TRENDS AND PRACTICE TIPS FOR REPRESENTING CHILD PORNOGRAPHY OFFENDERS AT SENTENCING

By Tess Lopez, Mark H. Allenbaugh and Alan Ellis

Among all types of federal offenses, child pornography inherently elicits the most visceral reaction. As the Internet and other technologies have allowed greater access to videos and photographs of child pornography, detection and prosecution has increased, with states and the federal government devoting substantial resources toward the investigation and prosecution of such offenses.

Since the mid-1990s, referrals, prosecutions, and convictions for child pornography have increased dramatically (*see* fig. 1), with referrals growing at a far greater rate than either prosecutions or convictions. Accordingly, the trend for more prosecutions and convictions will continue for the foreseeable future.

Published in *Criminal Justice*, Volume 27, Number 3, Fall 2012.

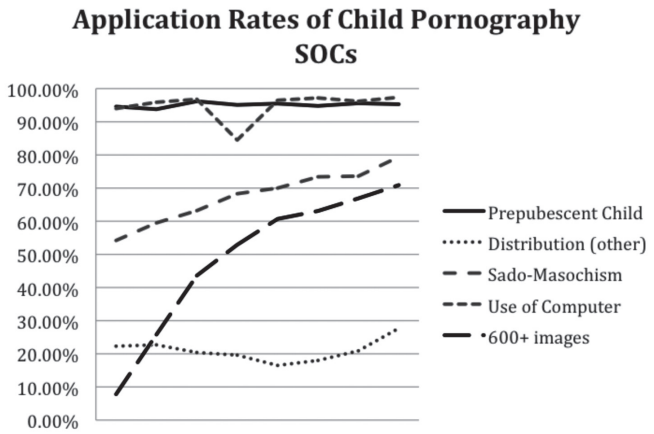

FIGURE 1

It is not surprising, therefore, that penalties for such offenses also have been steadily increasing during the same period. (*See generally* United States v. Henderson, 649 F.3d 955, 960–62 (9th Cir. 2011) (reviewing in detail the history of the child pornography guidelines).) As a result:

> In recent year[s], the [US Sentencing] Commission has received feedback from judges, the Department of Justice, defense attorneys, and organizations such as the National Center for Missing and Exploited Children, a leading advocate for victims of these offenses, all indicating that a review of the penalties for child pornography offenses is appropriate at this time because of the evolving nature of how these offenses are committed.
>
> In light of this feedback, the Commission is undertaking a thorough examination of these offenses and the offenders who commit them, including the technological and psychological issues associated with child pornography offenses.
>
> The Commission anticipates issuing a comprehensive report later this year.

(*Public Hearing on Child Pornography Offenses Before the U.S. Sentencing Comm'n,* 7 (Feb. 15, 2012) (statement of Judge Patti B. Saris, chairperson), *available at* http://tinyurl.com/7beerdb.)

The law and practice regarding child pornography offenses likewise has evolved considerably, especially since *United States v. Booker*, 543 U.S. 220 (2005). At its core, the history of the child pornography guidelines continues a trend that first arose during the evolution of the drug guidelines, namely, a critical assessment by the judiciary of the empirical support and rationality of the particular guideline. As with the drug guidelines, the critique from the bench has grown to critical mass, such that the child pornography guidelines now, too, in all likelihood will be revised downward by commission amendment if not congressional directive. This article reviews some of the more pertinent developments for the practitioner, and provides tips on how best to advocate for your client in the current, fast-changing legal climate.

