APPENDIX D
SUMMARIES OF THE TESTIMONY OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON FEDERAL CHILD PORNOGRAPHY CRIMES
WEDNESDAY, FEBRUARY 15, 2012
8:15 A.M.–5:30 P.M.
WASHINGTON, DC

I. Offender Use of Technology

United States Department of Justice
James Fottrell, Child Exploitation and Obscenity Section, Criminal Division

Mr. Fottrell observed that "[a]s new technologies emerge, offenders are often among the early adopters of those technologies to further their activities," and provided a brief background annotating the procedures and policies for examining and analyzing digital evidence. (TR 17–18). He stated that once exact-image copies are made of the digital media seized, its analysis "helps investigators and prosecutors answer some of the critical questions of the offense, including who did it, when did it happen, where did it come from, how did it get here, and what technologies were used to commit the offense," and that finding the answers to such questions "is like assembling the pieces of a puzzle in order to form a clear picture of the offense conduct." (TR 18).

Mr. Fottrell provided a number of examples of the kind of information that can be obtained during a computer forensics exam, and said that "[t]he analysis of [the obtained and copied] digital media can help provide evidence of the charged conduct, including providing critical evidence of the knowledge and intent to collect child pornography," as such information may be gleaned by examining the patterns of web browsing activity to determine who was using the computer at or around the time that illegal activity took place. (TR 19–20). Additionally, he described how a Thumbs.db file, Link Files, and the Windows Registry, provide specific date and time information about when a file was accessed or when images and/or videos were viewed by a computer user, all of which can help prosecutors "establish specific dates of knowingly possessing certain images and videos." (TR 20–22). Mr. Fottrell also explained how, in many investigations, offenders have large collections of images and videos, and stated that the folder names and the structure of the filing, "often contain useful insight into exactly the type of images that are most revered." (TR 22). Furthermore, he stated, that "[i]mages in particular folders sorted and organized [. . .] are not accidentally viewed; they are purposely sorted and organized in a particular manner." (TR 22–23).

In discussing the important question of being able to identify from where particular images and videos originated, Mr. Fottrell noted that while using computers and the Internet to access websites and e-mail are two technologies that may help to address the aforementioned question, "there are many other technologies used on the Internet every day," and many "different ways to classify and organize the types of different technologies used in online activity" such as by "identifying the different socialization aspects of the activity." (TR 23).

Mr. Fottrell explained how offenders may progress from an "individual experience" to an experience with much more group interaction. In the former, one acting alone receives, collects, and shares material online, he said, perhaps by registering for a child pornography website, receiving an e-mail with a user name and password, and possibly having limited communication abilities with the website administrator. (TR 23, 25–26). Next, an offender may increase his interactions with others by utilizing a "peer-to-peer" software program, often downloaded for free, and used to search for files using terms ranging from the very generic, such as "young," to the very specific, such as a particular series, victim name, website, or very narrow age range. (TR 26). One may then establish a unique online identity, used to communicate with other offenders via technologies such as "GigaTribe, instant messaging, newsgroups, and e-mail" in order to seek out more specific material. (TR 23–24). Such interactions, Mr. Fottrell claimed, helps offenders to "refine their desire for more specific material, while helping to validate their behavior among like-minded peers." (TR 24). Notably, Mr. Fottrell said that all of these technologies not only allow the exchange of images and video, but also provide a "conduit for direct communication [which] allows frank discussion of preference and specific types of material in helping individuals establish their unique identity." (TR 27). The next step in the progression, according to Mr. Fottrell, is to join an online community, which uses technologies such as "bulletin boards, social networking sites, and Internet-related chat." (TR 24, 27). Such groups often have specific rules and guidelines for membership, are sorted and organized into hierarchies to "distinguish the more experienced and senior members from the newer members," and work to "make sure that members employ sophisticated techniques to evade detection by law enforcement and deploy encryption to thwart the discovery of illegal material." (TR 24–25, 28). Such divisions, Mr. Fottrell said, "help law enforcement investigate and target and focus their investigations on the most serious offenders in the group." (TR 28–29).

Mr. Fottrell concluded by stating that "offenders use multiple Internet technologies to commit offenses online, and the type of evidence available to investigators and prosecutors varies depending on those technologies. [. . .] [I]n most cases, there is additional evidence located on computer servers on the Internet, separate from the offender's residence [and] [a]s investigators combine this evidence, they get a more complete picture of the offender's conduct." (TR 29–30).

Office of the Federal Public Defender
Gerald R. Grant, Digital Forensics Investigator

Mr. Grant believed that the advancements in technology are a very important area to be aware of while trying to understand how the child pornography guidelines and enhancements apply. (TR 30). Noting that while contraband material typically comes in two categories: still pictures and movies, he said that there is a transition taking place "from the original still picture, which was a physical copy of a picture you can hold, to what's now becoming digital — nothing more than ones and zeroes on a computer." (TR 30–31). Because of such increasing technology, according to Mr. Grant, an individual can instantly take pictures and videos and upload them to the Internet via social networking sites, and send them to others via e-mail. (TR 32). This is important, he said, because it means that "we can get more instantly," that uploading and/or downloading pictures is no longer "a slow, painful process," and that access and use of program such as AOL Instant Messaging, Yahoo, and MSN, became simpler. (TR 33–34).

Detailing the progression of access to child pornography, Mr. Grant described how individuals used to develop film on their own, or use polaroid type film, and then mail photos to others via the post office. (TR 33). With the advent of the Internet, he said, people could then e-mail each other small photos, or exchange them via private chat. (TR 34–36). Then, when search engines became available, individuals were able to quickly find anything they wanted on the Internet. (TR 36). "Internet Relay Chat," Mr. Grant said, was the beginning of what is now referred to as "peer-to-peer," which he sees as the "primary vehicle" in child pornography cases today. (TR 36). He explained how such systems have evolved over time, from there being a centralized area, to systems without centralized areas but where sharing files was required, to being able to share partial files, or "swarm." (TR 37–41). When files are shared on such a large basis, he said, the file names become longer and longer, and it becomes hard to know what the file actually contains. (TR 42–43). Plus, Mr. Grant said, an individual can create a search, glance at the resulting file list, tell the program to download, and then just walk away. As such, he claimed, one can start up a program, "type in the word 'sex,' grab all [their] files, go to lunch, come back, and [be] pretty certain [he is] going to hit every one of the sentencing enhancements within that short period of time based on high-speed technology, instant availability, and simple keyword searches that don't even indicate what [his] preference is." (TR 43).

In addition to discussing means of access to child pornography, Mr. Grant discussed the availability of identity protection tools that he said are often automatic and computer cleaning software as things that may affect an investigation. (TR 44–47). Finally, he noted that the Adam Walsh Act has made it "extremely difficult for the defense," in that while they may be able to get access to the forensic analysis of their client's computer, they do not have the ability to do a full forensics examination themselves. (TR 47).

Professor Brian Levine, Ph.D.
Department of Computer Science, University of Massachusetts Amherst

Dr. Levine addressed the question of how Congress, sentencing judges, and federal sentencing guidelines can "appropriately distinguish between less and more serious offenders" from his view of technology and hoped that the Commission would place his statements in the context of other witnesses speaking. (TR 48–49). Noting that offenders can be distinguished, in part, "by their online actions and the technology they use to access and share images of child exploitation on the Internet," Dr. Levine stated that he sees three critical modern aspects of this crime, its offenders, and the technology that supports it, which are not generally considered at this point in time. (TR 49).

First, Dr. Levine discussed "the value that offenders contribute to the online community that they leverage to acquire and share files containing images," construing the term "community" broadly to extend from users who never communicate and just trade data, to groups that trade and have detailed social relationships. (TR 49–50). He stated that the value of such communities can be determined by a few factors: (1) the number of peers involved; (2) the amount of content shared; (3) the amount of time devoted to the community; and (4) the resources, or bandwidth, contributed to meet the demands for the content, and that "[u]sers that have contributed a great deal of value to a community in these terms are more serious offenders, or can be viewed as more serious offenders." (TR 51–52). Further, Dr. Levine noted, while the quantity of images that an offender contributes to a community is a part of determining his value, it is not the only

thing to consider, nor sufficient to consider alone. Rather, value is added by "increasing the set of available files on the network," when sharing unique files, as well as making it "easier for others to get content," when sharing files over a long period of time. (TR 52–53).

Second, Dr. Levine explored "the nonpecuniary benefits that [offenders] receive [by participating in online communities.]" (TR 49). In some venues, he said, offenders will receive benefits and incentives for their participation and it is those offenders who take advantage of such benefits who are considered "more serious offenders." (TR 54). As examples, Dr. Levine said that benefits can range from improved network performance when offenders "friend" one another, to training and encouragement that may lead from file trading to contact offenses. (TR 54).

Third, Dr. Levine addressed "the masking mechanisms [offenders] may employ intentionally to evade investigation." (TR 49). He asserted that those who intentionally use various mechanisms to mask network addresses and other information as part of their crimes should be, or can be, viewed as "significantly more serious offenders," as they fully participate in communities, make content available, but then "stonewall[…] justice and thwart [. . .] investigators' abilities to put a stop to [the] communities and rescue exploited children in some cases." (TR 55). Stating that masking is different than encryption, Dr. Levine said that there are many ways to mask one's IP address, but also noted that just because one is masking his IP address, does not mean that he is doing anything illegal. Comparing a child pornography trafficker or trader who masked his IP address to a bank robber wearing a mask, Dr. Levine said that while the masking may not cause more harm directly, the robber can receive a sentencing enhancement. (TR 56).

II. Child Pornography Offending – Pathways, Community, Treatment

Gene G. Abel, M.D.
Medical Director, Behavioral Medicine Institute
Founder and President, Abel Screening, Inc.

Stating that it is important to understand why people want to look at child pornography, Dr. Abel said that he would focus on child pornography and its relationship to past sexual behavior, as well as talk about treating the abuser, screening those at risk for molesting children, and how abuse impacts boys and girls to "develop sexual interest in children." (TR 87–88).

