Child Pornography Guidelines Are Ripe for Challenge

BY ALAN ELLIS AND KAREN L. LANDAU

In the current version of the U.S. Sentencing Guidelines, U.S.S.G. § 2G2.2 governs possession of child pornography. (In 2004, section 2G2.4, which covered strictly possession, was eliminated and section 2G2.2 revised to cover both possession and trafficking offenses.) In 1987, when the guidelines were first enacted, possession of child pornography was not a federal crime, and the guidelines covered only trafficking in child pornography. When the U.S. Sentencing Commission first enacted a guideline for possession of child pornography in 1990, the base offense level was 10. The guideline had available one upward adjustment: two levels for images of minors under age 12, resulting in a total exposure based on an offense level of 12 and the defendant's criminal history. (U.S.S.G. § 2G2.4 (1990).)

Since its enactment, however, the guideline governing possession and trafficking of child pornography has undergone 11 amendments. These amendments are relatively unique: they largely resulted from congressional directives that are fairly described as legislative fiats requiring an upward modification to the guidelines. While such congressional directives are legally permissible, guidelines adopted thereunder do not carry the weight given to guidelines developed by the commission as an expert sentencing agency working in consultation with penological and sociological experts.

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The amendments also are notable for their consistent increase in both the base offense level applicable to offenses involving child pornography, and the creation of new and additional specific offense characteristics. All of the specific offense characteristics have the effect of dramatically increasing the guideline range applicable to an offender. The increases in the mean guideline sentence between 2002 and 2007 were particularly noteworthy. Each calendar year, the mean imposed sentence on an offender convicted of a child pornography-related offense increased by 11.9 months. (Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* at 2, *available at* http://mow.fd.org/3%20July%202008%20Edit.pdf.) Thus, from 1994 to 1995, child pornography offenders received a mean sentence of 36 months and the 24 offenders convicted only of possessing illegal images received a mean sentence of 15 months' confinement. (*Id.*) By 2007, the mean sentence for a child pornography offender had grown to 109.6 months. (*Id.*) This represents more than a 300 percent increase "in the *typical* imposed sentence." (*Id.*)

Practitioners should consider a number of relevant historical facts in seeking a below-guideline sentence in child pornography offenses.

The changes to the child pornography guidelines did not result from an empirical need for consistently harsher sentencing.

> [T]hese changes [were] largely the consequence of numerous morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or study of any kind. Congressionally mandated changes were even enacted to prevent the Commission from implementing carefully considered modifications which would have lowered applicable offense levels.

(*Id.* at 3.)

As a result, numerous district courts have concluded that the current version of U.S.S.G. § 2G2.2 "diverges significantly from the Sentencing Commission's typical, empirical approach," frequently producing a sentence "greater than necessary to provide just punishment." (United States v. Hanson, 561 F. Supp. 2d 1004, 1008 (E.D. Wis.

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2008); United States v. Stern, 2008 U.S. Dist. LEXIS 102802 (N.D. Ohio Dec. 19, 2008).) Several district courts have expressed concern: "The Court is particularly troubled that the Guidelines for sentencing those who possess child pornography 'have been repeatedly raised despite evidence and recommendations by the [United States Sentencing] Commission to the contrary.'" (*Hanson*, 561 F. Supp. 2d at 1009.) A recent study shows that "[o]ver the last six years, the mean imposed sentence on [child pornography] offenders has increased an average of 11.9 months per calendar year." (Stabenow, *supra*, at 2.)

In addition to dramatically increasing the applicable base offense level, the changes in the guidelines have made almost every enhancement apply to almost every case. These guideline changes, in turn, cause most guideline sentences for defendants convicted of possession of child pornography to approach the statutory maximum. (*See* United States v. Grober, 595 F. Supp. 2d 382, 384-85 (D.N.J. 2008).) As a result, probation officers frequently recommend sentences of 97 months or more for defendants whose statutory maximum is 10 years, who fall into Criminal History Category I, and who have never sexually exploited a child.

The U.S. Supreme Court recently emphasized that guidelines not supported by empirical data are entitled to less deference than are guidelines that exhibit the Sentencing Commission's "exercise of its characteristic institutional role" as an expert agency tasked with promulgating empirically-based guidelines. (*See* 28 U.S.C. §§ 991(b)(1)(C), 994 (describing empirical starting point for promulgation of guidelines and independent development of same); Spears v. United States, 129 S. Ct. 840, 842-43 (2009) (internal quotation marks omitted).) The child pornography guidelines, like those for crack cocaine, are not based on empirical research and should receive little deference. Several district courts have so held. (*Grober,* 595 F. Supp. 2d at 392-93; United States v. Phinney, 2009 U.S. Dist. LEXIS 13277 at *23-24 (E.D. Wis. Feb. 20, 2009); United States v. Gellatly, 2009 U.S. Dist. LEXIS 2693 (D. Neb. Jan. 5, 2009).)

The guidelines achieve unreasonable sentences in several ways. First, over time, the base offense level for possession of child pornography has been increased from 10 to 18, or even 22 if the defendant is convicted of "receipt." Second, the child pornography guidelines achieve unreasonable sentences by imposing multiple enhancements that are applicable to almost every case involving the possession or receipt of child pornography, not merely those that are most aggravated. For example, the guidelines exponentially increase the number of images attributed to video files, counting a single video file as having 75 images. Thus, a defendant with only six video files is treated as possessing more than 600 images of child pornography and is subject to the maximum upward adjustment for the number of images. (U.S.S.G. § 2G2.2, App. Note 4(B)(ii).) Third, the upward adjustments for use of a computer, an image of a child under 12 years of age, and sadistic images are applicable to almost every case. (*E.g.*, *Gellatly*, 2009 U.S. Dist. 2693 LEXIS at *32-34; *Grober,* 595 F. Supp. 2d at 393-94.) The upward adjustment for use of a computer is applicable generally, and not only to cases where the use of a computer makes the offense more serious, such as when a defendant uses a computer to promote or widely distribute child pornography. (*Gellatly*, 2009 U.S. 2693 Dist. LEXIS at *32-34.) Similarly, almost every case involves at least one image of a child under 12 and one image that falls into the category of sadistic. (*Id.*) These adjustments are applicable whether or not the defendant specifically intended to possess such material. (*Id.*) The widespread applicability of these adjustments pushes most sentences toward the statutory maximum. (*Id.*; United States v. Hanson, 561 F. Supp. 2d 1004, 1010-11 (E.D. Wis. 2008).)

Ultimately, the lack of empirical support for the child pornography guidelines and the general applicability of the enhancements results in sentences that are not fairly individualized. The history of legislative enactments reflect congressional concerns with the use of computers to lure minors into sex acts, the use of materials to desensitize and entice victims, and the production of such materials. (*Gellatly*, 2009 U.S. 2693 Dist. LEXIS at *24.) But, the upward adjustments apply to all defendants who possess child pornography, regardless of whether they have ever attempted to exploit a minor and who simply downloaded and possessed child pornography.

Defendants who possess and receive child pornography are a particularly despised group of individuals. Their lack of popularity makes them especially vulnerable to receiving unduly harsh sentences and increases their need of effective advocacy at sentencing. ■

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