individualized assessment and treatment.<sup>34</sup>

Generally speaking, the prevailing mode of treatment for child pornography offenders does not appear to differ significantly from the treatment of other types of sex offenders, including offenders convicted solely of “contact” sex offenders. Some “[m]odifications . . . have been implemented that consider the role that the [I]nternet plays in the [child pornography] offense process.”<sup>35</sup> In particular, effective treatment of child pornography offenders typically must address problematic Internet use such as compulsion or an offender’s involvement, if any, in Internet-based sexually deviant “communities” of other offenders.<sup>36</sup>

In order to design appropriate treatment, clinicians typically first administer a psychosexual evaluation to determine: amenability to treatment; recommended types and intensity of treatment; level of risk for sexual and non-sexual recidivism; and level of criminal justice supervision required.<sup>37</sup> A complete psychosexual evaluation will typically include a

<sup>32</sup> See *e.g.*, David K. Ho & Callum C. Ross, *Editorial: Cognitive Behaviour Therapy for Sex Offenders. Too Good to be True?* 22 CRIM. BEHAV. & MENTAL HEALTH 1 (2012); Kevin L. Nunes, Kelly M. Babchishin & Franca Cortoni, *Measuring Treatment Change in Sex Offenders*, 38 CRIM. JUST. & BEHAV. 157 (2011) (contending that individuals show only “modest” positive change after treatment).

<sup>33</sup> See, *e.g.*, CSOM, *Comprehensive Approach to Sex Offender Management*, *supra* note 31, at 5; Kevin L. Nunes, Kelly M. Babchishin & Franca Cortoni, *Measuring Treatment Change in Sex Offenders*, 38 CRIM. JUST. & BEHAV. 157 (2011); Leigh Harkins & Anthony R. Beech, *A Review of the Factors that Can Influence the Effectiveness of Sexual Offender Treatment: Risk, Need, Responsivity & Process Issues*, 12 AGGRESSION & VIOLENT BEHAV. 615, 618–19 (2007) (discussing different treatment goals including, *inter alia*, confronting and changing distorted attitudes about sexuality, promoting healthy social functioning, and preventing recidivism).

<sup>34</sup> See Harkins & Beech, *supra* note 33, at 616; Testimony of Dr. Jennifer A. McCarthy, Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology, to the Commission, at 113 (Feb. 15, 2012) (“McCarthy Testimony”).

<sup>35</sup> Prepared Statement of Dr. Jennifer McCarthy to the Commission, at 5–6 (Feb. 15, 2012) (“McCarthy Statement”).

<sup>36</sup> *Id.* Implementation of treatment regimes tailored to child pornography offenders — called “i-SOTP” (short for “Internet Sex Offender Treatment Programs”) — first occurred in the United Kingdom in 2006. See David Middleton, *From Research to Practice: The Development of the Internet Sex Offender Treatment Programme (i-SOTP)*, 5 IRISH PROBATION J.49 (2008). Results of a preliminary study concerning the effectiveness of the i-SOTP “appear[] to be sufficiently encouraging,” although a long-term study of the effectiveness of the program will require more time to pass. David Middleton et al., *Does Treatment Work with Internet Sex Offenders? Emerging Findings from the Internet Sex Offender Treatment Program (I SOTP)*, 15 J. SEXUAL AGGRESSION 5, 17 (2009).

<sup>37</sup> CSOM, *Comprehensive Approach to Sex Offender Management: Clinical Assessments*, *supra* note 31, at 4–5.

clinical interview during which a thorough history is taken including the offender's sexual history (interests, behaviors, and sexual partners), the history of any physical or sexual abuse inflicted on the offender, substance abuse history, and mental health and medical history.<sup>38</sup> The evaluation may include a personality assessment<sup>39</sup> and risk assessment.<sup>40</sup>

One factor of particular interest in creating a treatment plan is an offender's deviant sexual attitudes, especially attitudes toward children. Cognitive distortions appear to play a significant part in offenders' interest in child pornography and also some offenders' proclivities to commit sexual contact offenses against children.<sup>41</sup> The clinical interview thus often will include discussion of the offender's sexual interests and beliefs regarding children. However, the evaluator often also typically will rely on non-verbal tests to determine whether an offender has pedophilic, hebephilic, or other paraphilic interests,<sup>42</sup> because offenders tend to minimize their behavior or deny deviant thoughts.<sup>43</sup> Two common such assessments are penile phallometric tests ("PPT") (which measure physical arousal to sexual stimuli) and visual response time (VRT) tests (which measure visual response to images of persons from different genders and age groups).<sup>44</sup>

According to experts, "[t]here is a variety of accepted treatment and behavior management programs" for sex offenders.<sup>45</sup> Sex offenders, including child pornography offenders, are most commonly treated with cognitive behavioral therapy (CBT),<sup>46</sup> often involving

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<sup>38</sup> McCarthy Testimony, *supra* note 34, at 109.

<sup>39</sup> *Id.*

<sup>40</sup> Risk assessment is discussed in Section B.3., *infra*.

<sup>41</sup> See Martin C. Calder, *The Internet: Potential, Problems, and Pathways to Hands-on Sexual Offending* in CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 2 (Martin C. Calder ed., 2004); Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 DEVIANT BEHAV. 331 (2002).

<sup>42</sup> McCarthy Testimony, *supra* note 34, at 109.

<sup>43</sup> *Id.* at 150; see also Theresa A. Gannon, Kirsten Keown & Devon L.L. Polaschek, *Increasing Honest Responding on Cognitive Distortions in Child Molesters: The Bogus Pipeline Revisited*, 19 SEX ABUSE 5, 5–6 (2007).

