

Chapter 6

ANALYSIS OF SENTENCING DATA IN CASES IN WHICH OFFENDERS WERE SENTENCED UNDER THE NON-PRODUCTION SENTENCING GUIDELINES

A. INTRODUCTION

This chapter examines data concerning sentencing trends, offense conduct, and offender characteristics in child pornography cases in which offenders were sentenced under the non-production sentencing guidelines, USSG §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), during the past two decades.¹ The data in this chapter primarily are derived from two separate sources: (1) the Commission's regular annual datafiles of non-production offenses for fiscal years 1992 through 2010;² and (2) the Commission's special coding project of virtually all cases in which offenders were sentenced under the non-production guidelines in fiscal years 1999, 2000, and 2010, and cases from the first quarter of fiscal year 2012. Relevant data in the Commission's regular datafiles include basic demographics, criminal history, guideline applications, sentences imposed, application of specific offense characteristics, and sentences relative to the guideline range. Data in the special coding project supplement the annual datasets with more detailed information on offense conduct and offender characteristics. The first part of this chapter will discuss data from the Commission's annual datafiles, and the remainder of the chapter will discuss data from the Commission's special coding project.³ Although the data analyzed in the first part of this chapter generally end with fiscal year 2010 cases — so as to allow a comparison to the Commission's special coding project of fiscal year

¹ Cases in which offenders were sentenced under the production guideline (USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)) are addressed separately in Chapter 9.

² The Commission selected fiscal year 1992 as the starting point for data analysis because the offense of possession was created by Congress in 1990 and the corresponding sentencing guideline went into effect in 1991. *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 17-18 (Oct. 2009). In view of delays involved in the prosecution and sentencing of defendants under a new penal statute and guideline, the Commission relied on sentencing data beginning in fiscal year 1992. In accordance with 28 U.S.C. §§ 994(w)(1) & 995(a)(12)-(15), the Commission routinely collects, analyzes and disseminates data concerning the sentencing process from sentencing documents submitted by district courts to the Commission.

³ With respect to fiscal year 2010 cases, the data analyses in the first part of this chapter (based on the Commission's regular annual datafiles) concern 1,717 cases of offenders sentenced under the non-production guidelines, while the data analyses in the second part of this chapter (based on the Commission's special coding project) concern 1,654 of those cases. The difference in the two sets of cases relates to the fact that the Commission's special coding project excluded both cases with certain types of insufficient documentation and also cases sentenced under versions of the non-production guidelines applicable to offenses committed before November 1, 2004. *See infra* note 52.

2010 cases discussed in the second half of the chapter — occasionally fiscal year 2011 data from the Commission’s regular annual datafile will be noted where significant changes occurred.

With respect to data from the Commission’s annual datafiles, the following analysis divides cases in which offenders were sentenced under the non-production guidelines into two primary offense types based on the manner in which the guidelines were applied: (1) receipt, transportation, and distribution offenses, as well as other similar but less common offenses (*e.g.*, importation) [hereafter collectively referred to as “R/T/D offenses”]; and (2) possession offenses.⁴ With respect to data from the special coding project, cases in which offenders were sentenced under the non-production guidelines are classified in greater detail based both on the most serious offense of conviction⁵ and on real offense conduct in the case.⁶

B. UNDERSTANDING THE DATA BASED ON THE CHANGING LEGAL LANDSCAPE FROM 1992 TO 2010

The data for child pornography offenses discussed in this chapter generally cover a lengthy time period (fiscal years 1992 to 2010). During that period, there were several significant changes in the legal landscape concerning constitutional law, relevant statutes, and the guidelines that affected sentencing in child pornography cases. Understanding those changes is necessary to properly interpret the data.

⁴ A case was deemed an R/T/D offense if an offender was sentenced under a version of USSG §2G2.2 in effect from November 1, 1992, through October 31, 2004, or sentenced pursuant to the current version of §2G2.2(a)(2) (which went into effect on November 1, 2004). A case was deemed a possession offense if an offender was sentenced under the former USSG §2G2.4 or the current version of §2G2.2(a)(1). (A very small number of possession cases were obscenity offenses involving images depicting minors, which were sentenced under the provisions governing possession offenses. *See infra* note 58.) Classification of offense type was thus based on guideline application rather than the statute of conviction in a case. Although the Commission’s annual datafiles contain information about the statutes of conviction, there are two reasons why classification of offense type is not based on offense of conviction for non-production cases contained in the Commission’s annual datafiles. First, with respect to offenders convicted of the offense of possession, the version of §2G2.4 in effect from 1992 until 2003 contained a cross-reference provision requiring courts to apply §2G2.2 to defendants convicted solely of possession but who, according to relevant conduct found by a sentencing court, actually received or distributed child pornography. *See* USSG §2G2.4(c)(2) (2003). Thus, the guideline application in such cases is a better indicator of an offender’s actual conduct than the statute of conviction. Second, receipt and distribution offenses appear disjunctively in the same statutory provision (*i.e.*, “receipt or distribution” in both 18 U.S.C. §§ 2252(a)(2) & 2252A(a)(2)), which makes it impossible to determine the precise offense of conviction based solely on the statute of conviction. The Commission’s annual datafiles thus do not contain complete information about the specific *offense* of conviction (only the *statute* of conviction) in such cases. As discussed below, the Commission’s special coding project examined indictments and judgments to determine the specific offense of conviction.

⁵ As discussed below, as part of its special coding project of fiscal year 2010 cases, the Commission examined the indictments and judgments in all USSG §2G2.2 cases to determine the most serious non-production offense of conviction. By “most serious” offense the Commission refers to the following offenses of conviction in order of gravity (from most serious to least serious): distribution; importation; transportation (including shipping and mailing); receipt; morphing; and possession. The determination of degree of gravity of offense was based both on the statutory penalty ranges for the offense types (both minimums and maximums) and whether the sentencing guidelines provide for enhanced (or reduced) offense levels based on the offense conduct. For a discussion of statutory ranges of punishment and guideline application relevant to this determination, *see* Chapter 2 at 22-32.

⁶ *See infra* notes 55–57 and accompanying text (discussing the manner in which the Commission coded fiscal year 2010 non-production cases for real offense conduct with respect to receipt and distribution).

Following the enactment of the Sentencing Reform Act of 1984,⁷ which resulted in the promulgation of mandatory sentencing guidelines in late 1987, the Supreme Court and Congress refined the federal sentencing system in ways that impacted sentencing generally and child pornography sentencing specifically. In 1996, the Supreme Court held in *Koon v. United States*⁸ that departure decisions by federal sentencing courts were due significant deference and that appellate courts should use an abuse of discretion standard in reviewing departures.⁹ *Koon* meant that district courts had greater discretion to depart from the sentencing guidelines than they did before the Supreme Court’s decision. While measuring the actual impact of *Koon* on the departure rates is difficult, the downward departure rates increased from 1996 to 2003, including in child pornography cases, which led to a perception that *Koon* was, at least in part, responsible.¹⁰

As discussed elsewhere in this report, Congress’s concern over downward departures — in particular, downward departures for child pornography and child sex offenders — was reflected in provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (“PROTECT Act”).¹¹ The PROTECT Act did several things to increase child pornography sentences and limit downward departures for child pornography offenders. In order to ensure increased sentences, the PROTECT Act increased statutory maximums and imposed new mandatory minimums for R/T/D offenders. It also directly amended the child pornography sentencing guidelines to add a new enhancement relating to the number of images collected by an offender and made possession offenders eligible for other enhancements. In order to discourage downward departures for child pornography offenders, the PROTECT Act changed the standard of review for departures to a *de novo* appellate review for all offenses (thus superseding *Koon*); explicitly limited downward departures for sex offenses (including child pornography offenses); and required greater explanation by a court when a downward departure was imposed.¹²

On January 12, 2005, in *Booker v. United States*,¹³ the Supreme Court rendered the guidelines “effectively advisory,”¹⁴ which had the effect of lifting the PROTECT Act’s restraints on sentences outside the guideline ranges in child pornography cases.¹⁵ Subsequent decisions by the Court further clarified both the sentencing courts’ discretion and appellate deference to below

⁷ Pub. L. No. 98–473, 98 Stat. 1837 (1984).

⁸ 518 U.S. 81 (1996).

⁹ *Id.* at 97-100.

¹⁰ See U.S. SENT’G COMM’N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 54-56 (2003).

¹¹ Pub. L. No. 108–21, 117 Stat. 650 (2003).

¹² See Chapter 1 at 4, 7–8; see also HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 38-48.

¹³ 543 U.S. 220 (2005).

¹⁴ *Id.* at 245.

¹⁵ See Chapter 1 at 7 & n.48 (discussing lower courts’ decisions concerning the effect of *Booker* on 28 U.S.C. § 3553(b)(2)(A)).

range sentences.¹⁶ Since *Booker*, sentencing courts have increasingly exercised their discretion to impose below range sentences for non-production child pornography offenses.¹⁷ As discussed in Chapter 8, some appellate courts have approved a district court’s categorical refusal to sentence in accordance with the child pornography guidelines based on a “policy” disagreement.¹⁸

In addition to statutory and case law developments between 1987 and the present, the child pornography guidelines themselves have gone through several iterations based on both the Commission’s own review and amendment process and also directives from Congress and other legislation regarding appropriate guideline penalties. These changes are comprehensively chronicled in the Commission’s 2009 publication, *History of the Child Pornography Guidelines*, but are briefly summarized in Tables 6–1 and 6–2. As reflected in Table 6–1, since 1992, the base offense levels have increased for both R/T/D offenses and possession offenses.¹⁹

**Table 6–1
INCREASES IN BASE OFFENSE LEVELS — NON-PRODUCTION GUIDELINES**

R/T/D Offenses 18 U.S.C. §§ 2252(a)(1)-(2), (b)(1) and 2252A(a)(1)-(2), and (b)(2).			Possession ²⁰ 18 U.S.C. §§ 2252(a)(4) , (b)(2) and 2252A(a)(5), (b)(2).		
1992	2000	Present	1992	2000	Present
2G2.2	2G2.2	2G2.2	2G2.4	2G2.4	2G2.2
15	17	22	13	15	18

Increases in the base offense levels have raised sentence ranges under the guidelines. In the guidelines’ Sentencing Table,²¹ depending on the exact offense level at issue, an increase of 2 levels typically raises the corresponding guideline minimum (*i.e.*, the bottom of the applicable sentencing range) approximately 20 to 30 percent, and an increase of 5 levels typically raises the corresponding guideline minimum approximately 70 to 80 percent. For example, assuming an

¹⁶ See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007) (holding that a district court has discretion to “vary” from the applicable guidelines range as a “policy” matter); *Gall v. United States*, 552 U.S. 38 (2007) (applying a deferential abuse of discretion standard on appeal concerning a district court’s decision to “vary” from the applicable guideline range based on the characteristics of the offender and circumstances of the offense); see also Chapter 1 at 9.

¹⁷ See Chapter 1 at 9–10.

¹⁸ See, e.g., *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); but see *United States v. Miller*, 665 F.3d 114 (5th Cir. 2011); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008); see generally Chapter 8 at 238–41.

¹⁹ Although Tables 6-1 and 6-2 make reference to the “present” version of the non-production guideline, that version, for all practical purposes, went into effect on November 1, 2004. See Chapter 1 at 2 & n.11.

²⁰ Possession offenses were previously referenced to USSG §2G2.4. Following the PROTECT Act, because of the increased base offense level and the changes in the types of enhancements available, the Commission deleted §2G2.4 and referenced all offenders convicted of non-production offenses to USSG §2G2.2. See Chapter 1 at 2 n.13.

²¹ See USSG, Ch. 5, Part A - Sentencing Table. The Sentencing Table is reproduced at the end of this report in Appendix B.

offender who is in Criminal History Category I,²² an increase from offense level 15 to offense level 17 raises the corresponding guideline minimum from 18 months to 24 months (a 33% increase), and an increase from offense level 17 to offense level 22 raises the corresponding guideline minimum from 24 months to 41 months (71%).

Not only have base offense levels increased during past two decades, new specific offense characteristics for non-production offenders have been added to increase guideline penalties. As reflected in Table 6–2 below, the specific offense characteristics applicable to both R/T/D and possession offenses have grown in number. In 1992, R/T/D offenders were eligible to receive enhancements for three specific offense characteristics, while possession offenders were eligible to receive enhancements for two specific offense characteristics. Over the years, the non-production guidelines were amended at various points to add new enhancements. By 2004, when §2G2.4 was merged with §2G2.2 and the new guideline encompassed all types of non-production offenses, both R/T/D offenders and possession offenders became eligible for enhancements based on six specific offense characteristics.²³ As a consequence, the corresponding guideline ranges for typical non-production offenders have increased substantially.²⁴

Table 6–2
INCREASE IN SPECIFIC OFFENSE CHARACTERISTICS —
NON-PRODUCTION GUIDELINES

SOCs ²⁵	Impact ²⁶	R/T/D Offenses		Possession	
		Effective Date	End Date	Effective Date	End Date
Pre-Pubescent Minor	+2	1987	Present	1991	Present
Distribution	+2 to +7	1987	Present	2004	Present
S&M	+4	1990	Present	2004	Present
Pattern of Activity	+5	1991	Present	2004	Present
Use of Computer	+2	1996	Present	1996	Present
At Least 10 Images	+2	N/A	N/A	1991	2004
Image Table	+2 to +5	2003	Present	2004	Present

²² The typical child pornography offender is in Criminal History Category I. See Figure 6-13, *infra*.

²³ See HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 41-49.

²⁴ See Chapter 8 at 210–12 (discussing increases in typical guideline sentencing ranges during the past decade).

²⁵ The various specific offense characteristics are discussed *infra* at 137–41.

²⁶ The impact and application of some specific offense characteristics have changed since the start date, such as the distribution enhancement. See HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 1-54. The information provided in this table concerns the current enhancements' impacts or a particular enhancement's impact as of its end date.

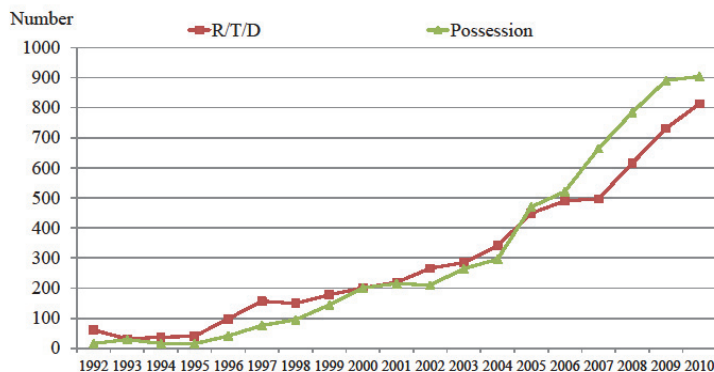
C. NON-PRODUCTION SENTENCING DATA DERIVED FROM THE COMMISSION'S ANNUAL DATAFILES

1. Introduction

The data analysis in this section relies primarily on the Commission's datafiles for non-production child pornography cases from fiscal years 1992 through 2010.²⁷ As shown below (in Figure 6–4, *infra*), average sentences for offenders sentenced under the non-production guidelines have increased significantly during those two decades — from an average sentence of 18 months in fiscal year 1992 to an average of 129 months in fiscal year 2010 for R/T/D offenders, and an average sentence of 11 months in fiscal year 1992 to an average of 63 months in fiscal year 2010 for possession offenders — although they have leveled off in recent years. While offenders' demographic characteristics have remained relatively stable, changes in the nature of offense conduct (*e.g.*, increased use of computers), corresponding sentencing enhancements, and increases in statutory penalty ranges have together contributed to higher average guideline ranges and substantially longer average sentences. Since the guidelines became advisory in 2005, the rate of within range sentences in non-production cases has steadily decreased, although average sentence lengths in fiscal year 2010 were significantly longer than in the pre-*Booker* period (as reflected in Figures 6–7 and 6–8, *infra*).