Child Pornography Offenders and the History of the Guidelines

According to the US Sentencing Commission's (USSC's) *2011 Sourcebook of Federal Sentencing Statistics*, Appendix A, "*Child Pornography* includes the sale, distribution, transportation, shipment, receipt, or possession of materials involving the sexual exploitation of minors." The typical child pornography defendant is a first-time offender with no history of harming or touching children. The best empirical research shows that the vast majority of these offenders do not go on to molest children, according to Richard Wollert, PhD, who testified before the USSC at a public hearing on February 15, 2012, about a study regarding the lack of correlation between passive child pornography viewers and active child molesters. (*See The Implications of Recidivism Research and Clinical Experience for Assessing and Treating Federal Child Pornography Offenders: Public Hearing on Child Pornography Offenses Before the U.S. Sentencing Commission*, 12 (Feb. 15, 2012) (written testimony by Richard Wollert, Washington State University Vancouver), *available at* http://tinyurl.com/cqjrgtw.) The study followed 72 individuals for four years after they were charged with or convicted of a child pornography offense and referred to federally funded outpatient treatment programs; it found that none were rearrested for a contact offense. Wollert cited to a recent study that followed 231 child pornography offenders without prior contact offenses for six years after their initial offense. Only two of those people (0.8

TESS LOPEZ *is a sentencing mitigation specialist and a former US probation officer in the Northern District of California. She is a member of the Practitioners Advisory Group to the US Sentencing Commission (USSC), and cochair of the Criminal Justice Section's Alternative Dispute Resolution and Restorative Justice Committee. Visit her website at http://sentencingmitigation.com.* **MARK H. ALLENBAUGH** *is an attorney with offices in Los Angeles, Cleveland, Washington, D.C., and Beijing, and is of counsel to the Law Offices of Alan Ellis. His practice focuses on federal sentencing law and policy as well as China trade law and commercial disputes. He currently serves as cochair of the Sentencing Committee for the National Association of Criminal Defense Lawyers (NACDL), and as a member of the USSC's Practitioners Advisory Group. Prior to entering private practice, he served as a staff attorney for the USSC. He can be reached at mark@allenbaughlaw.com or go to www.allenbaughlaw.com.* **ALAN ELLIS** *is past president of the NACDL and former Fulbright Visiting Professor of Law, Shanghai Jiaotong University School of Law, and practices in the areas of federal sentencing, prison matters, postconviction remedies, and international criminal law, with offices in San Francisco, New York, and Shanghai, China. He is also a columnist for* Criminal Justice *magazine. Contact him at AELaw1@aol.com or go to www.alanellis.com.*

Published in *Criminal Justice*, Volume 27, Number 3, Fall 2012.

percent) committed a contact offense. (*See* Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC Psychiatry 43 (2009).)

It is widely known that the child pornography guidelines have been amended dramatically since the inception of section 2G2.2 of the US Sentencing Guidelines in 1991. In 2003, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub. L. No. 108-21, which resulted in significant changes to the statute and the child pornography guidelines, and paved the way for Congress to enact mandatory minimum sentences for child pornography offenses. The USSC responded by adding enhancements and increasing the penalties for possession. Consequently, in response to directives from Congress, there have been numerous increases in the guidelines for these offenses. As a result, the average sentence length for first-time child pornography offenders is now over three times what it was for both first-time and recidivist offenders in 1994. The average guideline sentence for possession currently is 119 months, or nearly 10 years. (*See* U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics tbl.13.)

Challenge the Reasonableness of the Guidelines

Much like the drug guidelines, which were also formulated and regulated by directives from Congress rather than in response to empirical data, practitioners, academics, and sentencing courts are questioning the reasonableness of the child pornography guidelines. For example, the guidelines do not distinguish offenders with differing levels of culpability, and nearly all of the enhancements apply to all child pornography offenders. Nearly all use a computer, nearly all have at least one image of a prepubescent minor under the age of 12, most images reflect violence (intercourse with a minor), and, due to file sharing programs, most possess more than 600 images, intentionally or unintentionally. (*See generally* U.S. Sentencing Comm'n, The History of the Child Pornography Guidelines (2009); *see* fig. 2 for increase rates of application of common sentencing offense characteristics.) These enhancements combine to reflect an effective base offense level of 31 with a range of 108 to 135 months.