In beginning to explore whether the use of child pornography is related to past child molestation, Dr. Abel presented information about four groups of individuals that he has studied: Group 1— looked at child pornography but did not go to meet a child; Group 2— did not look at child pornography but have gone to meet a child; Group 3 — both looked at child pornography and met a child; Group 4 — child molesters. (TR 95–96). The individuals were asked (1) if they were referred to the criminal justice system; and (2) if they were arrested for viewing child pornography. Of those referred for viewing child pornography or for soliciting children, Dr. Abel said, there was a smaller odds ratio for having actually molested a child — which he said "doesn't make sense." (TR 97). But he asserted, the odds ratio is explained by the fact that once an individual has been arrested for viewing child pornography or soliciting a child, he stops talking about the kind of behavior he has been involved in. When looking at Group 4 (those referred for having molested children), however, Dr. Abel asserted that it becomes clear that

"viewing child pornography increases the likelihood of an individual having molested a child in the past by 2.3" times — twice as likely, and having solicited a child increases the likelihood of molestation by 4.3 times. Those with the highest rates of molesting, he said, are those who both look at child pornography AND solicit children; there "the odds ratio is 9.9, or 10 times more likely to have molested children in the past." (TR 98–99).

In answering specific questions provided to him, Dr. Abel offered that "we assume" the majority of offenders view child pornography for sexual gratification. (TR 104). Additionally, because of the increase of the use and prevalence of technology, he asserted that "the landscape has changed" and that we are "forced to deal with younger and younger individuals who can manufacture, so to speak, child pornography." (TR 105). Finally, he opined that "early sexual experiences, masturbation fantasies, [and] being abused" are some of the factors causing people to seek sexual gratification from child pornography. (TR 105).

Concluding, Dr. Abel offered his view that "sentencing for child pornography when no child has been abused should be significantly less than for child sexual abuse, but probation should remain," but agrees with other witnesses that the individuals who make it easier for others to download material should be gone after. (TR 107). Finally, he asserted, "the criminal justice system ought to be prepared to deal with more 12- to 17-year-olds generating, obtaining, and viewing child pornography." (TR 108).

Jennifer A. McCarthy, Ph.D.
Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology & Forensic Behavioral Science

Dr. McCarthy began by briefly discussing the assessment process she undertakes for child pornography offenders. (TR 109). Included in this assessment are: a clinical interview pertaining to the individual's full history, a personality or psychopathology assessment, offline and Internet sexual history assessments, and assessment of sexual interest, a review of the individual's social skills, and other specific assessment measures as needed, based on the individual at hand. (TR 109).

Dr. McCarthy stated that there are both sexual and nonsexual motivations for collecting child pornography material. Some of the nonsexual motivations, she said, range from pure curiosity, to fulfilling a collection compulsion, avoiding real-life problems, or as a purely commercial endeavor for financial gain. (TR 110–11). As for those with sexual motivations, Dr. McCarthy asserted that the individual motivations range from being purely fantasy, to having a sexual interest in minors and actually using the material to groom potential victims, to just having an indiscriminate interest in all types of pornography and needing "more and more and more serious and violent stuff to satisfy" sexual needs. (TR 111–13).

Leading to treatment, Dr. McCarthy stated that she usually follows a cognitive behavioral framework, but stressed that any such treatment must be individually based as "one-size-fits-all" treatment "never works." Furthermore, she opined that treatment providers must "consider the dynamic process of the Internet itself" and look at how an offender actually came to look at, obtain, trade, etc., the material, as well as the individual's motivation in collecting the material, and any emotional disconnect and/or cognitive distortions with regards to the material. (TR 113–

15). As an example, Dr. McCarthy said that with an individual with a primary sexual interest in minors, the treatment facilitators will look at high-risk factors, use behavior modification techniques, keep tabs on their sexual fantasies, masturbation habits, etc., as well as deal with relapse prevention and educate the offenders to help them manage their high-risk factors. (115–16). Psychopharmacology may also be employed, as well as life enhancing training where the providers design treatment around helping the offenders achieve their life goals in a healthy manner. (TR 116–17). Finally, Dr. McCarthy discussed the use of the polygraph in treatment and explained that there are three types of polygraphs — the sexual history polygraph, the specific issue polygraph, and the maintenance monitoring polygraph, which usually deals with treatment and probation issues. (TR 117–21). She also noted that her program uses the "Containment Model" where the treatment provider, polygraph examiner, referral agent, etc., all "work together in order to manage [the] offender." (TR 122). However, she said that when providing treatment it is rare for her to be able to see an offender's presentence report (TR 122–23) and that she has never seen a forensic analysis report in the assessment or treatment of an offender. (TR 124).

Dr. McCarthy also presented her opinion that "it [is] not necessarily the amount of child porn in an individual's collection; it [is] the ratio between adult porn and child porn that [is] a significant factor that distinguish[es] contact from noncontact offenders." (TR 125). Further, she cites the type of activity in the pornography material, the gender, and the age of those displayed in the images as being "crucial information" that helps to inform the treatment process. An additional distinguishing factor, she said, is whether an offender accesses material via a direct search or simply by clicking on pop-up ads. (TR 125–26).

In sum, Dr. McCarthy asserted that "digital evidence is extremely, extremely important with regard to informing the assessment, the treatment, and the management of [offenders] in the community," with the ultimate goal being to prevent reoffense and hold people responsible. (TR 127).

III. Possible Relationship Between Sexually Dangerous Behavior, Child Pornography

Michael C. Seto, Ph.D.
Dir. Of Forensic Rehab. Research, Integrated Forensic Program, Royal Ottawa Health Care Group

Dr. Seto opined that there are increasing pressures on the criminal justice and mental health and social service systems with regard to child pornography related crimes and offered as support a U.S. Department of Justice report showing that while the number of individuals entering the federal system for transportation offenses or contact sexual offenses has remained relatively stable for a period of years, the number of individuals entering the system for child pornography offenses has been steadily increasing. (TR 161). Additionally, while understanding that sentencing serves a variety of functions, Dr. Seto believed that it is also about "protecting the public, and protecting children in particular," and as such he hopes that "risk for future sexual offending is […] a central concern." (TR 162).

Beginning his discussion on known characteristics of child pornography offenders, Dr. Seto stated that "quite remarkably this is an extraordinarily male phenomenon," with typically 99

percent or more of United States and Canada study participants being male, as compared to the "perhaps 90 to 93 percent of […] incarcerated sex offenders." (TR 163). Further, he said that "child pornography offenders are disproportionately Caucasian," and while he does not have an explanation for why that is so, he opined that there may be "some cultural or ethnicity factors that might explain" the disproportionality. (TR 163).

Comparing child pornography and contact offenders, Dr. Seto asserted that both his research, and the research of others, suggests that offenders are, on average, likely to have pedophilia, as evidenced by one of his studies showing that about "61, 62 percent of child pornography offenders clearly showed a sexual preference for children." (TR 163–64). Next, Dr. Seto offered that some research shows that, on average, child pornography offenders have a higher IQ and are better educated than contact offenders — they are "just closer to the population average than contact offenders who tend to be below average on those two dimensions," and child pornography offenders have "less criminal history." (TR 164–65). Turning to psychological risk factors that have been identified in research, Dr. Seto stated that child pornography offenders, on average, score higher than contact offenders in terms of being "preoccupied by sexual thoughts and fantasies, having difficulty controlling their sexual urges and so forth," all of which are factors that have been shown, at least in the mainstream sex offender research field, "to be predictive of sexual offending in the future." (TR 166).

Dr. Seto explained the "counterintuitive" anomaly that one (the contact offenders) would have sexual contact with a child if they were not sexually interested in children, by stating that while sexual motivations are important, some offenders who sexually victimize children may be motivated by other factors such as opportunity, substance abuse, incest, etc. (TR 167–68). Further, he stated that the relationship between child pornography and being sexually interested in children is "robust enough" that the task force looking at psychiatric diagnostic criteria for pedophilia for the next version of the DSM is considering "persistent use of child pornography" as one of the factors to consider. (TR 169). Dr. Seto was careful to point out, however, that while there is an association between child pornography offending and pedophilia, it is not a "one-to-one" association. (TR 169–70).

Introducing the topic of child pornography offenders' history of contact offending, Dr. Seto presented his study that reviews a total of 21 studies done by different researchers, each focused on determining contact offending histories based on official criminal records or self-reporting information. (TR 170–71). The end result, he provided, is that about "one in eight of the online offenders had an official record, [while about] one in two [in the self-report studies] admitted having committed contact sexual offense in the past." (TR 171). Dr. Seto asserted that these findings highlight the "discrepancy between what has happened and what is officially known," as well as "belie the assumption that all child pornography offenders have necessarily sexually offended directly against children." (TR 171–72). His review also identified nine studies following child pornography offenders after they have been convicted and released, which showed a 2 percent rate of contact sexual offenses and a 3.4 percent rate for new child pornography offenses. (TR 176–77). While acknowledging that there are some inherent flaws with the research leading to those percentage rates, and saying that he is "sure that the observed recidivism rates will go up with time," Dr. Seto also said that he agrees with Dr. Abel in that new offenses will typically take place in the first five, six, seven years. (TR 177). Concluding, Dr. Seto asserted that an important takeaway from the studies is that they "contradict an assumption

that necessarily child pornography offenders are a high risk to sexually reoffend, either in terms of further child pornography offending, or in terms of contact sexual offending against children." (TR 178).

Dr. Seto also addressed the Butner Study, saying that in his analysis of the available research, that study "was a statistical outlier." (TR 172–73). Specifically, he asserted that the study's 85 percent value of child pornography offenders admitting to a history of contact offending upon treatment is "unusually high compared to the other research that is available." (TR 173). He also acknowledged a handful of the criticisms directed at the Butner Study, while simultaneously supporting the inclusion of that study in his larger review, stating that such a review has value in that "you are taking up studies that are quite diverse in terms of […] various issues, and you are trying to . . . see the signal despite the noise in them." (TR 174–76).

