

## Chapter 7

# PRIOR CRIMINAL SEXUALLY DANGEROUS BEHAVIOR BY OFFENDERS SENTENCED UNDER THE NON-PRODUCTION CHILD PORNOGRAPHY GUIDELINES

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This chapter is concerned with the prevalence rate<sup>1</sup> of criminal sexually dangerous behavior (“CSDB”)<sup>2</sup> among child pornography offenders.<sup>3</sup> As discussed below, social scientists have examined this issue and have come to varying conclusions as the result of differing methodologies, operative definitions, and study samples (including several studies of foreign child pornography offenders). The Commission thus conducted its own study of 1,654 federal offenders sentenced under the non-production guideline, USSG §2G2.2 (Receipt, Transportation, Distribution, and Possession of Child Pornography), in fiscal year 2010 and 382 offenders sentenced under §2G2.2 in the first quarter of fiscal year 2012. To allow for a comparison of the prevalence rates of CSDB in federal non-production cases over time, the Commission additionally studied 660 offenders sentenced under §2G2.2 (or the former §2G2.4, the separate guideline for simple possession cases) in fiscal years 1999 and 2000.

It should be noted that offenders’ acts of CSDB occurring *after* they reentered the community following sentencing for their federal non-production offenses are analyzed separately in Chapter 11, which addresses *recidivism*.<sup>4</sup> The current chapter only concerns CSDB occurring *before* an offender’s prosecution for his federal non-production child pornography offense — referred to as “precidivism” in this report. Although related concepts, precidivism and recidivism should be analyzed separately. Furthermore, as discussed in Part C below, although the Commission’s coding project was limited to *criminal* sexually dangerous behavior, the Commission believes that an offender’s sexually deviant behavior may be relevant regarding the offender’s sexual dangerousness even if such behavior does not rise to the level of a criminal offense.

The remainder of this chapter will: (1) explain CSDB’s relevance in child pornography cases; (2) discuss relevant social science research; (3) define CSDB and also discuss the methodology used in the Commission’s study and its limitations; and (4) present the findings of the Commission’s study.

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<sup>1</sup> See Chapter 6 at 157 & n.84 (defining prevalence rate as the rate among the general population or a specific part of the population that a particular disorder or event occurred at least once during their lifetime).

<sup>2</sup> CSDB is defined below in Part C, *infra*. It includes both “contact” and “non-contact” sex offenses committed by a child pornography offender before his arrest and prosecution on child pornography charges as well as an offender’s commission of a prior non-production child pornography offense separated from the instant child pornography offense by an arrest or other official law enforcement intervention known to the offender.

<sup>3</sup> Chapter 4 of this report addressed social science research concerning sexual dangerousness and deviance as a significant differentiating characteristic among non-production child pornography offenders. See Chapter 4 at 99–104.

<sup>4</sup> That chapter includes the findings of the Commission’s recidivism study of the 660 offenders sentenced in fiscal years 1999 and 2000. See Chapter 11 at 299–303.

## A. RELEVANCE OF SEXUALLY DANGEROUS BEHAVIOR IN CHILD PORNOGRAPHY CASES

Although there is a lack of consensus among social scientists and others about the historical prevalence rate of CSDB among child pornography offenders convicted of a non-production offense,<sup>5</sup> there appears to be general agreement that offenders who in the past or concomitantly with their non-production offenses also engaged in CSDB are qualitatively different from child pornography offenders who never engaged in CSDB.<sup>6</sup> There are three primary reasons for this distinction.

First, non-production offenders with histories of CSDB pose a greater risk of sexual recidivism than non-production offenders without any history of CSDB.<sup>7</sup> Second, non-production offenders with a known history of at least one act of CSDB are more likely to have engaged in *other*, as yet undetected acts of CSDB in the past.<sup>8</sup> Third, offenders with histories of

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<sup>5</sup> See *infra* note 13.

<sup>6</sup> See, e.g., *United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011) (“Not only is the failure to distinguish between contact and possession-only offenders questionable on its face, but it may go against the grain of a growing body of empirical literature indicating that there are significant, [28 U.S.C.] § 3553(a)-relevant differences between these two groups.”); Jesse P. Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); Prepared Statement of Deirdre D. von Dornum, Federal Defenders of New York (on behalf of the federal defender community), to the Commission, at 11 (Feb. 15, 2012) (“The least culpable offenders on the spectrum [of child pornography offenders] are the [simple] possessors, followed by distributors, producers, and child molesters [who also commit child pornography offenses]”) (“von Dornum Statement”); *id.* at 12 (contending that “the harshest sentences [should be for those child pornography offenders] who directly harm children”); *cf.* Testimony of U.S. Chief District Judge M. Casey Rodgers (N.D. Fla.) (on behalf of the Criminal Law Committee of the Judicial Conference of the United States Courts), to the Commission, at 372 (Feb. 15, 2012) (“The issue of [a child pornography offender’s sexual] dangerousness . . . is what keeps many [of] us judges awake at night . . .”).

<sup>7</sup> See, e.g., Angela Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-Up Study*, 35 LAW & HUM. BEHAV. 466, 472–73, 475 (2011); Jerome Endress et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC PSYCHIATRY 43 (2009); Michael Seto & Angela Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. OF RES. & TREATMENT 201, 207 (2005); see also *United States v. Garthus*, 652 F.3d 715, 720 (7th Cir. 2011) (Posner, J.) (“A pedophilic sex offender who has committed both a child-pornography offense and a hands-on sex crime is more likely to commit a future crime, including another hands-on offense, than a defendant who has committed only a child-pornography offense.”) (citing Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 1, 9 (2008); Seto & Eke, *supra*, at 207). Although social science research concerning sexual recidivism is primarily concerned with offenders’ prior “contact” sexual offenses, an offender’s history of “non-contact” or “hands-off” sexual offenses also appears to be a risk factor for sexual recidivism. See Andrew Harris et al., *STATIC-99 Coding Rules Revised — 2003*, STATIC 99, 4–5, 13–15 (2003), [http://www.static99.org/pdfdocs/static-99-coding-rules\\_e.pdf](http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf) (stating that the STATIC-99 risk assessment for sex offenders may be used on offenders with a known history of “contact” or “non-contact” sex offenses involving an identifiable victim, e.g., voyeurism and exhibitionism). The Static-99 assessment is not applicable to offenders whose only sex offense is a non-production child pornography offense. See *id.* at 5. However, for an offender with a history of a “contact” or “non-contact” sex offense with an identifiable victim, that offender’s commission of a non-production child pornography offense is a risk factor for future sex offenses. See *id.* at 14–15.

<sup>8</sup> Researchers have found that child pornography offenders who engaged in one type of CSDB in the past (e.g., soliciting a minor on-line for sex) were more likely than other child pornography offenders also to have engaged in

CSDB are more culpable for having engaged in CSDB in addition to having committed their instant non-production offenses — in the same manner that any offender who has committed multiple related offenses is generally more culpable than an otherwise similarly situated offender who committed only a single offense.<sup>9</sup> Thus, from the perspective of an offender’s dangerousness and culpability, whether an offender has ever engaged in CSDB in addition to his non-production child pornography offense is a salient issue.

Furthermore, policy-makers and courts need reliable data about the overall prevalence rate of CSDB among all §2G2.2 offenders. Such data is one of several considerations relevant to the determination of whether penalty levels are generally proportionate for non-production offenders. Some critics have contended that the current penalty ranges in non-production cases are inappropriately based in significant part on the notion that an offender’s possession of child pornography is a “proxy” for detected and undetected prior sexual abuse of children. In a related vein, they contend that harsh punishments are imposed to incapacitate offenders for a lengthy period of time in order to prevent them from committing future sexual abuse offenses.<sup>10</sup> These critics contend that, because some non-production offenders have not engaged in CSDB in the past and will not engage in CSDB in the future, it is unfair to punish them based on what other non-production offenders have done in the past or may do in the future.<sup>11</sup>

As discussed in Chapter 12, the Commission believes that a non-production offender’s sexual dangerousness — demonstrated on a case-by-case basis — is one of three primary aggravating factors relevant to sentencing in non-production cases.<sup>12</sup> In addition, reliable data about the prevalence of sexual dangerousness among all non-production offenders is one factor that policy-makers should consider in deciding whether *overall* penalty levels are generally proportionate for the entire class.

## **B. EXISTING SOCIAL SCIENCE RESEARCH**

Social scientists, both academics and government-employed social scientists, have studied the prevalence rate of prior sex offenses (typically looking only at “contact” sex offenses

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past “contact” CSDB. See Testimony of Dr. Gene G. Abel, to the Commission, at 96 (Feb. 15, 2012); Testimony of Dr. Jennifer A. McCarthy, Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology, to the Commission, at 118 (Feb. 15, 2012); see also Jennifer McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders*, 16 J. SEXUAL AGGRESSION 181, 190, 192 (2010).

<sup>9</sup> Cf. USSG §4A1.3(a)(2)(E) (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) (authorizing an upward departure based on “[p]rior similar adult criminal conduct not resulting in a criminal conviction”).

<sup>10</sup> See, e.g., *United States v. C.R.*, 792 F. Supp. 2d 343, 377 (E.D.N.Y. 2011); *United States v. Johnson*, 588 F. Supp. 2d 997, 1005 (S.D. Iowa 2008); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 870–72, 880–83 (2011); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545, 548 (2011).

<sup>11</sup> See Hessick, *supra* note 10, at 870–72, 880–83; Hamilton, *supra* note 10, at 548; see also Von Dornum Statement, *supra* note 6, at 24–25.

<sup>12</sup> See Chapter 12 at 320, 324–25 .

but sometimes also considering non-contact sex offenses and prior child pornography offenses) among child pornography offenders. These studies have found substantially different prevalence rates.<sup>13</sup> The studies, which varied in their methodologies,<sup>14</sup> operative definitions,<sup>15</sup> and study samples (with respect to time periods, size of sample, and nationality of offenders studied),<sup>16</sup>

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<sup>13</sup> See, e.g., Richard Wollert et al., *Federal Internet Child Pornography Offenders — Limited Offense Histories and Low Recidivism Rates*, in *THE SEX OFFENDER: CURRENT TRENDS IN POLICY & TREATMENT PRACTICE* Vol. VII (Barbara K. Schwartz ed., 2012) (based on a study of 72 federal child pornography offenders in the United States who were treated by the authors during the past decade, the authors found that 20, or 28%, had prior convictions for a contact or non-contact sexual offense, including a prior child pornography offense); Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 *SEXUAL ABUSE* 22, 33–34 (2011) (finding, based on 2006 data from surveys of approximately 5,000 law enforcement officials throughout the United States, that 21% of cases that began with investigations of child pornography possession “detected offenders who had either committed concurrent sexual abuse [offenses] or been arrested in the past for such crimes”); Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 *SEXUAL ABUSE* 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight “online offenders” — the vast majority of whom were child pornography offenders — had an “officially known contact sex offense history,” but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on clinical “self-report” data); Michael L. Bourke & Andres E. Hernandez, *The “Butner Study” Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 *J. FAM. VIOLENCE* 183 (2009) (study of 155 federal child pornography offenders in the United States who participated in the residential sex offender treatment program at FCI Butner from 2002–05; finding that official records, including the offenders’ presentence reports in their child pornography cases, revealed that 26% had previously committed a contact sex offense, yet finding that “self reports” of the offenders in therapy revealed that 85% had committed prior “hands on” sex offenses); Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 *BMC PSYCHIATRY* 1 (2009) (study of 231 Swiss child pornography offenders; finding that only 1.0% had prior convictions for “hands-on” sex offenses and an additional 3.5% had prior convictions for possession of child pornography); Caroline Sullivan, *Internet Traders of Child Pornography: Profiling Research — Update*, N.Z. Dep’t of Internal Affairs (Dec. 2009), [http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/\\$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf) (last visited Dec. 21, 2012) (finding that approximately 10% of 318 New Zealand child pornography offenders prosecuted from 1993–2007 “have been found to have criminal histories involving a sexual offence against a male or female under the age of 16 years”).

<sup>14</sup> Some studies have considered only prior convictions for sex offenses; others have also considered any “official record” of adjudicated or alleged sex offenses; and still others have also considered “clinical self reports” by offenders outside of the law enforcement context. Compare, e.g., Wollert et al., *supra* note 13 (prior convictions), with Bourke & Hernandez, *supra* note 13 (prior convictions, information in presentence reports, and clinical self-admissions).

<sup>15</sup> Some studies have considered only “hands on” or “contact” sex offenses, while others have considered “non-contact” sexual offenses and prior child pornography offenses as well. Compare, e.g., Wollert et al., *supra* note 13 (considering contact and non-contact offenses), with Bourke & Hernandez, *supra* note 13 (considering only “hands on” sexual offenses). Some studies have looked only at prior sexual misconduct against minors, while others considered prior sex offenses against adult as well as minor victims. Compare, e.g., Wolak, *supra* note 13, at 33 (minor victims or undercover officers posing as minors), with Seto et al., *Contact Sexual Offending*, *supra* note 13 (minor and adult victims, although noting that most victims were children).

