EXECUTIVE SUMMARY

A. OVERVIEW

This report is the result of a multi-year process in which the United States Sentencing Commission ("the Commission") examined cases of offenders sentenced under the federal sentencing guidelines and corresponding penal statutes concerning child pornography offenses. The primary focus of this report is USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), the current guideline for non-production offenses such as possession, receipt, transportation, and distribution of child pornography, the four primary offense types. One chapter of this report also analyzes cases of offenders sentenced under the guideline for production of child pornography, USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). The purpose of this report is to contribute to the ongoing assessment by Congress and the various stakeholders in the federal criminal justice system regarding how federal child pornography offenders are prosecuted, sentenced, incarcerated, and supervised following their reentry into the community.[1]

This report complements and expands upon the Commission's 2009 report, *History of the Child Pornography Guidelines.*[2] The 2009 report chronicled the federal non-production child pornography guidelines (§2G2.2 and the former §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)) from their inception through 2009. In particular, it tracked all substantive amendments made to those guidelines, several of which resulted from congressional directives to the Commission or other legislation. The most significant amendments to the guidelines resulted from the PROTECT Act of 2003,[3] which also created new statutory mandatory minimum statutory penalties for most child pornography offenses.[4]

Several factors have prompted the Commission to continue its examination of child pornography cases. First, during the past two decades, cases in which offenders have been sentenced under the child pornography guidelines, while only a small percentage of the overall

[1] This report is submitted pursuant to the Commission's general statutory authority under 28 U.S.C. §§ 994 and 995 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).

[2] *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009) (available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf).

[3] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003). The PROTECT Act is discussed in Chapter 1. *See* Chapter 1 at 4.

[4] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 38-48 (discussing the changes to the statutory and guideline penalties for child pornography offenses resulting from the PROTECT Act).

federal criminal caseload, have grown substantially both in total numbers and as a percentage of the total caseload.[5]

Second, since the enactment of the PROTECT Act of 2003 and *United States v. Booker*, which made the guidelines "effectively advisory"[6] in 2005, there has been a steadily decreasing rate of sentences imposed within the applicable guidelines ranges in non-production cases. That rate decreased from 83.2 percent in fiscal year 2004 — the last full fiscal year before *Booker*, when most offenders were not subject to increased statutory and guideline penalty ranges resulting from the PROTECT Act[7] — to 32.7 percent in fiscal year 2011.[8] The corresponding rate of below range sentences for reasons other than an offender's substantial assistance to the authorities likewise has increased significantly. By fiscal year 2011, that rate was 62.8 percent.[9] The steady decrease in the rate of sentences imposed within the applicable guideline ranges has occurred at the same time that average minimums of such ranges and average sentences imposed have significantly increased.[10] These sentencing data indicate that a growing number of courts believe that the current sentencing scheme in non-production offenses is overly severe for some offenders. As the Supreme Court has observed, the Commission's obligation to collect and examine sentencing data directly relates to its statutory duty to consider whether the guidelines are in need of revision in light of feedback from judges as reflected in their sentencing decisions.[11]

Third, as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability. Non-production child pornography offenses have become almost exclusively Internet-enabled crimes; the typical offender today uses modern Internet-based technologies such as peer-to-peer ("P2P") file-sharing programs that were just emerging only a decade ago and that now facilitate large collections of child pornography.[12] The typical offender's collection not only has grown in volume but also contains a wide variety of graphic sexual images (including images of very young victims),

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[5] *See* Chapter 6 at 126 (noting that, in fiscal year 1992, there were 77 non-production cases, which accounted for 0.2% of the total federal criminal caseload; by fiscal year 2010, there were 1,717 non-production cases, which accounted for 2.0% of the total caseload); Chapter 9 at 247 (noting that, in fiscal year 1992, there were ten production cases; by fiscal year 2010, there were 207 such cases, which accounted for 0.25% of the total caseload).

[6] 543 U.S. 220, 245 (2005).

[7] *See* Chapter 1 at 4 (discussing the effect of the PROTECT Act amendments).

[8] *See id.* at 7.

[9] *See id.* (noting that, in fiscal year 2011, 48.2% of offenders received non-government sponsored downward departures or variances, and 14.6% received government sponsored departures or variances other than for offenders' substantial assistance to the authorities).

[10] *See* Chapter 1 at 8 (noting that the average minimum of guideline ranges in non-production child pornography offenses in fiscal year 2004 was 50.1 months, and the average sentence imposed was 53.7 months; by fiscal year 2010, the average guideline minimum was 117.5 months, and the average sentence imposed was 95.0 months).

[11] Rita v. United States, 551 U.S. 338, 350 (2007); *see also* 28 U.S.C. §§ 994(o), (p), (w) & 995(a)(15), (20) (setting forth the Commission's obligation to collect and analyze sentencing data and, where appropriate, amend the guidelines and make recommendations to Congress to amend relevant legislation based on such data analysis).

[12] *See* Chapter 3 at 41–56; Chapter 6 at 146–51, 153–55.

which are now readily available on the Internet.[13] As a result, four of the of six sentencing enhancements in §2G2.2 — those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels — now apply to most offenders[14] and, thus, fail to differentiate among offenders in terms of their culpability. These enhancements originally were promulgated in an earlier technological era, when such factors better served to distinguish among offenders.[15] Indeed, most of the enhancements in §2G2.2, in their current or antecedent versions, were promulgated when the typical offender obtained child pornography in printed form in the mail.[16]

Fourth, recent social science research — by both the Commission and outside researchers — has provided new insights about child pornography offenders and offense characteristics that are relevant to sentencing policy. This research includes information regarding the prevalence of child pornography offenders' criminal sexually dangerous behavior[17] both before their arrests and after their ultimate reentry into the community following their convictions,[18] as well as emerging research on the efficacy of psycho-sexual treatment of offenders' clinical sexual disorders.[19]

Finally, most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously outmoded.[20] Those stakeholders, including sentencing courts, increasingly feel that they "are left without a meaningful baseline from which they can apply sentencing principles" in non-production cases.[21]

For these reasons, the Commission prepared this report. In preparing the report, the Commission: (1) reviewed both relevant statutory and case law as well as social science and legal literature concerning child pornography offenses, offenders, and victims; (2) engaged in extensive data analyses of several thousands of federal child pornography cases from fiscal year 1992 through the first quarter of fiscal year 2012; (3) studied recidivism rates for child pornography offenders, including conducting a recidivism study of 610 federal child

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[13] *See* Chapter 1 at 5–6.