Finally, Dr. Seto briefly talked about the risk factors for sexual recidivism, as determined through a number of studies, stating that "a lot of these factors aren't going to be a surprise to any judge who has dealt with criminal cases." (TR 180). Because of this, he said, there is a solid base in terms of understanding the factors that predict who goes on to sexually reoffend. (TR 180–81). As for additional factors that should be considered, Dr. Seto said that the ratio of child pornography content depicting boys, relative to the content depicting girls, is "coming out as predictive of sexual recidivism." (TR 182–83).

Richard Wollert, Ph.D.

Dr. Wollert started his testimony by telling the Commissioners that he is "something of a skeptic," and that what they will hear from him is likely different from what others have said. (TR 184).

Stating that "many believe that pedophiles and undetected molesters are predisposed to watch child pornography on the Internet," and that "[i]t is also believed that this causes recurrent sexual misconduct," Dr. Wollert opined that such theories, or what he calls the Pornographic Attraction Theory (PAT), have "probably influenced the child pornography guidelines [] to some extent." (TR 184–85). Referring to a table showing that the average sentence length for a first time child pornography offender is three times what it was for both first time and recidivist offenders in 1994, Dr. Wollert asserted that "[t]he guidelines have become more punitive, in spite of their application to a current population that seems less dangerous than the population from the early '90s." (TR 188). His testimony focused on the relationship and interactions between PAT and child pornography offenders as a means to reconsider the child pornography guidelines.

Dr. Wollert began his review of the PAT by discussing Dr. Seto's study which concluded that "there is a distinct group of online offenders whose only sex crimes involve child pornography," and that "[o]nline offenders rarely go on to commit contact sex offenses." (TR 190). He argued that the averaging approach utilized in Dr. Seto's study has limitations in that it (1) focuses on online offenders as opposed to federal child pornography offenders; (2) misses studies disseminated recently; and (3) gives equal weight to studies that vary in quality of design, and therefore that the most relevant body of research for evaluating the PAT's applicability to federal child pornography offenders is studies on federal child pornography offenders themselves — a category containing three projects. (TR 190).

Dr. Wollert first discussed the Butner Study, which he and his colleagues "criticized stringently and trenchantly" due to its research design flaws, particularly stating that "almost any offender faced with the pressures built into the Butner program would generate many possible false disclosures." (TR 192–94). Additionally, Dr. Wollert asserted that the study's concentration on self-reported but unadjudicated sex crimes is not only peripheral, but also conflicts with the impression he developed from the group of 55 federal child pornography offenders that he treated over the course of 10 years. Those individuals, he said, struck him as "ashamed of their pornography offenses, motivated to succeed, well educated, responsive to treatment, compliant with supervision, and nonrecidivistic." (TR 194–95). Providing a vastly different view from that presented by the Butner Study, Dr. Wollert described the extensive data spreadsheet he created by compiling information from the file documents of all child pornography offenders who had been in his program, along with 17 additional offenders, and said that analysis of that information showed that "two out of 72 [child pornography offenders] were taken into custody for possessing child pornography over an average risk period of four years, [n]o one was arrested on charges of child molestation, [and] [n]inety-two percent succeeded in completing their supervision without being revoked." (TR 195–96). Furthermore, he said that 14 percent of the offenders had previously been convicted of contact sex offenses — a number similar to that reported by Dr. Seto. (TR 196). These results, Dr. Wollert said, parallel those obtained by Wakeling in another study, where it was found that 1 percent of a cohort of child pornography offenders had high scores on the Risk Matrix 2000 actuarial instrument, and that the sex recidivism rate for generalist sex offenders with low actuarial scores was four times higher than the rate for child pornography offenders. (TR 197).

The second project (of studies on federal child pornography offenders) that Dr. Wollert referred to was Probation Officer Lawrence Andres' memo to Judge Jack Weinstein, reporting on the treatment and supervision of child pornography offenders under the Eastern District of New York's supervision. (TR 197). Of the 108 child pornography offenders supervised since 1999, the memo stated that "approximately 20 percent disclosed a prior victim either via clinical polygraph examination or self-report during the term of supervision," with a "prior victim" being defined as a person under 18 years of age. (TR 197–98). Further, according to the memo, only one offender committed a new contact offense while under supervision, and 87 percent of the offenders succeeded in not violating the terms of their supervision. (TR 198). Combining that data with his own, Dr. Wollert asserted that "the overall base rate of contact offense recidivism is six-tenths of 1 percent." (TR 198–99). Additionally, Dr. Wollert said, while Andres's memo contained data obtained via self-reporting measures, similar to those used in the Butner Study, only 20 percent of the supervised offenders in New York made new disclosures, as compared to the 59 percent reported in the Butner Study — a "highly significant" difference according to statistical testing. (TR 199).

In considering all of the research discussed, Dr. Wollert presented five conclusions about federal child pornography offenders: (1) the "average estimated risk per existing actuarials was low;" (2) "[t]he recorded contact sex offense recidivism rate was very low;" (3) "about 15 percent had been convicted of contact sex offenses prior to their index pornography conviction;" (4) "[90] percent successfully completed probation;" and (5) "using self-report to count prior offenses produces unreliable results — at least the way it has been done so far." (TR 199–200). Dr. Wollert contended that such findings are consistent with the results of four other studies of

Internet child pornography offenders, and that they hold "diagnostic and prognostic implication at odds with the PAT." (TR 200–01). Stating that the "base rate occurrence of these problems is low," that the level of accuracy attainable by actuarial instruments is "moderate, or modest," and that there are legal constraints to consider, Dr. Wollert asserted that "the PAT is a highly contagious theory [and a] refractory to strong doses of evidence to the contrary." (TR 201–02). As such, he made three recommendations: (1) "increase efforts to support the reintegration of [child pornography offenders] into the community sooner rather than later;" (2) work towards having comparative research "study the value of these alternative theories [such as a learning theory] and not just focus in on a mental disorder theory;" and (3) "look at child pornography offending from a public health perspective as well as a criminological one," such as by providing "warnings on the Internet or TV stating that viewing, possessing, and distributing child pornography is a very serious crime that will result in a ten-year federal prison sentence." (TR 202–04).

IV. Law Enforcement Perspective

Janis Wolak
Senior Researcher, Crimes Against Children Research Center

Ms. Wolak began by clarifying that she was not speaking from the law enforcement perspective, but rather as a researcher who has done a lot of research with the assistance of law enforcement agencies. (TR 224–25). She introduced the background of her research, stating that "the goal of our research was to look at the numbers of technology-facilitated child sexual exploitation crimes." (TR 226). Excluding everyone except child pornography possession, and sometimes distribution offenders, Ms. Wolak stated that in 2000, she found that there were about 1,000 arrests for child pornography possession, with roughly one-quarter resulting in federal charges and the remaining three-quarters being handled in state courts, with "fairly similar" sentencing among both groups. (TR 228). In 2009, she said, there were about 3,800 arrests involving only child pornography possession, with roughly one-third handled at the federal level and the remaining two-thirds handled at the state level. Of those sentenced at the federal level, 65 percent received sentences of more than five years in prison, as compared to roughly 20 percent of offenders in state cases being sentenced to more than five years in prison. (TR 229). Acknowledging that the federal cases were more serious in some ways, Ms. Wolak asserted that she can control statistically for those elements of seriousness through a "logistic regression" analysis and, even after doing as much, that the federal offenders were twice as likely to be sentenced to five or more years in prison. (TR 230). In sum, Ms. Wolak stated that "the sentences in federal courts have increased substantially at least in terms of the number, the percentage of offenders who get more than five years, while the sentences in state courts have increased a little bit but not really substantially," (TR 229) and that "simply being charged in federal rather than in state court increases the likelihood that someone is going to get five or more years." (TR 230).

Recognizing the limitations to her data, Ms. Wolak believed that the disparities addressed may be a result of judges and prosecutors in state courts having a different orientation than the ones in federal courts, possibly based on differences in the number of child molestation or sexual abuse cases seen, varying levels of training about the seriousness of child pornography possession crimes, as well as different levels of advocacy among law enforcement investigators. (TR 231–

32). Finally, Ms. Wolak stressed "that the discrepancy between state and federal sentencing that we've identified doesn't address the question of what is an appropriate sentence. [. . . But rather,] we are simply documenting that there does appear to be a considerable difference in cases of equal seriousness based on whether or not federal charges are brought." (TR 233).

United States Department of Justice

Steven DeBrota, Assistant United States Attorney

Mr. DeBrota came to believe from a fairly early perspective that a prosecutor or investigator in the child pornography area "had a responsibility to visually examine the images, principally to see if we could locate the child victim who might be in the images." (TR 234). During the course of investigations, Mr. DeBrota and investigators would carefully examine images and sort the collections "because it became very easy to identify [the defendant's] paraphilias by looking at what he collected and valued." (TR 235–36).

Mr. DeBrota stated "in 1996 there were no readily traded series on the Internet involving infants and toddlers in any numbers." (TR 236). Additionally, Mr. DeBrota noted that "readily traded child pornography in 1998 did not include [to his knowledge] infants and toddlers." (TR 237). However by 2010, Mr. DeBrota prosecuted groups of nepiphiles, those who are not interested in anyone after they clear about age five. (TR 237–38). He indicated that "the amount of material [groups] trafficked pointing at [nepiphilia] was vast. And they also, within the group, encouraged each other to produce the material because it was hard to find, and that occurred. And then they trafficked that newly created material." (TR 238). Mr. DeBrota believed that "it is an absolute fact" that the nature of child pornography from when he started in 1991 to the present "has gotten much worse," and he does not "see how anyone looking at that same data set could reach any other conclusion." (TR 238).

Mr. DeBrota thought "it is critical to know what someone collects and values as a measure of their true interest and activities, immune from the bias of what they may say, or what their history is, or the uncertainty of anything else." (TR 239). Mr. DeBrota believed that "there is utility, for example, in the sentencing guidelines saying someone has sadistic images, because that tells us a bit about them, or the number of images because it tells us maybe how long they were doing it, which was one of [the Commission's] concerns, and a valid one." (TR 239–40). Mr. DeBrota noted that "it could also tell you the degree of harm, because how many children were affected and those things." (TR 240).