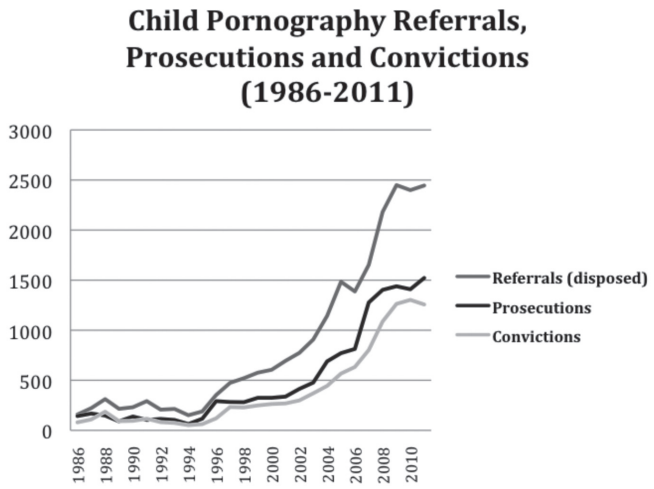

FIGURE 2

It is beyond dispute that a case involving attempts to lure a minor into sexual activity is more serious conduct than possession of child pornography. Surprisingly, however, the child pornography guidelines often result in higher sentences for possessing child pornography than for actually attempting to abuse a child. (*See* United States v. Dorvee, 616 F.3d 174, 187 (2d Cir. 2010).) The problem with the child pornography guidelines is not so much the unwarranted disparity as it is unwarranted similarity, such that dissimilarly situated offenders are treated similarly. That, as well as the overly onerous sentences imposed under these guidelines as a result of congressional intervention, makes the reasonableness of any sentence imposed within the range questionable.

And in those instances where a downward departure or variance is given by a court, the matter is not necessarily settled. The resulting sentence still could be far too onerous and otherwise inconsistent with the principle of parsimony set forth at 18 U.S.C. § 3553(a). In short, even a sentence that was the result of a downward variance still could be infected by the irrationality of the child pornography guidelines. As we discuss in more detail below, it is the *degree* of the variance and not the variance per se that is relevant for purposes of 18 U.S.C. § 3553(a).

Challenge the "Market Thesis"

Since at least the Supreme Court decision in *New York v. Ferber*, 458 U.S. 747 (1982), courts and the government routinely, but uncritically, have been asserting the market thesis in an effort to justify severe sentences in nonproduction, noncontact possession and distribution cases. The market thesis simply holds that those who possess or distribute child pornography create a demand for child pornography, which is supplied by child pornography producers, i.e., those who actually assault and abuse children while recording the conduct. "Without a market for such images, and without a strong appetite for more and more images exhibited by [such] defendants, there would be far fewer children who are injured and criminally assaulted in this way." (United States v. Miller, 665 F.3d 114, 123 (5th Cir. 2011); *see Ferber*, 458 U.S. at 760 ("The most expeditious if not the only practical method of law enforcement may be to dry up the market for [child pornography] material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").) Clamp down on the consumers of child pornography (i.e., possessors and distributors, which now often are one and the same given the broad reach of the term "distributor"), and the production of child pornography will be greatly diminished—or so the thinking goes.

While the market thesis has intuitive appeal, it has no empirical basis, at least in child pornography cases. Unlike illicit drug manufacturers who, but for the demand, would

not manufacturer the drug, child pornography producers also are the consumers of the pornography, so third-party demand for their product does not affect whether it is produced. Meth manufacturers do not manufacture meth for themselves but to receive the proceeds from the sale of meth to users. No meth users, no meth manufacturers. In contrast, child pornography producers produce for themselves and not for any profit or altruistic distribution motive. In short, no child pornography consumers does not mean no child pornography producers.

As one commentator recently noted, "The market thesis . . . is more speculative and ideological than supported by experiential data." (Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 Cardozo L. Rev. 1679, 1729 (2012).) Likewise, a 2009 United Nations report observed:

> The possibility that children are being victimized for the sole purpose of making marketable child pornography is subject to empirical verification, but, to date, has not yet been tested. Despite the seizures of many hard drives and even servers containing hundreds of thousands of images, very little work has been done examining the content of these images to determine what can be said about the nature of production—how much is professionally produced, and how much is clearly amateur. In fact, little research has been done on the global scale or growth of the child pornography industry. . . . Given the importance of the issue, it is remarkable that such research has not yet been done.

