# Sex Offenders: Part 1—Sentencing

BY ALAN ELLIS AND MARK H. ALLENBAUGH

According to the US Sentencing Commission's (USSC's) 2012 report to Congress entitled *Federal Child Pornography Offenses*, federal prosecutions of child pornography possession, distribution, and production offenses respectively rose from 16, 61, and 10 in 1992 (a total of 87 child pornography offenses overall) to 904, 813, and 207, respectively, in 2010 (for a total of 1,924). In other words, the prosecution of child pornography offenses grew more than 2,100% in that period of time. Since *United States v. Booker*, the average sentence imposed for child pornography offenders grew from 98.7 months in 2006, to 154 months in 2015. Child pornography offenses thus have far and away the fastest growing prosecution rate and greatest increase in average sentences imposed over any other major offense category.

Concurrent with this increase in prosecution of child pornography offenses has been an increase in potential penalties, both statutory and guideline. While courts have roundly rejected these new sanctions as politically motivated and lacking empirical support, sentencing in sex offense cases presents unique responsibilities and challenges for which counsel must be prepared.

## Who Is the Average Child Pornography Defendant?

The average child pornography defendant typically is a 42-year-old, white (88.9%) male (98.7%) US citizen (97.7%) with at least a high school diploma (92.1%), though likely at least some college (58.1%), and no prior felony conviction (79.9%). (*See* Mark Motivans & Tracey Kyckelhahn, U.S. Dep't of Justice, *Federal Prosecution of Child Sex Exploitation Offenders*, 2006, Bureau Just. Stat. Bull., Dec. 2007.) Greater than 95 percent of such prosecutions result in conviction, overwhelmingly via a guilty plea. (*Id.*) As is true in most criminal cases, sentencing courts are left to question and understand the factor(s) that contributed to the defendant's offense behavior, though with sex offenses, recidivism concerns are magnified.

## Obtain a Psychosexual Evaluation

One of the first steps defense counsel should take in their cases involving alleged sexual misconduct is to refer the client for a confidential psychosexual evaluation. Similar to a standard mental health evaluation, a psychosexual evaluation assesses an individual's social, familial, education, and employment history, as well as general psychological makeup. However, such assessments focus further on issues concerning sexual history and development, including victimization, paraphilias, and risk. Obtaining a psychosexual evaluation early in the sentencing process not only informs issues concerning a client's alleged misconduct but, looking prospectively, may also provide a baseline upon which the client can improve during his or her case's pendency.

## Refer Client for Treatment

Subject to cost and available clinical resources, a recommended course after obtaining the initial psychosexual evaluation, for which a report is not necessary, is to refer the client for treatment with a confidential, independent provider—that is, with a professional other than the person who conducted the evaluation. Stand-alone treatment provides the benefit of enabling the evaluator to view the client both before and after treatment, permitting a more objective assessment of any progress and risk reduction. It also affords additional insight into the client from a second clinician capable of speaking to the evolution of treatment.

## Most Lookers Are Not Doers

Courts confronted with an Internet sex offense are sometimes sensitive to the reality that the leap from viewing child pornography to sexual contact is enormous, and there is little-to-no empirical support for a causal link between viewing illegal images and the commission of contact offenses. (*See, e.g.*, David L. Riegel, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 Archives Sexual Behav. 321 (2004).) Although, in certain cases, pornography may be part of a larger offense, viewing pornography is not the cause of sexual offending (acting out). (*See* Robert Bauserman, *Sexual Aggression and Pornography: A Review of Correlational Research*, 18 Basic Applied Psychol. 405 (1996); W.L. Marshall, *Revisiting the Use of Pornography by Sexual Offenders:*

**ALAN ELLIS** *is a regular columnist for* Criminal Justice *magazine and past president of the NACDL. He practices in the areas of federal sentencing, prison matters, postconviction remedies, and international criminal law, with offices in San Francisco and New York. Contact him at AELaw1@alanellis.com or go to www.alanellis.com.*

**MARK H. ALLENBAUGH** *is a former staff attorney to the U.S. Sentencing Commission. He is located in Cleveland, Ohio, where his practice is focused on federal criminal defense. He may be reached at mark@allenbaughlaw.com.*



Published in Criminal Justice, Volume 31, Number 1, Spring 2016. © 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express writtenconsent of the American Bar Association.

*Implications for Theory and Practice*, 6 J. Sexual Aggression 67 (2000).) Of particular relevance to federal prosecutions, "the current research literature supports the assumption that the consumers of child pornography form a distinct group of sex offenders." (Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC Psychiatry 43 (2009).)

