The Changing Landscape Of Sentencing Mitigation In Possession of Child Pornography Cases

BY MARCIA G. SHEIN

Since 1995, the sentences typically imposed for defendants convicted of federal pornography/prostitution offenses have increased by 300 percent.[1] In 1996, only 77 percent of federal child pornography defendants received a prison sentence. In 2006, this number skyrocketed to 97 percent.[2] This astronomical increase came about because of the public outcry about such cases, which created media attention due to violent interaction with children or child abuse by individuals classified as pedophiles. Most of the increases are largely the consequences of numerous morality earmarks slipped into larger bills in Congress over the last 15 years, often without notice, debate, or study of any kind. These earmarks increased penalties across the board without distinguishing between "doers" and "viewers." Further, these earmarks did not take into account other mitigating factors for cases dissimilar to the most severe pedophile child abuse and child pornography production cases. What has been the result of these changes? The mere possession of child pornography has been swept up and included with the most dangerous offenses and the harsher sentences imposed on the more dangerous offenders.

This article compares the 1995 Sentencing Guidelines relating to possession of child pornography with the current Guidelines, explaining how the changes came about and how the Guidelines are applied today. The article discusses the government's arguments in support of the Guidelines, and the growing unease of courts to apply the Guidelines in "possession only" cases. Finally, the article offers practice pointers for defense counsel to consider in preparing for sentencing in a case involving possession of child pornography.

Guidelines: 1995 vs. Today

In 1995, U.S.S.G. § 2G2.4 governed possession of child pornography. Guideline § 2G2.4 provided that a base offense level of 13 would apply to possession of materials depicting a minor engaged in sexually explicit conduct.[3] Further, the Guidelines added two levels if a prepubescent minor, or one under 12, was involved and added an additional two levels if the defendant possessed 10 or more books, films, etc.[4]

The Guidelines have undergone some dramatic revisions since 1995, including being combined with another section and becoming part of U.S.S.G. § 2G2.2. In effect, today the Guidelines provide for a higher base offense level — 18 or 22, depending on the underlying conviction.[5] In addition to the two-level increase from 1995 for the involvement of a prepubescent minor or one under 12,[6] two levels are added if the offense involved the use of

a computer[7] or if the offense involved between 10 and 150 images.[8] Additionally, the Guidelines today provide, in part, for a five-level increase if the defendant is distributing the images for pecuniary gain or for the expectation of something of value (including other child pornography);[9] a four-level increase if the material involves "sadistic or masochistic conduct or other depictions of violence";[10] and a five-level increase if the offense involved 600 or more images.[11]

The Evolution of § 2G2.2

Congress played a huge role in the changes and enhancements that have been added to the child pornography Guidelines, particularly § 2G2.2.[12] As a report published by the U.S. Sentencing Commission in 2009 recognizes, "Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses."[13] The result is that "the Commission [has been] constantly reacting to Congress's repeated directives, and the penalties for child pornography offenses [have] steadily, and often dramatically, increase[ed]."[14] All of this occurred without distinguishing cases involving mere possession from cases involving production and abuse.

For example, in 1991, the Commission amended the Guidelines and lowered the base offense level from 13 to 10 for possession of child pornography[15] because the Guideline sentence for the least culpable conduct was too severe.[16] This amendment was in effect for less than a month because of congressional disapproval, and the base offense level was raised to 13 in § 2G2.4.[17] In 1996, despite concerns of the Commission, the base offense level was raised again at the direction of Congress and the two-point computer enhancement was added.[18] "In 2003, Congress, apparently without seeking any input from the Commission, which, of course, it was not required to do, passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), which resulted in several significant changes to the child pornography statutes and Guidelines, including 'the first and only time to date [Congress] directly amended the Guidelines.'"[19] At the direction of Congress, the Commission added four step-up enhancements for the number of images and an enhancement for images that depict violence.[20] Finally, in 2004, the Sentencing Commission combined § 2G2.4 with § 2G2.2, and raised the base offense level in response to new statutory minimums.[21] In making these changes, the Sentencing Commission recognized that "a majority of offenders sentenced under § 2G2.2 were subject to specific offense characteristics that increased their offense level."[22]

This history of the Sentencing Commission reacting to congressional directives makes clear that "§ 2G2.2 was not developed pursuant to the Commission's institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives."[23]

The Application of § 2G2.2 To the Typical Possession of Child Pornography Case

The changes initiated by Congress and implemented by the Sentencing Commission have had a huge impact on the offense level and sentence a traditional possessor and viewer of child pornography faces. Today, the most common way for a defendant to view and receive child pornography is through the computer. This means that the two-level increase is added in approximately 97 percent of cases.[24] Further, by the very nature of the Internet and file sharing programs (a common way to exchange child pornography[25]), individuals share their files with others in expectation that others will likewise share. It is common for more than 600 images to be exchanged with a few clicks of the mouse.[26] Therefore, the five-level increase often applies because the individual exchanges child pornography with the expectation of receiving something of value and because of the amount of child pornography exchanged. Specifically, the five-level expectation of value increase applies in approximately 13.8 percent of the cases and the five-level increase for possessing more than 600 images is applied in 63.1 percent of the cases.[27]

