

Chapter 8

EXAMINATION OF SENTENCING DISPARITIES IN §2G2.2 CASES

This chapter examines sentencing disparities in cases in which defendants are sentenced for non-production child pornography offenses under USSG §2G2.2.¹ As discussed elsewhere in this report, the sentencing scheme for non-production offenses has not been updated for nearly a decade.² It thus does not account for significant changes in offense conduct, particularly in technology, that have occurred in recent years — such as the widespread use of peer-to-peer (“P2P”) file sharing, which typical offenders now use to receive and distribute large quantities of graphically violent child pornography.³ Such typical offense conduct triggers multiple guideline enhancements and exposes the vast majority of defendants today to substantial penalty ranges under the sentencing scheme resulting from the PROTECT Act of 2003.⁴ Growing numbers of sentencing courts and parties believe that this sentencing scheme fails to distinguish meaningfully among offenders in terms of their culpability and dangerousness.⁵ As the data analyses in this chapter show, many courts and parties have responded by engaging in a variety of charging and sentencing practices to distinguish among offenders in a manner that differs from the existing penalty scheme and often limits the offenders’ sentencing exposure under that scheme. This approach has resulted in growing sentencing disparities since 2004, the last year in which the guidelines were mandatory and the last year in which most offenders convicted of non-production offenses were sentenced based on significantly lower penalty ranges in effect before the enactment of the PROTECT Act.⁶ Finally, as discussed in Part F below, appellate review of sentences in non-production cases since *United States v. Booker*⁷ has not reduced the growing sentencing disparities in §2G2.2 cases. Indeed, differing approaches among the circuit courts have contributed to the sentencing disparities.

¹ One of the primary purposes of the Sentencing Reform Act of 1984 was to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.” 28 U.S.C. § 991(b)(1)(B) (instructing the Commission to avoid such disparities); *see also* 18 U.S.C. § 3553(a)(6) (instructing sentencing courts to do the same). In passing the Act, Congress found that “‘federal judges [had] mete[d] out an unjustifiably wide range of sentences to defendants with similar histories, convicted of similar crimes, committed under similar circumstances.’” *Koon v. United States*, 518 U.S. 81, 92 (1996) (quoting from S. Rep. No. 98-225, at 38 (1983)).

² *See* Chapter 1 at 2.

³ *See* Chapter 6 at 154–55; *see also* Chapter 1 at 6 (discussing the increasing presence of graphic and sexually violent images in offenders’ child pornography collections resulting from technological changes in offense conduct such as P2P file-sharing).

⁴ *See* Chapter 6 at 135, 138–41 (discussing the post-PROTECT Act guideline ranges in USSG §2G2.2 cases today); *see also infra* at 208–10.

⁵ *See* Chapter 1 at 10–14 (discussing criticisms of non-production sentencing scheme).

⁶ *See id.* at 4 (discussing guideline and statutory changes as a result of the PROTECT Act).

⁷ 543 U.S. 220 (2005).

A. SENTENCING FRAMEWORK IN NON-PRODUCTION CHILD PORNOGRAPHY CASES

Before analyzing the sentencing data, this chapter briefly summarizes the sentencing framework in cases in which offenders were sentenced under the non-production guideline in fiscal year 2010 — the time period primarily analyzed in this chapter — which, with a single exception, is identical to the current sentencing framework.⁸

Penalty ranges in non-production cases are a function of both the most serious offense of conviction and the sentencing court’s application of §2G2.2.⁹ The most serious offense of conviction not only determines the statutory minimums and maximums but also affects the applicable guideline range.¹⁰

In fiscal year 2010, the statutory range of punishment was zero to ten years for possession offenses and five to 20 years for receipt, transportation, and distribution (R/T/D) offenses; defendants with predicate convictions for sex offenses were subject to increased statutory imprisonment ranges (10 to 20 years for possession and 15 to 40 years for R/T/D offenses).¹¹ As noted, the only change in the statutory scheme since fiscal year 2010 has been an increase in the statutory maximum term imprisonment — from ten to 20 years — for possession offenses involving images of minors who were prepubescent or under 12 years of age.¹²

Section 2G2.2, which has not changed in any respect since fiscal year 2010, has base offense levels that correspond to the different statutory penalty ranges — 18 for possession convictions and 22 for R/T/D convictions. However, a specific offense characteristic for defendants convicted of receipt who had no intent to distribute child pornography effectively creates three “starting points” in the guideline: 18 for defendants convicted of possession; 20 for defendants convicted of receipt (whose real offense conduct involved only receipt); and 22 for defendants convicted of transportation or distribution or defendants convicted of receipt who intended to distribute child pornography.¹³

⁸ See Chapter 2, at 25–27, 31–32. In late 2012, Congress enacted the Child Protection Act of 2012, P. L. 112–206, 126 Stat. 1490 (Dec. 7, 2012), which raised the statutory maximum for possession offenses from ten to 20 years of imprisonment if an image possessed depicted a prepubescent minor or a minor under 12 years of age. See Chapter 1 at 4–5. Otherwise, the statutory sentencing scheme remains identical to what it was in fiscal year 2010.

⁹ See Chapter 2 at 25–27, 31–32.

¹⁰ See *id.* at 32.

¹¹ See *id.* at 25–27.

¹² See *supra* note 8.

¹³ See Chapter 2 at 32 (discussing the three “starting points”). As discussed in Chapter 2, a defendant’s base offense level in USSG §2G2.2 depends solely on the most serious offense of conviction regardless of the defendant’s actual conduct. See *id.* Thus, for example, a defendant convicted of possession will have a base offense level of 18 even if the defendant distributed large volumes of child pornography to others. The guidelines’ “relevant conduct” approach does not apply in setting base offense levels in §2G2.2; instead, the base offense level is established solely according to the nature of the most serious offense of conviction. Section 2G2.2(b)(1) includes a limited “relevant conduct” provision that requires a reduction in the base offense from 22 to 20 for defendants convicted of receipt if the court finds that an defendant did not intend to distribute and, instead, his “conduct was limited to the receipt or solicitation of” child pornography. See USSG §2G2.2(b)(1).

Several additional offense levels may be — and typically are — added based on several aggravating factors (“specific offense characteristics”) in §2G2.2(b)(2)–(b)(7). They include: a 2-level enhancement for possession of child pornography depicting prepubescent minors or children under 12 (“P/P/M”); incremental enhancements of 2 to 7 levels for different types of distribution of child pornography; a 4-level enhancement for possession of child pornography depicting sado-masochistic or violent conduct (“S/M”); a 5-level enhancement for engaging in a “pattern of activity” involving the sexual exploitation or abuse of a minor; a 2-level enhancement for use of a computer in connection with the offense; and incremental enhancements of 2 to 5 levels for possession of a certain quantity of images (with ten or more images receiving the minimum enhancement and 600 or more images receiving the maximum enhancement).¹⁴ As reflected in Table 8–1, which is based on the Commission’s regular annual datafile for fiscal year 2010 non-production cases, several of these enhancements applied in the vast majority of §2G2.2 cases.

Table 8–1
FY10 Application Rates of Enhancements in §2G2.2

	All §2G2.2 Cases N = 1654	Possession N = 874	Receipt N = 428	Transportation/ Distribution N = 352
P/P/M	96.3%	95.4%	97.4%	96.9%
S/M	74.2%	68.1%	80.1%	82.1%
Distribution	41.6%	26.8%	33.9%	87.8%
Use of Computer	96.3%	95.8%	96.0%	97.7%
Number of Images	96.9%	94.6%	98.4%	94.6%
Pattern of Activity	10.2%	7.3%	13.3%	13.6%

Before the PROTECT Act, the statutory and guideline framework was less complex, and penalty ranges were less severe. For non-production defendants with no predicate convictions for sex offenses, there were no statutory mandatory minimum penalties for possession offenses or R/T/D offenses, while statutory maximum penalties were five years of imprisonment for possession and 15 years of imprisonment for R/T/D offenses.¹⁵ In addition, the base offense levels for both possession offenses and R/T/D offenses were lower,¹⁶ and the impact of specific offense characteristics was substantially less for typical defendants.¹⁷ In addition to lower penalty levels, under the pre-PROTECT Act guidelines, defendants convicted of possession whose real offense conduct involved receiving, transporting, or distributing child pornography were sentenced under §2G2.2, which had a higher base offense level, as a result of a cross-reference provision in USSG §2G2.4.¹⁸ Thus, under the pre-PROTECT Act version of the non-

¹⁴ See Chapter 2 at 32–35. Nearly 70 percent of offenders who received an enhancement based on the number of images that they possessed received the maximum 5-level enhancement. See Chapter 6 at 141.

¹⁵ See 18 U.S.C. §§ 2252(a)(1), (a)(2) & 2252A(a)(1), (a)(2) (2002).

¹⁶ The base offense level for receipt, transportation, or distribution was 17 under USSG §2G2.2, while the base offense level for possession was 15 under USSG §2G2.4.

¹⁷ See Chapter 6 at 124–25.

¹⁸ See USSG §2G2.4(c)(2) (“If the offense involved trafficking in [child pornography] (including receiving, transporting, shipping, advertising, or possessing [child pornography] with the intent to traffic), apply §2G2.2.”).

production guidelines, a defendant's real offense conduct determined his base offense level notwithstanding his offense of conviction.

**B. COMMON GUIDELINE RANGES FOR OFFENDERS SENTENCED UNDER THE
NON-PRODUCTION GUIDELINES: FISCAL YEAR 2010 VERSUS
FISCAL YEAR 2004**

This section compares common guideline ranges for defendants sentenced under the 2010 and 2004 non-production guidelines. As discussed below, these ranges were calculated using the most commonly applied specific offense characteristics for possession, receipt, and transportation/distribution defendants. Because the vast majority of defendants sentenced under the non-production guidelines have no prior criminal record and plead guilty, the common ranges discussed below are for defendants in Criminal History Category I who received full credit for acceptance of responsibility.¹⁹

1. *Common 2010 Guideline Ranges*

As reflected in Table 8–1 above and Figure 8–1 below, the typical defendant in fiscal year 2010 sentenced under the current version of §2G2.2 received a minimum cumulative enhancement of 13 offense levels²⁰ in addition to a “starting point” of 18, 20, or 22.²¹ On average, each 2-level increase in the offense level results in a 20 to 30 percent increase in the minimum of the applicable guideline sentencing range.²² After accounting for a 3-level decrease for acceptance of responsibility, corresponding guideline ranges in 2010 were 78–97 months for defendants convicted of possession (based on a final offense level of 28 and Criminal History Category I) and 97–121 months for defendants convicted of receipt (based on a final offense level of 30 and Criminal History Category I). Guideline ranges for typical defendants convicted of transportation or distribution offenses were either 151–188 months (based on final offense level of 34 and Criminal History Category I) or 210–262 months (based on a final offense level of 37 and Criminal History Category I).²³ Their guideline ranges were greater not only because such defendants had a higher starting point of 22 but also because they typically received 2 or 5 additional levels for distributing child pornography under §2G2.2(b)(3)(B) (5 levels) or §2G2.2(b)(3)(F) (2 levels).²⁴

¹⁹ For instance, in fiscal year 2010, 82% of all USSG §2G2.2 defendants were in Criminal History Category I and 94.3% received full credit for acceptance of responsibility (*i.e.*, a reduction of 3 offense levels) pursuant to USSG §3E1.1 (Acceptance of Responsibility).

²⁰ See Chapter 6 at 138–41 (noting that the typical offender received the following enhancements: 2 levels for possessing images of a prepubescent minor, 4 levels for possessing sado-masochistic images; 2 levels for use of a computer; and 5 levels for possessing 600 or more images).

²¹ See Chapter 2 at 32 (discussing the three “starting points” under USSG §2G2.2).

²² See Chapter 6 at 124.

²³ See USSG, Ch. 5, Pt. A (Sentencing Table). The Sentencing Table is reproduced in Appendix B.

²⁴ Section 2G2.2(b)(3)(A)–(F) has six different subsections providing for incremental enhancements of 2 to 7 levels based on the type of distribution conduct. The typical defendant who receives an enhancement for distribution receives a 2- or 5-level enhancement under USSG §2G2.2(b)(3)(B) or (F). Subsection (B) provides for a 5-level enhancement for a defendant who distributed in expectation of the receipt of a thing of value (but not for pecuniary

2. Common 2004 Guideline Ranges

By comparison, common guidelines ranges for offenders sentenced under the non-production guidelines in fiscal year 2004 were significantly lower. Using the Commission's annual datafile for fiscal year 2004 (cases in which sentences were imposed between October 1, 2003, and June 24, 2004),²⁵ and considering only defendants sentenced under pre-PROTECT Act statutory and guidelines provisions,²⁶ the Commission identified the most common guideline ranges applicable to possession, receipt, and transportation/distribution offenders in Criminal History Category I during that year.²⁷

In fiscal year 2004, the most common guideline range for defendants convicted of possession resulted from a base offense level of 15 and 6 additional offense levels for the three most commonly applied specific offense characteristics in §2G2.4 — P/P/M, use of a computer, and possession of ten or more images.²⁸ After credit for acceptance of responsibility, the final offense level was 18 for defendants convicted of possession, and the corresponding guideline range was 27–33 months. The most common guideline range for defendants convicted of receipt resulted from a base offense level of 17 and 8 additional offense levels for the three most commonly applied specific offense characteristics in §2G2.2 — P/P/M, S/M, and use of a computer.²⁹ After credit for acceptance of responsibility, the final offense level was 22 for defendants convicted of receipt, and the corresponding guideline range was 41–51 months. The most common guideline range for transportation or distribution defendants resulted from a base offense level of 17 and 13 additional offense levels for the four most commonly applied specific offense characteristics in §2G2.2 — the same three applied to receipt defendants (P/P/M, S/M, and use of a computer) and also the 5-level enhancement for distributing child pornography for a

gain) (e.g., a defendant who traded child pornography images for other images), while subsection (F) provides for a 2-level enhancement for distribution without any expectation of the receipt of anything of value. The remaining subsections of §2G2.2(b) apply to defendants who distributed to minors or who distributed for pecuniary gain. 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).

