The Implications of Recidivism Research and Clinical Experience

For Assessing and Treating Federal Child Pornography Offenders:

Written Testimony Presented to the U.S. Sentencing Commission

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Chairperson Saris and members of the United States Sentencing Commission, thank you for giving me the opportunity to appear today to present my views on research results and treatment observations that bear on the sentencing guidelines for federal child pornography offenders.

I am a forensic clinical psychologist, lead developer of the MATS-1 actuarial test for estimating adult sexual recidivism (Wollert, Cramer, Waggoner, Skelton, & Vess, 2010), and former full professor of psychology. From 1999 to 2009 I treated federal sex offenders, including child pornography offenders (CPOs), in Portland, Oregon. I've also consulted with federal public defenders, federal probation officers, and federal judges. I've testified in federal and state courts in CPO and other sex offender cases.

From this experience I know that many professionals and laypersons believe that Pedophiles, convicted contact child molesters, and undetected molesters are predisposed to watch pornographic depictions of children on the internet. It is also believed that this causes an

increase in the intensity of deviant sexual fantasies, decreases inhibitions, and results in recurrent sexual misconduct that resists treatment and punishment.

One corollary of this commonsense conception, which I call the Pornographic Attraction Theory (PAT), is that CPOs are mentally ill. Another is that they are sexually dangerous. One version goes so far as to claim that the sophistication of CPOs makes them more dangerous than convicted child molesters.

The PAT, prominently featured in the work of federal psychologist Andres Hernandez (2000; Bourke & Hernandez, 2009), has probably influenced the child pornography sentencing guidelines of the United States Sentencing Commission (USSC) to some extent. Also, since 2006 it has been invoked by the Bureau of Prisons as a rationale for certifying federal prisoners as "sexually dangerous persons" and eligible for post-prison civil commitment under the Adam Walsh Act (Lee, Li, Lamade, Schuler, & Prentky, 2012).

In spite of its influence, the critical elements of the PAT – that federal CPOs are undetected child molesters and likely to molest children after incarceration – are unconfirmed. The gap that now exists between evidence about CPOs and the policies that have been adopted to sentence and civilly commit them will undoubtedly stimulate considerable research efforts by psychologists and other behavioral scientists in the next decade.

The remainder of my testimony is divided into four sections. The first reviews aspects of the USSC guidelines for sentencing CPOs that seem relevant to the PAT. It also describes variations from the guidelines. The second section summarizes Seto's (Seto, Hanson, & Babchishin, 2012) meta-analysis of research on online sex offenders that is relevant to the PAT. The third focuses on research with federal CPOss tells us about the PAT. The last combines these findings from science with my views as a clinician.

The Development of Federal Sentencing Guidelines Reflecting the PAT's Influence

The USSC was established as an independent entity under the judicial branch of government when Congress passed the Sentencing Reform Act (SRA) of 1984 (Stabenow, July 2008; Baron-Evans, May 11, 2008). It was tasked with a two-fold mission. One was to establish proportional sentencing policies as part of a process that combined empirical study of the guidelines with other initiatives such as research and hearings. The second was to periodically review and revise these guidelines.

One hundred-twelve CPOs were sentenced under the guidelines from 1994 to 1995 per the USSC's 1996 Report to Congress on *Sex Offenses Against Children* (p. 3 & p. 29). Table 1.2 of the 1993 *Compendium of Federal Justice Statistics* (Bureau of Justice, October 1996) indicates that federal prosecution was pursued in 37% of all charged cases (n=306).

Relatively dangerous CPOs were probably selected for prosecution in this era. This is suggested by the fact that 20% of the prosecution cohort was involved with the production of child pornography (see p. 29 of the 1996 Report). Only 31% of the cases "involved the use of a computer" (p. 29). Most offenders were therefore bold enough to seek out child pornography through the mail and by contacting suppliers, buyers, or traders rather directly.

The 1996 Report also presented three examples of offenders who were sentenced under the guidelines, but none of these examples mentioned the use of a computer. This is further evidence that the focus of prosecutions at this time fell on more dangerous offenders who did not use computers in the commission of their crimes.

From 1994 to 2006, the number of federal prosecutions for child pornography offenses increased far more than the number of prosecutions for other sex offenses. This increase is

charted in Figure 1 from the 2007 Bureau of Justice Statistics Bulletin on the *Federal Prosecution of Child Sex Exploitation Offenders.*
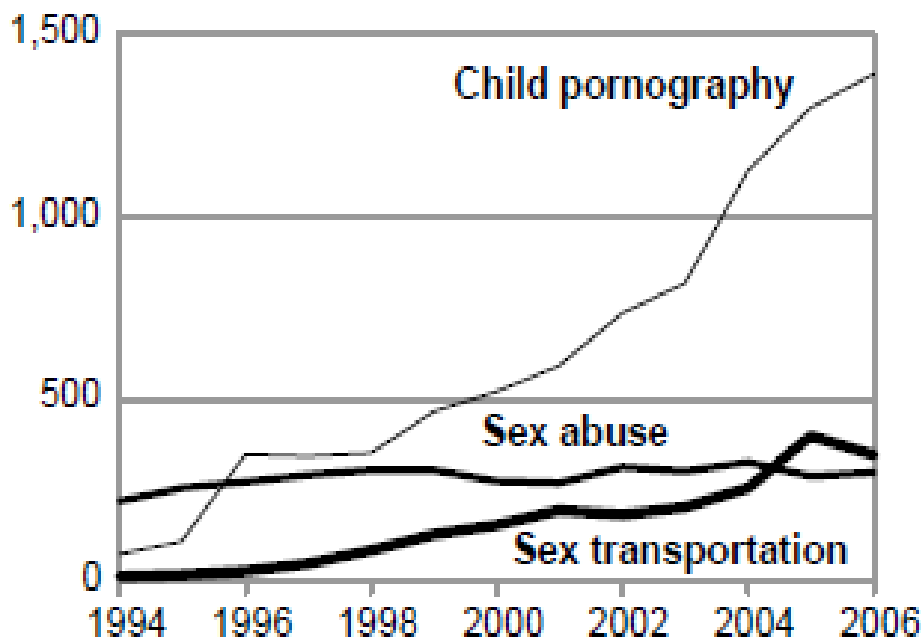

Figure 1. The number of federal prosecutions for child pornography offenses where matters with a child exploitation offense was the lead charge. Source: Executive Office for U. S. Attorney. National LIONS database, fiscal year 2006 as reported by Bureau of Justice Statistics Bulletin (December, 2007).