(U.N. Office on Drugs & Crime, The Globalization of Crime: A Transnational Organized Crime Threat Assessment 212 (2010).)

Questioning the actual market size for child pornography is nothing new. In a 1984 Senate report on child pornography, it was observed that "[t]he fact is that the overwhelming majority of child pornography seized in arrests made in the United States has not been produced or distributed for profit." (S. Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 99th Cong., 2d Sess., Child Pornography and Pedophilia 47 (Oct. 9, 1986).) Indeed, at the time, the total commercial value of child pornography in the United States was estimated to be only "a few million dollars" despite claims that the value of such market exceeded a half-billion dollars. (*Id.*) Thus, the market thesis, while intuitive, has no actual support. It is important to attack this presumption inasmuch as it tends to make simple possessors of child pornography appear more culpable and their offense more serious due to speculation about market creation. The simple fact is that there is no such link. Possessors/distributors do not create a market such that they exacerbate and encourage the production of child pornography. Accordingly, such a speculative thesis should not weigh against consumers in terms of culpability or seriousness of their offenses. And this conclusion is consistent with the growing scientific literature indicating little correlation between voyeurs and actual pederasts.

Use Data Recovery Specialists and Know the Technology

The guidelines focus solely on the number and type of images possessed, rather than the offender's level of culpability. Indeed, there is no evidence to suggest that the volume of images possessed increases the risk to the community. The number of images simply is not an accurate reflection of the seriousness of the conduct. Given the online climate of file sharing programs such as GigaTribe or LimeWire, an offender may receive far more images than the individual requested or intended to receive. In fact, other programs offer unlimited access to another user's files. Not surprisingly, many offenders end up with material that is too voluminous for any individual to review or with images they did not intend to possess.

Often after data recovery investigation, some images or entire files have never been opened while others were viewed quickly and deleted. Such investigation also reveals a majority or "type" of image an offender is interested in, with very few containing sadomasochistic images or prepubescent minors. The current specific offense characteristics (SOCs) add points if even one of these images is present among thousands of images. Therefore, it is important to use the result of such investigations to ensure your client is not hit with SOCs that should be reserved for the most egregious or violent content that was knowingly and intentionally—and not inadvertently—possessed.

For example, a data recovery specialist conducting forensic review of the images often discovers very important information, such as hard drives containing numerous images/files that were downloaded but never reviewed or opened, a large amount of duplicate images, multiple videos that are clipped into miniparts of one video but are counted separately, the amount of time the offender spent viewing the image, and many other relevant factors. If an offender spends one second viewing any image and then deletes it, it is reasonable to assume that type of image was not the focus of the search. In other words, the offender was not specifically looking for images of prepubescent minors and possessed a small amount of these images as a result of looking for other images. Many offenders' collection of child pornography is part of an even larger collection of adult pornography.

Indeed, in "receipt" cases, knowing the technology can be critical. As Pamela C. Marsh, the US attorney for the Northern District of Florida, recently explained:

> [A]n understanding of the technology is required to truly review the evidence in a receipt case, charged under 18 U.S.C. § 2252 or 2252A. The government's burden of proof in a receipt case is to show, beyond a reasonable doubt, how the image of child pornography was "received" on the computer, and that requires, in some cases, detailed forensic work

> to demonstrate how that image made its way from the Internet to the hard drive of the computer. In particular, the government's case can involve piecing together the forensic details of the chain of transmission in the cyber world, much like an attorney establishes a chain of custody for purposes of tangible evidence. Thus, it may be incumbent upon defense counsel to learn the intricacies of IP addresses, hash values of digital images, and other technical details, such as the program defaults and logging functions of the various browsers and peer-to-peer programs.