²⁵ Fiscal year data in 2004 was divided between cases in which sentences were imposed before June 24, 2004 — when the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004) — and cases in which sentences were imposed after that date. See U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS iii (2004). There were a total of 463 non-production cases in pre-*Blakely* fiscal year 2004.

²⁶ Of the 463 cases in the pre-*Blakely* fiscal year 2004 period, 408 (88.1%) were sentenced pursuant to the pre-PROTECT Act statutory and guidelines provisions. Fiscal year 2004 was the last year in which a majority of non-production defendants were sentenced under pre-PROTECT Act provisions, as the PROTECT Act applied to offenses committed on or after April 30, 2003.

²⁷ Of the 463 defendants in the pre-*Blakely* fiscal year 2004 period, 84.7% were in Criminal History Category I.

²⁸ In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.4, 91.2% received the enhancement for P/P/M, 75.8% received the enhancement for possession of 10 or more images, and 93.5% received the enhancement for use of a computer.

²⁹ In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.2, 96.3% received the enhancement for P/P/M, 54.7% received the enhancement for S/M, and 94.6% received the enhancement for use of a computer.

thing of value (other than pecuniary gain).³⁰ After credit for acceptance of responsibility, the final offense level was 27 for defendants convicted of transportation or distribution, and their corresponding guideline range was 70–87 months.³¹

Figure 8–1 compares common sentencing ranges for possession, receipt, and transportation/distribution defendants in 2004 and 2010.

Figure 8-1
Comparison of Non-Production Offenses:
Common Guideline Calculations and Ranges (CHC I)
Fiscal Years 2004 and 2010

	Possession		Receipt		Distribution/Transportation	
	FY2004	FY2010	FY2004	FY2010	FY2004	FY2010
Base Offense Level	15	18	17	22	17	22
Receipt Only	N/A	N/A	N/A	-2	N/A	N/A
Distribution for Gain	N/A	N/A	N/A	N/A	+5	+5
Pre-Pubescent Minor	+2	+2	+2	+2	+2	+2
Sadism & Masochism	N/A	+4	+4	+4	+4	+4
Use of a Computer	+2	+2	+2	+2	+2	+2
Number of Images	+2 (>10 images)	+5 (>600 images)	N/A	+5 (>600 images)	N/A	+5 (>600 images)
Acceptance	-3	-3	-3	-3	-3	-3
Final Offense Level	18	28	22	30	27	37
Range for CHC I	27-33 months	78-97 months	41-51 months	97-121 months	70-87 months	210-262 months

SOURCE: U.S. Sentencing Commission, 2004 & 2010 Datafile, USSCFY04 & USSCFY10.

³⁰ In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.2, 33.7% received the enhancement for distributing child pornography for a thing of value.

³¹ Six of those defendants sentenced under the distribution guideline were convicted of a single count of possession, and, therefore, faced a statutory maximum sentence of 60 months under the pre-PROTECT Act versions of 18 U.S.C. §§ 2252(a)(4) and 2252A(a)(5). Thus, under the operation of USSG §5G1.1(a) (Sentencing on a Single Count of Conviction), their guideline sentence was 60 months. See USSG §5G1.1(a) (“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.”).

C. GROWING SENTENCING DISPARITIES SINCE 2004

As discussed in Chapter 1, only 40.0 percent of non-production defendants sentenced in fiscal year 2010 received sentences within the applicable guideline ranges, compared to 83.2 percent in fiscal year 2004.³² The increasing number of sentences outside of the applicable guideline ranges reflects the belief of many stakeholders that the current guideline and statutory penalty levels are excessive or are not based on relevant factors in non-production cases.³³ In view of the steeply declining rate of within-range sentences, the Commission examined cases with the most frequently applied specific offense characteristics for possession, receipt, and transportation/distribution offenders sentenced in fiscal year 2010 to determine the extent of disparities among offenders who were similarly situated under the guidelines.

What follows are analyses of sentencing data based on the previously-mentioned common non-production sentencing case types — involving actual, not hypothetical cases — derived from data in the Commission’s regular fiscal year 2010 datafile.³⁴ The Commission examined 498 (or 30.1%) of all 1,654 non-production cases for these analyses. Each case involved a typical child pornography defendant with no criminal history points (and no predicate convictions for sex offenses) who, as reflected in findings in his presentence report (“PSR”), engaged in conduct that caused him to receive at least the 13 offense levels mentioned above. (Such defendants are hereafter referred to as “plus-13 defendants.”) Two of the three case types concern such defendants who also distributed child pornography and received an additional 2 or 5 offense levels under §2G2.2(b)(3)(B) or (F). All 498 defendants in the cases analyzed received full credit for acceptance of responsibility under USSG §3E1.1 (Acceptance of Responsibility).

The only difference in sentencing exposure under the guidelines and penal statutes for the members of the different case types analyzed relates to their offenses of conviction. Some defendants were convicted of R/T/D offenses (which, as noted, had guideline starting points of 20 or 22 and statutory ranges of five to 20 years of imprisonment), while others were convicted only of possession (and, thus, had a starting point of 18 under the guideline and a statutory range of punishment of zero to ten years based on the law then in effect).

1. Case Type One: No Distribution Enhancement

Figure 8–2 below compares the guideline determinations for the 245 plus-13 defendants who did not receive any additional enhancement for distribution pursuant to §2G2.2(b)(3). One group (157 offenders) was convicted of possession, while the second group (88 offenders) was convicted of receipt. Both sets of defendants engaged in comparable conduct, as described in the

³² See Chapter 1 at 7, 9–10. Just one year later, the within range rate in USSG §2G2.2 cases had fallen to 32.7%. See *id.* at 7.

³³ See *id.* at 10–14 (discussing criticism of the current statutory and guideline penalty frameworks by various stakeholders in the federal criminal justice system).

³⁴ All defendants in the three case types were sentenced under versions of the penal statutes and guidelines in effect since November 1, 2004 (reflecting the PROTECT Act amendments).

PSRs, but were convicted of different statutory offenses.³⁵ The 157 defendants convicted of possession had a guideline range of 78 to 97 months, while the 88 defendants convicted of receipt had a guideline range of 97 to 121 months. Thus, the guidelines provided substantially different ranges for the two groups of defendants who engaged in substantially similar conduct.

Figure 8-2
Case Type One:
No Distribution Enhancement

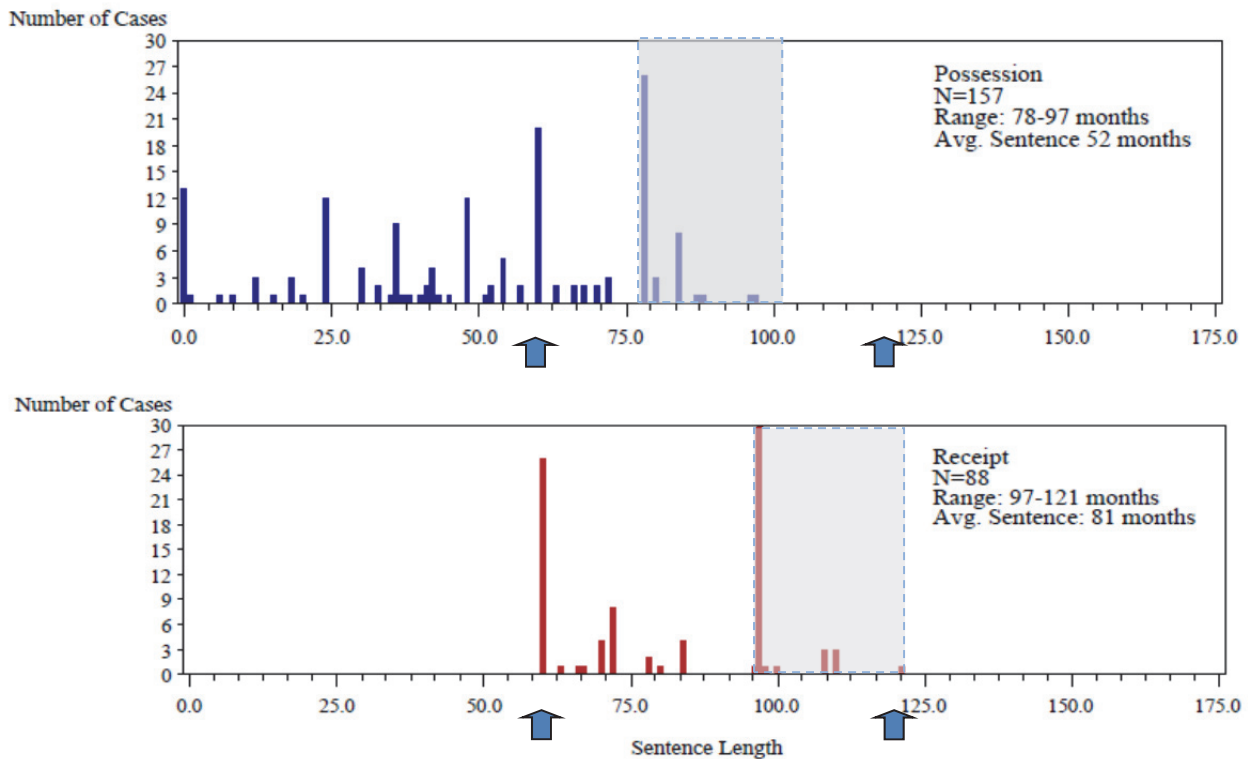
	Possession Offenders (N=157)	Receipt Offenders (N=88)
Base Offense Level	18	22
Receipt Only	N/A	-2
Pre-Pubescent Minor	+2	+2
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	28	30
Range for CHC I	78-97	97-121

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

Figure 8–3 below shows the manner in which these 245 defendants were actually sentenced. The top portion of the graph depicts the sentence lengths for the 157 defendants convicted of possession; the bottom portion of the graph depicts the sentence lengths for the 88 defendants convicted of receipt. The horizontal axes of both portions depict sentence lengths (in increasing increments, stated in months). The vertical axes of the two portions of the graph show the number of cases in each increment, as represented by blue or red bars; blue bars on the top portion together comprise the 157 defendants convicted of possession, and red bars on the bottom portion together comprise the 88 defendants convicted of receipt. The shaded area in the top portion of the graph represents the applicable guideline range for the possession defendants (78–97 months), and the shaded area in the bottom portion represents the applicable guideline range for the receipt defendants (97–121 months). Blue arrows on the horizontal axes mark 60 and 120 months, the statutory mandatory minimum term of imprisonment for receipt defendants (five years) and the statutory maximum term of imprisonment for possession defendants in 2010 (ten years).

³⁵ As determined by the Commission’s special coding project, which examined the offense conduct section of the PSRs, the 157 possession defendants all engaged in knowing receipt of child pornography. See Chapter 6 at 145–46 (discussing the Commission’s special coding project of fiscal year 2010 non-production cases).

Figure 8-3
Variation of Sentence Length for Case Type One Offenders
Convicted of Possession and Receipt Offenses



As Figure 8–3 above reflects, the clear majority of defendants convicted of possession (116 of 157, 73.9%) were sentenced below their applicable guideline range, and just over half of the defendants convicted of receipt (49 of 88, 55.7%) were sentenced below their applicable guideline range. The average sentence for defendants convicted of possession was 52 months, while the average sentence for defendants convicted of receipt was 81 months. The below range sentences for possession and receipt defendants varied widely. Figure 8–3 demonstrates not only significant sentencing differences *between* similarly situated defendants convicted of possession and similarly situated defendants convicted of receipt but also significant sentencing differences *among* similarly situated defendants convicted of receipt and *among* similarly situated defendants convicted of possession.

2. Case Type Two: Distribution Resulting in a 2-Level Enhancement

Figure 8–4 below compares the guideline determinations for the 132 plus-13 defendants who also received a 2-level enhancement for distribution pursuant to §2G2.2(b)(3)(F). One group (62 offenders) was convicted of possession, while the second group (70 offenders) was convicted of distribution. Both sets of defendants engaged in comparable distribution conduct, as found by sentencing courts in applying §2G2.2(b)(3)(F). However, because the two groups were convicted of different statutory offenses, their guideline ranges differed considerably as a result of different “starting points” under the guidelines and different statutory ranges of imprisonment. The 62 defendants convicted of possession had a guideline range of 97 to 120 months, while the 70 defendants convicted of distribution had a guideline range of 151 to 188

months.³⁶ Thus, both the relevant penal statutes and the guidelines provide substantially different ranges for two groups of defendants who engaged in substantially similar conduct as found by sentencing courts.