<sup>16</sup> Virtually all studies considered offender populations that were predominately white males who were older than the general offender populations.

thus provide significantly inconsistent results about the correlation between offenders' viewing child pornography and their prior or concomitant commission of other sex offenses.<sup>17</sup>

In order to better evaluate the prevalence of child pornography offenders who also have committed “contact” child sex offenses, Canadian researchers in 2010 conducted a “meta-analysis” of numerous studies involving offender populations from several different countries. They identified 24 studies of offenders whose instant offense was an Internet sex offense (the vast majority were child pornography offenses) where researchers attempted to determine how many offenders also had committed contact sex offenses.<sup>18</sup> Of the total sample of 24 studies with 4,697 offenders, 17.3 percent of offenders (812) were known to have committed a prior contact sex offense, mostly against children. Of the 24 studies, 18 used “official” reports (*e.g.*, convictions or arrest records), and six used offenders’ “self reports” (typically made during therapy) to determine the prevalence rate of prior contact sex offending. The 18 official report studies, when considered collectively, found a rate of 12.2 percent. The six self-report studies taken together reported a rate of 55 percent.<sup>19</sup>

The much higher percentage of prior contact sex offending found by the “self-report” studies is in large part attributable to the fact that many of the self-reported prior child sex offenses were not captured by official reports.<sup>20</sup> Studies show that only an “estimated 1 in 20 cases of child sexual abuse is reported or identified” and that “an arrest was made in only 29% of reported juvenile sexual assaults.”<sup>21</sup> This research demonstrates that a very large percentage of child sex abuse is unreported. As such, regardless of whether one relies on official reports, self-

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<sup>17</sup> See Hamilton, *supra* note 10, at 579–80 (after reviewing several studies, the author concluded that “[s]ocial science studies considering the correlation between viewing child pornography and contact sexual offenses against children are not consistent”); see also *C.R.*, 792 F. Supp. 2d at 375–77 (reviewing the conflicting studies and concluding that “[r]eliable empirical evidence on this issue is lacking”). The studies’ findings ranged from an 85% prevalence rate (Bourke & Hernandez, *supra* note 13), to a 4.5% prevalence rate (Endrass et al., *supra* note 13). The studies based on “official records” (typically convictions and arrests records) have found considerably less than 50% of child pornography offenders (typically 10% to 20%) had official records of prior sex offenses, while studies of clinical self-reports have found significantly higher rates of prior sex offenses (ranging from 32.3% to 85.4%). See generally Seto et al., *Contact Sexual Offending*, *supra* note 13, at 128–30 (Table I).

<sup>18</sup> Seto et al., *Contact Sexual Offending*, *supra* note 13, 128–30 (Table I).

<sup>19</sup> See *id.* at 125–40. The meta-analysis of studies relying on self-reports included a study conducted at the Federal Correctional Institute at Butner, North Carolina (where federal child pornography offenders participated in a sex offender treatment program) — often referred to as the “Butner Study.” The Butner study involved 155 federal offenders, 84.5% of whom admitted during treatment that they had committed at least one prior “hands on” sex offense. Polygraph examinations were used in conjunction with self reporting in an effort to insure cooperation and accuracy. See Bourke & Hernandez, *supra* note 13. The Butner study has been criticized for a variety of reasons, including selection bias. The meta-analysis observed that the Butner study’s finding is a statistical “outlier” among self-report studies. Seto et al., *supra* note 13, at 133. After excluding the Butner study, the meta-analysis showed that the remaining self-report studies, when considered collectively, found that approximately 42.5% of offenders had committed prior contact offenses. See Seto et al., *Contact Sexual Offending*, *supra* note 13, at 134.

<sup>20</sup> See Seto et al., *Contact Sexual Offending*, *supra* note 13, at 134. Neither self-reports nor official criminal records are a perfect measure of prior contact sex offending, and therefore neither number derived from their meta-analysis should be regarded as definitive.

<sup>21</sup> See Ryan C. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 *MAYO CLINIC PROC.* 457, 460–61 (2007).

reports, or a combination, “[t]he key point, that some child pornography offenders have committed officially undetected contact offenses[,] is not controversial.”<sup>22</sup>

### C. THE COMMISSION’S STUDY: DEFINITION, METHODOLOGY, AND LIMITATIONS

#### 1. *Definition of Criminal Sexually Dangerous Behavior*<sup>23</sup>

For purposes of the Commission’s study, “criminal sexually dangerous behavior” (“CSDB”) by offenders sentenced under the non-production child pornography guidelines comprises three different types of criminal sexual conduct:

- **“Contact” Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender’s commission of a non-production child pornography offense;
- **“Non-Contact” Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct not involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender’s commission of a non-production child pornography offense; and
- **Prior Non-Production Child Pornography Offenses:** a non-production child pornography offender’s prior commission of a non-production child pornography offense if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender.

The first two types of CSDB are sex offenses against “real-time” victims (*i.e.*, victims other than the ones depicted in the child pornography for which the offenders were convicted in federal court). Offenders who committed such CSDB thus engaged in two types of victimization: they victimized the children depicted in the child pornography that the offenders collected or distributed,<sup>24</sup> and they also victimized the other, real-time victims of their CSDB.

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<sup>22</sup> Prepared Statement of Michael C. Seto, Ph.D, Director of Forensic Rehabilitation Research, Royal Ottawa Health Care Group, to the Commission, at 3 (Feb. 15, 2012).

<sup>23</sup> The term “sexually dangerous behavior” has not appeared with much frequency in either the legal or academic contexts regarding child pornography offenders. Rather, the term primarily has been used in the broader context of civil commitment of “sexually dangerous persons.” *See, e.g.*, *Laxton v. Bartow*, 421 F.3d 565, 572 (7th Cir. 2005) (“While Laxton disputed that he lacked control over his sexually dangerous behavior, the evidence presented at the commitment trial firmly established the requisite nexus between Laxton’s mental disorder and his dangerousness.”); 18 U.S.C. § 4248 (authorizing the civil commitment of “sexually dangerous” persons). This use of the term is appropriate in the specific context of child pornography offenders because it captures a primary concern of policy-makers, judges, and law enforcement officers, *i.e.*, whether child pornography offenders have engaged in sexually dangerous behavior involving abusive, exploitative, or predatory sexual conduct in addition to their non-production child pornography offenses.

<sup>24</sup> *See* Chapter 5 at 112–14 (discussing how child pornography offenders victimize the minors depicted in child pornography).

The third type of CSDB does not involve a real-time victim and, instead, involves a §2G2.2 offender's repeated commission of a non-production child pornography offense, so long as the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention (*e.g.*, a law enforcement officer's seizure of the offender's computer pursuant to a search warrant for child pornography) known to the offender.<sup>25</sup> Consistent with child pornography recidivism studies, the Commission decided to treat such repeat non-production child pornography offenses as CSDB because persistent engagement in child pornography offenses even after being officially investigated demonstrates an offender's strong and persistent sexual deviancy and willingness to continue to break the law despite known official intervention.<sup>26</sup> In this regard, the Commission's data analysis (set forth below in this chapter) shows that nearly half of offenders who had engaged in such repeat non-production child pornography offenses also had engaged in one or both of the other two types of CSDB mentioned above.<sup>27</sup> As discussed below, the subset of CSDB offenders who only engaged in repeat non-production offenses is small (51 of 581 CSDB offenders).<sup>28</sup>

As described above, CSDB is a broad categorization that encompasses not only illegal sexual contact with a victim (*e.g.*, child molestation involving rape or sexual assault)<sup>29</sup> but also non-contact sex offenses (*e.g.*, illegally enticing a minor to engage in sexual conduct remotely via a webcam).<sup>30</sup> CSDB also includes production of child pornography, which itself may involve contact with the victim (*e.g.*, an offender videotaped himself having sexual contact with a minor)

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<sup>25</sup> Instances of past child pornography offenses that did not result in a conviction or a criminal investigation of which an offender was aware were not treated as CSDB. Only instances in which an offender was arrested or otherwise put on notice that he was being criminally investigated for a child pornography offense and thereafter continued to offend (typically by collecting new images after his computer was seized by law enforcement) were treated as CSDB. In fiscal year 2010 cases, out of the 581 cases with evidence of CSDB, there were 51 cases in which a prior non-production child pornography offense was the offender's only CSDB. Of those 51 cases, 39 involved prior non-production child pornography convictions and 12 involved judicial findings of an offender's prior commission of a non-production offense separated from the instant non-production offense by an arrest or other official intervention. See Figure 7-2, *infra*.

<sup>26</sup> See, *e.g.*, Eke et al., *Examining the Criminal History and Future Offending*, *supra* note 7, at 466, 468; Wollert et al., *supra* note 13. Moreover, 18 U.S.C. §§ 2252(b) and 2252A(b) treat convictions for such conduct as a basis for a recidivist enhancement in the same manner as convictions for the other types of CSDB. See, *e.g.*, *United States v. Jennings*, 652 F.3d 290, 293-96 (2d Cir. 2011) (defendant convicted of possessing child pornography received an enhanced sentence under § 2252A(b)(2) based on his prior conviction for possessing child pornography).

<sup>27</sup> See Table 7-1 & Figure 7-1, *infra* (of the 90 USSG §2G2.2 offenders who had the second type of CSDB shown in Table 7-1, 39, or 43.3%, also had engaged in the other types of CSDB, as reflected in Figure 7-1).

<sup>28</sup> See Figure 7-1, *infra*.

<sup>29</sup> Sexual assault offenses included "statutory rape." Where necessary, the Commission researched applicable state law to determine the age of consent. As discussed in footnote 59 *infra*, statutory rape offenses involving otherwise consensual sexual activity between an offender and a sexually mature victim were extremely infrequent in the instances of CSDB coded by the Commission. Only two such cases were identified.

<sup>30</sup> Cf. Eke et al., *Examining the Criminal History and Future Offending*, *supra* note 7, at 466, 468 (2011) (examining both "contact" and "noncontact" sexual offenses); Wollert, et al., *supra* note 13 (same).

and acts that do not involve contact (*e.g.*, an offender solicited self-produced sexual images of a minor via the Internet or a cellular phone but did not engage in sexual contact with the minor).<sup>31</sup>

In its analysis of non-production cases, the Commission only coded an offender's sexually deviant conduct as CSDB if it was illegal under federal or state penal laws.<sup>32</sup> Common examples of such non-criminal yet sexually deviant behavior discussed in presentence reports ("PSRs") included: (1) a defendant's Internet "chat" with a real or perceived minor during which the defendant asked sexually-oriented questions of the minor or expressed general desires to have sex with the minor in the future but did not actually solicit sex, send obscene images, or otherwise engage in illegal conduct toward the minor; (2) a defendant's collection of children's underwear associated with his collection of child pornography; (3) a defendant's "diary" or "journal" containing graphic descriptions of his purported sexual acts with minors (where a subsequent law enforcement investigation determined that such sexual acts did not occur) or obvious fantasies about such acts; (4) a defendant's Internet "chat" with another adult in which the defendant claimed to have engaged in illicit sex with a minor (where a subsequent law enforcement investigation determined that such sexual acts did not occur) or expressed his desires to engage in such illicit sex;<sup>33</sup> and (5) a defendant's surreptitious photographing or videotaping of clothed minors in a public setting that were produced for the purpose of the defendant's sexual gratification.<sup>34</sup>

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<sup>31</sup> Child pornography *production* cases, *i.e.*, those in which offenders were sentenced pursuant to USSG §2G2.1, are discussed in Chapter 9. In the *non-production* cases discussed in this chapter, offenders whose CSDB involved production of child pornography were sentenced pursuant to USSG §2G2.2 as their primary guideline. In some of those cases, an offender's production of child pornography occurred concomitantly with his non-production offense, but his non-production offense yielded a sentencing range under USSG §2G2.2 that was higher than the sentencing range under §2G2.1 for his production offense. In other cases, offenders who committed both production and non-production offenses were sentenced under §2G2.2 rather than §2G2.1 for reasons that are not apparent from reviewing the sentencing documents in their cases.

<sup>32</sup> Two commonly recurring types of sexually-oriented criminal offenses were excluded as CSDB for purposes of the Commission's study: (1) an offender's creation of a "morphed" image of the head of an identified underage friend or family member superimposed on a sexually-explicit photograph of the nude body of an unidentified child; and (2) prostitution offenses (other than child prostitution). While both are criminal offenses, *see, e.g.*, 18 U.S.C. §§ 2252A(a)(5)(B) & 2256(8)(C) (criminalizing "morphing"); N.Y.P.L. § 230.00 (criminalizing prostitution), neither were considered sufficiently similar in seriousness to CSDB such as child molestation, production of actual child pornography, Internet solicitation or enticement of a minor, or sexual voyeurism or exhibitionism offenses.

<sup>33</sup> Routinely, when an offender made such statements in a diary or during Internet "chat," law enforcement officers investigated to determine whether such sexual abuse actually occurred. In several cases reviewed by the Commission, law enforcement officers determined that offenders who had claimed to have sexually abused their own relatives did not have such relatives. In other cases, offenders made claims that were not facially incredible (*e.g.*, an offender claimed to have sexually abused a neighborhood child known to exist). If a PSR indicated that a law enforcement investigation substantiated the offender's claim, the Commission treated the case as a finding of CSDB or as an unresolved allegation (depending on the results of the investigation and the findings in the PSR).

<sup>34</sup> According to PSRs, some offenders were polygraphed either after law enforcement seized their computers or arrested the offenders for their non-production offenses and typically asked if they had committed other sex offenses. The Commission excluded as CSDB findings by a polygraph examiner that an offender was "deceptive" in denying that he had sexually abused a minor (as recounted in a PSR) when there was no independent proof of such sexual abuse.