(Pamela C. Marsh, U.S. Attorney, N.D. Fla., Remarks at the 21st Annual National Seminar on the Federal Sentencing Guidelines: Child Porn/Adam Walsh Act (May 25, 2012).)

Understanding the technology involved in committing child pornography offenses not only can assist the practitioner in developing defenses, but also can assist in developing arguments in mitigation of a client's conduct. The child pornography guidelines simply do not account for the technological realities underlying virtually all child pornography offenses, and fail to take into account an offender's true conduct and actual risk for harming a child.

Cite Statistics and Trends in Sentencing

It is no surprise, then, that federal judges are not following the guidelines in child pornography cases. A survey of US district judges conducted by the USSC from January 2010 to March 2010 revealed that 70 percent of the judges opined that the guidelines for possession of child pornography were too high. (*See* U.S. Sentencing Comm'n, Results of Survey of United States District Judges January 2010 through March 2010 tbl.1 (2010), *available at* http://tinyurl.com/7uz7wob.) Their sentences imposed reflect growing displeasure with the guidelines. The USSC quarterly data report for the first quarter of 2012 reflects that judges imposed sentences below the guidelines 46 percent of the time in 2011. (*See* U.S. Sentencing Comm'n, Preliminary Quarterly Data Report tbl.3 (2012), *available at* http://tinyurl.com/cevaxeg.)

Only about a third of child pornography offenders are now sentenced within the guidelines. (*See* figs. 3–4.) When compared to other major offense categories, it is clear that the judiciary practices what it has been preaching, i.e., that these guidelines are far too onerous.

And looking at the data over the last five years, it is telling not only that nongovernment-sponsored below-guidelines sentences imposed for child pornography offenses consistently have the highest degree of variance (in terms of months) from the bottom of the otherwise applicable guidelines range, but that such a *degree* of variance (like the number of variances per se) also is increasing faster than any other major offense category. (*See* fig. 5.)

Finally, a review of state sentencing practices can be extremely enlightening, especially when comparing sentences not just for child pornography but for actual contact offenses such as child molestation. While historically reference to state sentencing practices was not considered appropriate, the tide slowly is changing in this regard. (*See*, *e.g.*, United States v. Ringgold, 571 F.3d 948, 952 (9th Cir. 2009) (holding courts are not precluded from considering state sentencing practices); United States v. Clark, 434 F.3d 684, 688–89 (4th Cir. 2006) (Motz, J., concurring) (finding that "some cases in which consideration of state sentences will not conflict with § 3553(a)(6)'s mandate to 'avoid unwarranted sentence disparities' . . . may in fact help courts to apply correctly the other factors set forth in § 3553(a)").) Such data can illustrate the substantive unreasonableness of a defendant's sentence regardless of whether it was the result of a downward departure or variance.

