Department of Justice

Testimony of
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Committee on the Judiciary

Hearing on Sex Crimes and the Internet: Danger is Just a Click Away

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Chairman Conyers, Ranking Member Smith, and other members of the Committee:

Thank you for inviting me to represent the Department of Justice at this important hearing and to describe our current proposals for enhancing our ability to investigate and to prosecute predators who sexually exploit children, especially through the Internet. The Department appreciates Congress's strong support for our efforts. The work that you have done recently, most notably the passage of the Adam Walsh Child Protection and Safety Act, has already made a difference.

The Department has a number of proposals to enhance our current investigative and prosecutorial efforts. Three of these proposals are contained in the Violent Crime and Anti-Terrorism Act that former Attorney General Gonzales transmitted in June. We also have several new proposals to facilitate prosecution of fugitive sex offenders.

Mandatory Minimum for Possession of Child Pornography

First, we urge Congress to establish a mandatory minimum sentence for possession of child pornography. This is crucial because too many people believe that child pornography is "just pictures" and is not "a big deal." That is wrong. Each pornographic image of a child is the visual record of the sexual exploitation of that child. It is not just a picture. Every time that image is viewed, the child is violated once again. Moreover, the demand for such images is what fuels the physical violation of the children in these images in the first place. Possession of child pornography is victimization of a child and should be punished accordingly.

Unfortunately, since the Federal Sentencing Guidelines became advisory under the Supreme Court's decision in *United States v. Booker* the number of downward departures by judges in federal child pornography possession cases has increased. After enactment of the PROTECT Act of 2003, which restricted in various ways the authority of courts to make non-government-sponsored downward departures in sentences, the rate of non-government-sponsored below-range sentences for all offense types was about 5%. *See* United States Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing (March 2006), at p. 54, *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf. Following *Booker*, that rate jumped up to 12.5%. *Id*. at p. 47. For child pornography possession offenses, however, the rate of non-government-sponsored below-range sentences leapt to 26.3%, more than twice the average rate. *Id*. at p. 122. By way of comparison, for drug trafficking and firearms violations, the rate has increased to 12.8% and 15.2%, respectively, much closer to the average. *Id.* at table on page D-5.

The increase in non-government-sponsored, below-range sentences for possession offenses after *Booker* demonstrates the need for a mandatory minimum sentence for possession offenses. Establishing a two-year minimum sentence will be a warning to potential consumers of child pornography, prevent unwarranted downward departures, and forcefully express our revulsion at this type of material. This change is contained in

section 201 of the Department's Violent Crime and Anti-Terrorism Act of 2007 and is included as section 201 of H.R. 3156, the Violent Crime Control Act of 2007.

Strengthening 42 U.S.C. § 13032 to Ensure That Child Pornography is Effectively Reported.

Our second proposal would amend an existing law that requires certain providers of electronic communications services to report violations of the child pornography laws. Currently the law provides that a provider who knowingly and willfully fails to report the presence of child pornography images on its computer servers shall be subject to a criminal fine of up to $50,000 for the initial failure to report and $100,000 for each subsequent failure to report. Prosecutors and law enforcement sources report that this criminal provision has been virtually impossible to enforce because of the particular *mens rea* requirement and the low amount of the potential penalty. These impediments severely hinder the needed crackdown on the presence of child pornography on the Internet.

Our legislation would triple the criminal fines available for knowing and willful failures to report, making the available fines $150,000 for the initial violation and $300,000 for each subsequent violation.

Even more importantly, the legislation would add civil fines for *negligent* failure to report a child pornography offense. The civil penalty is set at $50,000 for the initial violation and $100,000 for each subsequent violation. The Federal Communications Commission would be provided with the authority to levy the civil fines under this section and to promulgate the necessary regulations, in consultation with the Attorney General, for imposing the fines and for providing an appropriate administrative review process.

These proposals would make it much more likely that service providers will exercise sound practices for weeding out child pornography. The images are out there, too often on commercial computer servers, and law enforcement needs to know about them to investigate and to prosecute the sexual predators who consume them. This amendment is contained in section 202 of the Department's Violent Crime and Anti-Terrorism Act of 2007 and in section 202 of H.R. 3156.

Knowingly Accessing Child Pornography.