The curves in Figure 1 suggest that the dangerousness of the pornography offender pool was diluted over time and that later defendants were more timid than earlier ones. Table 17 of the USSC's *Sourcebooks of Federal Sentencing Statistics* indicate only 10% to 11% of all child pornography defendants were sentenced for production in 2008 and 2009. The Bureau of Justice Statistics Bulletin on *Federal Prosecution of Child Sex Exploitation Offenders* (2007) reported that 97% of the 2006 defendants in child pornography cases used computers (p. 2) and that only 20% had previously been convicted of any kind of felony (p. 5). Finally, whereas federal

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prosecutors pursued adjudication in 37% of all possible cases in 1994 and 1995, Table 2 of the Bulletin indicated the pursuit rate increased to 60% by 2006.

The Guidelines have become ever more punitive in spite of their application to a current population that seems less dangerous than the population from the early 1990s. The 2003 "PROTECT Act," for example, "created a five-year mandatory minimum for trafficking and receipt, raised the statutory maximum for trafficking from 15 to 20 years and for possession from five to ten years" (USSC, 2009, October, p. 38). Table 1 shows that the average sentence length for first time CPOs is now over three times what it was for both first time and recidivist CPOs in 1994. It also shows that the average sentence length for first-time pornography offenders is only about 10 months less than what it is for pornography recidivists.

Quantitative data suggest that judges are concerned about the proportionality of applying the guidelines to CPOs (Stabenow, 2011; Wollert, Waggoner, & Smith, in press). As Senator Arlen Specter has observed, "each year the federal judges' departure rate for child pornography increases significantly" (Specter & Hoffa, 2011, September). In fiscal year 2009, 1,606 CPOs were sentenced in cases involving possession and distribution of child pornography. Fifty-three percent of defendants were sentenced below the guideline range. The departure-variance rate was 58% in 2010. It was about 62% in 2011.

Case-specific decisions reflect similar concerns (Hansen, July 1, 2009). A *New York Times* article, for example, (Sulzberger, May 21, 2010) recounted a decision by the U.S. Court of Appeals for the Second Circuit (United States of America v. Dorvee, 2010) that was highly critical of the section of the Guidelines (§2G2.2) that covers possession and distribution cases. As a result the court "vacated a 20-year child pornography sentence by ruling that the sentencing Guidelines … „unless applied with great care, can lead to unreasonable sentences.‟"

Table 1

Sentences for federal child pornography offenders in the mid-1990s versus 2008 & 2010.

Year	Types of Child Pornography Offenses	N	Average # of months
1994 & 1995[a]	Possession	22	15
1994 & 1995[a]	Distribution	66	29
1994 & 1995[a]	Production	24	79
1994 & 1995[a]	For all child pornography offenders	112	36
2008 (FY)[b]	For first-time pornography recidivists	1,620	122
2008 (FY)[b]	For first-time offenders	1,295	112
2010 (FY)[c]	For all child pornography offenders	1,802	120.1

[a]USSC, 1996 Table I. [b]USSC, 2008 Table 14. [c]USSC, 2010 Table 14.

In 2009 the Commission "established a review of the child pornography guidelines as a policy priority for the guidelines amendment cycle ending May 1, 2010" (October 2009, p. 1). It extended this commitment. As part of this review it has dedicated the hearing at hand to the topic of child pornography. The present hearing provides a chance to reconsider the guidelines in light of research on the PAT.

A Summary of Seto's Meta-Analysis of Recent Behavioral

Research On The PAT As It Applies to Online Offenders

Assessing the characteristics of those who expose themselves to an emergent condition like internet child pornography requires the introduction of the condition to a population, the identification of offenders, and the passage of time. Information needs to be collected for a large pool of offenders to estimate the rate of prior contact sex offenses or the prevalence of a mental disorder like Pedophilia. A several year follow-up period is needed to arrive at a recidivism estimate. The dissemination of research results is also a lengthy process.

In light of the relatively recent advent of the internet it is not surprising that most studies relevant to the PAT's evaluation were disseminated after 2008. Seto and his colleagues (2011) condensed the results of 22 published and unpublished studies into a few averages that estimated the percentage of online sex offenders who had committed contact sex offenses. They also averaged the results of nine published and unpublished follow-up studies to estimate a single recidivism rate. Most of the subjects in these studies were CPOs.

Regarding the issue of prior contact offenses, Seto's team found that 12 % of more than 4,000 offenders had "an officially known contact sexual offense history at the time of their index offense" (p. 124). Self-report data were also solicited from a subset of 523 volunteer and non-volunteer online offenders via interviews, polygraph examinations, and questionnaires that were either completed anonymously or in conjunction with treatment. Fifty-five percent of the 523 offenders in this nonrepresentative cohort reported committing a contact sex offense.