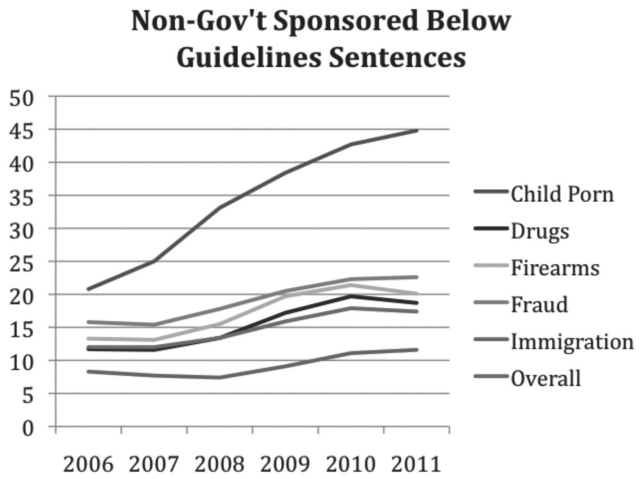

FIGURE 3

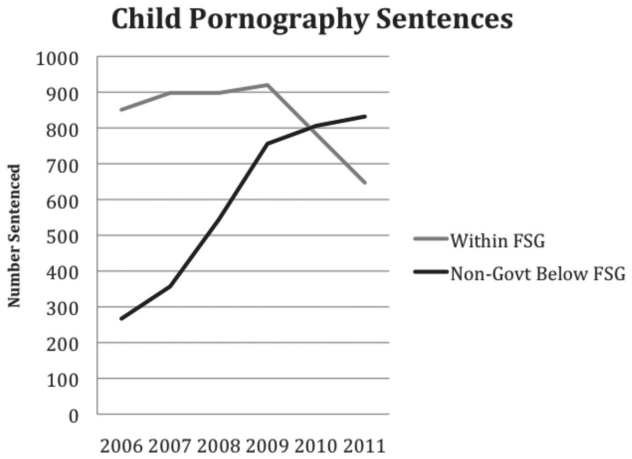

FIGURE 4

For example, on January 1, 2007, California's new child pornography statute went into effect. (*See* Cal. Penal Code § 311.11.) Section 311.11 provides for a felony sentence of up to one year for a first offense, and up to six years on a subsequent offense. Since its implementation, 241 male offenders have been sentenced with an overall

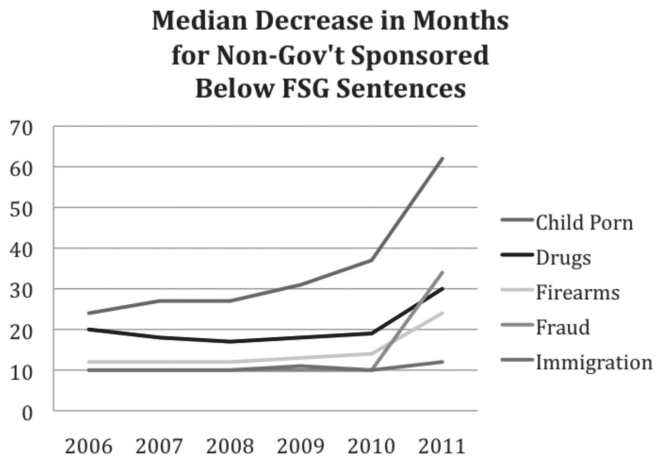

FIGURE 5

median sentence of 44 months. (*See* Cal. Dep't of Corr. & Rehab., Datafile P311_11_11_2001_2010_MALE.xls (on file with authors).) The median federal sentence for child pornography offenses in 2011 was 84 months, or nearly 91 percent greater than California's median sentence.

California's child molestation statute is located at Penal Code section 288(A). In the 10-year period covering January 1, 2001, to December 31, 2010, 14,111 male offenders were sentenced for violating this statute. (*See* Cal. Dep't of Corr. & Rehab., Datafile P288(AB)_2001_2010_MALE.xls (on file with authors).) The overall median sentence was 72 months. Thus, the median sentence for federal child pornography offenders still is nearly 17 percent greater than the median California state sentence for child molesters.

According to the Illinois Criminal Justice Information Authority, the average time that a Class X sex offender will serve—and this is actual prison time factoring any good-time credits—is only 116 months. (*See* David E. Olson et al., Ill. Criminal Justice Info. Auth., Final Report: The Impact of Illinois' Truth-in-Sentencing Law on Sentence Lengths, Time to Serve and Disciplinary Incidents of Convicted Murderers and Sex Offenders 5 (2009).) Class X sex offenders consist of those convicted of aggravated criminal sexual assault and predatory criminal sexual assault of a child. (*See id.* at 11; 720 Ill. Comp. Stat. 5/11-1.40.) In contrast, the average (as opposed to median) federal sentence for child pornography offenders in 2011 was 121 months. (*See* U.S. Sentencing Comm'n, 2011 Sourcebook of Federal Sentencing Statistics tbl.14.) Such comparisons starkly illustrate the wholly counterintuitive severity of sentences imposed on noncontact voyeurs when compared to actual pederasts.

