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Before the
UNITED STATES SENTENCING COMMISSION
Public Hearing
Wednesday, February 15, 2012
Federal Judicial Center, Classrooms A-C
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington, DC 20002-8002

The hearing was convened, pursuant to
notice, at 8:22 a.m., before:

JUDGE PATTI B. SARIS, Chairwoman
MR. WILLIAM B. CARR, JR., Vice Chairman
MS. KETANJI BROWN JACKSON, Vice Chairwoman
CHIEF JUDGE RICARDO H. HINOJOSA,
Commissioner
JUDGE BERYL A. HOWELL, Commissioner
MS. DABNEY FRIEDRICH, Commissioner
MR. JONATHAN J. WROBLEWSKI, Ex-Officio
Member of the Commissioner

COURT REPORTER: Jane W. Beach, Ace-Federal Reporters

1 PANELISTS:

2 PANEL I: Presentation: Child Pornography

3 Offender Use of Technology

4 JAMES FOTTRELL

5 Child Exploitation and Obscenity Section

6 Criminal Division, U.S. Department of Justice

7 District of Columbia

8 GERALD R. GRANT

9 Digital Forensics Investigator

10 Office of the Federal Public Defender

11 Western District of New York

12 BRIAN LEVINE, Ph.D.

13 Professor, Department of Computer Science

14 University of Massachusetts, Amherst

15 Amherst, Massachusetts

16 PANEL II: Presentation: Child Pornography

17 Offending — Pathways, Community, Treatment

18 GENE G. ABEL, M.D.

19 Medical Dir., Behavioral Medicine Institute

20 Founder and President, Abel Screening, Inc.

21 Atlanta, Georgia

22

1 PANEL II (Continued):

2 JENNIFER A. McCARTHY, Ph.D.

3 Assistant Dir. & Coordinator

4 Sex Offender Treatment Program

5 N.Y. Ctr for Neuropsychology

6 and Forensic Behavioral Science

7 Brooklyn, New York

8 PANEL III: Presentation: Possible Relationship

9 Between Sexually Dangerous Behavior

10 and Child Pornography

11 MICHAEL C. SETO, Ph.D.

12 Dir. of Forensic Rehab. Research

13 Integrated Forensic Program

14 Royal Ottawa Health Care Group

15 Brockville, Ontario

16 RICHARD WOLLERT, Ph.D.

17 Vancouver, Washington

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1 PANEL IV: Law Enforcement Perspective

2 JANIS WOLAK, Senior Researcher

3 Crimes Against Children Research Center

4 Durham, New Hampshire

5 STEVEN DeBROTA

6 Assistant United States Attorney

7 United States Department of Justice

8 Southern District of Indiana

9 CAPTAIN KIRK MARLOWE

10 Virginia State Police Bureau of Criminal

11 Investigation, High Tech Crimes Division

12 NOVA-DC Internet Crimes Against Children Task Force

13 Richmond, Virginia

14 PANEL V: Victim Perspective

15 MICHELLE COLLINS

16 Director, Exploited Child Unit

17 National Center for Missing and Exploited Children

18 Alexandria, Virginia

19 SHARON COOPER, M.D.

20 Adjunct Professor, Pediatrics

21 University of North Carolina-Chapel Hill Sch. of Med.

22 Fayetteville, North Carolina

23

1 PANEL V (Continued):

2 SUSAN HOWLEY

3 Chair, Victims Advisory Group to the U.S. Sentencing

4 Commission

5 District of Columbia

6 PANEL VI: Policy Perspective from the Courts,

7 the Executive, and the Defense Bar

8 HONORABLE CASEY RODGERS

9 Chief Judge

10 Northern District of Florida

11 FRANCEY HAKES

12 Nat'l Coordinator Child Exploitation

13 Prevention & Interdiction

14 United States Department of Justice

15 District of Columbia

16 DEIRDRE von DORNUM

17 Assistant Federal Defender

18 Federal Defenders of New York

19 Southern & Eastern District of New York

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P R O C E E D I N G S

(8:22 a.m.)

CHAIR SARIS: Good morning, and it is a very early morning. Thank you all for coming.

On behalf of the United States Sentencing Commission I would like to welcome you to today's important hearing on child pornography offenses and the federal sentencing guidelines. We appreciate that all of you took the time to be with us today.

Child pornography offenses are serious crimes that now make up an increasing proportion of the federal caseload, approximately 2 percent in fiscal year 2011.

As detailed in the Commission's 2009 report *The History of the Child Pornography Guidelines*, over the last decade or so Congress has repeatedly expressed its concern in this area by creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses.

And the Commission, on its own initiative, and in response to congressional action, has

1 substantially revised the child pornography
2 guidelines nine times.

3 In recent year, the Commission has
4 received feedback from judges, the Department of
5 Justice, defense attorneys, and organizations such as
6 the National Center for Missing and Exploited
7 Children, a leading advocate for victims of these
8 offenses, all indicating that a review of the
9 penalties for child pornography offenses is
10 appropriate at this time because of the evolving
11 nature of how these offenses are committed.

12 In light of this feedback, the Commission
13 is undertaking a thorough examination of these
14 offenses and the offenders who commit them, including
15 the technological and psychological issues associated
16 with child pornography offenses.

17 The Commission anticipates issuing a
18 comprehensive report later this year. This hearing
19 is part of our information-gathering process for that
20 report, and we will be hearing from leading experts –
21 I have three in front of me – in their fields. I am
22 sure the testimony we hear today will be very helpful

23

1 to the Commission as it works to complete its
2 report.

3 I will also note that we got a letter last
4 night from Congressman Sensenbrenner, Congressman
5 Lamar Smith, and Senator Grassley, which we will be
6 putting into the record. Their input is very
7 welcome.

8 Now I would like to introduce the rest of
9 the commissioners. I am going to start with Mr. Will
10 Carr, to my right, who has served as vice chair of
11 the Commission since December 2008. Previously he
12 served as an assistant United States attorney in the
13 Eastern District of Pennsylvania from 1981 until his
14 retirement in 2004.