<sup>44</sup> The PPT will typically expose the subject to different images and measure the change in bloodflow based on the type of image. See FABIAN M. SALEH et al., SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 89–118 (Oxford 2009); MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH 14–3 (Kim English et al., eds. 1996); Gene Abel et al., *Classification Models of Child Molesters Utilizing the Abel Assessment for Sexual Interest*, 25 CHILD ABUSE & NEGLECT 703 (2001).

<sup>45</sup> Association for the Treatment of Sexual Abusers (ATSA), *Sex Offender Treatment for Adult Males* 1 (2008), <http://atsa.com/sites/default/files/ppSOAdultMaleTx.pdf> (last visited Dec. 20, 2012).

<sup>46</sup> Testimony of Dr. Gene A. Abel, Medical Director, Behavioral Medicine Institute, to the Commission, at 92 (Feb. 15, 2012) ("Abel Testimony"); McCarthy Testimony, *supra* note 34, at 113; see also COSM, *Sex Offender Specific Treatment in the Context of Supervision*, *supra* note 30 (finding that "[c]ognitive-behavioral approaches appear most promising" as a mode of sex offender treatment). A related form of treatment is referred to as "psycho-educational" therapy. Psycho-educational techniques "focus[] on increasing offenders' empathy for the victim while also teaching them to take responsibility for their sexual offenses." See U.S. Dept. of Justice, Office of Justice Programs (Bureau of Justice Assistance), *What Are Sex Offender Programs/Strategies?* <https://www.bja.gov/evaluation/program-corrections/sops1.htm> (last visited Dec. 20, 2012).

both individual and group therapy.<sup>47</sup> CBT combines elements of behavioral therapy, which focuses on external offender behaviors, with cognitive therapy, which focuses on internal thought processes.<sup>48</sup> The individualized CBT for child pornography offenders relies on, among other things, an offender's motivations for using child pornography, sexual interests, participation in an online community of offenders, and predilection for contact offenses or other sexually dangerous behavior. If a mental health provider were able to access and review the offender's previous child pornography collection or, at a minimum, a forensic report regarding the collection, the provider's ability to develop a more finely tailored program of treatment would be enhanced.<sup>49</sup> According to some clinical practitioners, CBT in conjunction with additional relapse prevention support, including polygraph testing (discussed further below), appears to be effective for most child pornography offenders.<sup>50</sup> In addition to CBT, treating psychiatrists also may prescribe medication (*i.e.*, serotonin-specific reuptake inhibitor drugs or, in some cases, anti-androgenic medication).<sup>51</sup>

Experts believe that the appropriate duration of treatment, including follow-up "maintenance" to prevent relapse, "depends on a variety of factors, including the program or practitioner's approach and the offender's characteristics, offense patterns, level of risk to recidivate, and community support."<sup>52</sup> Dr. Gene Abel, M.D., a psychiatric expert on sex offenders who testified before the Commission at its 2012 public hearing on child pornography offenses, recommended a period of treatment and follow-up "maintenance" ranging from five to ten years for the typical non-production offender.<sup>53</sup> For some offenders, he opined, life-time maintenance is required.<sup>54</sup>

<sup>47</sup> See Michael Knapp, *Treatment of Sex Offenders* 13–5, in *MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH* (Kim English et al., eds., 1996) ("Group therapy provides the best format for confronting ongoing denial [by offenders], increasing an offender's acceptance of deviance, and maximizing accountability. . . . For sex offenders, individual therapy cannot begin to match the effectiveness of group therapy.").

<sup>48</sup> Harvey Milkman & Kenneth Wanberg, *Cognitive-Behavioral Treatment: A Review & Discussion for Corrections Professionals*, NAT'L INST. OF CORR., at xii (2007).

<sup>49</sup> McCarthy Testimony, *supra* note 34, at 122–24 (testifying that, "if we have information from the [forensics] report to say this guy focused primarily on images that were depicting minors under the age of 12, that's extremely valuable information with regard to treatment"). However, according to Dr. McCarthy, treatment providers today do not typically have access to information about the nature of an offender's child pornography collection (other than a general description of the specific images for which he was convicted). See *id.* at 122–24.

<sup>50</sup> See, e.g., Abel, Testimony, *supra* note 46, at 92–93 ("How effective is that treatment? It's quite effective. Treating adults, 93 to 95 percent success if [official supervision] is involved, and if polygraphs are done every six months, and if cognitive behavioral treatment is used.").

<sup>51</sup> D.M. Greenberg & J.M.W. Bradford, *Treatment of the Paraphilic Disorders: A Review of the Role of the Selective Serotonin Reuptake Inhibitors*, 9 *SEXUAL ABUSE: A J. OF RES. AND TREATMENT* 349 (1997); D.J. Stein et al., *Serotonergic Medications for Sexual Obsessions, Sexual Additions and Paraphilias*, 53 *J. CLINICAL PSYCHIATRY* 267 (1992); Barry M. Maletzky et al., *The Oregon Depo-Provera Program: A Five-Year Follow-Up*, 18 *SEXUAL ABUSE: A J. OF RES. AND TREATMENT* 303 (2006); see also McCarthy Testimony, *supra* note 34, at 116 (testifying that occasionally "psychopharmacology may be used" in treatment but is not common "because there's a lot of side effects to this medication").

<sup>52</sup> ATSA, *Sex Offender Treatment for Adult Males*, *supra* note 45, at 1.