Regarding the issue of recidivism, the Seto group reported (p. 135) that "most of the follow-up times were under 4 years … 3.4% … of the online offenders recidivated with a contact sexual offense and 3.6% recidivated with a child pornography offense … 4.2% recidivated with a

violent offense." Such findings led them to conclude that " there is a distinct group of online offenders whose only sexual crimes involve illegal (most often child) pornography … online offenders rarely go on to commit contact sexual offenses" (p. 136).

Seto's averaging approach referenced the most current body of research relevant to studying online offenders at the time it was written and reported some descriptive statistics for this group. It has limitations, however, for the purpose of policy determination by the Commission. These are that it (1) focuses on online sex offenders, not federal CPOs; (2) misses studies disseminated in the last year; and (3) gives equal weight to studies that vary in their quality of design. The last problem is particularly significant in that a number of studies about online offenders that Seto included in his analysis were flawed by poor research designs that included imprecise dependent measures, nonrepresentative sampling, strong demand characteristics, masking, overinterpretation, and lack of cross-validation. Definitions and examples of these flaws are presented in Table 2. Table 2 also includes some suggestions for controlling them.

The obvious conclusion from these observations is that the most relevant and least misleading body of research for evaluating the PAT's applicability to federal CPOs consists of studies that focus directly on federal CPOs.

Table 2. Research Design Flaws That Produce Artifactual Estimates of Prior Contact Sex Offenses (PCSOs) For Federal CPOs

Type of Flaw	Definition	Example (Artifactual Effects in Parentheses)	Possible Solutions
Misleading dependent measures	An outcome is underestimated by a narrow definition or inflated by a broad definition.	The definition of a PCSO includes sex between a 19 year-old and a 16 year-old. (This produces high rates in both offender and non-offender samples).	Have experts specify definitions. Compare a full range of outcomes.
Nonrepresentative sampling	Data are collected from subjects who come from the extremes of a reference group.	An ad solicits interviews from "Pedophiles" and the PCSO rate they report is attributed to federal CPOs. (The rate for CPOs is misestimated because a minority of CPOs are Pedophiles.)	Carefully define the reference group. Use procedures to select representative samples.
Obvious demand characteristics	Research procedures are adopted that are so transparent that subjects know the results that researchers hope to obtain.	Counts of PCSOs are based on unverified self-reports from patients in treatment programs where a premium is placed on high levels of disclosure. (Clients give their therapists whatever they want).	Verify offenses. Look at disclosure rates for different procedures. Minimize demands.
Masked effects	Data from different offender populations are averaged.	Four of 25 CPOs with no current contact convictions report a PCSO. Sixty of 100 convicted molesters do so. The data are pooled and a 51% rate is reported. (The high rate for the molesters hides the lower rate for the CPOs).	Test if groups differ on the data. Report data separately if groups differ.
Overinterpretation	Data collected from a single group are treated as though they are valid and uniquely characterize the group.	A sample of CPOs is called "dangerous" after a 25% rate of prior contact sex offenses is obtained. (The rate may not be special because it could be elicited from other groups like drug users).	Compare data for other groups of offenders and non-offenders with data for CPOs.
Lack of cross-validation	The properties of an actuarial test developed on one sample are not verified in a second sample.	A test identifies 80% of those CPOs with a PCSO in a developmental sample. (Accuracy is overestimated when a test is developed.)	Collect follow-up data from groups with different PCSO rates.

Three research projects fall in this category. Data on incarcerated federal CPOs in treatment at the Butner Federal Correctional Institution were reported in the first project, described in a conference presentation by Hernandez (2000) and in an article by Bourke & Hernandez (2009). My colleagues and I argued that the Butner results were artifacts of a badly flawed research design. As an alternative we reported data for federal CPOs in community-based treatment in a conference presentation (Wollert, Waggoner, & Smith, 2009) and a book chapter (Wollert, Waggoner, & Smith, in press). Most recently, U.S. Supervisory Officer Lawrence Andres, Jr., reported data for another group of federal CPOs like ours in a memorandum to Senior U.S. Judge Jack Weinstein (2011, May).

The next section describes the Butner studies, our criticisms, our research, and the data collected by Mr. Andres and reported to Judge Weinstein.

A Summary of Research on Federal CPOs

The Butner Studies

Hernandez proposed in a 2000 conference paper that users of child pornography "can be equally predatory and dangerous as extrafamilial offenders" after he found that a group of 54 CPOs who completed Personal History Questionnaires (PHQs) and polygraph exams during sex offender treatment at the Butner Federal Correctional Institution disclosed more molestations than they did during their federal presentence investigations. Bourke and Hernandez (2009) conducted a second study with a larger group of CPOs following Hernandez' earlier procedures. They assessed two outcome variables from a review of the records of 155 CPOs who voluntarily participated in the Butner program, which Hernandez directed. The Butner CPOs were not described as being different from the general population of federal internet CPOs. One of the variables recorded by Hernandez and Bourke reflected the number of adjudicated and self-

reported molestations reported in the presentence investigation for each CPO. The other reflected the number of adjudicated and self-reported molestations disclosed by each CPO to staff members at Butner, who apparently expected all treatment participants to make new disclosures on an ongoing basis and to pass a polygraph indicating they had "fully disclosed" their sex offenses. Participants were also told they did not have to "reveal any identifying information when listing their victims" (p. 186).

Bourke and Hernandez estimated that 26% of their subjects had previously committed either an adjudicated or nonadjudicated molestation per their presentence reports, which described a total of 75 sex crimes. They also reported that the first figure grew to 85% when treatment disclosures were added in while "the number of reported victims known at the end of treatment … was 1,777" (p. 187). Assuming that disclosures made in treatment reflected the "true extent" (p. 188) of the sex offense histories of CPOs, it was suggested (p. 189) that the results of the Butner studies validated the theory that CPOs harbor "pervasive and enduring" pedophilic interests that cause them to access child pornography on the Internet. This access, in turn, reinforces the "paraphilic lifestyle" of CPOs and results in "behavioral disinhibition" that makes them likely to commit more child molestations. Bourke and Hernandez also asserted that "the findings of this study underscore the importance of prison-based sex offender treatment" (p. 188).