Figure 8-4
Case Type Two:
Two-Level Distribution Enhancement

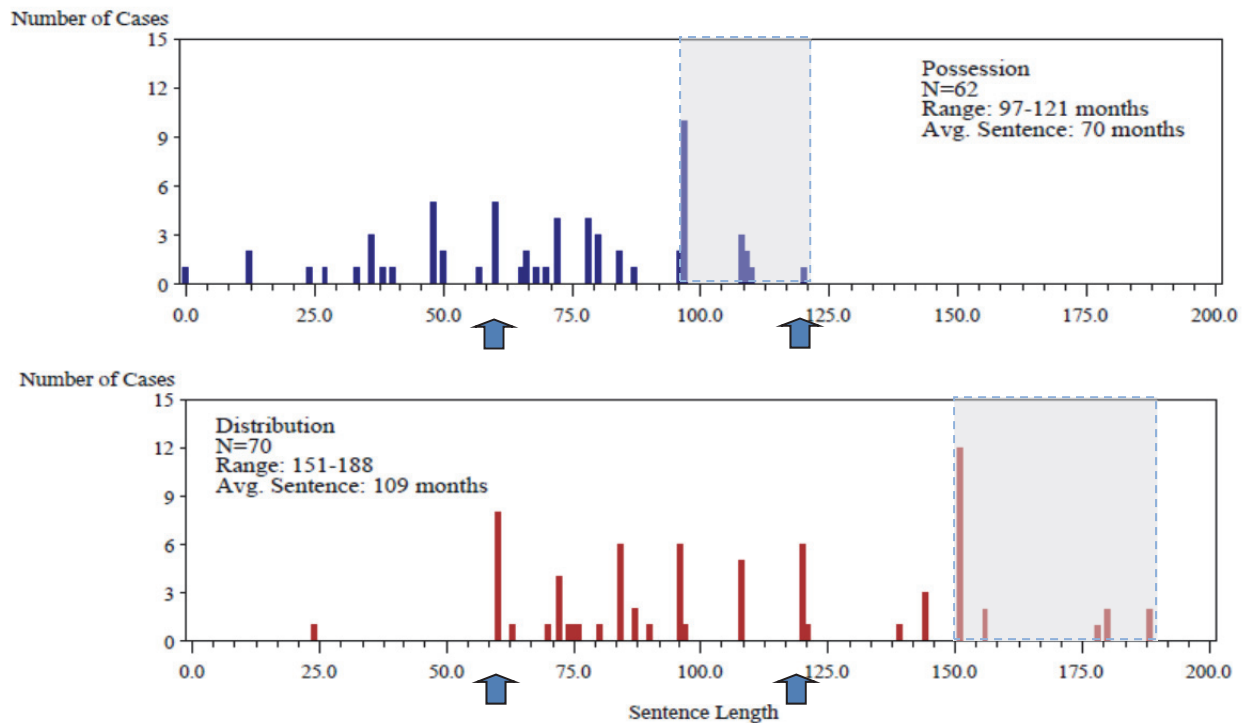
	Possession Offenders (N=62)	Distribution/Transportation Offenders (N=70)
Base Offense Level	18	22
Pre-Pubescent Minor	+2	+2
Other Distribution	+2	+2
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	30	34
Range for CHC I	97-121 97-120	151-188

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

Figure 8–5 below shows the manner in which these 132 defendants were actually sentenced. The average sentence for defendants convicted of possession was 70 months, while the average sentence for defendants convicted of distribution was 109 months. Just as with the similarly situated defendants in case type one above, significant differences in sentence length are apparent in case type two — both *between* defendants convicted of possession and similarly situated defendants convicted of distribution and *among* similarly situated defendants in each sub-group. The vast majority of defendants in both sub-groups (72.6% of possession defendants and 72.9% of distribution defendants) received below-range sentences.

³⁶ Because offenders convicted of a single count of possession were subject to a 120-month statutory maximum term of imprisonment under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5), their guideline range was 97–120 months pursuant to USSG §5G1.1(c)(1) rather than 97–121 months. Section 5G1.1(c)(1) provides that the guideline range cannot be “greater than the statutorily authorized maximum sentence.” *Id.* The shaded area in the top portion of the graph in Figure 8–4 depicts the guideline range that would have been applicable but for the fact that the possession defendants faced a 120-month statutory maximum sentence.

Figure 8-5
Variation of Sentence Length for Case Type Two Offenders
Convicted of Possession and Distribution Offenses



3. Case Type Three: Distribution Resulting in a 5-Level Enhancement

Figure 8–6 below compares the guideline determinations for the 121 plus-13 defendants who also received a 5-level enhancement pursuant to §2G2.2(b)(3)(B) for distribution; one group (40 offenders) was convicted of possession, while the second group (81 offenders) was convicted of distribution. As noted, both sets of defendants engaged in comparable conduct, as found by sentencing courts in applying §2G2.2(b)(3)(B), but were convicted of different statutory offenses. Their guideline ranges differed both because of different “starting points” under the guidelines and also because of different statutory ranges of imprisonment. The 40 defendants convicted of possession had a guideline sentence of 120 months (135 to 168 months without the statutory maximum of 120 months), while the 81 defendants convicted of distribution had a guideline range of 210 to 240 months.³⁷ Thus, both the relevant penal statutes and the guidelines provide substantially different ranges for two groups of defendants who engaged in substantially similar conduct as found by sentencing courts.

³⁷ Because offenders convicted of a single count of possession faced a 120-month statutory maximum term of imprisonment under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5), their guideline sentence was 120 months pursuant to USSG §5G1.1(a) rather than 135–168 months. Section 5G1.1(a) provides that “[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.” *Id.* The shaded area in the top portion of the graph in Figure 8–7 depicts the guideline range that would have been applicable but for the fact that the possession defendants faced a 120-month statutory maximum sentence. Similarly, because the statutory maximum punishment for transportation or distribution was 20 years (240 months), *see* 18 U.S.C. §§ 2252(a)(1), (a)(2) & 2252A(a)(1), (a)(2), the guideline range for the defendants convicted of those offenses was 210–240 months rather than 210–262 months.

Figure 8-6
Case Type Three:
Five-Level Distribution Enhancement

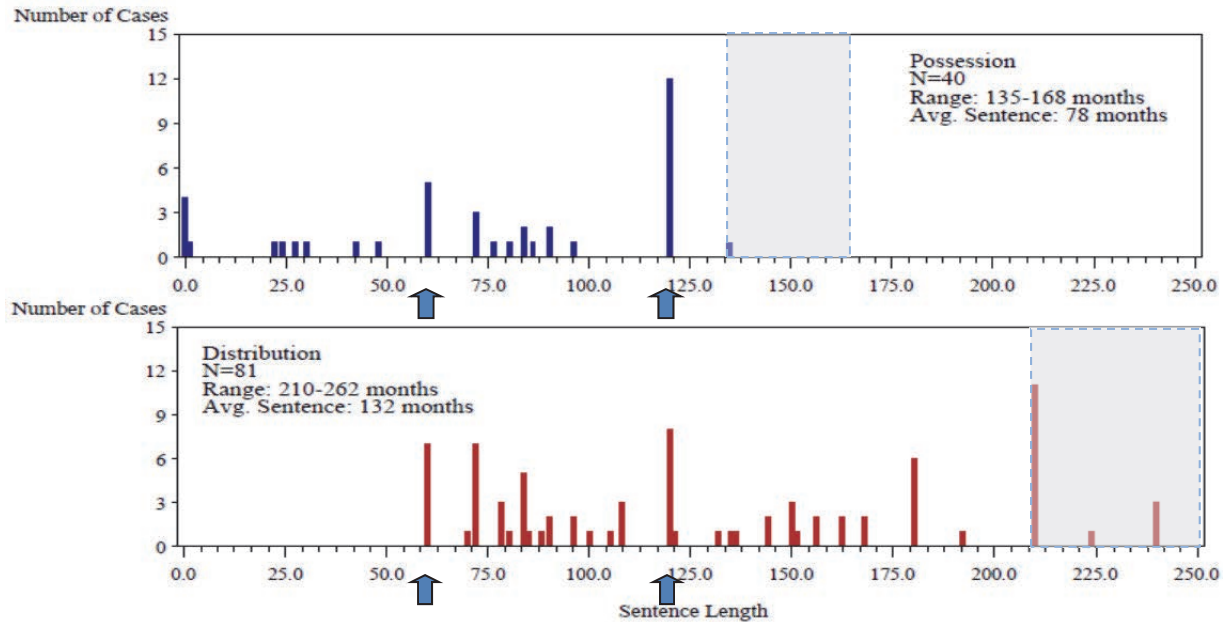
	Possession Offenders (N=40)	Distribution/Transportation Offenders (N=81)
Base Offense Level	18	22
Pre-Pubescent Minor	+2	+2
Distribution to Minor/for Gain	+5	+5
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	33	37
Range for CHC I	135-168 120-120	210-262 210-240

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

Figure 8–7 below shows the manner in which these 121 defendants were actually sentenced. The average sentence for defendants convicted of possession was 78 months, while the average sentence for defendants convicted of distribution was 132 months. Just as with the first two case types, significant differences in sentence length are apparent — both *between* the defendants convicted of possession and similarly situated defendants convicted of distribution and *among* similarly situated defendants in each sub-group. All but one of the defendants convicted of possession received sentences below the guideline range that would have been applicable but for the fact that they were charged with a single count of possession that carried a statutory maximum sentence of 120 months.³⁸ The vast majority of defendants convicted of distribution (81.5%) received a below-range sentence.

³⁸ The single defendant who received a within-range sentence was convicted of two counts of possession and, thus, was able to receive a sentence above 120 months pursuant to USSG §5G1.2(d).

Figure 8-7
Variation of Sentence Length for Case Type Three Offenders
Convicted of Possession and Distribution Offenses



D. COMMON PRACTICES OF COURTS AND PARTIES IN LIMITING OFFENDERS’ SENTENCING EXPOSURE UNDER THE STATUTORY AND GUIDELINE PENALTY SCHEMES

The remainder of this chapter addresses the specific manners in which many courts and parties in non-production cases have limited defendants’ sentencing exposure under the statutory and guideline frameworks created by the PROTECT Act. As discussed below, there are four primary methods whereby courts and/or parties have not applied the statutory and guidelines sentencing schemes:

- Charging practices that do not reflect the most serious offense conduct;
- Guideline stipulations in plea agreements (adopted by sentencing courts) that are inconsistent with the facts in the “offense conduct” sections of presentence reports and/or the “factual basis” sections of plea agreements;
- Government sponsored variances and departures (other than departures for a defendant’s substantial assistance to the authorities pursuant to USSC §5K1.1 (Substantial Assistance to Authorities (Policy Statement))); and
- Non-government sponsored variances and departures.

1. *Charging Practices*

As explained below, a common method for limiting defendants’ sentencing exposure in fiscal year 2010 non-production cases was charging practices that permitted defendants who

committed R/T/D offenses to plead guilty to possession. The data analysis of charging practices that follows is based on the Commission's special coding project of all 1,654 non-production cases, including 1,310 cases that had plea agreements, in fiscal year 2010. The Commission examined cases with and without plea agreements to determine whether defendants avoided mandatory minimum penalties despite their actual offense conduct.

First, to determine whether a defendant received a "charge bargain,"³⁹ the Commission initially examined the language of plea agreements that memorialized the parties' agreements. Typically, in charge-bargain cases, the parties expressly agreed that the prosecution would dismiss (or not bring) an R/T/D offense carrying a mandatory minimum penalty in exchange for a defendant's guilty plea to possession. The Commission next examined both the "factual basis" sections of plea agreements and the "offense conduct" sections of PSRs to determine whether there was sufficient evidence that the defendant had committed an R/T/D offense. In cases without plea agreements in which a defendant was only charged with possession, the Commission examined the "offense conduct" section of PSRs to determine whether an R/T/D charge appeared available but was not brought.⁴⁰

As shown in Chapter 6, 878 (53.1%) of the 1,654 non-production defendants were convicted of possession rather than an R/T/D offense.⁴¹ The Commission's review of PSRs and plea agreements revealed that, of the 878 defendants convicted solely of possession, 837 (95.3%) engaged in knowing receipt and/or distribution of child pornography⁴² and thereby either totally avoided a mandatory minimum penalty as a result of charging practices or, in the case of defendants with predicate sex convictions, were subject to a lower mandatory minimum

³⁹ A "charge bargain" is an agreement between the parties whereby the prosecutor agrees to dismiss a charge already brought or agrees not to bring a charge where evidence of such an offense exists — often one carrying a mandatory minimum penalty — in exchange for the defendant's agreement to plead guilty to a remaining charge. *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 108 (2011) (defining and discussing "charge bargains" in federal cases).

⁴⁰ As explained in Chapter 6, in typical non-production cases, the Commission's review of PSRs and plea agreements revealed that receipt and/or distribution conduct appeared readily provable based on the manner in which law enforcement detected the offense. In nearly 90% of fiscal year 2010 cases, law enforcement detected the offense in one of three ways: (1) by accessing the offender's child pornography files through a P2P file-sharing program used by the offender; (2) by directly receiving child pornography from an offender via email or an instant-messaging service during an Internet "chat" session with an undercover officer; or (3) by discovering that an offender had obtained child pornography from a website (typically using his own name as well as an email address and credit card associated with his true identity). In such cases, the evidence of the defendant's act of receipt or distribution was directly related to the manner in which the defendant was detected by law enforcement and, thus, appeared readily provable. *See* Chapter 6 at 145. Nevertheless, the Commission recognizes that in some of those cases in which only possession charges were brought, there may have been limited forensic resources available to the prosecution (thus making it much easier to prove possession rather than receipt or distribution) or other forensic difficulties related to proving receipt or distribution in addition to possession. *See* Testimony of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, to the Commission, at 58 (Feb. 15, 2012) (on behalf of the Department of Justice) (noting limited forensic resources available to law enforcement in some child pornography cases).