The Commission limited its study to *criminal* sexually dangerous behavior because it proved impractical to code non-criminal sexually deviant behavior indicating sexual dangerousness toward children without an objective and clear standard (such as the criminality of an offender's conduct). An offender's non-criminal sexually deviant behavior, however, may be reflective of the offender's sexual dangerousness and increased culpability.<sup>35</sup>

Although the vast majority of CSDB coded by the Commission constituted felony offenses under state or federal law (*e.g.*, sexual assault, Internet enticement of a minor, production of child pornography), *see* Table 7–1, *infra*, some of the CSDB constituted misdemeanor offenses under the penal laws of the relevant jurisdictions (*e.g.*, most indecent exposure and sexual voyeurism offenses). The Commission included as CSDB both adult sex offenses and sex offenses committed when §2G2.2 offenders were juveniles. Although juvenile offenses are sometimes excluded as criminal history under the sentencing guidelines,<sup>36</sup> social science research shows that an adult sex offender's history of committing sex offenses as a juvenile is a significant risk factor in predicting sexual recidivism because it indicates antisociality.<sup>37</sup> The Commission's coding project revealed that the vast majority of known CSDB committed by offenders occurred when they were adults, as reflected in Figure 7–5, *infra*.<sup>38</sup>

In addition to attempted and completed acts of CSDB involving actual victims, the Commission counted as CSDB attempted criminal conduct<sup>39</sup> involving perceived (but non-existent) minors. The Commission reviewed many PSRs that recounted instances in which §2G2.2 offenders engaged in sexually-oriented Internet “chat” with undercover law enforcement officers posing as minors. Frequently, such offenders solicited sex from the perceived minors or

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<sup>35</sup> *See, e.g.*, United States v. Cunningham, 669 F.3d 723, 727, 735–36 (6th Cir. 2012) (finding that a sentencing court did not err in considering a USSG §2G2.2 offender's “legal” self-recorded “rape fantasy,” involving the defendant's filming “himself masturbating to [non-pornographic, legal] photographs of . . . a young child” and “sen[ding] [the] video to another offender . . . along with lascivious audio commentary of the act”); *see also id.* at 735 (“By any measure, the video depicting Defendant acting out a rape fantasy with a child is probative of Defendant's ‘history and characteristics’ and ‘the need . . . to protect the public from further crimes’ by Defendant. 18 U.S.C. § 3553(a)(1), (2)(C).”); Michael Seto, *Assessing the Risk Posed by Child Pornography Offenders*, U.N.C. Injury Prevention Research Center 6 (Apr. 6–7, 2009), [http://www.iprc.unc.edu/G8/Seto\\_Position\\_Paper.pdf](http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf) (last visited Dec. 20, 2012) (suggesting that future sexual risk assessment instruments for child pornography offenders will consider the extent of an offender's “sexual interest in children”); *see also* Seto et al., *Contact Sexual Offending*, *supra* note 13, at 137 (noting that current risk assessment instruments for “contact” sex offenders consider the extent of an offender's “sexual deviance”).

<sup>36</sup> *See* USSG §4A1.2(d) (Definitions and Instructions for Computing Criminal History) (setting forth limitations on consideration of juvenile criminal history of federal offenders).

<sup>37</sup> *See* Chapter 10 at 285-87 (discussing risk assessments of sex offenders).

<sup>38</sup> *See infra* at 185 (noting mean age of “contact” CSDB offenders was 31 years old at time of the CSDB).

<sup>39</sup> The Commission deemed an offense to be a criminal attempt if the offender intended to commit the offense and also took a “substantial step” toward the commission of the offense (*e.g.*, an offender mailed a webcam to a minor with whom he had been chatting on the Internet with instructions for the minor to engage in sexual activity in front of the webcam, but the minor ultimately decided not to comply with the offender's request). *See* United States v. Resendiz-Ponce, 549 U.S. 102, 106–07 (2007) (noting that the traditional requirements for proving criminal attempt are evidence of both intent to commit the offense and a “substantial step” toward the commission of the offense).

attempted to entice the perceived minors to self-produce child pornography and send it to the offenders via email or instant message (IM) attachments or to engage in real-time sexual conduct via webcam (commonly called “cybersex”). Although the perceived minors with whom the offenders communicated did not exist, these offenders nevertheless committed a criminal act.<sup>40</sup> If an offender arranged to meet a fictional minor for sexual contact, such conduct was classified as an attempted “travel” offense (contact CSDB).<sup>41</sup> If the offender attempted to entice a perceived minor to engage in sexual conduct outside of the offender’s physical presence or sight (e.g., encouraging the minor to engage in mutual masturbation with the offender while the two “chatted” via IM or email or over the telephone), such conduct was deemed a non-contact “enticement” offense (non-contact CSDB).<sup>42</sup> If an offender requested self-produced sexual images or a video from the fictional minor (to be made in response to the offender’s request), such conduct was deemed attempted production of child pornography (non-contact CSDB). If the offender transmitted either child pornography or sexual images of himself to a perceived minor, such conduct was treated as non-contact CSDB (either distributing obscenity to a minor or indecent exposure).

## 2. Methodology

As discussed above, social scientists have studied the historic prevalence rates of CSDB among child pornography offenders, and these studies vary in significant ways, including their sources of data, operative definitions, and study samples (with respect to time periods, size of sample, and nationality of offenders).<sup>43</sup>

The Commission’s study of CSDB in §2G2.2 cases synthesizes the methodological approaches of many of these earlier studies. First, as noted above, the Commission’s findings concerning CSDB are divided into three general categories: (1) “contact” CSDB; (2) “non-contact” CSDB, and (3) repeat non-production child pornography offenses.

Second, the Commission’s findings specify whether victims of the offenders’ CSDB were adults or minors and, in the case of “contact” CSDB, the Commission’s study notes the ages and genders of the victims as well as the average number of victims per offender. CSDB involving adult victims of criminal sex offenses is considered relevant because it indicates that an offender convicted of a non-production *child* pornography offense also has a history of sexually abusive,

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<sup>40</sup> See, e.g., *United States v. Hughes*, 632 F.3d 956 (6th Cir. 2011) (defendant convicted of Internet enticement after arranging to meet a perceived 14-year old for sex; purported minor was in fact an undercover officer).

<sup>41</sup> See Chapter 2 at 30 (discussing “travel” offenses under federal law).

<sup>42</sup> See *id.* (discussing “enticement” offenses under federal law). Although the Seventh Circuit has held that such conduct not involving actual or attempted physical presence or physical contact by the offender does not violate the federal enticement statute, see *United States v. Taylor*, 640 F.3d 255 (7th Cir. 2011); *but see United States v. Fugit*, \_\_\_ F.3d \_\_\_, 2012 WL 6734787, at \*5-\*6 (4th Dec. 31, 2012) (disagreeing with *Taylor*), the penal laws in many states (such as those prohibiting an adult from taking indecent liberties with a minor or corrupting a minor’s morals) would criminalize such conduct even without physical presence or physical contact by the offender. See *Taylor*, 640 F.3d. at 262 & nn.5–7 (Manion, J., concurring) (citing cases and statutes from several jurisdictions). The Commission thus treated such conduct as non-contact CSDB.

<sup>43</sup> See *supra* notes 13–15 and accompanying text.

predatory, or exploitative conduct that may recur with an adult *or* minor victim.<sup>44</sup> As discussed below, the vast majority of CSDB offenders (94.3%) abused minor victims.<sup>45</sup>

Third, the Commission’s study was based only on “official records,” *i.e.*, PSRs in the offenders’ §2G2.2 cases. A PSR contains two potential sources of information about an offender’s CSDB: (1) an offender’s criminal history (discussions of prior convictions or arrests for sex offenses); and (2) findings in other parts of the PSR (typically in the “offense conduct” section) that an offender engaged in CSDB but was not convicted of such illegal conduct.<sup>46</sup>

The Commission’s study includes separate findings concerning unadjudicated allegations of CSDB where sentencing courts did not resolve such allegations recounted in PSRs.<sup>47</sup> As the analysis below reveals, such allegations were only a small fraction of all cases involving CSDB.<sup>48</sup> Some of the allegations resulted in arrests or formal investigations by a child protection agency, while others were simply mentioned in the PSR (*e.g.*, an offender’s adult daughter told the probation officer who wrote the PSR that the offender had molested her when she was a child but the offender was never investigated or arrested for such alleged conduct). The Commission reports prior convictions, CSDB findings in PSRs, and the allegation-only cases separately in most of the data analyses that appear below in Part D.

### 3. *Limitations*

Because the Commission’s findings were based only on *known* CSDB that was recounted in PSRs, the Commission’s findings should be regarded as a conservative estimate of the actual rate of CSDB among offenders who were sentenced under the non-production guidelines. It is widely accepted that the actual rate of criminal CSDB among child pornography offenders is higher than the “known” or “official” rate for the simple reason that sexual offenses, particularly

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<sup>44</sup> See Chapter 4 at 77–78 (discussing sexually deviant child pornography offenders whose deviancy is not limited to children).

<sup>45</sup> See *infra* note 55.

<sup>46</sup> The Commission was limited to coding such information from PSRs because sentencing courts do not send the Commission other documents concerning offenders that may contain relevant information concerning CSDB (*e.g.*, transcripts of court proceedings).

<sup>47</sup> In several cases, a PSR contained allegations of an offender’s CSDB but did not find the allegations to be true or untrue (*e.g.*, a PSR simply listed an offender’s prior arrest for a child molestation offense but did not find whether the alleged underlying conduct was true or untrue). In some cases, a defendant objected to the allegations but the court did not resolve the objection because the court stated that it would not consider the allegations at sentencing. A sentencing court need not rule on a defendant’s objection to some portion of a PSR if the “the matter will not affect sentencing or [if] the court will not consider the matter at sentencing.” Fed. R. Crim. P. 32(i)(3)(B). In other cases, the defendant did not object to such an allegation (which did not affect his guideline range) and the court adopted the PSR in the statement of reasons form.

<sup>48</sup> As set forth in Figure 7–2 *infra*, of the 581 cases, the vast majority (520, or 89.5%) involved either a prior conviction or a finding of CSDB in the PSR. The Commission identified an additional 61 cases (10.5%) in which one or more unresolved allegations of CSDB had been made against an offender. An additional 37 cases had unresolved allegations in addition to prior convictions or findings of *unrelated* CSDB.

against children, are systemically underreported to law enforcement.<sup>49</sup> Furthermore, PSRs do not always include complete “official” criminal histories of offenders.<sup>50</sup>

Unlike other studies of CSDB, which examined samples of child pornography offenders, the Commission’s study of CSDB was based on virtually the entire populations of federal offenders sentenced under the non-production guidelines in fiscal years 1999, 2000, and 2010.<sup>51</sup> For this reason, the Commission’s study is not subject to any limitation concerning selection bias<sup>52</sup> and allows for a comparison of the rates of CSDB over a decade-long period. As discussed below, the rates of CSDB remained stable over time.

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<sup>49</sup> See *supra* notes 20–22 & accompanying text; see also PEGGY HEIL & KIM ENGLISH, CAL. DEP’T OF CORR. AND REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 40 (2007) (“Official record data are woefully inadequate when it comes to reflecting an offender’s sex crime history.”) (citing Peggy Heil et al., *Integration of Polygraph Testing with Sexual Offenders in the Colorado Department of Corrections*, 29 POLYGRAPH 26–35 (2002)); cf. *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (Posner, J.) (“Estimates of recidivism are bound to be too low when one is dealing with underreported crimes such as sex offenses.”).

<sup>50</sup> For instance, an offender’s juvenile criminal record is sometimes not included in a PSR because a federal probation officer was not given access to the offender’s sealed juvenile record.

<sup>51</sup> As discussed in Chapter 1, the only cases that the Commission did not examine from those three fiscal years were cases lacking sufficient documentation and, in the case of fiscal year 2010 cases, those in which offenders were sentenced under the former USSG §2G2.4 or a version of USSG §2G2.2 in effect before November 1, 2004. See Chapter 1 at 17 & n.89. The Commission also studied a sample of offenders from fiscal year 2012. See *infra* at 201–04.

<sup>52</sup> Cf. Melissa Hamilton, *The Child Pornography Crusade and its Net Widening Effect*, 33 CARDOZO L. REV. 1679, 1706–07 (2012) (criticizing the “Butner Study” for selection bias resulting from, *inter alia*, the fact that only certain federal child pornography offenders participated in FCI Butner’s residential sex offender treatment program). The Commission’s study results are not necessarily representative of *all* child pornography offenders in the United States because the population studied comprised only federal offenders. The Commission’s study also may not be reflective of future populations of federal child pornography offenders, in that law enforcement techniques and offender and offense characteristics may change over time. For example, the rate of known CSDB could rise in future years if USSG §2G2.2 offenders are selected for prosecution based on evidence that they also engaged in CSDB.

**D. FINDINGS OF COMMISSION’S FISCAL YEAR 2010 STUDY**

1. *Findings Concerning All Types of CSDB*

Of the 1,654 §2G2.2 cases in fiscal year 2010 that the Commission studied, 520 (31.4%) had a prior conviction for a sex offense or finding in a PSR that an offender had engaged in CSDB. Considering allegation-only cases as well, 581 (35.1%) involved evidence or allegations of CSDB. Table 7–1 below lists various subcategories of CSDB. An offender who falls in different subcategories in relation to different offenses (*e.g.*, an offender with a prior rape offense and a prior indecent exposure offense) or the same offense (*e.g.*, an offender who committed a contact offense during the course of a travel offense and who produced child pornography with the victim) appears more than once, so the total number of behavior types substantially exceeds the 581 CSDB offenders.<sup>53</sup> Table 7–1 does not include the number of times an offender engaged in a particular type of CSDB. For example, an offender who was convicted of multiple sexual assaults with child victims will only appear once in the subcategory conviction for a contact offense with a child victim. As a result, Table 7–1 underestimates the total number of victims.