Wollert, Waggoner, & Smith's Criticisms of the Butner Studies

My colleagues and I criticized the Butner Studies because they included the types of flaws listed in Table 2. One very troubling feature was that the welfare of Hernandez' "subjects" was dependent on their standing in his program. From interviewing or counseling CPOs who had been at Butner we learned they were fearful of program termination. If this happened they

would be moved to the general prisoner population, where they would be harassed as sex offenders. Another problem was that Hernandez could define a sex offense anyway he wanted. He could, for example, count a dating relationship between a college freshman and a high school junior as an offense. It was also impossible to verify the accuracy of reports because CPOs were told not to identify victims and consent forms promised confidentiality. Still another problem that several Butner patients revealed to us was that staff members expected them to disclose new offenses on an ongoing basis. One former patient, for example, spontaneously wrote a letter to me (C.S., personal communication, September 6, 2010) stating that "when I got into the SOTP program I was instructed to count all incidents of sexual contact regardless of my age or the age of my „victim‟". Another was required to complete three PHQs within the span of a year. Finally, Butner patients were also expected to pass the full disclosure polygraph that Bourke and Hernandez (2009) described in the "Measures" section of their paper (p. 186). This holds significant implications for a study based on self-report data because a technique that is widely used to pass this exam entails "overestimating the number of possible victims" (Abrams, 1991, p. 259).

We also described how these circumstances interacted with one another to artifactually produce Hernandez' results. This explanation relied heavily on the fact that subjects in psychological experiments will act the way a researcher wants them to act if they know what the researcher hopes to find. Aspects of the research situation that tip subjects off to these hopes are referred to as "demand characteristics" (Orne, 1962; Fillenbaum, 1966). In the Butner research, it was a simple matter for offenders in treatment to figure out what Hernandez wanted from them. This "demand" was reinforced by polygraph examinations and repeated PHQ administrations accompanied by an awareness that those who were terminated would be placed

in the general population. Overdisclosure was also encouraged by the adoption of data collection procedures that made it impossible to verify the accuracy of disclosures.

This analysis led us to conclude that almost any offender faced with the pressures built into the Butner program would generate many possible false disclosures. We also pointed out that Hernandez could have assessed whether his results were artifacts of his methods by changing his instructions in his second study. He could have, for example, told the second group that they wouldn't be placed in the general prison population under any circumstances, that they weren't expected to make ongoing disclosures or pass a polygraph, that they were only expected to be totally honest, and that he wanted to collect victim information to verify their truthfulness. Had he achieved his original results after exercising some of these options he could have claimed that his results were not due solely to demand characteristics. He did not do so, however.

The best explanation of Hernandez' results about prior contact sex offenses by CPOs is therefore that they were artifacts of inadequate research design. At least one federal judge has come to a similar conclusion, stating that the "Court can find no error in (the) conclusion that the Butner Study … „doesn't meet scientific standards for research, and is based upon, frankly, an incoherent design for a study'" (United States v. Johnson, p. 18).

My colleagues and I also criticized Hernandez for concentrating on the number of self-reported sex crimes escaping adjudication because it is of minor importance for estimating sex offender recidivism risk. Actuarial tests, which are most accurate for this purpose, always consider arrests or convictions for sex offenses that are officially recorded. They discourage putting significant weight on self-reported sex crimes, however. The reason for this, based on my own experience with actuarials (Wollert, 2002, 2003; Wollert, 2006; Waggoner, Wollert, & Cramer, 2008; Wollert et al., 2010; Wollert & Cramer, 2011), is that self-report is subject to

speculation and error by both offenders and evaluators. Consistent with this view, no reliable

method has been developed for adjusting actuarial estimates to account for undetected sex

offenses (Wollert, 2006).

About a year after we finalized our criticisms I received an anonymous 13-page report

that was apparently compiled by Butner inmates and "distributed to the forensic psychology and

legal communities, and law enforcement" ("The Butner Study," 2011). The report alleged that

Hernandez' research was "fraudulent" and explained the reasons for this assertion. I am

documenting this event here because I have never encountered a similar complaint about

research participation from a group of sex offenders.

Wollert, Waggoner, & Smith's Research on Outpatient CPOs

Since 1978 I have personally treated about 3,000 offenders convicted of either contact

sex offenses or noncontact offenses like peeping or public indecency. I have also evaluated

1,000 sex offenders for treatment or sentencing and been retained in 200 sexually dangerous

person proceedings. The great majority of these referrals were for contact offenses.

Between 1999 and late 2009 I provided psychological evaluations and treatment to 55

CPOs under federal supervision in the Portland metropolitan area. Some clients were required to

make nominal co-payments, but the federal contract I held covered most treatment costs. As a

result the clients in my program represented a near exhaustive sample of federal offenders with

child pornography index offenses in the local area.

I treated all CPOs myself. My impression of this group conflicted with the picture

presented by Hernandez. Those in the CPO cohort struck me as ashamed of their pornography

offenses, motivated to succeed, well-educated, responsive to treatment, compliant with

supervision, and nonrecidivistic.

To further analyze the features of this group I compiled a computerized spreadsheet in 2009 on all 55 CPOs who had participated in my program from documents in their files. These documents often included presentence investigations, police records, charging sheets, psychological evaluations, and treatment reports. I recorded each CPOs birthdate and marital status, his date of program admission, and his status on 10 possible offense-related risk factors. I also recorded the date whenever a client absconded from supervision, died, or was taken into custody. This made it possible to automatically calculate each person's time at risk in the community.