The number of cases in which offenders have been sentenced under the non-production guidelines has grown substantially both in total numbers and as a percentage of the total federal case load. As reflected in Figure 6–1, in fiscal year 1992, there were 61 R/T/D cases, which increased to 813 cases in fiscal year 2010. In fiscal year 1992, there were 16 possession cases, which increased to 904 cases in fiscal year 2010. In fiscal year 1992, non-production cases accounted for 0.2 percent of the 36,498 total federal criminal cases. By fiscal year 2010, such cases accounted for 2.0 percent of all 83,946 federal criminal cases.

**Figure 6-1
Non-Production Cases
Fiscal Years 1992-2010**

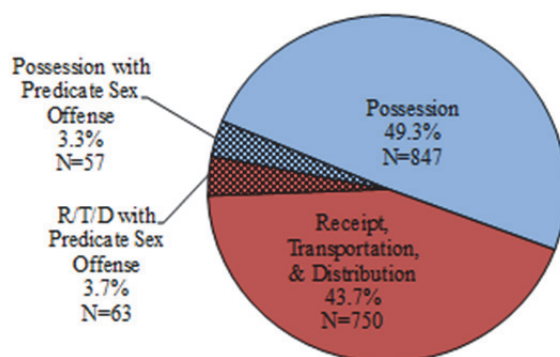


SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

²⁷ As discussed in Chapter 7, some offenders sentenced under the non-production guidelines were convicted of both production and non-production child pornography offenses. In such cases, the current non-production guideline (the version of USSG §2G2.2 in effect for offenses on or after November 1, 2004) yielded a higher penalty range for the non-production offense than the guideline range resulting from application of the production guideline (USSG §2G2.1). In such cases, an offender's case was deemed a "non-production" case for purposes of the Commission's data analysis because §2G2.2 was the "primary guideline" in the case. See Chapter 7 at 176 n.31.

Figure 6–2 below depicts the percentages of the two main categories of non-production child pornography cases in fiscal year 2010 (possession and R/T/D cases) as total percentages of the overall non-production caseload and also shows those offenders in each category who had predicate convictions for sex offenses.²⁸ Of all non-production offenders, 52.6 percent were convicted solely of possession, while 47.4 percent were convicted of R/T/D offenses. Possession cases in which offenders did not have predicate convictions for sex offenses were 49.3 percent of cases, while R/T/D cases in which offenders did not have predicate convictions were 43.7 percent of cases. The remaining cases, which are represented in the shaded portions of Figure 6–2, involved offenders whose sentences were enhanced based on predicate sex convictions. They constituted less than one-tenth of all non-production cases in fiscal year 2010.

Figure 6-2
Non-Production Offense Types (N=1,717)
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Non-production child pornography cases were prosecuted in every circuit and district, but the number of cases in each circuit and district varied substantially. Table 6–3 below displays non-production cases by circuit. Of the 1,717 cases in fiscal year 2010, 333 (19.4%) were from districts within the Ninth Circuit; 215 (12.5%) were from districts within the Eighth Circuit, 191 (11.1%) were from districts within the Eleventh Circuit; and 188 (10.9%) were from districts within the Sixth Circuit. Thus, 927 (54.0%) of the 1,717 non-production cases were from districts within those four circuits.

²⁸ As discussed in Chapter 2, offenders with predicate convictions for sex offenses face substantially higher penalties than offenders without such predicate convictions. See Chapter 2 at 25–26.

Table 6-3
Frequency of §2G2.2 Child Pornography Cases by Circuit
Fiscal Year 2010

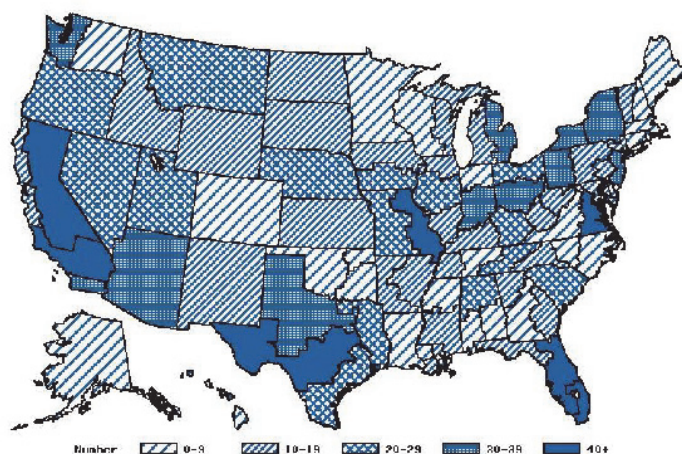
	Total		R/T/D		Possession	
	N	%	N	%	N	%
D.C.	13	0.8	9	1.1	4	0.4
First	23	1.3	11	1.4	12	1.3
Second	124	7.2	58	7.1	66	7.3
Third	107	6.2	36	4.4	71	7.9
Fourth	149	8.7	77	9.5	72	8.0
Fifth	178	10.4	72	8.9	106	11.7
Sixth	188	10.9	111	13.7	77	8.5
Seventh	113	6.6	71	8.7	42	4.7
Eighth	215	12.5	104	12.8	111	12.3
Ninth	333	19.4	123	15.1	210	23.2
Tenth	83	4.8	22	2.7	61	6.8
Eleventh	191	11.1	119	14.6	72	8.0

This table excludes cases missing information for the variables required for analysis.

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

With respect to the 94 districts, non-production cases occurred most frequently in the Eastern District of Missouri (72, 3.7% of all such cases), the Central District of California (70, 3.6%), the Middle District of Florida (60, 3.1%), the Eastern District of Virginia (54, 2.8%), the Western District of Texas (49, 2.5%), the Southern District of Florida (45, 2.3%), and the Eastern District of California (41, 2.1%). Those seven districts accounted for 20.3 percent of all non-production cases in 2010. Figure 6–3 depicts the distribution of non-production cases in all 94 federal judicial districts.

Figure 6-3
Frequency of Non-Production Offenses by District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

2. Sentence Length Data

a. Probationary Sentences

For all non-production offenses committed before April 30, 2003, the effective date of the PROTECT Act, offenders who did not have a predicate conviction for a sex offense were statutorily eligible for probation. Such offenders did not face a mandatory minimum term of imprisonment and, in addition, the statutory classes of their offenses did not preclude probation under 18 U.S.C. § 3561(a)(1).²⁹ For offenses committed after the PROTECT Act, however, only those offenders convicted solely of possession remain statutorily eligible for probation (and only if they have no predicate convictions for a sex offense).³⁰ Possession offenders with predicate convictions and all offenders convicted of R/T/D offenses or production offenses are ineligible for probation because they face mandatory minimum terms of imprisonment.³¹

²⁹ Under 18 U.S.C. § 3561(a)(1), in cases where there is no mandatory minimum term of imprisonment, only defendants convicted of Class A or B felony offenses are ineligible for probation. Before the PROTECT Act, possession offenses had a statutory maximum of five years of imprisonment, while receipt, transportation, and distribution (R/T/D) offenses had a statutory maximum of 15 years of imprisonment. See Chapter 1 at 4 & n.26. Based on those maximum penalties, possession was a Class D felony, and R/T/D offenses were Class C felonies. See 18 U.S.C. § 3559(a). Such offenses thus were eligible for probation.

³⁰ After the PROTECT Act, offenders convicted of possession who have no predicate convictions for a sex offense are eligible for probation because their offense is a Class C felony. See 18 U.S.C. §§ 3559(a)(3) & 3561(a)(1).

³¹ See Chapter 2 at 25–26.

Under the sentencing guidelines in effect before the enactment of the PROTECT Act, probationary sentences were generally unavailable for the vast majority of child pornography offenders — even those who were statutorily eligible for probation — because the guidelines, which were then mandatory, prohibited probation absent a downward departure. In particular, subsection (a) of USSG §5B1.1 (Imposition of a Term of Probation) prohibited probation unless an offender’s sentencing range fell within Zones A or B of the guidelines’ Sentencing Table. Even with generally lower sentencing ranges for offenders convicted of non-production offenses in the pre-PROTECT Act era,³² such offenders’ sentencing ranges fell within Zone C or D.³³ Thus, those offenders given probation in the pre-PROTECT Act era received it as a result of a court’s downward departure to Zone A or B. In fiscal year 2002, the last full fiscal year before the PROTECT Act, 8.8 percent of all non-production offenders (42 of 476 cases) received probation.

In fiscal year 2010, nearly all offenders convicted of a non-production offense (1,688 of 1,715 or 98.4%)³⁴ were sentenced to a term of imprisonment. Only 27 (1.6%) were sentenced to probation, including either straight probation or probation with a condition of home or community confinement. Those 27 probationary sentences were spread throughout the country, in 17 different districts, and were imposed by 25 different district judges.

Of the 27 §2G2.2 offenders who received probation in fiscal year 2010, all were convicted only of possession, which did not carry a mandatory minimum term of imprisonment. All but one offender were in Criminal History Category I,³⁵ and none had a predicate conviction for a sex offense. All received downward departures or variances from their guideline ranges.

b. Sentences of Imprisonment

Since 1992, on a consistent basis, average sentences of imprisonment for offenders convicted of R/T/D offenses (“R/T/D offenders”) have been longer than average sentences for offenders convicted only of possession (“possession offenders”), which reflects the different statutory and guideline provisions governing these offenses.³⁶ Average sentences for both types of offenders have risen significantly since the PROTECT Act of 2003, in response to the

³² See Chapter 8 at 211–12.

³³ Prior to the PROTECT Act, the least severe base offense level in effect for non-production cases was 13 (applicable to possession offenders until the 2000 amendment to the possession guideline raised it to 15), see Table 6-1, *supra*, and the least severe final offense level was 11, assuming a 2-level reduction for acceptance of responsibility pursuant to subsection (a) at USSG §3E1.1 (Acceptance of Responsibility) and no enhancements based on application of the specific offense characteristics. Such an offender would not have been eligible for probation absent a downward departure. See USSG, Ch. 5, Part A - Sentencing Table (2002) (showing that an offender in Criminal History Category of I with final offense level of 11 was in Zone C, which precluded probation). In 2010, the Sentencing Table was amended so as to increase Zone B one level upward (*i.e.*, to offense level 11).

³⁴ Two of the 1,717 cases were missing sentence disposition information and thus were excluded from this analysis.

³⁵ One offender was in Criminal History Category III.

³⁶ See Chapter 2 at 25–27, 31–32.

enactment of new mandatory minimum sentences, increased statutory maximum sentences, and increases in guideline penalties (as reflected in Tables 6–1 and 6–2, *supra*).³⁷

The proportion of both R/T/D and possession offenders receiving prison only sentences steadily increased from fiscal years 1992 through 2010, as shown in Table 6–4.

Table 6–4
Type of Sentence Imposed on R/T/D and Possession Offenders
Fiscal Years 1992, 2004, and 2010

	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	61	100.0	341	100.0	813	100.0	16	100.0	295	100.0	902	100.0
Prison Only	37	60.7	331	97.1	812	99.9	6	37.5	276	93.6	863	95.7
Prison/ Community Split	4	6.6	1	0.3	1	0.1	0	0.0	8	2.7	12	1.3
Probation and Confinement	12	19.7	3	0.9	0	0.0	9	56.3	7	2.4	11	1.2
Probation Only	8	13.1	6	1.8	0	0.0	1	6.3	4	1.4	16	1.8

This table excludes cases missing information for the variables required for analysis. Percentages may not sum to 100.0% due to rounding. As shown here, a “split” sentence is a sentence in Zones B or C of the Sentencing Table of the *Guidelines Manual*, whereby a court substitutes community or home detention (as a condition of supervised release) for a portion of the term of imprisonment
SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

In fiscal year 2010, 99.99 percent (812 of 813) of R/T/D offenders received a prison only sentence and 0.01 percent (1 of 813) received a split sentence of prison and some other type of confinement. In fiscal year 2010, 95.7 percent (863 of 902) of possession offenders received a prison only sentence; 1.3 percent (12 of 902) received split sentence of imprisonment and some other type of confinement;³⁸ 1.2 percent (11 of 902) received probation with the condition of some period of community confinement; and 1.8 percent (16 of 902) received a probation only sentence. The proportion of offenders convicted of non-production offenses who received prison only sentences exceeded the overall average for all federal offenses in fiscal year 2010. For all

³⁷ See Chapter 1 at 4, 7–8.

³⁸ A “split sentence” is a sentence in Zone B or C of the Sentencing Table of the *Guidelines Manual*, whereby a court substitutes community or home detention (as a condition of supervised release) for a portion of the term of imprisonment that the court could otherwise impose. See USSG §5C1.1 (Imposition of a Term of Imprisonment); see also USSG §5D1.1 (Imposition of a Term of Supervised Release), comment. (n.4).

federal offenses in fiscal year 2010, the prison only rate was 87.4 percent, followed by probation only (7.3%), probation with a condition of some form of community confinement (2.8%), and a split sentence of imprisonment coupled with some form of community confinement (2.5%).

In general, as reflected in Figure 6–4 below, the average length of imprisonment increased substantially for both R/T/D and possession offenders during the past two decades. For R/T/D offenders, the average prison sentence rose from 18 months in fiscal year 1992, to 71 months in fiscal year 2004, and to 129 months in fiscal year 2010. For possession offenders, the average prison sentence rose from 11 months in fiscal year 1992, to 34 months in fiscal year 2004, and to 63 months in fiscal year 2010. Both types of offenders’ average prison sentences were higher than the average prison sentence for all federal offenders in fiscal year 2010; the overall average length of imprisonment for all federal offenders was 53.9 months.³⁹

**Figure 6-4
Non-Production Sentences Over Time
Fiscal Years 1992-2010**

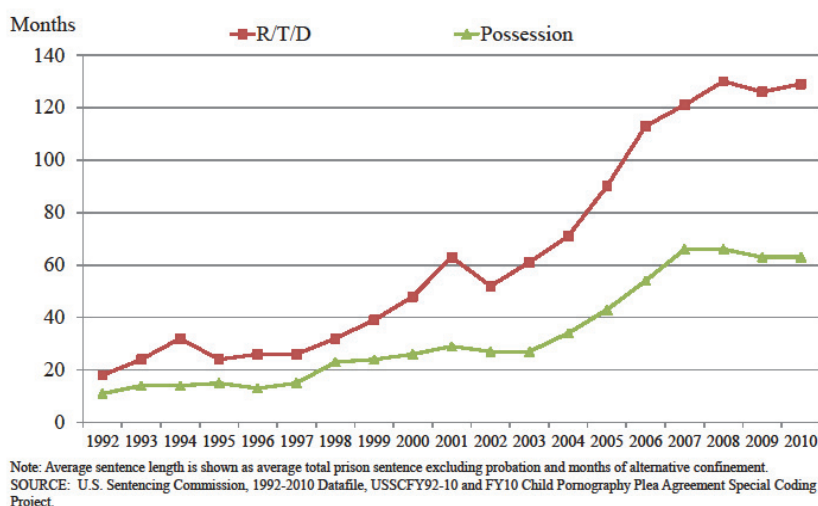


Table 6–5 below displays §2G2.2 sentences within and outside the guideline range using a format that allows comparison pre- and post-*Booker*, and displays within range sentences, below range sentences based on a government-sponsored motion for departure pursuant to USSG §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), all other government and non-government sponsored below range sentences, and above range sentences. In fiscal year 1992, the within range rate for R/T/D offenders was 58.0 percent; it rose to 82.5 percent by fiscal year 2004, before decreasing to 40.1 percent in fiscal year 2010. For possession offenders, 86.7 percent (13 of 15 offenders) received within range sentences in fiscal year 1992; the percentage of within range sentences thereafter fluctuated during the next decade or so but generally

³⁹ See U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30 (2010) (Table 14). “Average length of imprisonment” above refers to only cases in which some amount of imprisonment was imposed. Cases in which sentences of probation were imposed were excluded. See *id.* at 30 n.1.

remained well above 50 percent of cases. The within range rate for possession offenders decreased during post-*Booker* period to 39.5 percent by fiscal year 2010. Substantial assistance departures (§5K1.1) have been rare for all child pornography offenders. In fiscal year 2010, such departures occurred in 34 of 791 (4.3%) of R/T/D cases and in 17 of 886 (1.9%) of possession cases. Above range sentences have fluctuated but, like substantial assistance departures, have constituted a relatively small percentage of cases. In fiscal year 2010, above range sentences were imposed in 12 of 791 (1.5%) R/T/D cases and in 22 of 886 (2.5%) possession cases.