**Table 7-1  
Number of CSDBs for §2G2.2 Offenders  
Fiscal Year 2010**

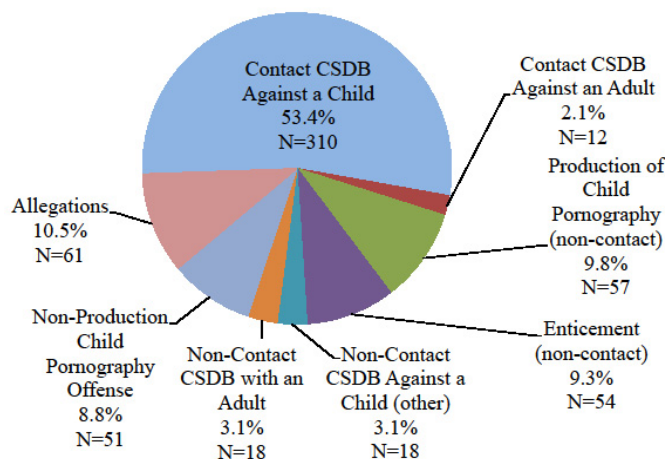
Type of Behavior	N	Percent (total of 581 cases)
Contact CSDB against a child (forcible sex offenses and “statutory rape”)	310	53.4
Contact CSDB against an adult	18	3.1
Production of child pornography (contact and non-contact)	127	21.9
Actual or attempted travel to meet a child for sexual contact after meeting on-line (“travel” offenses)	102	17.6
Solicited production of sexually-oriented images of a minor from their adult caretaker	19	3.3
Non-contact Internet “enticement” (other than “travel” – <i>e.g.</i> , “cyber sex” via webcam)	124	21.3
Non-contact CSDB with a child	133	22.9
Non-contact CSDB with an adult	36	6.2
Prior non-production child pornography offense	90	15.5
Allegations of criminal sexually dangerous behavior (three-quarters were “contact” offense allegations)	100	17.2

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.

<sup>53</sup> Table 7–1 includes cases regardless whether an offender was convicted or found in a PSR to have engaged in a particular type of CSDB.

Figure 7–1 below shows only the most *serious* type of CSDB in which offenders engaged. All 581 offenders appear in only one category below (the most serious applicable one) despite the fact that they may have engaged in multiple types of behavior.<sup>54</sup>

**Figure 7-1**  
**§2G2.2 Offense Characteristics: Most Serious CSDB**  
**Fiscal Year 2010 (N=581 of 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.

As reflected in Figure 7–1, the vast majority of CSDB (94.3%) involved victims who were children,<sup>55</sup> and over half (53.4%) of all fiscal year 2010 non-production cases with CSDB involved a sexual contact offense against a child.

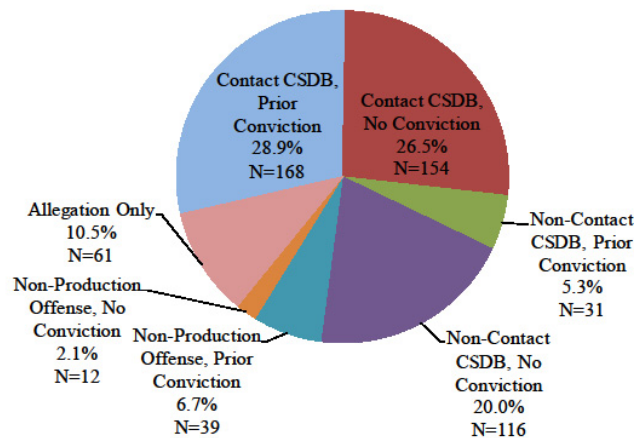
Figure 7–2 below divides the types of CSDB by both the manner in which the CSDB was proved (or alleged) at sentencing (by conviction, PSR finding, or unresolved allegation), and by the nature of the type of behavior. The categories from most to least severe are: (1) a prior conviction for “contact” CSDB (“contact CSDB, prior conviction”); (2) a PSR finding of “contact” CSDB (“contact CSDB, no conviction”); (3) a prior conviction for “non-contact” CSDB (“non-contact CSDB, prior conviction”); (4) a PSR finding of “non-contact” (“non-contact CSDB, no conviction”); (5) a prior conviction for a non-production child pornography offense (“non-production offense, prior conviction”); (6) a PSR finding of a prior non-production

<sup>54</sup> The Commission used the following order of ranking by seriousness in Figure 7–1: contact offenses against children (including production and travel offenses involving actual or attempted contact); contact offenses against adults; production of child pornography (non-contact); Internet enticement offenses (non-contact); other non-contact offenses against a child; non-contact offenses against an adult; and prior non-production child pornography offenses. Figure 7–1 separately reports unresolved allegations of CSDB.

<sup>55</sup> Of the 61 cases involving allegations-only, 60 cases involved allegations of offenses against minors. As reflected in Figure 7–1, 30 of the remaining 520 cases involved adult victims. Therefore, of all 581 CSDB cases, 550 (94.7%) involved minor victims. In some cases, the PSRs did not indicate the ages of the victims. In such cases, the Commission assumed that the victims were adults rather than minors.

offense (“non-production offense, no conviction”); and (7) an unresolved allegation of “contact” or “non-contact” CSDB (“allegation only”).<sup>56</sup> An offender who falls in multiple categories of CSDB appears only once, in the category corresponding to their most severe conduct (*i.e.*, contact before non-contact sex offense) and strongest evidence of crime (*i.e.*, a conviction before a finding in a PSR without a conviction).

**Figure 7-2**  
**§2G2.2 Offense Characteristics: Categories of CSDB**  
**Fiscal Year 2010 (581 of 1,654 cases)**



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.

## 2. Findings Concerning “Contact” CSDB

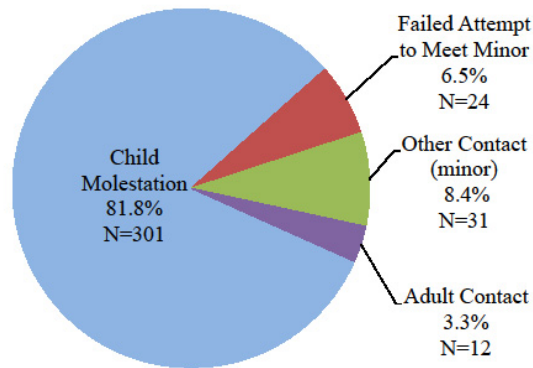
Figure 7–3 below, which is based on cases with evidence or allegations of CSDB, shows the different types of contact CSDB (child molestation;<sup>57</sup> attempted “travel” offenses not resulting in actual contact with a child;<sup>58</sup> “other” contact offenses against children, such as fondling a child’s breasts or buttocks; and adult contact offenses). The vast majority of contact CSDB cases (81.8%) involved child molestation.

<sup>56</sup> Of the 61 offenders who had only unresolved allegations of CSDB, 75.4% of such offenders (46 of 61) had allegations of “contact” sex offenses. Of the remaining 15 offenders, none had allegations of prior non-production offenses; all 15 were alleged to have engaged in some type of “non-contact” CSDB (*e.g.*, sexual exhibitionism).

<sup>57</sup> “Child molestation” offenses include the following categories of sexual contact: oral to genital or anal; genital to genital or anal; digital to genital or anal; object to genital or anal, with an actual child. The Commission did not include as “child molestation” attempted “travel” offenses that did not result in sexual contact. Such cases were deemed “failed attempt to meet minor.” The Commission also did not include as “child molestation” cases in which an offender sexually fondled only a minor’s breasts or buttocks (as opposed to the minor’s genitals or anus). The Commission classified such cases, which were rare, as “other” contact offenses.

<sup>58</sup> See Chapter 2 at 30 (discussing “travel” offenses). Such offenses almost always involved an undercover law enforcement officer pretending to be a minor whom an offender met on-line and with whom the offender arranged to meet in order to have sexual relations.

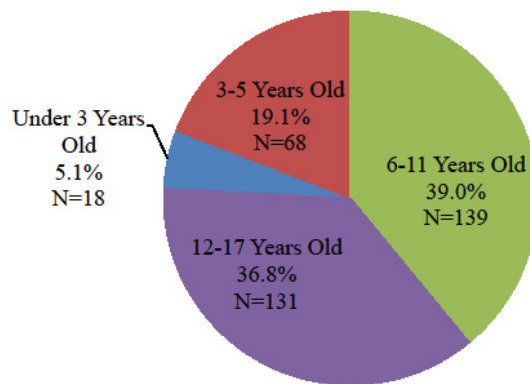
**Figure 7-3**  
**§2G2.2 Contact CSDB Offense Characteristics:**  
**Nature of Contact**  
**Fiscal Year 2010 (N=368)**



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 7-4 shows the ages of the victims in cases of contact offenses against minors. Of the 356 cases, 225 (63.2%) involved victims who typically were prepubescent (under 12).

**Figure 7-4**  
**§2G2.2 Contact CSDB Offense Characteristics:**  
**Age of Youngest Victim at Time of Offense**  
**Fiscal Year 2010 (N=356)**

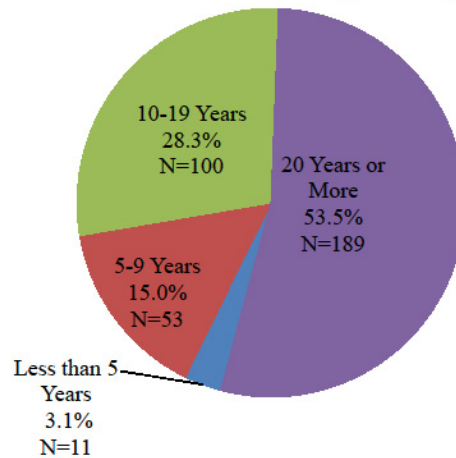


Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, twelve cases were excluded where the youngest victim was an adult.  
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.



Figure 7–5 below shows the differences in age between the offenders and their minor victims in cases with contact CSDB (less than five years; five or more years but less than ten years; ten or more years but less than 20 years; 20 or more years). The majority of offenders (53.5%) were at least 20 years older than their victims.<sup>59</sup>

**Figure 7-5**  
**§2G2.2 Contact CSDB Offense Characteristics:**  
**Offender-Victim Age Differential at Time of Offense**  
**Fiscal Year 2010 (N=353)**



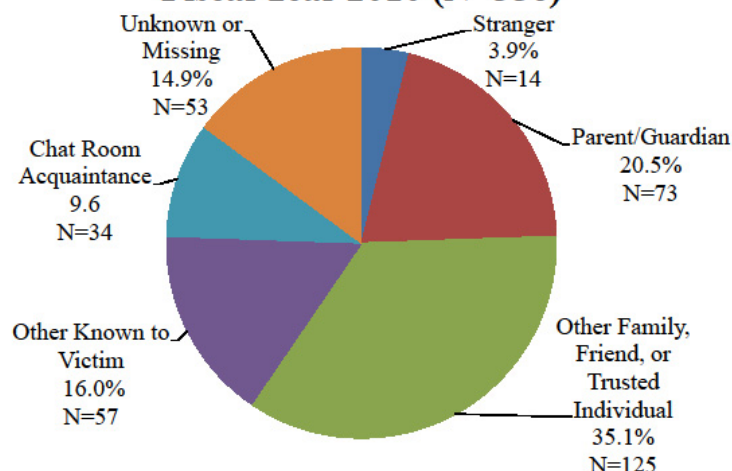
Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, three cases were excluded for missing information and twelve cases were excluded where the youngest victim was an adult.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

The mean age of offenders who engaged in such contact CSDB with minor victims was 31 years old at the time of the CSDB (which may or may not have been earlier than the date of the federal child pornography offense, as some offenders engaged in CSDB concomitantly with their child pornography offenses). The mean age of the minor victims in those cases was nine years old. The average number of victims per offender with a history of contact CSDB was 2.1 victims. Of the cases with victims of contact CSDB whose gender was documented, 66.7 percent of the cases had only female victims, 23.1 percent of the cases had only male victims, and 10.2 percent of the cases involved victims of both genders.<sup>60</sup>

<sup>59</sup> Of the 11 cases involving less than five years of age difference between the offender and minor victim, two involved what appear to have been “statutory rape” between the offender and a sexually mature yet underage victim (*i.e.*, otherwise apparently consensual sexual activity that was illegal because the victim was below the legal age of consent). The remaining nine cases involved forcible rape or non-consensual sex with intoxicated or mentally impaired victims.

<sup>60</sup> In 4.7% of cases, the PSRs did not indicate the gender of the minor victims.

**Figure 7-6**  
**§2G2.2 Contact CSDB Offense Characteristics:**  
**Offender-Victim Relationship**  
**Fiscal Year 2010 (N=356)**



Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, twelve cases were excluded where the youngest victim was an adult.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–6 above shows the relationship between offenders and minor victims (parent/guardian; other family member or adult friend; “other” known to victim (*e.g.*, coach); an acquaintance from an Internet “chat-room”; or stranger). The vast majority of victims (at least 71.6%, with 14.9% cases missing relevant data) had preexisting relationships with the offenders.

#### **E. THE ASSOCIATION BETWEEN CSDB AND OFFENSE AND OFFENDER CHARACTERISTICS**

Because a substantial proportion of §2G2.2 offenders have known histories of CSDB, the Commission analyzed fiscal year 2010 §2G2.2 cases to determine whether there was an association between particular offender and offense characteristics relevant to sentencing (*e.g.*, the most serious non-production offense of conviction or an offender’s Criminal History Category under the guidelines) and CSDB.<sup>61</sup>

At the outset, it should be noted that some offenders’ histories of CSDB are expressly taken into consideration in the guideline’s “pattern-of-activity” enhancement, §2G2.2(b)(5), and/or the statutory enhancement in 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1) for offenders with

<sup>61</sup> As explained in Chapter 2, the guideline penalty range for a non-production child pornography offender is established through a combination of a mandatory minimum penalty (if applicable), an offender’s “starting point” under USSG §2G2.2, aggravating factors in six specific offense characteristics, and the offender’s Criminal History Category. See Chapter 2 at 25–26, 31–32.

predicate convictions for sex offenses.<sup>62</sup> Those two enhancements do not apply in every §2G2.2 case with CSDB because the criteria for the enhancements' application exclude some cases with CSDB. The pattern of activity enhancement applies only if a court finds that an offender engaged in two separate acts involving “the sexual abuse or exploitation of a minor” in addition to the offender’s non-production child pornography offense.<sup>63</sup> The statutory enhancement applies only if an offender has a prior conviction for an enumerated sex offense.<sup>64</sup> According to the Commission’s fiscal year 2010 datafile, 13.9 percent (230) of all 1,654 §2G2.2 offenders received one or both of these enhancements. Considering the subset of 520 offenders with known CSDB histories established through prior convictions or findings in PSRs, 44.2 percent of such offenders (230 of 520) received the guideline enhancement and/or the statutory enhancement.<sup>65</sup> The remaining 55.8 percent of offenders with CSDB histories (290 of 520) did not receive either enhancement based on their CSDB typically because it both did not qualify as the requisite “pattern of activity” for the guideline enhancement and also did not result in a conviction as required for the statutory enhancement.