Because an individual may now obtain hundreds, if not thousands, of pornographic images with a few clicks of the mouse,[28] it is not surprising that the increases for children under 12 and for images depicting violence apply in 94.8 percent and 73.4 percent of the cases, respectively.[29]

It is not uncommon for the run-of-the-mill child pornography defendant charged with possession to end up with an offense level of 40, simply by applying the enhancements for involvement of a minor under 12, use of computer, material depicting violence, 600 images or more, and expectation of value.[30] This results in a recommended sentence range of 292-365 months, assuming a Criminal History Category of I.[31] Such a recommendation is drastically higher than the 41-51 months that would be recommended if the base offense level of 22 was applied.[32] In addition, even the low end of this range is above the statutory mandatory maximum of 20 years that Congress enacted for convicted child pornographers.[33] Interestingly, the upper end of this range exceeds the 30-year statutory maximum penalty for those first time offenders engaged in the actual production of child pornography, and is far above the 15-year minimum penalty.[34] This failure to differentiate between a "viewer" and an actual "maker" of child pornography is a clear sign that something is amiss.

Responding to Recent Government Arguments Supporting § 2G2.2 Enhancements

Since the Supreme Court's decision in *United States v. Booker*,[35] defendants are mounting challenges to the application of the Guidelines to cases involving the possession and trading of child pornography. The government, however, continues to defend the application of § 2G2.2. Its defense of the Guidelines is based, at least in part, on a 2008 study referred to as "the Butner Study" or "the Study." The Butner Study surmises that those who collect child pornography are more likely than not to have participated in actual abuse.[36] The Butner Study questions whether it is "pragmatically, not to mention theoretically, useful to discriminate between 'child pornographers' and 'child abusers' or even 'pedophiles'" because it claims that 85 percent of its sample admitted at least one instance of child abuse and that there were "less than two percent of polygraphed subjects confirmed as 'just pictures' offenders."[37]

While, if accurate, these statistics are admittedly alarming, defense counsel should argue that there are several serious flaws with this study. Examples of these flaws include: (1) the participants in the study were incarcerated and participating in a sexual offender treatment program, and thus were not randomly selected; (2) the "highly coercive" nature of the program, which will remove offenders who do not admit to additional crimes; (3) the Study excluded 23 percent (46/201) of individuals in the treatment program who left due to voluntary withdrawal,

expulsion, or death; (4) the Study questionnaire is unpublished and thus cannot be tested; (5) the Study relied on polygraph examinations, which are unreliable; and (6) "the Study also appears to suffer from flaws relating to its control group and independent variable, or lack thereof."[38] Perhaps the most suspect statistic in the Study is the "dramatic increase (2,369 percent) in the number of contact sexual offenses acknowledged by the treatment participants."[39]

Additionally, it is important to note that the Study does not "definitively define the causal relationship between viewing child pornography on the Internet and subsequently committing a contact sexual offense" because most individuals admitted to the abuse *before* viewing child pornography on the Internet.[40] Further, there is no way to know whether individuals who choose to participate in treatment are "typical" or representative of those who do not seek treatment.[41] "Another concern that one cannot overlook is the possible incentive for false reporting among a population sample based exclusively of federal inmates."[42] The fact that the Study was co-authored by a U.S. Marshal should also raise concerns regarding potential bias.[43]

No reliable study has found that a possessor of child pornography is more likely to commit a contact offense. Moreover, it is important to highlight for the sentencing court the fact that reliable research found that "[i]f one takes into account both prior and current offenses, child pornography offenders with no other forms of criminal involvement were the least likely to commit future offenses."[44] While research on the "effect child pornography use might have on the likelihood of subsequently having sexual contact with a child" is limited,[45] there are significant reasons to doubt that a possessor of child pornography is more likely to engage in a contact offense.[46] In fact, a 2009 article examining the risk posed by child pornography offenders, in examining recidivism, stated that "research has shown that relatively few child pornography offenders go on to commit contact sexual offenses (that are detected by the authorities)."[47] What's more, a lot can be learned from the traditional viewer of violent adult pornography, who most agree is no more likely to rape or abuse a woman because of viewing these images.[48]

Additionally, the alleged propensity toward inappropriate contact largely misses the point. As the Southern District of Iowa recognized, even if this were true, to justify a sentence based on this inference "is distasteful and prohibited by law. Uncharged criminal conduct may generally only be considered in sentencing if proved by a preponderance of the evidence."[49] A generalized assertion that one may be more likely to have inappropriate contact does not meet the preponderance of the evidence burden "because it fails to demonstrate whether [a specific defendant] has, personally, previously assaulted a child sexually."[50] Interestingly, only 9.2 percent of defendants received an enhancement for a "pattern of activity involving sexual exploitation."[51]

The government relies on other arguments, including: (1) viewers of child pornography are as culpable as doers because viewers provide the audience and the incentive for the doers; (2) viewing the pornography makes continuing victims of the children; (3) the use of computers allows the images to be distributed to larger audiences; and (4) other Guidelines are based on the quantity of drugs and guns, and the deterrent effect. These arguments, however, suffer from serious flaws.