[14] *See* Chapter 8 at 209; *see also* USSG §2G2.2(b)(2), (4), (6) & (7) (enhancements for use of a computer, possession of images of a prepubescent minor, possession of sado-masochistic images, and possession of a certain number of images in increments from 10 or more to 600 or more).

[15] *See* Chapter 1 at 6.

[16] *See id.*

[17] Chapter 7 at 174 (defining criminal sexually dangerous behavior as including "illegal sexually abusive, exploitative, or predatory conduct" against "real-time victims").

[18] *See id.* at 171– 74 (discussing social science research); *id.* at 174–86 (discussing the Commission's special coding project concerning criminal sexually dangerous behavior occurring before offenders' prosecutions for non-production offenses); Chapter 11 at 294–303 (discussing Commission's recidivism study of non-production offenders).

[19] *See* Chapter 10 at 277–87.

[20] *See* Chapter 1 at 10–14 (discussing the views of the Criminal Law Committee of the Judicial Conference of the United States Courts, the Department of Justice, the defense bar, and other interested parties).

[21] United States v. Stern, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008).

pornography offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000; and (4) held a public hearing at which the Commission received testimony from experts in technology and the social sciences, treatment providers, law enforcement officials, legal practitioners, victims' advocates, and members of the judiciary.

B. SUMMARY OF THE CHILD PORNOGRAPHY SENTENCING SCHEME

1. *Penal Statutes*

Several statutory provisions proscribe a variety of acts related to the production, advertising, distribution, transportation (including by shipping or mailing), importation, receipt, solicitation, and possession of child pornography.[22] For sentencing purposes, child pornography offenses generally are divided into two larger categories — production offenses and non-production offenses. Offenses related to the production of child pornography are prosecuted in approximately ten percent of all federal child pornography cases.[23] The four primary non-production offense types are distribution, transportation, receipt, and possession of child pornography, which represent approximately 90 percent of all federal child pornography prosecutions.[24]

The statutory penalties for these federal offenses vary in severity. A production offense carries a statutory mandatory minimum term of 15 years of imprisonment and a maximum term of 40 years (and higher minimum and maximum penalties if the offender has a predicate conviction for a sex offense).[25] A receipt, transportation, or distribution (R/T/D) offense carries a statutory mandatory minimum sentence of five years of imprisonment and a maximum sentence of 20 years (with increased minimum and maximum penalties if the offender has a predicate conviction for a sex offense).[26] A simple possession offense carries no statutory mandatory minimum penalty and a maximum term of ten or 20 years of imprisonment (unless the offender has a predicate conviction for a sex offense, which would result in a mandatory minimum term of imprisonment of ten years and a maximum term of 20 years).[27]

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[22] *See* 18 U.S.C. §§ 2251, 2252, 2252A, & 2260. An additional statute, 18 U.S.C. § 1466A, prohibits possession, receipt, distribution, and production of "obscene visual representations of the sexual abuse of children"; although it is an obscenity offense in the penal statutes, its violation is considered a child pornography offense for sentencing purposes. *See* USSG §2G2.2(a)(1). Section 1466A's penalty provisions mirror those in § 2252A for equivalent offense conduct. *See* 18 U.S.C. § 1466A(a), (b). Prosecutors also occasionally bring obscenity charges under other obscenity statutes when the offenses in fact involved images that would qualify as child pornography. *See* 18 U.S.C. §§ 1461 *et seq.* Such offenses, if they involved the obscene depiction of minors, are subject to the guidelines' child pornography provisions rather than the guideline applicable to obscenity depicting adults. *See, e.g.*, USSG §2G3.1(c).

[23] *See* Chapter 1 at 7 n.42.

[24] *See id.*; *see also* Chapter 6 at 146.

[25] 18 U.S.C. § 2251(a), (d)(1)(B) & (e).

[26] 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

[27] 18 U.S.C. §§ 2252(b)(2) & 2252A(b)(2). In late 2012, Congress enacted the Child Protection Act of 2012, Pub. L. No. 112–206, 126 Stat. 1490 (Dec. 7, 2012), which raised the statutory maximum term of imprisonment for possession of child pornography from ten to 20 years for defendants who possessed images of a prepubescent minor

Table 1 below summarizes the statutory penalty ranges for offenses involving child pornography or sexually obscene images of children:

Table 1
Child Pornography Statutory Penalty Ranges

Production			Receipt/Distribution/ Transportation		Possession		Obscenity	
No Prior Sex Conviction	**Prior Sex Conviction**	**> 1 Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**18 U.S.C. § 1466A**	**18 U.S.C. §§ 1461 *et seq*.**
15 to 30 years	25 to 50 years	35 years to life	5 to 20 Years	15 to 40 years	0 to 10 years or 0 to 20 years (depending on age of victim)	10 to 20 years	Mirrors penalties in CP statutes	0 to 5 years or 0 to 10 years (varies by statute)

2. *Sentencing Guidelines*

Sentencing guidelines for child pornography offenses are found in Chapter Two, Part G, Subpart 2 (Sexual Exploitation of a Minor), of the *Guidelines Manual*. The Commission's report focuses on §2G2.1, which addresses offenses related to production of child pornography, and §2G2.2, which addresses non-production child pornography offenses.[28] Both guidelines are reproduced in full in Appendix B at the end of the report. For readers' convenience, §2G2.2, which is a primary focus of this report, also is set forth at the end of this executive summary.

Section 2G2.1, the guideline for production offenses, has a base offense level of 32 and six sentencing enhancements for different aggravating factors primarily related to the nature of the images produced (the type of sexual acts perpetrated upon victims and the ages of the victims

or a minor under 12 years of age. *See* Chapter 1 at 4–5. Commission data show that virtually all offenders possess such images. *See* Chapter 8 at 209 (noting 96.3% of non-production offenders possessed such images in fiscal year 2010).