Information for another 17 CPOs treated under a federal contract in Iowa by Dr. Jason Smith was obtained after this to increase the size of the data base. One offender who was referred to me was sentenced under §2G2.1 of the guidelines for producing child pornography; two with this background were referred to Dr. Smith. All other referrals were sentenced under §2G2.2.

Analyzing our survival data as of September 1, 2009, our research team found that two out of 72 CPOs were taken into custody for possessing child pornography over an average risk period of 4.0 years. Another CPO who was on active supervision was apprehended for the commission of a non-contact sex offense, two were apprehended for technical violations, and one absconded but was returned to continue his supervision. Most importantly, no one was arrested on charges of child molestation. Ninety-two percent of our clients succeeded in completing their supervision without being revoked, and no one who successfully completed supervision was charged with either a contact or a non-contact sex offense.

Tabulating our demographic data, we found our clients were 48 years old on the average but that 35% had never been involved in a long-term committed relationship. Regarding contact

offense data, 14% had previously been convicted of contact sex offenses, 8% were sentenced for a contact offense with their index pornography offense, and 3% tried to meet with a minor for sexual reasons. Overall, 21% had contact offense convictions (*n*=15). Regarding noncontact offenses, 3% had prior convictions for possessing child pornography, 3% had prior convictions for public indecency, and 3% had prior convictions for peeping. Overall, 6% had prior noncontact offenses. Regarding targets of offending, 37% of the victims of contact and noncontact offenses were family members. Regarding other markers of criminality, no client was sentenced for a violent crime with his index offense, one had a prior conviction for violence, and 2 had four prior sentencing dates. A low level of risk for our cohort as a whole was reflected in the fact that 72 % of those in our entire cohort were negative for all of the sexual conduct problems we selected for analysis except for being convicted of a pornography offense.

To examine this issue further we used the foregoing data to compute point totals for Static-99R, an actuarial instrument for estimating sexual recidivism risk among adult contact sex offenders (Helmus, Thornton, Hanson, & Babchishin, 2011). The average Static-99R score for our 72-person cohort was one point. According to the 99R's actuarial table one would expect a five-year recidivism rate of 4 % for a cohort having a score of one. The average 99R score for the 11 CPOs with prior convictions for contact sex offenses was 3 points. In this case the 99R table leads to a 5-year expected recidivism rate of 7.5 %. These results, being overestimates or our obtained recidivism rate, support the advice of the 99R developers (Harris, Phenix, Hanson, & Thornton, 2003) that Static-99R should not be used to estimate CPO recidivism risk among those with no contact offenses.

Our results parallel those of Wakeling and her colleagues (Wakeling, Howard, & Barnett, 2011). They found that only 1% of a large cohort of CPOs had high scores on the Risk Matrix

2000 actuarial. They also found that the 6.7 % sexual recidivism rate for "Generalist Sexual Offenders" with low actuarial scores was four times higher than the 1.6 % rate for CPOs.

The average or "base" 4-year contact sex offense recidivism rate of 0% for the 15 CPOs in our cohort with contact sex offenses was also far below the 2.5-year rate of over 9% that Seto and Eke (2005) reported for Canadian CPOs. Personal communication with Seto (August 2011) and a conference paper by Seto and Eke (2008, October) indicated that Ontario Police Services purposely referred many production offenders to them (21% per Seto & Eke, 2008, October). We received a representative sample with only three production offenders in it (4%). The average age of Seto and Eke's cohort was also 10 years younger than ours. These factors suggest their cohort committed more contact offenses because production offenders are probably more dangerous than possession offenders, and younger offenders are more likely to reoffend than older offenders (Hanson, 2006; Waggoner et al., 2008; Wollert, 2006; Wollert et al., 2010).

The Memorandum to Judge Weinstein

In the case of United States v. C.R., U.S. Judge Jack Weinstein directed the Eastern District of New York to prepare a report for him on the treatment and supervision of CPOs under the district's supervision (Stabenow, 2011). In response, Probation Officer Lawrence Andres, Jr., sent Judge Weinstein a memorandum in May 2011 indicating that the district had supervised a total of 108 CPOs since 1999. Although Officer Andres did not indicate the percentage of CPOs with prior sex offense convictions he stated that

Approximately 20% ... disclosed a prior victim [sexual contact with a minor (under 18)[1]

that occurred before the term of supervision which was never reported to law

enforcement or another treatment agency] either via clinical polygraph examination or

self-report during the term of supervision. It is the policy of the probation department

and treatment provider to advise offenders that any such disclosure will not be used against them for the pursuit of new criminal charges, so long as they do not provide identifying information. As such, they are encouraged to <u>only</u> report the age, gender, and details of the sexual contact in an effort to gain the offender's trust and provide the basis for continued honesty in treatment.

Regarding the issue of recidivism, Officer Andres informed Judge Weinstein that "only 1" CPO had "committed a new sexual contact offense while under the supervision of this department … this offender admitted to current sexual contact of a 9 year-old female family member." Eighty-seven percent of the New York cohort also succeeded in not having their supervision revoked.

The timeframe for Officer Andres' review was almost the same as ours. The supervision success rate was also comparable. Although risk periods were not calculated using our methods, it seems safe to assume that the average risk period for CPOs in the New York cohort was about four years long. It also seems reasonable to combine the New York cohort with ours on the assumption they come from the same underlying population. The resulted in an overall base contact offense rate for a four-year period of six-tenths of one percent (1/180 = .6%).

The New York District used some, but not all, of the self-report procedures that Bourke and Hernandez (2009) used. Twenty percent of the New York supervisees made new disclosures. Fifty-nine percent did so in Hernandez and Bourke's program. Statistical testing indicated the difference between the two rates was highly significant (z=6.3, p<.0001). This finding shows how easy it is to manipulate self-report data in a clinical setting. It is also consistent with our conclusion that Bourke and Hernandez used extreme methods to extract disclosures from their patients.