First, the criminalization of viewing child pornography contemplates any incentive it provides to the doers as well as the victimization of the child through the viewing of the images and the deterrent effect. As well, the enhancements relating to the number of images have never been tied to "an incremental increase in the offender's contribution to the child pornography market in a manner that justifies the increased sentencing range."[52] Furthermore, given the vast nature of the worldwide child pornographic industry, even the effect of possession of 600 images in this market would be "miniscule."[53] Moreover, simply because an individual possesses a pornographic image does not mean that he has viewed it or that he made it available for others to view.[54]

Second, the computer enhancements were added to the Guidelines in order to "help our law enforcement efforts in this area keep pace with changing technology by increasing the penalties for the use of computers in connection with the distribution of child pornography."[55] Today, however, almost all communication and child pornography are viewed on the computer, and law enforcement agencies have long since figured out ways to detect and arrest individuals using computers for viewing child pornography. Therefore, "[i]n reality, the computer enhancements are out of touch with the actual effects of 'changing technology' when it comes to the criminal world of child pornography." In fact, today it takes much more of an effort to obtain child pornography through the mail; perhaps, as one scholar has posited, an enhancement is more appropriate for one who goes through this almost extreme effort to obtain child pornography as opposed to one who views it as all others do.[56]

Finally, comparing possession of child pornography through the computer to possession of drugs is like comparing apples to oranges. One charged with possessing a large amount of drugs necessarily sought that amount of drugs and is aware of his possession. The same cannot be said for possession of child pornography. An individual can obtain thousands of images through a click of a button with virtually no effort, and certainly without the effort it takes to obtain images through the mail or to purchase large quantities of drugs.[57] Additionally, individuals may often obtain images that they never open or view. Sometimes individuals do not even know that they have these images (for example, images obtained through pop-ups, partially deleted files, and hidden files).[58]

In the end, even if sentences harsher than the minimum are appropriate, none of the arguments typically put forth by the government explain why it is acceptable for a viewer possessing child pornography to face a Guideline range that is more severe than the sentence received by many doers who actually make and participate in the possession and production of child pornography.[59]

Courts Are Departing From the Guidelines in Possession Cases

The Supreme Court's decision in *Kimbrough v. United States*[60] opened the door for sentencing courts to vary from a Guideline sentence based on a policy disagreement with Congress. Specifically, *Kimbrough* provided that a court could vary from the Guidelines to achieve § 3553(a)'s objectives even in a "mine-run" crack cocaine case "because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role."[61] That is exactly what has happened to mere possessor/viewers of child pornography.

Answering this call, courts are increasingly becoming wary of the Guidelines as applied to possessor/viewers of child pornography and are granting downward variances — if not disregarding with § 2G2.2 in its entirety. This disagreement is based, at least in part, on the fact that (1) the Guidelines are not based on empirical studies but are the

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Dr. Rich Kaplan has been working with child abuse victims for over 30 years. A board certified pediatric child abuse specialist at the Children's Hospitals and Clinics of Minnesota, he serves as an Associate Professor of Pediatrics at the University of Minnesota Medical School. Dr. Kaplan is the Medical Director of the Center for Safe and Healthy Children – the University of Minnesota Amplatz Children's Hospital Child Abuse Program and the Associate Medical Director at Midwest Children's Resource Center, a regional medical child abuse evaluation program at Children's Hospitals and Clinics of Minnesota. He is a member of the Executive Board of the American Academy of Pediatrics Section on Child Abuse and Neglect (SOCAN) and has been named as the Section's representative to the Academy's Committee on Child Abuse and Neglect (COCAN). Dr. Kaplan established and is the Medical Director of Telehealth Institute for Child Maltreatment – a national program to provide expert review to child abuse medical providers regardless of their location. Most recently he has become board certified in the new pediatric specialty: Child Abuse Pediatrics.

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result of pressure by Congress; (2) following § 2G2.2 will often result in a Guideline sentence greater for a viewer than one who has had actual inappropriate contact with a minor; and (3) many of the enhancements apply in run-of-the-mill cases.

In *United States v. Dorvee,*[62] the Second Circuit emphatically announced that the Federal Sentencing Guidelines for child pornography cases could be abused. In that case, the PSR initially calculated the Guideline range of 262 to 327 months based on a total offense level of 39 with a Criminal History Category of I. The PSR, however, noted that because the statutory maximum for the offense of conviction was 20 years incarceration "the Guideline range would be 240 months." The preliminary evaluation in the PSR revealed that the offense level would be 22 but for the extraordinary and draconian enhancements applied: §§ 2G2.2(b)(2), 2G2.2(b)(3)(E), 2G2.2(b)(4), 2G2.2(b)(6), and 2G2.2(b)(7). The sentencing court imposed a sentence of 233 months and 16 days.