Violations of § 1466A involving receipt, distribution, or production of "obscene visual representations of the sexual abuse of children" carry a statutory mandatory minimum penalty of five years of imprisonment and a statutory maximum of 20 years of imprisonment. Violations of § 1466A involving simple possession of such obscene material carry no statutory mandatory minimum penalty and have a statutory maximum of ten years of imprisonment. 18 U.S.C. § 1466A(a) & (b) (subjecting violators to the same "penalties provided in section 2252A(b)" for comparable offense conduct involving child pornography rather than obscenity depicting minors). Other obscenity statutes occasionally are used to prosecute offenders who possess, receive, transport, or distribute what legally would be considered child pornography; they carry no mandatory minimum penalty and have a statutory maximum penalty of five or ten years of imprisonment depending on which statute applies. *See* 18 U.S.C. §§ 1461, 1462, 1463, 1465, 1466, 1468, & 1470.

[28] For non-production offenses committed before November 1, 2004, defendants only convicted of possession offenses were sentenced under the former USSG §2G2.4, while defendants convicted of R/T/D offenses were sentenced under the prior version of USSG §2G2.2. Offenders convicted of any type of non-production offense committed on or after November 1, 2004, are sentenced under the current version of §2G2.2. *See* Chapter 1 at 2 n.13.

depicted in the images), whether defendants distributed the images, and the relationship between the defendants and victims.[29]

Section 2G2.2, which covers non-production offenses, has a two-tiered system for assigning a base offense level to a defendant based on the nature of the most serious statute of conviction. A defendant convicted of simple possession of child pornography[30] has a base offense level of 18.[31] A defendant convicted of an R/T/D offense has a base offense level of 22.[32] The offense level of a defendant convicted solely of receipt is reduced by two levels if the court finds that the defendant's actual conduct was limited to receipt or solicitation of child pornography and that he "did not intend to traffic in, or distribute" any child pornography.[33] Section 2G2.2 thus differentiates offenders' starting points in calculating their offense levels by dividing them into three primary groups: (1) those convicted of simple possession (offense level 18); (2) those convicted of receipt who did not intend to distribute (offense level 20); and (3) those convicted of receipt but who intended to distribute as well as all those convicted of distribution or transportation (offense level 22). Section 2G2.2 contains six sentencing enhancements based on aggravating circumstances related to the nature of the images possessed (the ages of the victims depicted and whether the sexual acts depicted involved sadistic or masochistic acts or other violence), the number of images possessed, whether the defendant used a computer in the commission of the offense, whether the defendant distributed child pornography, and whether the defendant engaged in a "pattern of activity" involving the sexual exploitation or abuse of minors.[34]

C. HIGHLIGHTS OF THE REPORT

1. *All child pornography offenses, including the simple possession of child pornography, are extremely serious because they both result in perpetual harm to victims and validate and normalize the sexual exploitation of children.*

    - Child pornography offenses inherently involve the sexual abuse and exploitation of children. Typical child pornography possessed and distributed by federal child pornography offenders today depicts prepubescent children engaging in graphic sex acts, often with adult men.[35] Approximately half of child pornography offenders in the United States possess one or more images (including still images and/or videos)

[29] USSG §2G2.1(b).

[30] 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

[31] USSG §2G2.2(a)(1). In addition, defendants convicted of a child pornography "morphing" offense under 18 U.S.C. § 2252A(a)(7), or of certain obscenity offenses in which the obscene images depicted children, *see, e.g.*, 18 U.S.C. § 1466A(b), also have a base offense level of 18 under the guideline. USSG §2G2.2(a)(1).

[32] USSG §2G2.2(a)(2).

[33] USSG §2G2.2(b)(1).

[34] USSG §2G2.2(b)(2)-(7).

[35] *See* Chapter 4 at 86–87.

depicting the sexual abuse of a child under six years old and approximately one-quarter of offenders possess one or more images depicting the sexual abuse of a child two years old or younger.[36]

- Child pornography victims are harmed initially during the production of images, and the perpetual nature of child pornography distribution on the Internet causes significant additional harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used by offenders for sexual gratification and potentially for "grooming" new victims of child sexual abuse.[37]

- Child pornography offenses are international crimes. Images depicting the abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may continue to redistribute the same images. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it.[38] The harm to victims thus is lifelong.

- The ready availability of child pornography on the Internet, the existence of online child pornography "communities" that validate child sexual exploitation, and a growing but largely non-commercial "market" for new images all contribute to the further production of child pornography and, in the process, to the sexual abuse of children.[39]

- Although child pornography validates and normalizes the sexual abuse of children, social science research has not established that viewing child pornography "causes" the typical offender to progress to other sex offending against minors. For some offenders, however, obtaining sexual gratification through the use of child pornography is a risk factor for other sex offending against minors, as child pornography may strengthen existing tendencies in ways that may create a "tipping-point effect" if other risk factors are also present.[40]

2. *Child pornography offenders engage in a variety of behaviors reflecting different degrees of culpability and sexual dangerousness.*

    - Typical offenders maintain collections of still and video images numbering in the hundreds or thousands. Such images often depict

[36] *See id.* at 87.

[37] *See* Chapter 5 at 107–14.

[38] *See* Chapter 3 at 41, 64.

[39] *See* Chapter 4 at 97–99.

[40] *See id.* at 102–03.

prepubescent children engaging in graphic sexual acts with adults. A minority of offenders acquire enormous and often well-organized collections containing tens of thousands or occasionally even hundreds of thousands of images. Some offenders also intentionally collect child pornography depicting the sexual torture of children, including infants and toddlers.[41]

- There have been dramatic technological changes related to computers and the Internet in the past decade, such as the ascendance of P2P file-sharing programs, which have changed the way that typical offenders today receive and distribute child pornography.[42] The Commission's special research project of 1,654 fiscal year 2010 §2G2.2 cases found that nearly two-thirds of offenders (65.4%) distributed child pornography to others. The most common manner of distribution was a P2P file-sharing program.