Table 6–5
Sentences Relative to the Guideline Range for R/T/D and Possession Offenders
Fiscal Years 1992, 2004, and 2010

	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	50	100.0	314	100.0	791	100.0	15	100.0	269	100.0	886	100.0
Within Range	29	58.0	259	82.5	317	40.1	13	86.7	221	82.2	350	39.5
Above Range	1	2.0	13	4.1	12	1.5	0	0.0	10	3.7	22	2.5
§5K1.1 Substantial Assistance	2	4.0	7	2.2	34	4.3	0	0.0	8	3.0	17	1.9
Other Below Range	18	36.0	35	11.1	428	54.1	2	13.3	30	11.2	497	56.1

Note: Only cases with complete guideline application information are included in this analysis. Above Range includes upward departures and variances, if applicable. Other Below Range includes downward departures and variances, less Substantial Assistance departures.
SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

The within range rate for all non-production offenses (40.0%) in fiscal year 2010 was lower than the within range for all federal offenses that year (55.0%). Similarly, the government sponsored and non-government sponsored below range rates (excluding substantial assistance departures) for non-production offenses (55%) was higher than these combined below range rates for all federal offenses (33.0%) in fiscal year 2010.

Figures 6–5 and 6–6 display sentences relative to the applicable guideline ranges during the period of 2005 through 2010. This period is displayed separately because, beginning in fiscal year 2005, the Commission changed its methodology in collecting information on sentence length relative to the applicable guideline range in response to *Booker*.⁴⁰ This change allows the below range sentences displayed in Table 6–5 to be divided between government sponsored below range sentences

(other than for an offender’s substantial assistance to the authorities pursuant to §5K1.1) and non-government sponsored below range sentences. Both government sponsored and non-government sponsored below range sentences increased after *Booker* for offenders sentenced under the non-production guidelines. As shown in Figure 6–5, in fiscal year 2005, 4.3 percent of R/T/D offenders received a government sponsored below range sentence (other than for substantial assistance under §5K1.1), and 15.3 percent received a non-government sponsored below range sentence.

Figure 6-5
Within Range and Out of Range Sentences: R/T/D Offenses
Fiscal Years 2005-2010

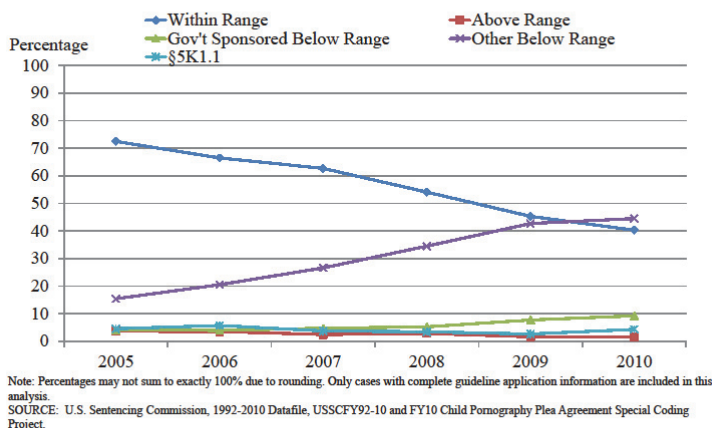
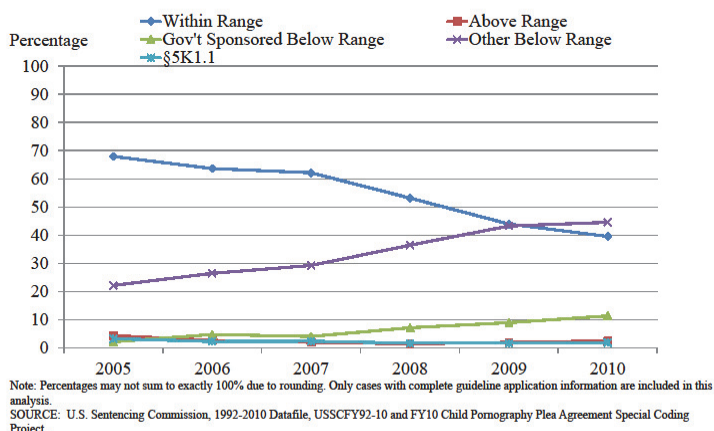


Figure 6-6
Within Range and Out of Range Sentences: Possession Offenses
Fiscal Years 2005-2010



percent received a government sponsored below range sentence (other than for an offender’s substantial assistance), and 22.7 percent received a non-government sponsored below range sentence. By fiscal year 2010, the number had increased to 11.2 percent for government sponsored below range sentences (other than for an offender’s substantial assistance) and 44.9 percent for non-government sponsored below range sentences.

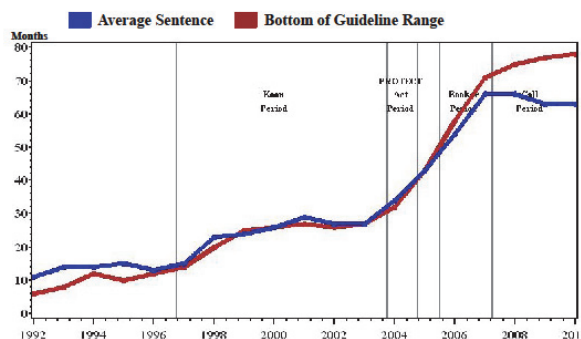
⁴⁰ This change took effect for cases in which offenders were sentenced on or after January 12, 2005, the date of the *Booker* decision. As a result, fiscal year 2005 is reported as the partial year from January 12, 2005, through September 30, 2005.

In fiscal year 2011, the trends apparent in Figures 6–5 and 6–6 continued. R/T/D offenders received within range sentences in only 38.3 percent of cases (down from 40.1% in fiscal year 2010). The rate of non-government sponsored below range sentences in such cases increased to 45.4 percent of cases (from 44.6% of cases in fiscal year 2010), and the rate of government sponsored below range sentences (other than for an offender’s substantial assistance) increased to 11.5 percent (from 9.5% in fiscal year 2010). Possession offenders received within range sentences in only 27.3 percent of cases in fiscal year 2011 (down from 39.5 in fiscal year 2010). The rate of non-government sponsored below range sentences in such cases increased to 51.3 percent of cases (from 44.9% of cases in fiscal year 2010), and the rate of government sponsored below range sentences (other than for an offender’s substantial assistance) increased to 17.6 percent of cases (from 11.2% of cases in fiscal year 2010).

Figures 6–7 and 6–8 display the average sentence length and the average bottom of the guideline range (*i.e.*, guideline minimum) for the two categories of non-production offenses.

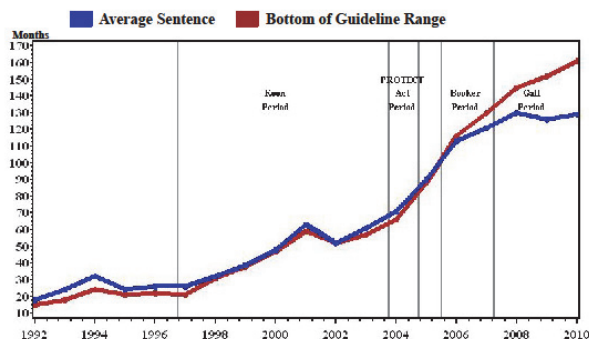
Those two figures represent *all* cases in each category (*i.e.*, both those that received within range sentences and those that received sentences below or above the applicable ranges). Indicated on the figures are key periods discussed above: the post-*Koon* period; the PROTECT Act period; the post-*Booker* period; and the period after the Supreme Court’s decisions in *Gall* and *Kimbrough*. As the figures demonstrate, in possession cases, the average sentence remained quite close to the average guideline minimum before *Booker*. After *Booker*, average prison sentences leveled off for possession offenses, while average guideline minimums continued to increase as a result of the higher base offense levels and increased frequency with which enhancements applied (Figure 6–7). R/T/D offenses followed a pattern that is

Figure 6-7
Average Guideline Minimum and Sentence Imposed:
Possession Offenses
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 6-8
Average Guideline Minimum and Sentence Imposed:
R/T/D Offenses
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

generally similar to possession cases but with higher average guideline minimums and higher average sentences. Average sentences for R/T/D offenses tracked the average guideline minimums closely pre-*Booker* but diverged post-*Booker* as the average guideline minimums continued to rise to historically high levels (Figure 6–8). In summary, average guideline ranges and sentence lengths have increased substantially over the period fiscal years 1992 through 2010, although average sentence lengths stopped increasing after 2007 (following the Supreme Court’s decisions in *Gall* and *Kimbrough*).

Unlike the *rate* of downward departures and variances, which has steadily increased in non-production cases since *Booker*, the average *extent* of downward departures and variances — as expressed in the difference in percentage between the average guideline minimum and average sentence imposed in cases receiving below-range sentences — has remained basically stable in non-production cases each year since *Booker*. In fiscal year 2010, in R/T/D cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 35.8 percent (or an average reduction of 63 months); the average extent of government sponsored downward departures and variances (other than for an offender’s substantial assistance) was 32.5 percent (or an average reduction of 54 months). In possession cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 43.0 percent (or an average reduction of 32 months); and the average extent of government sponsored downward departures and variances (other than for an offender’s substantial assistance) was 49.5 percent (or an average reduction of 42 months). Similar differences in percentage between the average guideline minimum and average sentence imposed occurred annually each year from fiscal year 2005 until fiscal year 2010 in non-production cases in which a below range sentence was imposed.

3. Comparative Proportionality Analysis: Other Federal Sex Offenses

As discussed in Chapter 1, critics of the current non-production penalty scheme contend that sentences for typical §2G2.2 offenders are disproportionately severe compared to sentences for typical offenders who engaged in sexual “contact” offenses with real-time victims (including minor victims).⁴¹ Table 6–6 below compares mean guideline minimums and mean sentence lengths for §2G2.2 cases (possession and R/T/D cases considered together) with mean guideline minimums and sentence lengths for a variety of other federal sex offenses. Table 6–7 below compares the rates of sentences imposed within and outside guideline ranges for the same offense types. Data concerning §2G2.2 cases appear in bold in the two tables to facilitate comparison to data concerning the other sex offense types. Case types in the two tables appear in descending order from offense types with the highest mean guideline minimum to offense types with the lowest mean guideline minimum.

As Table 6–6 shows, the mean guideline minimum for §2G2.2 cases is lower than the mean guideline minimums for six other sex offense types but higher than the mean guideline minimum for four other sex offense types, including three with minor victims, *i.e.*, (1) traveling to engage in sexual contact with a minor 12 years old or older (USSG §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor); Transportation of Minors to

⁴¹ See Chapter 1 at 13.

Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor);⁴² (2) abusive sexual contact with a minor (*e.g.*, sexual fondling) (§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact)); and (3) statutory rape of a minor under 16 years of age (§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts)).

The Commission includes this data to permit a comparative proportionality analysis but cautions that general comparisons of §2G2.2 cases with other types of federal sex offenses are problematic because of the wide variety of offense behavior and other variables affecting guideline application and sentence lengths in these types of cases.

Table 6-6
Sex Offenses: Prison Sentences
Fiscal Year 2010

Primary Guideline	Mean Guideline Minimum (in months)	Mean Prison Sentence (in months)
§2G2.1, Production Child Pornography Offenses (N=200)	281	270
§2A3.1, Criminal Sexual Abuse (<i>i.e.</i> , forcible rape/sexual assault of minor younger than age 12) (N=27)	252	230
§2G1.3, Travel to Engage in Sexual Contact w/ Pre-Pubescent Minor (Minor younger than age 12) (N=21)	222	187
§2A3.1, Criminal Sexual Abuse (<i>i.e.</i> , forcible rape/sexual assault of minor age 12 or older) (N=10)	176	173
§2G1.3, Child Prostitution Offenses (N=34)	171	155
§2A3.1, Criminal Sexual Abuse (<i>i.e.</i> , forcible rape/sexual assault of adult) (N=39)	146	148
§2G2.2, Non-Production Child Pornography Offenses (N=1,643)	118	95
§2G1.3, Travel to Engage in Sexual Contact w/ Minor (Minor age 12 or older) (N=147)	101	104
§2A3.4, Abusive Sexual Contact (Minor) (<i>e.g.</i> , fondling) (N=21)	44	46
§2A3.2, Criminal Sexual Abuse of a Minor (Statutory Rape) (N=47)	32	37
§2A3.4, Abusive Sexual Contact (Adult) (<i>e.g.</i> , fondling) (N=16)	15	19

Note: Cases with insufficient documentation were excluded from the analysis. Twenty-nine cases with non-prison sentences were excluded from the analysis. Twenty-four cases from USSG §2A3.1 and ten cases from USSG §2G1.3 were excluded due to missing information. Primary guideline categories are shown from highest to lowest average guideline range minimum sentence.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

⁴² USSG §2G1.3 covers other sex offense types (including child prostitution offenses and traveling to have sexual contact with minors under 12 years of age), which appear separately in Tables 6-6 and 6-7.

Table 6-7
Sex Offenses: Sentences Relative to the Guideline Range
Fiscal Year 2010

Primary Guideline	Within Range	Above Range	§5K1.1 Departure	Other Gov't Sponsored Below Range	Non-Gov't Sponsored Below Range
§2G2.1, Production Child Pornography Offenses (N=200)	56.5%	5.0%	3.5%	11.5%	23.5%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor younger than age 12) (N=27)	55.6%	3.7%	—	22.2%	18.5%
§2G1.3, Travel to Engage in Sexual Contact with a Pre-Pubescent Minor (age 12 or younger) (N=21)	42.9%	9.5%	4.8%	14.3%	28.6%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor age 12 or older) (N=10)	70.0%	—	—	10.0%	20.0%
§2G1.3, Child Prostitution Offenses (N=34)	50.0%	—	14.7%	14.7%	20.6%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of adult) (N=39)	59.0%	10.3%	2.6%	12.8%	15.4%
§2G2.2, Non-Production Child Pornography Offenses (N=1,669)	39.8%	1.9%	3.1%	10.4%	44.8%
§2G1.3, Travel to Engage in Sexual Contact with a Minor (age 12 or older) (N=147)	70.8%	6.8%	3.4%	5.4%	13.6%
§2A3.4, Abusive Sexual Contact (e.g., fondling a minor) (N=21)	71.4%	9.5%	—	9.5%	9.5%
§2A3.2, Criminal Sexual Abuse of a Minor (e.g., Statutory Rape) (N=47)	66.0%	8.5%	—	8.5%	17.0%
§2A3.4, Abusive Sexual Contact (e.g., fondling an adult) (N=16)	75.0%	—	—	12.5%	12.5%

Note: Cases with insufficient documentation were excluded from the analysis.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. Specific Offense Characteristics

As discussed in Part B of this chapter, *supra*, the sentencing guidelines relating to both R/T/D and possession offenses contain six separate enhancements for specific offense characteristics that can substantially increase the guideline range above the “starting points” discussed in Chapter 2.⁴³ When the two non-production guidelines (§§2G2.2 and 2G2.4) were merged following the PROTECT Act into a new version of §2G2.2 that applied to both R/T/D and possession offenses (effective November 1, 2004), all offenders sentenced under the new version of §2G2.2 faced six potential enhancements.⁴⁴ As reflected in Figures 6–7 and 6–8, *supra*, the increasing availability and application of enhancements over the past two decades have resulted in significantly higher average guideline ranges and average sentence lengths. The four figures that appear below in this section show the impact of the various enhancements over the past two decades.

a. Prepubescent Minors and Use of a Computer

Two enhancements have been available for both R/T/D and possession offenders during most or all of the past two decades. The enhancement for images depicting a prepubescent minor (presently §2G2.2(b)(2)), which results in a 2-level increase, has been available for R/T/D offenses since the inception of §2G2.2 in 1987 (when that guideline only applied to such offenses) and to possession offenses since the former possession guideline, §2G2.4, was promulgated in 1991. The enhancement for use of a computer (presently §2G2.2(b)(6)), which also results in a 2-level increase, was added to both §2G2.2 and §2G2.4 on November 1, 1996.