On appeal, the Second Circuit discussed at great length the various enhancements that were applied. The court confirmed that the enhancements applied to the defendant may not have been appropriate and created an unreasonable sentence. In reaching this conclusion, the court examined how the Guidelines have been cobbled together over time and explained that "the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties."[63] The court noted that the result of this process is that the Guideline sentence is often "near or exceeding the statutory maximum, even in run-of-the-mill cases."[64]

The court continued, noting the absurd results that could follow from blindly adhering to the Guidelines because "[h]ad [the defendant] actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower."[65] The court remanded the case for further proceedings on the unreasonableness finding.

In *United States v. Grober*[66] and *United States v. Hanson,*[67] the sentencing courts discussed the complications related to the type of sentencing process involved in a possession of child pornography case. These opinions cited liberally an article by Troy Stabenow,[68] which discusses some of the flaws within § 2G2.2. Specifically, both *Grober* and *Hanson* cited the following passage from Stabenow's article with approval:

> The flaw with U.S.S.G. § 2G2.2 today is that the average defendant charts at the statutory maximum, regardless of acceptance of responsibility and Criminal History. As noted by the Guidelines Commission, there are "several specific offense characteristics which are expected to apply in almost every case (e.g., the use of a computer, material involving children under the 12 years of age, number of images)." *See* Amendment 664, U.S.S.G.App. C "Reason for Amendment" (November 1, 2004). The Internet provides the typical means of obtaining child pornography resulting in a two-level enhancement. *See* U.S.S.G. § 2G2.2(b)(6). Furthermore, as a result of Internet swapping, defendants readily obtain 600 images with minimal effort, resulting in a five-level increase. *See* U.S.S.G. § 2G2.2(b)(7)(D). The 2004 Guidelines created an Application Note defining any video clip as creating 75 images. *See* U.S.S.G. § 2G2.2(b)(2),(4). Thus one email containing eight, three-second video clips would also trigger a five-level increase. Undoubtedly, as the Commission recognized, some of these images will contain material involving a prepubescent minor and/or material involving depictions of violence (which may not include "violence" per se, but simply consist of the prepubescent minor engaged in a sex act), thereby requiring an additional six-level increase. See U.S.S.G. § 2G2.2(b)(2), (4). Finally, because defendants generally distribute pornography in order to receive pornography in return, most defendants receive a five-level enhancement for distribution of a thing of value. See U.S.S.G. § 2G2.2(b)(3)(B). Thus, an individual who swapped a single picture, and who was only engaged in viewing and receiving child pornography for a few hours, can quickly obtain an offense level of 40. Even after Acceptance of Responsibility, an individual with no prior criminal history can quickly reach a Guideline Range of 210-262 months, where the statutory maximum caps the sentence at 240 months. See U.S.S.G. § 5G1.1(a).
>
> The results are illogical; Congress set the statutory range for first time distributors as five to twenty years. Congress could not have intended for the average first time offender with no prior criminal history to receive a sentence of 210 to 240 months. An individual with a Criminal History Category of II faces a Guideline range of 235 to 240 months, and any higher Criminal History score mandates the statutory maximum. These results run contrary not only to congressional will, but also to a principal Guideline policy — providing harsher penalties to individuals with more significant Criminal History scores while still retaining an incentive for pleas at all Criminal History levels.[69]

The *Grober* court went on to discuss why § 2G2.2 does not accomplish the sentencing goals of 18 U.S.C. § 3553(a). First, § 2G2.2 enhancements apply almost all the time and operate exponentially. Second, § 2G2.2 enhancements promote sentencing disparity. Finally, there is a paucity of direct judicial experience to use in fashioning fair sentences. Ultimately, the *Grober* court did not apply the Guideline range the government had requested. Instead, citing the 18 U.S.C. § 3553 factors and the mandatory minimum set by Congress guided the court; it imposed a 60-month sentence.

On appeal, the U.S. Court of Appeals for the Third Circuit affirmed, citing *Dorvee* and the cobbling together of the applicable Guidelines.[70] The court also found it worthwhile to mention "that the Commission recently surveyed federal district court judges regarding their experience with, and opinions of, *inter alia,* the child pornography Guidelines, and found widespread dissatisfaction with § 2G2.2."[71]

The *Dorvee, Hanson,* and *Grober* cases are filled with golden nuggets for arguing against the traditional enhancements under § 2G2.2 of the federal Sentencing Guidelines in possession of

child pornography cases. This is just a small sampling of the recent court decisions taking on this issue. Increasingly, courts are refusing to mechanically apply the § 2G2.2 enhancements that result in the maximum penalty for a run-of-the-mill possession of child pornography case.[72]

Practice Pointers

A practitioner representing a client who is a traditional possession "viewer" facing sentencing under § 2G2.2 has very strong ammunition to argue for the court to either disregard the Guidelines or grant a variance pursuant to § 3553(a). It is advisable in most instances to make a two-pronged attack to provide for the best possible chance of success.