The extent of any association between CSDB and other offender and offense characteristics relevant to sentencing will be examined below. Such analysis is intended to assess how the current sentencing scheme in child pornography cases punishes §2G2.2 offenders with known histories of CSDB compared to §2G2.2 offenders without known histories of CSDB.

1. *Association Between CSDB and Offense Characteristics*

a. *Association Between CSDB and Most Serious Offense of Conviction*

As discussed in Chapter 2, §2G2.2 offenders are convicted of a variety of non-production statutory offenses ranging from possession to distribution, and the offense of conviction plays a significant role in determining an offender’s punishment in that it affects the statutory range of punishment as well as an offender’s “starting point” under §2G2.2.<sup>66</sup>

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<sup>62</sup> See Chapter 2 at 25–26, 32 (discussing the two enhancements).

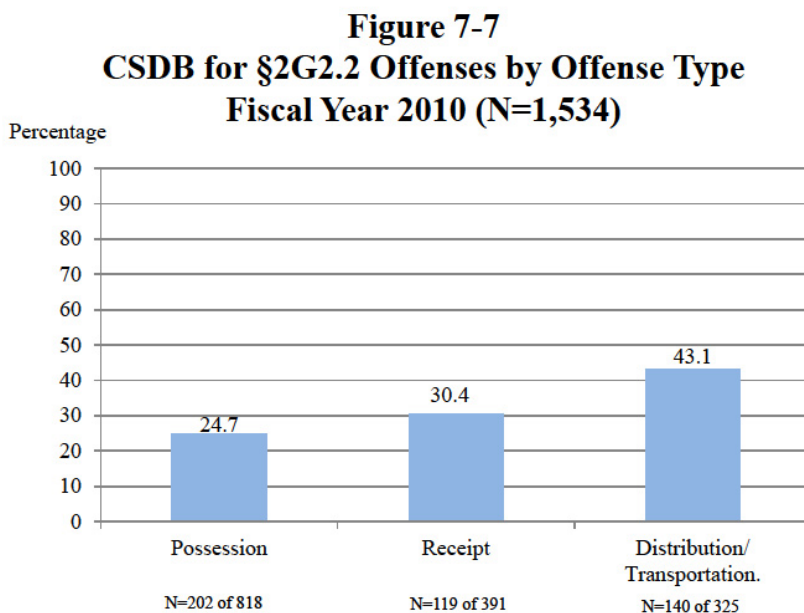
<sup>63</sup> USSG §2G2.2(b)(5). Application Note 7 following USSG §2G2.2 provides that “[i]f the defendant engaged in the sexual abuse or exploitation of a minor at any time . . . and subsection (b)(5) does not apply, an upward departure may be warranted.” USSG §2G2.2, comment. (n.7). Unlike §2G2.2(b)(5), that upward departure provision does not require two acts of CSDB. Of the §2G2.2 cases in fiscal year 2010 in which courts did not apply the pattern-of-activity enhancement, a court in a single case upwardly departed from the applicable guideline range pursuant to Application Note 7. In addition, courts in two other §2G2.2 cases “varied” upwardly pursuant to 18 U.S.C. § 3553(a) for similar reasons in cases in which the pattern-of-activity enhancement was not applied.

<sup>64</sup> 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1).

<sup>65</sup> Of those 230 offenders, 58 received both the guideline and statutory enhancements, 110 received only the guideline enhancement, and 62 received only the statutory enhancement.

<sup>66</sup> See Chapter 2 at 31–32.

The Commission thus analyzed §2G2.2 cases to determine the degree of association between the different offenses of conviction and the rates of CSDB among offenders convicted of those offenses. A total of 1,534 §2G2.2 cases without predicate convictions for sex offenses<sup>67</sup> were divided into three categories based on the most serious offense of conviction: (i) possession,<sup>68</sup> (ii) receipt; and (iii) distribution/transportation.<sup>69</sup> Figure 7–7 below shows the rates of CSDB in these three categories.



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–7 shows that the rate of CSDB was highest in distribution/transportation cases (140 of 325 cases, or 43.1%) and lowest in possession cases (202 of 818 cases, or 24.7%), with receipt cases falling in between the two other types of cases (119 of 391 cases, or 30.4%). These differences are consistent with the relative levels of gravity for the three types of offenses in §2G2.2’s sentencing scheme (*i.e.*, the different “starting points” for distribution, receipt, and possession).<sup>70</sup>

<sup>67</sup> The 120 offenders whose sentences were enhanced under 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1) based on a predicate conviction for a sex offense necessarily were punished more severely based on their CSDB. Thus, only cases without such predicate convictions were analyzed.

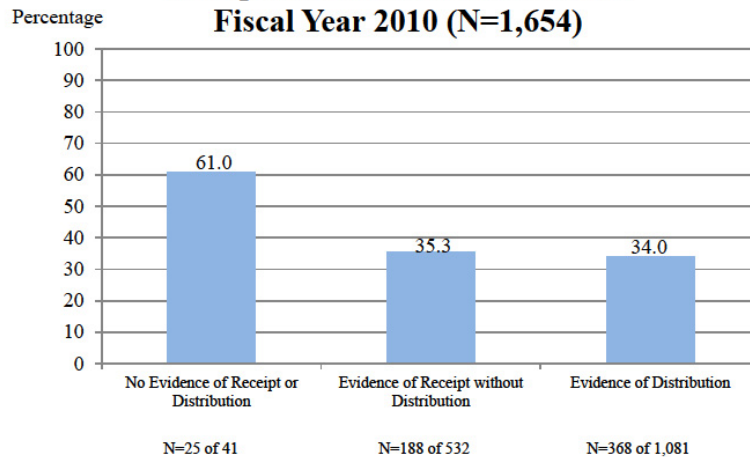
<sup>68</sup> For purposes of this analysis, the five obscenity cases sentenced under USSG §2G2.2 in fiscal year 2010 were treated as possession cases.

<sup>69</sup> Transportation and distribution offenses were combined for this analysis. As noted in *infra* note 72, the vast majority of offenders convicted of transportation (88.7%) in fact distributed child pornography to another person.

<sup>70</sup> See Chapter 2 at 32.

As discussed in Chapter 6, the most serious offense of conviction often does not reflect the actual conduct of offenders; in particular, many offenders who knowingly received or distributed child pornography were convicted solely of possession.<sup>71</sup> Figure 7–8 (below) therefore depicts the rates of CSDB based on the most serious actual conduct of offenders as recounted in PSRs and/or plea agreements (distribution, receipt, or no evidence of receipt or distribution) regardless of their offense of conviction.<sup>72</sup> It shows that the rates of CSDB were very similar for receipt and distribution offenders (35.3% and 34.0%); however, the 41 offenders whose PSRs and plea agreements contained no evidence of receipt or distribution conduct (and, instead, only recounted evidence of simple possession) had a substantially *higher* rate of CSDB (61.0%) than offenders whose PSRs found that they engaged in receipt and/or distribution conduct.

**Figure 7-8**  
**CSDB for §2G2.2 Offenders by**  
**Receipt and Distribution Conduct**  
**Fiscal Year 2010 (N=1,654)**



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

The higher rate of CSDB for the 41 possession-only offenders appears to relate to the fact that a majority of these offenders initially were investigated by law enforcement officers for reasons other than suspicion of child pornography. Typically, officials investigated such offenders based on allegations of sexual abuse against a minor or as part of supervision of the offenders as registered sex offenders. During such investigations, law enforcement officers

<sup>71</sup> See Chapter 6 at 146–48.

<sup>72</sup> Although the Commission coded cases based on *convictions* of transportation, the Commission did not separately code transportation as a distinct type of offender behavior (in addition to distribution or receipt conduct). Prosecutors charged transportation (rather than distribution) under 18 U.S.C. §§ 2252(a)(1) or 2252A(a)(1) in 141 USSG §2G2.2 cases in fiscal year 2010. See Chapter 6 at 146. However, only a small percentage of such offenders simply transported child pornography without the intent of distributing to another. The vast majority of such offenders (125, or 88.7%) engaged in knowing distribution to another, according to their PSRs and/or plea agreements.

located child pornography in the offenders' possession (sometimes on media other than computer hard drives), but there was an apparent absence of proof that the offenders had knowingly received or distributed the child pornography. Thus, the manner in which many of these child pornography offenses were detected was different from the typical manner in which non-production offenders were detected (*e.g.*, law enforcement officers' accessing the offenders' computer files using P2P file-sharing programs). The typical manner of detection necessarily involved receipt or distribution conduct by the vast majority of offenders, while the manner in which the 41 possession-only offenders were detected did not.

b. Association Between CSDB and Aggravating Factors in Specific Offense Characteristics

The Commission also analyzed the rates of CSDB with respect to three aggravating factors contained in specific offense characteristics in §2G2.2(b) — distribution, sado-masochistic images, and the number of images. The remaining three aggravating factors — prepubescent images, use of a computer, and “pattern of activity” — were excluded from the analysis because virtually all non-production cases had two of those factors (prepubescent images and use of a computer) present,<sup>73</sup> and every case with the pattern of activity enhancement necessarily involved CSDB. Although the enhancement for the number of images occurs in virtually all cases,<sup>74</sup> the incremental levels contained within that enhancement based on how many images were possessed — §2G2.2(b)(7)(A)–(D) — applied at varying rates. The analysis that follows thus examines whether particular numbers of images possessed by offenders are associated with increased or decreased rates of CSDB.

i. Distribution enhancement

Of the 1,654 non-production offenders, 683 offenders (41.3%) received an enhancement for distribution under §2G2.2(b)(3). Of those 683 offenders, 256 (37.5%) had a history of CSDB. By comparison, 971 offenders (58.7% of all 1,654 offenders) did not receive an enhancement under §2G2.2(b)(3). Of those 971 offenders, 325 (33.5%) had a history of CSDB. Thus, offenders who received the enhancement had only a slightly higher rate of CSDB than offenders who did not receive the enhancement.<sup>75</sup>

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<sup>73</sup> See Chapter 8 at 209 (96.3% of fiscal year 2010 cases received an enhancement under USSG §2G2.2(b)(2) for prepubescent images and 96.3% of such cases also received an enhancement under §2G2.2(b)(6) for use of a computer).

<sup>74</sup> See Chapter 8 at 209 (96.9% of fiscal year 2010 cases had the enhancement under USSG §2G2.2(b)(7)).

<sup>75</sup> Section 2G2.2(b)(3) has six different subsections providing for incremental enhancements based on the type of distribution conduct ((A) through (F)). Although enhancements of 5 to 7 additional levels can occur for offenders who distributed to minors, see USSG §2G2.2(b)(3)(C),(D) & (E) — which constitutes CSDB — those enhancements are infrequently applied. The 5- or 2-level enhancements under §2G2.2(b)(3)(B) & (F), which do not require distribution to minor in order to apply, are much more commonly applied. In fiscal year 2010, of the 683 offenders who received an enhancement under §2G2.2(b)(3), 620 (90.8%) receive a 2- or 5-level enhancement under §2G2.2(b)(3)(B) & (F), while 50 (7.3%) received a 5-, 6- or 7-level enhancement under §2G2.2(b)(3)(C), (D), or (E). Of the remaining 13 cases, two received an enhancement under §2G2.2(b)(3)(A) for distribution for pecuniary gain (*e.g.*, posting sexual images of a child prostitute on Craigslist.com as an advertisement), and the remaining 11 cases had insufficient documentation to permit a determination of which subsection of §2G2.2(b)(3) applied.

As discussed in Chapter 6, a substantial number of non-production offenders (398) actually engaged in knowing distribution conduct but did not receive an enhancement under §2G2.2(b)(3).<sup>76</sup> Therefore, the Commission compared the CSDB rate of *all* 1,081 offenders who actually distributed child pornography with the CSDB rate of the 573 offenders who did not distribute. Of the 1,081 offenders who distributed, 368 (34.0%) had a history of CSDB. Of the 573 offenders who did not distribute, 213 (37.2%) had a history of CSDB. Both percentages are similar to the overall CSDB rate for all §2G2.2 offenders (35.1%). Therefore, distribution conduct, one of the primary legal factors in the current non-production penalty scheme (in both the penal statutes and guidelines), is generally not associated with a higher rate of CSDB.

Although the general act of distribution is not associated with a higher rate of CSDB, the *specific manners* of distribution are associated with different rates of CSDB. In Chapter 6, the various modes of distribution are set forth in Table 6–10.<sup>77</sup> Figure 7–9 below reflects the CSDB rates for the different modes of distribution described in the 1,080 cases where PSRs showed the specific manner of distribution. If an offender distributed child pornography in more than one way (*e.g.*, by both “open” P2P file-sharing and email), Figure 7–9 depicts only the primary mode of distribution used by offenders. The primary mode was selected based on the following order of ranking: “personal” modes of Internet distribution, followed by “impersonal” Internet distribution (which exclusively was “open” P2P file-sharing), and followed by finally non-Internet modes (hand-delivery, mailing, or texting, all of which were “personal”).<sup>78</sup> “Personal” Internet distribution modes were ranked in the following order: (1) emailing or instant-messaging (IM) with an attachment; (2) posting or otherwise distributing images in connection with Internet chat-rooms, bulletin boards, newsgroups, or similar Internet forums; and (3) “closed” P2P file-sharing (*e.g.*, Gigatribe). Eighteen cases solely involved “other” modes of Internet distribution that could not be classified in any of the other groups. Such cases typically involved an offender’s posting child pornography images on his own social networking site (*e.g.*, Facebook or MySpace) or on a commercial photo-hosting service (*e.g.*, Photobucket.com or Flickr.com). The intended recipient(s) of the child pornography in those 18 cases could not be determined from PSRs. They are thus treated separately.