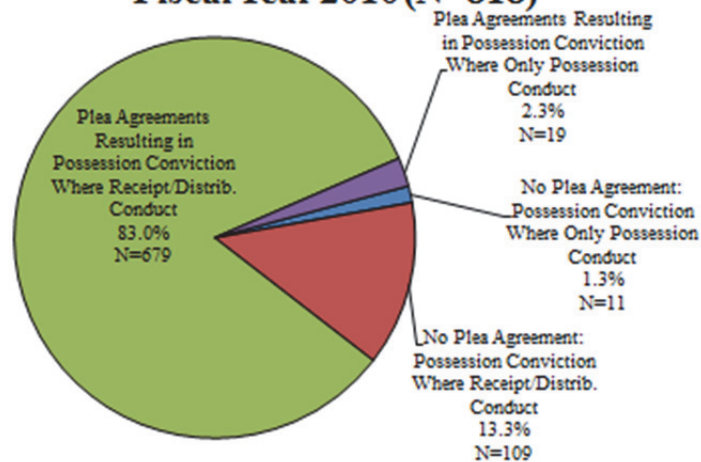
⁴¹ Chapter 6 at 145-46. Included in this group of "possession" defendants were five defendants convicted of obscenity offenses not carrying a mandatory minimum penalty who, at sentencing, were treated as the equivalent of defendants convicted of possession under USSG §2G2.2(a)(1).

⁴² Chapter 6 at 146-47.

penalty.⁴³ In the other 41 cases (4.7%), the offense conduct sections of PSRs and factual basis sections of plea agreements did not recount evidence of an R/T/D offense.

Figure 8–8 below summarizes the charging practices in the 818 cases in which defendants without predicate convictions for sex offenses were convicted of possession rather than an R/T/D offense.

Figure 8-8
Charging Practices in Possession Offenses without
Mandatory Minimums
Fiscal Year 2010 (N=818)



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

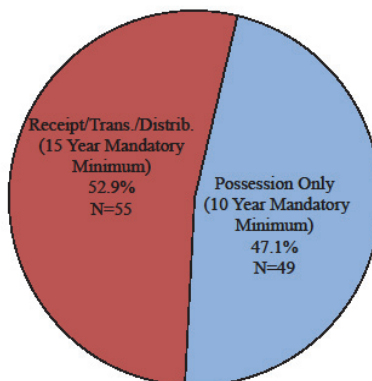
Of the 818 cases, only 30 cases (3.7%) involved defendants charged solely with possession where PSRs did not contain evidence of knowing receipt and/or distribution. In contrast, 679 (83.0%) involved plea agreements whereby defendants pleaded guilty to possession but the offense conduct sections of their PSRs and/or factual basis sections of their plea agreements stated that such defendant engaged in knowing receipt and/or distribution. An additional 109 cases (13.3%) involved defendants who only were charged with (and convicted of) possession without a plea agreement, despite findings in PSRs that the defendants had engaged in knowing receipt and/or distribution.

Figure 8–9 below shows the charging practices in the 104 non-production cases in which defendants had predicate convictions for sex offenses and engaged in knowing receipt and/or distribution conduct according to their PSRs or plea agreements. Of the 104 cases, 49 cases (47.1%) involved defendants who only were charged with possession. Such defendants, unlike

⁴³ See *id.* at 148 (Figure 6–16). Of the 878 defendants convicted of possession, 818 defendants (93.2%) were convicted of a possession offense that did not carry a mandatory minimum term of imprisonment, while 60 (6.8%) of those possession defendants had predicate convictions for sex offenses and, thus, faced a statutory mandatory minimum sentence of ten years of imprisonment.

the remaining 55 defendants who were convicted of R/T/D offenses, were subject to a ten-year rather than a 15-year statutory mandatory minimum sentence.⁴⁴

Figure 8-9
Charging Practices in Non-Production Offenses with
Predicate Sex Convictions and Receipt/Distribution Conduct
Fiscal Year 2010 (N=104)



Note: Percentages may not sum to exactly 100% due to rounding. Only cases involving 18 U.S.C. §§ 2252 and 2252A were used in this analysis. Other mandatory minimum cases (N=21) were excluded for this analysis.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

2. *Guideline Stipulations in Plea Agreements*

Parties also used stipulations in plea agreements concerning the application of the guidelines (which were adopted by sentencing courts) to limit defendants' sentencing exposure in some non-production cases.⁴⁵ Of the 1,310 non-production cases with plea agreements, 1,117 (85.3%) contained guideline stipulations in some form.⁴⁶ The Commission divided the guideline stipulations into two groups: (1) stipulations that were consistent (or at least not inconsistent) with the relevant underlying facts as recounted in PSRs or plea agreements concerning specific offense characteristics in §2G2.2(b); and (2) stipulations that were inconsistent with the relevant facts as recounted in PSRs or plea agreements concerning specific offense characteristics in §2G2.2(b) and that resulted in a guideline range lower than one consistent with the defendant's actual offense conduct.⁴⁷ An example of the latter type of stipulation is a plea agreement in

⁴⁴ See Chapter 2 at 26.

⁴⁵ Typically, guideline stipulations in plea agreements in non-production cases concerned not only the relevant facts but also the manner in which the parties envisioned that the sentencing guidelines would apply. Cf. USSG §6B1.4(a) (Stipulations (Policy Statement)) ("A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing.").

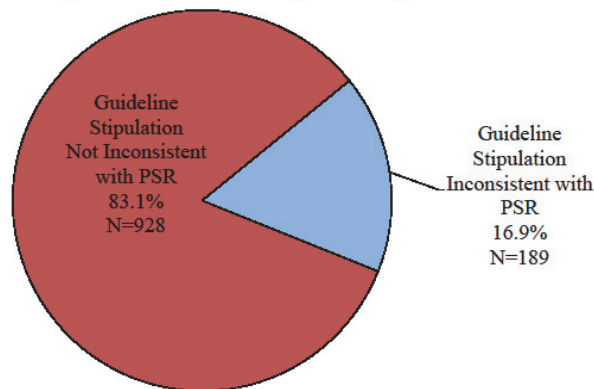
⁴⁶ Some plea agreements contained full guidelines stipulations that addressed all of the applicable issues in Chapters Two, Three, and Four of the *Guidelines Manual*, while others addressed only limited guideline application issues (e.g., a stipulation that a defendant should receive credit for acceptance of responsibility under USSG §3E1.1).

⁴⁷ The Commission only considered facts contained in PSRs if they were adopted by district courts (as reflected in the statement of reasons forms).

which the parties agreed not to apply the use-of-a-computer enhancement in §2G2.2(b)(6), despite the PSR’s finding that the defendant used a computer during the offense. Figure 8–10 shows that, of the 1,117 non-production cases with guideline stipulations in plea agreements, 189 (16.9%) contained stipulations that were inconsistent with the relevant facts set forth in PSRs or plea agreements and that resulted in lower guideline ranges.

Figure 8-10
Guideline Stipulations in Non-Production Plea Agreements
Fiscal Year 2010

(N=1,117 Cases with Guideline Stipulations
out of 1,310 Cases with Plea Agreements)



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

3. *Government Sponsored Downward Variances and Departures*

A third practice that reduced defendants’ sentencing exposure in non-production cases was a government motion for downward variance or departure⁴⁸ from the otherwise applicable guideline range based on reasons other than a defendant’s substantial assistance to the authorities.⁴⁹ Of the 1,654 non-production cases in fiscal year 2010, 171 (10.3%) involved such government motions for downward variances or departures.⁵⁰ In the typical such case, no reason was given in a plea agreement for such downward variances or departures.⁵¹

⁴⁸ For an explanation of the difference between “variances” and “departures,” see USSG §1B1.1(b) & (c) (Application Instructions); see also *id.*, comment. (back’d).

⁴⁹ In 51 cases (3.1%) prosecutors moved for downward departures pursuant to USSG §5K1.1 based on defendants’ substantial assistance to the authorities. In no child pornography case in fiscal year 2010 did the government move for an early disposition program (or “fast track”) downward departure pursuant to USSG §5K3.1 (Early Disposition Programs (Policy Statement)).

⁵⁰ By fiscal year 2011, 14.6% of USSG §2G2.2 cases had government-sponsored departures or variances (other than for a defendant’s substantial assistance). See U.S. SENT’G COMM’N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28).

⁵¹ In the relatively small number of cases in which a plea agreement did specify a reason for a government sponsored variance or departure, the most common reason cited was a defendant’s agreement to submit to a psycho-

4. *Non-Government Sponsored Downward Variances and Departures*

A final means of reducing a defendant's sentencing exposure was a non-government downward variance or departure. Of the total 1,654 non-production cases, 733 cases (44.3%) involved courts' imposition of sentences below the applicable guidelines ranges based on non-government sponsored variances or departures.⁵² Such downward variances or departures usually were initiated by the filing of a motion by the defendant, but it appears from the statement of reasons forms that sentencing courts occasionally downwardly varied or departed *sua sponte*.⁵³ Of the 733 cases involving downward variances or departures, the prosecution objected in 632 such cases (86.2%), but did not object in 101 cases (13.8%). The three leading reasons given by courts for downwardly varying or departing from the applicable guideline ranges were: (1) a variance based on the "nature and circumstances of the offense [and/or] the history and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1) (551 cases, or 75.1% of cases with variances or departures); (2) a departure⁵⁴ or variance based on the overrepresentation of a defendant's criminal history score (26 cases, or 3.5% of such cases); and (3) a departure based on a mitigating factor of a kind or to a degree not adequately taken into consideration by §2G2.2 (20 cases, or 2.7% of such cases).⁵⁵ The remaining 18.7 percent of downward variances and departures were based on a wide variety of grounds, including defendants' ages (youthful or elderly), physical conditions, and previous employment records. Some cases involved multiple grounds for downward variance or departure.

As a result of the different types of variances and departures, only 668 (40.4%) of the 1,654 non-production defendants received within-range sentences in fiscal year 2010. Figure 8–11 below shows the different types of variances and departures in non-production cases (including upward variances or departures, which occurred in only 1.9% of cases).

sexual examination by a mental health expert (that would be shared with the prosecution and court). This practice was limited to only a few districts (*e.g.*, W.D. Wash.).

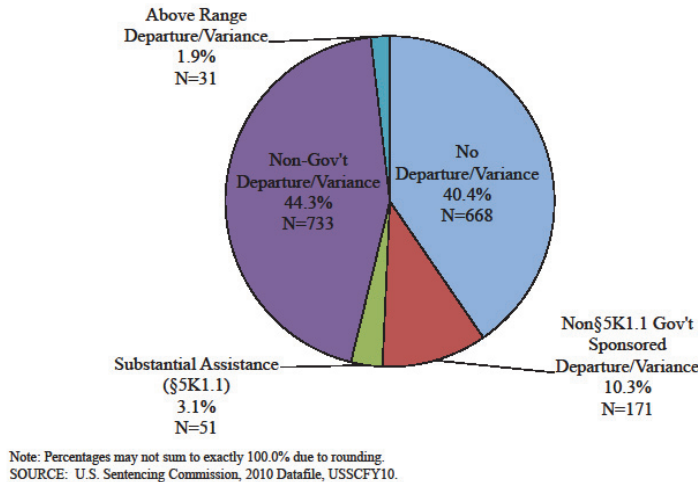
⁵² The vast majority of such sentences imposed outside of the applicable guidelines ranges in non-production child pornography cases were the result of variances rather than departures. *See, e.g.*, U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2010) (Table 28). In fiscal year 2011, the percentage of USSG §2G2.2 offenders receiving non-government sponsored variances or departures grew to 48.1%. *See* U.S. SENT'G COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28).

⁵³ Such *sua sponte* downward variances or departures most commonly occurred in cases in which a defendant had agreed in the plea agreement not to move for a variance or departure.

⁵⁴ *See* USSG §4A1.3(b) (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

⁵⁵ *See* USSG §5K2.0 (Grounds for Departure (Policy Statement)).

Figure 8-11
Departures and Variances in Non-Production Offenses
Fiscal Year 2010 (N=1,654)



E. ANALYSIS OF THE CUMULATIVE EFFECT OF THE FOUR PRACTICES TO REDUCE DEFENDANTS’ SENTENCING EXPOSURE IN NON-PRODUCTION CASES

As reflected in Figure 8–12 below, 78.8 percent (1,304 of the 1,654) of non-production defendants in fiscal year 2010 had their sentencing exposure reduced by one or more of the four practices employed by the parties and/or courts — charging practices, guideline stipulations inconsistent with the facts recounted in PSRs and/or plea agreements, government sponsored variances and departures (other than for substantial assistance), and non-government sponsored variances and departures. Because many cases involved two or more practices, the total number of cases listed in Figure 8–12 exceeds the total number of non-production cases (1,654).

Figure 8-12
Charging and Sentencing Practices to
Limit Defendants’ Sentencing Exposure
Fiscal Year 2010
(N=1,654)

Practice	Number and Percentage
Government Charging Practices	770 (46.6%)
Guideline Stipulations in Plea Agreements that are Contrary to PSRs	189 (11.4%)
Government Sponsored Variances/Departures (Other than §5K1.1)	171 (10.3%)
Non-Government Sponsored Variances/Departures	733 (44.3%)

- 78.8% (N=1,304) of all non-production cases involved one or more of these four practices.

The 1,304 cases summarized in Figure 8–12 do not include those in which defendants received downward departures solely pursuant to §5K1.1 (based on a defendant’s substantial assistance) or cases in which a court *upwardly* varied or departed. For purposes of the analysis in this chapter, “limited sentencing exposure” cases only include those in which the parties or the court engaged in one or more of the above-mentioned four practices to *limit* a

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

defendant’s sentencing exposure under the statutory or guidelines sentencing schemes (other than based on a defendant’s substantial assistance).

