



U.S. Department of Justice

Office of the Deputy Attorney General

Nat'l Coordinator for Child Exploitation Prevention and Interdiction

Washington, D.C. 20530

March 5, 2013

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Saris:

The Sentencing Commission's Child Pornography Report ("Report") issued on February 27, 2013, reflects a significant amount of detailed research and thoughtful analysis. The Department of Justice thanks the Commission and its staff for undertaking the important task of laying the foundation for reforming sentencing practices involving non-production child pornography offenses. The Department also appreciates the opportunity it was afforded by the Commission to present its views and provide the benefit of its extensive experience in this area.

The Department agrees with a number of the Commission's conclusions. We agree that non-production child pornography offenses are serious crimes in and of themselves, even absent evidence that an offender engaged in direct sexual abuse of children. We also agree with the Commission's conclusion that non-production child pornography offenses are not "victimless" crimes. The possession, receipt, transportation, and distribution of child pornography perpetuates the harm to the victims depicted in images, validates and normalizes the sexual exploitation of children, and fuels a market, thereby leading to further production of images. And, the Department agrees with the Commission's conclusion that advancements in technology and the evolution of the child pornography "market" have led to a significantly changed landscape – one that is no longer adequately represented by the existing sentencing guidelines. Specifically, we agree with the Report's conclusion that the existing Specific Offense Characteristics ("SOCs") in USSG §2G2.2 may not accurately reflect the seriousness of an offender's conduct, nor fairly account for differing degrees of offender dangerousness. The current guidelines can at times under-represent and at times over-represent the seriousness of an offender's conduct and the danger an offender poses. The Report represents an important step in that effort.

The Department has joined in the call for a critical review of the existing sentencing guidelines for non-production child pornography crimes. This process should not, however, undermine the purposes of the 2003 PROTECT Act, which was, in part, a response to the

prevalence of downward departures and the general inadequacy of sentences in child pornography cases. *See* H.R. Rep. No. 108-66, 108th Cong., 2nd Sess. 58-59 (2003). The threat posed to children by child pornography trafficking has only increased since passage of the PROTECT Act, as offenders now trade larger quantities of child pornography featuring more explicit and violent conduct involving younger children, and nearly two-thirds of all offenders distribute images to others. Congress recently recognized the growing threat to younger children with the passage of the Child Protection Act of 2012, which, among other things, raised the statutory maximum sentence, from ten to twenty years imprisonment, for possession of child pornography involving prepubescent children or children less than twelve years of age. The PROTECT Act, as well as the subsequent technology-facilitated explosion in child pornography trafficking, counsel in favor of maintaining a robust and strict sentencing scheme, while making targeted adjustments to the sentencing guidelines to better align sentencing factors with offender culpability and dangerousness and to reduce sentencing disparities.

Below, the Department sets out (1) recommended modifications to the SOCs in the non-production child pornography sentencing guideline, (2) its concerns regarding the Report's conclusions on recidivism and treatment, (3) its position on the Report's suggested changes to the child pornography possession, receipt, and distribution statutes, and (4) a response to the Report's characterization of the role of prosecutorial charging discretion in sentencing disparities.

1. The Department Recommends Targeted Revisions to the Sentencing Guideline.

The Department believes that the best way to address the concerns about child pornography sentencing shared by the courts, prosecutors, and the defense bar is to revise §2G2.2 to account for new technology and the dramatic evolution in how offenders obtain, store, organize, trade, and protect child pornography collections.¹ Accordingly, the guideline's SOCs should establish sentencing ranges based on how an offender obtains child pornography; the volume and type of child pornography an offender collects; how long an offender has been collecting child pornography; the attention and care an offender gives to his collection; how an offender uses his collection once obtained; how an offender protects himself and his collection from detection; and whether an offender creates, facilitates, or participates in a community centered on child exploitation. All of these are important aggravating factors that should be accounted for in the guideline.

¹ The Department does not believe that revisions to Section 2G2.2's SOCs require conforming amendments to the corresponding provisions in Section 2G2.1, related to child pornography production offenses.