- Child pornography offenders vary widely in their technological sophistication. Many are relatively unsophisticated "entry-level" offenders who use readily available technologies such as "open" P2P file-sharing programs to receive and/or distribute child pornography in an indiscriminate manner. Other offenders, however, use their technological expertise to create private and secure trading "communities" and to evade, and help others evade, detection by law enforcement.[43]

- Technological advances in Internet and computer technologies have resulted in the growth of Internet-based child pornography communities, which not only operate as a forum for offenders to receive and distribute images but also serve to validate and normalize the sexual exploitation of children. Such communities thrive in Internet chat-rooms and bulletin board systems and also through the use of "closed" P2P file-sharing programs in which offenders directly communicate with each other.[44] Not all child pornography offenders join such communities, and those who do vary in the level of their engagement. The Commission's data suggest that a significant minority of offenders (approximately one-fourth) have some level of involvement in such communities.[45]

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[41] *See id.* at 84–92.

[42] *See* Chapter 3 at 41–56; *see also* Chapter 6 at 153–55 (noting the Commission's study of large samples of federal child pornography cases from fiscal year 2002 and fiscal year 2012 revealed that no presentence reports ("PSRs") mentioned the use of P2P file-sharing programs by offenders sentenced in fiscal year 2002, while PSRs in the majority of cases of offenders sentenced in fiscal year 2012 mentioned their use of P2P file-sharing programs).

[43] *See* Chapter 3 at 61–62.

[44] *See* Chapter 4 at 92–99.

[45] *See* Chapter 6 at 151 & n.70 (finding that 445 of the 1,654 non-production offenders sentenced in fiscal year 2010, or 26.9% of offenders, engaged in "personal" distribution of child pornography to other adult offenders using modes of distribution such as email, which suggests at least some degree of involvement in child pornography communities).

- Some federal offenders who commit non-production child pornography offenses also have engaged in sexually dangerous behavior, either prior to or concomitantly with their instant child pornography offenses. Existing studies, which have employed different methodologies and examined different offender populations — including some offenders outside the United States — have yielded inconsistent findings concerning the prevalence rate of other sex offending by non-production offenders.[46] The Commission thus engaged in a special research project that reviewed virtually all federal non-production child pornography cases from fiscal year 1999, 2000, and 2010, as well as a sample of such cases from fiscal year 2012, to provide reliable data concerning the percentage of federal offenders sentenced under the non-production child pornography guidelines who have known histories of criminal sexually dangerous behavior ("CSDB").

- For purposes of this report, CSDB comprises three different types of criminal sexual conduct: (1) actual or attempted "contact" sex offenses occurring before or concomitantly with offenders' commission of non-production child pornography offenses; (2) "non-contact" sex offenses occurring before or concomitantly with offenders' commission of non-production child pornography offenses;[47] and (3) prior non-production child pornography offenses (if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender).

- After examining the presentence reports ("PSRs") in a total of 2,696 non-production child pornography cases, the Commission found that approximately one in three[48] offenders had engaged in one or more types of CSDB predating their prosecutions for their non-production offenses.[49]

- The Commission's study had certain limitations that resulted in its being underinclusive in certain important respects. The study did not include

[46] *See* Chapter 7 at 171–74 (discussing the existing studies); *see also* Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight "online offenders" – the majority of whom were child pornography offenders – had an "officially known contact sex offense history," but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on offenders' "self-report" data in six studies).

[47] Contact offenses include sexual molestation offenses (rape and sexual assault). Non-contact offenses include enticing a minor to engage in sexual conduct via the Internet (*e.g.*, "cybersex" via a webcam), knowingly distributing child pornography to a real or perceived minor, and sexual voyeurism and exhibitionism offenses. *See* Chapter 7 at 174–78.

[48] The rate of CSDB reflected in prior convictions or findings in PSRs was 33.9% for offenders sentenced in fiscal years 1999-2000, 31.4% for offenders sentenced in fiscal year 2010, and 33.0% for offenders sentenced in the first quarter of fiscal year 2012.

[49] *See* Chapter 7 at 181, 201–02.

CSDB that was not reported to or detected by the authorities or otherwise not recounted in PSRs. The Commission coded offenders' CSDB only as reflected in: (1) convictions for sex offenses; (2) findings in PSRs that offenders had engaged in CSDB (which did not result in convictions); and (3) unresolved allegations of CSDB in PSRs.[50] It is well established that the *actual* rate of offenders' CSDB is higher than the *known* rate because official records of known sex offenses by child pornography offenders fail to account for all such sex offenses.[51] In addition, the Commission's study is underinclusive of all conduct reflecting offenders' sexual dangerousness insofar as the study was limited to prior sexually dangerous behavior that amounted to a *criminal offense* and did not include *non-criminal* acts of sexually deviant behavior.[52] The Commission's review of PSRs revealed a variety of non-criminal but sexually deviant conduct (*e.g.*, an offender's collection of children's underwear associated with his collection of child pornography or an offender's "diary" containing graphic descriptions of his sexual fantasies concerning children).[53]

3. *Guideline penalty ranges, average sentences of imprisonment, and average terms of supervised release have substantially increased in significant part because of the statutory and guideline amendments resulting from the PROTECT Act of 2003.*

- The average guideline minimum for non-production child pornography offenses in fiscal year 2004 — the last full fiscal year when the guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act — was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010, as a larger percentage of cases was affected by the provisions of the PROTECT Act that increased penalty levels, the average guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months.[54]

[50] *See id.* at 179. The Commission was limited to coding such information from PSRs because the Commission does not receive other documents that may contain relevant information concerning CSDB (*e.g.*, transcripts of court proceedings). The Commission's study reports unresolved allegations separately from CSDB reflected in prior convictions and findings in PSRs. *See* Chapter 7 at 181-82.

[51] *See id.* at 179–80.

[52] The Commission could not code non-criminal sexually dangerous behavior in reviewing PSRs as a result of difficulties in classifying such varied behavior without a bright-line standard such as criminality. Existing social science research has only undertaken to determine the prevalence of *criminal* sexually dangerous behavior among child pornography offenders. *See generally* Seto et al., *supra* note 46.

[53] *See* Chapter 7 at 176. Such sexual deviance, even if not criminal, is a risk factor for sexual recidivism. *See* Chapter 10 at 286.