Propose Less Incarceration and Longer Supervision

Child pornography offenders are very closely monitored and their freedom greatly restricted. To address the concern of public protection, the US Probation Office utilizes myriad tools to protect the community, including search and seizure of offenders' residences, computers, and phones; restrictions on computer use, such as only for employment; electronic monitoring and surveillance; and compliance with treatment. Additionally, child pornography offenders are required to register as sex offenders, alerting local law enforcement to monitor their actions closely. Sentences for those who possess child pornography should focus more on counseling, treatment, prevention, monitoring, and supervision—and less on imprisonment. This can be accomplished cost-effectively through sentences of supervised release as opposed to long terms of imprisonment.

Still, counsel should be cognizant that the guidelines default position that sex offenders should receive a lifetime of supervised release (*see* U.S. Sentencing Guidelines Manual § 5D1.2(b)) is *not* required by law. And as with terms of imprisonment generally, the length of supervised release should be tailored to the characteristics of the client; where recidivism is unlikely, lengthy supervised release is unnecessary.

Finally, imprisonment for any sex offender, but particularly for child sex offenders, carries a substantial risk that such offenders will be brutalized in prison, or worse. Recently, Judge Bruce D. Black of the District of New Mexico noted, "The last defendant this Court was required to sentence to the mandatory five-year prison term for receipt of child pornography, a 72-year old retired attorney, was beaten to death within days of arriving at the federal penitentiary." (United States v. Kelly, No. 11-1866, 2012 U.S. Dist. LEXIS 86532, at *5 n.1 (D.N.M. June 20, 2012).) A downward variance may be warranted not only because of the unusual susceptibility to abuse in prison child pornography offenders face, but also because prison may actually exacerbate their conduct. According to Judge Jack Zouhary:

> [T]he enhanced lengthy sentences for those convicted of child pornography come at a time when the federal prison population far exceeds the system's capacity. See Lanny Breuer & Jonathan Wroblewski, Letter to the U.S.S.C. Chair, 24 Fed. Sent'g Rep. 2, 137, 138 (2011) (reporting 50% crowding at high security facilities and 39% at medium security facilities). This level of crowding makes the delivery of programming aimed at reducing recidivism far more difficult. *Id.* Moreover, the increased sentences are occurring at a time when the average annual cost of incarceration for federal inmates, based on 2010 statistics, is $28,284 per inmate. Notice of Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081 (Sept. 15, 2011). Many of these offenders are then sent away to crowded prisons and receive little or no counseling, thereby aggravating the problem.

(United States v. Marshall, No. 3:11-cr-00557, 2012 U.S. Dist. LEXIS 90487, at *6–7 (N.D. Ohio June 29, 2012).)

Restitution

While this issue does not come up all that frequently, it still is important for the practitioner to be aware that orders of

mandatory restitution are not automatic. A relatively new area of litigation has arisen out of the so-called "Amy" and "Vicky" series of child pornography. These victims and others actively seek restitution in child pornography cases where pictures or videos of them have been identified. The plurality of circuits, however, has held that in order for a victim of child pornography to obtain restitution, there must be a showing that the offender's conduct was a "proximate cause" of the victim's harm. (*See* United States v. Evers, 669 F.3d 645 (6th Cir. 2012); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011) (citing United States v. McDaniel, 631 F.3d 1204, 1208–09 (11th Cir. 2011); United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999)).) The Fifth Circuit, however, recently ruled that only "but for" causation need be established. (*See In re* Amy Unknown, 636 F.3d 190 (5th Cir. 2011).) Yet, as of this writing, it appears the Fifth Circuit may reverse itself and join the plurality. (*See In re* Amy Unknown, 668 F.3d 776 (5th Cir. 2012) (granting en banc review).)

In those cases where your client may have assets, it is important that counsel be cognizant of these recent developments. The plurality of circuits rightly has held that common-law principles of causation still apply with respect to restitution awards in child pornography cases. Without a showing of proximate cause, therefore, an order of restitution should not be imposed.