15 Ms. Ketanji Jackson, to my left, has
16 served as vice chair of the Commission since February
17 2010. Previously she was a litigator at Morrison &
18 Foerster, LLP; and was an assistant federal public
19 defender in the Appeals Division of the Office of the
20 Federal Public Defender in the District of Columbia.

21 Judge Ricardo Hinojosa served as a chair
22 and subsequently acting chair of the Commission from
23

1 2004 to 2009. He is the chief judge of the United
2 States District Court for the Southern District of
3 Texas, having served on that court since 1983.

4 Judge Beryl Howell has served on the
5 Commission since 2004. She has also been a judge of
6 the United States District Court of the District of
7 Columbia since last year.

8 Dabney Friedrich, way over here, has
9 served on the Commission since December 2006.
10 Previously she served as an associate counsel at the
11 White House, as counsel to Chairman Orrin Hatch of the
12 Senate Judiciary Committee, and assistant U.S.
13 attorney in the Southern District of California, and
14 the Eastern District of Virginia.

15 And way over here to my right is Jonathan
16 Wroblewski, who is an ex-officio member of the
17 Commission, representing the Attorney General of the
18 United States. Currently he serves as director of
19 the Office of Policy and Legislation in the Criminal
20 Division of the Department of Justice.

21 Now at this time I would like to ask if
22 any of my fellow commissioners – I guess fellow and
23

1 "sister" commissioners – have any opening remarks or
2 observations.

3 COMMISSIONER HOWELL: I would like just to
4 add a couple of points to what you said, Chairman
5 Saris. I do think that this hearing is a very
6 important one in the Commission's continuing focus on
7 how to make these advisory guidelines more useful to
8 sentencing judges.

9 I think the Commission has addressed child
10 pornography in comprehensive ways in prior reports.
11 Our last comprehensive report on child pornography
12 was in 1996. So even though we have mentioned and
13 discussed child pornography guidelines as recently as
14 our October 2011 mandatory minimum report, the last
15 time we took a comprehensive look at it was quite
16 some time ago and I think it is really time for an
17 update.

18 You mentioned that we got a letter from
19 senior Members of Congress, and I do think that is
20 important for us to be mindful that the issue of child
21 pornography is highly charged, both emotionally and
22 politically. I think deterring and punishing child
23

1 pornography offenses, and those who exploit children,
2 the most vulnerable parts of our society, is of deep
3 concern to all of us, and it is a high priority for
4 past Congresses, past Administrations, and it has
5 been a high priority for this Commission.

6 In our role of recommending specific
7 penalties for child pornography offenses, the
8 Commission must be guided by the policy judgments of
9 the Congress, as articulated in the penal statutes
10 and the directives to the Commission that are given
11 to us. And I think it is worth mentioning, since a
12 number of our witnesses will talk about, as you
13 mentioned, our history of the child pornography
14 guidelines, it makes clear that Congress has
15 occasionally not liked the direction the Commission
16 has taken with child pornography guidelines, nor
17 thought that we acted in a timely enough fashion.

18 I think specifically in the PROTECT Act
19 that Congress was frustrated that the Commission was
20 not reacting in a timely enough fashion to the
21 departure rate then. And I think, as we will hear
22 later – and I don't think it is any secret for the
23

1 people who are attending this hearing – the below-
2 guidelines rate for child pornography offenses is
3 among the highest.

4 I think it is also notable that the
5 government-sponsored departure rate for child
6 pornography offenses is among the highest, as well,
7 for reasons other than substantial assistance or
8 fast-track programs.

9 So I think this is a very important
10 hearing about what we should do, if anything, about
11 the child pornography guidelines to make them more
12 useful to sentencing judges. And as a new sentencing
13 judge myself, I have to say that there are a number
14 of factors that may go into determining what the
15 appropriate penalty is for a defendant convicted of
16 child pornography who stands before me. And some of
17 those factors are not addressed in the guidelines,
18 such as how long a person has been collecting child
19 pornography, how many of the images standing alone
20 are unique as opposed to duplicates, a number of –
21 whether the person organized them for easy retrieval
22 and review later, or sharing.

23

1 There are a number of different factors
2 that I think judges would find very useful to help
3 prod them in thinking, and help prosecutors and law
4 enforcement know what judges would find interesting
5 as they are doing the investigations.

6 So I do want to say that I appreciate that
7 this is a hearing that talks about the forensics, the
8 digital forensics that go into investigating these
9 kinds of cases, what's possible, what isn't, what are
10 the resources and so on, as well as some of the legal
11 aspects, because all of those issues I think combine
12 in addition to the social science research that can
13 help shed light on what is of deep concern to all of
14 us, which is what risk child pornography possessors
15 pose in terms of contact offenses, either in the past
16 or in the future.

17 So with that, I look forward to hearing
18 from the witnesses.

19 CHAIR SARIS: Thank you. Anybody else?

20 COMMISSIONER WROBLEWSKI: Very briefly,
21 Judge Saris. We are very pleased that the Commission
22 is holding this hearing.

23

1 As you know, and I know as we're going to
2 hear, this crime has really exploded over the last 10
3 or 15 years with the development of the Internet. We
4 at the Department of Justice and in law enforcement
5 have reacted in a variety of ways, including
6 deploying agents and prosecutors, new technologies of
7 our own, to try to address this.

8 We have a new national strategy. We have
9 a new national coordinator to do this. But we also
10 recognize that sentencing policy does need to be
11 reformed; that there are changes that need to be
12 made, and we are pleased that the Commission is
13 taking this up.

14 We have identified it as a priority over
15 the last several years, and the Commission has put
16 together a very, very impressive array of witnesses
17 that we're going to hear from today and we are very
18 much looking forward to it.

19 CHAIR SARIS: Thank you very much,
20 Commissioner. Anybody else?

21 (No response.)