<sup>53</sup> See Abel Testimony, *supra* note 46, at 136–37 (recommending at least five to ten years of treatment, including "maintenance," for the typical child pornography offender). Dr. Abel opined that CBT usually is successfully

Polygraph testing of sex offenders is widely accepted by experts as a critically important corollary to effective treatment. In this context, polygraph testing is not intended to develop incriminating evidence, but instead is used as a “truth facilitator” for sex offenders to accomplish the goals of treatment.<sup>55</sup> “Like urinalysis testing with drug offenders, the polygraph examination is a tool to gauge [a sex] offender’s progress and compliance with treatment and supervision expectations.”<sup>56</sup> According to senior federal probation officers with expertise in supervising sex offenders: “Polygraph exams may be used to aid supervision and treatment, and officers may discuss the polygraph results with the treatment provider and the offender. Frequently, the offender will admit to violations [of the conditions of supervision] before the polygraph is administered.”<sup>57</sup> Use of polygraphs in sex offender treatment has been recommended by the Association for the Treatment of Sexual Abusers.<sup>58</sup>

## 2. Treatment in Prison and on Supervision

Treatment of child pornography offenders may occur while they are in federal prison and, as noted above, is a standard condition of their supervision (on probation or supervised release).

### a. Treatment While in Prison

The Federal Bureau of Prisons (“BOP”) has comprehensive sex offender management strategy, including for offenders serving sentences for child pornography offenses. According to the BOP:

With the passage of the Walsh Act [in 2006<sup>59</sup>], the BOP has further expanded its monitoring, evaluation, and treatment programs for sex offenders. As required by the Walsh Act, a specialized sex offender program is offered in each BOP region. Inmates with a history of sexual offenses may be designated to the Sex Offender Management Program (SOMP), at one of six institutions: FMC Devens; United States

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implemented with “120 contacts” between an offender and treatment provider. *Id.* at 136. He further opined that “maintenance [should be] really long, and the maintenance is just as important as the treatment . . . . [W]hatever treatment you have, it doesn’t count unless it’s maintained over time.” *Id.*

<sup>54</sup> *See id.* at 137.

<sup>55</sup> Jami Krueger, *The Use of the Polygraph in Sex Offender Management*, RESEARCH BULLETIN 3, at 12 (N.Y. State Div. of Probation and Correctional Alternatives), <http://nicic.gov/Library/023570> (last visited Dec. 20, 2012); *see also* Kim English et al., *The Value of Polygraph Testing in Sex Offender Management: Research Report Submitted to the National Institute of Justice* (December 2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/199673.pdf>; *see also* McCarthy Testimony, *supra* note 34, at 117–22 (Feb. 15, 2012) (testifying about the effective use of polygraphs in treatment); Abel Testimony, *supra* note 46, at 132 (opining that, while “polygraphs are not perfect,” they are “exceedingly useful” in the treatment of such offenders because the typical offender in treatment tends to be dishonest about his sexual preferences and/or sexual history with children).

<sup>56</sup> HEIL & ENGLISH, *supra* note 30, at 30.

<sup>57</sup> Adam Graves & Mike Jones, *The Containment Model and its Impact on Sex Offender Policy*, 36 NEWS & VIEWS [newsletter of U.S. Probation and Pretrial System] 8 (Aug. 1, 2011).

<sup>58</sup> English et al., *supra* note 47, at 15–3.

<sup>59</sup> The Adam Walsh Act is discussed at *infra* note 100 and accompanying text.

Penitentiary (USP) Marion; USP Tucson; Federal Correctional Institution (FCI) Seagoville; FCI Petersburg; and FCI Marianna. Assignment is made in accordance with the security level of the individual. An inmate amenable to treatment is offered participation in the Sex Offender Treatment Program (SOTP-NR) offered at all SOMP institutions. SOTP-NR offers inmates individualized nonresidential treatment, ordinarily involving six to eight hours of programming per week, over a six month period. All participation in non-residential treatment services is voluntary.<sup>60</sup>

BOP also has a “residential” treatment program for sex offenders (including child pornography offenders):

Inmates at any BOP institution may choose to volunteer for an intensive residential sex offender treatment program (SOTP-R) offered at FMC Devens. The BOP reviews each application for the SOTP-R, considering such factors as the seriousness of the inmate’s sexual offending history, the inmate’s disciplinary record, and the amount of time remaining on the inmate’s sentence. The SOTP-R is a therapeutic community, housed in a 112-bed specialized unit. The program employs a wide range of cognitive-behavioral and relapse prevention techniques to help the sex offender manage his sexual deviance both within the institution and in preparation for release. Ordinarily, participants complete the program in 12 to 18 months.<sup>61</sup>

b. The “Containment Model”: Treatment of Offenders on Supervision

It is widely accepted among treatment providers that “prison treatment will be more effective if it is followed by community-based containment services, including supervision, treatment, and polygraph testing.”<sup>62</sup> Like many of their counterparts in the state parole and probation systems, federal probation officers currently implement what is known as the “containment model” of supervision of sex offenders, including child pornography offenders, on federal probation or supervised release.<sup>63</sup> The containment model is based on the close cooperation of the supervising officer, a mental health treatment provider, and a polygraph

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<sup>60</sup> See BOP, *Legal Resource Guide to the Federal Bureau of Prisons* 28–29 (2008), [http://www.bop.gov/news/PDFs/legal\\_guide.pdf](http://www.bop.gov/news/PDFs/legal_guide.pdf). (last visited Dec. 12, 2012).