1. *Variation in Sentence Lengths*

The four practices, individually or collectively, had significant effects on defendants’ sentence lengths and thereby resulted in disparate sentences for similarly situated defendants. Figure 8–13 below shows the distribution of sentence lengths for all 1,654 non-production cases in fiscal year 2010 cases — comparing the 1,304 offenders whose sentencing exposure was limited in one or more of the four ways discussed above with the 350 offenders whose sentencing exposure was not so limited. The horizontal axes of Figure 8-13 depict sentence lengths in 24-month increments (*e.g.*, sentences from 0-23 months, sentences from 24-47 months).

Figure 8-13
Distribution of Sentence Lengths for Non-Production Offenses
Fiscal Year 2010

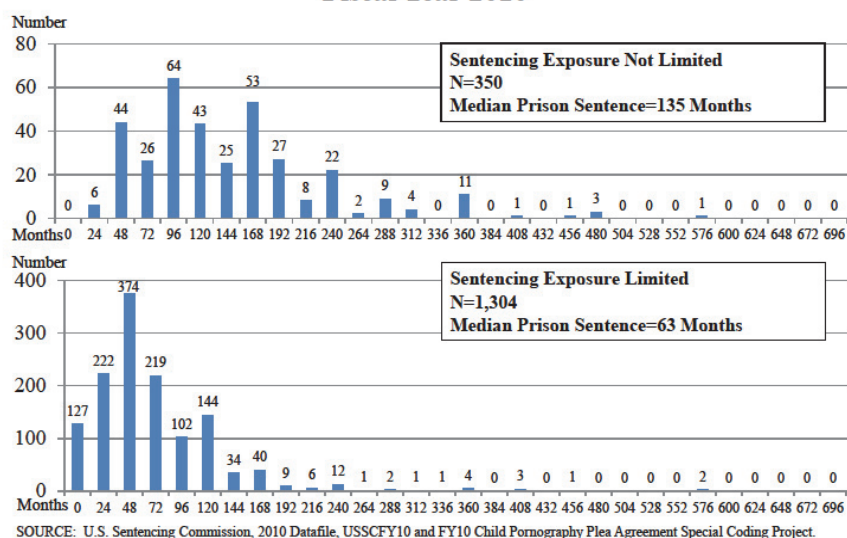


Figure 8–13 demonstrates that the median sentence for defendants whose sentencing exposure was limited was less than one half of the median sentence for defendants whose sentencing exposure was not limited. Furthermore, because a mandatory minimum penalty did not apply to many of the defendants whose sentencing exposure was limited, a significant percentage of such defendants received sentences of less than 60 months. In contrast, relatively few defendants whose sentencing exposure was not limited received prison sentences below 60 months.⁵⁶

⁵⁶ The relatively small number of sentences under 60 months that did not result from one or more of the four above-mentioned practices were those in which a defendant received a downward departure based on substantial assistance or was convicted of possession and there was no readily-provable receipt or distribution conduct.

2. *Analysis of Possible Influences on Sentencing Practices*

Because of the significant differences in average sentence lengths for offenders based on whether their sentencing exposure was limited, the Commission analyzed a variety of offender and offense characteristics, as well as the geographical location of prosecutions, to help explain why most offenders benefited from limited sentencing exposure but some did not. That analysis follows.

a. *Primary Aggravating Factors*

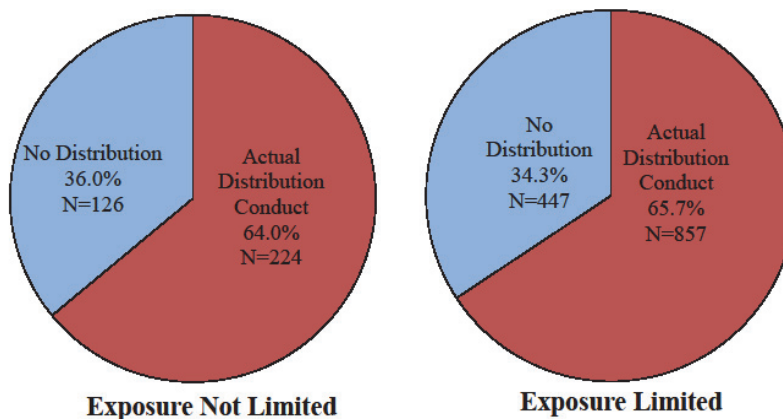
The Commission examined three factors that would appear most likely to explain differences in sentence length — distribution conduct, criminal history, and criminal sexually dangerous behavior — to determine whether one or more of those factors explain why the vast majority of defendants (78.8%) received sentences based on limited sentencing exposure.

i. Distribution

Distributing child pornography is commonly cited as a primary basis for punishing non-production defendants who distributed more severely than non-production defendants who did not.⁵⁷ The Commission compared the incidence of distribution conduct in all cases to determine whether defendants whose sentencing exposure was limited had a lesser incidence of distribution conduct than defendants whose sentencing exposure was not limited. Figure 8–14 below shows that the incidence of distribution conduct is virtually identical in the two groups.

⁵⁷ See U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, Question 1 (noting that 71% of judges who responded stated that the mandatory minimum penalty for receipt was too high, while only 37% of judges believed that the mandatory minimum penalty for distribution was too high); *id.*, Question 8 (noting that 69% of the judges stated that the guidelines penalty ranges for receipt cases generally were too high; 70% of the respondents believed that the guideline ranges for possession cases generally were too high; but only 30% of judges believed that the guideline ranges for distribution cases generally were too high); see also 18 U.S.C. § 2252(a)(2) & 2252A(a)(2) (providing for a five-year mandatory minimum penalty for distribution); USSG §2G2.2(b)(3) (providing for enhancements of 2 to 7 levels depending on the type of distribution conduct of a defendant).

Figure 8-14
Non-Production Offense Characteristics:
Distribution Conduct by Sentencing Exposure
Fiscal Year 2010



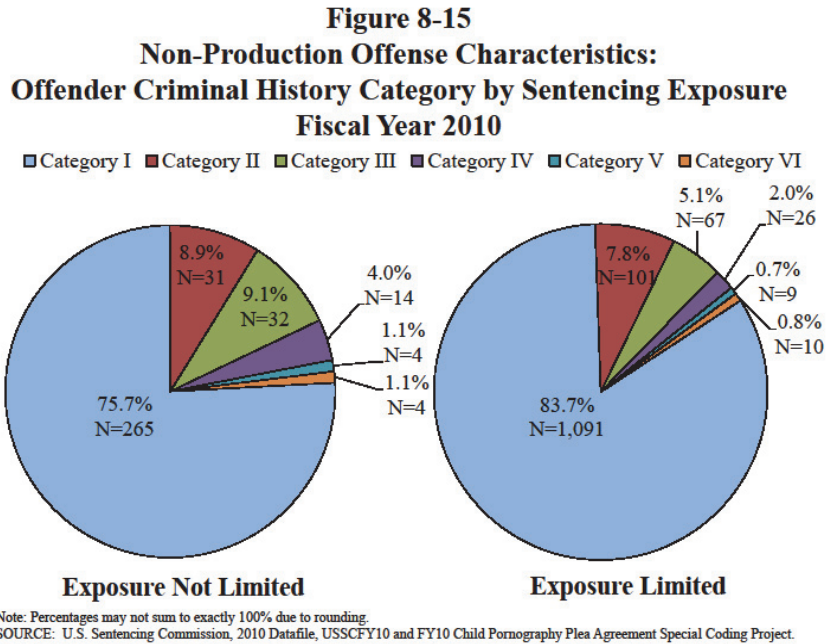
Note: Percentages may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

The Commission further specifically examined the incidence of “personal” and “impersonal” modes of distribution to determine whether the two modes were associated with different rates of limited sentencing exposure.⁵⁸ Sentencing exposure was limited in a slightly larger percentage of cases involving impersonal distribution (487 of 577 cases, or 84.4%) than in cases involving personal distribution (324 of 445 cases, or 72.8%). However, this data suggest that the type of distribution offers only a partial explanation for whether sentencing exposure was limited, as the vast majority of offenders with both types of distribution had their sentencing exposure limited.

ii. Criminal History

The Commission next examined whether the extent of a defendant’s criminal history was associated with different rates of limited sentencing exposure. Figure 8–15 below shows that a defendant’s criminal history (or lack of it) is not a significant explanatory factor concerning whether a defendant had limited sentencing exposure. In particular, although a larger percentage of defendants without limited sentencing exposure were in Criminal History Categories II through VI than defendants who had limited sentencing exposure (24.3% compared to 16.3%), the vast majority of defendants in both groups were in Criminal History Category I.

⁵⁸ See Chapter 3 at 52–53 (discussing “personal” and “impersonal” modes of distribution); see also Testimony of Deirdre D. von Dornum, Assistant Federal Defender, Federal Defenders of New York (on behalf of the Federal and Community Defenders), to the Commission, at 398–99 (Feb. 15, 2012) (“von Dornum Testimony”) (contending that offenders who distribute using “passive,” impersonal modes of P2P file-sharing are less culpable than offenders who engage in “active dissemination of images” to others).

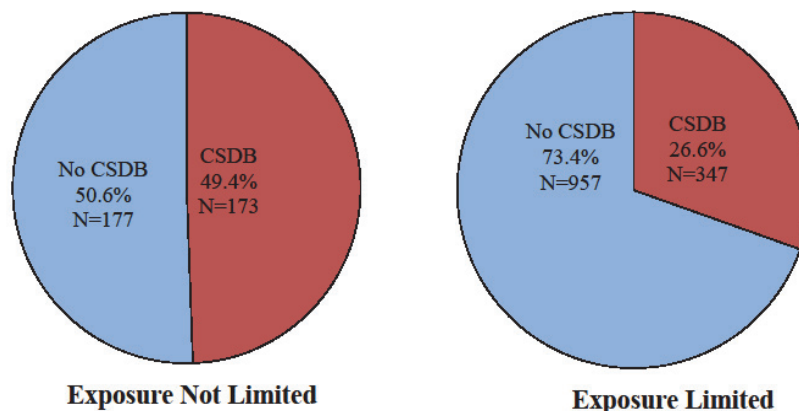


iii. Criminal Sexually Dangerous Behavior

The Commission also specifically examined whether offenders whose sentencing exposure was limited had lower rates of criminal sexually dangerous behavior (“CSDB”) in their pasts than offenders who did not have their sentencing exposure limited.⁵⁹ Figure 8–16 below shows that 26.6 percent of offenders whose sentencing exposure was limited had histories of CSDB compared to 49.4 percent of offenders whose sentencing exposure was not limited.

⁵⁹ CSDB in non-production cases is discussed in Chapter 7. As explained in that chapter, a significant percentage of offenders with CSDB histories were never convicted of such illegal conduct. See Chapter 7 at 182–83. Thus, an analysis of CSDB histories should occur separately from analysis of offenders’ Criminal History Categories (which are based on prior convictions).

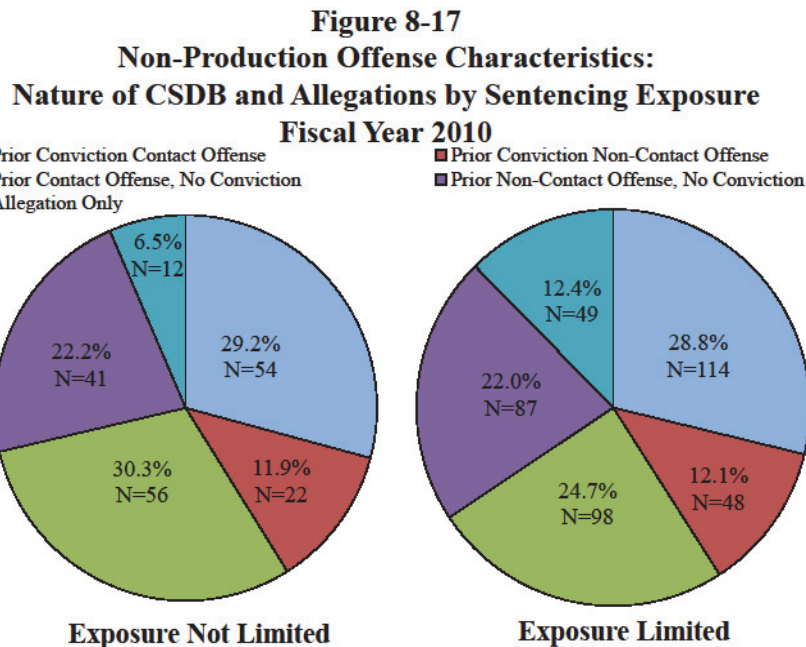
Figure 8-16
Non-Production Offense Characteristics:
CSDB by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding. Allegations were not included among the CSDB.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

However, as Figure 8-16 shows, more than two-thirds of all offenders with a history of CSDB (347 of 520) received sentences based on limited sentencing exposure. As such, the presence of CSDB offers only a partial explanation for why a minority of defendants received sentences not based on limited sentencing exposure.

The Commission also examined whether the type of CSDB (contact vs. non-contact offenses) or the type of proof of CSDB (prior conviction, judicial finding, or allegation-only) differed with respect to the rate of limited sentencing exposure. Figure 8-17 below shows that both the type of CSDB and type of proof of CSDB appear at similar rates in cases with limited sentencing exposure and cases without it.