First, a practioner should challenge the applicability of § 2G2.2 to the run-of-the-mill viewer case. Citing *Kimbrough* and *Spears*, the practitioner should highlight the court's ability to disregard or vary from the Guidelines based on a policy disagreement with Congress.[73] The practitioner should highlight all of the inherent problems with § 2G2.2 discussed here, including the applicability of certain enhancements to almost every defendant, the lack of thoughtful study before increasing the sentences, the fact that almost every viewer will be sentenced to near the statutory maximum penalty under the current Guidelines, and the fact that many doers and actual molesters will receive lighter sentences than viewers, as well as rapists and murders.[74]

Even if the sentencing court is not inclined to disregard the § 2G2.2 enhancements entirely, a practitioner should alert the court to the fact that in a recent Eleventh Circuit case affecting child pornography Guidelines, the court in *United States v. Jerchower*[75] determined that Sentencing Commission amendment 732 is a clarifying amendment and carries retroactive effect. Previously, offenders could receive a two-level enhancement under U.S.S.G. § 2G1.3(b)(2)(B) for "unduly influencing a minor to engage in prohibited sexual conduct" even when that conduct is only with a law enforcement agent. Now this enhancement will no longer apply if the person being influenced is a law enforcement agent.

While the attack on the applicability of § 2G2.2 to the run-of-the-mill viewer case is gaining traction, a practitioner should still be careful to request a variance from a § 2G2.2 sentence based on the factors laid out in

§ 3553(a), which provides that a "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection."

While the § 3553(a) factors are necessarily case specific, one argument to consider making is the extreme vulnerability to abuse in prison to which a viewer of child pornography will be exposed.[76] Further, some courts have found the continued support of the community particularly compelling in the traditional viewer case.[77] If at all possible, it is incredibly helpful to have an expert explain why the defendant is not at risk for re-offending with the proper treatment.[78] Finally, the defense attorney should continue to highlight the severity of a Guideline sentence and the fact that many doers receive lesser sentences than viewers under the Guidelines as currently written.[79] The Guidelines are not always developed with research and logic.

Another good example of successful § 3553(a) arguments can be found in a Florida district court case. In *United States v. Stellabuto*,[80] the Middle District of Florida granted a variance and sentenced the defendant, who had an offense level of 34 and a Criminal History Category of 1 (which provides for a suggested sentence of 151-188 months),[81] to 76 months in prison. To help the sentencing court reach that decision, the defense attorney provided the court with reasons to grant the variance based on the defendant's troubled history, psychological evaluations, post-offense rehabilitative efforts taken by the defendant, the defendant's sincere remorse, and the history and disparity in the Guidelines as applied to viewers of child pornography versus participants in the making of it. All of this information helped the court tailor a sentence based on the § 3553(a) factors for the defendant. Practitioners should consider providing sentencing courts with similar information if it will provide support for leniency. There are many similar district court cases that have emerged from around the country as courts grapple with the draconian sentences called for in the Guidelines for traditional viewer cases. Combining background information with legal and statistical analysis can enhance the chances of success in getting a client a more lenient sentence than what is likely called for in the Guidelines in these types of cases.

Regrettably, Congress acts and overreacts to certain crimes as they appear to increase in society. Congress all too often responds with unreasonable sentencing ranges without regard to hearings, expert information, research, or analysis. This was the case for decades in crack cocaine cases and now in possession of child pornography cases. The sentences given for possession and viewing cases are disparate and draconian to the individual and often greater than necessary to achieve the goals of sentencing under the statute. Courts are beginning to recognize that a Guideline sentence in a possession of child pornography case is often too severe; sometimes they either disregard the Guidelines entirely or grant a variance. Practitioners should continue to highlight the severity of a Guideline sentence to the run-of-the-mill possession of child pornography case and give the court the ammunition it needs to impose a sentence more appropriate for the crime. Even though most possession cases cannot receive less than a minimum mandatory sentence of five years, this potential result is far better than the Guidelines and more reasonable when distinguishing the difference between cases involving possession and viewing versus cases involving production of child pornography.

Notes

1. *Compare Sex Offenses Against Children, Findings and Recommendations Regarding Federal Penalties* 3 and Table 1 (U.S. Sent. Comm. 1996) [hereinafter *Sex Offenses Against Children*] *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/SCAC_Executive_Summary.htm (last visited Jan. 18, 2011) *with Sourcebook of Federal Sentencing Statistics*, at Tables 13, 14, (U.S. Sent. Comm. 2007) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2007/SBTOC07.htm (last visited Jan. 18, 2011).

2. Mark Motivans, Ph.D. & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006* [hereinafter *Federal Prosecution of Child Sex Exploitation Offenders*] (Bureau of Justice Statistics 2006); *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf (last visited Jan. 16, 2011).