Mr. DeBrota stated that "right now, there is no obvious way to differentiate between nepiphiles and someone older," and he thought that is a flaw because he does think "it matters that the target group they're attracted to is incapable of speech." (TR 240). Mr. DeBrota noted that it would be complicated to prove a case involving the molestation of an infant or a toddler. (TR 240).

Mr. DeBrota believed there is no need to worry about the question of duplicates because in the 20 years that he has directly prosecuted about 200 cases, he has never charged a duplicate or used it as a sentencing consideration because he's never had to. (TR 240–41). He explained that "I don't count duplicates even though the law might say I could because it's never come up. It's

not been a problem." (TR 241). Mr. DeBrota noted that "there are technological ways of dealing with the duplicates such as hashing." (TR 241).

Mr. DeBrota suggested that "to know what percentage of child pornography there is in an offender's computer, you would have to know how much adult material they have." (TR 241). For example, Mr. DeBrota stated that "we don't have a data set of all the Internet adult material . . . We would have to accumulate that to have an automated mechanism. And we would have to run that against a computer and get a number. Then we've got to run the child pornography and get a number and do the math." (TR 241–42). Mr. DeBrota thought that "we shouldn't set sentencing questions, unless they're of paramount value to [the Commission], on that basis because the overhead to the judicial system will be vast." (TR 242).

Mr. DeBrota noted that "telling how sorted someone's collection is, or how long they've been doing something, is much, much easier to do" than determine the percentage of certain material against a total collection. (TR 242). First, Mr. DeBrota stated that prosecutors and law enforcement interview child pornography offenders, and "most of the time, if they think we'll get the answer anyway forensically," they admit how long they have been collecting child pornography. (TR 242–43). Mr. DeBrota believed they could answer that question by looking at some forensic information in the offender's computer in a relatively straightforward manner. (TR 243).

Mr. DeBrota worked with people from Homeland Security, the FBI, the Postal Service, the State Police, all the IGs, and many state and local agencies, and he stated that he needs them. (TR 243–44). Mr. DeBrota explained that he needs these people not to look through a collection principally to drive a sentencing computation, but he needs them to look through the collection to find the kids. (TR 244). Mr. DeBrota wanted to have sentencing calculations "as efficient as possible" to getting the Commission what it needs. (TR 244). Mr. DeBrota stated that when the Commission talks about the information he provides courts, it is the last step in the process. (TR 244). When Mr. DeBrota prepares information for a presentence report, he is "not doing an elaborate description of everything in the investigation," he is "not giving them a forensic exam report," he is "trying to lay out why the specific offense characteristics apply as they do." (TR 244). Mr. DeBrota stated that "you cannot get an accurate measure of someone's true interests and activities exhaustively by reading just a PSR. You'd have to do more than that." (TR 244). Mr. DeBrota suggested that if the Commission needs more information, or if the sentencing criteria ought to be greater to call prosecutors to do more, they certainly could, but he suggested "we should constantly balance the drain on the judicial resources and the litigant's resources versus [does the Commission] really need that piece of information." (TR 245). Mr. DeBrota stated that "forensic rules, forensic demands, judicial demands, play into sentencing policy. It has to be worth it . . . to really advance" what the Commission wants to try to do with sentencing enhancements. (TR 245).

Mr. DeBrota stated that the people who work these cases are volunteers. (TR 246). He explained that the prosecutors give the volunteers requests for information and then the volunteers get information to do a search warrant, and the prosecutors will do a "danger assessment." (TR 246). Mr. DeBrota noted that it does not matter what the opening allegation is, they will do a "danger assessment first based on the interview of the target" and then do an "on-scene triage of their

computer." (TR 246). Mr. DeBrota stated that in his district, they look at "the stuff" and interview the offenders about it, but other districts use polygraphs. (TR 246).

Mr. DeBrota explained that if they think they have an offender working in isolation, they will do a confirmation exam, a level one forensic exam. (TR 246). Mr. DeBrota indicated that the purpose of this exam is to "confirm why we were there and get some ideas about them, and so forth." (TR 246–47). Mr. DeBrota explained that a level two exam is "much more robust, much more time consuming and so forth" and is used when they think the offender is networking with other people where the investigators could trace communication links to victims or other offenders. (TR 247). Mr. DeBrota stated that a "level three exam is one where there is some forensic issue like someone claiming that they didn't understand something, or that the computer did it automatically." (TR 247). Mr. DeBrota claimed that about 90 percent of his cases are resolved in level one and two because the offender "will confess on-scene more than 90 percent of the time. The child pornography we already knew they had, they will identify and confirm. And we can go on to then work on finding kids and doing those things." (TR 247). Mr. DeBrota stated that "one in ten cases goes to trial either because there's a fact issue, or because the person is in so much trouble there's no incentive to plead." (TR 247–48).

Mr. DeBrota stated that "almost all of the offenders we've prosecuted the last three or four years were not just generic passive recipient peer-to-peer people. They were the other kind." (TR 248). Mr. DeBrota believed that it is impossible to be a member of a collective group and still be a neophyte. (TR 248). In his experience, to get in a group "you had to already demonstrate you were willing to distribute child pornography within the group. You had to do that, so they knew you weren't a copy. And you had to be vouched for by another member." (TR 248–49).

Captain Kirk Marlowe
Virginia State Police Bureau of Criminal Investigation, High Tech Crimes Division
NOVA-DC Internet Crimes Against Children Task Force

One of the major issues that Captain Marlowe's task force faces is "the misinformation that continues to grow that the folks we're dealing with are merely looking at nude pictures of youth, when in fact there are gruesome acts of violence against the most innocent citizens that we have. So we are in a constant battle there to bring it back to the real issue at hand." (TR 250). Captain Marlowe explained that another issue for his task force is "when we do the forensic work we are only able to recover a small amount of the images from the actual media that we have in front of us." (TR 250). Captain Marlowe stated that this causes a problem because "the images, once they're out into the virtual world, they continue to circulate. The victims are revictimized over and over again from that situation." (TR 250).

Captain Marlowe stated that there is a direct correlation between those who possess child pornography and being hands-on offenders. (TR 250). He noted that "[q]uite often the child pornography is a way into the door, and then we find out there's a whole other sinister world there that we otherwise would not have known about had we not initiated this type of information." (TR 250–51).

One challenge that Captain Marlowe and his task force faced is that many of the predators they encounter are professionals (*i.e.*, law enforcement officers, teachers, doctors, lawyers, etc.) who

do not have criminal histories, so they are often viewed differently. (TR 251). Another challenge that Captain Marlowe described is that the investigators and examiners are forced to view thousands of images and discuss them with the prosecutors, but "just like in all lines of work, some are better at that than others, and so often the true nature of the gruesome act is not conveyed to the court." (TR 251–52).

Captain Marlowe stated that forensics are done differently all around the country, but his task force does on-scene triage to get information. (TR 252). However, Captain Marlowe noted that "quite often those cases still need a full-blown forensics before they go to trial," which "backlogs the system for three to six months on any given case." (TR 252).

Another point that Captain Marlowe emphasized is that "as technology is improving the electronic service providers are better at reporting to the National Center [of Missing and Exploited Children]." (TR 252). He stated that the volume at the National Center continues to grow and the National Center is "vetting that and pushing that out to the" Internet Crimes Against Children tasked forces. (TR 252). Captain Marlowe explained that as the number of cyber tips continues to grow, it forces the task forces "into more of a reactive strategy" because they are "responding to tips from the public, from the service providers, instead of being proactive and going out and combating this problem." (TR 252–53). Captain Marlowe concluded by stating that "[t]here are certainly many variables that affect the system, so no one person or one discipline is to blame. It's a team effort to try to move forward and make it better for everyone." (TR 253).

V. Victim Perspective

Michelle Collins
Director, Exploited Child Unit, National Center for Missing and Exploited Children

Ms. Collins stated that to date, the National Center for Missing and Exploited Children (NCMEC) has received over 1.3 million Cyber Tipline reports since 1998. (TR 289). Of those reports, 92 percent were related to child pornography. (TR 289).

Ms. Collins stated that NCMEC operates the Child Victim Identification Program (CVIP) which assists federal, state, and local law enforcement agencies as well as prosecutors with determining which seized images contain children who have already been identified by law enforcement and assists law enforcement in identifying and locating those children who still may be in an abusive situation. (TR 289–90).

Ms. Collins indicated that the "majority of the children that we know who have been identified are here in the United Stated, but that can very much be pointed to the fact that law enforcement here in the U.S. is aware of CVIP and provides us with that information." (TR 293). Ms. Collins stated that in 2010, law enforcement agencies submitted nearly 14.2 million images and videos to CVIP for review, and in 2011, they submitted more than 22 million images and videos. (TR 294). Ms. Collins attributed this increase, in part, to the increased awareness of this resource to law enforcement agencies. (TR 294). She acknowledged that "the increase may also be due to high-speed Internet access and digital storage capacity, which has made it easier for child pornography possessors to collect a large volume of illegal material." (TR 294).

Ms. Collins asserted that "[o]f the identified victims whose images were frequently submitted to us by law enforcement, 43 percent of the children depicted in the images were boys, and 57 percent depicted in the images were girls." (TR 294). Further, she stated that "76 percent of these images depict the abuse of prepubescent children, including 10 percent which depict infants and toddlers," and "24 percent depict pubescent children." (TR 295). Ms. Collins noted that from the start of the CVIP program, "there have always been a percentage of images . . . which depict infants and toddlers," which she thought "suggests that there has always been a demand for pornographic images of these very young children, yet this demand fuels the production of more of these images." (TR 295). Ms. Collins stated that because many of these victims are often pre-verbal so "there are fewer opportunities to be able to identify these child victims of abuse." (TR 295–96).