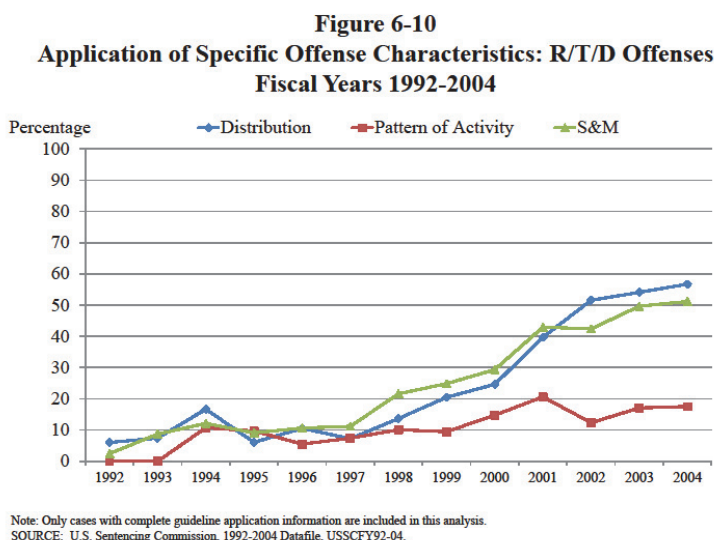
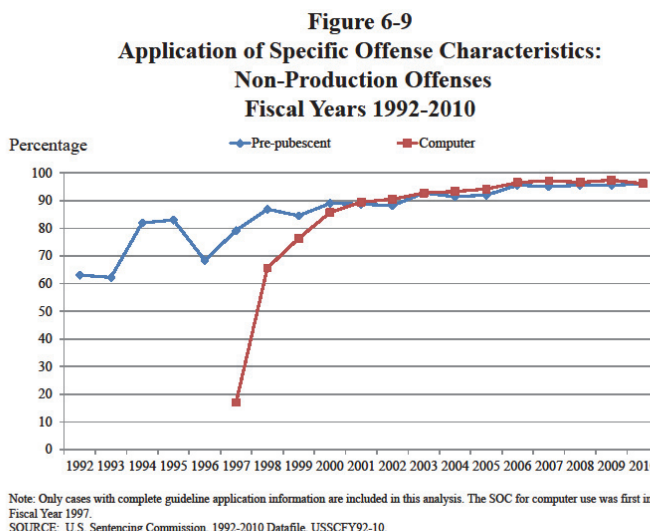
⁴³ See Chapter 2 at 32.

⁴⁴ See HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 48-49.

These two enhancements remained in §2G2.2 when it was amended on November 1, 2004, to apply to both R/T/D and possession cases. Figure 6–9 demonstrates the steady increase in the application rate of these two enhancements in the non-production guidelines (considered together in the figure) from fiscal year 1992 until fiscal year 2010. As shown in Figure 6–9, both of these enhancements now apply to virtually all non-production offenders.

b. Other §2G2.2 Enhancements Predating the PROTECT Act

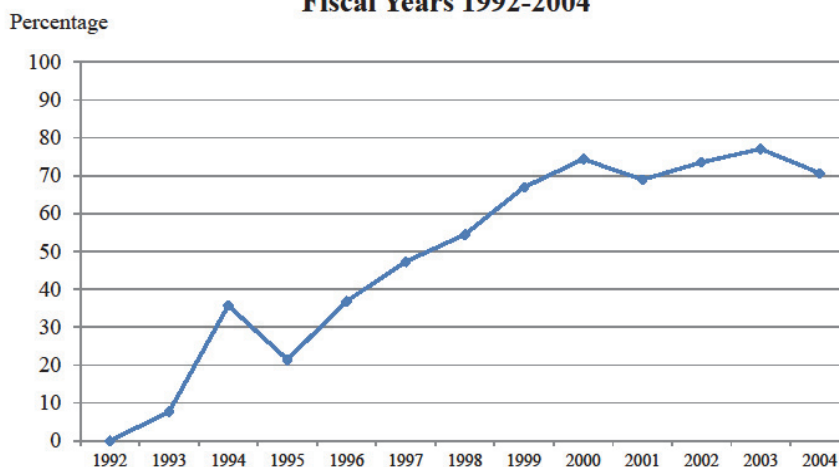
Three other enhancements were amended or added at different times before the PROTECT Act — distribution of child pornography (in the original 1987 guideline; presently §2G2.2(b)(3)), which results in incremental enhancements from 2 to 7 levels; images depicting sadistic or masochism conduct or other depictions of violence (added in 1990; presently §2G2.2(b)(4)), which results in a 4-level enhancement; and an offender’s “pattern of activity involving the sexual abuse or exploitation of a minor” (added in 1991; presently §2G2.2(b)(5)), which results in a 5-level increase. None of these three enhancements was in the former §2G2.4 and all remained in §2G2.2 after the PROTECT Act amendments. Figure 6–10 below demonstrates the steady increase in the application rate of these three enhancements from their inception until fiscal year 2004, when the current version of §2G2.2 was promulgated.



c. The “Old” Number-of-Images Enhancement in §2G2.4

The former §2G2.4, unlike the version of §2G2.2 in effect before the PROTECT Act, contained a 2-level enhancement for possession of at least ten images, books, magazines, videotapes, or “other items” containing child pornography. That enhancement was added in late November 1991, less than one month after the original version of the guideline was promulgated. Figure 6–11 below shows the application rate of this enhancement in §2G2.4 cases from fiscal year 1992 until fiscal year 2004.

Figure 6-11
Application of Specific Offense Characteristics
Number of Images: Possession Offenses
Fiscal Years 1992-2004



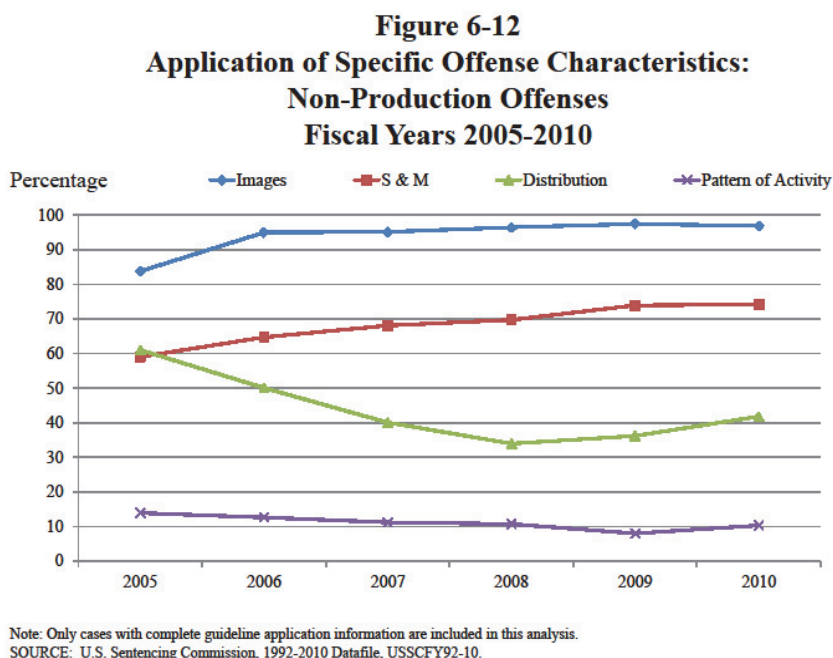
Note: Only cases with complete guideline application information are included in this analysis.
 SOURCE: U.S. Sentencing Commission, 1992-2004 Datafile, USSCFY92-04.

d. New Enhancements Added to §2G2.2 After the PROTECT Act

Effective November 1, 2004, §2G2.2 was amended in two ways: first, it applied to both R/T/D and possession offenders; and, second, a new “images table” was added that provided for incremental enhancements from 2 to 5 levels depending on the number of images possessed (presently §2G2.2(b)(7)). Figure 6–12 below shows the application rates of the images table enhancement as well as the previously existing three enhancements depicted in Figure 6–10 above (for distribution, sado-masochistic images, and a “pattern of activity”) during the post-2004 period.⁴⁵ The application rates of the other two enhancements in the “new” version of

⁴⁵ The noticeable drop in the distribution enhancement’s rate of application after fiscal year 2005 — from 60% in fiscal year 2005 to approximately 40% between fiscal years 2007 through 2010 — is a reflection of the fact that an increasing number of offenders convicted of possession after the PROTECT Act have been sentenced under the “new” version of USSG §2G2.2 (rather than under the former USSG §2G2.4). Although a significant percentage of offenders convicted of possession also distributed child pornography as well, that percentage is smaller than the percentage of offenders convicted of R/T/D offenses who distributed. See Figures 6–15 & 6–16, *infra*.

§2G2.2 from fiscal year 2005 until fiscal year 2010 — images depicting prepubescent minors and use of a computer — are depicted in Figure 6–9, *supra*.



Notably, in fiscal year 2010, 1,602 of 1,654 offenders (96.9%) received an enhancement pursuant to §2G2.2(b)(7) based on the number of images that they possessed, and 1,115 of the 1,602 (69.6%) received the maximum 5-level enhancement based on possession of 600 or more images.

5. Offender Characteristics

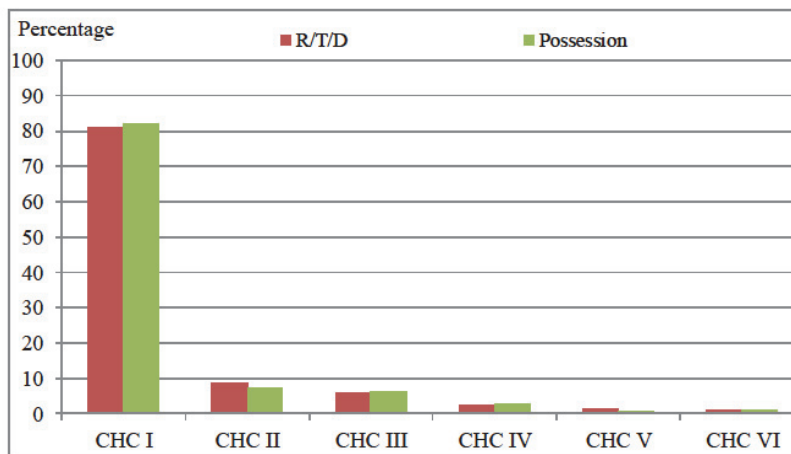
Data about offender characteristics in non-production cases are contained in Table 6–8 and Figure 6–13 below. Table 6–8 contains data about the demographic characteristics of non-production offenders over time, and Figure 6–13 shows the criminal histories of such offenders in fiscal year 2010. These data reflect a large degree of homogeneity among non-production offenders: the vast majority are white male United States citizens with little or no criminal history.

Table 6–8
Demographic Characteristics of Offenders Convicted of R/T/D and Possession Offenses
Fiscal Years 1992, 2004, and 2010

	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	57	93.4	314	92.1	710	87.6	14	87.5	270	91.2	810	89.9
Black	3	4.9	4	1.2	29	3.6	1	6.3	5	1.7	21	2.3
Hispanic	0	0.0	16	4.7	54	6.7	1	6.3	15	5.1	53	5.9
Other	1	1.6	7	2.1	18	2.2	0	0.0	6	2.0	17	1.9
Total	61	100.0	341	100.0	811	100.0	16	100.0	296	100.0	901	100.0
Citizenship												
U.S. Citizen	60	98.4	332	97.7	794	97.7	15	100.0	291	98.3	878	97.1
Non-Citizen	1	1.6	8	2.4	19	2.3	0	0.0	5	1.7	26	2.9
Total	61	100.0	340	100.0	813	100.0	15	100.0	296	100.0	904	100.0
Gender												
Male	59	96.7	336	98.5	808	99.4	16	100.0	295	99.7	899	99.5
Female	2	3.3	5	1.5	5	0.6	0	0.0	1	0.3	5	0.6
Total	61	100.0	341	100.0	813	100.0	16	100.0	296	100.0	904	100.0
Average Age												
		42		41		42		48		44		43

This table excludes cases missing information for the variables required for analysis. Percentages may not sum to 100.0% due to rounding.
 SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

Figure 6-13
Non-Production Offense Characteristics: Criminal History Category
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Section 2G2.2 offenders differ significantly from the general federal offender population with respect to race, gender, age, and criminal history. Nine out of ten §2G2.2 offenders (both possession and R/T/D offenders) in fiscal year 2010 were white males; by contrast, only 23 percent of the general federal offender population were white males.⁴⁶ Section 2G2.2 offenders also differ from the general federal population with respect to age and criminal history. The average age of all federal offenders in fiscal year 2010 was 35,⁴⁷ while the average age of R/T/D offenders was 42, and the average age of possession offenders was 43. The average age of all non-production offenders was 42. Offenders convicted of non-production offenses have less extensive criminal histories than the average federal offender. In fiscal year 2010, 81.1 percent of R/T/D offenders and 82.2 percent of possession offenders were in Criminal History Category I, as shown in Figure 6–13.⁴⁸ By contrast, 43.9 percent of all federal offenders were in Criminal History Category I, which applies to those offenders with the least serious criminal history.⁴⁹

⁴⁶ See U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 17 (2010) (Table 7).

⁴⁷ See *id.* at 16 (Table 6).

⁴⁸ From 1992 through 2010, the vast majority of non-production offenders have been in Criminal History Category I. For instance, in 1992, 92.0% were in Criminal History Category I; in 2000, 83.3% were in Criminal History Category I; in 2004, 82.9% were in Criminal History Category I; and in 2010, 82.0% were in Criminal History Category I.

⁴⁹ 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 46, at 46 (Table 21).

D. NON-PRODUCTION SENTENCING DATA DERIVED FROM THE COMMISSION'S SPECIAL CODING PROJECT

To provide a more complete profile of offense conduct and offender characteristics in cases in which offenders were sentenced under the non-production guidelines, the Commission undertook a comprehensive special coding project of non-production (§2G2.2) cases from fiscal year 2010. Reviewing the five sentencing documents sent to the Commission in each case by district courts pursuant to 28 U.S.C. § 994(w), the Commission coded and analyzed data concerning numerous personal characteristics of offenders and also aspects of their instant offense conduct and their prior criminal conduct. Those data are not contained in the Commission's regular annual datafiles of child pornography cases.⁵⁰

The Commission reviewed all 1,654 fiscal year 2010 non-production cases in which courts imposed sentences pursuant to §2G2.2 in *Guidelines Manuals* effective on or after November 1, 2004 (reflecting the PROTECT Act amendments),⁵¹ and for which courts submitted the requisite documents to the Commission pursuant to section 994(w).⁵² The Commission coded those 1,654 cases for numerous variables, including: (1) the most serious offense of conviction in each case; (2) whether an offender engaged in knowing distribution or receipt of child pornography; (3) the specific types of distribution and receipt conduct (*e.g.*, peer-to-peer file-sharing, emailing); (4) whether an offender ever engaged in any criminal sexually dangerous behavior⁵³ in addition to or as part of committing the child pornography offense and, if so, the type of criminal sexually dangerous behavior; (5) several characteristics about the offender (including any military service record, substance abuse history, a reported history of sexual abuse as a child, net worth, and employment status); and (6) the content of plea agreements.

