

Chapter 11

RECIDIVISM BY CHILD PORNOGRAPHY OFFENDERS

A. INTRODUCTION

One of the primary issues facing sentencing judges and policy-makers regarding federal child pornography offenders is the extent to which offenders sentenced under the non-production guidelines recidivate — and, in particular, engage in new sex offenses (“sexual recidivism”) — after reentering the community.¹ The conventional assumption is that the rate of recidivism (in particular, sexual recidivism) by federal child pornography offenders is high.² As discussed below in this chapter, the Commission’s study of known recidivism by child pornography offenders suggests that the rate of known recidivism (in particular, sexual recidivism) may not be as high as commonly believed.

Most existing studies of recidivism either involved an insufficient number of subjects³ or focused on offenders sentenced outside the United States.⁴ One exception is an as yet unpublished study of federal child pornography offenders by researchers from the Federal Bureau of Prisons (“BOP”), which is discussed below. In order to supplement the existing research on recidivism and focus on a large number of federal child pornography offenders, the Commission conducted a recidivism study of federal non-production offenders sentenced during fiscal years 1999 and 2000.⁵

The Commission selected federal non-production offenders sentenced in fiscal years 1999 and 2000 to account for and balance two primary research requirements: (1) the need to provide for a minimum two-year follow-up period during which the vast majority of a specific

¹ See, e.g., *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012) (“With respect to Defendant’s risk of recidivism, the [sentencing] court expressed concern regarding studies demonstrating an increased level of recidivism among child sex offenders who viewed child pornography”); *United States v. Pugh*, 515 F.3d 1179, 1199–1200 (11th Cir. 2008) (noting that the legislative history of 18 U.S.C. § 3583(k), which increased the statutory maximum term of supervised release to a lifetime term for sex offenders, including all child pornography offenders, was in response to Congress’ concern about the “high rate of recidivism” by such offenders).

² See, e.g., *Conference Report on S.151, PROTECT Act of 2003*, 149 CONG. REC. H2950–01, H2966 (daily ed. Apr. 9, 2003) (“Recidivism is a huge problem in sexual exploitation cases.”).

³ See, e.g., Richard Wollert et al., *Federal Internet Child Pornography Offenders — Limited Offense Histories and Low Recidivism Rates*, in VII THE SEX OFFENDER 2–1 (Barbara K. Schwartz ed., 2011) (study of 72 federal child pornography offenders in the United States).

⁴ See, e.g., Angela W. Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 LAW & HUM. BEHAV. 466 (2011) (recidivism study of Canadian child pornography offenders). That study is addressed *infra* at 306-07.

⁵ Recidivism (in particular, sexual recidivism) by child pornography offenders should be distinguished from “precidivism” by such offenders, which was discussed in Chapter 7 in connection with criminal sexually dangerous behavior (“CSDB”) committed *before* an offender’s original arrest on federal child pornography charges. See Chapter 7 at 169.

cohort of offenders were in the community;⁶ and (2) the need to study a relatively modern offender cohort whose crimes were committed when computers and Internet use were common (in order to provide recidivism data relevant to current offenders). Offenders from fiscal years 1999 and 2000 satisfied both criteria to a sufficient degree. The sentencing period (fiscal years 1999 and 2000) was early enough to ensure that the vast majority of those offenders, including most of those with the longest prison sentences imposed, were released from prison for at least two years at the time of the Commission’s study yet recent enough that the typical offender then, like current offenders, used a computer during the commission of his child pornography offense.⁷

After presenting the results of the Commission’s study, this chapter also compares the Commission’s research to several other recidivism studies — including studies involving: (1) child pornography offenders, (2) state “contact” sex offenders, and (3) federal offenders generally and, in particular, a comparable demographic segment of the entire federal offender population (*i.e.*, white male United States citizens).

B. METHODOLOGY OF THE COMMISSION’S RECIDIVISM STUDY

In order to examine the rate of known recidivism of non-production offenders sentenced during fiscal years 1999 and 2000, the Commission first identified all offenders sentenced under the applicable non-production guidelines, USSG §§2G2.2 and 2G2.4, who could be matched to the Record of Arrest and Prosecution database (“RAP sheets”) of the National Crime Information Center (“NCIC”) of the Federal Bureau of Investigation’s (“FBI”) Criminal Justice Information Services Division⁸ and then tracked them after release from prison (or, for a small percentage of offenders, on probation) for at least two years. Data on offender and offense characteristics of this group, including any history of criminal sexually dangerous behavior (“CSDB”), were collected from the relevant sentencing documents in their instant federal child pornography cases.⁹

Although RAP sheets are generally considered to be the single best source for recidivism studies, they necessarily underreport offenders’ actual rate of recidivism.¹⁰ Some amount of

⁶ As explained below, in order to be valid, a recidivism study requires an average follow-up period of at least three years and, for studies of sex offenders, ideally an even longer period. *See infra* note 24. Because average sentence lengths for non-production offenders sentenced during fiscal years 1999 and 2000 were much shorter than average sentences later imposed pursuant to the PROTECT Act sentencing scheme, the vast majority of offenders sentenced in fiscal years 1999 and 2000 were released from prison in sufficient time to allow for an average follow-up period well above two years. *See* Chapter 6 at 132 (Figure 6–4) (showing that average prison sentences for non-production offenders sentenced in fiscal years 1999 and 2000 was two years for offenders convicted of possession and three to four years for offenders convicted of receipt or distribution).

⁷ As noted *infra* in Table 11–2, 81.7% of the offenders sentenced in fiscal years 1999 and 2000 used a computer.

⁸ The FBI’s compilation of an individual’s criminal identification, arrest, conviction, incarceration, and revocation information is known as the Interstate Identification Index. This information is also known as a Record of Arrest and Prosecution (“RAP”). The RAP database contains information voluntarily reported by law enforcement agencies across the country as well as information provided by other federal agencies. It contains information on felonies, misdemeanors, and certain municipal and traffic offenses.

⁹ *See* Chapter 7 at 202–03 (discussing CSDB histories of this cohort).