<sup>61</sup> *Id.* at 29; see also Kathleen Horvatis, *Sex Offender Treatment Programs at the Federal Bureau of Prisons* 36 NEWS & VIEWS [newsletter of U.S. Probation and Pretrial System] 4 (Aug. 1, 2011).

<sup>62</sup> HEIL & ENGLISH, *supra* note 30, at 1.

<sup>63</sup> See Graves & Jones, *supra* note 57, at 8 (“In the supervision of sex offenders, our system has relied on [the book,] *Managing Adult Sex Offenders: A Containment Approach* [(Kim English et al., eds., 1996)]. Since the book’s release in 1996, it has steadily become respected system-wide as the blueprint for the community supervision of sex offenders.”).

examiner.<sup>64</sup> Kim English, one of the leading developers of the containment model, has described it in the following manner:

The containment approach operates in the context of multi-agency collaboration, explicit policies, and consistent practices that combine case evaluation and risk assessment, sex offender treatment, and intense community surveillance, all designed specifically to maximize public safety. . . . There are three anchors in containment-focused risk management: (1) supervision, (2) therapy, and (3) polygraph examinations. Each benefits from the distinct function of the others. The criminal justice supervision activity is informed and improved by the information obtained in sex-offender-specific therapy, and therapy is informed and improved by the information obtained during well-conducted post-conviction polygraph examinations. Each anchor must be perceived by the offender as separate yet aligned with the other.<sup>65</sup>

According to the Center for Sex Offender Management, “[a]gencies that have moved to a Containment Approach are hopeful that the combination of these three resources will prove significantly effective in reducing re-offense rates.”<sup>66</sup> The CSOM also has noted “promising results” of a recent study of the efficacy of sex offender treatment in the specific context of the containment model.<sup>67</sup> It is widely accepted that the containment model has become a “best practice” to be implemented in supervising sex offenders in both the federal system and many state systems.<sup>68</sup>

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<sup>64</sup> *Id.*; see also MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH, *supra* note 47, at 2–5–2–6, 2–10–2–12 (discussing the “containment approach,” which “seeks to hold sex offenders accountable through the combined use of both the offenders’ internal controls and external controls through criminal justice control measures, and the use of the polygraph to monitor internal controls and compliance with external controls”).

<sup>65</sup> Kim English, *The Containment Approach to Managing Sex Offenders*, 34 SETON HALL L. REV. 1255, 1257, 1262 (2004).

<sup>66</sup> CSOM, *Sex Offender Treatment in the Context of Supervision: Effectiveness of Sex Offender Treatment*, *supra* note 30.

<sup>67</sup> *Id.*; see also SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 542 (Laws & O’Donohue eds., 2d ed. 2008) (likewise noting “promising results” from studies of the effectiveness of psycho-sexual treatment in the specific context of the containment model).

<sup>68</sup> See Graves & Jones, *supra* note 57, at 8 (noting that, since the mid-1990s, the containment model “has steadily become respected system-wide as the blueprint for the community supervision of sex offenders”); Roger Pimentel & Jon Muller, *The Containment Approach to Managing Defendants Charged With Sex Offenses*, 74 FED. PROB. 24, 24 (2010) (“The containment approach . . . is an accepted, effective way to manage sexual offenders, based on empirical data and theoretical concepts consistent with the best available information from the field of community corrections.”); see also Kevin Walkow, *Chapter 219: Chelsea’s Law*, 42 MCGEORGE L. REV. 656, 671 (2011) (“The Containment Model is considered the best practice in sex offender management.”). Similarly, a representative of the federal defender community, who testified before the Commission in February 2012, opined that child pornography offenders “can be treated through this containment model.” Testimony of Deirdre von Dornum, Assistant Federal Defender, Federal Defenders of New York, to the Commission, at 388 (on behalf of federal and community defenders) (Feb. 15, 2012).

Although child pornography offenders make up a small percentage of offenders under federal supervision,<sup>69</sup> their supervision requires “extraordinary” resources,<sup>70</sup> and “[p]robably no other offender population offers management challenges in the way that sex offenders do.”<sup>71</sup> Success in implementing the containment model thus depends on adequate resources and proper training of the professionals who implement it.<sup>72</sup>

### 3. Risk Assessments of Child Pornography Offenders

A threshold issue in approaching individualized treatment and supervision of a sex offender is assessing a particular offender’s risk for sexual recidivism. Because a significant percentage of child pornography offenders either have a history of criminal sexually dangerous behavior<sup>73</sup> and/or are pedophiles,<sup>74</sup> the need to assess their risk of engaging in sexually dangerous behavior is critical. Mental health experts who treat sex offenders generally agree that an actuarial risk assessment of a sex offender, particularly when used in conjunction with a treatment provider’s clinical assessment, is a better means of predicting sexual recidivism than a provider’s clinical judgment alone.<sup>75</sup> An actuarial risk assessment, which uses a validated “instrument” such as the Static-99,<sup>76</sup> “is based on the presence or absence of a limited number of pre-specified factors” associated with recidivism.<sup>77</sup> However, there is some debate about the

<sup>69</sup> As discussed in Chapters 6 and 9, in fiscal year 2010, non-production child pornography offenders were 2.0% of federal offenders sentenced and production offenders were .025% of all federal offenders sentenced. See Chapter 6 at 126 Chapter 9 at 247.

<sup>70</sup> Michelle Spidell & Trent Cornish, *Introduction to the Special Issue on Supervision of Sex Offenders and Location Monitoring in the Federal Probation and Pretrial Services System*, 74 FED. PROB. 2, 2 (Sept. 2010).