22 CHAIR SARIS: Okay, we are ready. You are
23

1 up at bat. We are going to start - I am going to
2 start by introducing folks.

3 James Fottrell - if I got that right - is
4 the director for the Child Exploitation and Obscenity
5 Section, I guess CEOS? CEOS, in the Criminal
6 Division of the United States Department of Justice.
7 Mr. Fottrell oversees computer forensics specialists
8 within the section's High Technology Investigative
9 Unit. He conducts forensic examinations of seized
10 computer systems and the media, provides
11 investigative and analytical support to prosecutors
12 and law enforcement agents to identify online child
13 pornography and obscenity offenses, and develop
14 strategies for gathering electronic evidence.

15 So in the middle is Gerald Grant, digital
16 forensics investigator for the Western District of
17 New York, Federal Public Defender's Office. He is a
18 professional computer forensics expert and systems
19 analyst with over 30 years of experience involving
20 computer automation forensics and programming. He
21 performs forensic investigations in all electronic
22 evidence involved in federal criminal cases.

23

1 Last but not least, since he is from my
2 home state, is Brian Levine, who is a professor in
3 the Department of Computer Sciences at what we call
4 UMass-Amherst, but others may say University of
5 Massachusetts in Amherst, where he has taught since
6 1999. Dr. Levine's research focuses on mobile
7 networks, privacy, and forensics and the Internet.
8 He serves as a primary investigator on a variety of
9 federally funded projects.

10 Now before we get going, there's a certain
11 protocol here – I know this exists in the First
12 Circuit, I don't know whether it exists in every
13 circuit – the light protocol. So I just wanted to say
14 that the way this is going is there will be a yellow
15 light that will go on when time is running close, and
16 then a red light when the time is up, and then the
17 hook.

18 (Laughter.)

19 CHAIR SARIS: But now quite. We are going
20 to have everyone essentially go through their
21 presentations, and then I am going to ask everybody
22 if they have any questions for you. But knowing, as

23

1 well, that we have an incredibly long day and I have
2 got a lot of panels that I need to get through. In
3 fact, I think we are going from what's it, 8:15 to
4 5:30, and we are trying to make it. There's so much
5 to say about this important topic.

6 So why don't I turn to you, Mr. Fottrell.

7 MR. FOTTRELL: Good morning, Chairwoman
8 Saris, Vice Chairs Carr and Jackson, and the
9 Commissioners:

10 Thank you for this opportunity to be here
11 this morning to talk to you about the Department's
12 efforts in investigating child pornography offenses
13 and the computer forensics associated with that.

14 For the past 20 years I have been involved
15 in computer forensics and the investigation,
16 prosecution of child exploitation offenses. I am
17 familiar with the different technologies that
18 offenders have used to commit their offenses and the
19 evolution of the technologies over the past years.

20 As new technologies emerge, offenders are
21 often among the early adopters of those technologies
22 to further their activities. I have witnessed how

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1 digital evidence has kind of standardized, how there
2 are procedures and policies for how digital evidence
3 is examined and analyzed by forensics practitioners.

4 When digital evidence is seized, one of
5 the first steps undertaken is for software programs
6 to create exact-image copies. The copying process
7 duplicates all of the data on the digital evidence.
8 Techniques such as creating unique hash values are
9 used to ensure that the image copy is accurate and
10 complete and allows the further examination and
11 analysis of the image copy while the original media
12 is safely stored away.

13 Once image copies of the digital media are
14 created, the analysis of this media helps
15 investigators and prosecutors answer some of the
16 critical questions of the offense, including who did
17 it, when did it happen, where did it come from, how
18 did it get here, and what technologies were used to
19 commit the offense. Finding the answers to these
20 questions is like assembling the pieces of a puzzle
21 in order to form a clear picture of the offense
22 conduct.

23

1 The analysis of this digital media can
2 help provide evidence of the charged conduct,
3 including providing critical evidence of the
4 knowledge and intent to collect child pornography.
5 Identifying and extracting images and videos is only
6 the first step in the process. An additional
7 analysis is needed to assist the prosecutors in
8 determining the appropriate criminal charges.

9 An example of how analysis can help the
10 digital investigation and help the prosecutors reach
11 their goals is to examine the patterns of web
12 browsing activity.

13 Using a web browser is probably the most
14 common Internet activity used by almost all computer
15 users, and this activity provides valuable
16 information about who was using the computer.
17 Examples of web browsing activity that can uniquely
18 identify who was using the computer include web-based
19 e-mail, online banking, web activity associated with
20 a particular job interest or hobby.

21 A timeline can be created and unique web
22 browsing activity can be plotted alongside illegal
23

1 activity to help establish who was using the computer
2 during a particular timeframe.

3 Digital media can also include valuable
4 electronic artifacts about when particular images and
5 videos are displayed by the computer user. This is
6 particularly relevant in child exploitation cases
7 where the images and videos themselves are often
8 specifically charged conduct.

9 There are many different ways to show when
10 a computer user actually viewed the images and
11 videos, including the existence of a file commonly
12 known as a Thumbs.db file. A Thumbs.db file is
13 automatically created by the operating system when a
14 user navigates to a folder and displays it in
15 Thumbnail view. The date and time associated with
16 this file is evidence that the computer user viewed
17 the particular file at a particular time.

18 Another example of the kind of information
19 that can be extracted during a computer forensics
20 exam is information contained in the Windows
21 Registry. The Windows Registry is another file
22 automatically created by the Windows Operating System

23

1 that stores valuable information about web browsing
2 activity and specific information about images and
3 videos viewed by the computer user.

4 An example of the information stored in
5 the Windows Registry is the text that a user enters
6 into the address bar of a web browser software. This
7 information is called "Typed URLs" in the Windows
8 Registry. This information is automatically saved
9 and presented to the user if they begin to type the
10 same web address at a later time.

11 In child exploitation investigations, this
12 information from the Windows Registry can contain the
13 names of websites specifically associated with
14 illegal material.