The Department recommends revising the guideline with respect to the following SOC²:

- *Communication/Group membership*: This new SOC would augment the guideline range for offenders who communicated or associated with others concerning the sexual abuse or exploitation of a minor. The SOC could be structured to assess varying increases in offense level based on a range of conduct — addressing offenders who communicated with others outside a formal group regarding their preferences for certain types of child pornography or exploitation, members of groups dedicated to trafficking in or communicating about the sexual exploitation of children, and offenders who encouraged the production of materials depicting such abuse. Membership in a group is closely correlated with particularly dangerous, prolific, and sophisticated child pornography offenders. In addition, informal communication and participation in these groups validates, normalizes, and encourages sexual abuse of minors by other individuals. Enhancements for providing incentives for the production of child pornography and for a leadership or facilitating role in the group would address the offender's aggravating role in effectuating the exploitation of minors.
- *Duration of conduct*: This new SOC would increase the punishment for offenders who engaged in repeated and long-term child pornography collecting or trafficking. Offenders who spend years amassing child pornography collections would thereby, for the first time, be distinguished from offenders who are relative newcomers to this type of criminal conduct.
- *Offender sophistication*: This new SOC would enhance the guideline range for offenders who used, or advised others regarding the use of, technologies or procedures to evade detection by law enforcement. These technologies and procedures (currently including encryption and anonymization, and sure to evolve in unforeseeable ways in conjunction with offenders' efforts to thwart detection) are frequently employed by the most dedicated, sophisticated, and dangerous child pornography offenders. Moreover, they make detection and apprehension of offenders far more onerous for law enforcement.
- *Pattern of activity*: This current SOC should be retained, but the Department recommends modifying the definition in application note 1 to include conduct that involved only one instance of the sexual abuse or sexual exploitation of a minor (as opposed to the current requirement of two instances). Alternatively, the enhancement could be revised so that an offender receives varying increases in offense level based on whether his conduct involved one, two, or more instances of sexual abuse or sexual exploitation of a minor.

² We recognize that some of the SOC^s may overlap and address the same offense conduct. These recommendations are not intended to suggest that all SOC^s should be cumulative to one another.

- *Use of a computer.* Because the vast majority of child pornography offenses now involve the use of a computer, this SOC should be eliminated and replaced by others, such as those suggested above and below, which better distinguish between different classes of offenders.
- *Distribution:* This SOC should continue to augment the guideline range for offenders who distributed images, especially to a minor, and in particular for distribution to a minor with the intent to induce the minor to engage in prohibited sexual conduct.
- *Image severity:* This SOC should continue to increase the guideline range for offenses involving material that portrays sadistic or masochistic conduct, and should also inversely correlate punishment severity with the age of the victim depicted (*e.g.*, significantly enhanced sentences for images of infants, babies, or toddlers).
- *Image quantity:* This SOC should continue to tie the guideline range to the quantity of child pornography an offender collected, but, in light of the technology-facilitated ease of obtaining larger child pornography collections, the numeric thresholds should be substantially increased for each offense level, so as to better distinguish between occasional and habitual collectors of child pornography.

2. The Report's Assertions Regarding the Recidivism Risk Posed by Child Pornography Offenders and the Effectiveness of Rehabilitation Should Not Be the Basis of Sentencing Policy.

Notwithstanding the Department's general agreement that there is a misalignment between the non-production child pornography sentencing guidelines and offender culpability and dangerousness, and that revisions to the SOC's in USSG §2G2.2(b) are warranted, the Department takes issue with two broad conclusions in the Report: that the recidivism rate of child pornography offenders is not particularly high compared to other offenders, and that child pornography offenders can be successfully treated. The Report draws these conclusions without a sufficient factual predicate; in the Department's view, firm conclusions cannot be drawn on those questions based on the existing data and literature, which reach disparate conclusions regarding recidivism and rehabilitation. The Department is concerned that the Report's assertions regarding recidivism and rehabilitation, which are based on only a small number of imprecise social science studies rather than a widely-accepted scientific consensus, can be used to justify reductions in child pornography sentences without a sufficient basis or adequate consideration of the statutory goals of sentencing.