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

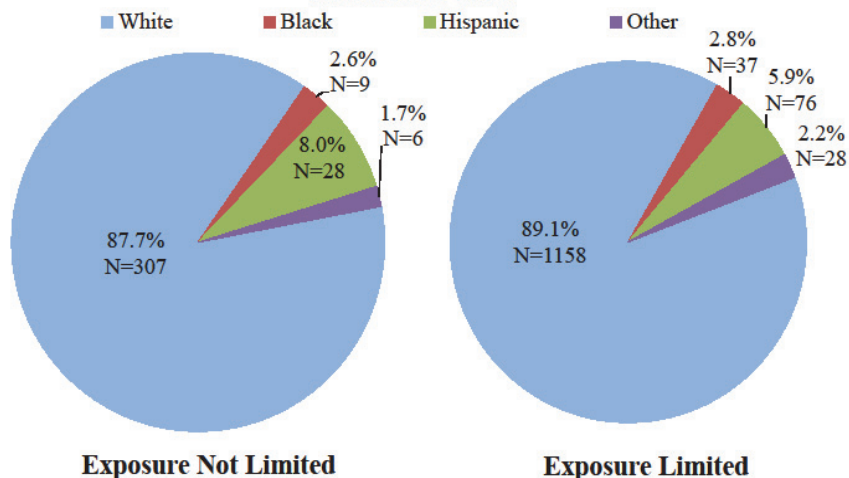
b. Demographic Factors

The Commission next compared cases with and without limited sentencing exposure to determine whether there were any significant differences regarding demographic characteristics of offenders. The demographic factors examined by the Commission included race of the offender, education level, employment at the time of arrest, net worth at the time of the presentence investigation, age at time of sentencing, reported history of substance abuse, reported history of childhood sexual abuse, and military record.⁶⁰

Figure 8–18 below compares the racial identities of defendants whose sentencing exposure was limited with the racial identities of offenders whose sentencing exposure was not limited. It shows no notable differences.

⁶⁰ Although some offender characteristics are prohibited or discouraged factors under the sentencing guidelines, *see* USSG §5K2.0(b)–(d), most such factors are generally relevant under 18 U.S.C. § 3553(a)(1), which permits a sentencing court to consider the “history and characteristics of the defendant.” *Id.* As discussed *supra* at 224, three-fourths of sentencing courts that have “varied” from the advisory guideline sentencing range have done so under § 3553(a)(1).

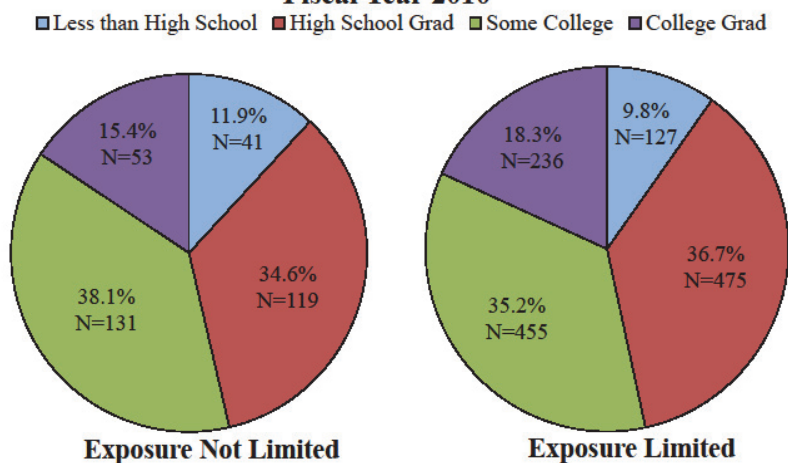
Figure 8-18
Non-Production Offense Characteristics:
Offender Race by Sentencing Exposure
Fiscal Year 2010



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

Figure 8–19 below compares the educational levels of defendants whose sentencing exposure was limited with the educational levels of defendants whose sentencing exposure was not limited. It shows no notable differences.

Figure 8-19
Non-Production Offense Characteristics:
Offender Education by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding. Seventeen cases were excluded from the analysis due to missing information on offender education.
 SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–20 below compares the employment status of defendants. It shows only minor differences (in particular, offenders whose sentencing exposure was not limited had a slightly higher rate of unemployment and somewhat lower rate of full-employment).

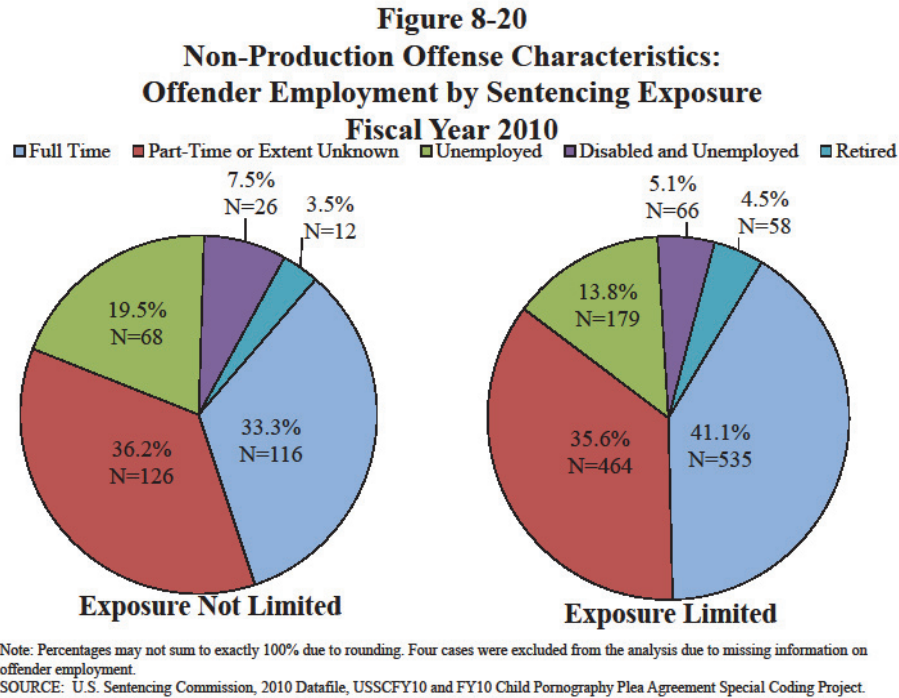


Figure 8–21 below compares defendants’ net worth. It shows only minor differences.

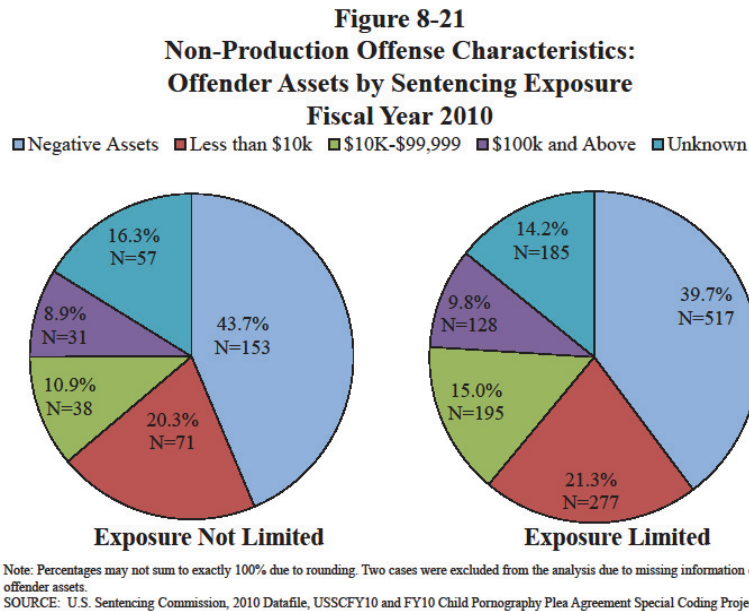


Figure 8–22 below compares the ages of defendants. It shows that, although both groups contain generally comparable percentages for most of the age ranges, youthful defendants (in particular, offenders under 21 years of age) were more likely to have their sentencing exposure limited.

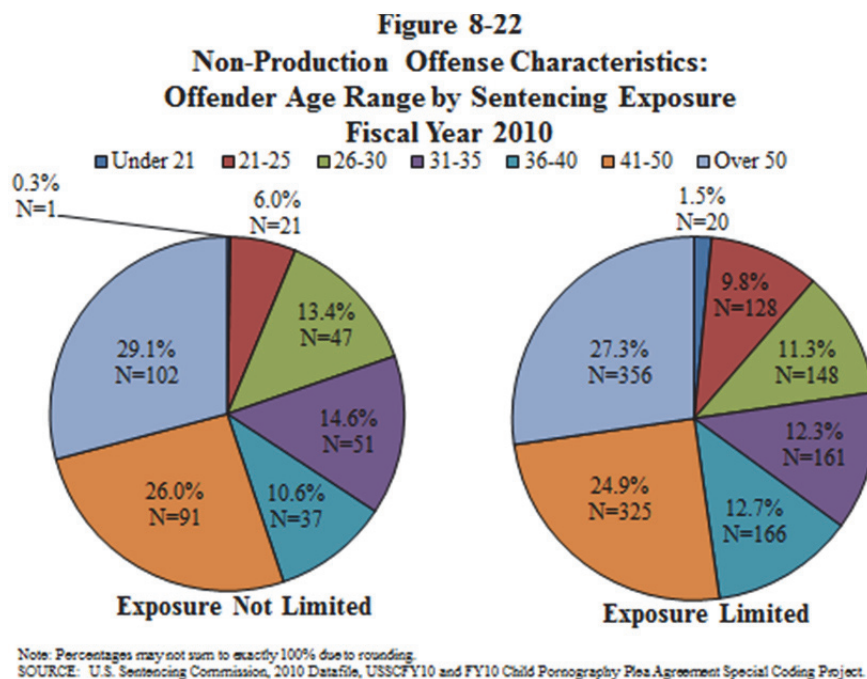


Figure 8–23 below compares defendants’ reported substance abuse histories. It shows no notable differences.

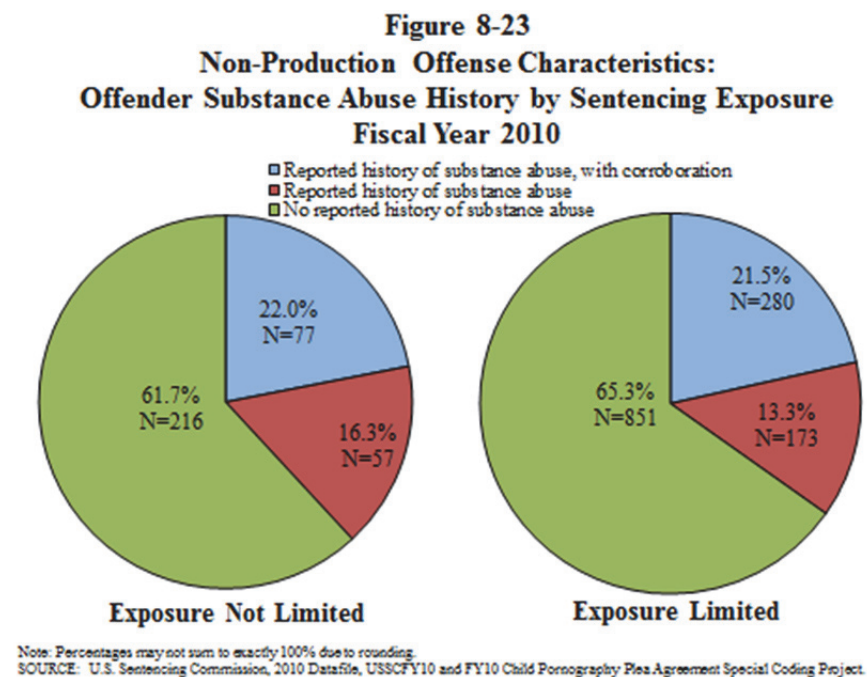


Figure 8–24 below compares the military records of defendants. It shows no notable differences.

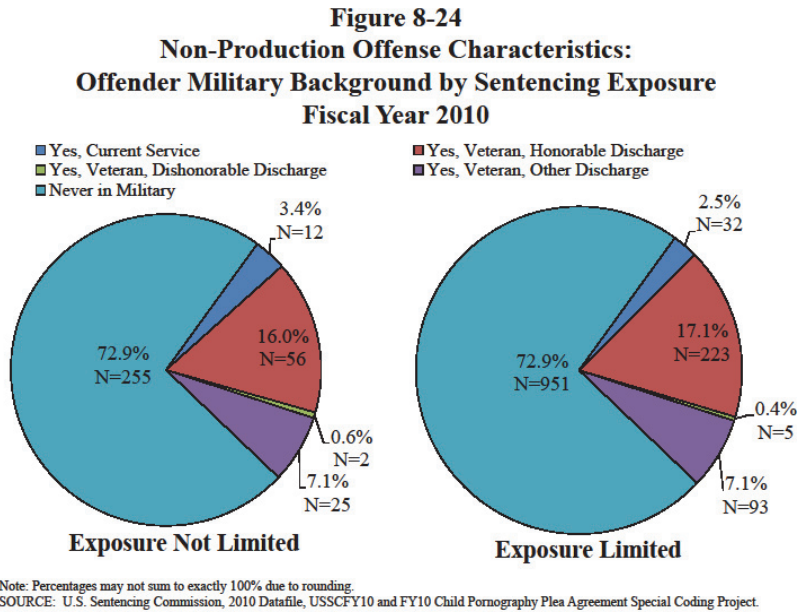
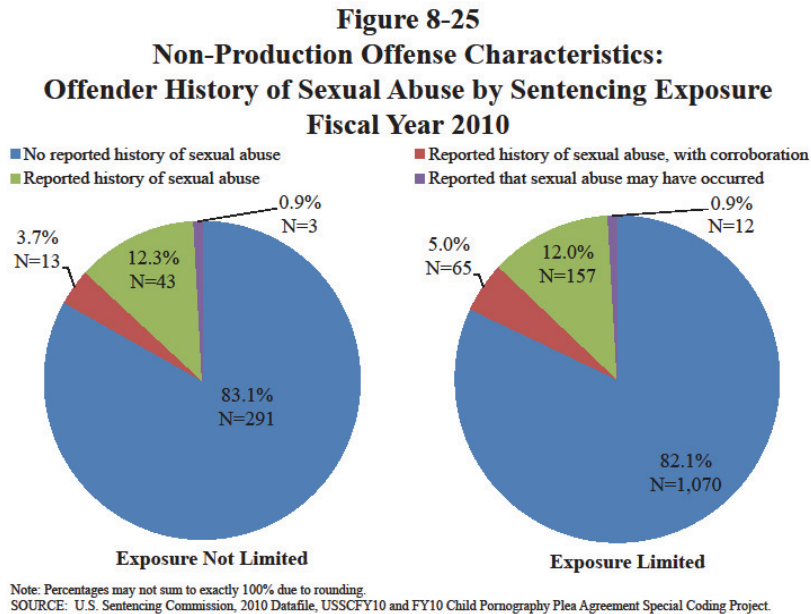


Figure 8–25 below compares defendants’ reported histories of childhood sexual abuse. It shows no notable differences.