[54] *See* Chapter 1 at 8; *see also id.* at 4 (discussing the PROTECT Act).

- Typical guideline penalty ranges and average sentences of imprisonment have increased since fiscal year 2004 not only because of a growth in the number and severity of enhancements following the PROTECT Act amendments but also because of an increase in the incidence of the underlying conduct and circumstances triggering such enhancements, particularly in the technology used.[55] In particular, four of the six enhancements in §2G2.2(b) — together accounting for 13 offense levels — now apply to the typical non-production offender.[56] In fiscal year 2010, §2G2.2(b)(2) (images depicting pre-pubescent minors) applied in 96.1 percent of cases; §2G2.2(b)(4) (sado-masochistic images) applied in 74.2 percent of cases; §2G2.2(b)(6) (use of a computer) applied in 96.2 percent of cases; and §2G2.2(b)(7) (images table) applied in 96.9 percent of cases.[57] Thus, sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders. Higher penalty ranges and average sentences also have resulted from the statutory mandatory minimum penalties created by the PROTECT Act, which apply in approximately half of all §2G2.2 cases today and which result in higher base offense levels under the guidelines for offenders convicted of offenses carrying such mandatory minimum penalties.[58]

- Supervised release terms in child pornography cases have increased significantly since the PROTECT Act. The PROTECT Act raised the maximum statutory term of supervised release from three years for most child pornography offenders to a lifetime term for all child pornography offenders and also created a statutory mandatory minimum term of five years for all such offenders. In fiscal year 2010, the average term of supervised release for non-production offenders was approximately 20 years (220.3 months for offenders convicted of possession and 273.7 months for offenders convicted of R/T/D offenses); the average term of supervised release for offenders sentenced under the production guideline was nearly 27 years.[59] The sentencing guidelines currently recommend the statutory maximum term of lifetime supervision for all child pornography offenders.[60]

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[55] *See* Chapter 6 at 123–25; *see also* Chapter 8 at 208–12.

[56] *See* Chapter 8 at 209 (Table 8-1).

[57] The images table contains incremental enhancements depending on the number of images. The majority of offenders receiving an enhancement based on the images table (69.6%) received the maximum enhancement of 5 levels based on their possession of 600 or more images. *See* Chapter 6 at 141.

[58] *See* Chapter 2 at 32; Chapter 6 at 146.

[59] *See* Chapter 10 at 271–76.

[60] *See id.* at 272.

4. *Increasing numbers of courts and parties in non-production cases have engaged in charging and sentencing practices that have had the effect of limiting the sentencing exposure for many offenders as a result of the view that the current non-production sentencing scheme is outmoded, fails to distinguish adequately among offenders based on their levels of culpability and dangerousness, and is overly severe in some cases. Growing sentencing disparities have resulted from these practices.*

   - A variety of stakeholders in the federal criminal justice system, including the Department of Justice, the defense bar, and many in the federal judiciary, are critical of the current non-production penalty scheme. Although these stakeholders are not unanimous concerning the perceived flaws in the penalty scheme, many believe that it fails to adequately differentiate among offenders based on their culpability and sexual dangerousness, needs to be updated to reflect recent changes in typical offense conduct associated with the evolution of computer and Internet technologies, and is too severe for some offenders.[61] As a result, courts and parties increasingly have engaged in charging and sentencing practices that have limited many offenders' sentencing exposure. Such inconsistent application of the existing guideline and statutory penalty provisions has led to growing sentencing disparities among similarly situated offenders.[62]

   - The Commission's special research project of fiscal year 2010 §2G2.2 cases revealed four common practices used to limit non-production offenders' sentencing exposure: (1) charging practices that permitted offenders to be convicted only of simple possession despite having committed R/T/D offenses (46.6% of cases); (2) plea agreements containing guideline stipulations regarding sentencing enhancements that limited offenders' sentencing exposure under the guidelines (11.4% of cases); (3) government sponsored downward departures and variances for reasons other than for an offender's substantial assistance to the authorities (10.3% of cases); and (4) non-government sponsored downward departures and variances (44.3% of cases).[63] In fiscal year 2010, approximately four out of five (78.8%) §2G2.2 offenders benefited from one or more of the above-mentioned four practices. The Commission's analysis also showed that no offender or offense characteristics (*e.g.*, an offender's military service record, history of criminal sexually dangerous behavior, or distribution of child pornography) appeared to account for these practices in most cases. Rather, geographical differences in charging, plea bargaining, and sentencing practices among the 94 districts

[61] *See* Chapter 1 at 10–14.

[62] *See generally* Chapter 8.

[63] *See id.* at 219–25. Because multiple practices occurred in some cases, the percentages mentioned above add up to more than 100%.

appear to be the strongest factor explaining whether an offender benefitted from one or more of these practices.[64]

- The Commission's special coding project of fiscal year 2010 cases revealed that slightly over half of §2G2.2 offenders were convicted solely of possession, which subjected them to no statutory mandatory minimum sentence and a statutory maximum sentence of ten years (assuming they had no predicate conviction for a sex offense). According to their PSRs and/or plea agreements, however, well over 90 percent of these offenders committed one or more R/T/D offenses.[65] Had these offenders been convicted of an R/T/D offense, they would have been subject to significantly higher statutory penalty ranges as well as a higher base offense level under §2G2.2 than offenders convicted only of possession.[66]

- The Commission's study of a large sample of similarly situated §2G2.2 offenders with no criminal history who were sentenced in fiscal year 2010 revealed substantial sentencing disparities resulting from how they were charged and sentenced under the guidelines. On average, offenders convicted of possession but who knowingly received child pornography were sentenced to a term of 52 months of imprisonment, while on average similarly situated offenders convicted of receipt were sentenced to a term of 81 months of imprisonment. On average, offenders convicted of possession but who distributed child pornography in exchange for other child pornography received a sentence of 78 months, while similarly situated offenders convicted of distribution received an average sentence of 132 months.[67]

- Appellate review of sentences in non-production cases since *Booker* has not reduced the growing disparities. Indeed, differing approaches among the circuit courts have contributed to the sentencing disparities.[68]

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[64] *See id.* at 227–38.