15 Link Files are another example of the type
16 of files that are automatically created by the
17 operating system and are available to a computer
18 forensics examiner. Link Files are automatically
19 created by the operating system when the file is
20 displayed. Computer forensics software programs can
21 quickly identify these Link Files and create detailed
22 reports listing particular images or videos and the

23

1 date that they were displayed.

2 This type of information helps prosecutors
3 establish specific dates of knowingly possessing
4 certain images and videos.

5 In many investigations, the offenders have
6 very large collections of images and videos. With
7 any large collection of files, it is necessary to
8 sort and organize them into particular different
9 folders. The folder names and structure often
10 contain useful insight into exactly the type of
11 images that are most revered.

12 This folder listing is an example of the
13 type of detail used to organize a collection of child
14 pornography. This list includes a folder named
15 "Stuff I Want More Of", and "Self-Mades, High Quality
16 Stuff." These examples help to illustrate the types
17 of information that is typically identified during
18 computer forensics examination and show which images
19 and videos present on a specific computer were
20 accessed and mistakingly viewed. Images in
21 particular folders sorted and organized in this way
22 are not accidentally viewed; they are purposely

23

1 sorted and organized in a particular manner.

2 An important question to address in child
3 exploitation investigations is to identify where the
4 images and videos originated from. Computer
5 forensics can provide answers to these questions.
6 Most computer users are very familiar with using
7 computers and the Internet to access websites and
8 e-mail.

9 While these two technologies are the most
10 popular, there are many other technologies used on
11 the Internet every day. Some of these technologies
12 have been in use for years, or even decades, and
13 other technologies have only been available in the
14 past few years.

15 There are many different ways to classify
16 and organize the types of different technologies used
17 in online activity. One way to organize online
18 activity is by identifying the different
19 socialization aspects of the activity.

20 The first level, in the lower left [of the
21 Power Point] is the individual experience where the
22 offender is acting alone to receive, collect, and

23

1 share material online. As the offender increases
2 their desire for more specific material, they begin
3 to reach out and contact other individuals who share
4 the same interests.

5 As they communicate with other offenders,
6 using such technologies as GigaTribe, instant
7 messaging, newsgroups, and e-mail, they begin to
8 establish a unique online identity and use this
9 online nickname, alias, or some other online
10 identifier to identify themselves online.

11 These contacts with other individuals help
12 them to refine their desire for more specific
13 material, while helping to validate their behavior
14 among like-minded peers.

15 The next progression of behavior is to
16 join an online community, including web-based forums,
17 social networking sites, or Internet-related chat
18 rooms where members congregate simultaneously to
19 provide encouragement and further establish a sense
20 of community.

21 An important component of this level is to
22 make sure that members employ sophisticated

23

1 techniques to evade detection by law enforcement and
2 deploy encryption to thwart the discovery of illegal
3 material.

4 More experienced offenders offer guidance
5 and support to newer members to help teach them
6 different technologies to obtain more exclusive
7 material. And I will go through some examples of
8 these technologies.

9 The singular experience; Offenders
10 operating alone without direct contact with other
11 offenders or victims. In a typical commercial child
12 pornography website, potential members would be able
13 to view a number of preview images and videos as an
14 advertisement to encourage paid membership. A
15 potential member would join by clicking the "join
16 now" link and completing a web-based form, entering a
17 name, e-mail address, credit card or other form of
18 online payment. An e-mail message is sent to the
19 user with a link to the members-only content, and a
20 user name and password to access it.

21 The user would then have access to the
22 exclusive members-only area on the commercial

23

1 website. At this level, members have no direct
2 method to communicate with other offenders or limited
3 ability to communicate with the website
4 administrator.

5 Peer-to-peer software programs such as
6 LimeWire, FrostWire, and others, is usually
7 downloaded from a vendor's website at no cost. Once
8 the software is installed on a computer, the user
9 enters a search term to begin a search for files
10 matching the search term on the Gnutella network. As
11 matches are found on the network, they are displayed
12 to the user. When a user selects a file from the
13 list, the file is begun to be downloaded to the
14 computer.

15 Search terms used by peer-to-peer users
16 can sometimes be very generic, as the word "young,"
17 or they can be very specific, such as a particular
18 series or a particular victim name, a particular
19 website, or a very specific age range of material.

20 When offenders are communicating directly
21 with other like-minded people, they would use a
22 different set of technologies, including e-mail,

23

1 instant messaging, GigaTribe, and Usenet news groups.
2 Many of these technologies have been widely used on
3 the Internet for more than 20 years, and some of
4 them, including GigaTribe, have only become popular
5 in the past five years.

6 Certainly all of these technologies allow
7 individuals to exchange images and videos, but they
8 have the additional capability of providing a conduit
9 for direct communication. This communication allows
10 frank discussion of preference and specific types of
11 material in helping individuals establish their
12 unique identity.

13 The group experience: Group experience
14 involves technologies that are designed for multiple
15 users to meet, communicate, and share information.
16 They include such technologies as web-based forums
17 sometimes known as bulletin boards, social networking
18 sites, and Internet-related chat.

19 A common characteristic of these online
20 groups is that they are exclusive clubs, and they
21 have specific rules and guidelines for membership.
22 This is a sample of rules from a past website forum
23

1 investigation. The administrator of this forum is
2 clearly explaining the type of images and videos
3 wanted: nude and non-nude. What is the age range?
4 Zero to 17. And there are separate sections for both
5 boys and girls.

6 Other rules instruct members on how to
7 configure their web browser to increase security, and
8 how to use a proxy server to mask your actual
9 Internet Protocol address online.

10 As the number of members in an online
11 group grows, it becomes natural to sort and organize
12 themselves into separate hierarchies to distinguish
13 the more experienced and senior members from the
14 newer members. In this example, we can see the
15 different group levels and the number of members in
16 each group. At the lowest level, there are 208
17 regular members. The next category is a "trusted
18 member" and there are 225 of these individuals.
19 "Master VIPs" are next with 92 members. And finally
20 there are three top administrators.

