



CAUTIONclick

National Campaign for Reform

May 29, 2013

Kenneth P. Cohen, Esquire
Staff Director
United States Sentencing Commission

Washington, D.C.

Dear Mr. Cohen,

It was a pleasure meeting you at the Commission's February 27 briefing in anticipation of the release of the Commission's 2013 Report on Federal Child Pornography Offenses. I also want to congratulate you to your new appointment as Staff Director of the United States Sentencing Commission.

As an expert¹ working with sexual offenders and assessing Child Pornography (CP) offenders in particular, I found the report to be outstanding – accurate and informative as well as comprehensive. The Commission should be commended for their work and diligence, as well as their contribution to the scientific literature regarding internet sex offenders and underage pornography. The Commission's work has certainly served to advance the nature of the field.

I wanted to reach out to re-introduce myself and the organization for which I am writing on behalf, and to thank you once again for taking the time to address participants' questions and concerns during the Commission's February 27 "Pre-Release" meeting in Washington D.C.

¹ I am the former State Administrator of Florida's Sexually Violent Predator Program (SVPP). Florida's SVPP is the second largest civil commitment program in the country and considered by many in the field to be a national model of practice in the assessment, management and treatment of sexually violent predators. In addition to overall administration of the program, the SVPP Administrator is also responsible for maintaining a \$35 million dollar budget; identifying alternative, cost effective methods for dealing with sexual offenders; assisting in public policy formulation, development, and amendment; and coordinating state-wide training for Florida experts contracted to provide assessment and treatment of sexual offenders.

I am a Licensed Psychologist currently in private practice in Tallahassee, Florida, specializing in the assessment of sexual offenders and consulting with national organizations on effective sex offender management practices/public policy.

CautionClick National Campaign for Reform (CCNCR) is a national, grassroots organization dedicated to working toward evidence-based policy reform of the federal sentencing guidelines for CP offenders, to ensure that sentences for these offenders, like all other offenders, are fair, just and consistent with the purposes of sentencing.

Few issues in the mental health field and criminal justice system stimulate more controversy and abdication as dealing with sexual offenders. Recent years have seen a significant and particular increase in the criminal penalties associated with possession of child pornography. For most of us, there is a strict moral code regarding the preservation of childhood innocence. Congressional directives increasing the severity of these crimes appear to be based on arguments that blur the distinction between those who possess images of underage pornography and those who sexually abuse or exploit children. In particular, sentences have been increased based on arguments that: (a) possession of pornography is equivalent to or worse than child sexual abuse; (b) viewing child pornography increases the risk that an individual will sexually abuse a child; and (c) those who possess child pornography are abusing children undetected. Unfortunately, failing to differentiate offenders by grouping them all into one homogeneous category blurs distinction between offenders and culpability and reinforces public misperceptions that child sexual abuse is a stranger-danger issue. As the Commission reviewed in its Report, the empirical research regarding sexual offenders and recidivism simply does not support this assumption (or many other public misperceptions about the nature of sexual offenders and offending behavior).

Prosecution of CP cases is costly, to the government as well as taxpayers. According to Commission statistics, possession of underage pornography (nonproduction) represents only 2.4% of all federal felony and Class A Misdemeanor cases, yet has one of the highest prison sentences on average. In addition, the vast majority of CP offenders have a Criminal History Category of I, the least severe category.

Since *United States v. Booker*, the federal government has spent nearly \$30 billion on incarceration, which exceeds the Gross Domestic Product of many countries. Of this, over 2 billion alone is spent incarcerating child pornography offenders. For comparison purposes, during the same time period, over four times as many people have been sentenced for fraud offenses, yet the total cost for incarcerating those individuals was almost \$1 billion less. What this translates into is that the cost per offender is much higher for child pornography offenders than for any other major offense category.

In the modern technological world, every peer-to-peer sharing network and every software download program not only allows for large downloads, but is actually designed to facilitate mass downloading. Thousands of images can be downloaded with the click of a button, in a matter of minutes, even if the user only intended to download a few specific images. For some, this mass downloading of images can occur without knowledge on the user's part (*United States v. Burns*, No 07CR556, 2009 WL 3617448, at 24 – reasoning that “the internet leads to the easy, and sometimes unintended, collection of massive collections of images, including those with violence and prepubescence”). Thus, in today's world, computers and volume no longer signal greater

danger and sophistication on the part of an offender. Despite this statistical reality, the current Guidelines' five-level enhancement will increase a defendant's potential sentence by over four years in prison.

Not only are CP offenders subjected to longer prison sentences, many are also subjected to lifetime registration under the Sex Offender Registration and Notification Act (SORNA; Title I of the Adam Walsh Act). In response to well-publicized child abductions and murders committed by convicted sex offenders, jurisdictions all over the United States have enacted exclusionary zone laws prohibiting sex offenders from residing within close proximity to a school, park, daycare center, or school bus stop. Since their enactment, housing restrictions have increased these buffer zones, often ranging from 1,000 to 2,500 feet. These sex offender zoning laws have essentially banned sex offenders from urban areas where schools, parks, and other prohibited zones overlap.

Housing restrictions are based largely on the misconception that anyone who views child pornography will eventually, or had previously, molested a child. Housing restrictions are also based on three other common misperceptions: that (1) all sex offenders reoffend, (2) treatment does not work; and (3) children are sexually abused by strangers. While good intentioned, sex offender registration and residency restrictions have greatly diminished viable housing options for sex offenders, destabilizing resources and edging out newly released and vulnerable offenders to rural areas far away from family support and mental health services crucial to preventing future reoffending.