Ms. Collins stated that the most frequently submitted images of identified victims for the last five years revealed the kind of sexual abuse that is most often inflicted upon these victims who are abused and photographed: "Eighty-four percent of the series contain images or videos depicting oral copulation; 76 percent of the series contain images depicting anal or vaginal penetration; 52 percent, more than half, of the series contain images depicting the use of foreign objects or sexual devices; 44 percent of the series contain images depicting bondage or sadomasochism; 20 percent of the series contain images depicting urination and/or defecation; and 4 percent of the series contain images depicting bestiality." (TR 296–97). Ms. Collins specified that these are only the images of the identified children. (TR 297).

Ms. Collins stated that most of the child pornography victims in the images and videos NCMEC has seen are being abused by someone that they know. (TR 297). She claimed that "[o]f the child victims that have been identified by law enforcement, the vast majority were victimized by an adult that they knew and they trusted." (TR 298). Ms. Collins stated that "[i]n 22 percent of the cases it was a parent or guardian," and in "10 percent it was another relative." (TR 298). She noted that 47 percent of the children were sexually abused by a family friend. (TR 298). Ms. Collins indicated that "a small but growing percentage of identified victims produced the sexually explicit material of themselves." (TR 298). She noted that these images are frequently submitted to NCMEC more often than found in the child pornography collections that law enforcement are seizing. (TR 298). Ms. Collins pointed out that "regardless of how their images are collected, the child victims depicted nonetheless sustain harm and damaging consequences, suffering shame and fear of public embarrassment." (TR 298).

Ms. Collins acknowledged that "Congress, the Supreme Court, issue experts, and this Commission have all recognized the extreme harm inflicted upon the victims of child pornography." (TR 298–99). She stated that the "victims suffer at the hands of the offender who has sexually abused them," and they "suffer knowing that offenders may use images of their abuse to entice or manipulate other children into sexually abusive acts." (TR 299). Ms. Collins noted that "[c]hild victims may experience depression, withdrawal, anger, feelings of guilt, responsibility for the abuse, as well as betrayal and a sense of powerlessness and low self-esteem." (TR 299). Additionally, she pointed out that "[i]t is impossible to calculate how many times a child's pornographic image may be possessed and distributed online. Each and every time an image is viewed, traded, printed, or downloaded, the child in that image is being revictimized." (TR 299).

Ms. Collins stated that "[r]ecent technology such as smartphones and thumb drives and cloud computing have made it easier for offenders to collect and store their child pornography." (TR 300). She noted that "[o]ther technological tools such as anonymizers and encryption have enhanced an offender's ability to evade detection by law enforcement." (TR 300). Ms. Collins believed that "the size of an offender's collection is not necessarily a mere reflection of these technological advances, it suggests an active participation in the child pornography market, which is a market in which the demand fuels the ongoing victimization of children." (TR 300).

Sharon Cooper, M.D.
Adjunct Professor, Pediatrics, University of North Carolina–Chapel Hill School of Medicine

Dr. Cooper referred to child pornography as "child abuse image, or child sexual abuse images" because this is the "internationally accepted term for this kind of contraband because it helps debunk the myth that these are images of children who are voluntarily modeling; that these are not really children, they're all morphed images; that these are adults made to look like children; and most of all, to do away with the myth that this is a victimless crime." (TR 302–03). She stated that child pornography is what she calls "insult to injury," with the injury being the child sexual abuse and "the memorialization is the insult to those children who have been sexually abused." (TR 303). Dr. Cooper outlined the several types of child sexual exploitation. (TR 303).

The first type of child sexual exploitation Dr. Cooper discussed is the issue of child pornography. (TR 304). Dr. Cooper equated child pornography to voyeurism cases and stated that "the offender is a voyeur who is looking in a virtual window at this child abused" for the purpose of gaining sexual gratification. (TR 304).

The second type of child sexual exploitation Dr. Cooper outlined is "interfamilial prostitution of children." (TR 305). Dr. Cooper explained that this prostitution can be for money, food, clothing, and shelter by a non-offending parent, and it can also be for influence. (TR 306). She stated that the issue of interfamilial prostitution today, "often entails the use of child sexual abuse images." (TR 306–07). Dr. Cooper stated that there are many cases where people are "intentionally adopting children for the purpose of selling them for the production of child pornography and interfamilial prostitution—not for money, but for networking." (TR 307).

The third type of child sexual exploitation Dr. Cooper mentioned is that of cyber enticement. (TR 307). Dr. Cooper explained that today "a child sex ring is often a family that is sexually abusing their child on demand by live webcamming, who is involving with other families who meet on a regular basis, and where there's live discussion about what type of sexual abuse they'd like to see depicted in the live streaming video." (TR 308). Dr. Cooper stated that "cyber enticers" are individuals who contact youth on a regular basis, grooming them to become "compliant victims." (TR 308). She noted that "[i]t is within this context that we frequently see a cajoling of those victims to self-produce images, and to respond to the request for the fact that if you truly love me you'll send me a picture of you pleasuring yourself, one of the more common terms that's usually used in these types of victims." (TR 308–09). Dr. Cooper stated that in those children that she has evaluated who were victims of cyber enticement, "the guilt and self-blame and shame is much greater than we would see in your typical child sexual abuse victim" (TR 309). She reasons that this is because "not only has the child been sexually abused

after they've met with this person, but all of their family, and all of their sphere of nurturers in their lives continue to point a finger at them, and how could they be so stupid as to have done this?" (TR 309). Dr. Cooper stated that enticement is coming into the world of video gaming. (TR 309). She noted, "And that is one of the reasons that this particular Sentencing Commission discussion with all of the ramifications of the production of images, but also the collecting and distribution of images, is so important." (TR 310).

Dr. Cooper explained that the fourth type of sexual exploitation is child sex tourism, "usually associated with a person who is going to travel in order to have sex with a child." (TR 310). She stated that the "resulting sexual abuse images that are distributed to collectors from these particular types of environments are often going to be traded and possessed in many places, and we know that the United States is both a country of origin and destination for child sex tourists." (TR 310).

The fifth type of child sexual exploitation Dr. Cooper discussed is commercial sexual exploitation of children, "sometimes for domestic minor sex trafficking when we're talking about children who are not trafficked from outside our country into our country." (TR 311). She noted that "[w]e are focusing quite a bit these days on domestic minor sex trafficking victims, but many of us fail to recognize that child pornography is another component of the victimization here." (TR 311). Dr. Cooper suggested that these images are sometimes produced to break down the resilience of a child who may try to escape from the trafficker, and that this "process of sexual assault associated with videotaping of that sexual assault by the trafficker early on in the process of grooming and breaking in of a victim is well described by victims" to her and other clinicians. (TR 311).

Dr. Cooper noted that the "additional impact upon children who are being trafficked with respect to the issue of production of pornographic images entails the use of communication technology through 3G and 4G technology." (TR 312). She stated that the technology "helps us to understand how taking a picture of a child and sending it to a potential client and saying is this the one that you want takes us away from the Internet, takes us away from the computer-based form of victimization," which is why the United Nations' study on violence against children in 2005 said that these cases can no longer be referred to as ICAC cases but ICT cases, "information and communication technology crimes against children, just because it's not always on the Internet." (TR 312).

Dr. Cooper stated that the constant theme children share with her during clinical interviews is the invasion of privacy. (TR 312–13). She explained that many of the children she sees who were exploited live a "double life" where the "child tries to go to school, and tries to interact with other people as if all is well. But, who are highly vigilant and fearful whenever they come into contact with a computer, especially a computer within a social gathering." (TR 313). Dr. Cooper provided that in addition to the diagnosis typically seen of child sexual abuse victims, those diagnoses of post-traumatic stress disorder, depression, and anxiety, now there is a new diagnosis for these children who are "constantly worried all the time, as are their parents, that other people are looking at them," and this diagnosis is called "nondelusional paranoia." (TR 314).

Dr. Cooper noted that the number of images captured by the National Center for Missing and Exploited children are under-estimated "because most investigators who are determining that

child pornography images exist are going to look at only prepubescent images" because "when you have a child who is 14 or 15 whose images have been made, they are still children but they won't be counted as child pornography images because their bodies will not be discernible from those of adult women." (TR 314–15).

According to Dr. Cooper, "[o]ffenders who download, possess, and trade in child sexual abuse images with a certain typology such as sadistic imagery promote the further commission of these kinds of crimes against children." (TR 315). She noted that "[f]rom the perspective of mental health treatment for victims of sexual abuse images, research has shown that the majority of clinicians feel ill-prepared in order to provide appropriate therapeutic purposes and services for these children." (TR 316).

Dr. Cooper cites a UK study which helps explain why children often do not bring up or deny the fact they have been victimized by pornography: "I don't talk about this because the images make it look like I just let it happen; I don't talk about it because sometimes he made me smile; I don't talk about it because I was the recruiter for other kids in my school that he said for me to come and spend the night on a sleepover and then he sexually abused them; I don't talk about it because I had to have sexual contact with another child and it makes me feel worse . . . the offender said, 'You should have stopped this. It's your fault this all happened.'" (TR 317).

Dr. Cooper reminded the Commission that "most of the meta-analysis studies of recidivism have been based upon rearrest rates. When you recognize that children who have been sexually abused and pornographically photographed don't tell more than people who have been sexually abused without pornography, then you will understand that these are the types of children who are not going to make a disclosure." (TR 318). Dr. Cooper suggested that this "will be a major hindrance to rearrest rate[s]," and she thought "it will help us to have to think carefully about recidivism in child pornography victimization." (TR 318).

Susan Howley
Chair, Victims Advisory Group to the U.S. Sentencing Commission

Ms. Howley stated that "the proliferation of child abuse images increases the risk of future victimization and harms the victims who are the subject of those images." (TR 319). She explained that "it increases the risk of victimization because repeated exposure to those images normalizes the sexual assault of children, promoting cognitive distortions." (TR 319–20). Based on a meta-analysis of published research on the effects of pornography, Ms. Howley suggested that "clear and consistent exposure to pornographic material puts one at an increased risk for developing sexually deviant tendencies, committing sexual offenses, experiencing difficulties in one's intimate relationships, and accepting the rape myth." (TR 320). She stated that "those who collect such images also increase the demand for additional images, raising the risk of future victimization." (TR 320). Additionally, she noted that "child sexual abuse images are often used to groom future victims in an attempt to persuade them that such acts are normal and pleasurable." (TR 320).