3. U.S.S.G. § 2G2.4(a) (1995).

4. U.S.S.G. § 2G2.4 (b)(1) and (2) (1995). If the offense involved participating in the solicitation or transportation of a minor to engage in the production of child pornography or trafficking (including possessing with the intent to traffic), then the section cross-referenced additional sections with higher base offense levels and additional enhancements. *See* U.S.S.G. § 2G2.4(c)(1) and (2) (1995).

5. U.S.S.G. § 2G2.2(a). If the base offense level is 18, a party is entitled to a two-point deduction if his conduct was limited to the receipt of child pornography and he did not intend to traffic or distribute the materials. U.S.S.G. § 2G2.2(b)(1).

6. U.S.S.G. § 2G2.2(b)(2).

7. U.S.S.G. § 2G2.2(b)(6).

8. U.S.S.G. § 2G2.2(b)(7)(A).

9. U.S.S.G. § 2G2.2(b)(3)(A) and (B). There are also increases for distribution to a minor and for any other types of distribution not listed. U.S.S.G. § 2G2.2(b)(3)(C)-(F).

10. U.S.S.G. § 2G2.2(b)(4).

11. U.S.S.G. § 2G2.2(b)(7)(D). The Guidelines also provide for an increase if the defendant "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor" (U.S.S.G. § 2G2.2(b)(5)) or if 300-600 images were involved (U.S.S.G. § 2G2.2(b)(7)(B) and (C)). Additionally, if the offense involved participating in the solicitation or transportation of a minor to engage in the production of child pornography, then the section cross-references § 2G2.1. U.S.S.G. § 2G2.2(c).

12. *The History of the Child Pornography Guidelines* [hereinafter *The History*] (U.S. Sent. Comm., Oct. 2009) *available at* http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf (last visited Jan. 18, 2011).

13. *The History*, *supra* note 12, at 1.

14. *United States v. Grober*, 624 F.3d 592, 604-05 (3d Cir. 2010).

15. *The History*, *supra* note 12, at 36-37.

16. *The History*, *supra* note 12, at 21.

17. *The History*, *supra* note 12, at 19-25.

18. *The History*, *supra* note 12, at 26-32. *See also Sex Offenses Against Children, supra* note 1, at 30.

19. *Grober, supra* note 14, at 605 *citing The History*, *supra* note 12, at 38.

20. *The History*, *supra* note 12, at 38-41.

21. *The History*, *supra* note 12, at 41-49.

22. *The History*, *supra* note 12, p. 46.

23. *Grober, supra* note 14, at 608.

24. *Federal Prosecution of Child Sex Exploitation Offenders, supra* note 2, at 6 (of the child pornography defendants, "97 percent were sentenced for the use of a computer in the offense"); *see also Use of Guidelines and Specific Offense Characteristics; Fiscal Year 2009* [hereinafter *Specific Offense Characteristics; Fiscal Year 2009*], (U.S. Sent. Comm.); *available at* http://ftp.ussc.gov/gl_freq/09_glinexgline.pdf (same) (last visited Jan. 16, 2011).

25. *See, e.g.*, *File Sharing Programs: Child Pornography Is Readily Accessible Over Peer-to-Peer Networks* 2 (U.S. Gen. Accounting Office 2003) *available at* http://www.gao.gov/new.items/d03537t.p

df (last visited March 12, 2011) ("Child pornography is easily found and downloaded from peer-to-peer networks. … There have been increased reports of child pornography on peer-to-peer networks; since it began tracking these in 2001, the National Center for Missing and Exploited Children has seen a fourfold increase — from 156 reports in 2001 to 757 in 2002. Although the numbers are as yet small by comparison to those for other sources (26,759 reports of child pornography on websites in 2002), the increase is significant."); Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, XVI RICHMOND J.L. & TECH. 1, 8, 35 (2010) ("By 2006, however, 97 percent of child pornography defendants committed the offense using a computer.") *available at* http://jolt.richmond.edu/v16i3/article8.pdf (last visited March 20, 2011).

26. *See, e.g.*, Josh Moulon, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*, Child Sexual Exploitation Program Update 1 (National District Attorneys Association, Nov. 2010) *available at* http://www.ndaa.org/pdf/UpdateGreen_v5.pdf *(*last visited March 12, 2011) ("Depending on the software used to access the Gnutella network, [the downloading process] can be accomplished several ways: double clicking the file, right clicking it and selecting 'download,' highlighting several files and clicking on a download button, and/or any combination of these methods."); Exum, *supra* note 25, at 41 ("Imagine the person who willfully orders 200 print images of child pornography through the mail, or the person who makes the effort to leave his house and meet someone to purchase 200 such images and then transport them home. Both of those offenders have to exert much more effort and conscious decision-making than the offender who pushes a few buttons on his computer to download those same 200 images."). Not only is it easy to download a file, but more than one image may be stored in a file. *See, e.g.*, http://www.a-pdf.com/faq/how-to-save-many-different-images-into-1-pdf-file.htm (last visited March 12, 2011) (describing how to save many different images to one .pdf file).