As Figures 8–18 through 8–25 show, with certain limited exceptions, these demographic factors do not appear to be associated with different rates of limited sentencing exposure.

c. Geographic Variations

Finally, the Commission analyzed whether geography — *i.e.*, the circuit or district in which non-production defendants were sentenced — was associated with differing rates of limited sentencing exposure. Table 8–2 below shows the geographic variation by circuit with respect to the percentage of offenders whose sentencing exposure was limited.

Table 8-2
Non-Production Cases by Circuit
Fiscal Year 2010

Circuit	Cases by Circuit	Percent of Cases Where Sentencing Exposure Was Limited	Median Sentence (in months)
D.C.	12	66.7	63
First	22	86.4	60
Second	119	89.1	63
Third	101	89.1	60
Fourth	147	78.9	72
Fifth	172	72.7	96
Sixth	183	72.1	87
Seventh	111	63.1	108
Eighth	205	82.9	60
Ninth	315	86.7	63
Tenth	79	88.6	72
Eleventh	188	66.5	86

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

As shown in Table 8–2, the sentencing exposure of 63.1 percent of offenders in the Seventh Circuit was limited, which was the lowest rate among the circuits. Conversely, in both the Second and Third Circuits, the sentencing exposure of 89.1 percent of offenders was limited.⁶¹ Excluding cases from the D.C. Circuit (which had too few cases to permit meaningful analysis), the data demonstrate that, in those circuits with higher rates of limited sentencing exposure, the median sentences were less than those in circuits with lower rates of limited sentencing exposure.

⁶¹ As discussed below, in 2010 both the Second and Third Circuits issued decisions that permitted or even encouraged downward variances from USSG §2G2.2 in many cases. *See* United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010); United States v. Grober, 624 F.3d 592 (3d Cir. 2010). The opinion in *Dorvee* was issued on May 11, 2010, and the opinion in *Grober* was issued on October 26, 2010. *Dorvee* was thus decided approximately halfway through the fiscal year in 2010 — and may partially explain the Second Circuit’s high rate of limited sentencing exposure — while *Grober* was issued after the end of that fiscal year.

Different rates of sentencing exposure — and corresponding differences in sentence lengths — were more pronounced at the district level. Table 8–3 below shows the top five districts in terms of the number of non-production cases per district in fiscal year 2010 (which ranged from 49 to 72 cases). Those five districts varied greatly in terms of the extent of limited sentencing exposure — from 93.1 percent of cases in the Eastern District of Missouri to 65.3 percent of cases in the Western District of Texas. Just as with the circuit comparisons, higher rates of limited sentencing exposure were associated with lower median sentences in the districts.

Table 8-3
Districts with the Most Non-Production Cases
Fiscal Year 2010

	Western Texas	Middle Florida	Eastern Virginia	Central California	Eastern Missouri
N	49	59	53	63	72
Percent of Cases Where Sentencing Exposure Was Limited	65.3	72.9	73.6	92.1	93.1
Median Sentence (in Months)	100	78	72	42	54

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

As Tables 8–2 and 8–3 above reflect, geography — in particular, the district in which a non-production defendant was charged and sentenced — appears to be a more significant explanatory factor with respect to whether the defendant’s sentencing exposure was limited than any of the above noted offender or offense characteristics. Geographic differences primarily appear to be a function of local charging and sentencing practices and policies. Such local practices to some degree may reflect different offender and offense characteristics in the cases brought in particular districts. For instance, the Commission examined the non-production cases brought in both the Eastern District of Missouri (which has one of the highest rates of limited sentencing exposure at 93.1%) and the Western District of Texas (which has one of the lowest rate, *i.e.*, 65.3% of cases) with respect to the three primary aggravating factors mentioned above (“personal” distribution conduct, criminal record, and CSDB). Although the rate of “personal” distribution and percentage of cases with defendants in Criminal History Categories II through VI were comparable in the two districts, the Commission found the rate of CSDB in the cases in the Eastern District of Missouri was 20.8 percent compared to 42.9 percent for cases in the Western District of Texas. Comparing those two districts alone would suggest that increased rates of CSDB could explain a lower rate of limited sentencing exposure. However, that association is not apparent in other districts. For instance, in the Middle District of Florida — which has a rate of limited sentencing exposure (72.9%) that resembles the Western District of

Texas (65.3%) more than the Eastern District of Missouri (93.1%) — the CSDB rate (23.7%) more resembles the CSDB rate in the Eastern District of Missouri (20.8%) than the rate in the Western District of Texas (42.9%).

In sum, varying local charging and sentencing practices appear to account for much of the differences in sentence length for similarly situated non-production offenders in the post-PROTECT Act era.

F. DIFFERENCES IN APPELLATE REVIEW AMONG THE COURTS OF APPEALS

Both before and after the Supreme Court’s decision in *Booker*, meaningful appellate review of sentences has been considered an important part of the sentencing system created by the Sentencing Reform Act of 1984 (SRA).⁶² A primary purpose of appellate review of sentences is to help avoid unwarranted disparities in sentencing.⁶³ As discussed below, particularly since the Supreme Court’s decisions in *Gall* and *Kimbrough*, the Courts of Appeals have taken inconsistent approaches in their “substantive reasonableness” review⁶⁴ of sentences in non-production child pornography cases, which has not reduced — and, indeed, appears to have increased — disparities among similarly situated offenders.

1. *Review of Variances Based on “Policy Disagreements” with USSG §2G2.2*

The Court’s decision in *Kimbrough*, which approved downward variances from the crack cocaine guideline based on a district court’s “policy disagreement” with the guideline,⁶⁵ has engendered significant disagreement in the circuit courts about whether a district court may categorically reject §2G2.2 in non-production cases on “policy” grounds. Several circuits have considered the argument that the guideline deserves little or no weight in the sentencing process⁶⁶ because Congress, through repeated directives to the Commission, significantly altered

⁶² *Gall v. United States*, 552 U.S. 38, 50 (2007) (“After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”); *Booker v. United States*, 543 U.S. 220, 264–65 (2005) (“The courts of appeals review sentencing decisions for unreasonableness [after *Booker*]. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”); *Koon v. United States*, 518 U.S. 81, 98 (1996) (“That the district court retains much of its traditional discretion [at sentencing under the guidelines] does not mean appellate review is an empty exercise. . . .”); *Burns v. United States*, 501 U.S. 129, 154 (1991) (“[A] procedure available to minimize the risk of serving an unreasonable sentence is appellate review of the sentence itself.”).

⁶³ *Kimbrough v. United States*, 552 U.S. 85, 107–08 (2007) (citing *Booker*, 543 U.S. at 263–64).

⁶⁴ *See Gall*, 552 U.S. at 51 (“Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances [An appellate court] may consider the extent of the deviation, but must give due deference to the district court’s decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance.”).

⁶⁵ *See Spears v. United States*, 555 U.S. 261, 265–66 (2009) (per curiam) (discussing *Kimbrough*).

⁶⁶ Even after *Booker* rendered the guidelines advisory, district courts generally still must apply the guidelines as the “initial benchmark” in the sentencing process. *See Gall*, 552 U.S. at 49–50 (“A district court should begin all

§2G2.2 and, in so doing, created a guideline that fails to reflect the Commission’s traditional institutional expertise and is not based on empirical evidence.⁶⁷

The United States Courts of Appeals for the Second, Third, and Ninth Circuits have held that, under *Kimbrough*’s reasoning, a sentencing judge may reject §2G2.2 categorically as a “policy” matter and have either affirmed a district court’s decision to do so or reversed a district court’s decision that refused to do so.⁶⁸ The most pointed criticism of the guideline was voiced by the Second Circuit in *United States v. Dorvee*, which vacated the defendant’s 240-month guideline sentence for “procedural” reasons (*i.e.*, the district court’s erroneous guideline application) but also held that the guideline, even if correctly applied in the defendant’s case, would yield a “substantively unreasonable” sentence.⁶⁹ The court in *Dorvee* not only permitted district courts to reject the guideline under *Kimbrough* and impose below range sentences but also suggested that the guideline will yield an “unreasonabl[y]” severe sentence in some cases.⁷⁰ The court concluded that §2G2.2 warrants virtually no deference because it is “fundamentally different” from most other guidelines in that it was not promulgated by “an empirical approach based on data about past practices” but, instead, was created “at the direction of Congress” through a series of directives to the Commission.⁷¹ Additional circuits, while affording district courts discretion to reject the guideline on policy grounds in particular cases, nonetheless have affirmed a district court’s ability to impose a within range sentence and thereby have held that §2G2.2 is not *per se* substantively unreasonable.⁷²

sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”). Although a court is permitted to vary from the applicable guideline range, the court must give “respectful consideration” to that range after properly calculating the guidelines. *Kimbrough*, 552 U.S. at 101.

⁶⁷ See, e.g., *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012); *United States v. Miller*, 665 F.3d 114 (5th Cir. 2011); *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Huffstatler*, 571 F.3d 620 (7th Cir. 2009); *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).

⁶⁸ *Henderson*, 649 F.3d at 960 (“[T]he history of the child pornography Guidelines reveals that, like the crack-cocaine Guidelines at issue in *Kimbrough*, the child pornography Guidelines were not developed in a manner ‘exemplify[ing] the [Sentencing] Commission’s exercise of its characteristic institutional role,’ so . . . district judges must enjoy the same liberty to [vary] from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*.”) (*quoting Kimbrough* 552 U.S. at 109); *Dorvee*, 616 F.3d at 184–88 (holding that USSG §2G2.2 “is fundamentally different from most [guidelines because it was not created based on empirical data and rather based on congressional directives] and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what [18 U.S.C.] § 3553 requires”; vacating defendant’s 240-month sentence as “substantively unreasonable”); *Grober*, 624 F.3d at 599 (“The government does not challenge the District Court’s authority to vary, as the Court did, from the advisory Guidelines range based on its policy disagreement with §2G2.2, nor does the dissent.”).

⁶⁹ *Dorvee*, 616 F.3d at 188.

⁷⁰ *Id.* at 184 (encouraging district courts “to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”).

⁷¹ *Id.* at 184–85.

⁷² See, e.g., *United States v. Stone*, 575 F.3d 83, 90–91 (1st Cir. 2009) (sentencing court may reject USSG §2G2.2 on “policy” grounds based on *Kimbrough* but need not do so). The Seventh Circuit permits — albeit with apparent hesitation — sentencing judges to reject §2G2.2 as a policy matter. Compare *United States v. Pape*, 601 F.3d 743,

The United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuits have taken a position contrary to cases such as *Dorvee* by refusing to allow district courts to categorically reject §2G2.2 based on congressional involvement in amending the guideline and, instead, have required courts to afford the guideline respectful consideration in sentencing defendants (even if ultimately courts decide to vary for other reasons).⁷³ Most recently, the Sixth Circuit has called other courts' categorical rejection of §2G2.2 based on the many congressional directives reflected in it as "misguided" by noting that, in our system of government, defining crimes and fixing penalties are legislative functions. While Congress has delegated some authority to the Commission, "it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission."⁷⁴ The Sixth Circuit emphasized that it was not constraining district court discretion to disagree with the child pornography guidelines on policy grounds, but rather holding that "the fact of Congress' role in amending a guideline is not itself a valid reason to disagree with the guideline."⁷⁵ Moreover, the court concluded that the argument that the Commission had departed from its usual role in amending §2G2.2 simply "misses the point":

It is true that the Commission did not act in its usual institutional role with respect to the relevant amendments to §2G2.2. But that is because Congress was the relevant actor with respect to those amendments; and that puts §2G2.2 on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*. . . . It simply misses the point, therefore, to say

749 (7th Cir. 2010) (holding that a *Kimbrough*-type "policy" variance is proper regarding "any guideline," including §2G2.2), *with* United States v. Garthus, 652 F.3d 715, 721 (7th Cir. 2011) ("The defendant's final argument is that the provisions of the sentencing guidelines relating to [child pornography offenses] are empirically unsupported, vindictive, and excessively harsh. . . . The argument is more properly addressed to the Sentencing Commission, or to Congress, which has greatly influenced the child-pornography guidelines . . . than to an individual district judge in a sentencing hearing."). A more recent decision noted that, "[w]hile we have rejected the argument that district courts are required to sentence below the Guideline range in cases involving U.S.S.G. §2G2.2, we have noted that such criticism has been 'gaining traction.'" United States v. Halliday, 672 F.3d 462, 474 (7th Cir. 2012) (citation omitted).