[65] *See* Chapter 6 at 145–48. As noted in *supra* note 27, the statutory maximum sentence for possession offenses was ten years (for offenders who did not have a predicate conviction for a sex offense) in fiscal year 2010. In late 2012, Congress raised the statutory maximum to 20 years for offenders who possess images depicting prepubescent minors or minors under 12 years of age.

[66] *See* Chapter 8 at 213, 218. Offenders without a predicate sex conviction would have been subject to a statutory mandatory minimum sentence of five years and a statutory maximum sentence of 15 years if convicted of an R/T/D offense. Such offenders with a predicate conviction for a sex offense would have faced a statutory mandatory minimum of 15 years and a statutory maximum sentence of 40 years. *See id.*

[67] *See id.* at 215.

[68] *See id.* at 238–44.

5. *Emerging research indicates that child pornography offenders with clinical sexual disorders may respond favorably to psycho-sexual treatment, particularly if administered pursuant to the "containment model."*

- Experts disagree on what percentage of child pornography offenders have clinical sexual disorders such as pedophilia. Some experts believe most or even virtually all child pornography offenders are pedophiles, while other experts believe that most child pornography offenders are not pedophiles.[69]

- Many experts believe that sex offenders, including child pornography offenders, with clinical sexual disorders such as pedophilia cannot be "cured." Nevertheless, some recent studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders. Emerging research on the effectiveness of psycho-sexual treatment administered as part of the "containment model" is especially promising and warrants further study. The containment model involves close cooperation among the treatment provider, a polygraph examiner, and a qualified probation officer or other supervising officer. The containment model is now widely considered to be a "best practice" to be implemented in supervising sex offenders, including federal child pornography offenders. The success of the containment model depends on adequate resources and proper training of the professionals who administer it.[70]

- Polygraph testing is an important part of the treatment of child pornography offenders. Polygraph testing encourages offenders in treatment to be truthful, which can advance the goals of treatment.[71]

- Researchers are beginning to develop actuarial risk assessments to gauge child pornography offenders' risk of sexual recidivism. Two primary factors that appear to be correlated with criminal sexually dangerous behavior are an offender's antisociality and his sexual deviance.[72]

- Psycho-sexual treatment providers report that the accuracy of their risk assessments of offenders and the efficacy of their treatment could be increased if they had better access to information about offense and offender characteristics (*e.g.*, access to the results of forensic analyses of offenders' computers and knowledge of offenders' histories of sexually dangerous behavior discussed in their PSRs).[73]

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[69] *See* Chapter 4 at 75.

[70] *See* Chapter 10 at 277–78, 283–84.

[71] *See id.* at 282.

[72] *See id.* at 285–87.

[73] *See id.* at 281.

6. *The Commission's study of 610 offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000 found that their rate of known general recidivism was 30.0 percent and their rate of known sexual recidivism (a subset of general recidivism) was 7.4 percent.*

- The Commission conducted a study of the rate of known recidivism by 610 federal offenders sentenced under the non-production guidelines during fiscal years 1999 and 2000. In evaluating any recidivism study, particularly one involving sex offenders, caution should be exercised because the known recidivism rate is lower than the actual recidivism rate.[74] Using Federal Bureau of Investigation Record of Arrest and Prosecution ("RAP") sheets, the Commission tracked the 610 offenders during an average eight-and-one-half year follow-up period after their reentry into the community and found a rate of known general recidivism of 30.0 percent (183 of the 610 offenders). Consistent with many other recidivism studies, general recidivism was measured by offenders' arrests for or convictions of any felony or serious misdemeanor offense (including sex offender registration violations) as well as "technical" violations of the conditions of supervision resulting in an arrest or revocation. The Commission found that the offenders' rate of sexual recidivism, which is a subset of general recidivism, was 7.4 percent (45 of the 610 offenders). Likewise consistent with many other recidivism studies, sexual recidivism was measured by offenders' arrests for or convictions of a sexual offense (including a new child pornography offense but excluding a sex offender registration violation). Twenty-two of those 45 offenders (or 3.6% of the 610 offenders) were arrested for or convicted of sexual "contact" offenses.[75]

- The Commission's findings concerning offenders' general and sexual recidivism rates are similar to the findings of two recent child pornography offender recidivism studies by other researchers (one study of federal offenders and the other of Canadian offenders).[76] In addition, the rate of known general recidivism by the Commission's study group is similar to the rate of known general recidivism by a comparable segment of the entire federal offender population (*i.e.*, white male United States citizen offenders), and the study group's general recidivism rate and sexual "contact" offense recidivism rate were lower than the equivalent rates of state "contact" sex offenders.[77]

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[74] *See* Chapter 11 at 295.

[75] *See id.* at 299–301.

[76] *See id.* at 306–07.

[77] *See id.* at 307–08 (noting that the sexual contact offense recidivism rate of the state sex offenders was 5.3% over a three-year follow-up period, while the sexual contact recidivism rate of the federal child pornography offenders was 2.6% over a comparable three-year follow-up period).

7. *Current federal laws regarding victim notification and restitution present unique challenges for victims of federal non-production child pornography offenses.*

- Under the Crime Victims' Rights Act (CVRA),[78] codified at 18 U.S.C. § 3771, federal law enforcement officials must notify a child pornography victim (or his or her guardian if the victim is still a minor) each time the officials charge an offender with a child pornography offense related to an image depicting the victim. Because images circulate widely on the Internet, it is not unusual for some victims to receive multiple official notifications each week. Such notifications can be emotionally traumatic because they serve to remind the victims that the images of their sexual abuse are indelible and increasingly widespread. Although under the CVRA victims may opt out of receiving such notice, doing so may prevent them from obtaining restitution and otherwise exercising their rights as victims. Thus, even as the victims' rights laws have empowered child pornography victims and enabled them to be involved in the criminal justice process, the notification process itself has had the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images for some victims.[79]

- In recent years, some victims of child pornography offenses have started to attempt to enforce their statutory right to restitution in 18 U.S.C. § 2259 against non-production offenders who have had no connection to the victims other than in the possession, receipt, or distribution of their images. Federal courts have struggled with calculating restitution for these victims and have reached different outcomes. Courts uniformly have found that child pornography victims are "victims" of the offenses under § 2259 and have suffered harm. Many district courts have refused to order restitution, however, because they have concluded either that a non-production child pornography offense was not the "proximate cause" of the victim's injury or that it would be impossible to apportion a specific amount of restitution owed by an individual defendant. Other district courts either have not required proximate cause or have found proximate cause and then attempted to calculate an appropriate restitution award. This division among federal courts has now extended to the appellate level where a split in the federal circuit courts has developed regarding the process of awarding restitution for child pornography victims.[80]

[78] *See* Justice for All Act of 2004, Pub. L. No. 108–405, tit. I, § 102, 118 Stat. 2260, 2261-64 (Oct. 30, 2004).