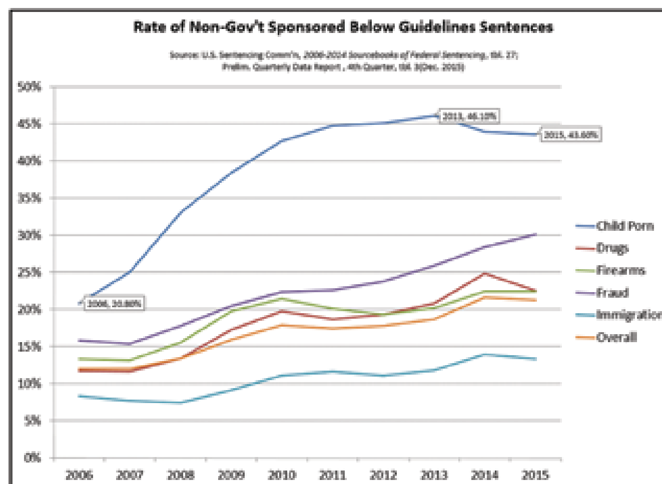
One study looking at reoffense rates for adult male child pornography offenders found that while 4% of child-pornography-only offenders (no prior sex offense convictions) committed a further pornography offense, only 1% escalated to a contact sexual reoffense. (Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders,* 17 Sexual Abuse: J. Res. & Treatment 201 (2005).) Another study found that "there is some indication to suggest that there is a sub group of internet offenders who pose a risk of repeated internet pornography offending, but not an escalation to contact sex offending. . . . [B]y far the largest subgroup of internet offenders [including those convicted of making child pornography] would appear to pose a very low risk of sexual recidivism." (L. Webb, J. Craissati & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 Sexual Abuse: J. Res. & Treatment 449, 463 (2007).) Finally, after analyzing six years of recidivism data of 231 men convicted of child pornography offenses, the Endrass study, supra, found:

> Among the subjects of the present study, only 1% were known to have committed a past hands-on sex offense, and only 1% were charged with a subsequent hands-on sex offense in the 6 year follow-up. The consumption of child pornography alone does not seem to represent a risk factor or committing hands-on sex offenses in the present sample—at least not in those subjects without prior convictions for hands-on sex offenses.

When coupled with a psychosexual evaluation that confirms the isolated nature of a defendant's conduct and low risk to reoffend, the foregoing empirical considerations have contributed to courts regularly rejecting a sex offender's prescribed guidelines range in favor of a more rational disposition, one that satisfies 18 U.S.C. § 3553(a)'s parsimony requirement.

## Sentencing Trends

The chart below demonstrates that while non-government-sponsored below guidelines sentences (i.e., non-section 5K1.1 departures) have increased across all major offense categories and overall since Booker, the rate in child pornography cases more than doubled from 2006 (20.8%) to the fourth quarter of 2015 (43.6%) peaking at 46.1% in 2013. The rate of such downward variances has consistently remained the highest among all major offense categories.




## Showing Why the Guidelines Should Be Rejected

Key to achieving such a result is clearly showing courts why the child pornography guidelines at USSG §2G2.2 should be rejected. The person perhaps most responsible for leading this charge has been Assistant Federal Public Defender (AFD) Troy Stabenow. (*See* Mark Hansen*, A Reluctant Rebellion*, A.B.A. J., June 2009.) AFD Stabenow's memorandum, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (available at http://tinyurl.com/hsk3bmg), provided the analytical framework on which first district courts and then circuit courts relied when holding the sex offense guidelines unsustainable, on policy grounds. (*See* United States v. Henderson, 649 F.3d 955, 962 (9th Cir. 2011) (noting that most amendments to the child pornography guidelines "were Congressionally-mandated and not the result of an empirical study"); United States v. Grober, 624 F.3d 592 (3d Cir. 2010); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010).) Equally as important, the USSC effectively corroborated AFD Stabenow's conclusions concerning the guidelines' deficiencies through its own report and analysis. (USSC, The History of the Child Pornography Guidelines (2009), *available at* http://tinyurl.com/jftwy4h.) In 2012, the USSC published a comprehensive follow-up report to Congress entitled *Federal Child Pornography Offenders* that further corroborates its earlier findings and documents the continuing dissatisfaction the judiciary has with these guidelines.

AFD Stabenow's article has been cited by federal district and appellate courts *(continued on page 62)*



Published in Criminal Justice, Volume 31, Number 1, Spring 2016. © 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express writtenconsent of the American Bar Association.

dozens of times since its initial publication. It also has been cited in dozens of law review and law journal articles. A version of AFD Stabenow's original white paper was published in the *Federal Sentencing Reporter*, considered by many to be the preeminent journal on federal sentencing matters. (*See* Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 Fed. Sent'g Rep. 108 (2011).) The USSC also cited AFD Stabenow's original white paper in its ground-breaking report to Congress on the child pornography guidelines. (*See* USSC, Federal Child Pornography Offenses 2 n.15; 3 n.71; app. G, at G-4 (2012), *available at* http://tinyurl.com/gv7r2bn.)

## Conclusion

If you want an atypical sentence, take an atypical approach. Most judges have a profound dislike of the child pornography guidelines. Give them the tools to sentence well below them:

- Learn, understand and effectively convey to the court the psychological "why" of your client's conduct and "how" it can be prevented in the future.
- Use the statistics and charts above.
- Provide the court with a Stabenow argument.

Child pornography offenses present unique challenges for the practitioner. These tips can prevent your client from unnecessarily languishing for years in a federal prison. ■


Published in Criminal Justice, Volume 31, Number 1, Spring 2016. © 2016 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express writtenconsent of the American Bar Association.