The results of the Commission's coding project of non-production cases are set forth below with respect to offense and offender characteristics. Data concerning criminal sexually

⁵⁰ Pursuant to 28 U.S.C. § 994(w), courts are required to submit to the Commission copies of the charging instrument; the presentence report and any addenda; the statement of reasons form; the judgment and commitment order; and any written plea agreement in the case. A word of caution about the Commission's coding project should be given at the outset of the discussion of its results. The Commission typically receives only the five sentencing documents noted above and does not receive other relevant sources of information about the investigation, charging, adjudication, and sentencing processes (*e.g.*, police reports, transcripts of court proceedings). Thus, the sources of information about a particular case are limited to the information contained within those five documents. In some cases, that documentation did not provide complete information about a coding issue in a case (*e.g.*, the amount of an offender's assets), which resulted in potentially under-inclusive data for analysis in some instances.

⁵¹ See Chapter 1 at 4, 7–8 (discussing the PROTECT Act amendments).

⁵² Of the 1,717 cases sentenced pursuant to USSG §2G2.2 in fiscal year 2010, 38 cases were excluded for incomplete documentation. An additional 25 cases were excluded because they either were sentenced under a version of §2G2.2 in effect before the PROTECT Act in 2004 or were sentenced under the former version of USSG §2G2.4. Such cases were excluded from analysis because the base offense levels and specific offense characteristics of those former guidelines do not correspond to the current version of §2G2.2, which went into effect on November 1, 2004, and has remained essentially the same since that time (save for the addition of "morphing" offenses and for certain technical, miscellaneous, and conforming amendments that went into effect on November 1, 2009, *see* USSG, App. C, amend. 733, 736, and 737).

⁵³ Criminal sexually dangerous behavior is defined and discussed in Chapter 7.

dangerous behavior and the contents of plea agreements are discussed in Chapters 7 and 8, respectively.⁵⁴

1. *Offense Conduct*

For the special coding project, the Commission analyzed fiscal year 2010 §2G2.2 cases to determine both the most serious offense of conviction and whether offenders had engaged in more serious conduct that apparently would have supported a conviction and sentence for a more serious child pornography offense. The Commission examined the indictments and judgments to determine the most serious offense of conviction. Information about the offenders' actual offense conduct generally was obtained from the "factual basis" sections of the plea agreements and the "offense conduct" sections of the presentence reports ("PSRs"). When data were extracted from the PSRs, only portions of the PSRs adopted by sentencing courts pursuant to Federal Rule of Criminal Procedure 32(i)(3) — as reflected in the statement of reasons form — were considered.⁵⁵

In analyzing §2G2.2 cases for actual offense conduct, the Commission coded a case as involving knowing receipt or distribution conduct only if the PSR's recounting of the evidence and/or the parties' stipulation of the facts in plea agreements reflected readily provable conduct. In a typical §2G2.2 case, receipt and/or distribution conduct was deemed readily provable based on the manner in which law enforcement detected the offense. In nearly 90 percent of all fiscal year 2010 §2G2.2 cases, law enforcement detected an offender in one or more of three ways: (1) by accessing the offender's child pornography files through a peer-to-peer ("P2P") file-sharing program used by the offender; (2) by directly receiving child pornography from an offender via email or an instant-messaging service or by accessing images or videos posted by an identifiable offender in an Internet "newsgroup," "bulletin board," or similar Internet forum; or (3) by tracing an offender's purchase of child pornography from a commercial website (typically using his own name as well as an email address and credit card associated with his true identity).⁵⁶ In such cases, law enforcement typically would acquire information about an offender's Internet Protocol ("IP") address, obtain and execute a search warrant, and then engage in a forensic analysis of the offender's computer. In a typical case, the forensic evidence clearly established receipt and/or distribution conduct. In addition, in a typical case, the PSR indicated that the offender also confessed to knowingly receiving child pornography; in many cases, the offender also confessed to knowingly distributing child pornography. Finally, in many cases, the prosecution offered

⁵⁴ See Chapter 7 at 181–206; Chapter 8 at 219–23.

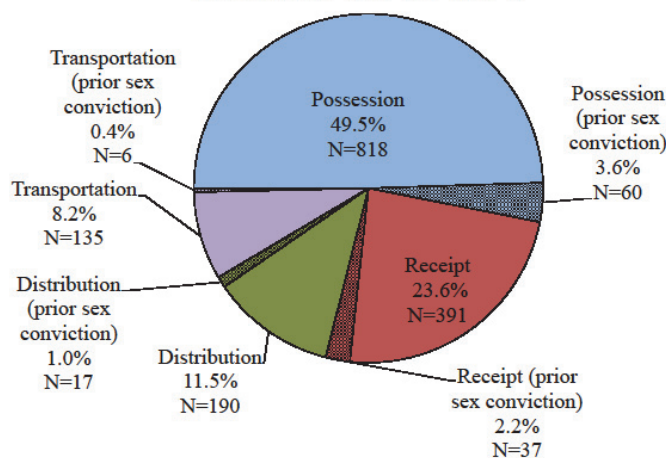
⁵⁵ The Commission cautions that, while the standard of proof for a conviction is proof beyond a reasonable doubt, the preponderance standard applies to judicial findings at sentencing, *McMillian v. Pennsylvania*, 477 U.S. 79, 81 (1986), and the rules of evidence applicable at trial are not applicable at sentencing. USSG §6A1.3 (Resolution of Disputed Factors (Policy Statement)), comment. Nevertheless, it is well accepted that, as a general matter, "a PSR bears sufficient indicia of reliability to permit a sentencing court to rely on it at sentencing." *United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995); see also *United States v. Morillo*, 8 F.3d 864, 872 (1st Cir. 1993) (same); *United States v. Powell*, 650 F.3d 388, 394 (4th Cir. 2011) (noting the "presumption of reliability" afforded to PSRs).

⁵⁶ The Commission's special coding project revealed that law enforcement detected offenders in 88.4% of cases in one or more of those three manners. See also Tables 6-9 & 6-10 (summarizing the various modes of receipt and distribution used by offenders).

uncontroverted evidence that the offender also had used computer search terms commonly associated with child pornography.⁵⁷

Figure 6–14 below provides data concerning the most serious non-production offense of conviction in §2G2.2 cases.⁵⁸ The shaded portions of the figure represent cases in which offenders’ sentences were enhanced based on predicate convictions for sex offenses.

Figure 6-14
Non-Production Offense Characteristics:
Nature of Most Serious Offense of Conviction
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 6–14 shows that 53.1 percent (878) of the 1,654 child pornography offenders sentenced under §2G2.2 were convicted of possession (818, or 49.5%, had no predicate sex convictions, and 60, or 3.6%, had predicate sex convictions).⁵⁹ However, Figure 6–15 below

⁵⁷ See Chapter 3 at 50, 52 (discussing offenders’ use of such search terms).

⁵⁸ As discussed in *supra* note 5, the order (from most serious offense to least serious offense in terms of the applicable penalty ranges) in non-production cases is: distribution; importation; transportation (including shipping and mailing); receipt; morphing; and possession. In fiscal year 2010, there were no cases in which importation or morphing offenses were the most serious offense of conviction. There were five cases with convictions for obscenity offenses (as the most serious offense of conviction) that were sentenced under USSG §2G2.2(a)(1). Those five obscenity cases — none of which had a mandatory minimum penalty — were treated as “possession” cases in the data analysis that follows. Note that in some §2G2.2 cases, offenders were convicted of both non-production offenses and other types of sex offenses (production, “travel,” or enticement offenses); however, in such cases, the offenders’ “primary” guideline was §2G2.2 because it yielded a higher guideline range than the guideline referencing the other sex offenses. See *supra* note 27. Only such offenders’ most serious non-production offenses of conviction are represented in Figure 6-14.

⁵⁹ A predicate sex conviction increased a possession offender’s statutory imprisonment range from zero to ten years to ten to 20 years. See Chapter 2 at 26 & n.39.

shows that the vast majority of all offenders sentenced under §2G2.2 (1,613, or 97.5%) actually engaged in knowing receipt⁶⁰ and/or distribution⁶¹ conduct.

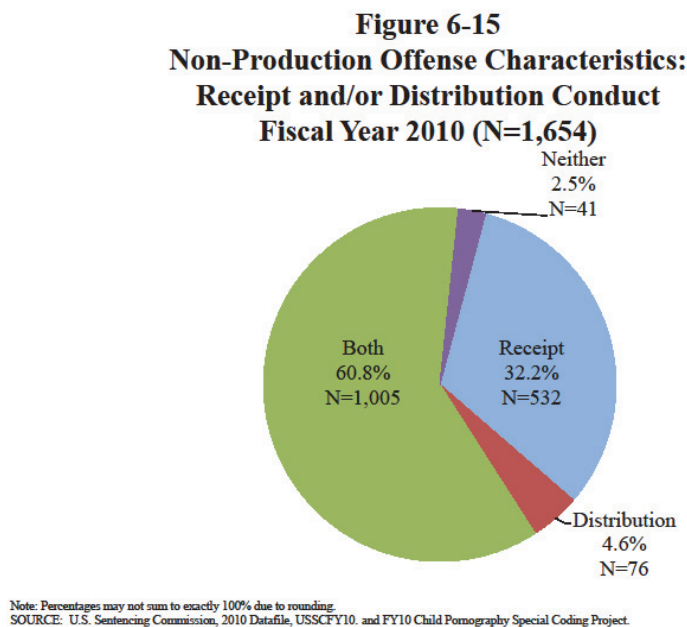


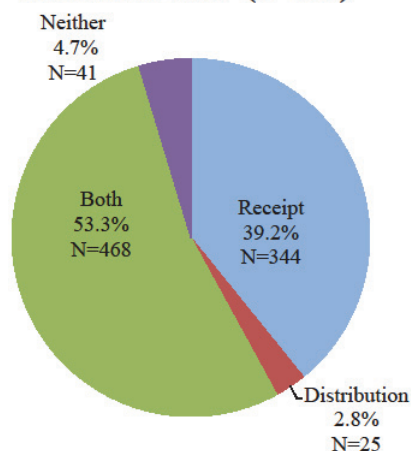
Figure 6–16 below shows the percentage of §2G2.2 offenders *convicted of possession* (as the most serious offense of conviction) who in fact engaged in knowing receipt and/or distribution conduct. The vast majority of possession offenders (95.3%) engaged in such conduct. If convicted of an R/T/D offense, these offenders would have faced a five-year

⁶⁰ As Judge Posner has noted, “possessors, unless they fabricate their own [child] pornography, are also receivers [at some earlier point in time].” *United States v. Richardson*, 238 F.3d 837, 839-40 (7th Cir. 2001). Although there may be some possessors who unwittingly received child pornography and later decided, upon its discovery, to maintain possession of it, *United States v. Meyers*, 355 F.3d 1040, 1042 (7th Cir. 2004) (describing this possibility), that percentage appears small. In none of the fiscal year 2010 cases reviewed by the Commission did a PSR find that an offender had unwittingly received child pornography and, after discovering it, decided to possess it. This is not to say that such cases do not exist, yet they are likely rare. *Cf. United States v. Welton*, 2009 WL 4507744, at *18-20 & n.209 (C.D. Cal. Nov. 30, 2009) (“Following receipt, the defendant may have culled from the stack [of pornography that he received] images of child pornography that were later found by law enforcement. Under these circumstances, the court would not be able to determine whether the defendant knowingly received child pornography unless it could ascertain that at the moment of receipt defendant knew the nature of the images he was receiving.”); *see also United States v. Kamen*, 491 F. Supp.2d 142, 152-53 (D. Mass. 2007) (holding that the evidence offered at trial by the defendant — that he initially did not realize he had received child pornography and thereafter, only after discovering it was child pornography, he decided to maintain possession of it — entitled the defendant to a jury instruction on the lesser-included offense of possession).

⁶¹ Because federal law requires sufficient proof that a defendant *knowingly* distributed child pornography in order to be guilty of distribution, *see* 18 U.S.C. §§ 2252(a)(2) and 2252A(a)(2), the Commission excluded cases as involving knowing distribution when a court found that a defendant who had used a P2P file-sharing program either “opted out” of the P2P program or unwittingly “opted in” to the P2P program. *See* Chapter 3 at 50 (discussing how users of certain P2P programs may opt in or opt out of the programs’ file-sharing features).

mandatory minimum sentence of imprisonment if they did not have predicate sex convictions, and a 15-year mandatory minimum sentence of imprisonment if they had predicate sex convictions.⁶²

Figure 6-16
Possession Offense Characteristics:
Receipt and/or Distribution Conduct
Fiscal Year 2010 (N=878)



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

As depicted in Figure 6–16, 92.5 percent of fiscal 2010 possession cases involved knowing receipt by the defendant. In the remaining cases, the evidence recounted in the PSRs and plea agreements did not discuss the manner in which the defendants received the child pornography (either because the probation officers omitted discussion of such evidence where it existed or because the prosecution did not have such evidence).⁶³

Table 6–9 below shows the types of receipt conduct by the 1,527 §2G2.2 offenders whose PSRs discussed the manner in which they knowingly received child pornography (through P2P file-sharing, by downloading from a website, from an email or instant-message with an attachment, or by “other” means, such via texting or mail).⁶⁴ Because some offenders received

⁶² See Chapter 2 at 26.

⁶³ In a small percentage of possession prosecutions, because of computer forensic difficulties or other proof problems, the government cannot establish that a defendant who knowingly possessed child pornography previously knowingly received it.

⁶⁴ The cases depicted in Table 6–9 do not include the 127 cases in which PSRs and plea agreements did not discuss the manner in which receipt occurred. In ten of those cases, the defendants were convicted of receipt, yet their PSRs and plea agreements did not discuss the manner of receipt with enough detail to allow for classification of the specific mode of receipt. In the remaining 117 cases, offenders were not convicted of receipt and their PSRs and plea agreements did not discuss the manner in which they received child pornography.

child pornography in multiple ways, the percentages in Table 6–9 add up to more than 100 percent.

Table 6-9
Non-Production Offense Characteristics:
Types of Receipt Conduct
Fiscal Year 2010 (N=1,527)

Receipt Conduct	N	Percentage
P2P	857	56.1
Website	666	43.6
Email/IM	258	16.9
Other	91	6.0

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Nearly two-thirds of §2G2.2 offenders (1,081 of 1,654, or 65.4%) distributed child pornography, although the sentencing documentation in one of those cases does not reveal the manner in which the distribution occurred.⁶⁵ Table 6–10 below shows the specific modes of distribution conduct by the 1,080 §2G2.2 offenders whose PSRs discussed the manner in which they knowingly distributed child pornography (by P2P file-sharing; by emailing or instant-messaging (IM) with an attachment; by posting images in connection with an Internet bulletin board, newsgroup, chat room, or similar Internet “community” forum dedicated to child sexual exploitation; by a mode of non-Internet distribution, including mailing, texting, or hand-delivering an image; and by “other” modes, such as posting an image on a photo-sharing website such as Flickr.com or an offender’s social networking site such as MySpace). Some offenders distributed in multiple ways. Therefore, the percentages in Table 6–10 add up to more than 100 percent. The most common manner of distribution was P2P file-sharing (used in 73.8% of cases in which distribution occurred). Significantly, the Commission’s review of PSRs revealed that none of the fiscal year 2010 cases in which §2G2.2 offenders distributed child pornography involved traditional *commercial* distribution (e.g., a commercial child pornography website operator). Rather, all distribution in the fiscal year 2010 cases was either gratuitous or involved bartering among offenders.

⁶⁵ In that case, the offender was convicted of distribution.