Discussion

In the course of evaluating the PAT I reviewed the research on CPOs and other online offenders cited in Seto's meta-analysis. I also reviewed a couple of studies that have been disseminated more recently. I concluded that many studies seemed irrelevant to CPOs because of the flaws they contained. Researchers in this area should consider the goals of their research carefully and adopt designs that are congruent with these goals. Table 2 was compiled as a conceptual tool that might be helpful for identifying and avoiding procedures that threaten to make research results either misleading or irrelevant.

Five major conclusions emerged from our simple but interpretable study of a representative sample of federal CPOs. First, average estimated risk level as measured by Static-99R was low. Second, the obtained contact sex offense recidivism rate of CPOs was very low; this was confirmed in a follow-up study of a similar sample from New York. Third, a minority – about 15 % – had been convicted of contact sex offenses prior to their index pornography conviction. Fourth, about 90% of federal CPOs successfully completed their term of probation. Fifth, self-report data from CPOs are highly susceptible to error in the absence of studies that verify their reliability and group-specific validity.

These findings hold diagnostic and prognostic implications that are inconsistent with the PAT. For example, they suggest that only a moderately low percentage of CPOs meet the criteria for Pedophilia as defined in the current edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (2000). They also suggest that the large majority of CPOs succeed on supervision and avoid recidivating because they do not meet the criteria for what the Code of Federal Regulations refers to as a "serious difficulty in refraining from sexually violent conduct or child molestation." These conclusions are consistent with the results of

studies of internet CPOs by Endrass (Endrass, Urbaniok, Hammermeister, Benz, Elbert, Laubacher, & Rossegger, 2009), Frei (Frei, Erenay, Dittman, & Graf, 2005), Wakeling (Wakeling, Howard, and Barnett, 2011), and Webb (Webb, Craissati, & Keen, 2007).

Contrary to what the Pornographic Attraction Theory leads one to expect, my impression of the average CPO from shouldering a CPO caseload for ten years is that he is slightly passive, expresses himself articulately, lacks some level of confidence, experiences moderate dysphoria or anxiety, and doesn't connect with others as easily as the typical adult. Prior to apprehension he may seem addicted to searching for pornography because he spends hours a day on the internet. He does not have a long rap sheet, however, and is mortified by his criminal internet behavior once he is confronted with its reality in the wake of being arrested. This reaction is helpful for motivating him against relapse, which is rarely encountered. Nonetheless, immature and young offenders are more worrisome than those who are consistently focused and remorseful. External interventions that reinforce appropriate behavior include apprehension, court appearances, exposure to work release or reasonable incarceration, steady employment, and participation in about a three-year course of probation supervision and anti-relapse counseling. About five percent of a CPO cohort may merit additional counseling and supervisory support because they are particularly attracted to children. Supervision and post-supervision success is achieved in the great majority of cases when these interventions are administered with consistency, clarity, seriousness, and adequate support.

Our findings are also applicable to assessing the feasibility of developing actuarial instruments for identifying prior contact offenses and predicting future contact offenses. Regarding retrospective identification of prior contact sex offenses, the non-speculative base rate for such "priors" among federal CPOs is about 15%. The levels of accuracy attainable by

current actuarial tests are modest. There are legal constraints to consider in that "uncharged criminal conduct may generally only be considered in sentencing if proved by a preponderance of the evidence" (Stabenow, 2011, p. 115). The preponderance standard can't be precisely defined, but my guess is that it falls somewhere between 50 and 90 percent certainty. Combining the assumed base rate and test accuracy probabilities, it is mathematically unlikely that the expected identification rate of prior contact offenses will ever reach the "preponderance of evidence" standard.

Regarding future recidivism prediction, the picture is more challenging. In this case the base contact offense rate for CPOs is 1%. Combining modest accuracy probabilities with a 1% base rate, the expected recidivism rate for CPOs with the very highest test scores only comes to 4%. Although the Department of Justice claims that "certain factors … can signal that a particular child pornography offender poses a higher risk" (Stabenow, 2011, p. 116), a 4% rate of recidivism leads me to doubt that anyone will be able to improve on the base rate as an estimate of recidivism in those cases where 99R can't be used.

Wakeling and her colleagues (2011) have already plowed this bleak terrain. They scored 690 CPOs without contact offenses on the Risk Matrix 2000 and then did a follow-up. They obtained a 1.6% recidivism rate for low scores, a 1.6% rate for medium scores, and a 0% rate for high scores. This is an example of a study that was unnecessary because there was never any mathematical chance of compiling a useful actuarial table.

Dr. Seto and his colleagues (pp. 124 & 136) concluded that "there is a distinct group of online offenders whose only sexual crimes involve illegal (most often child) pornography … (they) pose (a) relatively low risk of committing contact sexual offenses in the future. I agree

wholeheartedly on the basis of the data my colleagues and I have analyzed. I also agree

wholeheartedly on the basis of my clinical experience.

Paradoxically, the PAT seems highly contagious and refractory to strong doses of

evidence to the contrary. Some may wish to commit considerable resources to identifying the

statistically rare person who exemplifies the PAT. This is like using a weak magnifying glass to

find a small needle in a mountainous haystack.

I'm not saying that we shouldn't be concerned about safety, accountability, or human

suffering. Life involves endless uncertainty, however, and we cannot prevent all possible

tragedies. If we habitually dedicate scarce resources to guard against low incidence events we

won't have resources to attain other objectives of more utility. My view is that we should invest

on this latter side of the equation.