27. *See also Specific Offense Characteristics; Fiscal Year 2009*, *supra* note 24.

28. *See* note 26, *supra*.

29. *Specific Offense Characteristics; Fiscal Year 2009*, *supra* note 24.

30. *See, e.g.*, *United States v. Hanson,* 561 F. Supp. 2d 1004, 1010-11 (E.D. Wis. 2008) (quoting Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of Child Pornography Guidelines* (July 3, 2008) (23-24)); *United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010) (recognizing the general application of the foregoing Guidelines minus the exchange for something of value, and noting that "these enhancements, which apply to the vast majority of defendants sentenced under § 2G2.2, add up to 13 levels, resulting in a typical total offense level of 35").

31. U.S.S.G. § 5(A).

32. *Id.*

33. *See* 18 U.S.C. §§ 2252(a)(2) and (b)(1).

34. 18 U.S.C. § 2251(3) (15-30 years).

35. 543 U.S. 220, 226-27 (2005).

36. Michael L. Bourke & Anders E. Hernadez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, J. FAM. VIOLENCE 183, 183 (2009).

37. *Id.* at 188.

38. *United States v. Johnson*, 588 F. Supp. 2d 997, 1005-07 (S.D. Iowa 2008) (discussing its rejection of the unpublished version of "the Butner Study"). The *Johnson* court also criticized the unpublished *Butner Study* for not being peer reviewed. *Id.* The more recent study, however, has been peer reviewed. Ian Friedman, Roger Pimentel, Kristina W. Supler & Robert Weis, *Sexual Offenders: How to Create a More Deliberative Sentencing Process*, THE CHAMPION, December 2009 at 12 ("In the recently published and peer-reviewed version of the Butner Study, the authors acknowledge the study's limitations, but they do not concede any methodological flaws.").

39. Bourke & Hernadez, *supra* note 36, at 188, *Johnson*, *supra* note 38, at 1007 n.9 (discussing its rejection of the Butner Study).

40. Friedman, et al., *supra* note 38, at 13.

41. *Id.* ("it stands undetermined if those who seek treatment are more or less likely to have engaged in a contact offense").

42. *Id.*

43. *Id.*

44. *Id.* citing Michael Seto, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN 160 (2008).

45. *Id.* ("Importantly, however, Seto noted that 'no research has been conducted to determine what effect child pornography use might have on the likelihood of subsequently having sexual contact with a child.'").

46. Carissa Berne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 WASH. U. L. REV. 24 (2010) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577961## (last visited March 12, 2011).

47. Michael Seto, *Assessing the Risk Posed by Child Pornography Offenders* 2; Prepared for the G-8 Global Symposium (2009) *available at* http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf (last visited March 12, 2011).

48. Hessick, *supra* note 46, at 27 ("Other advocates made more specific claims about violent pornography causing men to rape or otherwise physically abuse women. These claims were disputed and refuted by a number of prominent commentators. Not only does adult pornography not appear to cause violence against women, but there also 'may be an inverse relationship between exposure to sexually explicit expression and violence.'").

49. *Johnson*, 588 F. Supp. 2d at 1005.

50. *Id.*

51. *See also Specific Offense Characteristics; Fiscal Year 2009*, *supra* note 24, at 36-37.

52. Exum, *supra* note 25, at 36.

53. *United States v. Raby*, No. 2:05-cr-00003, 2009 WL 5173964, at *2-8 (S.D. W. Va. Dec. 30, 2009).

54. Exum, *supra* note 25, at 38.

55. Exum, *supra* note 25, at 9 citing 141 CONG. REC. S5519 (daily ed. Apr. 6, 1995) (statement of Sen. Hatch).

56. Exum, *supra* note 25, at 41-42.

57. Exum, *supra* note 25, at 39-43; note 26, *supra*.

58. Exum, *supra* note 25, at 33-35.

59. *See, e.g.*, *United States v. Forrest*, 429 F.3d 73, 77 (4th Cir. 2005) (the defendant convicted of sexually exploiting a minor for purposes of producing child pornography faced a Guideline range of 108-135 months); *United States v. Bell*, 5 F.3d 64 (4th Cir. 1993) (defendant whose conduct involved molesting family children in order to make a visual depiction of that conduct faced a Guideline range of 87-108 months).

60. 552 U.S. 85 (2007). *See also Spears v. United States*, 555 U.S. 261 (2009) (per curiam).

61. 552 U.S. at 109-10.

62. 616 F.3d 174 (2d Cir. 2010).

63. *Id.* at 184 citing *The History*, *supra* note 12.

64. *Id.* at 186.

65. *Id.* at 187.

66. 595 F. Supp. 2d 382, No. 06-880 (D.N.J. 2008) *affirmed on appeal by Grober*, *supra* note 14.

67. 561 F. Supp. 2d 1004 (E.D. Wis. 2008).

68. *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines, available at* http://mow.fd.org/3%20july%202008%20edit.pdf.