Table 6-10
Non-Production Offense Characteristics:
Types of Distribution Conduct
Fiscal Year 2010 (N=1,080)

Distribution Conduct	N	Percentage
P2P	797	73.8
Email/IM	333	30.8
Newsgroup, Bulletin Board, Chat Room	59	5.5
Hand, Text, Mail	33	3.1
Other	64	5.9

Note: A single offender may appear in more than one category. One case is missing type of distribution conduct.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Of the 797 cases in which offenders distributed child pornography using P2P file-sharing programs, 577 (72.4%) offenders solely used an “open” P2P program (*e.g.*, LimeWire)⁶⁶ and did not distribute in any other manner; 75 (9.4%) offenders solely used a “closed” P2P program (*e.g.*, Gigatribe) and did not distribute in any other manner; and the remaining 145 (18.2%) offenders used one of the two types of P2P programs and also used some other mode of distribution.

Of the offenders in the 1,080 cases with a discussion of the manner of distribution, a majority (577, or 53.4%) solely engaged in “impersonal” anonymous distribution using an “open” P2P program such as LimeWire, with no two-way communication between the offender

⁶⁶ See Chapter 3 at 52–53 (discussing “open” and “closed” P2P file-sharing programs). In 293 of those 577 cases in which PSRs mentioned defendants’ use of “open” P2P file-sharing programs, the offense conduct sections of the PSRs expressly stated that the offenders knowingly distributed child pornography using a P2P file-sharing program. In the remaining 284 cases, the PSRs did not expressly find that the offenders knowingly distributed child pornography using a P2P file-sharing program (and no enhancement was given for distribution under USSG §2G2.2(b)(3)). However, in such cases, law enforcement officials typically accessed child pornography images or videos on the defendants’ computers via open P2P file-sharing programs, and there was no indication in the PSRs in those cases that the offenders had unwittingly “opted in” to the file-sharing programs when they had installed the P2P file-sharing software. See Chapter 3 at 50 (discussing the process of “opting in” or “opting out” of the file-sharing feature of open P2P programs such as LimeWire). In view of the nature of P2P file-sharing programs, it is reasonable to infer that those defendants knowingly distributed child pornography via open P2P file-sharing programs in such cases. See *United States v. Dodd*, 598 F.3d 449, 452 (8th Cir. 2010) (“[T]he purpose of a file sharing program is to share, in other words, to distribute. Absent concrete evidence of ignorance — evidence that is needed because ignorance is entirely counterintuitive — a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose.”). In its review of cases, the Commission excluded 22 cases as not involving knowing distribution because the PSRs in those cases found that the defendants had unwittingly “opted in” to open file-sharing programs later accessed by a law enforcement officers.

who distributed and persons who obtained images or videos from the offender’s computer.⁶⁷ Another group of offenders who distributed (445, or 41.2%, of the 1,080) engaged in “personal” distribution of child pornography to one or more adult offenders⁶⁸ (e.g., emailing images or distributing them using a “closed” P2P program such as Gigatribe), which typically involved two-way communication between offenders about child pornography.⁶⁹ Such personal distribution suggests that such offenders likely either were involved in or were seeking to become involved in (or create) a child pornography “community” on the Internet.⁷⁰

The rates of application of the guideline enhancements for distribution, §2G2.2(b)(3)(A) – (F), varied depending on whether offenders distributed in a personal or impersonal manner.⁷¹ Of those 445 offenders who engaged in personal distribution to adults, 233 (52.4%) received an enhancement of 5 levels or more under one of the prongs of §2G2.2(b)(3); 146 (32.8%) received a 2-level enhancement under §2G2.2(b)(3)(F); and 66 (14.8%) received no guideline enhancement for their distribution.⁷² Of the 577 offenders whose impersonal distribution conduct did not suggest active involvement in an Internet community, 69 (12.0%) received an enhancement of 5 levels or more under one of the prongs of §2G2.2(b)(3); 189 (32.8%) received a 2-level enhancement under §2G2.2(b)(3)(F); and 319 (55.3%) received no enhancement for

⁶⁷ Of those 577 offenders, 12 (2.1%) received child pornography from other adult offenders in a “personal” manner (e.g., via email). That small subset of the 577 offenders appears to have been involved in an Internet-based child pornography “community,” as evinced by their receipt conduct. The receipt and distribution conduct of the vast majority of the 577 offenders, however, did not indicate their involvement in such a community.

⁶⁸ An additional 40 offenders (3.7%) distributed child pornography to real or perceived minors (typically via email or Instant Messaging (“IM”)) but did not appear from their PSRs to have distributed to adults or otherwise been involved in child pornography “communities.” An additional 18 offenders (1.7%) only distributed child pornography in other manners (e.g., posting images on a photo-sharing website such as Flickr.com), but it was unclear from the PSRs whether the persons with whom they intended to share images were adults or minors (and, thus, the Commission excluded them from presumptive membership in a “community” of offenders).

⁶⁹ See Chapter 3 at 52–53 (discussing “personal” and “impersonal” modes of distribution).

⁷⁰ See Chapter 4 at 92–99 (discussing child pornography “communities” on the Internet). The 445 offenders who engaged in personal distribution to other adult offenders represent slightly more than one-fourth (26.9%) of all 1,654 non-production offenders in fiscal year 2010.

⁷¹ The different levels of enhancement for distribution — from 2 to 7 levels — depend on the type of distribution at issue. See USSG §2G2.2(b)(3)(A)-(F). For simple distribution to another adult (without an expectation of anything in return), an offender receives a 2-level increase under §2G2.2(b)(F). For distribution to another adult where an offender expected to receive something in return other than money (e.g., bartering child pornography), the offender receives a 5-level increase under §2G2.2(b)(B). For distribution for pecuniary gain, additional levels may be added under §2G2.2(b)(A) depending on the financial value of the exchange. For distribution to a minor, an offender receives between 5 and 7 levels (depending on the circumstances). See USSG §2G2.2(b)(3)(C)-(E).

⁷² 229 of 445 (51.5%) also were convicted of a distribution/transportation offense (and thus faced a five-year statutory mandatory minimum sentence or a 15-year minimum sentence in the case of defendants with predicate convictions for sex offenses).

their distribution.⁷³ Therefore, offenders who engaged in personal distribution generally received a greater enhancement than those who only engaged in impersonal distribution.

Finally, of the 1,081 defendants whose PSRs or plea agreements indicated that they knowingly distributed child pornography, 398 (36.8%) did not receive an enhancement under §2G2.2(b)(3). In addition, 116 of those 398 offenders were convicted of receipt (as their most serious offense) and received a 2-level decrease in their offense level pursuant to §2G2.2(b)(1), notwithstanding the fact that they knowingly distributed child pornography.⁷⁴

2. *Fiscal Year 2012 (First Quarter) Supplemental Coding Project*

The Commission also examined all §2G2.2 cases from the first quarter of fiscal year 2012 for which the Commission had received sufficient documentation at the time of coding. There were 382 such cases. In a manner similar to the Commission’s fiscal year 2010 coding project discussed above, the Commission examined these cases to determine certain offense characteristics not discernible in the Commission’s regular datafile for §2G2.2 cases. In particular, the Commission coded for: (1) the nature of the most serious non-production offense of conviction (distribution, importation, transportation (including shipping and mailing), receipt, morphing, and possession); (2) the types of distribution and receipt conduct, if any, that occurred (*e.g.*, “open” P2P file-sharing, “closed” P2P file-sharing, emailing); and (3) whether, and to what extent that, an offender had engaged in criminal sexually dangerous behavior before or concomitantly with his non-production child pornography offense.⁷⁵

The Commission coded the first-quarter fiscal year 2012 cases in order to determine whether the ongoing changes in technology and offense behavior have resulted in significant differences in offender and offense characteristics since fiscal year 2010. As discussed below, with the exception of increasing use of P2P file-sharing programs to receive and distribute child pornography by offenders, little has changed during the ensuing two years. Data concerning the most serious offense of conviction and receipt/distribution conduct are discussed in this section. Data concerning criminal sexually dangerous behavior are discussed in Chapter 7.

a. *Most Serious Offense of Conviction*

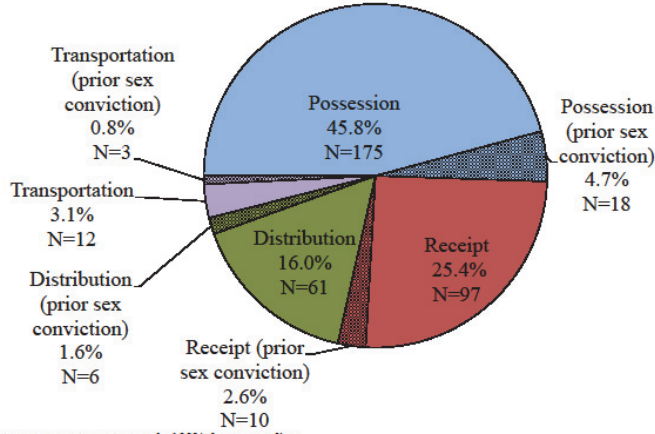
As shown in Figure 6–17, and as was also apparent in the fiscal year 2010 cases, in slightly over half of all first-quarter fiscal year 2012 §2G2.2 cases possession was the most serious offense of conviction. An R/T/D offense was the most serious offense of conviction in the remaining cases.

⁷³ 73 of the 577 (12.7%) also were convicted of a distribution/transportation offense (and thus faced a five-year statutory mandatory minimum sentence or a 15-year minimum sentence in the case of defendants with predicate convictions for sex offenses).

⁷⁴ Section 2G2.2(b)(1) applies if “the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor and . . . the defendant did not intend to traffic in, or distribute, such material” USSG §2G2.2(b)(1)(B) & (C).

⁷⁵ This supplemental coding project did not examine the offender characteristics (*e.g.*, military record, history of substance abuse) that were coded in the Commission’s coding project of all fiscal year 2010 USSG §2G2.2 cases. Those offender characteristics are discussed in section D.3, *infra*.

Figure 6-17
Non-Production Offense Characteristics:
Nature of Most Serious Offense of Conviction
1st Quarter, Fiscal Year 2012 (N=382)

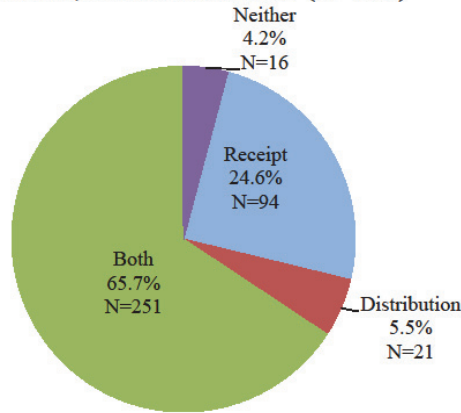


Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission First Quarter 2012 Datafile, USSCFY12 and First Quarter FY12 Child Pornography Special Coding Project.

b. Receipt and Distribution Conduct

As shown in Figure 6–18, and also similar to the fiscal year 2010 §2G2.2 cases, offenders in the vast majority of first-quarter fiscal year 2012 §2G2.2 cases — 95.8 percent — actually engaged in knowing receipt and/or distribution conduct notwithstanding the fact that slightly over half were only convicted of possession.

Figure 6-18
Non-Production Offense Characteristics:
Receipt and/or Distribution Conduct
1st Quarter, Fiscal Year 2012 (N=382)



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, First Quarter 2012 Datafile, USSCFY12 and First Quarter FY12 Child Pornography Special Coding Project.

As reflected in Tables 6–11 and 6–12 below, and consistent with recent trends of offenders’ increasing use of P2P file-sharing programs to receive and/or distribute child pornography,⁷⁶ three-fourths of offenders in the first quarter of fiscal year 2012 who received child pornography (257 of 345, or 74.5%) used P2P programs to do so; an even larger percentage of offenders who distributed (232 of 272, or 85.3%) used P2P programs to do so. Of 232 offenders who distributed using P2P programs, 129 (55.6%) solely used an “open” P2P program (e.g., LimeWire) and did not distribute in any other manner; 67 (28.9%) solely used a “closed” P2P program (typically Gigatribe) and did not distribute in any other manner; and the remaining 36 (15.5%) used both types of P2P programs or used one of the types and also some other mode of distribution. The other common means of receiving child pornography (downloading from websites and transmissions via email or IM) and distributing child pornography (posting images in traditional Internet forums such as bulletin boards and transmissions via email or instant messaging (IM)) appear to have decreased somewhat since fiscal year 2010, as use of P2P file-sharing has increased.

Table 6-11
Non-Production Offense Characteristics:
Types of Receipt Conduct
1st Quarter, Fiscal Year 2012 (N=345)

Receipt Conduct	N	Percentage
P2P	242	70.1
Website	67	19.4
Email/IM	45	13.0
Other	26	7.5

Note: A single offender may appear in more than one category.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

⁷⁶ See Chapter 3 at 48–53 (discussing P2P file-sharing).

Table 6-12
Non-Production Offense Characteristics:
Types of Distribution Conduct
1st Quarter, Fiscal Year 2012 (N=272)

Distribution Conduct	N	Percentage
P2P	232	85.3
Email/IM	58	21.3
Newsgroup, etc.	13	4.8
Hand, Text, Mail	5	1.8
Other	17	6.3

Note: A single offender may appear in more than one category.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Because of the significant increase in the use of P2P file-sharing programs in just two years, the Commission examined federal non-production child pornography cases a full decade earlier, in fiscal year 2002, to determine what percentage of offenders then used P2P file-sharing programs in the commission of their non-production offenses (according to their PSRs). Of the 345 randomly selected fiscal year 2002 cases examined by the Commission, which represented 83.3 percent of all federal non-production cases in that fiscal year, *none* involved the use of P2P file-sharing programs by offenders, according to the offense conduct sections of the PSRs.⁷⁷

3. Offender Characteristics

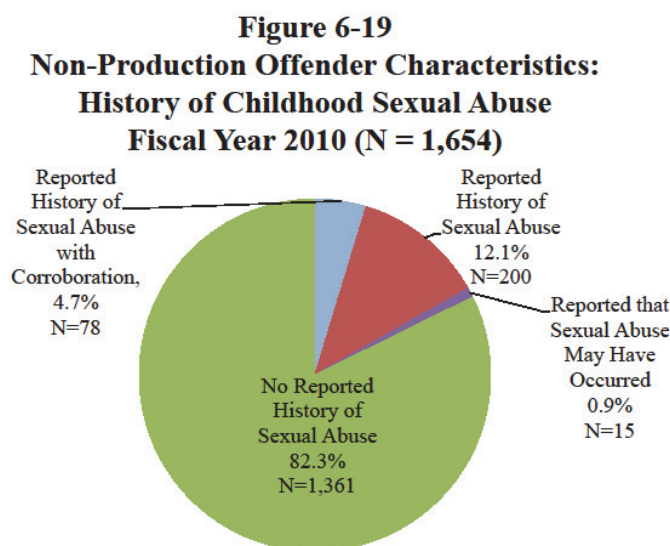
The Commission analyzed the following offender characteristics in fiscal year 2010 §2G2.2 cases in order to provide a more complete profile of offenders than could be derived from the Commission’s regular annual datafiles: (1) whether offenders reported being sexually

⁷⁷ According to a February 2003 report by the U.S. General Accounting Office, P2P file-sharing programs were then “emerging” as an Internet technology used by some child pornography offenders. See U.S. GENERAL ACCOUNTING OFFICE, FILE-SHARING PROGRAMS: PEER-TO-PEER NETWORKS PROVIDE READY ACCESS PORNOGRAPHY 8 (2003) (“Although peer-to-peer file-sharing programs are largely known for the extensive sharing of copyrighted digital music, they are emerging as a conduit for the sharing of child pornography images and videos.”) (available at <http://www.gao.gov/new.items/d03351.pdf>). It should be noted that the offenders sentenced in the fiscal year 2002 non-production cases examined by the Commission typically committed their offenses well over a year before the date on which they were sentenced (some even in the mid to late 1990s). The Commission’s data about P2P file-sharing use in fiscal year 2002 cases are consistent with the recent findings of the Crimes Against Children Research Center in their report, *Trends in Arrests for Child Pornography Possession: The Third National Juvenile Online Victimization Survey (NJOV-3) 2* (April 2012) (finding that 61% of non-production child pornography offenders used P2P programs in 2009, 28% used P2P programs in 2006, and 4% used P2P programs in 2002), http://www.unh.edu/ccrc/pdf/CV270_Child%20Porn%20Production%20Bulletin_4-13-12.pdf (last visited Nov. 20, 2012).

abused during their youth; (2) whether offenders reported having a history of substance abuse (drugs or alcohol); (3) offenders’ military service records, if any (including being in the military at the time of the child pornography offense); (4) offenders’ financial status at the time of sentencing; and (5) offenders’ employment status at the time of their arrests for their child pornography offenses. By way of comparison, comparable statistical information about the general United States population (adult white males, in particular)⁷⁸ and the general federal prison population is noted (where it exists).⁷⁹

a. History of Childhood Sexual Abuse

Figure 6–19 shows the percentage of offenders who, during the presentence investigation, reported a history of childhood sexual abuse.⁸⁰ A minority, 17.7 percent, reported such a history. Regarding those offenders who reported a history of childhood sexual abuse, Figure 6-19 also shows those cases in which some corroboration of the reported sexual abuse appeared in an offender’s PSR (*e.g.*, a family member’s statement that the offender was sexually abused).