With this in mind, I would make three recommendations. One is that it would be

appropriate to increase our efforts to support the reintegration of CPOs into the community

sooner rather than later. The more an ex-CPO is tied to the community, and the greater his stake

in it, the less likely he will be to reoffend.

Most of the online offenders I've treated didn't view child pornography the first time they

obtained sexually explicit material over the internet. They started with adult pornography. Then

they accessed pornography depicting adolescents. Eventually they viewed depictions of

prepubescent children. Their use of the internet usually stopped after they were apprehended and

sentenced. This pattern suggests the presence of a learned disorder. This is important because a

learned disorder is easier to remediate than a preferential paraphilia. Comparative research

should therefore study the value of these alternative theories for conceptualizing CPOs.

The last recommendation I have is to look at child pornography offending from a public health perspective as well as a criminological one. A public health perspective stresses the importance of stopping a problem as early as possible. Each pack of cigarettes, for example, informs the consumer that "smoking is hazardous to your health." Smokers who describe the damaging effects of smoking are featured in public service announcements on television. I have not seen any warnings on the internet or TV that viewing, possessing, and distributing child pornography is a very serious crime that will result in a 10-year federal prison sentence. The rate of contact sex offenses and sexual recidivism have dropped in our country in the last 20 years. There are two reasons for this. One is that our society has voiced strong disapproval of contact sex crimes.   The other is that this message has not fallen on deaf ears. I hope it will be possible to attack the problem of child pornography in the same way by putting more resources into raising public awareness through community education.

Thank you again for asking me to testify at this important hearing.

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References

Abrams, S. (1991). The use of polygraphy with sex offenders. *Annals of Sex Research, 4,* 239-263.

Andres, L. (2011, May 15). Memorandum to the Honorable Jack B. Weinstein.

American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed. -TR). Washington, D.C.: Author.

Baron-Evans, A. (2008, May 11). Rita, Gall and Kimbrough: A Chance for Real Sentencing Improvements. Retrieved from on June 1, 2010 from http://www.fd.org/pdf_lib//Rita%20Gall%20Kimbrough%20Sentencing%20Strategies.5.11.08.pdf

Bourke, M. L. & Hernandez, A. E. (2009). The "Butner Study" redux: A report of the incidence of hands-on victimization by child pornography offenders. *Journal of Family Violence*, *24*, 183-191. doi: 10.1007/s10896-008-9219y.

Bureau of Justice Statistics. (October 1993). Compendium of Federal Justice Statistics, NCJ 160089.

Bureau of Justice Statistics (October 1996). Compendium of Federal Justice Statistics. Retrieved on June 2, 2010 from http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=649.

Bureau of Justice Statistics (December 2007). Federal Prosecution of Child Sex Exploitation Offenders. Retrieved on June 3, 2010 from http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=886.

Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., & Rossegger, A. (2009). The consumption of Internet child pornography and violent and sex offending. *BMC Psychiatry*, *9,* 43-50. doi: 10.1186/1471-244X-9-43.

Fillenbaum, S. (1966). Prior deception and subsequent experimental performance: The "faithful" subject. *Journal of Personality and Social Psychology, 4*(5), 532-537.

Frei, A., Erenay, N., Dittman, V., & Graf, M. (2005). Paedohphilia on the Internet: A study of 33 convicted offenders in the Canton of Lucerne. *Swiss Medicine Weekly*, *135*, 488-494.

Hansen, M. (2009, June). A reluctant rebellion. *American Bar Association Journal, 95*(6), 54-59.

Hanson, R.K. (2006). Does Static-99 predict recidivism among older sexual offenders? *Sex Abuse*, *18*, 343-355. doi: 10.1007/s11194-006-90274y

Harris, A., Phenix, A., Hanson, R., & Thornton, D. (2003). Static-99 coding rules revised –
    2003. Ottawa: Solicitor General Canada.

Helmus, L., Thornton, D., Hanson, K., & Babchishin, K. (2011). Improving the predictive
    accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights.
    Sexual Abuse. doi: 10.1177/1079063211409951.

Hernandez, A. (2000, November). *Self-reported contact sexual offenses by participants in the
    Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet
    sex offenders.* Paper presented at the Annual Conference of the Association for the
    Treatment of Sexual Abusers, San Diego, CA.

Lee, A. F., Li, N., Lamade, R., Schuler, A., & Prentky, R. (in press). *Predicting hands on
    child sexual offenses among possessors of internet child pornography*. To appear in
    Psychology, Public Policy, and Law.

Orne, M. T. (1962). On the social psychology of the psychological experiment: With particular
    reference to demand characteristics and their implications. *American Psychologist, 17,*
    776-783.

Seto, M. C., & Eke, A. (2005). The criminal histories and later offending of child pornography
    offenders. *Sexual Abuse: A Journal of Research and Treatment*, *17*, 201-210. doi:
    10.1007/s11194-005-4605-y.

Seto, M.C. & Eke, A. (2008, October). Predicting new offenses committed by child
    pornography offenders. Paper presented at the annual meeting of the Association for the
    Treatment of Sexual Abusers, Atlanta, GA.

 Seto, M. C., Hanson, R. K., & Babchishin, K. M. (in press). Contact sexual offending by men
    with online sexual offenses. *Sexual Abuse.* doi:10.1177/1079063210369013.

Specter, A. & Hoffa, L. (2012). A quiet but growing judicial rebellion against harsh sentences
    for child pornography offenses – should the laws be changed? The Champion, 33 (6).
    Retrieved on November 14, 2011 from
    http://www.nacdl.org/champion.aspx?id=22897.