As pointed out in the Commission's CP Report, according to the United States Department of Justice's Bureau of Justice Statistics, only 5.3 percent of sex offenders released from prison are rearrested for a new sex crime and only 3.3 percent of persons convicted of child molestation will be arrested for another sex crime against a child. These recidivism rates are very low compared to the sixty-eight percent recidivism rate for all offenders released from United States prisons. In the Commission's own recidivism study of 610 offenders convicted of possession or receipt (not distribution or production), the Commission found that the rate of committing more crimes of any sort was 30 percent and the rate of sexual reoffending was 7.4 percent – which is lower than the rate of sexual offending for people convicted of contact offenses/molestation. Thus, the notion that sex offenders recidivate at an alarming rate is not supported by the evidence.

What is supported by vast empirical research is that proper mental health treatment and supportive familial and social networks serve to significantly reduce future re-offense rates. Residency restrictions threaten this by forcing offenders to live on their own in rural and impoverished areas far from their communities or in socially-disorganized, economically depressed neighborhoods that have far fewer resources for mobilizing community strategies to deter crime and protect residents. Consequently, denying sex offenders residency in metropolitan areas where treatment and community resources are readily available inadvertently increases risk by aggravating stressors already known to contribute to recidivism (such as isolation, disempowerment, shame, depression, anxiety,

lack of social supports and lack of viable employment opportunities). Additionally, residency restrictions inadvertently increase transiency and homelessness amongst sex offenders, thereby decreasing the ability of law enforcement authorities to keep track of offenders and probation officers to supervise offenders.

There are several potential remedies to working with low risk CP offenders. One solution is to amend the federal guidelines to include an element of intent or willfulness. Criminal mindset and sexual deviancy are probably the most significant factors aggravating risk. Another solution would be to implement a "Pretrial Diversion" program for low risk, first time CP offenders, which diverts this low risk group from the traditional criminal justice system into a community-based supervision and treatment program, similar to the one administered by the U.S. Probation Service. The U.S. Attorney can defer prosecution of any individual against whom a prosecutable case exists where the accused is not a person with a prior felony conviction, an addict, a public official or former public official accused of an offense arising out of an alleged violation of a public trust. Participants who successfully complete the diversion program are either not charged, or, if they have already been charged, participants will have the charges against them dismissed. ***This single remedy could potentially result in millions to billions of dollars saved.*** Participants who are unsuccessful are returned to court for prosecution.

Diversion programs are intended to save prosecutorial and judicial resources for concentration on major cases and to provide, where appropriate, a vehicle for restitution to communities and victims of crime. The period of supervision should be around twelve months, but not to exceed eighteen months. The supervision may include employment, counseling, education, job training, mental health treatment, and case management. New York appears very receptive to pretrial diversion programs in working with CP offenders. Of the 270 18 U.S.C. §2252 cases in New York State where prosecution was declined between 2004 and 2008, 2.9% were declined after pretrial diversion was completed. Additionally, 14.8% were declined due to an agency request, due to instructions from the Department of Justice, or due to department policy. Another 21% were declined due to lack of evidence of criminal intent. Thus diversion and prosecutorial discretion are being used in federal child pornography cases in New York, even if only on a small scale.

The overwhelming majority of current scientific and legal evidence supports the contention that those convicted of first-time, nonviolent CP possession pose the least risk to the public. Diversion programs offer the ideal win-win situation for the government, public and offender. On the one hand, the government, having doubts about the innocence of an offender's exploration of child pornography, will have sufficient time to observe and monitor an offender's behavior while under supervision, in particular his risk to the community. If the offender should fail, the government would still be able prosecute the offender and sentence him to imprisonment if warranted. For all those who successfully complete the program, the government and tax payers will save both money and resources.

Alternatively, Congress could amend the federal statutes such as 18 U.S.C. §2252 and 2252A to include an element of "willfulness" in addition to the existing "knowingly"


element. There is some evidence that federal prosecutors in New York occasionally decline to prosecute 18 U.S.C. §2252 cases due to a lack of criminal intent, and explicit language requiring willfulness in addition to the existing knowingly element would clarify the requisite mental state required under U.S.C. §§ 2252 and 2252A, and more effectively target offenders for whom such laws were passed. Ultimately, it is the public that will benefit.

In summary, there are many alternative methods for dealing with first-time, low risk CP offenders that would lessen the financial burden and overcrowding imposed by the current rise in prison populations, retain taxpayers in the system, and eliminate offenders' families from the frequent reliance on state financial assistance that occurs when the source of a family's primary financial support is incarcerated. Thus, on behalf of CCNCR, ***I would like to respectfully request a meeting with you to further discuss possible alternatives for consideration in reforming the federal sentencing guidelines for CP offenders.*** I am happy to travel to Washington DC at your convenience. CCNCR would also like to share with you their commercial Public Service Announcement (not yet released) warning youth against the dangers of surfing the internet and viewing underage pornography, as well as a draft for a CP Pretrial Diversion Pilot Program targeting low risk, nonviolent, first-time offenders.

Thank you for your time and consideration. I look forward to hearing from you. I may be reached at:

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Sincerely,



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