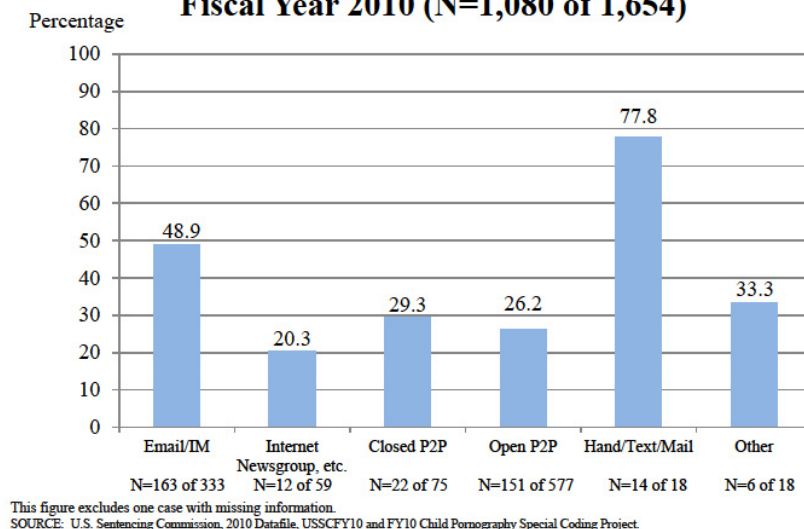
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<sup>76</sup> See Chapter 6 at 152.

<sup>77</sup> See *id.* at 150.

<sup>78</sup> See Chapter 3 at 52–53 (discussing “personal” and “impersonal” distribution).

**Figure 7-9**  
**CSDB for §2G2.2 Offenders by Type of Distribution**  
**Fiscal Year 2010 (N=1,080 of 1,654)**



Although the CSDB rate for offenders who solely distributed by hand, mail, or texting with a cell phone — *i.e.*, not using the Internet — was the highest rate (77.8%) among the different modes of distribution, that rate represented a very small number of offenders (only 18 of 1,080 offenders) and must be viewed with caution for that reason.

As Figure 7–9 shows, the most common primary mode of distribution was P2P file-sharing, with 577 offenders using an “open” P2P program, and 75 offenders using a “closed” P2P program as their primary modes of distribution.<sup>79</sup> The rates of CSDB were similar for these two groups — 26.2 percent for “open” P2P offenders, and 29.3 percent for “closed” P2P offenders.

The second most popular mode of distribution, email and IM, was associated with a higher rate of CSDB than both “open” and “closed” P2P file-sharing programs. Of the 333 offenders whose primary distribution mode was email or IM, 163 (or 48.9%) had known histories of CSDB. However, 98 of those 163 cases (60.1%) involved email or IM distribution concomitantly with an “enticement” or “travel” offense (during which the offenders typically were detected by law enforcement in Internet “sting” operations after offenders distributed child pornography to the perceived minors as part of the “grooming” process).<sup>80</sup> The vast majority of such offenders (nearly 80%) appear to have committed no other unrelated CSDB in addition to

<sup>79</sup> See Chapter 6 at 150 (discussing fiscal year 2010 offenders’ use of P2P file-sharing programs).

<sup>80</sup> See Chapter 4 at 77, 102 & n.173 (discussing “grooming”).



their enticement or travel offenses.<sup>81</sup> Excluding those 98 cases, the CSDB rate for offenders who used email or IM (65 of 235 cases, or 27.7%) is comparable to the CSDB rate for the other modes of Internet distribution (185 of 711 cases, or 26.0%). Thus, it does not appear that email or IM distribution is more associated with CSDB outside of the particular context of Internet enticement or travel cases that also involved the distribution of child pornography.

Finally, the Commission compared the CSDB rate of the 445 offenders who engaged in one or more “personal” modes of distribution<sup>82</sup> to one or more adults<sup>83</sup> with the CSDB rates of (1) the 577 offenders whose distribution was limited to “impersonal” distribution (*i.e.*, those who only used “open” P2P programs such as LimeWire); and (2) the 573 offenders who did not distribute child pornography to anyone. The Commission conducted this analysis in order to assess whether offenders’ apparent involvement in child pornography “communities” — as reflected in their “personal” distribution of child pornography to other adult offenders<sup>84</sup> — was associated with a higher CSDB rate than the rates of offenders who did not appear to have been involved in such communities.<sup>85</sup>

Of the 445 offenders who engaged in one or more “personal” modes of distribution of child pornography to other adults (presumptive “community” members), the CSDB rate was 38.4 percent. Of the 577 offenders whose distribution was “impersonal” only, the CSDB rate was 26.2 percent. The CSDB rate for the 573 offenders who did not distribute to anyone was 37.2 percent. Therefore, the CSDB rate for the 445 presumptive “community” members was significantly higher than the 577 offenders who distributed only using an “impersonal” mode of distribution but very similar to the 573 offenders who did not distribute child pornography to anyone. The combined CSDB rate for the 577 “impersonal” distributors and the 573 non-distributors was 31.7 percent. Comparing the 38.4 percent CSDB rate of the 445 presumptive “community” members to the 31.7 percent CSDB rate of all offenders with no apparent community involvement, it appears that community involvement was associated with a somewhat higher CSDB rate.

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<sup>81</sup> The Commission examined 40 randomly selected cases (of the 98) in which offenders distributed via email or IM and also engaged in “travel” or “enticement” offenses. Of those 40 cases, 33 (78%) had no CSDB besides the travel or enticement offenses.

<sup>82</sup> See Chapter 6 at 151 (discussing how those 445 offenders were classified as “personal” distributors). Such offenders distributed by using one or more of the following modes: Internet newsgroups, bulletin boards, chat-rooms, or similar Internet forums; email or IM; “closed” P2P file-sharing; and hand-delivery, mail, or texting.

<sup>83</sup> Those 445 offenders do not include the 40 offenders whose PSRs indicated that they distributed child pornography *solely* to minors (and who did not have any involvement in a child pornography “community” of adult offenders) and those 18 offenders whose intended recipients could not be determined from their PSRs (*i.e.*, those offenders who engaged in “other” Internet distribution modes discussed above). See Chapter 6 at 151 & n.68.

<sup>84</sup> See *id.* at 151 (explaining that an offender’s “personal” distribution of child pornography to another adult suggested some degree of involvement in a child pornography “community”).

<sup>85</sup> As discussed in Chapter 4, existing social science research is inconclusive concerning whether community involvement is associated with higher rates of criminal sexually dangerous behavior by child pornography offenders. See Chapter 4 at 94. Nevertheless, regardless whether involvement in a community is associated with higher CSDB rates, such communities normalize and validate child sexual exploitation and do encourage at least some offenders to commit new sex offenses against children. See *id.* at 96, 98.

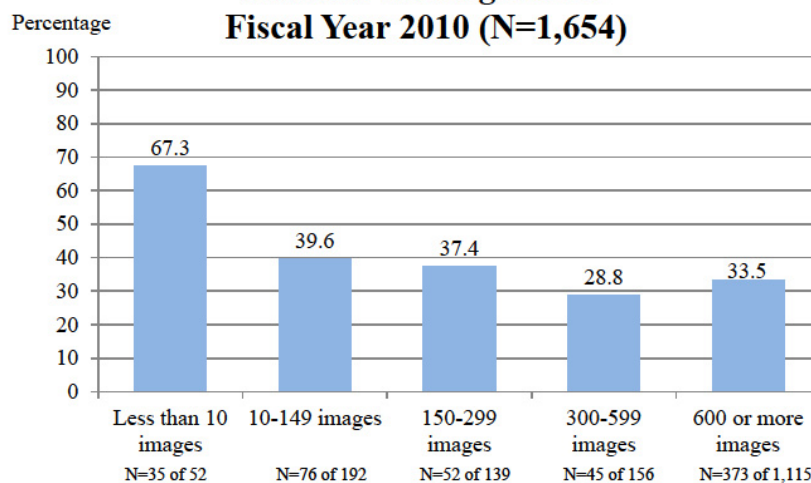
ii. Sado-Masochistic Images

The possession of sado-masochistic images does not appear to be associated with a higher rate of CSDB. Of the 1,227 cases in which the sado-masochism enhancement in §2G2.2(b)(4) was applied, 427 cases (34.8%) involved CSDB. That rate was almost identical to the CSDB rate in cases without the sado-masochistic enhancement (154 of 427 cases, or 36.1%) and the overall CSDB rate in all §2G2.2 cases (35.1%, as noted above).

iii. Number of Images

Figure 7–10 compares the rates of CSDB for the different levels of enhancement in the guideline’s specific offense characteristic for the number of images possessed (*see* §2G2.2(b)(7)(A)–(D)).

**Figure 7-10**  
**CSDB for §2G2.2 Offenders by**  
**Number of Images SOC**  
**Fiscal Year 2010 (N=1,654)**



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Notably, the rate of CSDB was highest for those offenders who possessed less than ten images and thus received no enhancement under §2G2.2(b)(7) (which requires a minimum of ten images for the minimum 2-level enhancement to apply). The likely explanation is that many such offenders were selected for prosecution based on their criminal sexually dangerous behavior as opposed to the content or size of their child pornography collections. Thirty-five of the 52 offenders (67.3%) who possessed less than ten images engaged in CSDB related to production of child pornography and/or travel or enticement offenses (whereby they typically sent child pornography images to a real or perceived minor as part of the “grooming” process). Such offenders were detected in a manner other than the typical manner for detecting non-production offenders today (whereby offenders are detected when law enforcement officers access their

illegal files using peer-to-peer file sharing programs, which often yield large volumes of child pornography).<sup>86</sup> With respect to offenders who possessed ten or more images, analysis of the different levels of enhancements in §2G2.2(b)(7)(A) through (D) did not indicate that possession of increasingly larger collections of images was associated with increasingly higher rates of CSDB.

## 2. Association Between CSDB and Offender Characteristics

The extent of any association between certain offender characteristics, including criminal history and personal characteristics, and the rate of CSDB in §2G2.2 cases will be examined below.

### a. Association Between CSDB and Guideline Criminal History Scores

Eighty-two percent of §2G2.2 offenders in fiscal year 2010 (1,356 of 1,654) were in Criminal History Category I.<sup>87</sup> Of those 1,356 offenders in Criminal History Category I, 376 (27.7%) had a history of CSDB (including offenders with allegations of CSDB), while 980 (72.3%) did not have a history of CSDB. The significant percentage of offenders with CSDB histories who fell in Criminal History Category I is explained by three factors: (1) some offenders with histories of CSDB were never convicted of the conduct constituting their CSDB; (2) some offenders' CSDB resulting in a conviction was concomitant with their federal child pornography offenses (*e.g.*, production, travel, or enticement offenses), and their convictions for such CSDB were not treated as “prior” convictions under §4A1.2(a)(1);<sup>88</sup> and (3) some offenders with prior convictions for CSDB did not have their convictions counted under §4A1.2(e) because of the “staleness” of the convictions.

Of the 298 non-production offenders in Criminal History Category II through VI, 205 (68.8%) had a history of CSDB.<sup>89</sup> Yet of those 298 offenders, 119 (39.9%) did not have prior *convictions* for sex offenses; instead, their CSDB was established through findings in the PSRs. Thus, 39.9 percent of the offenders in Criminal History Category II through VI had criminal records unrelated to CSDB.

Although higher Criminal History Categories in non-production cases are associated with higher rates of CSDB, a majority of offenders with CSDB are in Criminal History Category I,<sup>90</sup> as a result of both the operation of certain provisions in Chapter Four of the *Guidelines Manual*

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<sup>86</sup> See Chapter 6 at 145, 149-50.

<sup>87</sup> See *id.* at 143 n.48.

<sup>88</sup> As discussed in *supra* note 31, such offenders' “primary guideline” was USSG §2G2.2 because it yielded a higher penalty range than any other applicable guideline.

<sup>89</sup> Offenders in Criminal History Category II through VI are analyzed collectively because a clear majority (59% or higher) of the offenders in each Criminal History Category had a history of CSDB.

<sup>90</sup> As noted above, 376 such offenders were in Criminal History Category I, while 205 were in Criminal History Categories II–VI.

discussed above and the fact that many offenders were not previously convicted of their CSDB conduct.

b. Association Between CSDB and Other Offender Characteristics

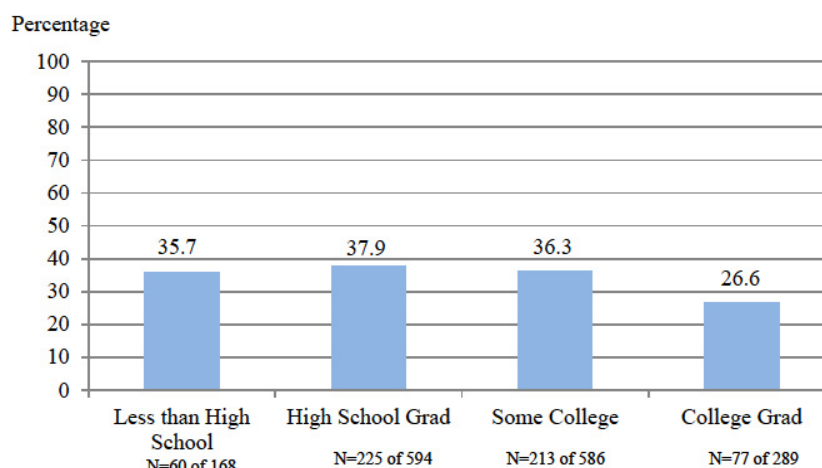
The Commission also examined several other offender characteristics that are commonly addressed in PSRs — reported history of childhood sexual abuse, education level, employment status, race, age, history of substance abuse, and military record — with respect to their degree of association with CSDB.