21 These self-reporting groupings help law
22 enforcement investigate and target and focus their
23

1 investigations on the most serious offenders in the
2 group.

3 One of the benefits in joining an
4 exclusive group is the ability to trade material that
5 is exclusive to the group. There are many different
6 types of exclusive content, including particular
7 victims, age ranges, types of sexual conduct,
8 including extremely sadistic material.

9 This example shows the section of a web-
10 based forum that is reserved for super hard core.
11 The rules of the section are quite clear as to what
12 constitutes "super hard core" material: preteens in
13 distress or crying. The last line includes: If the
14 girl looks totally comfortable, she's not in distress
15 and it doesn't belong in this section.

16 In conclusion, offenders use multiple
17 Internet technologies to commit offenses online, and
18 the type of evidence available to investigators and
19 prosecutors varies depending on those technologies.
20 In some cases, all of the evidence of the offense can
21 be found on the offender's computer. But in most
22 cases, there is additional evidence located on

23

1 computer servers on the Internet, separate from the
2 offender's residence. As investigators combine this
3 evidence, they get a more complete picture of the
4 offender's conduct.

5 Thank you, and I will be happy to answer
6 any questions from the commissioners.

7 CHAIR SARIS: Thank you very much.

8 Mr. Grant?

9 MR. GRANT: Thank you. Excuse me while I
10 clear my throat. I also appreciate the Commission
11 for allowing me to speak on behalf of this important
12 topic. As we go through the process of the Internet,
13 as Mr. Fottrell has mentioned, one thing I would like
14 to make sure that everybody is very familiar with is
15 advancements in technology. I think this is a very
16 important area to be aware of as we try to understand
17 how these guidelines and these enhancements apply.

18 As we know as was mentioned, contraband
19 material comes in typically two categories: still
20 pictures and movies. What's happening, though, is
21 we're seeing this transition from the original still
22 picture, which was a physical copy of a picture you
23

1 can hold, to what's now becoming digital – nothing
2 more than ones and zeroes on a computer.

3 That type of convenience, instant access
4 to everything, is where we are seeing the evolution
5 of computers. Technology advances at such a
6 speed – much faster than many of the other
7 technologies around it, are areas of interest.

8 As we can see in this slide, we have gone
9 from standard film that required developing right to
10 digital cameras. As we all know, many people walk
11 around with smartphones in their pocket. They are
12 all capable of taking video, taking pictures quickly,
13 and what's interesting about these is there's no
14 regard for are you going to run out of film? Do we
15 need to get these developed?

16 We are in a world where we have instant
17 gratification and instant access to what we need.
18 Let's take for example somebody who takes a picture
19 of a family member on a roll of film would need to
20 wait until they used the rest of that film to take it
21 to be developed, and then they would find out if
22 those pictures were blurry, if they needed to take
23

1 additional ones.

2 Well along the rules of technology as it
3 advances, just like in any other technology, film
4 also advanced where you can get an instant film
5 developed right in front of your eyes. Polaroid
6 cameras came out. So the technology went from having
7 to wait to develop, to watch this thing developing in
8 your hands and wondering, wow, this technology is
9 phenomenal and where can we go from here.

10 Well now in today's world, we don't have
11 to wait. We also don't need to worry about if we're
12 running out of film. We also don't need to worry
13 about how many pictures we take, because we can
14 instantly take them, delete the ones we want, and we
15 know if they're blurry, we know if we captured the
16 moment that we want.

17 What is also important because of
18 technology is a person can instantly take these
19 pictures and videos and quickly upload them to their
20 social pages, their Twitter accounts, they can tweet
21 about them, they can send them via e-mail to their
22 loved ones.

23

1 Why is this important? Because we need to
2 understand where technology is going. Everything is
3 smaller. Everything is faster. What does that mean?
4 It means that we can get more instantly. We don't
5 have to wait anymore. It's the same for the
6 Internet.

7 What used to take the time to download a
8 single picture in today's world we can download
9 hundreds of pictures in that exact same time. Most
10 people have highspeed Internet in their homes. They
11 are no longer working with modems.

12 In the old days, when child pornography
13 has been around, as we've known, it's been around for
14 awhile. There used to be the film where they would
15 have to develop them either on their own, or use the
16 polaroid types, send them in the post office, and
17 mail them to other people. That's no longer the
18 case. The Internet has changed all that. It has
19 taken away boundaries. It has offered convenience.
20 But what happens is the Internet, when it first
21 started, was slow, according to today's standards.
22 And that wasn't that long ago.

23

1 Modems would connect everybody to the
2 Internet. So therefore to download pictures was a
3 slow, painful process, as well as to upload. Videos
4 were almost nonexistent at this point because they
5 were too long to download.

6 So as the Internet has developed, as we
7 heard from Mr. Fottrell, these different bulletin
8 boards, the chat rooms, all started developing in the
9 background. These were the ways of social
10 interaction with people that allowed them to
11 communicate. Still, you are limited to the speed of
12 the Internet at that time.

13 What this allowed you to do, though, is
14 socially interact with others, exchange ideas,
15 exchange interests. At some point, these programs
16 developed where AOL Instant Messaging, Yahoo, MSN,
17 became standards. People were comfortable with
18 these.

19 The user interface and the easibility
20 became simpler to the average user. That's what is
21 important here. Now they can go into a quick chat
22 room. There were abilities to go one-on-one with
23

1 what's called "private chat," which then also allowed
2 them to exchange files.

3 This exchanging of files within chat rooms
4 though required some type of affirmative action. A
5 person had to say they wanted to send a file. The
6 person had to receive it. They could have refused if
7 they wanted to.

8 Well what does that mean? As I mentioned
9 before, bandwidth of highspeed Internet is hundreds
10 of times faster than what it used to be just a short
11 time ago. That is where you have massive downloads
12 of files and can see hundreds and hundreds of
13 pictures where you otherwise would not see that in
14 past technology. That is just the speed of the
15 Internet. That is the speed of technology. That is
16 the common nature of human beings.