<sup>71</sup> CTR. FOR SEX OFFENDER MGMT. (CSOM), *ENHANCING THE MANAGEMENT OF ADULT AND JUVENILE SEX OFFENDERS: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS* 56 (2007) (“CSOM HANDBOOK”).

<sup>72</sup> See *id.* at 9–13.

<sup>73</sup> See Chapter 7 at 181 (approximately one-third of all federal non-production offenders in fiscal year 2010 had histories of criminal sexually dangerous behavior).

<sup>74</sup> See Chapter 4 at 75 (noting that some experts believe that a majority of child pornography offenders are pedophiles).

<sup>75</sup> See, e.g., Dennis Doren, *Recidivism Risk Assessments: Making Sense of Controversies*, in *SEXUAL OFFENDER TREATMENT* 3 (W. Marshall et al., eds., 2006). Several different risk assessments instruments are used by treatment providers. See R. Karl Hanson, *Risk Assessment, ATSA Information Package* (Association for Treatment of Sexual Abusers), 2–4 (2000), <http://www.atsa.com/sites/default/files/InfoPack-Risk.pdf> (last visited Dec. 20, 2012) (discussing the different instruments); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability*, 40 AMER. CRIM. L. REV. 1443 (2003) (same).

<sup>76</sup> See Static99 Clearinghouse “Overview,” <http://www.static99.org> (last visited Dec. 20, 2012) (describing the Static-99 risk assessment instrument).

<sup>77</sup> Douglas Mossman et al., *Risky Business Versus Overt Acts: What Relevance Do “Actuarial,” Probabilistic Risk Assessments Have For Judicial Decisions on Involuntary Psychiatric Hospitalization*, 11 HOU. J. HEALTH & L. POL’Y 365 (2012) (“Over the past two decades, for example, several teams of psychologists have developed ‘actuarial risk assessment instruments’ . . . to aid in quantifying the level of risk — that is, the probability — that an evaluatee will engage in certain kinds of [illegal] behavior during specified future periods of time. These instruments get the name ‘actuarial’ because they implement a judgment process similar to methods used by insurance companies to assess probabilities of certain events (e.g., deaths) and to make decisions about premiums (e.g., for life insurance). In both cases, an actuarial judgment of risk is based on the presence or absence of a limited number of

predictive value of such assessments for different subgroups of sex offenders, in particular those who have no known history of committing sexual “contact” offenses.<sup>78</sup> A child pornography offender’s risk of committing contact sex offenses generally can be assessed using a validated risk assessment instrument where the offender has a history of committing one or more contact sex offenses.<sup>79</sup> Social science research on risk assessments applicable to child pornography offenders with no known history of CSDB “is just beginning to emerge.”<sup>80</sup> Currently, there is no validated risk assessment instrument applicable to such offenders — with respect to both future CSDB (in particular, sexual contact offenses) and subsequent non-production child pornography offending.<sup>81</sup>

Emerging research has focused on the “two major dimensions of risk” — sexual deviance and antisociality<sup>82</sup> — for sex offenders generally and child pornography offenders specifically. Such research, which is nascent, has suggested certain specific factors that, particularly in combination, may be relevant to predicting sexual recidivism by child pornography offenders.<sup>83</sup> Because existing research on the predictive value of these factors, whether alone or in

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pre-specified factors with known, empirically established relationships to an outcome. Although the scope and implementation styles [of such assessments] vary, they generally direct mental health professionals to gather information about a specific set of ‘risk factors’ . . . The evaluator then assigns numerical values to these factors according to some preset formula to produce an estimate of risk — a numerical probability . . .”).

<sup>78</sup> See Loretta J. Stalans, Robyn Hacker & Mary E. Talbot, *Comparing Nonviolent, Other-Violent & Domestic Batterer Sex Offenders: Predictive Accuracy of Risk Assessments on Sexual Recidivism*, 37 CRIM. JUST. & BEHAV. 613, 613 (2010); Martin Rettenberger et al., *Prospective Actuarial Risk Assessment: A Comparison of Five Risk Assessment Instruments in Different Sexual Offender Subtypes*, 54 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 169, 170 (2010).

<sup>79</sup> See Angela W. Eke & Michael C. Seto, *Risk Assessment of Child Pornography Offenders*, at 163, INTERNET CHILD PORNOGRAPHY: UNDERSTANDING AND PREVENTING ON-LINE CHILD ABUSE (K. Ribisl & E. Quayle eds., 2012) (“Well-validated risk measures are already available for child pornography suspects who have a known history of contact sexual offending.”); Kelly M. Babchishin et al., *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 SEXUAL ABUSE 92, 94 (2011) (“For online offenders who already have a known contact sex offense [history], current risk assessment . . . would be applicable.”); *but cf.* United States v. C.R., 792 F. Supp. 2d 343, 459–60 (E.D.N.Y. 2011) (crediting an expert witness who testified that STATIC-99, a risk assessment instrument for offenders who committed “contact” sex offenses, was not appropriately used on an offender who was convicted of a child pornography offense but whose only known “contact” sex offense was proved by a “self-report” by the offender rather than by a prior conviction).

<sup>80</sup> Eke & Seto, *supra* note 79, at 155; *see also* Jody Osborn et al., *The Use of Actuarial Risk Assessment Measures with UK Internet Child Pornography Offenders*, 2 J. OF AGGRESSION, CONFLICT, & PEACE RES. 16 (2010).