¹⁰ As the Commission noted in a prior recidivism study: “The recidivism literature recognizes that the FBI offender ‘RAP’ sheets are the most accurate and readily available data source for repeat criminal behavior. However, ‘RAP’

criminal activity by offenders during or after supervision is undiscovered or unreported during the period of observation. As a result, RAP sheets can only be used to determine the rate of *known recidivism*. Particularly for sex offender recidivism studies, RAP sheets will underreport the actual recidivism rate of offenders. It is widely accepted among researchers that sex offenses against children often go unreported or undetected¹¹ and, for that reason, do not appear on RAP sheets. This so-called “dark figure” in sex offender research always should be considered in assessing the results of a sex offender recidivism study based solely on reported arrests or convictions.¹² For the foregoing reasons, the findings of the Commission’s recidivism study should be viewed as a conservative measurement of actual recidivism.¹³

The Commission’s final study group included 610 offenders who satisfied four conditions:

1. They were sentenced under the non-production guidelines in fiscal years 1999 or 2000;
2. Their original sentencing documents (*e.g.*, presentence reports) provided information about relevant offense and offender characteristics (*e.g.*, demographic information and criminal sexually dangerous behavior);
3. They were matched successfully to RAP sheets; and
4. They were available to be tracked in the community for a minimum of two years¹⁴ immediately after release following service of prison sentences¹⁵

sheets can contain errors or partial information. For example, ‘RAP’ sheets only contain information on offenses for which offender fingerprints were obtained. Additionally, depending on the reporting policies and practices of local jurisdictions, arrest dispositions may not always be transferred to the FBI for inclusion on ‘RAP’ sheets. ‘RAP’ sheets will under report actual criminal behavior, and will under report convictions resulting from arrests.” U.S. SENT’G COMM’N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4–6 (2004) (available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf).

¹¹ See Ryan C.W. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 460–61 (2007) (noting that studies show that only an “estimated 1 in 20 cases of child sexual abuse is reported or identified” and that “an arrest was made in only 29% of reported juvenile sexual assaults”).

¹² See Albert D. Biderman & Albert J. Reiss, Jr., *On Exploring the “Dark Figure” of Crime*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967); see also *United States v. McIlrath*, 512 F.3d 421, 425 (7th Cir. 2008) (Posner, J.) (“Estimates of recidivism are bound to be too low when one is dealing with underreported crimes such as sex offenses.”).

¹³ An alternative approach to studying recidivism involves self-report data (*i.e.*, offenders’ admissions, typically made during therapy, about their criminal relapses). See Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders*, *supra* note 4, at 466–67 (comparing studies based on official reports such as arrest or conviction records with studies based on “self-report” data).

¹⁴ The period of time after which an offender is released from incarceration or is otherwise at liberty in the community—commonly called “street time” — is the time during which the offender is at risk of committing recidivist acts. Recidivism studies must necessarily measure recidivism during this period. Inclusion of periods of time when the offender was not at liberty would otherwise inflate the time the offender was at risk and avoided failure. See William D. Bales et al., *Recidivism of Public and Private State Prison Inmates in Florida*, 4 CRIMINOLOGY & PUB. POL’Y 57 (2005). Offenders were removed from the sample if they had little or no street time

(or, in the case of a small minority, during service of their probation terms) for their federal child pornography offenses (*i.e.*, not detained in connection with another offense, deported, or otherwise lost to the study), or until their first recidivism event, whichever came first.

There were a total of 724 non-production offenders sentenced in fiscal years 1999 and 2000. Of these 724, 673 had sufficient court documentation regarding offense and offender characteristics to conduct this analysis. Of those 673, 610 offenders could be successfully matched to RAP sheets and also were in the community for a minimum of two years after release from prison or the commencement of their probation. Those 610 offenders were included in the Commission's analysis. Of the 610 offenders, the vast majority 552 (90.5%) were sentenced to some term of imprisonment (with an average prison term of 33 months) followed by a term of supervised release (with an average supervised release term of 35 months), while 58 offenders (9.5%) were sentenced to probation (*i.e.*, those offenders were not sentenced to a term of imprisonment).

For this study, *known recidivism* is defined as any of the following events occurring within the study period following an offender's release from incarceration or commencement of a probationary sentence:¹⁶

- an arrest that led to a conviction for a felony or qualifying misdemeanor offense;
- an arrest with no case disposition information available;¹⁷ or
- a reported "technical" violation of the conditions of an offender's probation or supervised release that led to an arrest or revocation.¹⁸

after service of the sentence and therefore did not have a sufficient follow-up period. For example, non-citizen offenders were typically deported immediately after release from the federal prison system, and thus had no street time. Some offenders were removed from the community subsequent to their original release (usually due to re-incarceration), and such time "off the streets" was subtracted from their follow-up periods. If these offenders returned to the community during the study period, their street time recommenced at that juncture.

¹⁵ Release following service of a prison sentence means release from the custody of the Federal Bureau of Prisons ("BOP") into the community for the first time following incarceration for the federal child pornography offense of interest.

¹⁶ The arrest/revocation date, most serious crime, and disposition (if available) were coded from each recidivism event following release for purposes of reporting time to recidivism and crime type. Some offenders had more than one event following release.

¹⁷ RAP sheets did not always report the ultimate disposition of a case following an arrest. Consistent with other recidivism studies, arrests without dispositions were counted as well as arrests resulting in convictions. See Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 333 (2002) ("[A]rrest is a better indicator of offender recidivism than is conviction.") The Commission's study, like other studies, assumes that false arrests are exceptional and that the typical arrest of an offender on supervision reflects recidivism (including "technical" violations of the conditions of supervision).

¹⁸ Revocations of probation or supervised release result from violations of the conditions of supervision related to either: (1) the commission of a new crime, or (2) "technical" violations (or both). For this analysis, violations which were reported without dispositions were included along with violations that led to some type of reported sanction (*e.g.*, imprisonment). It should be noted, however, that only rarely did an offender's RAP sheet merely report an arrest on a warrant based on an *alleged* violation of supervision. Typically, a RAP sheet reported a court's

New criminal arrests or convictions include felony offenses and, with certain exceptions,¹⁹ misdemeanors that were committed while an offender was on supervision or after supervision was terminated.²⁰ Arrests with dispositions of an acquittal or dismissal of all charges were treated as non-recidivism events. If a RAP sheet showed both an arrest and conviction for the same event, it was treated solely as a conviction.