Of those 293 offenders with reported histories of sexual abuse in their own childhoods, 128 (43.7%) had a history of CSDB. Of those 1,361 offenders with no reported history of childhood sexual abuse, 453 (33.3%) had a history of CSDB. Thus, offenders with a self-reported history of childhood sexual abuse had a noticeably higher rate of CSDB than offenders with no reported history of childhood sexual abuse.

Offenders’ different levels of education were associated with different rates of CSDB in only one respect. College graduates had a somewhat lower rate of CSDB than the offenders with lower education levels, all of whom had comparable rates of CSDB, as shown in Figure 7–11.

With respect to employment status, offenders who were unemployed at the time of their non-production offenses had a higher level of CSDB (106 of 247, or 42.9%) than employed

**Figure 7-11**  
**CSDB for §2G2.2 Offenders by Education Level**  
**Fiscal Year 2010 (N=1,637)**



Note: This figure excludes 17 cases with missing information.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

offenders (402 of 1,241, or 32.4%).<sup>91</sup> Retired offenders had the lowest rate of CSDB (28.6%, 20 of 70), while those offenders considered “disabled” had the highest rate (49 of 92, 53.3%). Similarly, with respect to offenders’ financial assets at the time at sentencing, offenders with net assets worth greater than \$10,000 had a lower rate of CSDB than less affluent offenders. The CSDB rates by level of assets were 36.0 percent for offenders with negative assets (241 of 670), 37.9 percent for offenders with positive assets less than \$10,000 (132 of 348), and 27.8 percent for offenders with assets greater than \$10,000 (109 of 392).<sup>92</sup>

The remaining offender characteristics — race, age, substance abuse history, and military service record — showed no significant associations with higher or lower rates of CSDB in §2G2.2 cases.<sup>93</sup>

### 3. *Association Between CSDB and Geographic Location of Prosecutions*

The different geographical locations where federal non-production child pornography offenders were prosecuted appeared associated with different rates of CSDB. Such differences likely are explained at least in part by the charging policies of the 94 U.S. Attorneys’ offices. As a federal prosecutor testified before the Commission, certain offices prioritize “high risk” non-production offenders for federal prosecution to a greater extent than other offices.<sup>94</sup>

Offenders with a history of CSDB were prosecuted across all circuits, although there was some variation in the concentration of CSDB offenders, as shown in Figure 7–12. The highest proportion of CSDB offenders among all §2G2.2 offenders in 2010 (excluding the First and D.C. Circuits because of the small numbers of cases in those two circuits)<sup>95</sup> occurred in Seventh and Tenth Circuits (40.5%). The lowest proportion of CSDB offenders occurred in the Third Circuit (27.7%).

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<sup>91</sup> The higher rate of CSDB histories for unemployed offenders may reflect that some such offenders had prior convictions for a sex offense, which made it more difficult for such offenders to obtain employment.

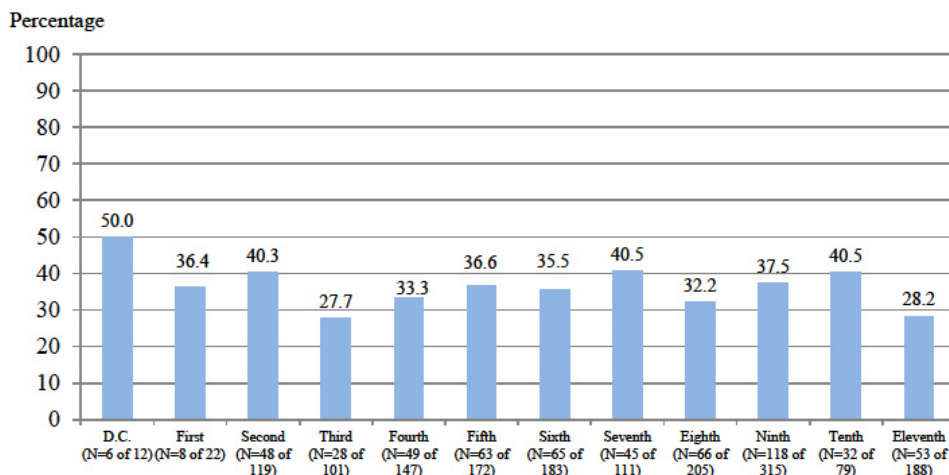
<sup>92</sup> An additional 244 cases had PSRs with no information on assets. The CSDB rate for the offenders in those cases was 40.9%. Because of the higher CSDB rate in those cases, for which no asset data was available, caution should be exercised in interpreting the CSDB rates in the cases with known asset information.

<sup>93</sup> The CSDB rates by race were 35.6% for Whites and 31.5% for non-Whites. (The numbers of Hispanic, Black, and Other offenders were too small for discrete analyses by those races.) The CSDB rates by age were 31.2% for offenders age 25 or younger, 30.1% for those age 26 through 30, 30.8% for those age 31 through 35, 37.0% for those age 36 through 40, 36.5% for those age 41 through 50, and 36.5% for those age 50 and older. The CSDB rate for offenders with a reported history of substance abuse was 35.4%, and the CSDB rate for offenders with no reported history of substance abuse was 35.0%. The CSDB rates by military service record were 34.3% for those without a military service record, and 37.5% for those with a military service record.

<sup>94</sup> See Testimony of Steven DeBrotta, Assistant United States Attorney (Northern District of Indiana), to the Commission, at 246–49 (Feb. 15, 2012).

<sup>95</sup> D.C. Circuit (12 cases) and First Circuit (22 cases).

**Figure 7-12**  
**CSDB for §2G2.2 Offenders by Circuit**  
**Fiscal Year 2010 (N=581)**



Note: The D.C. Circuit had a total of 12 cases and the First Circuit had a total of 22 cases making them too small to draw conclusions.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Geographical differences by district were more pronounced than differences by circuit; however, the number of CSDB offenders within any given district was small, so conclusions must be viewed with that limitation. Among districts with at least 30 §2G2.2 cases,<sup>96</sup> the highest rates of CSDB in §2G2.2 cases appeared in Northern New York (58.3%), Western Texas (42.9%), Southern Florida (39.5%), and Western New York (40.0%). Among districts with at least 30 §2G2.2 cases, the lowest rates of CSDB in §2G2.2 cases appeared in Eastern Missouri (20.8%), Middle Florida (23.7%), Central California (23.8%), and Western Pennsylvania (28.6%).

#### **F. ASSOCIATION BETWEEN CSDB AND SENTENCE LENGTH**

The Commission analyzed fiscal year 2010 §2G2.2 cases to determine the extent to which offenders' known histories of CSDB were associated with higher sentence lengths. Of the 520 offenders with CSDB established by a prior conviction or a finding in a PSR,<sup>97</sup> 518 received a sentence of imprisonment; two of the 520 offenders received sentences of probation.<sup>98</sup>

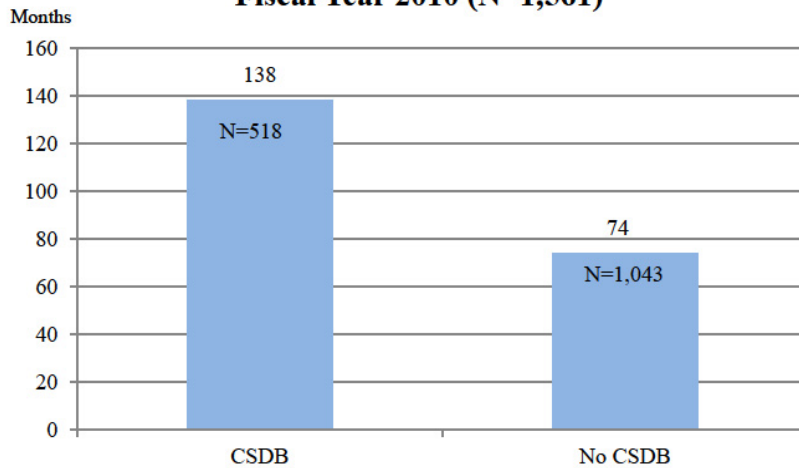
<sup>96</sup> Fifteen districts had more than 30 USSG §2G2.2 cases.

<sup>97</sup> Cases solely with unresolved allegations of CSDB were excluded from this analysis.

<sup>98</sup> The remaining 25 USSG §2G2.2 cases in fiscal year 2010 in which probationary sentences were imposed, *see* Chapter 6 at 130 (noting 27 non-production cases in fiscal year 2010 received probationary sentences), did not

As shown in Figure 7–13, the average sentence of imprisonment for the 518 offenders with known CSDB (138 months) was significantly longer than the average sentence of imprisonment for the 1,043 offenders without any history of CSDB (74 months).

**Figure 7-13**  
**Sentence Length for §2G2.2 Offenders by CSDB**  
**Fiscal Year 2010 (N=1,561)**



Note: This figure excludes eight cases with missing sentence information and 24 cases that did not receive a prison sentence. This figure also excludes the 61 cases in which PSRs contained unresolved allegations of CSDB.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Of those 518 offenders with CSDB histories, 291 (56.2%) received sentences of ten years or more, 227 offenders (43.8%) received sentences of less than ten years and, of the latter group, 66 (12.7% of all CSDB offenders) received sentences of less than five years. Of those 227 offenders who received sentences of less than ten years, 187 (82.4%) did not receive either the guideline pattern-of-activity enhancement in §2G2.2(b)(5) or a statutory enhancement based on a prior conviction for a predicate sex offense (18 U.S.C. § 2252(b) or 2252A(b)).

Some offenders who had engaged in a single instance of CSDB did not receive the pattern-of-activity enhancement because §2G2.2(b)(5) requires two predicate acts in order to establish a “pattern.”<sup>99</sup> Those offenders received an average sentence of incarceration of 114 months — 24 months lower than offenders who received the pattern of activity enhancement but 40 months higher than offenders with no history of CSDB.

The Commission also analyzed prison sentence lengths for offenders whose CSDB was established solely by a finding in the PSR (as opposed to a prior conviction). This analysis was done because the existence of a predicate *conviction* for many types of CSDB triggers higher

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involve either a prior conviction or finding in the PSR establishing CSDB. One of those 25 cases involved an unresolved allegation of CSDB.

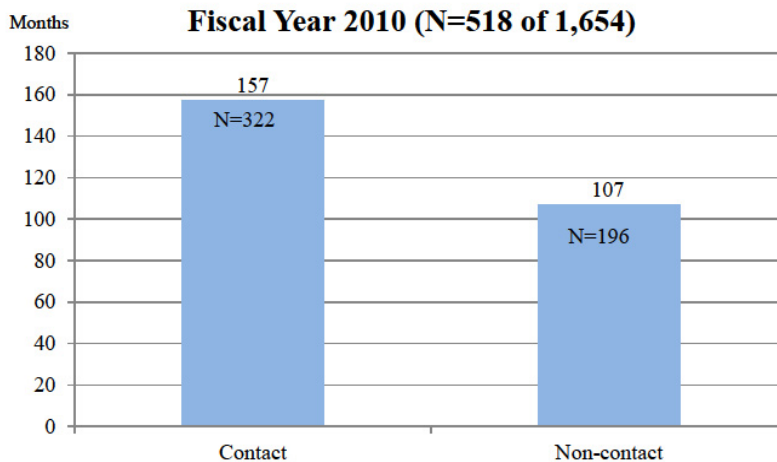
<sup>99</sup> See USSG §2G2.2(b)(5) (requiring *two* predicate acts to establish a “pattern”).

statutory mandatory minimum and maximum penalties under 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1), while a factual finding at sentencing does not trigger such higher statutory penalty range absent a prior conviction. The average prison sentence for the 236 offenders whose prior convictions established CSDB was 160 months, while the average prison sentence for the 282 offenders whose CSDB was established solely by findings in PSRs was 120 months.

The Commission also analyzed the average sentence length of those 288 offenders with known histories of CSDB who received neither the pattern-of-activity enhancement nor the statutory enhancement for a predicate conviction for a sex offense. The average prison sentence for such offenders was 102 months — compared to average prison sentence of 186 months for the 230 offenders with known CSDB histories who received either the guidelines or statutory enhancement (or both).

Finally, the Commission analyzed sentence length for the 322 offenders who had a history of “contact” CSDB versus the 196 offenders who had a history of only “non-contact” CSDB or repeat non-production child pornography offenses. As shown in Figure 7–14, average sentence of imprisonment for the former offenders was 157 months, while the average prison sentence length for the latter offenders was 107 months.

**Figure 7-14**  
**Sentence Length for §2G2.2 Offenders by**  
**Contact and Non-Contact CSDB Offenses**  
**Fiscal Year 2010 (N=518 of 1,654)**



Note: This figure excludes two cases that did not receive a prison sentence.  
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

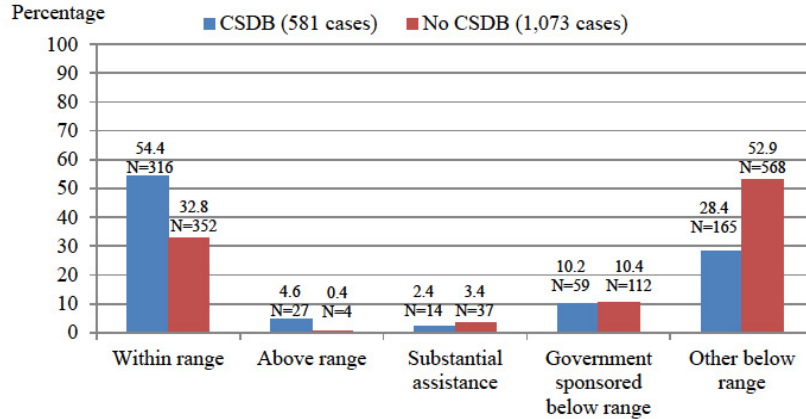
**G. DIFFERENCES IN DEPARTURE/VARIANCE RATES BASED ON CSDB**

The differences in average sentence length between CSDB and non-CSDB offenders are only partly explained by the application of the pattern of activity enhancement and statutory recidivist enhancement. As noted, one or both of those two enhancements applied to 13.9 percent of all §2G2.2 offenders, while approximately one-third of all §2G2.2 offenders had known histories of CSDB. Another explanation for the differences in sentence length appears to be noticeably different rates of variances and departures from the applicable guideline ranges.