⁷³ *Bistline*, 665 F.3d at 762 (refusing to permit a "policy disagreement" variance in USSG §2G2.2 case); United States v. Mohr, 418 F. App'x 902, 908–09 (11th Cir. 2011) ("Mohr essentially makes a *Kimbrough*-style argument that U.S.S.G. §2G2.2 should be disregarded because it is based on flawed policy considerations. . . . This Court has already concluded that the provisions of U.S.S.G. §2G2.2 'do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.'" (quoting United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008))); United States v. Miller, 665 F.3d 114, 120–21 ("[W]e do not agree with [*Dorvee*'s] reasoning. Our circuit has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data. Empirically based or not, the Guidelines remain the Guidelines. . . . [W]e will not reject a Guidelines provision as 'unreasonable' or 'irrational' simply because it is not based on empirical data and even if it leads to some disparities in sentencing. The advisory Guidelines sentencing range remains a factor for district courts to consider in arriving upon a sentence."). Although not yet directly addressing the *Kimbrough* issue, the Fourth and Eighth Circuits have signaled their agreement with the Fifth and Eleventh Circuits by affording an appellate "presumption of reasonableness" to sentences imposed in accordance with USSG §2G2.2 notwithstanding the guideline's congressional influences. *See* United States v. Black, 670 F.3d 877, 882 (8th Cir. 2012) ("A presumption of reasonableness will be applied to sentences within the guideline range, even if the sentence is derived from a guideline that was 'the product of congressional direction rather than [an] empirical approach.'"); United States v. Strieper, 666 F.3d 288, 295–96 (4th Cir. 2012) (same).

⁷⁴ *Bistline*, 665 F.3d at 762.

⁷⁵ *Id.*

that the Commission departed from its usual role in the case of §2G2.2. Congress is the body that dictated numerous enhancements to that provision over the past two decades; and thus, with respect to those enhancements at least, it is Congress's reasons that a district court must refute before declining to apply §2G2.2 out of hand. . . . [It] is . . . Congress's prerogative to dictate sentencing enhancements based on a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result. When a congressional directive reflects such a judgment, a district court that disagrees with the guideline that follows must contend with those grounds too. Thus, when a guideline comes bristling with Congress's own empirical and value judgments — or even just value judgments — the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough*.⁷⁶

2. *Appellate Review of Extensive Downward Variances*

In *Gall*, the Supreme Court held that district courts possess broad discretion to downwardly vary from the applicable guideline ranges after considering both the guidelines and the statutory factors in 18 U.S.C. § 3553(a).⁷⁷ Appellate courts must apply an abuse of discretion standard and, although they “may consider the extent of the deviation,” they “must give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”⁷⁸ In *Gall*, the Court affirmed a probationary sentence imposed on a defendant convicted of drug trafficking whose guideline range was 30–37 months.⁷⁹

After *Gall*, some district courts in child pornography cases in which defendants have been convicted only of possession⁸⁰ have downwardly varied from significant guideline ranges to relatively lenient sentences — including sentences of probation or very short custodial sentences (such as one day) followed by terms of supervised release.⁸¹ In addition to taking inconsistent approaches to variances under *Kimbrough* based on “policy” disagreements with §2G2.2, the circuit courts after *Gall* have taken seemingly inconsistent positions in reviewing lenient

⁷⁶ *Id.* at 763–64.

⁷⁷ *Gall*, 552 U.S. at 50–51.

⁷⁸ *Id.* at 50.

⁷⁹ *Id.* at 59–60.

⁸⁰ Defendants convicted of receipt, transportation, or distribution face mandatory minimum prison sentences of five years. See Chapter 2, at 26. As noted in Chapter Six, approximately half of all non-production offenders today are convicted of possession and do not face any mandatory minimum prison sentence. See Chapter 6 at 146.

⁸¹ See generally Holly H. Krohel, *Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 637–60 (2011) (discussing such cases).

sentences of probation or very short prison sentences in §2G2.2 possession cases resulting from extensive variances.⁸²

For instance, in *United States v. Camiscione*, the 33-year old defendant, who had no criminal record, purchased subscriptions to a commercial child pornography website during a six-month period. Many of the graphic child pornography images that he possessed were of prepubescent minors and one was a four-year old child. After being arrested, the defendant underwent psychological treatment. He was diagnosed with various mental and emotional disorders, including diminished intellectual functioning, some of which was attributable to epileptic seizures he had experienced since childhood. He experienced social isolation as a result, had no friends, and had never had a romantic relationship. There was no evidence that he ever engaged in actual or attempted child sexual abuse or other sexually dangerous behavior in addition to downloading child pornography; he also was found to pose a “low risk” of engaging in such sexually dangerous behavior.⁸³ The Sixth Circuit vacated the district court’s probationary sentence (a downward variance from a guideline range of 27–33 months) as unreasonable, primarily on the ground that such a lenient sentence did not promote “general deterrence,”⁸⁴ one of the statutory factors set forth in 18 U.S.C. § 3553(a)(2).⁸⁵ The court also noted that, had the defendant been convicted of receipt of child pornography (conduct which he clearly committed) and punished under the PROTECT Act’s mandatory minimum provision, he would have received a minimum 60-month sentence.⁸⁶

Conversely, in *United States v. Duhon*,⁸⁷ the Fifth Circuit affirmed a probationary sentence for a 47-year old defendant with no prior criminal record who engaged in very similar, if not more culpable, conduct than the defendant in *Camiscione* and who had comparable

⁸² Compare, e.g., *United States v. Stall*, 581 F.3d 276 (6th Cir. 2009) (affirming as reasonable a one-day prison sentence; district court downwardly varied from 57–71 month guideline range); *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009) (affirming as reasonable sentence of probation; district court downwardly varied from 41–51 month guideline range); *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008) (affirming as reasonable sentence of probation; district court downwardly varied from 46–57 month guideline range), with *United States v. Morace*, 594 F.3d 340 (4th Cir. 2010) (vacating as unreasonable a sentence of probation; district court downwardly varied from a 41–51 month guideline range); *United States v. Camiscione*, 591 F.3d 823 (6th Cir. 2010) (vacating as unreasonable a one-day prison sentence; district court downwardly varied from a 27–33 month guideline range); *United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009) (vacating as unreasonable sentence of probation; district court downwardly varied from 30–37 month guideline range). It should be noted that the annual number of government appeals of downward variances imposed in USSG §2G2.2 cases since *Kimbrough* and *Gall* has been low. According to the Commission’s appellate database, only 23 government appeals in §2G2.2 cases were decided by the federal circuit courts during the five-year period from fiscal year 2007 through fiscal year 2011.

⁸³ 591 F.3d at 825–32.

⁸⁴ *Id.* at 833–34.

⁸⁵ 18 U.S.C. § 3553(a)(2)(B).

⁸⁶ *Camiscione*, 591 F.3d at 836; cf. *Morace*, 594 F.3d at 347 (Fourth Circuit vacated probation sentence based in part on its “respectful attention to Congress’ view that [child pornography crimes] are serious offenses deserving serious sanctions”). The defendant’s guideline range in *Camiscione* was based on the pre-PROTECT Act version of the non-production guidelines. See Chapter 1 at 4, 8–9 (discussing the lower penalty ranges associated with the pre-PROTECT Act non-production guidelines).

⁸⁷ 440 F.3d 711 (5th Cir. 2006), vacated, 552 U.S. 1088 (2008), on remand, 541 F.3d 391 (5th Cir. 2008). The defendant’s guideline range in *Duhon* also was based on the pre-PROTECT Act version of the guidelines.

mitigating circumstances. The defendant in *Duhon* not only downloaded graphic images of child pornography but also distributed such images to another person. The defendant received social security disability payments for his injured back and, after being arrested, sought psychiatric treatment for his sexual disorder. There was no evidence that the defendant had ever engaged in sexually dangerous behavior in addition to his receipt and distribution of child pornography. The Fifth Circuit deemed the district court’s downward variance from a guideline range of 27–33 months to probation to be reasonable under the deferential standard of review in *Gall*.⁸⁸ Unlike the Sixth Circuit in *Camiscione*, the Fifth Circuit in *Duhon* did not focus on deterrence as a § 3553(a)(2) factor militating against probation.⁸⁹

Similar to the Fifth Circuit in *Duhon*, the Ninth Circuit in *United States v. Autery*⁹⁰ affirmed as reasonable a sentence of five years’ probation — a downward variance from a guideline range of 41–51 months of imprisonment — for a 39-year old defendant. The district court had expressed its view that “Autery [was] ‘totally different than what . . . [the] court has normally experienced with people who are ordering this sort of child pornography’” because he “did not ‘fit the profile of a pedophile.’”⁹¹ Additionally, the district court credited the defendant’s “redeeming personal characteristics,” including that he had “no history of substance abuse, no ‘interpersonal instability,’ no ‘sociopathic or criminalistic attitudes,’ and that he was motivated and intelligent,” in addition to having the support of his family.⁹² The district court also opined that imprisonment would interfere with what it believed would be a successful outpatient treatment regime.⁹³ On appeal, the Ninth Circuit emphasized the district court’s assessment that the defendant was not a pedophile and that his “redeeming personal characteristics” were sufficient to support the district court’s conclusion that the defendant’s case was not a mine-run child pornography possession case.⁹⁴ As to the government’s argument that the sentence did not “reflect the seriousness of the offense, promote respect for the law, or provide just punishment for the offense,” the Ninth Circuit conceded that “[r]easonable minds can differ as to whether a five-year probation provides ‘just’ punishment” but noted that “the district court was desirous of doing what was ‘just’ in this case.”⁹⁵ The Ninth Circuit also concluded that the sentence did not fail to provide adequate deterrence because, in addition to the length of the probationary term and its attendant conditions, “the district court’s stern warning” that a violation of probation would result in a significant punishment would constitute effective deterrence.⁹⁶

⁸⁸ 541 F.3d 391.

⁸⁹ *See id.* at 398–99.

⁹⁰ 555 F.3d 864.

⁹¹ *Id.* at 867–68.

⁹² *Id.* at 868.

⁹³ *Id.*

⁹⁴ *Id.* at 877.

⁹⁵ *Id.* at 875.

⁹⁶ *Id.* at 876.

3. *Conclusions About Appellate Review*

After *Kimbrough* and *Gall*, appellate review of district courts' sentences in §2G2.2 cases has been inconsistent — both in terms of review of district court's "policy" disagreements with the guideline and of courts' extensive variances to lenient sentences of probation or very short custodial sentences. That inconsistency at the appellate level does not appear to have reduced sentencing disparities at the district court level, as the Court anticipated that it would in *Booker*.⁹⁷

G. CONCLUSION

Many judges and parties in §2G2.2 cases believe that the current statutory and guideline structure is outmoded, does not make meaningful sentencing distinctions among offenders, and is overly severe in some cases. As a consequence, they have, to some degree, fashioned their own sentencing schemes. The result has been growing sentencing disparities among similarly situated offenders. Furthermore, given the declining rate of within guideline sentences, judges increasingly are unable to impose sentences in accordance with §2G2.2 for the purpose of avoiding "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."⁹⁸

In particular, the Commission concludes that:

- Following both significant increases in the statutory and guideline penalty levels resulting from the PROTECT Act in 2003 and the Supreme Court's decision in *Booker* in 2005 (which rendered the guidelines advisory), many courts and parties in §2G2.2 cases have engaged in one or more of four practices that have the effect of limiting the sentencing exposure of defendants.
- Those four methods are: (1) charging practices (usually pursuant to plea agreements) in which an offender is charged only with possession despite readily provable conduct involving receipt and/or distribution; (2) guideline stipulations in plea agreements that limit enhancements in a manner inconsistent with the actual offense conduct as recounted in presentence reports and/or plea agreements; (3) government sponsored variances and departures (other than for a defendant's substantial assistance to the authorities); and (4) non-government sponsored variances and departures.
- The sentencing exposure of nearly four out of five non-production defendants in fiscal year 2010 was limited by one or more of these four practices.
- The Commission's analysis of all fiscal year 2010 §2G2.2 cases revealed that, with limited exceptions, parties' or courts' decisions whether to employ one of more of the four practices to limit defendants' sentencing exposure were not associated with particular offense or offender characteristics.

⁹⁷ See *Booker*, 543 U.S. at 264.

⁹⁸ 18 U.S.C. § 3353(a)(6) .

- The most significant explanatory factor with respect to how often one or more of the four practices were employed appears to have been geographical differences (at both the circuit and district levels). Higher rates of limited sentencing exposure were associated with lower average sentences in both the districts and circuits.
- The Commission’s study of a large sample of §2G2.2 offenders in Criminal History Category I sentenced in fiscal year 2010 revealed substantial sentencing disparities among similarly situated offenders resulting from how they were charged and sentenced. Offenders charged and convicted of possession but who in fact knowingly received child pornography had an average sentence of 52 months, while similarly situated offenders charged and convicted of receipt had an average sentence of 81 months. Offenders charged and convicted of possession but who in fact distributed child pornography in exchange for other child pornography received a sentence of 78 months, while similarly situated offenders charged and convicted of distribution received an average sentence of 132 months.
- Appellate review of sentences in non-production cases since *Booker* has not reduced the growing sentencing disparities in §2G2.2 cases. Indeed, differing approaches among the circuit courts concerning both district courts’ categorical rejection of §2G2.2 on “policy” grounds and the “substantive reasonableness” of significant downward variances from the applicable guidelines range have contributed to the sentencing disparities.