As reflected in the findings of the Commission's study that appear below in Part C, the Commission classified offenders' recidivism events as *general recidivism* and *sexual recidivism*. General recidivism refers to any criminal justice failure which resulted in either an arrest (with or without a conviction) for a new criminal offense or an arrest (without or without a revocation) for a "technical" violation of the offender's conditions of supervision. Sexual recidivism refers to arrests (with or without a conviction) for sexual offenses only, both contact and non-contact offenses, including new child pornography offenses but excluding arrests for failure to register as a sex offender.²¹ Sexual recidivism is a subset of general recidivism.

"Technical" violations of supervision encompass a wide range of behavior, including absconding from supervision, refusing to participate in mental health or substance abuse treatment, and failing drug tests. In addition, sex offenders typically are subject to additional restrictions, such as prohibitions on associating with minors or frequenting places where minors regularly appear, and accessing the Internet without permission.²² Some child pornography offenders commit violations that, while non-criminal, raise serious questions about public safety.²³ Unlike non-criminal "technical" violations such as failure to report to a probation officer as directed, failure to register as a sex offense is a criminal offense; however, it was treated as a "technical" violation of the conditions of supervision because it involved no additional criminal act unrelated to the defendant's status as a sex offender and his failure to comply with the conditions of supervision.

finding of a violation of the conditions of supervised release followed by some type of sanction (usually an additional term of imprisonment).

¹⁹ Consistent with the list of excluded minor offenses contained in USSG §4A1.2(c)(2), the Commission's study excluded certain petty misdemeanors (*e.g.*, public intoxication) as recidivism events.

²⁰ RAP sheets provide the date of arrest but do not ordinarily provide information about the date of the offense. Thus, it is possible that a small number of the arrests or convictions mentioned on RAP sheets were for offenses committed *before* an offender was released on supervision. Such offenses would not qualify as "recidivism" because they occurred before an offender reentered the community following his federal prosecution for a non-production child pornography offense.

²¹ The different types of contact and non-contact sex offenses are discussed in detail in Chapter 7 in relation to the Commission's study of sexually dangerous behavior. *See* Chapter 7 at 175–78.

²² *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 20–27 (2010).

²³ *See, e.g.*, *United States v. Mognano*, 649 F.3d 1,1–2 (1st Cir. 2011) (child pornography defendant's supervised release was revoked based on his frequenting places where unrelated children were present and also by failing to participate in sex offender therapy); *United States v. Musso*, 643 F.3d 566, 568–70 (7th Cir. 2011) (child pornography defendant's supervised release was revoked based on his failure to participate in sex offender therapy; for being alone with an unrelated young child; for possessing sexually suggestive, albeit non-pornographic, photos of minors, *i.e.*, a girl wearing only a bra and underwear; and for taking photos of "scantily-clad teenage girls" with his cell phone).

Information about offenders' violations of the conditions of their probation or supervised release is not routinely reported to the NCIC in the same manner as other information about criminal justice failures. Typically, an offender's alleged violation of the conditions of supervised release will be reported to the NCIC only if the offender was arrested pursuant a judicial warrant based on a petition filed by the supervising probation officer and then fingerprinted by the United States Marshal Service. In some cases, an offender on supervision who violates the conditions of his supervision is not arrested and, instead, is summoned to court (where his conditions are modified as a sanction), or his conditions are modified as a sanction without the offender ever appearing in court (by agreeing to the modification out of court). In such cases, it is highly unlikely that the offender's violation of the conditions of release would ever be reported to NCIC and appear on the offender's RAP sheet. Thus, the data in the Commission's recidivism study concerning violations of the conditions of supervision undercount the actual number of offenders who violated the conditions of their supervision. Only violations that resulted in an arrest of an offender are treated as recidivism events.

Using data from RAP sheets, the Commission analyzed offenders' records from their dates of release into the community — which, for the earliest offender, began on October 26, 1998, and, for the latest offender, began on March 30, 2008 — until the date that the RAP sheets were prepared for this study, March 30, 2010. The Commission's study required a minimum 24-month follow-up period (unless a recidivism event occurred before 24 months), and the average follow-up period in the Commission's study was 102 months (eight years and six months), well in excess of the period generally considered sufficient for a recidivism study of sex offenders.²⁴ Because these offenders were sentenced under the law in effect before the PROTECT Act, the typical statutory maximum term of supervised release was three years.²⁵ Therefore, many offenders tracked in this study were not under judicial supervision during a substantial portion of the study period.

The study methodology employed for the present study is consistent with previous Commission studies of offender recidivism and also is similar to the protocol previously followed by the Bureau of Justice Statistics in its recidivism study (discussed below in Part D).²⁶

²⁴ Generally, a follow-up period of at least three to five years is considered necessary for a strong recidivism study of sex offenders. See R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply To Sexual Offenders: A Meta-Analysis*, 39 CRIM. JUST. & BEHAV. 865, 887 (2009); but cf. Niklas Langstrom, *Long-Term Follow-Up of Criminal Recidivism in Young Sex Offenders: Temporal Patterns and Risk Factors*, 8 PSYCHOL., CRIME & LAW 41 (2002) (noting that recent studies indicate that risk for criminal reoffending by adult sex offenders may persist for decades after the index offense). Because the members of the Commission's study group were released at various times from October 26, 1998, until March 30, 2008, the Commission was unable to track the members of the study group in a coterminous manner over a discrete time period. Of the 610 members of the study group, seven (1.2%) had follow-up periods that were 24 months or greater but less than 36 months; 21 (3.4%) had follow-up periods that were 36 months or greater but less than 60 months; and 582 (95.4%) had follow-up periods that were 60 months or greater. The average follow-up period for all 610 offenders was eight and one-half years.

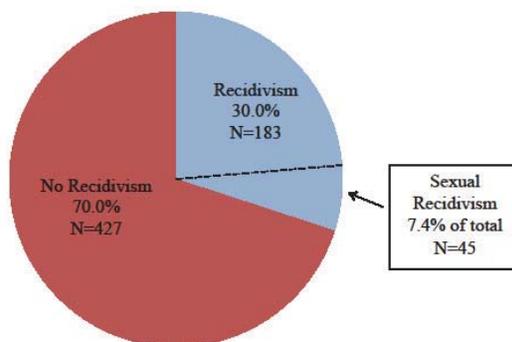
²⁵ See Chapter 10 at 271.