[79] *See* Chapter 5 at 115–17.

[80] *See id.* at 117–18.

8. *The Commission will continue to study sentencing practices in child pornography production cases, which in the past decade have shown both significant increases in average guideline minimums and average sentence lengths as well as significant decreases in the rate of sentences within the applicable guideline ranges.*

   - Average prison sentences for §2G2.1 offenders steadily increased from fiscal year 2004 to fiscal year 2009 (from 153.4 months to 282.9 months), as increasing percentages of offenders were subject to the PROTECT Act's provisions raising penalty ranges. However, the average sentence lengths decreased slightly in fiscal year 2010 (to 267.1 months) and remained essentially stable in fiscal year 2011 (at 274.0 months).[81]

   - The annual rates of sentences imposed within the applicable guideline ranges for production offenders have steadily decreased since fiscal year 2004. By fiscal year 2011, the within range rate had decreased to 50.4 percent of cases from a within range rate of 84.0 percent in fiscal year 2004.[82]

D. RECOMMENDATIONS TO CONGRESS

The Commission concludes that the non-production child pornography sentencing scheme should be revised to account for recent technological changes in offense conduct and emerging social science research about offenders' behaviors and histories, and also to better promote the purposes of punishment by accounting for the variations in offenders' culpability and sexual dangerousness.

1. *Potential Amendments to the Sentencing Guidelines*

As reflected in the report, the Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases:

(i) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technologies);

(ii) the degree of an offender's involvement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and

[81] *See* Chapter 9 at 252–53.

[82] *See id.* at 254–57.

(iii) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.

The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders' collecting behavior and insufficient emphases on offenders' community involvement and sexual dangerousness. As a result, penalty ranges are too severe for some offenders and too lenient for other offenders. The guideline thus should be revised to more fully account for these three factors and thereby provide for more proportionate punishments.

Consistent with the position of the Department of Justice,[83] the Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.[84] If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective, pursuant to 28 U.S.C. § 994(p).

Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors discussed above. As shown in Appendix E of this report, which contains an analysis of the provenance of each section of the current version of §2G2.2, a number of its provisions were promulgated on the Commission's own initiative — not as a result of a specific congressional directive or by direct statutory amendment — and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).

Potential amendments to the guideline would update specific offense characteristics in §2G2.2(b) in order to reflect:

- recent changes in typical offense behavior (*e.g.*, revisions of the enhancements in §2G2.2(b)(2), (4), and (7) related to the types and volume of images possessed to better reflect the current spectrum of offender culpability);

- recent changes in technology (*e.g.*, revisions of the enhancements in §2G2.2(b)(3) and (6), which concern distribution and use of a computer, to

[83] *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, United States Sentencing Commission, at 6 (June 28, 2010) ("We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.").

[84] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 11-49 (discussing how the current guidelines have been influenced by both a series of congressional directives since 1991 and also the direct amendments to the guidelines in the PROTECT Act of 2003).

reflect offenders' use of modern computer and Internet technologies such as P2P file-sharing programs); and

- emerging knowledge about offenders' histories and behaviors gained from social science research (*e.g.*, modifying the "pattern of activity" enhancement §2G2.2(b)(5) to better account for offenders' sexually dangerous behavior and possibly creating a new enhancement for offenders' involvement in child pornography "communities").

While a comprehensive revision of the guideline addressing production offenses, §2G2.1, is not necessary at this time, certain conforming amendments may be appropriate if the corresponding provisions in §2G2.2 were to be amended.[85]

Finally, the Commission will continue to study subsection (b) of USSG §5D1.2 (Term of Supervised Release), which recommends that courts impose "the statutory maximum term of supervised release" for all offenders convicted of a sex offense, including any child pornography offense. That guideline effectively recommends a lifetime term of supervision for all child pornography offenders because the current statutory maximum term of supervision for any offender convicted of a child pornography offense is "any term of years not less than 5, or life."[86] The recommendation in §5D1.2(b) was made before the enactment of the PROTECT Act of 2003, which raised the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all child pornography offenders.[87] The Commission is considering amending the guideline in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is tailored to individual offender's risk and corresponding need for supervision.

2. *Potential Amendments to the Statutory Scheme*

The Commission also believes that Congress should amend the statutory scheme to align the penalties for receipt and possession offenses. Since possession was first criminalized by Congress in 1990, receipt has carried more severe statutory penalties.[88] The limited legislative history from the early 1990s indicates that Congress had two primary reasons for punishing

[85] The guideline for production offenses contains certain enhancements that are similar to enhancements in the guideline for non-production offenses. *See* USSG §2G2.1(b)(2) (providing for 4-level enhancement for production of images depicting children under 12 years of age and a 2-level enhancement for children under 16 years of age), (b)(3) (providing for a 2-level enhancement for distribution of images), & (b)(4) (providing for a 4-level enhancement for production of images that depict sado-masochistic sexual conduct or other violence).

[86] 18 U.S.C. § 3583(k).

[87] *See* Chapter 10 at 272.