<sup>81</sup> Eke & Seto, *supra* note 79, at 155; *see also* Abel Testimony, *supra* note 46, at 107 (testifying that risk assessment instruments for child pornography offenders with no contact offense history currently do not exist but may be developed in the future).

<sup>82</sup> Eke & Seto, *supra* note 79, at 153.

<sup>83</sup> *Id.* at 156, 160 (noting several such factors: (1) an offender’s general criminal history and, in particular, prior commission of a violent or sexual offense; (2) an offender’s prior failure on judicial supervision; (3) an offender’s youthful age at the time of his first arrest (for any offense); (4) an offender’s history of substance abuse; (5) an offender’s low education level; (6) an offender’s admitted sexual interest in children; (7) an offender’s possession of child pornography depicting prepubescent children; and (8) the prevalence of male victims portrayed in the child pornography possessed by the offender).



combination, is extremely limited, caution should be exercised in using such specific factors to predict CSDB (including the commission of new child pornography offenses), particularly when such factors are considered in isolation. For instance, the Commission's special coding project of fiscal year 2010 non-production cases found that offenders with a history of criminal sexually dangerous behavior and offenders with no such history had virtually identical prevalence rates of substance abuse, even though this is one of the factors cited as relevant to predicting sexual recidivism.<sup>84</sup>

Some researchers have concluded that the single most significant factor associated with criminal sexually dangerous behavior committed by child pornography offenders (in particular, their commission of sexual contact offenses) is their degree of antisociality, as measured on an antisocial behavior scale.<sup>85</sup> This recent research concerning child pornography offenders is consistent with earlier research that concluded that antisociality, when coupled with sexual deviance, is a strong predictor of sexual recidivism among sex offenders generally.<sup>86</sup> Because antisociality is typically manifested during an offender's childhood<sup>87</sup> and further because the typical PSR does not contain extensive information about criminal and other antisocial acts committed by offenders before the age of majority,<sup>88</sup> the Commission's special coding project of child pornography cases was unable to specifically examine antisociality among offenders.

### **C. SEX OFFENDER REGISTRATION AND CIVIL COMMITMENT ISSUES FACING CHILD PORNOGRAPHY OFFENDERS**

All offenders convicted of a federal child pornography offense are now subject to sex offender registration laws. In addition, a small percentage of federal child pornography offenders may face civil commitment after serving their prison sentences. This section discusses those two post-conviction issues.

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<sup>84</sup> See Chapter 7 at 197 n.93.

<sup>85</sup> See Austin F. Lee et al., *Predicting Hands-On Child Sexual Offenses Among Possessors of Internet Child Pornography*, 18 PSYCH., PUB. POL'Y, AND L. 644 (2012). In their study, the researchers asked offenders various questions related to antisocial behavior, such as an offender's history of committing violent offenses, childhood bullying behavior, and misconduct resulting in expulsion from school. See *id.* Assessing antisociality often requires knowledge about an offender's youth (in particular, whether he engaged in antisocial acts before the age of 15 years old). See AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISIONS (DSM-IV-TR) 645–650 (4th ed. 2000) (requiring, for a diagnosis of antisocial personality disorder, that “[t]here is evidence of [antisociality] before [the] age [of] 15 years”).

<sup>86</sup> See R.K. Hanson & K. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. OF CONSULTING AND CLINICAL PSYCHOL. 1154 (2005) (meta-analysis of 82 different studies involving 29,540 sex offenders from several different countries, including the U.S.; primary findings were that deviant sexual interests and antisocial orientation were primary predictors of sexual recidivism).

<sup>87</sup> See DSM-IV-TR, *supra* note 85, at 645–50.

<sup>88</sup> Cf. USSG §4A1.2(d) (limiting consideration of offenses committed prior to age 18 for purposes of determining an offender's criminal history category).

## 1. Sex Offender Registration

A standard condition of supervised release for federal offenders convicted of child pornography offenses is the requirement that they comply with any applicable sex offender registration laws.<sup>89</sup> In 2006, the Sex Offender Registration and Notification Act (“SORNA”) established a new federal sex offender registration program for the states, the District of Columbia, federal territories, and Indian reservations to adopt minimum standards for registration.<sup>90</sup> Under SORNA, a sex offender — including a child pornography offender — is required to register and maintain current information in each jurisdiction in which he is convicted, employed, resides, or attends school, and also report on a periodic basis to the local authorities responsible for monitoring registered sex offenders.<sup>91</sup> The Act established a three-tiered system for the duration of the registration requirement based on the seriousness of the sex offense giving rise to the requirement to register.<sup>92</sup> Offenders convicted of production or distribution of child pornography are “Tier II” offenders,<sup>93</sup> while offenders convicted of receipt or possession of child pornography are “Tier I” offenders.<sup>94</sup> SORNA also created a new federal offense for failing to register as a sex offender as required by the Act, with a statutory maximum of ten years of imprisonment.<sup>95</sup> In fiscal year 2011, 364 offenders were sentenced for a criminal violation of SORNA.<sup>96</sup>

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<sup>89</sup> See 18 U.S.C. § 3583(d); USSG §5D1.3(a)(7).

<sup>90</sup> Adam Walsh Child Protection and Safety Act, Pub. L. No. 109–248, 120 Stat. 587 (2006).

<sup>91</sup> 42 U.S.C. § 16901 et seq. Offenders must report at different intervals (ranging from every three months to once each year) depending on the severity of their sex offense history. When they report, they are required to update basic information (such as their addresses) and allow the authorities to take a photograph of them. See U.S. DEP’T OF JUST., NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2008) (75 Fed. Reg. 38030).