²⁶ See U.S. SENT'G COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4–6 (2004) (available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002).

C. RESULTS OF THE COMMISSION'S RECIDIVISM STUDY

Figure 11–1 and Table 11–1 below show the results of the Commission's recidivism study. Figure 11–1 depicts the rate of general recidivism and notes the subset of sexual recidivism. Table 11–1 breaks down recidivism events by sexual recidivism and other types of criminal justice failures. It first shows sexual offenses, divided by contact sex offenses, new child pornography offenses, and other non-contact sex offenses (excluding failure to register as a sex offender); it then shows non-sexual offenses (including failure to register as a sex offender) and technical violations. Table 11–1 below also shows whether recidivism events resulted in a conviction or simply an arrest for a new criminal offense and separately reports revocations for technical violations. As noted above, the minimum follow-up period reflected in the data presented below was 24 months, and the average follow-up period for all members of the study group was eight and one-half years.

Figure 11-1
Non-Production Offender Characteristics: Recidivism
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding. The average follow-up period after offender release into the community was 102 months (eight years and six months), with a minimum of 24 months.
 SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Table 11-1
Non-Production Offenders:
Most Serious Criminal Justice Failure
Fiscal Years 1999-2000

Type of Behavior	N	Percent (total of 183 cases)
Sexual Recidivism		
Contact sex conviction	11	6.0
Non-production CP conviction	9	4.9
Any other sex conviction	4	2.2
Contact sex arrest	11	6.0
Non-production CP arrest	5	2.7
Any other sex arrest	5	2.7
Subtotal	45	24.6
Non-Sexual Recidivism		
Any other conviction	26	14.2
Any other arrest	26	14.2
Sex offender registration violation	22	12.0
Any other violation	64	35.0
Subtotal	138	75.4
Total (General Recidivism)	183	100.0

Note: A single offender appears in one category, with sexual contact and convictions taking precedence. Percentages may not sum to exactly 100% due to rounding. This study involves an average follow-up of 8 ½ years.
 SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Coding Project.

As reflected in Figure 11–1 above, the general recidivism rate was 30.0 percent (183 of 610 offenders).²⁷ As shown in Table 11–1 above, failures were almost evenly split between arrests or convictions for new crimes and arrests or revocations for others violations of the conditions of their supervision:

- 15.9 percent (97 of 610 offenders) were arrested for (and in some cases convicted of) a new criminal offense; and
- 14.1 percent (86 of 610 offenders) violated the conditions of their supervision or failed to register or report as sex offenders without an arrest for any other new criminal offense.

The sexual recidivism rate for all offenders was 7.4 percent (45 of the 610 cases). Of those 45 offenders:

- 22 offenders (or 3.6% of all 610 cases) were arrested for or convicted of sexual “contact” offenses (*e.g.*, rape or sexual assault of a child or adult);
- 14 offenders (2.3% of the 610 cases) were arrested for or convicted of a subsequent child pornography offense; and

²⁷ General recidivism was higher for offenders whose instant non-production offense involved receipt, transportation, and distribution (“R/T/D”) offenses (*i.e.*, those sentenced under USSG §2G2.2) (33.7%) than for those sentenced under the former possession guideline, USSG §2G2.4 (25.5%).

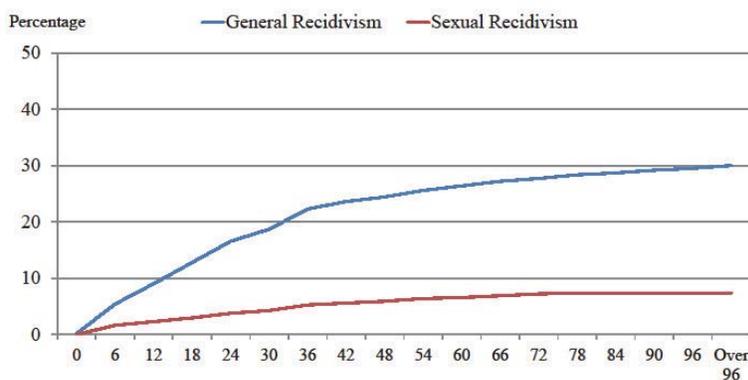
- the remaining nine offenders (1.5% of the 610 offenders) were arrested for or convicted of a non-contact sex offense involving obscenity or commercial sex.²⁸

Of the 97 offenders who were arrested for any type of new offense during the eight-and-one-half-year follow-up period, the vast majority (77, or 79.4%) were arrested once during the period. Twenty offenders (20.6%) were arrested more than once during the follow-up period. Similarly, of those 86 offenders whose recidivism was limited to violating the conditions of their supervised release or probation, 67 (77.9%) did so once, while the remaining 19 offenders (22.1%) violated their conditions more than once. Furthermore, of the 97 offenders who committed new criminal offenses, 41 (42.3%) were both arrested for a new criminal offense and also had at least one other violation of the conditions of their supervision.

The period of time between reentry into the community and the recidivism event is measured as the “street time” that the offender was at risk until the first arrest, conviction, or revocation (whichever came first).²⁹ Figure 11–2 below shows the general and sexual recidivism rates over time in six month increments. As shown, recidivism increased at a relatively steady rate for approximately the first three years following release and then grew at a much slower rate thereafter. The statutory maximum period of supervised release for the vast majority of this cohort of offenders was three years.³⁰ Thus, as reflected in Figure 11–2, approximately two-thirds of offenders recidivated during their terms of supervision, and one-third recidivated after their supervision ended. A small number of offenders recidivated for the first time after being in the community for more than five years.