[88] Currently, if they have no predicate convictions for sex offenses, offenders convicted of possession face a statutory range of punishment of zero to ten or 20 years (depending on the age and sexual maturity of the minors depicted in the child pornography), while offenders convicted of receipt face a mandatory minimum five-year term of imprisonment and a 20-year statutory maximum term. If they have predicate convictions for sex offenses, offenders convicted of possession face a statutory range of punishment of ten to 20 years, while offenders convicted of receipt face a mandatory minimum 15-year term of imprisonment and a 40-year statutory maximum term. *See* Chapter 2 at 26.

receipt more harshly than possession: first, that aligning the penalties for receipt with the penalties for distribution rather than with the penalties for possession was important for law enforcement purposes (insofar as it was easier to detect distributors in the act of receiving than in the act of distributing); and, second, that many receipt offenses contributed to the commercial child pornography market. Those reasons no longer apply with the same force because of changes in offense conduct and law enforcement methods to detect offenders on the Internet during the past two decades. Prosecutors can prove distribution as or more easily than receipt in a typical case today. Furthermore, as the result of changes in the child pornography "market" since the early 1990s, *non-commercial* child pornography distribution has overtaken commercial child pornography distribution, and most offenders thus pay nothing to receive child pornography. Both of these developments militate in favor of punishing receipt in an equivalent manner to possession rather than in an equivalent manner to distribution.[89]

Moreover, the Commission's review of over 2,000 non-production cases has demonstrated that the underlying offense conduct in the typical case in which an offender was prosecuted for possession was indistinguishable from the offense conduct in the typical case in which an offender was prosecuted for receipt. Yet the Commission's analysis of §2G2.2 cases from fiscal year 2010 revealed significant unwarranted sentencing disparities among similarly situated offenders based in large part on whether they were charged with possession or receipt.[90] For these reasons, the Commission recommends that Congress align the statutory penalties for receipt and possession. There is a spectrum of views on the Commission, however, as to whether these offenses should be subject to a statutory mandatory minimum penalty and, if so, what any mandatory minimum penalty should be.[91] Nevertheless, the Commission unanimously believes that, if Congress chooses to align the penalties for possession with the penalties for receipt and maintain a statutory mandatory minimum penalty, that statutory minimum should be less than five years.

The Commission's analysis of current offenders' distribution behaviors revealed several different types of common distribution conduct, ranging from "personal" modes of distribution associated with "community" involvement (*e.g.*, emailing images to other offenders or trading images in "closed" P2P file-sharing programs) to "open" P2P file-sharing programs involving impersonal and indiscriminate distribution to strangers.[92] The most common mode of distribution today is "open" P2P file-sharing.[93] The different types of distribution reflect a significant evolution in the technologies used to distribute child pornography, particularly in the past decade.[94] Because the existing statutory provisions prohibiting distribution and the related

[89] *See* Chapter 12 at 327-28.

[90] *See* Chapter 8 at 214–15 (Figures 8-2 & 8-3).

[91] *Cf.* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM xxxi (2011) (noting that "there is a spectrum of views among members of the Commission regarding mandatory minimum penalties" generally).

[92] *See* Chapter 6 at 149–52.

[93] *See id.* at 150, 154.

[94] *See id.* at 155 & n.77.

act of transportation of child pornography[95] were enacted in earlier technological eras,[96] Congress may wish to revise the penalty structure governing those offenses to differentiate among the various types of distribution.

Finally, the Commission recommends that Congress consider amending the current federal statutes governing notice to and restitution for victims of non-production child pornography offenses. The notice provision has been deemed necessary to protect the victims' rights (including their right to seek restitution) but in some cases has exacerbated victims' emotional harm. The restitution statute has generated confusion and disparate results around the country. Congress may wish to amend those two statutory provisions in order to minimize emotional trauma to victims and also provide specific guidance to sentencing courts to ensure appropriate restitution for victims.

E. CONCLUSION

The Commission's report is intended to provide Congress and the various stakeholders in the federal criminal justice system with relevant and thorough information about child pornography offenses and offenders. As illustrated by the report, child pornography offenses result in substantial and indelible harm to the children who are victimized by both production and non-production offenses. However, there is a growing belief among many interested parties that the existing sentencing scheme in non-production cases no longer distinguishes adequately among offenders based on their degrees of culpability and dangerousness. Numerous stakeholders — including the Department of Justice, the federal defender community, and the Criminal Law Committee of the Judicial Conference of the United States Courts — have urged the Commission and Congress to revise the non-production sentencing scheme to better reflect the growing body of knowledge about offense and offender characteristics and to better account for offenders' varying degrees of culpability and dangerousness.

The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior as well as its failure to account fully for some offenders' involvement in child pornography communities and sexually dangerous behavior. The current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application. A revised guideline that more fully accounts for all three factors in Part D above — the full range of an offender's collecting behavior, the degree of his involvement in a child pornography community, and any history of sexually dangerous behavior — would better promote proportionate sentences and reflect the statutory purposes of sentencing. Such a revised guideline, together with a statutory structure that aligns the penalties for receipt and possession, would reduce the unwarranted sentencing disparities that currently exist. The Commission also

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[95] 18 U.S.C. §§ 2252(a)(1),(2) & 2252A(a)(1), (2). As noted in Chapter 7, the vast majority of offenders convicted of transportation of child pornography in fact knowingly distributed it to other offenders. *See* Chapter 7 at 189 n.72. Transportation charges, which do not require proof of intent to distribute to another, often are brought in lieu of distribution charges. *See* Chapter 2 at 24–25.

[96] Section 2252 originally was enacted in 1977, and § 2252A originally was enacted in 1996. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 341 (E.D.N.Y. 2008), *vacated on other grounds*, 564 F.3d 142 (2d Cir. 2009). *See also* Chapter 1 at 5–6 (discussing the evolution of technology in offense conduct during the past four decades).

suggests that Congress may wish to revise the penalty structure governing distribution offenses in order to differentiate among the wide array of newer and older technologies used by offenders to distribute child pornography. Finally, the Commission also recommends to Congress that it consider amending the notice and restitution statutes for victims of child pornography offenses. The Commission stands ready to work with Congress, the federal judiciary, the executive branch, and others in the federal criminal justice community to improve the sentencing scheme for these extremely serious offenses.

* * *

§2G2.2. **Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor**

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other

than illegal activity covered under subdivision (E), increase by **6** levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by **2** levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.

3. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Application of Subsection (b)(7).—

(A) Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) Definition.—"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

7. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); April 30, 2003 (see Appendix C, amendment 649); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 664); November 1, 2009 (see Appendix C, amendments 733 and 736).