Recent Commission Activity Regarding Child Pornography

In February 2012, the USSC conducted a public hearing with invited guests who provided testimony regarding the federal penalties for child pornography offenses. After a three-year review of this issue, the USSC plans to release a report by the end of 2012 that may propose changes to the child pornography guidelines. Proposed changes could include less focus on the number of images and more focus on actual conduct. The guidelines also should be modified to reflect a lower base offense level for "child pornography" offenses with fewer SOCs. Rather than SOCs adding levels for the number of images or types of images, they should focus on actual risk to children. For example, there should be a distinction between an offender who possesses, views, and receives pornography and an offender who attempts to arrange a meeting with a child in an online "community." Everyone shares the outrage regarding conduct that harms and abuses children. However, there needs to be different levels of accountability for various crimes involving child pornography.

The PROTECT Act propelled into action numerous SOCs with the idea that possessors of child pornography present a direct risk to children. Possessors are essentially being punished for things they "might" do in the future. Because there is no direct link to possessing pornography and actual risk of harm to children, a sentence of probation or a short prison sentence is more than sufficient to address punishment. Child pornography offenders are punished far beyond incarceration. They suffer more collateral consequences than other offenders. They must suffer the stigma of being a sex offender and are restricted to where they can live, work, and even whether they can visit family for the rest of their lives.

On July 3, 2012, for the first time the commission began publishing its prison and sentencing impact assessments on its new "Research and Statistics" page (http://www.ussc.gov/Research_and_Statistics/index.cfm). The commission is required to perform these assessments by statute. (*See* 18 U.S.C. § 4047, 28 U.S.C. § 994(g).) Furthermore, pursuant to Rule 4.2 of the commission's rules of practice and procedure, "the Commission *shall* consider the impact of any amendment on available penal and correctional resources, and on other facilities and services and shall make such information available to the public." In the future, it is presumed that any amendments to the child pornography guidelines will also have published prison and sentencing impact assessments. Such assessments, especially those showing a decrease in prison beds and otherwise lowering the costs of incarceration, could be used by counsel to support the application of a downward adjustment, departure, or variance in appropriate circumstances. While past assessments have not been published, it is hoped the commission will do so soon. In all events, this is an extremely helpful and positive development of which counsel must be aware.

Finally, because one of the commission priorities for the upcoming amendment cycle is to undertake a comprehensive multiyear study of recidivism and make recommendations for using information obtained from the study to reduce costs of incarceration and overcapacity of prisons and determine whether any amendments to the guidelines may be appropriate, defense practitioners should be utilizing the studies already available regarding low rates of recidivism and low risk of actual harm to children. According to the Justice Department, federal prosecutors obtained at least 2,713 indictments for sexual exploitation of minors in 2011, up from 1,901 in 2006. Because the average sentence for possession of child pornography is nearly 10 years, in 2011, 2,713 viewers of child pornography entered our prisons to serve 10-year sentences.

Defense practitioners should challenge these guidelines, provide current sentencing statistics, and offer alternative sentences that reflect the client's true conduct, rather than sentences that respond to public outcry and punish offenders for the erroneous assumption of "what they might do in the future."

Conclusion

The quiet revolution against guidelines without reason began shortly after the promulgation of the drug guidelines. The revolution has since grown in volume to encompass the child pornography guidelines (and perhaps others). A chorus of critics uniformly has condemned these guidelines for lacking empirical support, being a product of Congress rather than the commission, and otherwise being far too punitive. Courts have acted. Fewer now follow the guidelines advisory range, while more

Published in *Criminal Justice*, Volume 27, Number 3, Fall 2012.

impose sentences at ever greater degrees of variance below the bottom of the range.

Practitioners are therefore well advised to bring the issues outlined in this article front-and-center to the sentencing judge as well as to the government's counsel, who may not be aware of some of the trends in sentencing child pornography offenders. While such offenses create visceral reactions, sentencing such offenders still must comport with reasoned and dispassionate applications of the law, and take into account the nature of the offender as much as the offense. The guidelines for child pornography offenses, nearly all now agree, simply do not achieve a parsimonious, let alone just, result. ■