Figure 11–3 below shows that the general recidivism rate for offenders in Criminal History Category I was substantially lower than the general recidivism rate for offenders in higher Criminal History Categories. Because relatively few offenders

Figure 11-2
Non-Production Offender Characteristics: Recidivism
Fiscal Years 1999-2000



SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

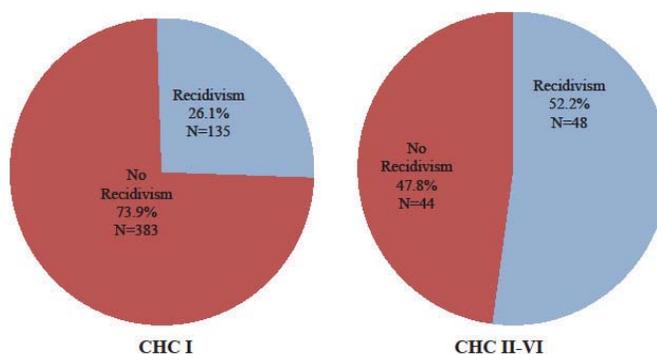
²⁸ The obscenity and prostitution offenses were not described in detail on the RAP sheets. For purposes of the Commission’s study, they are listed under the rubric of sex offenses although the actual offense conduct in these cases remains unknown.

²⁹ For those offenders with more than one recidivism event, the total follow-up period was computed to exclude periods of re-incarceration. That is, the total follow-up period was computed as time since release after deducting any time the offender was not at risk of recidivism subsequent to the original release (*e.g.*, incarceration on revocation of supervised release), so as not to inflate the actual street time.

³⁰ See Chapter 10 at 271.

recidivated with a new sexual offense, the numbers were too small for meaningful comparisons of such offenders in each of the Criminal History Categories. Thus, Figure 11–3 is only concerned with general recidivism rates by Criminal History Category.

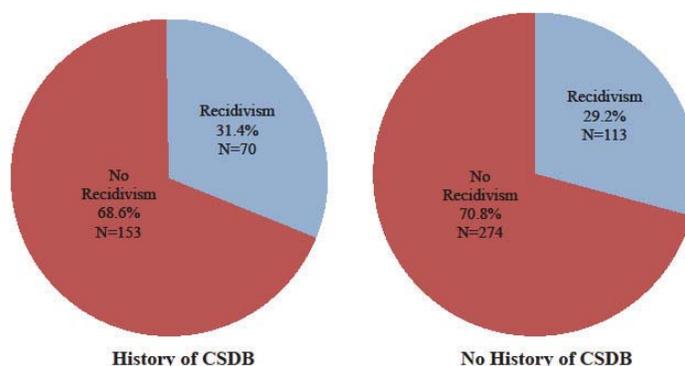
Figure 11-3
Non-Production Offender Characteristics:
General Recidivism by Criminal History Category
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Figure 11–4 below shows the general recidivism rate for offenders with a prior history of CSDB (*i.e.*, CSDB predating their arrest on their instant federal child pornography charges), compared to the general recidivism rate for offenders without a CSDB history. The rates for the two groups were similar (31.4% for CSDB offenders and 29.2% for non-CSDB offenders).

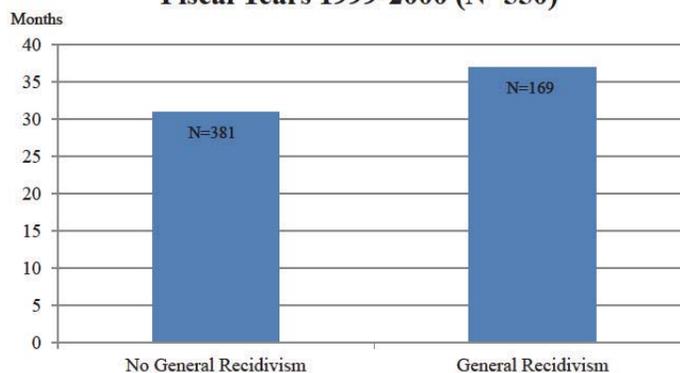
Figure 11-4
Non-Production Offender Characteristics:
General Recidivism by History of CSDB
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding.
 SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Caution should be exercised in drawing conclusions from this data analysis because, in addition to the other limitations concerning the Commission's recidivism study discussed above: (1) this particular analysis only refers to general recidivism (including technical violations of conditions of supervision), as opposed to sexual recidivism;³¹ and (2) the Commission was unable to control for the type of supervision involved (in particular, how closely offenders were supervised and the degree of restraints on their liberty).³²

Figure 11-5
Average Prison Term for Recidivist and Non-Recidivist
Child Pornography Offenders
Fiscal Years 1999-2000 (N=550)



Note: The figure excludes 58 offenders who received terms of probation and two offenders with missing sentencing information.
 SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Coding Project.

Finally, the Commission's study compared the average amount of imprisonment originally imposed on the offenders who recidivated with the average amount of imprisonment originally imposed on those offenders who did not recidivate.³³ The Commission's analysis found that the average sentence of imprisonment for the 381 non-recidivist offenders was 31 months. By comparison, the average sentence for the 169 recidivist offenders was 37 months. Therefore, offenders who recidivated had a 22.6 percent longer average term of imprisonment originally imposed than offenders who did not recidivate. The results of the Commission's analysis should be viewed with caution because there may be other factors explaining why the average lengths of the terms of imprisonment were different for the recidivists and non-recidivists (*e.g.*, on average, the recidivists had more serious criminal histories, which increased their guideline ranges).³⁴

³¹ The number of cases for analysis was too small to allow for meaningful comparisons of *sexual recidivism* rates between the two groups of offenders. As discussed in Chapter 7, social science research indicates that an offender's history of CSDB is a risk factor for sexual recidivism. See Chapter 7, at 170 & n.7.

³² CSDB offenders' rate of general recidivism may have been similar to the rate for offenders without a history of CSDB because high risk sex offenders on conditional release (*i.e.*, typically those with histories of CSDB) are generally more closely supervised than lower risk sex offenders — in particular, with a stricter application of the "containment model," which may have deterred violations of supervision. See Chapter 10 at 279-81 (discussing that treatment and supervision of child pornography offenders vary depending on the risk that such offenders pose according to risk assessments); see also JUDICIAL CONFERENCE OF THE UNITED STATES, 8 GUIDE TO JUDICIARY POLICY: PROBATION AND PRETRIAL SERVICES, Ch. Two (Policy Statements), § 230 (2011) ("Not all persons . . . convicted of sex offenses are alike. Rather, they present a spectrum of criminogenic risk and therapeutic need. Officers' . . . supervision techniques should vary accordingly.").