Stabenow, T. (July 3, 2008), Deconstructing the myth of careful study: A primer on the flawed
    progression of the Child Pornography Guidelines. Retrieved on June 1, 2010 from
    http://mow.fd.org/3%20July%202008%20Edit.pdf

Stabenow, T. (2011). A method for careful study: A proposal for reforming the child
    pornography guidelines. Federal Sentencing Reporter, 24 (2), 108-136.
    doi: 10.1525/fsr.2011.24.2.108.

Sulzberger, A. G. (2010, May 21). Defiant Judge Takes on Child Pornography Law. *The New York Times.com.* Retrieved on June 3, 2010 from www.nytimes.com/2010/05/22/nyregion/22judge.html

United States Sentencing Commission (June 1996). Report to Congress: Sex Offenses Against Children, Findings and Recommendations Regarding Federal Penalties. Retrieved on June 2, 2010 from http://www.ussc.gov/r_congress/SCAC.htm

United States Sentencing Commission (2008). Sourcebook of Federal Sentencing Statistics. Retrieved on June 4, 2010 from http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm

United States Sentencing Commission (2009). Sourcebook of Federal Sentencing Statistics. Retrieved on June 4, 2010 from http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm

United States Sentencing Commission (2009, October). 2009 Federal Sentencing Guidelines Manual. Retrieved on June 5, 2010 from http://www.ussc.gov/ANNRPT/2009/SBTOC09.htm

United States v. Dorvee, Docket No. 09-0648-cr (2d Cir. May 11, 2010).

United States v. Michael Paul Johnson. No 4:07-cr-00127 (S.D., Iowa Central, December 3, 2008).

Waggoner, J., Wollert, R., & Cramer, E. (2008). A re-specification of Hanson's 2006 Static-99 experience table that controls for the effects of age in a sample of 552 young sex offenders. Law, Probability, and Risk, 7, 305-312. doi: 10.1093/lpr/mgn008

Wakeling, H. C., Howard, P., & Barnett, G. (2011). Comparing the validity of the RM2000 scales and OGRS3 for predicting recidivism by internet sexual offenders. *Sex Abuse*, *23*, 146-168. doi: 10.1177/1079063210375974.

Webb, L., Craissati, J., & Keen, S. (2007). Characteristics of Internet child pornography offenders: A comparison with child molesters. *Sexual Abuse: A Journal of Research and Treatment, 19,* 449-465. doi: 10.1177/107906320701900408.

Wollert, R. (2002). The importance of cross-validation in actuarial test construction: Shrinkage in the risk estimates of the Minnesota Sex Offender Screening Tool-Revised. Journal of Threat Assessment, 2, 87-102.

Wollert, R. (2003). Additional flaws in the Minnesota Sex Offender Screening Tool – Revised: A response to Doren and Dow. Journal of Threat Assessment, 2(4), 65-78. doi: 10.1300/J177v2n04_05

Wollert, R. (2006). Low base rates limit expert certainty when current actuarial tests are used to identify sexually violent predators: An application of Bayes's Theorem. Psychology, Public Policy, and Law, 12, 56-85. doi: 10.1037/1076-8971.12.1.56

Wollert, R., Waggoner, J., & Smith, J. (2009, October). *Child pornography offenders do not have florid offense histories and are unlikely to recidivate*. Poster session presented at the annual meeting of the Association for the Treatment of Sexual Abusers, Dallas, TX.

Wollert, R., Cramer, E., Waggoner, J., Skelton, A., & Vess, J. (2010). Recent research (N=9,305) underscores the importance of using age-stratified actuarial tables in sex offender risk assessments. Sexual Abuse: A Journal of Research and Treatment, 22, 471-490. doi: 10.1177/1079063210384633

Wollert, R., Waggoner, J., & Smith, J. (in press). Federal internet child pornography offenders – limited offense histories and low recidivism rates. In B. K. Schwartz (Series Ed.), The Sex Offender: Vol. 7. Kingston, NJ: Civic Research Institute.

Wollert, R. & Cramer, E. (2011). Sampling extreme groups invalidates research on the Paraphilias: Implications for DSM-5 and sex offender risk assessments. *Behavioral Sciences and the Law*, *29*, 554-565. doi: 10.1002/bsl.992.

<div align="center">Footnotes</div>

[1] During a personal telephone call with Mr. Andres I learned that anyone under 18 years old was considered a minor and a thus a victim of a sex offense for the purpose of his review.   Within this framework a 40 year-old CPO who had sex with a 16 year-old high school junior when he was a 19 year-old college student would be counted as having committed a prior contact sex offense. This is obviously not in the same category of misconduct as a 35 year-old man who molests his sister's five year-old daughter.   Researchers who wish to study undisclosed sex offenses should therefore differentiate sexual contacts between adults and prepubescent children from other types of sexual behavior. They will otherwise potentially mislead their audience.

[2] The Bayesian likelihood ratio for high actuarial scores is about 3.5 (Wollert et al., 2010, p. 478).   The recidivism rate for any actuarial score equals the result of combining the score's likelihood ratio with the base rate for the offender's population according to the formula for conditional probability, also known as Bayes's Theorem. Presuming a nonspeculative rate of 15% and a well-validated likelihood ratio of 3.5, only 38% of those CPOs with high scores on a hypothetical test for identifying prior contact offenders would fall in the prior offender category. This obviously falls short of meeting the preponderance of evidence standard. A higher estimate may be obtained by assuming a higher base rate. Such speculative assumptions by their very nature are uncertain, however, so this type of "massaging" the data will at some point be rejected as unreliable. A frustrating aspect of the speculative approach is that rejection sometimes comes later because triers of fact want to give one side or the other the "benefit of the doubt" while more reliability testing is conducted. The problem that dogs this option is that waiting for more information may well skew the rate of false incarcerations or false releases in the interim. Test users should therefore be required to show that their conclusions are based on behavioral data rather behavioral speculation.