17 We all want faster, quicker, better
18 availability. We need that.

19 As was mentioned before, what were some of
20 the means? E-mail wa a means of sending back and
21 forth child pornography. What happened, though, with
22 e-mails in the earlier days, you were limited to

23

1 size. So videos being sent via e-mail was
2 nonexistent. Typically there were some pictures, or
3 there were some chatting back and forth to find the
4 interests.

5 While that's happening in the background,
6 you have the Internet developing, and all of these
7 search engines became available. What did that
8 allow? They marketed the needs of the person to have
9 instant feedback of what they wanted. They could
10 quickly type in a few keyword searches and find
11 anything you wanted on the Internet.

12 It's an amazing thing. The Internet has
13 brought a lot together. But obviously it has offered
14 other options for our child pornography. What comes
15 with this is Internet Relay Chat, as was mentioned,
16 as well.

17 Internet Relay Chat is kind of the
18 beginning of what we now see as peer-to-peer. The
19 peer-to-peer networking in my experience has been the
20 primary vehicle that we see our child pornography
21 cases today. Internet Relay Chat was a development
22 from the chat rooms, but then started turning into

23

1 what was called the first peer-to-peer file sharing.

2 Originally when you shared files, there
3 had to be some type of communication between two
4 people. They had to accept it. You had to send it.
5 IRC and these others developed the first type of file
6 sharing where a person could go in, if they knew that
7 person's IP address or information, and can look for
8 the files that they had available to share.

9 Now in the older days, it was very
10 cryptic. It wasn't user friendly. If you didn't
11 know the right command to type in, you couldn't get
12 this. That has all changed and the user interfaces
13 are becoming simple.

14 So what happens is, we have our first
15 considered peer-to-peer application. Napster
16 arrives. I'm sure we've heard about Napster. It has
17 now been shut down due to copyright infringements and
18 everything has been closed. Napster became the first
19 peer-to-peer system, but it was based on what's
20 called a centralized system. Meaning that the users
21 had to log in to a centralized server in order to
22 connect.

23

1 Well that mere fact is what allowed things
2 to be shut down. Because it put all of the
3 proprietary hosting on the Napster company's itself
4 and not the user's. So as popularity grows, and it
5 became such an easy to use system, it obviously
6 became a sore eye in the music industry and movie
7 industry.

8 So while that was litigating and being
9 shut down, a new model appears, what's called
10 decentralized peer-to-peer. This is typically what
11 we're seeing today in our cases. What it means is
12 that now machines can connect directly to other
13 machines without a centralized server. There's no
14 need to log in to a specific server in order to get
15 on this network.

16 The person's machine themselves becomes
17 the user, as well as can become the server itself, or
18 what they call the "ultrapeers." We see programs
19 called BearShare, KaZaA, which became extremely
20 popular, and then LimeWire at that point.

21 This was difficult to shut down. Why?
22 Because there is no centralized area. So therefore

23

1 the sharing grew and grew within these types of
2 systems. So therefore popularity happened.

3 But what was with these new systems? They
4 automatically shared your files. Early, initial
5 releases of these programs shared your files without
6 knowledge. It was kind of a protocol that needed to
7 happen.

8 What was eventually gained from this is
9 people would have the option to shut sharing off as
10 the software evolved. But what would be the penalty
11 is, if you shut sharing off your speed would slow
12 down. You would not have access to as many files as
13 needed. So you were actually penalized by not
14 sharing.

15 Well what does that mean? Well, as
16 competition comes together and people realize that
17 you don't have to share, the LimeWires, FrostWire,
18 all of these peer-to-peer softwares, evolved. And
19 what they did is they gave other ways of sharing
20 files. In this case, we can see what the original
21 LimeWire/FrostWire/KaZaA-type folders would have.
22 There are two holding areas: an incomplete area

23

1 where the file was being downloaded and not completed
2 yet, in the process; and a shared area. If a file
3 was in the shared area, it would be shared if the
4 user chose to share that physical file.

5 Well things change, and the newer
6 renditions, the newer versions offered more options
7 to share. They included a new folder. Instead of
8 just the shared and the incomplete, they also
9 introduced a "saved" folder. Kind of misleading to
10 the user, assuming that from now on if a file is
11 downloaded from the "incomplete" it gets moved to the
12 "saved" folder, instead of the "shared" folder.

13 To the user, the "shared" folder is what
14 is being shared; the "saved" is for their own saving.
15 It was kind of misleading, and I'll explain it.

16 As they came across, there were, as you
17 can see, options where you can un-share a shared
18 folder. But there is no option to change the "saved"
19 folder. You had to take an area, or set an area, to
20 save your files. Well these peer-to-peer ones would
21 automatically default. Even though you're not
22 sharing your area for shared folders, you are also

23

1 automatically sharing anything that you've downloaded
2 from the KaZaA, LimeWire network to begin with.
3 Meaning that even if you don't put something in the
4 shared folder, everything you access from the network
5 automatically gets shared back to the network.

6 Well what happens in this point? People
7 started finding ways of shutting off sharing. If you
8 were savvy enough, you can actually go in and modify
9 the program settings outside of the standard user
10 interface to shut this off.

11 Well as technology progresses, so does the
12 peer-to-peer. They introduced yet a third way of
13 sharing files. They started doing what's called
14 "sharing partial files," or "partial sharing of
15 files." This is a technique of what they call
16 "swarming."

17 What that meant is, even if you were able
18 to shut off the "shared" area and the "saved" area,
19 files that you were in the process of downloading
20 would automatically be shared, even if they were not
21 a complete file. So before you even had that file,
22 you were automatically advertising it as being

23

1 shared.

2 It became almost impossible to truly shut
3 off shared files. And this recently became a case in
4 Florida where the FTC was against FrostWire, and
5 there was a case that came about where they forced
6 FrostWire to now disclose to the user very clearly
7 every file that is being shared and who they are
8 sharing it to. So there is no misrepresentation.
9 And that was just, I believe, recently closed, a
10 civil case, in October of 2011.