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

⁷⁸ As discussed *supra*, 90% of USSG §2G2.2 offenders are white and over 99% are male. See Table 6-8.

⁷⁹ As noted below, such comparative information usually was obtained from a source other than the Commission’s datafiles.

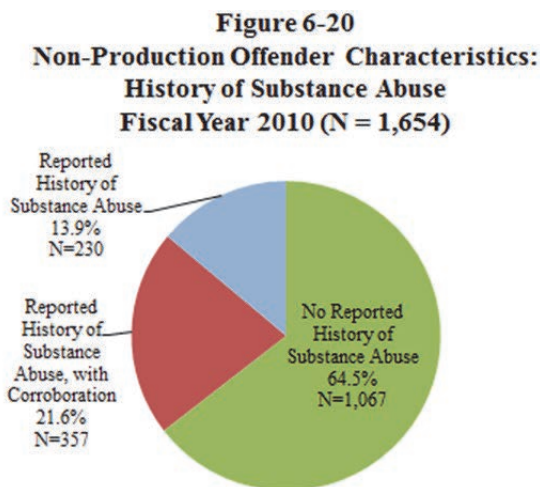
⁸⁰ The typical PSR did not define “sexual abuse.” PSR writers presumably used the term as it is commonly understood.

According to several studies of childhood sexual abuse, approximately one in six males (14.2%) in the United States is sexually abused during childhood.⁸¹ Thus, the percentage of §2G2.2 offenders reporting a history of childhood sexual abuse (17.7%) is comparable to the percentage of American males generally reporting such abuse in their childhoods.⁸²

b. History of Substance Abuse

Figure 6–20 shows the percentage of §2G2.2 offenders who reported a history of substance abuse (involving either drugs or alcohol) and also shows the percentage of offenders whose substance abuse histories were corroborated by other sources.⁸³ Slightly over one-third of offenders (35.5%) reported a history of substance abuse.

By comparison, according to the leading modern study of the “lifetime prevalence rate”⁸⁴ of a



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

⁸¹ See, e.g., Shanta R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AMER. J. PREVENTATIVE MEDICINE 430, 433 (2005) (CDC-sponsored study finding that 16.0% of 7,970 American males who were interviewed reported childhood sexual abuse); J. Briere & D.M. Elliot, *Prevalence and Psychological Sequelae of Self-Reported Childhood Physical and Sexual Abuse in General Population Sample of Men and Women*, 27 CHILD ABUSE & NEGLECT 1205 (2003) (study finding that 14.2% of adult males in U.S. reported being sexually abused before turning 18 years of age); *id.* at 1216 (noting other studies showing that 14% of males reported childhood sexual abuse histories); Bolen, R.M. & M. Scannapieco, *Prevalence of Child Sexual Abuse: A Corrective Meta-analysis*, 73 SOCIAL SERVICE REV. 281 (1999) (meta-analysis of other studies finding that 13% of boys experienced sexual abuse); D. Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19 (1990) (study finding that 16% of American men were sexually abused as children). A more recent telephonic survey conducted by the CDC found a much lower prevalence rate for males (6.7%), yet that study noted several limitations resulting from its methodology (e.g., only calling persons’ “land line” phones in residences). See Centers for Disease Control, *Adverse Childhood Experiences Reported by Adults – Five States, 2009* (Dec. 17, 2010), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5949a1.htm?s_cid=mm5949a1_w (last visited Nov. 26, 2012).

⁸² Studies are contradictory concerning whether the incidence of childhood sexual abuse among whites is less than among other races. See E. Douglas & D. Finkelhor, *Childhood Sexual Abuse Fact Sheet*, CRIMES AGAINST CHILDREN RESEARCH CENTER, UNIVERSITY OF NEW HAMPSHIRE (“The findings about race are . . . inconclusive. Several national studies have found that black and white children experienced near-equal levels of sexual abuse. Other studies, however, have found that found that both blacks and Latinos have an increased risk for sexual victimization.”) (internal citations omitted), <http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf> (last visited Nov. 27, 2012).

⁸³ The Commission found corroboration in cases with reliable evidence of a substance abuse history (e.g., a criminal history involving driving while intoxicated; a finding that the offender underwent substance abuse treatment as a condition of his pretrial release on bond).

⁸⁴ A “lifetime prevalence rate” refers to the rate among the general population (or a specific part of the population) that a particular disorder or event occurred at least once during the lifetimes of that population. See B. Vincente et al., *Lifetime and 12-Month Prevalence of DSM-III-R Disorders in Chile Psychiatric Prevalence Study*, 163 AMER. J.

substance abuse disorder (including either drug abuse or alcoholism), that rate is 14.6 percent among English-speaking United States citizens aged 18 years or older.⁸⁵

c. History of Military Service

The Commission has heard concerns about whether persons with military service records are disproportionately represented among child pornography offenders and also that some courts are imposing below range sentences based on offenders' military service.⁸⁶ Therefore, the Commission examined the military service records of §2G2.2 offenders. Figure 6–21 shows the percentage of §2G2.2 offenders who served in any branch of the United States military (including in the military reserves or National Guard) at some point prior to their arrest for their

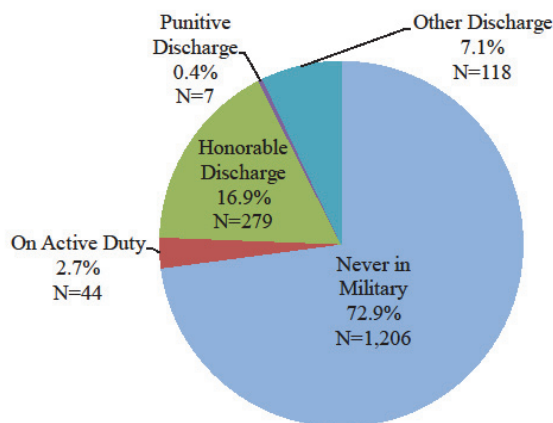
PSYCH. 1362 (2006) (“The lifetime prevalence rate is defined as the proportion of the sample who ever experienced the disorder . . .”).

⁸⁵ See R.C. Dressler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCH. 593, 595 (2005). That study did not list separate prevalence rates for males and females. However, the U.S. Department of Health and Human Services' most recent *National Survey on Drug Use and Health: Summary of the National Findings* (2010), available at <http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.htm#7.1.3> (last visited Nov. 27, 2012), shows that males in the United States 12 years of age and older have twice the 12-month prevalence rate of “substance dependence or abuse” (including abuse of illicit drugs, prescription drugs, and alcohol) compared to females 12 years of age and older. See *id.* at Sec. 7.1 (Substance Dependence or Abuse) (noting rate for males was 11.6%, while rate for females was 5.6%). That study also shows that the 12-month prevalence rate for whites is comparable to such a rate for the general population. See *id.* (rate for whites was 8.8%, while the rate for the general population was 8.7%). Assuming that the lifetime prevalence rate for white males is substantially higher than the 14.6% rate for the general population, which seems reasonable in view of marked gender differences in the 12-month prevalence rate, it still would appear lower than the 35.5% reported rate for §2G2.2 offenders. Regardless, it is notable that the lifetime prevalence rate for §2G2.2 offenders is substantially lower than the rate of substance abuse disorders among federal prisoners generally. The Federal Bureau of Prisons reports that, as of 2007, “45% of the federal prison population met the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnostic criteria for a drug abuse disorder.” FEDERAL BUREAU OF PRISONS, *ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS: FISCAL YEAR 2010* (available at http://www.bop.gov/inmate_programs/docs/annual_report_fy_2010.pdf); accord BUREAU OF JUSTICE STATISTICS, *DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004* (2006) (available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsf04.pdf>). These Bureau of Prisons and Bureau of Justice Statistics publications do not specify additional percentages of federal inmates who suffered from an alcohol addiction disorder only. An earlier Bureau of Justice Statistics study showed that nearly four out of five federal prisoners either reported a history of drug and/or alcohol abuse or reported being under the influence of drugs and/or alcohol at the time of their federal offenses. See BUREAU OF JUSTICE STATISTICS, *SUBSTANCE ABUSE AND TREATMENT: STATE AND FEDERAL PRISONERS, 1997* (Revised Mar. 11, 1999) (available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/satsfp97.pdf>).

⁸⁶ See, e.g., *United States v. Jager*, No. Cr. 10-1531, 2011 WL 831279, at *11, *14 (D. N.M. Feb. 17, 2011) (“The Court . . . has trouble squaring Jager’s excellent military record with the crime here. Because Jager’s circumstances fall into a pattern the federal courts encounter with some frequency, the Court does not think this case falls outside the heartland of cases [and, thus, no downward departure is warranted under USSG §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement))] [Nevertheless,] [t]he Court believes that a [downward] variance is appropriate here. While Jager does not fall outside of the heartland of [USSG §2G2.2] cases, his military service is relevant to granting him a variance. His service, with the exception of this crime, has been superior and uniformly outstanding. . . . The Court realizes he has brought shame upon the military with his crime, but with the exception of his crime, he has served with honor, and the Court thinks his service justifies a considerable variance from the guideline sentence.”).

child pornography offenses.⁸⁷ It also shows the type of discharge (honorable, dishonorable, or “other” discharge) for veterans. Over a quarter of offenders (27.1%) had a record of military service.

Figure 6-21
Non-Production Offender Characteristics:
U.S. Military Service (Active Duty or Veteran)
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

By comparison, in the general population of the United States in 2010, there were 22.7 million veterans,⁸⁸ 1.43 million active duty military personnel,⁸⁹ and approximately one million members of the National Guard and military reserves.⁹⁰ Thus, out of a total population of 308.7 million people in 2010,⁹¹ slightly over eight percent were either currently or formerly in some component of the military (7.4% veterans and 0.8% in the active military, National Guard, or reserves). Looking only at those statistics in isolation, the much larger percentage of §2G2.2 offenders who either were veterans (24.4%) or in the military (2.7%) at the time of their child pornography offenses would suggest a significant overrepresentation of such offenders with military service records.

⁸⁷ The above-mentioned federal offenders include those who were in the military at the time of their child pornography offenses; such offenders were prosecuted in federal district court rather than in military courts. See *United States v. Talbot*, 825 F.2d 991, 997 (6th Cir. 1987) (noting that “military and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing”).

⁸⁸ See National Center for Veterans Analysis and Statistics, *Veteran Population*, http://www.va.gov/vetdata/Veteran_Population.asp (last visited Nov. 28, 2012).

⁸⁹ See U.S. Dep’t of Defense, *Active Duty Military Personnel Strengths by Regional Area and by Country* (Sept. 30, 2010), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1009.pdf> (last visited Nov. 28, 2012).

⁹⁰ See Lawrence Kapp, Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* (July 20, 2010), <http://www.fas.org/sgp/crs/natsec/RL30802.pdf> (last visited Nov. 28, 2012).

⁹¹ See U.S. Census Bureau, *Population and Distribution Change, 2000-2010*, <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> (last visited Nov. 28, 2012).

However, as discussed below, comparing the specific offender population at issue — the vast majority of whom are white male United States citizens between 18 and 75 years of age⁹² — to persons with such characteristics in the general population, the percentage of §2G2.2 offenders with a military service record is not as overly representative as it initially would appear. According to United States Census Bureau estimates from 2010, when considering only white males who were 18 years and older in the general population, 19.9 percent of such persons were then veterans.⁹³ Such a percentage reflects the fact that past and present members of the military are overwhelmingly white⁹⁴ and male,⁹⁵ and a majority of living veterans today served in the Vietnam era or earlier.⁹⁶

Among younger §2G2.2 offenders, however, the extent of overrepresentation is more pronounced, as reflected in Figure 6–22 below.⁹⁷ That figure compares the age distribution of §2G2.2 offenders who were veterans to the age distribution of veterans among adult white male citizens in the general population in 2010. The lowest rate of military participation and largest overrepresentation were in the 18 to 34 age group (11.7% for child pornography offenders versus 4.3% for the general population group), while the highest rate of military participation and smallest overrepresentation were in the 65 and older age group (72.0% for child pornography offenders versus 54.2% for the general population group).

⁹² See Table 6-8, *supra*. The age range of §2G2.2 offenders in fiscal year 2010 was 19 to 82 years of age.

⁹³ See U.S. Census Bureau, *2010 American Community Survey: Sex by Age by Veteran Status for the Civilian Population 18 Years and Older (White Only)*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B21001A&prodType=table (last visited Nov. 28, 2012). That percentage was derived by dividing the total population of veteran white males 18 or older in the U.S. population (17,231,186) by the total number of white males 18 or older in the U.S. population (86,588,368) in 2010.

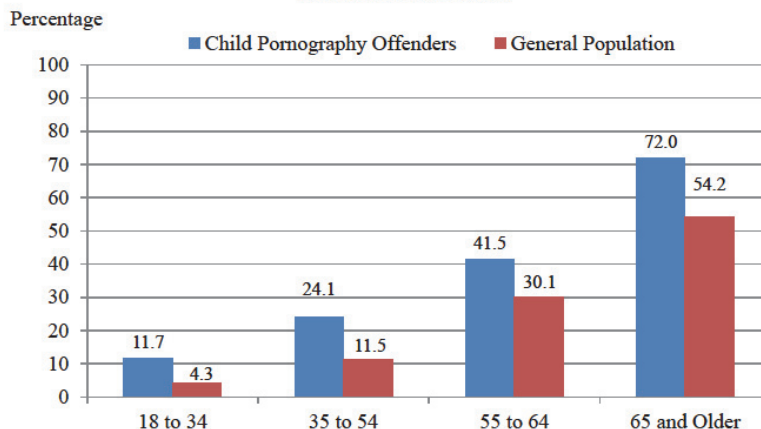
⁹⁴ See U.S. Dep’t of Veterans Affairs, *Profile of Veterans: 2009* 6 (noting that 82.0% of male veterans were white, while 64.6% of U.S. male non-veterans were white), http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2009_FINAL.pdf (last visited Dec. 20, 2012); U.S. Dep’t of Defense, *Representation of Racial and Ethnic Groups in the U.S. Military* (showing that, as of 2008, approximately three-quarters of enlisted members of the military were white and over four-fifths of officers were white), <http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2008/summary/chap5.pdf> (last visited Dec. 20, 2012).

⁹⁵ Ninety-three percent of veterans are male. See U.S. Dep’t of Veterans Affairs, *Profile of Veterans: 2009*, available at http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2009_FINAL.pdf (last visited Nov. 28, 2012). Between 15 and 18 percent of active and inactive military forces are female. See U.S. Dep’t of Defense, *Active Military Personnel by Rank/Grade (Women Only)* (Sept. 30, 2009) (noting 203,375 members of the active military were female as of the end of fiscal year 2009), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909f.pdf> (last visited Dec. 20, 2012); see also Women in Military Service for America Memorial Foundation, *Statistics on Women in the Military* (data as of Sept. 30, 2011), <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf> (last visited Dec. 20, 2012) (reporting 14.6% of “active duty” military were female and 17.7% of reservists and national guard members were female).