<sup>92</sup> See 42 U.S.C. § 16911. A “Tier I sex offender” is defined as “a sex offender other than a Tier II or Tier III sex offender” and is required to keep the registration current for 15 years. 42 U.S.C. § 16911(2) & 16915(a)(1). A “Tier II sex offender” is defined as a “sex offender other than a Tier III sex offender whose offense is punishable by imprisonment for more than 1 year” and “is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: sex trafficking [18 U.S.C. § 1591]; coercion and enticement [Section 2422(b)]; transportation with the intent to engage in criminal sexual activity [Section 2423(a)]; abusive sexual contact [Section 2244]; or involves the use of a minor, solicitation of a minor, or production or distribution of child pornography; or occurs after the offender becomes a Tier I offender.” 42 U.S.C. § 16911(3). A Tier II sex offender is required to keep the registration current for 25 years. 42 U.S.C. § 16915(a)(2). A “Tier III sex offender” is defined as a “sex offender whose offense is punishable by imprisonment for more than 1 year” and “is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse [Sections 2241, 2242]; or abusive sexual contact [Section 2244] against a minor who had not attained the age of 13 years; involves a kidnapping of a minor [. . .] or; occurs after the offender become a Tier II offender.” 42 U.S.C. § 16911(4). A Tier III sex offender is required to keep the registration current for life. 42 U.S.C. § 16915(a)(3).

<sup>93</sup> See 42 U.S.C. § 16911(3).

<sup>94</sup> See 42 U.S.C. § 16911(2) & (5)(A)(iii); see also NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 91, 75 Fed. Reg. at 38047.

<sup>95</sup> 18 U.S.C. § 2250.

<sup>96</sup> See U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 (2011) (Table 28) (noting number of offenders sentenced under USSG §2A3.5).

SORNA further provides that, in federal criminal prosecutions, “[t]he court shall order, as an explicit condition of [federal] supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act.”<sup>97</sup> The sentencing guidelines accordingly provide as a mandatory condition of supervised release that all sex offenders register as required under SORNA.<sup>98</sup>

According to the United States Court of Appeals for the Fifth Circuit, the registration requirement for sex offenders is not a sufficient substitute for the imposition of supervised release because the requirement to register, while mandating that offenders periodically report and provide the authorities with certain basic information, does not provide either a rehabilitative component or intensive monitoring of offenders.<sup>99</sup>

## 2. Civil Commitment

Federal sex offenders, including offenders convicted of child pornography offenses, are subject to the possibility of an indefinite civil commitment beyond the conclusion of their criminal sentences if they are determined by courts to be sexually dangerous persons.<sup>100</sup> Any federal offender can be certified as sexually dangerous by the Attorney General or the Director of the Bureau of Prisons (“BOP”). Once the person has been certified, his release is stayed until a court hearing is conducted to determine whether he is a sexually dangerous person.<sup>101</sup> If the court determines that the offender is a sexually dangerous person, the offender is committed to the custody of the Attorney General<sup>102</sup> until he is no longer considered sexually dangerous or

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<sup>97</sup> 18 U.S.C. § 3583(d).

<sup>98</sup> USSG §5D1.3(a)(7). “Sex offense” under this guideline includes any offense in chapter 110 of title 18 of the United States Code, save a “recordkeeping offense.” See USSG §5D1.2, comment. (n.1). See also *United States v. Kerr*, 472 F.3d 517 (8th Cir. 2006) (holding that condition of supervised release requiring registration as a sex offender was warranted even though the offender, convicted of possession and distribution of child pornography, was not a child molester).

<sup>99</sup> *United States v. Armendariz*, 451 F.3d 352, 361 (5th Cir. 2006) (discussing a state sex offender registration program in place prior to SORNA, and finding that “without federal supervised release, the sentence provides no mechanism to ensure that [the offender] will receive the supervision he needs upon his release from prison to prevent the urge to recidivate and to address the psychological component of the crime . . .” and further citing congressional intent in allowing lifetime supervised release for some sex offenses “in response to the same concerns regarding the offender’s potential for recidivism and need for counseling”) (citing H.R. Rep. No. 108–66, at 49–50 (2003); but cf. *United States v. C.R.*, 792 F. Supp. 2d 343, 519–520 (E.D.N.Y. 2011) (sentencing child pornography offender below the recommended maximum lifetime term of supervised release because it was considered “too severe and inhibitory of the total rehabilitation possible while [the offender] is still in his early twenties” and observing that the offender would, “in any event, be subject to long-term supervision under the state and federal sex offender registration and notification laws”).

<sup>100</sup> The Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109–248, § 302(4), 120 Stat. 587 (codified at 18 U.S.C. § 4248). Any offender in the custody of the BOP, committed to the custody of the Attorney General, or against whom criminal charges have been dismissed because of mental conditions can be certified by the Attorney General or the Director of BOP as a “sexually dangerous person” if certain conditions are met. See generally *United States v. Comstock*, 130 S. Ct. 1949, 1954–55 (2011) (discussing the Adam Walsh Act’s civil commitment procedures).

<sup>101</sup> 18 U.S.C. § 4248(a).