11 So what does that mean? With all this
12 peer-to-peer and sharing going on, file names became
13 larger. As we talked about before, you start seeing
14 file names with multiple ages in it. In my
15 experience, I see 2-year-old, 3-year-old, 4-year-old,
16 5-year-old, 6-year-old, PTHC, PETO, Lolita, Sex,
17 Porn, Son, Daughter, Mom. That is all one single
18 file. You have no idea what the content of that file
19 is. But they named these files like that so that
20 they show up no matter what search term you put in,
21 and you get a hit from them.

22 What makes it even more scary in this

23

1 case, you put in a term "sex," you can easily get 2-
2 to 300 files coming back that are available with the
3 term "sex" in it. But a lot of these also contain
4 12-year-old, 9-year-old, 2-year-old; they're all
5 intermixed.

6 What even makes it more important is a
7 user can look at this list without even scrolling
8 down to the rest of them, select them all, tell them
9 to download, and walk away. So within a matter of
10 minutes with today's technology, I can start up
11 LimeWire or FrostWire in this case, because LimeWire
12 is done, I can type in the word "sex," grab all my
13 files, go to lunch, come back, and I am almost pretty
14 certain I am going to hit every one of the sentencing
15 enhancements within that short period of time based
16 on highspeed technology, instant availability, and
17 simple keyword searches that don't even indicate what
18 my preference is.

19 That is what it means. Highspeed means
20 more files. Remember, we can download hundreds of
21 files that we couldn't download simply years ago with
22 modems now is available with highspeed.

23

1 It was also mentioned with peer-to-peer.
2 They evolve. GigaTribe, as was mentioned, is a
3 standard peer-to-peer option. It also offers private
4 chat rooms and private tribes, is what they call
5 them, "invite only." We're well aware that this is
6 happening out there.

7 So these types of evolutions with
8 peer-to-peer type software is in the works, and we're
9 starting to see those in some of our current cases.

10 So with all of those cases, what else is
11 on this computer? We see a lot of stuff happening in
12 this world of the Internet about identity theft.
13 Cyber crime is out of control. Viruses are being
14 developed at an extreme rate that's just amazing.
15 You can't simply go on the Internet without some type
16 of anti-virus without getting caught up with some
17 type of hacking within a short period of time.

18 There's a lot of identity protection tools
19 out there that are in common use: anonymizers, the
20 web browser filtering, what they call in-private
21 filtering. These tools are being built into standard
22 operating systems today – encryption, for a fact.

23

1 Windows now comes with its own built-in
2 bit-locker encryption. What would be considered a
3 higher-level technological advancement with
4 encryption and anonymizers is now in this day and
5 age a simple click away – within a few mouse clicks
6 and entries, you can encrypt an entire hard drive.
7 You can anonymize your web surfing. And it is even
8 being built into the standard browsers: Internet
9 Explorer, Firefox, they're all inclusive in handling
10 what's called in-private browsing.

11 Why? To protect your identity. You go to
12 a hotel. You don't have your laptop with you. You
13 go to their public kiosk and, you know, your credit
14 card has been denied, so you want to go look at your
15 bank account. Well if you do that and do not secure
16 or give some type of anonymization of this file, your
17 information is now on that machine and it could be
18 picked up by a hacker.

19 These programs are simply designed to
20 protect your identity. There's a lot of surfing
21 that's going on on the Internet purchasing. The same
22 thing with all these devices. We all run around with
23

1 now thumb drives. We have backup devices. We have
2 these smartphones. Standard – or encryption is being
3 built into these things. So you cannot even use
4 these devices without setting up a password, without
5 encrypting something. The Droid comes automatically
6 encrypted. Backup drives do the same thing.

7 It's becoming a standard. So this
8 technology is no longer advanced; it's just simply
9 available. And most of it is free on the Internet,
10 like anything else. What we're doing is just
11 stopping cyber criminals.

12 The same thing with wiping utilities and
13 cleaning utilities. They are all over. They're
14 free. There's websites that market this. What do
15 they do? Cleaning utilities clean up your machine.
16 They make them run faster. It's a proven fact that
17 if you use your machine over time it will slow down.
18 You will get temporary files scattered everywhere.

19 The fact that a cleaning software is on a
20 machine isn't of direct relevance to a crime. It's
21 the fact that they want to keep their machine clean.
22 Even though specific wiping utilities that take these
23

1 files and overwrite them still leave audit trails all
2 over. So through forensics it can easily be
3 recovered. We can see that activity. We may be able
4 to wipe a file, but we can't wipe the audit trail.

5 Even the DoD has created their own policy
6 in regard to this that says we do not let any devices
7 out the door unless a full forensics wipe is
8 processed.

9 New technology also comes into play.
10 These devices auto-clean themselves. They are
11 actually wiping unallocated space by themselves in
12 order to keep themselves running more smoothly and
13 faster.

14 Now we mentioned about forensics analysis.
15 Adam Walsh has made it extremely difficult for the
16 defense. Even though we can get access to the
17 analysis, we don't have the availability in our
18 offices to do a full forensics examination. It
19 requires time, access, cost. We need to bring our
20 own equipment over, or we're limited because we would
21 need to leave our equipment.

22 Therefore, we're in more speed, more

23

1 content, instant availability, standard options. I
2 thank you for your time and appreciate that.

3 CHAIR SARIS: Thank you very much.
4 Professor?

5 MR. LEVINE: Thank you. Judge Saris,
6 members of the Commission, it is my pleasure to be
7 able to speak at this hearing today and I thank the
8 Commission for its time and the opportunity to speak.

9 My experience in education and work as a
10 computer science professor at the University of
11 Massachusetts-Amherst involves computer networking,
12 digital forensics – especially in the context of
13 online investigations of crimes against children.

