

**Summary of Some Useful Aspects of the Sentencing Commission's
December 2012 Report to Congress on Federal Child Pornography Offenses**

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The following summary of parts of the Commission's 2012 Report on Federal Child Pornography Offenses is from the defendant's brief in a child pornography possession case in which the government appealed a substantial variance. The defendant's summary of the report may be helpful to practitioners in similar cases.

Background of Case

The defendant was a 70-year old man with severe health problems who had no criminal history, never touched a child, was deemed by the court's chosen psychiatrist to pose no risk of ever harming a child, and successfully completed sex offender treatment and a polygraph.

The judge focused on the extremely high rates of judge-initiated and government-sponsored variances; the plethora of enhancements that apply in every case and fail to distinguish among more and less culpable offenders (and the fact that each of these was either directed by Congress based on mistaken assumptions that all possessors are pedophiles and that severely punishing possessors will dry up the market, or adopted by the Commission on its own without empirical basis); the defendant's lack of sophistication in using a computer (his son installed LimeWire for him so he could listen to music, he figured out he could use it to view child porn, took no active role in "distributing" but got the distribution enhancement); the fact that multiple duplicate images were downloaded by LimeWire and all were counted for the number-of-images enhancement; the fact that he engaged in no organized "collecting" behavior (LimeWire automatically put the files in a "shared" folder where they remained); the fact that the type of images ranged from not so bad to bad and many offenders purposely collect images that are a lot worse; the fact that the defendant was not at risk of harming a child; and research showing that severely punishing child pornography offenders has no effect on the market.

Summary of Commission's Report from Defendant's Brief

In December 2012, the Commission released a report to Congress on the child pornography guidelines for non-production offenders. See U.S. Sent'g Comm'n, Report to the Congress: Federal Child Pornography Offenses (2012) ["Child Porn Report"]. The Commission explained that it compiled the report in large part due to the increasing rate of below-guideline sentences, pursuant to its statutory duty to "consider whether the guidelines are in need of revision in light of feedback from judges as reflected in their sentencing decisions," *id.* at ii, and because "as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability." *Id.* at ii; *id.* at 323.

The Commission explained that because the enhancements for computer use and type and

volume of images “now apply to most offenders,” the guideline “fail[s] to differentiate among offenders in terms of their culpability.” *Id.* at iii, xi; *id.* at 209, 323. It explained that “technological changes have resulted in exponential increases in the volume and ready accessibility of child pornography, including many graphic sexual images involving very young victims, a genre of child pornography that previously was not widely circulated.” *Id.* at 6. Because “sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders,” *id.* at xi, the “current guideline does not adequately distinguish among offenders regarding their culpability for their collecting behaviors,” *id.* at 323. The cumulative enhancements addressing the content and volume of images possessed, “in addition to base offense levels of 18 or 22, results in guideline ranges that are overly severe for some offenders in view of the nature of their collecting behavior.” *Id.*

In describing the varying degrees of culpability, the Commission reported that the “typical” child pornography case now involves images depicting “prepubescent children engaging in sexually explicit conduct.” *Id.* at 84. Some offenders “acquire enormous and often well-organized collections,” sometimes up to hundreds of thousands of images; some “intentionally collect child pornography depicting the sexual torture of children, including infants and toddlers,” *id.* at viii, 84-92; and some have collected material over “a series of decades” beginning in the pre-Internet era, *id.* at 80. The variety of images readily available on the Internet and found in offenders’ possession range from “legal but sexually suggestive poses” to extremely graphic images “depicting violence, humiliation, bondage, and bestiality.” *Id.* at 80-81, 90-91. Some offenders “are very discriminating” and limit their collection by preference. *Id.* at 81. Offenders “vary widely in their technological sophistication,” with some relatively unsophisticated offenders using widely available peer-to-peer networks, like LimeWire, to receive or distribute material “in an indiscriminate manner,” while others “use their technological expertise to create private and secure trading ‘communities’ and to evade, and help others evade, detection by law enforcement.” *Id.* at viii, 61-62.

The Commission reported that approximately one quarter of federal offenders “received child pornography from commercial websites, thereby fostering the commercial markets,” and one quarter engaged in “personal distribution” to another individual through bartering or trading of images, also described as a “market.” *Id.* at 98-99. There is, however, no social science research available to support the theory that criminal punishments “have affected commercial or non-commercial ‘markets’ in child pornography since the advent of the Internet and P2P file-sharing.” *Id.* at 98.

The Commission reported that some offenders have “non-sexual motivations for viewing child pornography,” including “avoidance of stress or dissatisfaction with life.” *Id.* at 79. It reported that recent studies show that “appropriate ‘treatment interventions . . . are associated with lower rates of recidivism—some of them very significant”” *id.* at 278 & n.31 (quoting Center of Sex Offender Management, *The Comprehensive Approach to Sex Offender Management 5* (2008)), and that “[p]olygraph testing of sex offenders is widely accepted by experts as a critically

important corollary of effective treatment.” Id. at 282.

The Commission reported that “not all child pornography offenders are pedophiles or engage in other sex offending.” Id. at 104. It reported that approximately one in three offenders sentenced under § 2G2.2 “have engaged in” what the Commission deems “sexually dangerous behavior,” criminal or non-criminal, past or present, based on allegations in PSRs, arrests, and convictions. Id. at ix-x, 204-05. However, “the current guideline measures for offender culpability (e.g., for distribution of child pornography, number of images possessed, possession of sado-masochistic images) are generally not associated with significantly higher rates of [criminal sexually dangerous behavior].” Id. at 204.

The Commission concluded that “[t]he current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders’ collecting behavior and insufficient emphases on offenders’ community involvement and sexual dangerousness.” Id. at xx; see also id. at 321. The Commission asked Congress to enact legislation to provide it authority to amend the guidelines that “were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.” Id. at xviii, 322.

The Commission recommends that the specific offense characteristics related to the types and volume of images, distribution and use of a computer “be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender’s collecting behavior reflecting his culpability (e.g., the extent to which an offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender’s collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender),” and “to reflect offenders’ use of modern computer and Internet technologies.” Id. at xviii-xix, 322-33. Other potential amendments would modify the enhancement for pattern of activity or possibly account for offenders involved in child pornography “communities.” Id. at 323-24.