As shown in Figure 7–15, offenders with histories of CSDB (including unresolved allegations) had a higher rate of within-range sentences, a higher rate of above-range sentences, and a lower rate of non-government sponsored below-range sentences than offenders without histories of CSDB.

**Figure 7-15**  
**Within Range and Out of Range Sentences for**  
**§2G2.2 Offenses by CSDB**  
**Fiscal Year 2010**



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Although this data suggests that some judges find evidence and allegations of CSDB to be an important factor in determining whether to impose a within-range sentence, the Commission’s analysis in Chapter 8 suggests that the relevance of CSDB for sentencing purposes varies widely depending on the judge and parties in a particular case.<sup>100</sup>

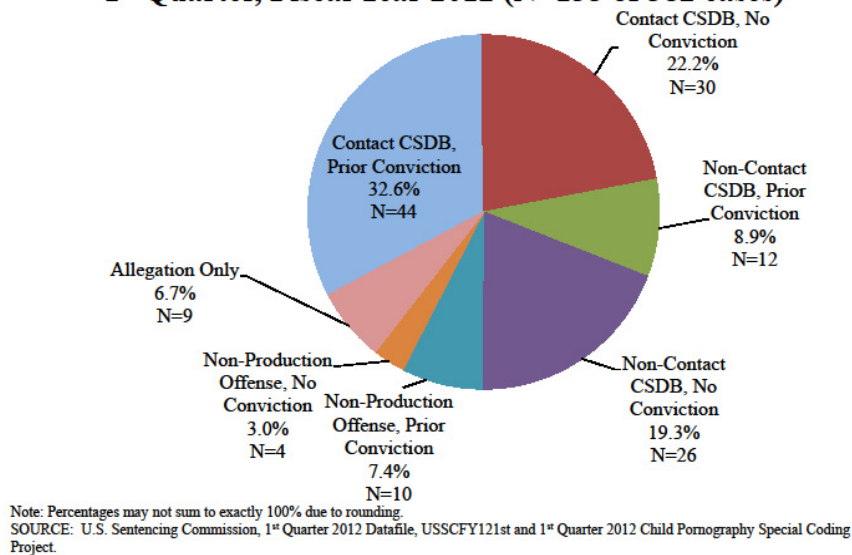
**H. FINDINGS OF COMMISSION’S STUDY OF FIRST-QUARTER FISCAL YEAR 2012 CASES**

As discussed in Chapter 6, the Commission coded 382 §2G2.2 cases from the first quarter of fiscal year 2012 for certain offense characteristics, including whether an offender had a history of CSDB. The Commission’s findings show that, in both fiscal year 2010 and fiscal year 2012, virtually the same percentages of §2G2.2 offenders had histories of CSDB. In the fiscal year 2012 cases, 33.0 percent of offenders had histories of CSDB (35.3%, including cases involving unresolved allegations of CSDB); as discussed in section D above, 31.4 percent of offenders in fiscal year 2010 cases had CSDB histories (35.1%, including cases involving unresolved allegations of CSDB). With respect to the types of CSDB in the fiscal year 2012 cases (contact, non-contact, and prior non-production offenses) and the types of evidence of such

<sup>100</sup> See Chapter 8 at 229–31.

conduct (prior conviction, judicial finding, and allegation only), Figure 7–16 shows the percentages of each (reported in a manner similar to Figure 7–2 above).

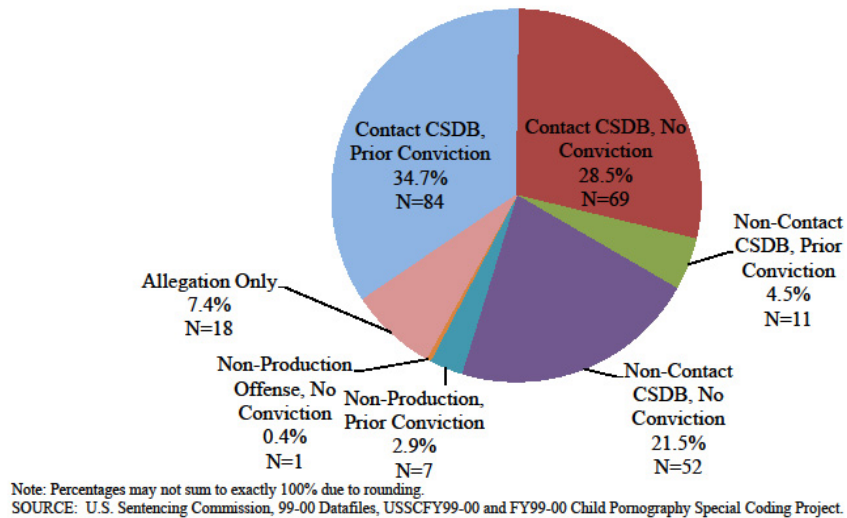
**Figure 7-16**  
**§2G2.2 Offense Characteristics: Most Serious CSDB**  
**1<sup>st</sup> Quarter, Fiscal Year 2012 (N=135 of 382 cases)**



## I. FINDINGS OF COMMISSION’S STUDY OF FISCAL YEARS 1999 AND 2000 CASES

In addition to coding for CSDB in §2G2.2 cases from fiscal years 2010 and 2012, the Commission also analyzed whether CSDB was present in the 660 cases from fiscal years 1999 and 2000 in which offenders were sentenced under the non-production guidelines (§2G2.2 and the former §2G2.4) in order to allow for a comparison over time. As reflected in Figure 7–17 below, the Commission identified 224 offenders with histories of CSDB (or 33.9% of the total 660 offenders) established by prior convictions or findings in PSRs. The Commission identified an additional 18 offenders against whom an allegation of CSDB had been made but was not resolved by the sentencing court. Thus, including cases with unresolved allegations, 242 of the total 660 offenders (36.7%) had CSDB histories. Consistent with Figures 7–2 and 7–16 above, Figure 7–17 reports the different types of CSDB and the different types of evidence of CSDB.

**Figure 7-17**  
**§2G2.2 Offense Characteristics: Categories of CSDB**  
**Fiscal Years 1999-2000 (N=242 of 660 cases)**



Despite the changes in methods of receipt and distribution of child pornography since 1999 (*e.g.*, the advent of P2P file-sharing), and the proliferation of child pornography on the Internet during that time period, the rate of CSDB in the cases in fiscal years 1999 and 2000 was nearly identical (approximately one-third of all cases) to the rates in the §2G2.2 cases in fiscal years 2010 and 2012.<sup>101</sup> One noticeable difference between the two time periods, however, is the somewhat larger percentage of “contact” CSDB in the older cases (63.2% of offenders in fiscal years 1999–2000 cases, excluding allegations, versus 55.4% in the fiscal year 2010 cases, excluding allegations, and 54.8% in the fiscal year 2012 cases, excluding allegations) and the smaller percentage of prior non-production offenses (3.3% in the fiscal year 1999–2000 cases versus 8.8% in the fiscal year 2010 cases). These differences may be explained in part by the manner in which offenders were detected during the two time periods. For instance, a greater number of offenders in fiscal years 1999 and 2000 were detected by law enforcement officers in Internet “sting” operations — often involving officers who posed as juveniles in Internet chat rooms — than in the more recent cases. Many of the latter period’s cases involved officers who detected offenders’ distribution of child pornography via P2P file-sharing programs, which were

<sup>101</sup> See Figures 7–2 & 7–16, *supra*. In a 1990 Commission staff study involving a much smaller number of cases, the study reported that “15 of 44 [child pornography trafficking cases] received by the Commission [in the prior two years] “involve an offender who currently or at some time in the past has been involved in the sexual abuse of children.” See U.S. SENT’G COMM’N, REVISED REPORT OF THE WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES AND HATE CRIME (Jan. 16, 1990). Subsequently, the Commission’s 1996 report to Congress noted that “13 percent of [child] pornography defendants had a history of sexual misconduct.” It is not clear whether that finding referred only to prior convictions or also included findings of sexual misconduct in presentence reports. See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN 33 (1996).

not apparent in the earlier period's cases. As discussed above in Part E.1.b.i., the CSDB rate of offenders whose distribution occurred through P2P file-sharing was lower than the overall rate of CSDB for all non-production offenders.

## J. CONCLUSION

The Commission's study of non-production cases from fiscal years 1999, 2000, 2010, and 2012 concerning sexually dangerous behavior and related social science research yields the following conclusions:

- Approximately one in three federal offenders sentenced under the non-production guidelines in the past decade had a known history of one or more types of CSDB predating their federal prosecutions for child pornography charges. Offenders sentenced in fiscal years 1999 and 2000 had both a somewhat higher rate of "contact" CSDB and a significantly lower rate of prior non-production offenses than modern offenders. That difference may reflect that a larger percentage of non-production offenders in the earlier period were detected in "sting" operations whereby law enforcement pretended to be minors in Internet chat rooms (and offenders attempted to engage in "travel" offenses) and also that more non-production offenders today are detected using P2P file-sharing programs.
- The proportion of non-production offenders who engaged in CSDB was likely higher than one-third of such offenders, as social science research (based on offender self-report data) demonstrates that the actual historical prevalence rate of CSDB among child pornography offenders is higher than the known rate. Furthermore, an additional segment of non-production offenders engaged in other types of non-criminal yet sexual deviant conduct in addition to their non-production offenses that may indicate their sexual dangerousness.
- The vast majority of offenders' acts of CSDB (94.7%) involved victims who were minors. The most common type of CSDB was sexual molestation of a female prepubescent minor who knew the perpetrator (*e.g.*, a family member or family friend). The typical non-production offender who engaged in such CSDB was at least 20 years older than the victim. The mean age of the non-production offender at the time of such CSDB was 31 years old, and the mean age of the victim was ten years old.
- Of those non-production offenders in fiscal year 2010 whose CSDB included prior non-production child pornography offenses, nearly half also had committed "contact" or "non-contact" sex offenses.
- Other than the pattern of activity enhancement in the guidelines and the statutory enhancement for predicate convictions for sex offenses, the current guideline and statutory measures of offender culpability (*e.g.*, for distribution of child pornography, number of images possessed, possession of sado-masochistic images) are generally not associated with significantly higher rates of CSDB.

- Although the general act of distribution of child pornography was not associated with a higher rate of CSDB, the particular types of distribution — “personal” versus “impersonal” distribution to other adult offenders<sup>102</sup> — were associated with different rates of CSDB. Of the offenders who engaged in one or more personal modes of distribution to other adults in fiscal year 2010 (e.g., emailing), their CSDB rate was 38.4 percent. Of the offenders whose distribution was impersonal only (*i.e.*, an “open” P2P file-sharing program such as LimeWire), their CSDB rate was 26.2 percent. By comparison, the CSDB rate for the offenders who did not distribute to anyone was 37.2 percent. Therefore, the CSDB rate for the offenders who engaged in personal distribution to other adults — and who thereby appeared to be involved to some degree in an Internet-based child pornography “community” — was significantly higher than the offenders who distributed only using an impersonal mode of distribution but very similar to the offenders who did not distribute child pornography to anyone.
- Of the 520 offenders with known CSDB histories established through prior convictions or findings in PSRs in fiscal year 2010, 44.2 percent of such offenders (230 of 520) received the guideline enhancement and/or the statutory enhancement. The remaining 55.8 percent of offenders with CSDB histories (290 of 520) did not receive either enhancement based on their CSDB typically because it did not constitute the requisite “pattern of activity” for the guideline enhancement or result in a conviction as required for the statutory enhancement.
- The guidelines’ criminal history scheme does not account for CSDB in a majority of cases where it existed; most offenders with a history of CSDB were in Criminal History Category I. This is because (1) some offenders with histories of CSDB were never convicted of the conduct constituting their CSDB; (2) some offenders’ CSDB resulting in a conviction was concomitant with their federal child pornography offenses (*e.g.*, production, travel, or enticement offenses), and their convictions for such CSDB were not treated as “prior” convictions under USSG §4A1.2(a)(1); and (3) some offenders with prior convictions for CSDB did not have their convictions counted under USSG §4A1.2(e) because of the age of the convictions.
- Certain offender characteristics — an offender’s reported history of childhood sexual abuse and lower socio-economic status (as reflected in unemployment status, minimal or negative assets, and lower educational levels) — appear to be associated with somewhat higher rates of CSDB.
- The rates of CSDB in §2G2.2 cases vary across the country, which apparently reflects differing charging policies among the 94 U.S. Attorneys’ offices with respect to the prioritization of offenders with known histories of CSDB.

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<sup>102</sup> All offenders who distributed child pornography to real or perceived minors necessarily engaged in CSDB.

- The average sentence length for offenders with CSDB histories was significantly higher than the average sentence length for offenders without CSDB histories. On average, offenders with CSDB histories received a 138-month sentence, while offenders without CSDB received a 74-month sentence.
- A substantial number of non-production offenders with CSDB histories (43.8%) received prison sentences of less than ten years. Over four out of five of those offenders did not receive either a guidelines pattern-of-activity enhancement or a statutory enhancement for a predicate conviction for a sex offense.
- Offenders with CSDB histories had a higher rate of sentences within the applicable guideline range than offenders without CSDB histories. Over half of CSDB offenders (54.4%) received within range sentences, while 32.8 percent of non-CSDB offenders received within range sentences.