69. *Hanson*, 561 F. Supp. 2d at 1009 (quoting Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of Child Pornography Guidelines* 23-24 (July 3, 2008)). *See also Grober*, 624 F.3d at 390-94 (citing Stabenow's study).

70. *Grober*, 624 F.3d at 603-09 (finding some error, but no significant procedural error that would require a remand).

71. *Id.* at 606-07, *citing Results of Survey of United States District Judges January 2010 Through March 2010* (U.S. Sent. Comm. June 2010) *available at* http:// www. ussc. gov/ Judge_ Survey/ 2010/Judge Survey_ 201006.pdf.

72. *See, e.g.*, *United States v. Diaz,* 720 F. Supp. 2d 1039, 1041-42 (E.D. Wis. 2010) (citing cases that declined to impose sentences within the Guideline range); *United States v. Riley,* 655 F. Supp. 2d 1298, 1305 (S.D. Fla. 2009) ("This court does not believe it is appropriate for a fairly typical first time offender who was not involved in the production or widespread distribution of child pornography to receive the maximum sentence of 20 years, when Congress has indicated that this crime can be punished by a range of 5 years to 20 years. Rather, the high end of the statutory range should be reserved for the worst offenders — not those that are fairly typical in this type of case. Thus, the court concludes … that the Guidelines range in this case does not warrant deference because it will result in a punishment that is greater than necessary to achieve the appropriate sentencing goals."); *United States v. McElheney,* 630 F. Supp. 2d 886, 895 (E.D. Tenn. 2009) ("The court agrees with those courts that have concluded the child pornography Guidelines are due less weight than empirically based Guidelines. However, the court parts company with those courts that categorically reject the child pornography Guidelines."); *United States v. Beiermann,* 599 F. Supp. 2d 1087, 1103, and 1108 (N.D. Iowa 2009) ("I join my brethren who find that the child pornography Guideline, U.S.S.G. § 2G2.2, which is the result of congressional mandates, is entitled to considerably less deference than other guidelines that *are* based on the Commission's exercise of its institutional expertise and empirical analysis" and categorically rejects the Guideline); *United States v. Phinney,* 599 F. Supp. 2d 1037, 1041 (E.D. Wis. 2009) ("the Guideline for child pornography offenses is seriously flawed and is accordingly entitled to little respect"). *But see, e.g., United States v. Brooks*, 628 F.3d 791, 800 (6th Cir. 2011) ("On the other hand, the fact that a district court *may* disagree with a Guideline for policy reasons and *may* reject the Guidelines range because of that disagreement does not mean that the court *must* disagree with that Guideline or that it *must* reject the Guidelines range if it disagrees"); *United States v. Cunningham,* 680 F. Supp. 2d 844, 853 (N.D. Ohio 2010) (affording § 2G2.2 deference).

73. *Spears*, 555 U.S. 261, 129 S. Ct. 840, 843-44 (explaining that the point of *Kimbrough was* "a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case"; clarifying "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines").

74. *See, e.g., Beiermann*, *supra* note 72, at 1104-08 (categorically rejecting § 2G2.2).

75. 631 F.3d 1181 (11th Cir. 2011).

76. See *United States v. Parish*, 308 F.3d 1025 (9th Cir. 2006) (eight-level departure in child porn case in part because the defendant would have "high susceptibility to abuse in prison" because of "his demeanor, his naiveté, and the nature of the offense" where psychiatrist testified the defendant was in for a hard time in prison); *United States v. Graham*, 83 F.3d 1466, 1481 (D.C. Cir. 1996) (extreme vulnerability to abuse in prison is grounds for departure and the case was remanded to consider such).

77. *Johnson,* 588 F. Supp. 2d at 1005 ("In light of defendant's interaction with his family and with society during the three-year period and the absence of any criminal history at all, the court believes that defendant is not likely to harm the public through future crimes.").

78. *Beiermann*, 599 F. Supp. 2d at 1112 ("Where the particular defendant convicted of a child pornography offense has a low potential for recidivism, particularly where that low potential is well informed by expert evaluations and the defendant's post-arrest conduct, the defendant has no significant prior criminal history, and where the defendant appears genuinely remorseful about his crimes and aware of the harm that they cause, several courts have found little need to impose a full Guideline sentence to protect the public.") citing, in part, *United States v. Baird,* 580 F. Supp. 2d 889, 895 (D. Neb. 2008); *Hanson,* 561 F. Supp. 2d at 1011; *United States v. Ontiveros,* 2008 WL 2937539, at *4-6 (E.D. Wis. July 24, 2008); *United States v. Grinbergs,* 2008 WL 4191145, *9 (D. Neb. Sept. 8, 2008); *Johnson,* 588 F. Supp. 2d at 1005; *United States v. Stern,* 590 F. Supp. 2d 945, 957-58 (N.D. Ohio 2008).

79. *See* note 59, *supra*.

80. *United States v. Stellabuto*, 6:10-CR-51-ORL-31-GJK.

81. U.S.S.G. Sentencing Table. ■

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