a. With respect to recidivism, the Report asserts that the rate of known recidivism by child pornography offenders may not be as high as some judges and policy makers believe, and is similar to the rate of known general recidivism for the entire federal offender population. *See* Report Ch. 11, pp. 293, 308-09. By tracking only defendants who have been convicted of a subsequent offense, however, "known" recidivism data fails to capture defendants who

reoffended but did not get caught. While this is, of course, true with respect to all offenses, it is well established that the “known” recidivism rate disproportionately under-represents the actual recidivism rate for child pornography offenses. *See* Report Ch. 7, p. 179; Report Ch. 11, pp. 294-95; Sentencing Commission Testimony of Gene Abel, Feb. 15, 2012, p. 107, lines 8-13; Sentencing Commission Testimony of Michael Seto, Feb. 15, 2012, p. 171, lines 15-18. Child pornography offenses are systematically underreported, and, because they are typically committed in the privacy of an offender’s home without any witnesses, are particularly difficult to detect. In addition, the Commission’s research involved a cohort of offenders who had been released from prison as little as 24 months prior to the study, but, as the Report itself notes, sex offenders may take longer periods to reoffend. *See* Report Ch. 11, p. 298, n.24. Moreover, the recent evolution of the technology that facilitates child pornography crimes further undermines the predictive power of past studies focused on a cohort of offenders who lacked access to current technological tools. For example, an offender, once caught through an online investigation, would be more likely to utilize techniques like open wireless, public hotspots, proxies, anonymous networks, and encryption, many of which have been widely adopted only during the last few years, and all of which make detection by law enforcement more difficult.

In sum, as the Report itself acknowledges, there is currently no valid risk assessment instrument applicable to child pornography offenders, and the existing data and literature do not support the assertion that recidivism rates for child pornography offenders are overstated. On the contrary, even under the Commission’s limited study (an admittedly conservative estimate based solely on PSR data), approximately one third of child pornography offenders had previously committed a prior criminal sexually dangerous behavior offense. *See* Report Chapter 11, p. 304. In the absence of more reliable and conclusive data, assertions about low recidivism should not be a basis for modifying child pornography sentencing practices.

b. With respect to rehabilitation, the research and data are similarly inconclusive. The Report asserts that child pornography offenders can be successfully treated, but it cites only a single study by Dr. Gene Abel, which contained significant caveats. *See* Report Ch. 10, p. 281, n.50; *id.* at pp. 281-82. Dr. Abel noted that, for some offenders, a lifetime of treatment and formal maintenance is required, and he nowhere concluded that his, or any other, proposed treatment regimen will definitively reduce recidivism by child pornography offenders. Nor do any other studies cited by the Report (which, again, do not reach any consensus regarding the general effectiveness of rehabilitation, let alone regarding which particular rehabilitation program will prove most effective) reach such a conclusion.

Moreover, the Report fails to address the practical difficulties involved in the execution of a “model” treatment program. For example, in footnote 53 (Report Ch. 10, pp. 281-82), Dr. Abel cautions that for any treatment program to be successful, the typical offender should receive five to ten years of treatment, with at least 120 contacts between the offender and the treatment provider. Thus, even assuming rehabilitation will ultimately prove successful (an assumption that is unsupported by a clear scientific consensus), the risk posed by a typical offender could remain acute for the first five to ten years. Moreover, such a program would require close supervision, including frequent home visits, consistent monitoring of computer use, and regular polygraph testing. There is no certainty that federal probation officers will have the resources to undertake such a level of supervision. In addition, considering that the

technological sophistication of offenders is continuously increasing, along with the forensic tools available to those offenders to evade detection (*see* Sentencing Commission Testimony of James Fottrell and Steve Debrot, Feb. 15, 2012), there is no guarantee that even the savviest probation officer would be able to effectively track offenders' post-incarceration behavior.