Ms. Howley stated that "each of these victims who is depicted suffers the harms normally associated with being a victim of sexual abuse." (TR 320). She referred to the framework proposed by Doctors David Finkelhor and Angela Browne, who identified four traumagenic

dynamics that link child sexual abuse to psychological injury: traumatic sexualization; betrayal; stigmatization; and powerlessness. (TR 321). Ms. Howley defined traumagenic sexualization as "a process in which a child's sexuality, including both sexual feelings and sexual attitudes, is shaped in a developmentally inappropriate and interpersonally dysfunctional fashion as a result of sexual abuse." (TR 321). She explained that betrayal "refers to the child's discovery that someone on whom he or she depended has harmed, lied to, used, manipulated, or blamed the victim." (TR 322). Ms. Howley noted that powerlessness "results from the repeated violation of a child's body or personal space and the inability to stop the abuse. It increases when children are unable to get help from other adults." (TR 322). She defined stigmatization as "the shame, guilt, and negative self-image resulting from the abuse." (TR 322). Ms. Howley noted that stigmatization "increases when others react with shock or hysteria after the abuse is revealed, or when they blame the victim or impute other negative characteristics to the victim." (TR 322). She suggested that this "framework for thinking about the harm caused by sexual abuse helps to explain the resulting anxiety, depression, lack of self-worth, increased risk for suicide and substance abuse, sexual dysfunction, and other consequences." (TR 323).

Ms. Howley claimed that "victims of child sexual abuse imagery suffer all those consequences and, in addition, they suffer new layers of impact." (TR 323). For example, she stated that "perpetrators may use images of the child to perpetuate the crime by maintaining the child's continued cooperation by threatening to reveal the images to parents or others, reinforcing that stigmatization and powerlessness that comes from the original abuse." (TR 323). Ms. Howley suggested that "[w]hen victims learn that the offender not only sexually abused them but then benefitted with the distribution of images of that abuse, whether financially or through increased status . . . this can compound that sense of betrayal that they already suffered as a result of the abuse." (TR 323). Additionally, she stated that the nature of the Internet and the permanence of the image can lead victims to live in fear that any person they interact with may have seen the images, and this "realization can intensify the victim's feelings of stigmatization that they already had from the original abuse." (TR 324).

Ms. Howley stated that victims "may be further sexually traumatized by realizing that the men they know, and many they may never know, have received pleasure, have received sexual gratification, by the images of their rape or abuse. And by recognizing that this could be happening at any moment in the day." (TR 324). Additionally, she noted that a victim's feelings of self-blame might increase if they were smiling in the images, which many offenders insist they do so that collectors can deny the wrongfulness of the abuse. (TR 324–25). Ms. Howley explained that victims suffer feelings of powerlessness because they can never put an end to the abuse because there is no way to guarantee that all the images of their abuse can be found and destroyed. (TR 325).

Ms. Howley noted that the creation, trading, and viewing of child sexual abuse images impacts not only the individual victim, but others as well, "particularly the nonoffending parent of the victim." (TR 325). She explained that the effects on others includes "blaming themselves for not discovering the abuse; not knowing how to help their child cope with the psychological and other effects; [and] being powerless to put an end to the circulation of the images." (TR 325–26).

Ms. Howley, on behalf of the Victims Advisory Group ("VAG") attempts to answer some of the questions posed by the Commission. (TR 326). She stated that the VAG cannot speak to the

typology of offenders, but she noted that "all offenses involving the creation, distribution, and collection of child sexual abuse images are harmful, whether or not they are coupled with a hands-on offenses, because they all work to normalize the sexual abuse of children." (TR 326). She indicated that the VAG agrees that those images that depict violence or in some way dehumanizes the child should be dealt with more severely. (TR 326–27). Ms. Howley suggested that "[i]t would also be useful to consider indications that an offender specifically sought such images, indicated by requests for such images, or the number of such images in a collection." (TR 327). She stated that the number of images is relevant because it reflects the number of victims harmed, and "the number of images of a particular victim may be relevant because victims may feel more distressed to know that an offender had more than one image of them." (TR 327). Ms. Howley noted that "the mere volume of images no longer connoted the same intentionality that it once did when images were traded through the mail. So other factors may be important . . . such as the number of times images were collected; the span of time over which images were collected; the extent to which the images were catalogued; anything that indicates an offender's real intentionality and involvement with this large collection of images." (TR 327–28).

Ms. Howley stated that with regard to the volume of distribution, "victims note that any distribution is harmful because even one distribution opens the door to further distribution." (TR 328). She posited that "other factors that relate to the degree of distribution may be relevant, including the extent to which the offender took deliberate actions to facilitate distribution such as taking steps to provide easier access to specific images in his collection; the frequency of distribution; the span of time over which images were distributed; and whether images were intentionally distributed widely." (TR 328). In examining the form of distribution, Ms. Howley suggested that "courts might consider whether the images were made publicly available, which potentially increases access to or exposure to child abuse images beyond an established community of perpetrators; whether the images were shared with minors, which could indicate grooming of future victims; whether distribution was in response to communication with the recipient and indicated an intention to facilitate or promote other offending or similar factors." (TR 328–39).

Ms. Howley stated that other types of offender behavior that might be relevant include whether child abuse images were shown to another child; whether the participant participated in a chat room or other social group dedicated to child abuse images; whether the offender participated in a chat room that incited additional production of child abuse images or sexual abuse of children, and if after participating or observing such a group, he or she failed to report that activity to the authorities; and whether a producer of child sexual abuse images threatened to expose a victim unless a victim cooperated in the production of additional images. (TR 329–30).

In response to a question about accounting for an offender's past and future sexual dangerousness, Ms. Howley stated that the VAG believed sentencing judges should have as much information as possible about the dangerousness of an offender beyond criminal convictions. (TR 330). She noted that most child sexual abuse remains undetected for reasons well understood, such as "embarrassment and shame; expectations of blame; fear of not being believed; the expectation that disclosure might not help . . . they don't understand having participated in something that was wrong; they might be trying to block out the memories" (TR 330–31). Ms. Howley indicated that "it has been estimated that fewer than ten percent of those

who will acknowledge the abuse state that their abuse was ever reported to authorities." (TR 331). Ms. Howley claimed that "much of the abuse that is reported is not going to result in a conviction due to either lack of evidence, unwillingness of the child's family to undergo the strain of a criminal case, concern about the offender, lack of support for the child and family by other family members, or many other reasons." (TR 331). Additionally, she noted that "many studies out there indicate that many offenders who have been convicted only of possession offenses have in fact committed hands-on offenses that they will self-identify." (TR 331). Ms. Howley concluded that "simply looking at prior convictions does not tell you whether someone has committed a hands-on offense." (TR 331–32). She stated that the VAG would suggest that "anything that can give judges more information about the likelihood that an offender committed a hands-on offense, including arrests, including reports to child protective services—whether substantiated or unsubstantiated." (TR 332). Ms. Howley explained that one unsubstantiated offense does not necessarily mean anything, but when there is a pattern of offenses, that becomes relevant.

With regard to the proper roles of imprisonment and judicial supervision, Ms. Howley believed that "sentences in cases involving child abuse images should reflect the seriousness of these offenses." (TR 332). She asserted that "[e]ven for those convicted only of possession offenses, the fact that an offender intentionally collected such information indicates they received some sort of pleasure or sexual gratification, and they could not have received that benefit if someone else did not abuse the child. So these are child sexual abusers by proxy." (TR 332–33). Ms. Howley suggested that "imprisonment and supervision should also reflect the need to protect the safety of victims and other children." (TR 333).

Ms. Howley stated that the first change the VAG would like to see would have to be made by Congress, "and that would be to amend the restitution statute for child pornography offenses." (TR 333). She indicated that a question has arisen whether the "proximate cause" requirement in 18 U.S. C. § 2259 applies to all of those other costs. (TR 334). Ms. Howley noted that victims' advocates would say "no, it does not even as written, but clarification would be very helpful." (TR 334). Beyond making the statutory change, Ms. Howley stated that the VAG would recommend that Congress set a presumptive amount of restitution due in such cases. (TR 335).

Ms. Howley indicated that the VAG agrees that "sentencing does not appear to be the perfect tool to reduce the market for child sexual images, but it is one of the few tools available." (TR 335–36). She noted that "[t]hrough sentencing we express to society and to the individual and family members harmed that we recognize the seriousness of this offense." (TR 336). Finally, Ms. Howley stated that "the seriousness of crimes involving child sexual abuse images warrants a strong response to offenders." (TR 336).

VI. Policy Perspectives from the Courts, the Executive Branch, and the Defense Bar

Northern District of Florida
Honorable Casey Rodgers, Chief United States District Judge

Judge Rodgers applauded the Commission for first setting the child pornography guidelines, but stated that there is an "overwhelming percentage of district judges who are dissatisfied with these guidelines, particularly the guideline in the area of possession and receipt." (TR 358). She

stressed that she thought judges would be the first to agree that child sex crimes are "gravely serious offenses" because "in our courtrooms we see and we hear about the unspeakable acts of some of these offenders, and the unimaginable harm that's suffered by the child victims." (TR 358–59). Judge Rodgers posited that judges know from their own experiences that "there are a number of offenses ranging from aggravated child sexual abuse on the one end, to child pornography and obscenity offenses on the other, all representing varying degrees of harm and levels of culpability, and thus judges understand that these sentences, although punitive, [] must be measured and proportionate to the seriousness of the particular offense that is involved." (TR 359).

Judge Rodgers believed that the guidelines in the area of child pornography "have not produced measured and proportionate sentences," and as a result, there have been a "growing number of departures and variances by judges in these cases." (TR 359). She suggested that this is due to "the way that these guidelines have evolved over the past two decades or so with congressional directive after congressional directive, even direct legislative amendment, all aimed at increasing penalties in this area, eliminating judicial flexibility, and often without any evidence-based input from the Commission." (TR 360). In Judge Rodgers's view, the child pornography guidelines had actually "frustrated rather than promoted the goals of proportionality and uniformity that lawmakers sought with the passage of the Sentencing Reform Act." (TR 360).