³³ The Commission excluded from the above analysis the 58 offenders who received terms of probation rather than terms of imprisonment, and two offenders whose cases had insufficient documentation.

³⁴ As discussed above, recidivists had longer average criminal histories than the non-recidivists. See *supra* Figure 11-3.

D. RELEVANCE OF THE COMMISSION’S RECIDIVISM STUDY TO CURRENT CHILD PORNOGRAPHY OFFENDERS

This section addresses the relevance of the Commission’s recidivism study of offenders sentenced in fiscal years 1999 and 2000 to current federal child pornography offenders. Since the late 1990s, new technologies related to personal computers and the Internet have greatly expanded the types and volume of child pornography possessed by typical offenders.³⁵ Furthermore, since 2000, the child pornography guidelines and corresponding penal statutes have undergone significant changes.³⁶ Given these technological and legal changes, it is appropriate to compare the study group from fiscal years 1999 and 2000 with modern non-production offenders to assess whether the Commission’s findings regarding the earlier cohort have continuing relevance to modern offenders. Using data from both the Commission’s regular annual datafiles from fiscal years 1999, 2000, and 2010, and the Commission’s special coding project of non-production cases from those same three fiscal years, this section compares the earlier cohort with the more recent cohort.³⁷ As discussed below, the two cohorts appear similar enough in relevant respects for the findings of the Commission’s recidivism study of the offenders sentenced in fiscal years 1999 and 2000 to have continuing relevance to current non-production offenders.

As demonstrated in Table 11–2 below, offenders in both groups were very similar with respect to race, gender, age, education, and criminal history. Most offenders in both groups had little or no prior criminal record, and approximately one-third of offenders in each time period had a known history of CSDB.

It is more difficult to compare the two groups of offenders based on the application of the sentencing guidelines in their cases (in particular, the frequency of specific offense characteristics) because significant

**Table 11-2
Comparison of Non-Production Offenders
Fiscal Years 1999-2000 & Fiscal Year 2010**

	FY1999-2000	FY2010
Offender Characteristics		
% White	93.3%	88.8%
% Male	99.7%	99.4%
Average Age (years)	41	42
Median Education Level	Some College	Some College
% Reported Not Sexually Abused as Child	85.7%	82.3%
% Employed at Time of Arrest	84.9%	75.2%
Criminal History and CSDB		
% CHC I	84.6%	81.7%
% SDB	36.7%	35.1%
Specific Offense Characteristics		
% Use of Computer	81.7%	96.3%
% Depiction of Image of Child Under 12	87.2%	96.2%

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FBI RAP Sheet Coding Project.

³⁵ See Chapter 3 at 41–43.

³⁶ See Chapter 1 at 4.

³⁷ As discussed in Chapters 6 and 7, the Commission conducted an extensive coding project of 1,654 non-production cases sentenced in fiscal year 2010 and 660 non-production cases sentenced in fiscal years 1999 and 2000. See Chapter 6 at 144; Chapter 7 at 202.

changes in the non-production guidelines have occurred during the past decade.³⁸ There are only a limited number of direct comparisons that can be made between the specific offender characteristics in the non-production guidelines in effect in fiscal years 1999 and 2000 and the non-production guidelines in effect in fiscal year 2010. Only two specific offender characteristics that applied in the fiscal year 1999–2000 cases have direct counterparts in the current version of USSG §2G2.2, *i.e.*, use of a computer and images depicting victims under the age of 12. In both periods, the vast majority of offenders received a 2-level increase for use of a computer in commission of the pornography crime and a 2-level increase for having pornographic material involving a minor under the age of 12 years, though both specific offender characteristics were more commonly applied in 2010.

While the child pornography guidelines have undergone a number of significant changes, offender and offense profiles have remained similar in most respects.³⁹ Typical offenders from both fiscal years 1999 and 2000 and fiscal year 2010 were white male United States citizens with a virtually identical average age who were employed at the time of the offense; they had no criminal records, no reported history of sexual abuse as a child, and some college education. The vast majority of offenders in both groups used a computer to commit their offenses and possessed images of prepubescent minors. Finally, approximately one-third of offenders, past and present, had a history of criminal sexually dangerous behavior. Given the many similarities in offense and offender characteristics, there is sufficient reason to believe that, in the context of supervision and recidivism, the findings of the Commission’s study of the 1999–2000 cohort are relevant to offenders who will be sentenced in the modern era and ultimately supervised in the future.

Non-production offenders sentenced in the current period will spend significantly longer periods in prison, on average, compared to the offenders sentenced in fiscal years 1999 and 2000.⁴⁰ Whether those longer sentences will affect the recidivism rates — positively or negatively — remains to be seen.⁴¹ In addition, while the earlier cohort of offenders generally had a three-year statutory maximum term of supervised release, current non-production offenders are subject to a statutory minimum five-year period of supervised release, and the average term of supervision is approximately four times that amount.⁴² Whether substantially longer terms of

³⁸ See Chapter 6 at 124–25.

³⁹ The Commission’s coding project of the fiscal years 1999 and 2000 cases does not include data concerning the specific manners of distribution and receipt of child pornography. Clearly, computer technology has changed significantly in the past decade — in particular, the growth of peer-to-peer file-sharing. Nevertheless, as noted, the vast majority of offenders in fiscal years 1999 and 2000 used computers (and the Internet) in connection with their crimes.

⁴⁰ See Chapter 6 at 132 (Figure 6–4); Chapter 8 at 210–12.

⁴¹ See, *e.g.*, LIN SONG, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, *RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED 1* (1993) (“Study findings indicate that the effect of incarceration (versus other sentencing options) and sentence length on recidivism is complex and is likely to be offender-specific. For some offenders, incarceration and longer confinement seem to increase the risk of recidivism. For other offenders, the likelihood of reoffense will either be unaffected or reduced by longer terms of incarceration.”), <http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf> (last visited Dec. 20, 2012).

⁴² See Chapter 10 at 271-72.

supervised release will affect the recidivism rates — positively or negatively⁴³ — also remains to be seen. Results of this study could be compared to a future recidivism study of the fiscal year 2010 cohort using the same methodology employed by the present study.