The Department fully supports the goal of an effective rehabilitation program for child pornography offenders as part of a comprehensive effort to minimize the risk of future offenses and victimization of children, and also fully supports further research into the efficacy of treatment. Given the limited state of the current data, however, there is no basis to conclude that treatment will necessarily reduce the recidivism risk of child pornography offenders over their lifetimes, nor any evidence that any particular course of treatment has proven to be effective in the long-term. There is accordingly no basis to rely upon the promise of rehabilitation in crafting sentencing policy, particularly where children bear the risk of suffering severe harm should assumptions about the efficacy of rehabilitation prove to be incorrect.

3. The Department Does Not Support the Elimination of or Significant Reduction in Any Child Pornography Statutory Mandatory Minimum Penalties.

In Chapter 12 of the Report, the Commission recommends two amendments to the non-production child pornography statutes: one that aligns the statutory penalties for the offenses of receipt and possession (including lowering or potentially eliminating the five-year mandatory minimum penalty for receipt offenses, *see* Report Ch. 12, p. 329), and one to the statutory provisions governing notice to and restitution for victims of child pornography. The Department agrees that efforts to align the penalties for receipt and possession should be considered, and it also concurs that improvements to the statutory restitution mechanism are warranted.

The Report's suggestions that the mandatory minimum sentence for receipt offenses should be lowered, or potentially even eliminated, and that the five-year mandatory minimum sentence for distribution offenses should also be scrutinized appear to flow, at least in part, from the Commission's belief that "severe penalty ranges [for possession, receipt, and distribution offenses] appear to assume that the typical offender both has engaged in sexual abuse of children in the past (before being arrested for a child pornography offense) and likely will engage in sexual recidivism in the future (after reentering the community)." *See* Report Ch. 1, p. 12; *see also* Report Ch. 7, pp. 171-73. The Department disagrees with this premise. The penalty ranges for possession, receipt, and distribution offenses appropriately reflect congressional recognition of the severity of the offense conduct and are meant to deter behavior that severely harms children, regardless of the perpetrator's history or likelihood of recidivism. The increasing volume and severity of this behavior, facilitated by technological evolution, has only increased the need for effective deterrence. Accordingly, the Department opposes the elimination of, or significant reduction in, mandatory minimum sentences in the event that the receipt and possession offenses are merged.

4. The Report Misstates the Role of Federal Prosecutors in Creating Sentencing Disparities.

Chapter 8 of the Report critiques the plea bargaining and charging practices of federal prosecutors, specifically targeting (1) “charge bargaining,” in which receipt, distribution, or transportation charges are dismissed and a defendant is convicted of a possession charge, and (2) guideline stipulations in plea agreements that do not accurately reflect the SOCs set forth in presentence reports.

Charge bargaining is not consistent with the United States Attorneys’ Manual, *see* USAM 9-27.300, or the Department Policy on Charging and Sentencing (set forth in a May 19, 2010, Memorandum by Attorney General Eric Holder), which emphasize that federal prosecutors should ordinarily charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” This determination, however, must always be made in the context of “an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime.” *See id.* As a general matter, the decision whether to seek statutory sentencing enhancements is to be guided by the same principles. *See id.* There is no basis to conclude that federal prosecutors systematically fail to adhere to these policies in non-production child pornography cases.

As noted, the charging and sentencing policy permits consideration of the specific circumstances of a case. Thus, to the extent that prosecutorial assessments of non-production child pornography cases conclude that potentially provable charges or sentencing enhancements should not be pursued, those determinations are based on individualized assessments of the particular circumstances, and they likely flow from a recognition by prosecutors that application of the non-production sentencing guideline may result in a sentence that is at times too high, and at other times too low, in light of the evolution in how offenders obtain, store, organize, trade, and protect child pornography collections.

Sincerely,



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Prevention and Interdiction

cc: Commissioners
Judy Sheon, Staff Director
Ken Cohen, General Counsel

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