Our third proposal fills a gap in existing law that has led some courts to overturn convictions of possessors of child pornography.

18 U.S.C. §§ 2252 and 2252A currently criminalize various activities related to child pornography including transportation, trafficking, and possession. Some courts have narrowly interpreted (incorrectly, in our view) the definition of possession so that a person would not have violated the statute if he, for example, viewed images of child pornography on his computer but did not save them onto his disk drive. Even if, in his computer's "temporary Internet cache," we have a record of his viewing the images, and

thus proof that he accessed them on a website, under this narrow interpretation, he would not be guilty of violating the statute if he did not know that his temporary Internet cache automatically saved the images on his computer.

Two recent cases demonstrate the need for these changes. In *United States v. Teal*, No. 1:04-CR-00042-CCB-1 (D. Md., motion to dismiss granted Aug. 13, 2004), the Maryland U.S. Attorney's Office prosecuted Marvin Teal, a former administrative law judge who had prior convictions for sexually abusing children, for possession and attempted possession of child pornography based on his viewing child pornography at a public library in Baltimore, Maryland. Library police officers saw child pornography on the computer Teal was using, arrested him, and printed out the images that could be seen on the computer screen. Because there was no evidence that the defendant had himself downloaded or saved anything, the District Court dismissed the case. We chose not to appeal, given the state of the law and the facts of the case.

In *United States v. Kuchinski*, 469 F.3d 853 (9th Cir. 2006), the Ninth Circuit vacated and remanded the sentence of an offender found with between 15,120 and 19,000 separate images of child pornography on his computer on the basis that he did not know that they were in his Internet cache. The court stated, "There is no question that the child pornography images were found on the computer's hard drive and that Kuchinski possessed the computer itself. Also, there is no doubt that he had accessed the web page that had those images somewhere upon it, whether he actually saw the images or not. What is in question is whether it makes a difference that, as far as this record shows, Kuchinski had no knowledge of the images that were simply in the cache files. It does." Of course we acknowledge the Ninth Circuit's authority to interpret the law this way. However, we think the court's distinction should not make a difference under the law.

Our proposal would correct these anomalies while protecting unsuspecting persons who unintentionally access child pornography from prosecution. Specifically, the bill would amend 18 U.S.C. § 2252(a)(4) and 18 U.S.C. § 2252A(a)(5) to criminalize not only possession of child pornography, but also "knowingly accessing child pornography with the intent to view it." That is, a person would be liable to prosecution if he purposefully clicked on a link with the intent that when the link opened, he would view child pornography. It would therefore be a two-step test that the prosecution would have to satisfy—first, that he purposefully (that is, not accidentally) clicked the link, and, second, he did so with the intent that by clicking on the link child pornography would appear on his computer screen. This test would not be difficult to satisfy in the case of people who really did want to view child pornography. Extrinsic evidence—such as the name of the link, which would probably have terms indicating that it displayed child pornography, and payment for the images—would be used to prove the violation. But in the case of an "innocent viewer" who accidentally came across child pornography, the two-step proof would be his protection. This change was included in Section 203 of DOJ's proposed bill and is now included in Section 4 of H.R. 3148.

Amendments to 18 U.S.C. § 2250

Our final set of proposals relates to 18 U.S.C. § 2250, which was enacted in the Sex Offender Notification and Registration Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006. Section 2250 creates the federal felony offense of failure to register as a sex offender or to update a registration. We understand that similar proposals will be included in legislation currently being developed (or that is expected to be introduced shortly).

First, by the terms of § 2250(a)(2)(B), the law applies to a person who "travels" in interstate or foreign commerce. Since the law was enacted, one federal district court has found that the statute's use of the present tense "travels" means that the law only applies when the interstate or foreign travel occurred after the statute's enactment. In order to clarify that this jurisdictional requirement is satisfied regardless of whether the travel occurred before or after the enactment of § 2250, the statute should be amended to add "or has traveled."

In relation to SORNA's objective of comprehensive registration and tracking of sex offenders on a nationwide basis, and in relation to the federal government's constitutional authority to enforce these registration requirements through federal prosecution in appropriate cases, it makes no difference whether the circumstances supporting federal jurisdiction under § 2250 occurred before or after SORNA's enactment on July 27, 2006. Thus, for example, a sex offender who traveled from one state to another, or entered or left Indian country, prior to the enactment of SORNA, and failed to register as SORNA requires following its enactment, should be subject to liability under § 2250 to the same extent as one whose interstate travel (or entry to or departure from Indian country) occurred after the enactment of SORNA.