Judge Rodgers reminded the Commission that it had "heard from countless judges across the country" that "the multiple large-level offense characteristics enhancement in section 2G2.2 have been applied too frequently, and they fail to distinguish harmful conduct." (TR 360). She suggested that "many judges feel that the base offense levels for possession and receipt are set too high." (TR 360). Judge Rodgers believed that in her experience, no one ever gets the benefit of the low end of the statutory range under the guidelines, and no one can, because of the way that the guidelines are currently designed. (TR 361).

Judge Rodgers noted that "Congress has provided a broad statutory range for possession and receipt offenses" which she thought "indicates that Congress contemplated both a wide spectrum of culpable conduct, as well as a broad range of appropriate sentences for these two offenses." (TR 361). On the other hand, Judge Rodgers pointed out that "Congress has issued directives in past amendments to these guidelines that ratchet sentences up to the high end of the statutory range, in effect ignoring the very statutory framework that they gave us judges to work with." (TR 361–62). Judge Rodgers claimed that "Congress insists that judges should not be departing and varying from [§]2G2.2," but she insists that "this guideline, is completely at odds with the Sentencing Reform Act." (TR 362). She stated that the Sentencing Reform Act requires judges to consider other factors, including the nature and circumstances of the offense and the history and characteristics of the defendant, but she stated that "[t]his is impossible to do under [§]2G2.2 which in many cases completely removes even criminal history from the sentencing equation." (TR 362). Judge Rodgers suggested that this "irreconcilable conflict" is "actually driving the high rates of departure and variances." (TR 362). She noted that this "occurs as judges struggle to impose sentences that are just and reasonable for the offenders who stand before them." (TR 362).

Judge Rodgers was provided with statistics of her district from the probation office. (TR 363). She asserted that the filings of child pornography cases in the Northern District of Florida "have

consistently been above the national average," and "in the past two years, they were more than double the national average." (TR 363). She indicated that in her district, "the statistical profile for the typical possessor and receiver of child pornography is nearly identical for those two offenders." (TR 364). Judge Rodgers noted that "100 percent of the offenders in our cases are white males; 38 percent are between the ages of 35 and 45; 90 percent were employed at the time of the commission of the offense; a majority are educated, having graduated either from high school or in many instances college; and over 80 percent have little or no criminal history." (TR 364). In terms of frequency of the offense characteristics in receipt and possession cases, Judge Rodgers stated that "[i]n 90 percent of the cases the. . . two levels for use of a computer is applied; 100 percent of receipt cases . . . and 46 percent of possession cases, the two levels for material involving a prepubescent child is applied; 80 percent of receipt cases, and 61 percent of possession cases, the four levels for sadistic, masochistic, or violent conduct is applied. And in more than 80 percent of possession and receipt cases, the 5-level increase for over 600 images from the image table" is applied. (TR 364–65). Judge Rodgers noted that she often sees numbers that "extend well beyond the image table," frequently spanning "from the range of 1,000 to 100,000 images." (TR 365). She believed that "the impact of these four offense characteristics, which again apply in the majority of these cases, creates . . . a serious imbalance, unlike anything else that we see in the guideline." (TR 365).

Judge Rodgers stated that in her district, "not one person charged or convicted of receipt and sentenced for receipt in the seven years from 2004 to 2011, had a guideline range that included the mandatory minimum. All began well above it." (TR 365). She noted that this is "despite the fact that in receipt cases" in the Northern District of Florida, "85 percent of those offenders were Criminal History Category I." (TR 365–66). Judge Rodgers believed that "[t]his imbalance has also created a problem of proportionality within the guidelines as a whole." (TR 366).

Judge Rodgers noted that there are "crimes involving similar yet arguably more egregious conduct that carry lower ranges." (TR 366). For example, she stated that "in section 2A3.2, which is the guideline for Criminal Sexual Abuse of a Minor Under the Age of Sixteen, the guideline range is 51 to 63 months for a first-time offender," and she claimed that "[t]hat's after applying offense enhancements and before adjusting for acceptance." (TR 366). Additionally, Judge Rodgers asserted that "a first-time offender who uses a computer to misrepresent his identity to persuade a minor to participate in sexual conduct scores out at 27 to 33 months" under §2A3.3. (TR 366). She stated that the same calculation for a first-time offender under §2G2.2 yields a range of 108 to 130 months for possession and 135 to 168 months for receipt. (TR 366).

Judge Rodgers asserted that "these unwanted sentencing disparities not only frustrate judges, they erode the public's confidence in the fair administration of justice." (TR 367). She suggested that "a complete restructuring of the child pornography guideline is needed" and recommends that the Commission "consider starting by separating out receipt and possession from trafficking." (TR 367). Judge Rodgers believed that "[r]eceipt is, by nature, more akin to possession and in fact, as the Commission has acknowledged, it is a logical predicate to possession." (TR 367).

Judge Rodgers suggested that "[p]ossession and receipt could be separated from the trafficking guideline, and a downward departure could be applied, or adjustment could be applied for possession cases in those small, very small number of cases that include . . . simple possession."

(TR 367–68). She asserted that "[s]eparating receipt and possession from the trafficking guideline would also permit the Commission to construct a set of offense characteristics that are more finely tuned to the actual facts of receipt and possession cases" that judges see. (TR 368). Judge Rodgers noted that there is a "wide range of culpable conduct in child pornography offenses, even among receipt and possession offenders that should be incorporated into the offense characteristics." (TR 368).

Judge Rodgers described distinctions she has seen in her own possession and receipt cases over the years: the lengths to which an offender has gone to obtain material; using Internet message boards and chat rooms; paying to obtain access to member-only websites, or to join files or peer-sharing networks; using various payment methods or layers of transactions to make the purchase appear legitimate; obtaining material from foreign countries; and using technology to execute and conceal the offense. (TR 368–69). Judge Rodgers suggested that these types of conduct "are more reflective of possession and receipt offenses, and thus they paint a more realistic picture of the increasingly harmful conduct in those cases, as opposed to the currently overly broad enhancements that are much more relevant [she thought] to production, advertisement, and in many instances trafficking or distribution." (TR 370).

In separating out the possession and receipt cases from trafficking, Judge Rodgers urged the Commission "to promulgate base offense levels for these offense[s] that are independent of the mandatory minimum for receipt." (TR 370). Judge Rodgers believed that "[t]ethering the base offense levels to the mandatory minimum, especially for possession offenses to which it doesn't apply, has . . . contributed to this problem of disproportionate ranges." (TR 370).

Judge Rodgers also urged the Commission to seek repeal of the mandatory minimum sentence for receipt offenders because "there does not appear to be any meaningful distinction between receipt or possession, yet the 60-month mandatory minimum applies to one and not the other." (TR 370). Judge Rodgers asserted that "because of the mandatory minimum, we have widely disparate charging practices for what in many cases is essentially the same conduct." (TR 371). She referred to drug users and noted that "although that individual is still in the chain of culpability and responsible for creating demand in the market, is not subject to a mandatory minimum." (TR 371). As an alternative if Congress is not amenable to repealing the mandatory minimum sentence with regard to receipt, Judge Rodgers urged the Commission "to recommend repeal of the constitutionally imposed restrictions on departures and to recommend that Congress provide a safety valve" for receipt and possession offenders. (TR 371). Judge Rodgers suggested that allowing more guidelines-based departures "will promote uniformity by giving judges much-needed flexibility in fashioning appropriate sentences." (TR 371).

"Regarding the offender side of the equation and the need to protect the public from further crimes of future crimes of these offenders," Judge Rodgers asked the Commission "to consult the science." (TR 372). She stated that this would be to determine "whether there is a reliable measure of the risk of dangerousness for child pornography offenders, particularly those involved in the viewing of these images." (TR 372). Judge Rodgers indicated that the "issue of dangerousness and the judge's need to protect the public, indeed protect our children, of future crimes by sex offenders" is what keeps many judges awake at night. (TR 372). She stressed that "we simply cannot lump everyone together" and "assume that everyone charged with a sex offense poses the same level of risk, and therefore must be taken out of society for lengthy

periods of time, or supervised for life." (TR 372). Judge Rodgers stated that judges need "reliable, evidence-based factors to inform [them] of the risk posed by these offenders, including the likelihood that they will engage in a contact offense," and she thought further study on this is imperative. (TR 372–73).

Judge Rodgers concluded by noting that no one, and certainly not her, "is suggesting that these defendants do not deserve to be punished," but stated that "these sentences must be proportionate" to the seriousness of the offenses. (TR 373). She stated that "we must also take into account the actual risk that is posed by the particular defendant who stands before us in the courtroom." (TR 373).

United States Department of Justice

Francey Hakes, Nat'l Coordinator Child Exploitation Prevention and Interdiction

Ms. Hakes explained that she is charged with overseeing the Department of Justice's efforts with respect to child exploitation, and they have recently formulated and are in the process of implementing the first ever national strategy for child exploitation prevention and interdiction. (TR 375). She stated that in that national strategy, "the Department for the first time ever compiled a lot of data, information, and interviews with prosecutors, investigators, and social scientists in what was for us the first-ever threat assessment of the threat that these kinds of crimes pose to the children of our country." (TR 376). Additionally, Ms. Hakes noted that the strategy contained a "review of all of the efforts that are currently ongoing inside the Department of Justice to fight against these crimes." (TR 376). She stated that the strategy also sets out certain goals and priorities for the Department to accomplish, including "enhanced collaboration and cooperation among all of our partners, like the National Center for Missing and Exploited Children, the Internet Crimes Against Children Task Forces, . . . the FBI, our global partners, all of our nongovernmental partners like PROTECT and other child advocacy organizations." (TR 376).