E. COMPARISON OF THE COMMISSION’S RECIDIVISM STUDY TO OTHER RELEVANT RECIDIVISM STUDIES

In order to offer some perspective concerning the results of the Commission’s present recidivism study, it is helpful to compare the findings of several other recidivism studies — including others involving child pornography offenders, as well as recidivism studies involving offenders convicted of “contact” sex offenders and federal offenders generally.

1. Other Studies of Child Pornography Offenders

The Commission’s findings are similar to two recent recidivism studies based on official records (as opposed to self-report data) of a comparable number of adult male child pornography offenders. The first study — which has not yet been published but the results of which were publicly presented in 2009 — was conducted by researchers at the Federal Bureau of Prisons (BOP) and thus is directly relevant for comparison with the Commission’s study.⁴⁴ The BOP study concerned 870 production and non-production child pornography offenders released from the BOP between 2002 and 2005 and reviewed for evidence of recidivism with an average follow-up period of 3.8 years. Regarding general recidivism rates, 221 of the 870 (25.4%) child pornography offenders were arrested or convicted for a new criminal offense or were arrested or revoked for a “technical” violation. Fifty offenders (5.7%) engaged in sexual recidivism, which the study defined as new non-production child pornography offenses, other non-contact sex offenses, or contact sex offenses.

The second study, which has been published in a peer-reviewed journal,⁴⁵ involved 541 adult male Canadian child pornography offenders. That study, which had an average follow-up time of 4.1 years (compared to the Commission’s 8.5 years), found that 175 of the 541 offenders (32.3%) had one or more criminal justice failures (arrests or convictions for new criminal offenses or violations of the conditions of their conditional release leading to arrests or revocations). Sixty offenders (11.1%) engaged in *sexual recidivism*: 28 of the 60 offenders engaged in contact or non-contact sexual offenses (other than child pornography offenses), while the other 32 committed new non-production child pornography offenses.⁴⁶ A recidivism study of foreign offenders should be viewed with caution in extrapolating its findings to American offenders because the foreign offenders were not subject to American penal laws and may have involved a cohort of offenders with different characteristics. Nevertheless, the close similarities

⁴³ Longer terms of supervision may deter some offenders from committing new offenses but also present other offenders with an increased opportunity to violate the conditions of supervision.

⁴⁴ Erik Faust, Cheryl Renaud & William Bickart, *Predictors of Re-offense Among a Sample of Federally Convicted Child Pornography Offenders*, Paper Presented at the 28th Annual Conference of the Association for the Treatment of Sexual Abusers (Oct. 2009).

⁴⁵ See Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders*, *supra* note 4, at 467.

⁴⁶ See *id.* at 471.

between the known recidivism rates of the two groups of North American offenders (the vast majority of whom were white males) is noteworthy.

2. *BJS Recidivism Study of State Sex Offenders Released in Fiscal Year 1994*

In 2003, the Bureau of Justice Statistics (BJS) published the results of its large-scale study of known recidivism by 9,691 sex offenders released from state prisons in 1994 and tracked for three years following their reentry into the community. The BJS study offers an additional point of comparison to the Commission's recidivism study of non-production offenders (which had an average eight-and-a-half year follow-up period).⁴⁷ The BJS study consisted of sex offenders who had committed traditional sex "contact" offenses (*i.e.*, rape, statutory rape, or sexual assault, against either children or adults),⁴⁸ but it did not include offenders convicted only of child pornography offenses. The BJS study, which used RAP sheets, defined recidivism in a similar manner to the Commission's definition, *i.e.*, arrest for or conviction of any new criminal offense (any felony and many serious misdemeanors), as well as "technical" violations of conditions of parole leading to re-incarceration.⁴⁹

The findings of the BJS study were as follows: 43 percent of the 9,691 sex offenders (4,163) were arrested for or convicted of any type of new criminal offense and, of that group, 517 (5.3% of the entire cohort studied) were arrested or convicted of a new "contact" sex offense.⁵⁰ As a separate finding, the BJS study found that 38.6 percent of the 9,691 sex offenders were returned to prison, including 2,656 offenders whose sole basis for returning to prison was a "technical" violation of the conditions of their supervision.⁵¹ The BJS study did not state how many of the 2,656 "technical violation" offenders also had been *arrested* (but not convicted and sentenced to a new term of incarceration) for a new criminal offense. It seems likely that the two groups — those arrested for or convicted of a new criminal offense and those returned to prison for a "technical" violation — overlapped only to some extent. Thus, the *general recidivism* rate (as defined above by the Commission) for the 9,691 sex offenders in the BJS study likely exceeded the rate of arrest or conviction for new offenses (43%).⁵²

It is noteworthy that the general recidivism rate found in the Commission's study of non-production offenders using a comparable three-year average follow-up period (as opposed to an eight-and-one-half year average follow-up period) was 22.3 percent, and the rate of new

⁴⁷ See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003).

⁴⁸ See *id.* at 1, 3.

⁴⁹ *Id.* at 5–6.

⁵⁰ *Id.* at 13. The BJS study only reported new "contact" sex offenses (*i.e.*, rape and sexual assault offenses, against either adults or children). See *id.* at 34. It is unclear from the BJS study whether new non-contact sex offenses (*e.g.*, child pornography offenses, indecent exposure) fell within the "other offense" category reported in the study. See *id.* at 34 (Table 41).

⁵¹ *Id.* at 14.

⁵² Another 2003 BJS recidivism study of 272,111 offenders sentenced to state prisons for *all* types of offenses (with only a very small percentage being sex offenders, *i.e.*, 3.6%) found even higher rates of recidivism during a 3-year follow-up period. See BJS, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (2003) (67.5% rate of new arrests or convictions and 26.4% rate of "technical" violations resulting in a return to prison).