As a practical matter, many of the sex offenders who have been apprehended by federal authorities for failing to register engaged in their interstate travel prior to the enactment of SORNA. A typical case might involve a sex offender released in 2002 following incarceration in New York for a rape or child molestation offense, who relocated from New York to Oklahoma in 2004; never registered in Oklahoma; and was apprehended in Oklahoma as a fugitive by federal authorities in 2007. The federal courts that have considered this issue have generally discerned the legislative intent accurately, finding that the occurrence of the travel prior to SORNA's enactment is no bar to liability under § 2250 for the sex offender's continuing failure to register following July 27, 2006. *See*, *e.g.*, *United States v. Madera*, 474 F. Supp. 2d. 1257 (M.D. Fla. 2007); *United States v. Husted*, No. CR-07-105-T, 2007 U.S. Dist. LEXIS 56662 (W.D. Okla. Jun. 29, 2007); and *United States v. Markel*, No. 06-20004, 2007 U.S. Dist. LEXIS 27102 (W.D. Ark. Apr. 11, 2007).

In one case, however, a federal district court has dismissed a prosecution under 18 U.S.C. § 2250 on the ground that the defendant's travel occurred before SORNA's enactment. *United States v. Bobby Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007). While

the dismissal in that case is being appealed, this is not a matter that should be open to litigation, and the fact that one judge has misunderstood the legislative intent in 18 U.S.C. § 2250 raises concerns that others may do so as well.

The amendment will foreclose such errors and problems by changing § 2250(a)(2)(B) to refer explicitly to any sex offender who "travels or has traveled in interstate or foreign commerce," together with conforming changes in the language relating to Indian country. This will help to ensure that sex offenders who have failed to register in conformity with SORNA do not enjoy a windfall immunity to federal criminal liability based on fortuities of timing in their travel among jurisdictions, and will thereby advance SORNA's basic objective of promoting public safety against sex offenders and offenders against children through a comprehensive national system for the registration of those offenders.

This could be accomplished by a simple change in the statute as follows:

Section 2250(a)(2)(B) of title 18, United States Code, is amended –

(1) by inserting "or has traveled" after "travels";

(2) by inserting "or has entered or left, or resided in," before "Indian country"; and

(3) by inserting ", after conviction of the offense by reason of which the person is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act" after "Indian country".

Additionally, the amendment would clarify that § 2250 offenses are continuing offenses as long as an offender's failure to register or update a registration exists. Certain courts have found that § 2250 offenses are not continuing offenses for *ex post facto* purposes. *See*, *e.g.*, *United States v. Sallee*, No. CR-07-152-L, 2007 U.S. Dist. LEXIS 68350 (W.D. Okla. Aug. 13, 2007); and *United States v. Stinson*, Crim. Act. No. 3:07-00055, 2007 U.S. Dist. LEXIS 66429 (S.D.W.V. Sep. 7, 2007). Additionally, a district court has found that a § 2250 offense is not a continuing offense for venue purposes, *United States v. Roberts*, No. 6:07-CR-70031, 2007 U.S. Dist. LEXIS 54646 (W.D. Va. Jul. 27, 2007), while another court in the same district has found that it is. *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007). The amendment will address these various opinions by clarifying that § 2250 offenses are continuing offenses for both purposes.

These two clarifications could be made by the following change to the statute:

Section 2250 of title 18, United States Code, is amended by adding at the end the following subsection:

"(d) Continuing offense. Failure to register or update a registration in violation of subsection (a) is a continuing offense for as long as such failure exists."

Finally, as an enhancement of the current law, we propose amend 18 U.S.C. § 3299, which currently provides that child abduction and felony sex offenses can be prosecuted at any time, without limitation, to cover § 2250 offenses as well. This enhancement could be accomplished with the following legislative language:

> Section 3299 of title 18, United States Code, is amended by inserting "109B," after "chapter 109A,".

Conclusion

Thank you for giving me the opportunity to discuss our proposals, and I am happy to answer your questions about them.