Ms. Hakes stated that one of the things that prosecutors and policymakers at the Department of Justice keep in mind are the words from the victims. (TR 378). She believed that this "is specifically why the Department of Justice believed that these cases merit serious sentences." (TR 378). Ms. Hakes asserted that the Department faces "hundreds of thousands, millions of images of these sexual victimization of children, and children whose eyes are begging us to come and rescue them." (TR 379).

Ms. Hakes alleged that she has seen a "dramatic increase in the absolute horrific nature of these images" in the last yen years. (TR 379). She asserted that it is "beyond the imagination of most of us what these children are experiencing." (TR 379). Additionally, Ms. Hakes noted that infants and toddlers are especially difficult to locate because they are so young. (TR 379–80).

Ms. Hakes argued that sentencing is about many things, and while it is about dangerousness, it is also about punishment. (TR 380–81). She noted that the harm to the victims "is really simply immeasurable." (TR 381). Ms. Hakes pointed out that people have questioned the notification of victims by suggesting that the Department of Justice or law enforcement is victimizing the

children by sending constant notifications, but she noted that no one questions a victim's right to be notified in any other kinds of crimes. (TR 381–82).

Ms. Hakes described a case that she prosecuted where the defendant victimized a young girl over a period of four years and the images "became ever more horrific." (TR 382). She stated that the defendant admitted that he started out trading child pornography but then he could no longer receive new images unless he had something to trade, "and he had complete access to this five-year-old girl and so began four years of a nightmare for that child who will for the rest of her life experience the horror over and over again." (TR 383).

Ms. Hakes argued that the Butner study used polygraphs to verify both when an offender had not disclosed conduct and when he had, so "there's been some allegation that offenders had reasons to make up incidences of prior sexual molestation of children." (TR 384). She explained that she wants the Commission to be aware that she worked closely with one of the co-authors and that the authors of the study indicated to her that they use the polygraphs to verify that information in addition to a lack of disclosure. (TR 384).

In conclusion, Ms. Hakes stated that the Department of Justice believes that the guideline "could and should be recalibrated." (TR 385). She argued that "a deeper look at the offender's relevant conduct is obviously critical, and something that is definitely impactful when it comes to the sentencing court's full picture of the defendant's conduct." (TR 385). Additionally, Ms. Hakes suggested that socialization, meaning a person's participation in groups, is relevant to a sentencing determination or a determination of whether or not the individual poses a future risk. (TR 385). Lastly, she believed that technology such as encryption techniques that defendants use to defeat law enforcement should be considered by the Commission in any recalibration of the guideline as well as "things like images involving infants and toddlers, especially those that involve bestiality." (TR 386).

Ms. Hakes opined that the images of the infants and toddlers she has seen appear to be even more violent than those of the older children because "these children simply are defenseless" and cannot say "no" or resist. (TR 386).

Federal Defenders of New York, Southern & Eastern District of New York

Deidre von Dornum, Assistant Federal Defender

Ms. von Dornum asserted that in New York, child pornography offenders are being managed safely in the community. (TR 387). She explained that she was talking about the "mine run of offenders," and it was "those offenders for whom this guideline as it is currently written is not based on empirical data and who is not accurately capturing those offenders who see as the majority of our cases and who in fact the majority of child pornography offenders being convicted in the federal system." (TR 388). She suggested that "those offenders can be treated through this containment model, through a specialized program in conjunction with treatment providers." (TR 388). Ms. von Dornum indicated that in the Eastern District of New York, the probation office has supervised over 100 child pornography offenders for a period of 13 years, "and in that time they have seen only one new contact offense." (TR 389). She stated that this is based on "polygraph, location surveillance, surveillance of their computers, very close

monitoring." (TR 389). Ms. von Dornum believed that "this is a significant marker for the types of sentences that should be contemplated for this majority population, especially given that the experience in New York is borne out by the social science research." (TR 389).

Ms. von Dornum claimed that the recidivism rate is "very low" for child pornography offenders who are "arrested and convicted and sentenced and supervised." (TR 390). She suggested that "they do not need long jail terms to be rehabilitated, and they appear to do very well with probationary terms and carefully tailored supervision and treatment." (TR 390). Ms. von Dornum clarified that she is not talking about the "worst-case scenarios" that she considers to be outliers because she stated that those "are not the cases for which I believe the Commission is seeing this high variance rate." (TR 390). She explained that she is referring to the "run-of-the-mill possession, receipt, and the more passive distribution cases." (TR 390).

Ms. von Dornum believed that "the current guideline has resulted in excessively severe sentences for noncontact child pornography offenders . . . because of this failure to distinguish among the different categories of offenders and offenses so that everyone is lumped at the top." (TR 391). She also stated that "the enhancements, as written, apply to everybody and don't tell the Judiciary anything about who is more dangerous." (TR 391).

Ms. von Dornum explained that the majority of her clients "either access child pornography out of curiosity or impulse without a specific sexual interest in children . . . or they do access child pornography to satisfy sexual fantasies but they don't commit contact sex offenses." (TR 391). She noted that they "do not see a large number of child pornography offenders who are involved for financial gain, or who are using the Internet to facilitate these contact sex offenses." (TR 392). Ms. von Dornum asserted that "the data shows that the typical offender who is a first-time offender with no previous convictions, no arrests for child sex offenses, and no prior contact with authorities who are responsible for investigating child sexual abuse, that they're not predators." (TR 392). She claimed that "[t]hey're not making social contact with basically anyone, let alone certainly with children." (TR 392). Ms. von Dornum contended that these first-time offenders she described "have been shown to be extremely susceptible to supervision and treatment." (TR 392).

Ms. von Dornum described a first-time child pornography offender who she represented about five years ago in the Southern District of New York. (TR 392). She explained that, after sharing child pornography images in online chat rooms, he was indicted on one count of possession and one for distribution and receipt, so "he initially faced the five-year mandatory minimum." (TR 392–93). Ms. von Dornum stated that when she met him, she quickly learned that he was "a 44-year-old man who suffered from severe long-term depression, which he had suffered from since high school." (TR 393). She noted that he was a college graduate who worked in his college's athletic department and "had worked steadily his entire life." (TR 393). Ms. von Dornum stated that this man was insecure and isolated, so he went to the Internet for companionship. (TR 393). She explained that he first started in sports chat groups, "talking first about sports and then they began sending him adult pornography. That then turned into him being sent images of adolescent girls, and in time to prepubescent girls." (TR 393). Ms. von Dornum stated that "he was so desperate to have friends that this was his community, and these were the people that he felt like would accept him." (TR 393–94). She noted that his pornography collection consisted of about half adult women, some clothed, and that as soon as the FBI went to his apartment, he

immediately confessed. (TR 394). Ms. von Dornum explained that after talking to the FBI, he stopped going on the Internet, took medical leave from his job, and moved back in with his parents because "he was truly shocked by this sort of shame and realization of how this had sort of unfolded step by step from being in a ESPN chat room to talking to the FBI about having prepubescent girls." (TR 394–95). She indicated that a psychosexual evaluation showed only a moderate sexual interest in adolescent girls and no interest at all in prepubescent girls. (TR 395). Ms. von Dornum stated that his initial guidelines' calculation yielded a range of 97 to 121 months, with a mandatory minimum of five years. (TR 395). After negotiating with the government, Ms. von Dornum explained that they agreed he posed "absolutely no risk to children" and dropped the mandatory minimum count. (TR 396). She stated that the government "offered a plea agreement to possession alone, with a stipulated range of 46 to 57 months, half of what had been originally called for." (TR 396). Ms. von Dornum stated that after taking into consideration the circumstances of the case, the judge sentenced him to five years of probation with no jail time at all, and she noted that five years later, he has not had a single violation. (TR 396–97).

Ms. von Dornum suggested that had her client been placed in federal prison, "then his community would have become contact sex offenders" and he would have been completely isolated from his family, with "no hope probably of getting employed once he got out," and "his depression likely would have turned him into a far more dangerous person than he was to start with." (TR 397). She asserted that in the Bureau of Prisons, "child pornography offenders and contact offenders are not separated." (TR 397). Ms. von Dornum argued that there is "very limited treatment" in prison and "everyone is lumped together, the child rapists in with the child pornography possessors." (TR 397–98). She suggested that "this shows that the guideline, as written, does not capture these people who are the majority of the offenders, and that the Judiciary and the Department of Justice are being forced to come up with these creative solutions." (TR 398).

Ms. von Dornum asserted that the base offense levels for receipt and possession start out too high and that a distinction needs to be made "between the passive distribution, the file sharing, versus an active dissemination of images." (TR 398). She believed that the enhancements are "from an era either before computers or are ones that just bear no correlation to actual dangerousness." Additionally, Ms. von Dornum stated that the position that if an offender has a lot of images, they are more dangerous "has a superficial appeal, it sounds worse to have a lot of images, but if you picture a single file sharing where suddenly you have 10,000 images, you have no idea what's in there, there's not any proven correlation between number of images and dangerousness." (TR 399). Furthermore, Ms. von Dornum asserted that the nature of image enhancements "are very problematic because they impose this strict liability framework where there doesn't even have to be a showing that the person knew he had sadistic or masochistic image[s], or an image of a child under 12." (TR 399). She believed that "this has to be modified so that it cannot be applied unless someone actually accesses the image and knew he had it, and even better whether they sought it out, which would seem to be a greater indicator of dangerousness than simply receiving it." (TR 399–400).

Ms. von Dornum added that she believed there are ways that actually more dangerous offenders could be identified. (TR 400). She suggested that "people who view live webcam images of sex abuse, people who order custom-made pornography from producers, people who are involved in

this for financial reasons, a person who first introduces an image to a wider market," are the people who are really having a direct impact on the victims. (TR 400). Ms. von Dornum posited that "it's not that possession of child pornography is not harmful, but it is the people who are introducing new images and creating those images who are really directly impacting those victims." (TR 400). She asked the Commission to "seriously consider setting base offense levels for this mine-run population at a level that permits probation and closely tailoring the aggravators, the specific offense enhancements, to conduct and role, as opposed to the sort of forensic analysis of what's on the computer." (TR 400–01).