⁹⁶ See U.S. Dep’t of Veterans Affairs, *Profile of Veterans: 2009*, *supra* note 94, at 14 (noting that at least 53.7% of the living veterans in 2009 had served during the era of the Vietnam conflict or earlier).

⁹⁷ Figure 6-22 only includes data about veterans and does not include data about persons who were then in the military. The lack of data about active duty military members reflects the fact that the U.S. Census Bureau data about age distributions in the adult white male population only concerned “civilians” (and, thus, excluded active military members).

Figure 6-22
Military Veterans by Census Age Group for
Non-Production Offenders and the General Population
Fiscal Year 2010



Note: This chart includes the 1,444 child pornography offenders who were adult, white male citizens of the U.S.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project and US Census data.

Similarly, the percentage of §2G2.2 offenders in the military (including the National Guard or reserves) at the time of their offenses (2.7%), while significantly higher than the percentage of the entire United States population currently in the military (0.8%), appears more consistent with the percentage of white male adults currently in the military (approximately 1.8%).⁹⁸

There is no reported data concerning the percentage of federal prisoners in 2010 who were veterans. Studies of federal prisoners from 1986 to 2004 show that the percentage of veterans among federal prisoners declined from 24.9 percent to 9.8 percent during that 18-year period.⁹⁹ Therefore, the percentage of §2G2.2 offenders with military service records is

⁹⁸ The U.S. Census Bureau does not report demographics for active military members in the manner that it does for veterans. However, the military's own data allow for a similar calculation: multiplying the approximate total population of active duty military members, national guard members, and reservists in 2010 (2.4 million, *supra* notes 89 & 90) by 0.75 (the approximate percent of whites in the military, *see supra* note 94) and further by 0.85 (the approximate percentage of males in the military, *see supra* note 95), the result is 1.53 million. Dividing 1.53 million by the total white male U.S. population in 2010 (86.6 million, *see supra* note 93) results in 1.8%.

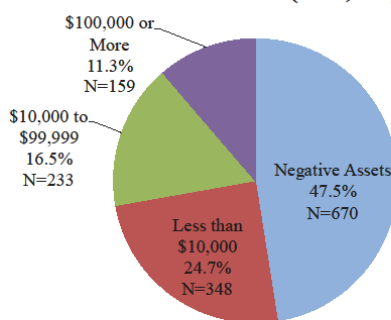
⁹⁹ BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL 1 (Jan. 2000) (from 24.9% in 1986 to 14.5% in 1997) (available at <http://bjs.gov/content/pub/pdf/vpj.pdf>); BUREAU OF JUSTICE STATISTICS, VETERANS IN STATE AND FEDERAL PRISON 2004 (2007) (the percentage dropped from 14.5% in 1997 to 9.8% in 2004) (available at <http://www.bjs.gov/content/pub/pdf/vsfp04.pdf>). The steady decline from 1986 to 2004 appears to be a function of both a net decrease of veterans in the general population (because of attrition of World War II, Korea, and Vietnam era veterans not offset by the addition of younger generations of veterans from more recent military conflicts), *see* BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL 2 (Jan. 2000) (noting the "stead[y] declin[e]" in the number of veterans from 28.0 million in 1985 to 25.1 million in 1998), and a significant increase in the number of non-citizen offenders in federal prison during the past two decades. *See* U.S. SENT'G COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 2 (2008) (noting that the percentage of federal offenders who were non-citizens increased from 22.7% of the offender population in fiscal year 1991 to 37.4% in fiscal year 2007). Although certain non-citizens are eligible to serve in the U.S. military, the requirements for enlisting and serving as a non-citizen have

significantly higher than the percentage of the overall federal offender population with military service records.

d. Financial and Employment Status

Figures 6–23 and 6–24 below contain information about the net worth and employment status of §2G2.2 offenders. Slightly less than half of the offenders reported a negative net worth during the presentence investigation.¹⁰⁰ Only 15.0 percent were unemployed (other than because of a disability or retirement) at the time of their arrests for their child pornography offenses.

Figure 6-23
Non-Production Offender Characteristics:
Offender Net Worth at Time of Conviction
Fiscal Year 2010 (N=1,410)

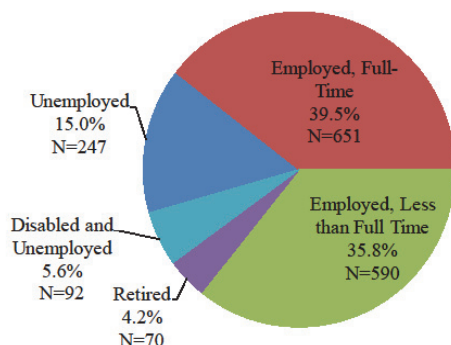


Note: Of the 1,654 cases, 244 cases were excluded for missing asset information. Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

the practical effect of excluding large numbers of non-citizens (*e.g.*, a recruit must be a lawful permanent resident and demonstrate English proficiency; certain occupational restrictions apply once a non-citizen joins the military). See Molly F. McIntosh et al., *Non-Citizens in the Enlisted U.S. Military* 19-21 (Nov. 2011), <http://www.cna.org/sites/default/files/research/Non%20Citizens%20in%20the%20Enlisted%20US%20Military%20D0025768%20A2.pdf> (last visited Nov. 28, 2012). Based on the declining number of older veterans and the continuing increase of non-citizen federal offenders in the years since 2004, see U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 19 (2010) (noting that 47.5% of federal offenders that year were non-citizens), there is no reason to believe that the percentage of veterans in the federal prison population in 2010 was higher than it was in 2004 and, indeed, likely decreased even more since that time.

¹⁰⁰ Information about assets and liabilities in the PSRs pertained to financial information provided during the presentence interviews of defendants by federal probation officers (and was reported in that manner because the purpose of that information in a PSR is to assist the court in determining what monetary penalty, if any, is appropriate). A typical offender’s net worth likely was significantly higher at the time of his arrest for two reasons: first, the offender may have lost his employment as the result the arrest (particularly, if he was denied bail, as 57% of USSG §2G2.2 offenders were in fiscal year 2010); and second, some offenders retained private counsel and spent significant assets on attorneys’ fees. Thus, the percentage of offenders who reported a negative net worth during the presentence interview was likely higher than the percentage of such offenders with a negative net worth at the time of their arrests.

Figure 6-24
Non-Production Offender Characteristics:
Offender Employment at Time of Arrest
Fiscal Year 2010 (N=1,650)



Note: Of the 1,654 cases, four cases were excluded for missing employment information. Percentages may not sum to exactly 100% due to rounding. "Employed, less than full time" includes cases in which the offender was employed, but it was unclear whether the employment was full time or part time.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Data concerning the pre-arrest employment status and pre-sentencing financial status of federal (or state) inmates generally are sparse.¹⁰¹ The most recent such data comes from the Bureau of Justice Statistics' 2004 survey of state and federal prisoners, which revealed that 72.4 percent of federal prisoners then reported being employed (full- or part-time) before their arrest, and the median amount of personal monthly income reported was between \$1,000–1,999 (which equates to a yearly income of between \$12,000–24,000).¹⁰² Although the basis for comparison is inexact,¹⁰³ the large percentage of employed §2G2.2 offenders (less than half of whom had negative assets) indicates that the typical §2G2.2 offender may occupy a higher socio-economic status than federal offenders generally (as judged by all federal offenders' lower average employment rates and average income levels). This conclusion is supported by data on offenders' pre-arrest education levels, which serve as a proxy¹⁰⁴ for socio-economic status; those data reveal that §2G2.2 offenders have a much higher educational level on average than federal offenders generally.¹⁰⁵

¹⁰¹ See Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 32 (2011) (noting that data on federal and state offenders' "economic status" is "almost nonexistent").

¹⁰² See Bureau of Justice Statistics, *Employment and Income of State and Federal Prisoners, By Gender*, (unpublished data provided to the Commission by the Bureau of Justice Statistics using data from its 2004 prisoner survey).

¹⁰³ The Commission's special coding project did not code for pre-arrest income levels, and the Bureau of Justice Statistics data did not include information on assets.

¹⁰⁴ See Hashimoto, *supra* note 101, at 55-62 (analyzing data concerning inmates' pre-arrest education levels as a "proxy" for socio-economic status and concluding that there "is sufficient data to establish that low-income people constitute a disproportionate percentage of criminal defendants" in the state and federal criminal justice systems).

¹⁰⁵ See U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 18 (2010) (Table 8) (showing that only 10.4% of child pornography defendants did not graduate from high school, while 51.4% of all federal inmates did not graduate from high school).

E. CONCLUSION

The Commission's analysis of data concerning offense and offender characteristics in cases in which offenders were sentenced under the non-production guidelines from fiscal year 1992 through fiscal year 2010 yields the following conclusions:

- The annual number of federal prosecutions for non-production offenses grew substantially from fiscal year 1992 (77 cases) to fiscal year 2010 (1717 cases). The growth rates of possession cases and R/T/D cases were comparable until 2006 — when higher statutory and guideline penalty levels associated with the PROTECT Act applied to most cases being brought — at which point possession cases began to slightly exceed R/T/D cases annually. In fiscal year 2010, 52.6 percent of non-production offenders were only convicted of possession, and 47.4 percent were convicted of R/T/D offenses.
- The overwhelming majority of §2G2.2 offenders in fiscal year 2010 were white male United States citizens in Criminal History Category I. The average age of such offenders was 42. The typical offender was employed at the time of the offense, had at least some college education, and had a positive net worth at the time of sentencing. The vast majority of non-production offenders reported neither a history of childhood sexual abuse nor a history of substance abuse. Over one-quarter of non-production offenders had a record of military service.
- The typical non-production offender differs in many significant respects from the general federal offender population today. The typical federal offender is non-white, has less than a high school education, has a criminal history, and possesses fewer assets and is less likely to be employed than the typical non-production offender. Less than one in ten of all federal offenders have a military service record.
- Both the percentages of offenders receiving prison only sentences (in both possession cases and R/T/D cases) and average sentence lengths (in both possession cases and R/T/D cases) grew substantially from fiscal year 1992 to fiscal year 2010. Especially in the years after the PROTECT Act of 2003, average sentence lengths increased rapidly; average sentence lengths nearly doubled between fiscal year 2004 and fiscal year 2010. In fiscal year 2004, the last year when most offenders were not subject to the PROTECT Act's increased statutory and guideline penalty levels, the average prison sentence for offenders convicted solely of possession offenses was 34 months, and the average prison sentence of offenders convicted of R/T/D offenses was 71 months. By fiscal year 2010, the average prison sentence for offenders convicted solely of possession offenses was 63 months, and the average prison sentence of offenders convicted of R/T/D offenses was 129 months.
- Only 27 of 1,654 (1.6%) non-production offenders received probation in fiscal 2010; all such offenders were only convicted of possession. In fiscal year 2002,

the last full fiscal year before the PROTECT Act was enacted, 8.8 percent of non-production offenders received probation.

- In fiscal year 2010, slightly over half of all non-production offenders faced a statutory mandatory minimum sentence. The vast majority of such offenders faced a five-year statutory mandatory minimum sentence.
- In fiscal year 2010, the typical non-production offender (in both R/T/D and possession cases) received four enhancements under §2G2.2(b) — for use of a computer, possession of images depicting a prepubescent minor, possession of images depicting sado-masochistic sexual conduct, and possession of 600 or more images — which together accounted for 13 offense levels. A substantial minority of non-production offenders (40.9%) also received an enhancement for distribution of child pornography (usually 2 or 5 offense levels). A decade earlier, only two enhancements — use of a computer and possession of images depicting prepubescent minors, which together accounted for only 4 offense levels — applied to the typical non-production offender. Typically, a 2-level increase in an offender’s offense level results in a 20 to 30 percent increase in the applicable guideline minimum, and a 5-level increase results in a 70 to 80 percent increase in the applicable guideline minimum.
- The rate of non-production cases in which sentences were imposed within the applicable guideline range steadily fell from its high point in fiscal year 2004, at 83.2 percent of cases, to 40.0 percent of cases in fiscal year 2010, and to 32.7 percent of cases in fiscal year 2011.
- The difference between the average guideline minimum and the average sentence imposed increased steadily after the Supreme Court’s decision in *Booker* (2005) and even more so after its decisions in *Kimbrough* and *Gall* (2007). That growing gap reflects an increasing *rate* of downward departures and variances since *Booker*, a rate that has continued to increase in recent years. In fiscal year 2010, in R/T/D cases, the rate of non-government sponsored below range sentences was 44.6 percent, and the rate of government sponsored below range sentences (other than for a defendant’s substantial assistance to the authorities) was 9.5 percent. In possession cases, the rate of non-government sponsored below range sentences was 44.9 percent, and the rate of government sponsored below range sentences (other than for a defendant’s substantial assistance to the authorities) was 11.2 percent. In fiscal year 2011, in R/T/D cases, the rate of non-government sponsored below range sentences was 45.4 percent, and the rate of government sponsored below range sentences (other than for a defendant’s substantial assistance to the authorities) was 11.5 percent. In possession cases, the rate of non-government sponsored below range sentences was 51.3 percent, and the rate of government sponsored below range sentences (other than for a defendant’s substantial assistance to the authorities) was 17.6 percent.

- Unlike the *rate* of downward departures and variances in non-production cases, which increased steadily each year after *Booker*, the average *extent* of downward departures and variances — as expressed in the difference in percentage between the guideline minimum and average sentence imposed in cases with below range sentences — has remained basically stable in non-production cases each year since *Booker*. In fiscal year 2010, in R/T/D cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 35.8 percent (or an average reduction of 63 months); the average extent of government sponsored downward departures and variances (other than for an offender’s substantial assistance) was 32.5 percent (or an average reduction of 54 months). In possession cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 43.0 percent (or an average reduction of 32 months); the average extent of government sponsored downward departures and variances (other than for an offender’s substantial assistance) was 49.5 percent (or an average reduction of 42 months).
- While 97.5 percent of §2G2.2 offenders engaged in knowing receipt and/or distribution conduct according to their PSRs and/or plea agreements, less than half of §2G2.2 offenders were convicted of an R/T/D offense in fiscal year 2010. The remainder (53.1%) were convicted only of possession.
- According to their PSRs or plea agreements, nearly two-thirds of all §2G2.2 offenders in fiscal year 2010 knowingly distributed child pornography to others. Of those offenders who distributed child pornography, slightly less than two-thirds (63.2%) received a guideline enhancement for distribution.
- A majority (53.4%) of offenders who distributed child pornography solely engaged in “impersonal” distribution by using “open” P2P file-sharing programs such as LimeWire. A substantial minority (41.1%) of offenders who distributed, however, engaged in “personal” distribution to one or more other adult offenders (*e.g.*, emailing images to another offender or posting images on an Internet bulletin board dedicated to child sexual exploitation). Such personal distribution suggests some level of participation in a child pornography “community.” The offenders who engaged in “personal” distribution had substantially higher rates of application of both the statutory mandatory minimum penalty for distribution and the guideline enhancement for distribution compared to offenders who engaged only in “impersonal” distribution.
- Offenders’ use of P2P file-sharing programs to receive and distribute child pornography has steadily increased in recent years. By the first quarter of fiscal year 2012, 74.5 percent of §2G2.2 offenders who received child pornography used P2P programs to do so, and 85.3 percent who distributed child pornography used P2P programs to do so. The typical offender who used a P2P program used an “open” program that did not involve direct two-way communication between the offender and others who participated in the P2P network. The Commission’s

examination of a large sample of 345 federal non-production cases in which offenders were sentenced a decade earlier, in fiscal year 2002, revealed that no offenders sentenced that year appeared to have used P2P file-sharing programs during the commission of their non-production offenses (according to their PSRs).