<sup>102</sup> 18 U.S.C. § 4248(d).

will not be sexually dangerous to others if released “under a prescribed regimen of medical, psychiatric, or psychological care or treatment.”<sup>103</sup>

To meet its burden of establishing that an offender is a sexually dangerous person,<sup>104</sup> the government must prove by clear and convincing evidence that the offender: (1) engaged in or attempted to engage in sexually violent conduct or child molestation at some point in the past; (2) suffers from a serious mental illness, abnormality, or disorder; and, as a result, (3) would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released.<sup>105</sup> The Act does not require a prior conviction for a “contact” child molestation offense and, consequently, some convicted child pornography offenders have been civilly committed based on evidence satisfying the three prongs of the Act.<sup>106</sup>

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<sup>103</sup> 18 U.S.C. § 4248(d)(2).

<sup>104</sup> A “sexually dangerous person” is defined as “a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.” “Sexually dangerous to others” is further defined to mean that “the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(5), (a)(6).

<sup>105</sup> 18 U.S.C. §§ 4247(a)(5)–(6) & 4248. BOP regulations provide: “In determining whether a person will have ‘serious difficulty in refraining from sexually violent conduct or child molestation if released,’ [BOP] mental health professionals may consider, but are not limited to, evidence: (a) Of the person’s repeated contact, or attempted contact, with one or more victims of sexually violent conduct or child molestation; (b) Of the person’s denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation; (c) Established through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals; (d) Established by forensic indicators of inability to control conduct, such as: (1) Offending while under supervision; (2) Engaging in offense(s) when likely to get caught; (3) Statement(s) of intent to re-offend; or (4) Admission of inability to control behavior; or (e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program.” 28 CFR § 549.95.

<sup>106</sup> See, e.g., *Comstock* 130 S. Ct. at 1955 (noting three offenders in that appeal, whom the Attorney General had moved to civilly commit under the Act after they had served their prison sentences, were originally in the BOP’s custody based on convictions for non-production child pornography offenses).

An issue that has arisen in Adam Walsh Act litigation is whether a federal inmate’s commission of a non-production child pornography offense by itself constitutes “child molestation” under the Act. Although the statute does not provide a definition of “child molestation,” in 2008, the BOP established regulations that state “child molestation” is “any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.” 28 C.F.R. §§ 549.92 and 549.93. The BOP’s definition — which equates all types of “sexual exploitation” of children with “child molestation” — is broad enough to encompass many types of non-contact sex offenses against children, including child pornography offenses. To date, no court has deemed an inmate’s prior commission of a non-production child pornography offense — without evidence that the offender also engaged in some type of sexually dangerous behavior — to be “child molestation” under the Adam Walsh Act. Some courts, however, have held that an offender’s child pornography offense conduct, when considered together with sexually dangerous behavior, is relevant to the determination of whether he would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released. See, e.g., *United States v. Volungus*, No. 07-12060, 2012 WL 1066396, at \*10 (D. Mass. Mar. 8, 2012) (“[W]hile this case stands apart from others where respondents have had an undeniable history of [contact] offending, proof of other ‘hands-on’ sexual contact with minors is not a *sine qua non* of the government’s case for commitment, though it obviously has significant evidentiary value where it is available. . . . Volungus has not been just a passive consumer of child pornography. Even in the viewing and downloading of internet pornography, he has been obsessively active. . . . More importantly, Volungus has participated in chat rooms . . . to meet other participants who were, or who he wanted to

**D. CONCLUSION**

- Before the PROTECT Act of 2003, the vast majority of child pornography offenders sentenced to imprisonment received three-year terms of supervised release, the statutory maximum term then in effect for all child pornography offenders without predicate convictions for sex offenses. After the PROTECT Act, all child pornography offenders are subject to a statutory mandatory minimum term of five years of supervised release and a statutory maximum term of lifetime supervision. In fiscal year 2010, average terms of supervised release were 323.0 months for production offenders, 273.7 months for R/T/D offenders, and 220.3 for possession offenders.
- The sentencing guideline provision concerning supervised release for sex offenders, including child pornography offenders, recommends the “statutory maximum” term of supervised release for all such offenders.<sup>107</sup> Because the PROTECT Act increased the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all offenders convicted of any offense in 18 U.S.C. §§ 2252 & 2252A, the guideline effectively recommends a lifetime term of supervision for all child pornography offenders. Judicial critics of this provision have contended that the guideline’s recommendation sweeps too broadly by failing to require judges to assess the specific risks posed by particular offenders and their corresponding need for a lifetime term. The Commission intends to study whether the guideline should be amended in response to this criticism.
- Standard conditions of supervision include psycho-sexual treatment. Emerging research has shown that sex offender treatment using commonly accepted treatment modalities such as cognitive-behavioral therapy is generally effective in reducing recidivism, particularly if implemented as part of the containment model. The containment model involves close cooperation between the supervising officer, the treatment provider, and a polygraph examiner.
- Actuarial risk assessments of sex offenders have become a standard part of supervision and treatment. Validated assessment instruments currently exist for sex offenders with a history of “contact” sex offenses but have not yet been developed for child pornography offenders with no known history of contact offenses. Researchers are currently seeking to develop such an actuarial instrument. An offender’s degree of sexual deviance and antisociality appear to be the two general factors that are most associated with sexual recidivism.
- Once child pornography offenders finish their federal prison sentences, they are subject to sex offender registration laws (the violation of which is a federal

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believe were, minor females . . . While these do not qualify literally as ‘hands-on’ encounters, they were nonetheless affirmative encounters, a step beyond passive consumption.”).

<sup>107</sup> USSG §5D1.2(b).

offense) and the possibility of civil commitment if an offender is deemed to be a serious risk of engaging in sexually violent behavior or child molestation in the future.