“contact” sex offenses was 2.6 percent. These lower rates for both general recidivism and new contact sex offenses likely reflect the fact that all of the BJS study group had known histories of contact sex offenses, while only one-third of the child pornography offenders in the Commission’s study had known histories of CSDB (not all of which involved contact sex offenses).⁵³ As discussed in Chapter Seven, social science research indicates that an offender’s history of CSDB (in particular, sexual contact offenses) is a risk factor for sexual recidivism.⁵⁴

3. *Recidivism by Federal Offenders Generally*

In 2004, the Commission published the results of a large-scale recidivism study of a stratified, random sample of 6,062 United States citizens who were sentenced under the federal sentencing guidelines for all types of federal offenses in fiscal year 1992, using a two-year follow-up period.⁵⁵ Table 11–3 below compares the Commission’s current study of recidivism by child pornography offenders to the Commissioner’s earlier recidivism study of all federal offenders. To allow for a meaningful comparison, Table 11–3 refers only to fiscal year 1992 data concerning white male United States citizen offenders, the group most comparable to the typical federal child pornography offender,⁵⁶ and only white male United States citizen non-production offenders from fiscal years 1999–2000 (566 of the 610 total members of the study group). To allow for a meaningful comparison, the recidivism rates of the non-production offenders sentenced in fiscal years 1999 and 2000 are shown two ways: first, using a two-year follow-up period, and, second, using the full eight-and-one-half year follow-up period.

As shown in Table 11–3 below, the overall two-year recidivism rate for the two groups is similar (17.4% rate for the fiscal year 1992 cohort versus a 16.6% rate for the child pornography cohort). However, when controlling for prior criminal record, including separating Criminal History Category I by 0 and 1 criminal history points, the two-year general recidivism rate for child pornography offenders is somewhat higher than the 1992 cohort (8.2% rate for the fiscal year 1992 cohort with no criminal history points versus a 12.5% rate for the child pornography cohort with no criminal history points; 13.1% rate for the fiscal year 1992 cohort with one criminal history point versus a 17.6% rate for the child pornography cohort with one criminal history point). The reason the overall recidivism rates (considering offenders in all Criminal History Categories) are similar is that the child pornography group has a higher percentage of Criminal History Category I offenders (84.9% as compared to 64.5% for the fiscal year 1992 group of all types of offenders), whose recidivism rate is the lowest of all criminal history categories.

⁵³ See Chapter 7 at 202.

⁵⁴ See *id.* at 170 & n.7.

⁵⁵ See U.S. SENT’G COMM’N, MEASURING RECIDIVISM, *supra* note 26.

⁵⁶ Both groups were restricted to white males because the child pornography group is overwhelmingly white and male. Consistent with the 2004 study, the fiscal year 1992 data are weighted to represent the entire comparable population United States white male citizen offenders sentenced under the federal guidelines in fiscal year 1992.

Table 11-3
Comparison of Child Pornography Recidivism for
White Male Offenders
Fiscal Year 1992 & Fiscal Years 1999-2000

	FY92 Recidivism Sample		FY92 General Recidivism Rate Within Two Years		FY99-00 Child Pornography Offenders		General Recidivism Rate Within Two Years		General Recidivism Rate Full Follow-Up Period	
	N		N	%	N	%	N	%	N	%
Total	11,888		2,064	17.4	566	100.0	94	16.6	172	30.4
Criminal History										
Category I	7,670		708	9.2	478	100.0	63	13.2	126	26.4
Zero Points	6,144		504	8.2	415	100.0	52	12.5	107	25.8
One Point	1,478		194	13.1	51	100.0	9	17.6	17	33.3
Categories II-VI	4,218		1,356	32.1	88	100.0	31	35.2	46	52.3

Note: Twelve FY99-00 cases and 48 weighted FY92 cases have missing criminal history points.
 SOURCE: U.S. Sentencing Commission, FY92 Recidivism Sample (2003 weighted data) and 1999-2000 Datafile, USSCFY92 and USSCFY99-00 and FBI RAP Sheet Coding Project.

A similar comparison can be made to data concerning the revocation rate for all federal offenders sentenced to supervised release. In its 2010 report, *Federal Offenders Sentenced to Supervised Release*, the Commission noted that the revocation rate for all federal offenders serving terms of supervised release has been 33.0 percent in recent years, but that the rate for offenders who were in Criminal History I at the time of their original sentencing was 18.7 percent.⁵⁷ Those revocation rates are not fully comparable to the two-year failure rates reported in Table 11-3 for two reasons: (1) not all criminal justice failures found in the Commission's recidivism studies would necessarily have resulted in revocations of the offenders' supervised release (*e.g.*, misdemeanor offenses and "technical" violations do not always result in revocations);⁵⁸ and (2) revocations of supervised release may result from offenders' violations occurring after two years following an offender's reentry into the community (although the average revocation occurs after only 17 months of supervision).⁵⁹ Nevertheless, despite these differences, the revocation data for all federal offenders appear generally consistent with the Commission's findings concerning the rate of general recidivism by child pornography offenders.

⁵⁷ See *id.* at 62, 67. That report is available at http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

⁵⁸ See, *e.g.*, USSG §7B1.3(a) (discussing the different types of supervised release violations and their consequences).

⁵⁹ FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, note 57, at 63.

F. CONCLUSION

The Commission's recidivism study of 610 offenders sentenced under the non-production child pornography guidelines in fiscal years 1999 and 2000 and other relevant recidivism studies allow for the following conclusions:

- The known *general recidivism* rate for federal non-production offenders studied by the Commission was 30.0 percent during an average follow-up period of eight and one-half years after the offenders' reentry into the community.
- Those offenders' known *sexual recidivism* rate, a subset of the general recidivism rate, during that same follow-up period was 7.4 percent. The known "contact" sexual recidivism rate, a subset of the overall sexual recidivism rate, was 3.6 percent.
- Because there are sufficient similarities in offense and offender characteristics between the offenders sentenced in fiscal years 1999 and 2000 and current federal non-production offenders, the findings of the Commission's recidivism study appear to have continuing relevance to current offenders.
- The known general and sexual recidivism rates found in the Commission's study of federal non-production offenders are comparable to the known general and sexual recidivism rates reported in two recent child pornography recidivism studies by BOP and Canadian researchers.
- The known general recidivism rate and known sexual "contact" offense recidivism rate found in the Commission's study are lower than such rates for contact sex offenders tracked by BJS in a large-scale study of such sex offenders released from state prisons in 1994.
- The known general recidivism rate found in the Commission's study is similar to the known general recidivism rate for a comparable segment of the total federal offender population (*i.e.*, United States citizen white male federal offenders) studied by the Commission in 2004, as well as the supervised release revocation rate for federal offenders generally (as discussed in the Commission's 2010 report on supervised release).