14 For many years before my interest in
15 digital forensics, I had been studying the Internet
16 and peer-to-peer networks. I work regularly with law
17 enforcement and my research group is responsible for
18 a suite of forensics tools used nationwide and
19 internationally. My testimony today is informed by
20 this experience.

21 I want to address one main question during
22 the time that has been allotted to me today: How can
23

1 Congress, sentencing judges, and federal sentencing
2 guidelines appropriately distinguish between less and
3 more serious offenders?

4 And though I am going to answer only from
5 my view of technology, I hope the Commission will
6 place my statements in the context of other witnesses
7 today that will speak from other points of view.

8 Offenders who engage more seriously in
9 child pornography file possession and in distribution
10 can be distinguished from less-serious offenders in
11 part by their online actions and the technology they
12 use to access and share images of child exploitation
13 on the Internet.

14 I see three critical modern aspects of
15 this crime, its offenders and the technology that
16 supports it, that are not generally considered now.

17 First, the value that offenders contribute
18 to the online community that they leverage to acquire
19 and share files containing images.

20 Second, the nonpecuniary benefits that
21 they receive from these communities by participating.

22 And third, the masking mechanisms they may
23

1 employ intentionally to evade investigation.

2 From my view, CP offenders are members of
3 online communities that are supported by various
4 mechanisms that we have just heard about, including
5 peer-to-peer file sharing networks, websites, web
6 services, and chat rooms, among others.

7 And I am using this word "community"
8 broadly. Some communities are comprised only of
9 users that never communicate and act just to trade
10 data. At the other end of the spectrum there are
11 groups that trade and have much more detailed social
12 relationships.

13 So my testimony today is based upon the
14 common properties that these venues and software
15 networks have, rather than particular properties, as
16 I want to speak about properties that I expect will
17 exist beyond any particular network or piece of
18 software that's available today.

19 So let me go through all three very
20 briefly.

21 First, offenders can be distinguished by
22 the value that they contribute to the communities

23

1 from which they have acquired this content. Now the
2 value of a community, any community online, is
3 dependent on what each member contributes. And any
4 successful service on the web is valuable, meaning
5 that it is used, and it is thriving, and growing in
6 part due to its content and in part due to its
7 availability and the ability of that network to meet
8 the demand for that content.

9 For example, in peer-to-peer networks
10 there is no central coordinator. And the value is
11 strictly based upon the contributions of the peers
12 that join. Many peer-to-peer networks exist, as
13 we've heard, including Gnutella, BitTorrent, Ares,
14 GigaTribe, and so on, and largely they are used for
15 other types of content, not CP. But they are
16 certainly used by CP offenders.

17 So what do I mean by "value"? Well more
18 specifically the value of these communities can be
19 determined by a few factors. First of all, the
20 number of peers involved. Secondly, the amount of
21 content that the peers share. The amount of time
22 that the peers devote to the community. And the

23

1 resources – in other words, bandwidth in this case –
2 that the peers contribute to meet demands for that
3 content.

4 Users that have contributed a great deal
5 of value to a community in these terms are more
6 serious offenders, or can be viewed as more serious
7 offenders. Counting the number of files shared by an
8 offender is necessary, but not sufficient here. So
9 to give some concrete examples:

10 Let's say we have a User A that shares 900
11 files – in other words, images of CP on the
12 network – and he does this for a single day, but
13 provides during that time a window of opportunity for
14 others to copy and further distribute the content
15 while he is then offline.

16 He adds value by increasing the set of
17 available files on the network as some in that
18 collection are likely to be unique to his collection.
19 And larger collections tend to have more unique files
20 in them, generally.

21 Now let's take for example User B who
22 shares just nine files but does it for 100 days. The

23

1 number of files is low, but the window of opportunity
2 is quite long, and the value that this user adds to
3 the network is to make it easier for others to get
4 content, no matter what time of day it is, during
5 that long period.

6 Now finally, User C shares the same nine
7 files as the second case, but is online only for a
8 short period of time. Now there is still value added
9 here due to the way that the Internet is actually
10 generally deployed. People that have residential
11 Internet service tend to have a great deal of
12 bandwidth for downloading, but a fraction of that
13 rate for uploading.

14 So in order for some User D to leverage
15 his entire download rate, he needs to get the file
16 not just from User B but from User C as well. And in
17 fact, the more portions of the file he can get in
18 parallel from many different users, the greater the
19 download rate and the greater benefit that he'll have
20 from that network.

21 So to summarize, it's not just the number
22 of files shared that matters, it's also the time and

23

1 resources devoted as well. And of course legal
2 aspects such as intent must also be considered.

3 Now second, offenders can be distinguished
4 in terms of the nonpecuniary benefits they receive
5 from these communities. In some venues, offenders,
6 as we have heard, will receive benefits and
7 incentives for their participation. Offenders that
8 take advantage of these benefits can be considered
9 more serious offenders.

10 So in some cases these benefits are
11 related to improved network performance. So for
12 example in some networks one offender might mark
13 another as a "friend" and in doing so will receive a
14 higher download rate. Once the download rates
15 increase between offenders on the same network, the
16 value increases for everybody because the ability to
17 get content is met more easily.

18 In other, more serious cases, the benefits
19 can include training and encouragement that may lead
20 from just simple file trading to contact offenses,
21 although I have less experience in this aspect of
22 things.

23

1 The third category by which offenders can
2 be distinguished is an intent to evade investigation
3 by masking their network information. The network
4 details such as IP addresses of the user's computer
5 that will form the basis of an online criminal
6 investigation. And it is important that
7 investigators are able to continue these
8 investigations because proactive investigation of
9 online networks is one of the best ways – or I should
10 say, is one of the best proactive ways to find
11 offenders that are trading these files, and in some
12 cases find contact offenders.

13 Offenders that intentionally use
14 mechanisms to mask network addresses and other
15 information as part of these crimes should be viewed,
16 or can be viewed as significantly more serious
17 offenders. Masked offenders can participate fully in
18 open communities, making content available
19 internationally, yet stonewalling justice and
20 thwarting investigators' abilities to put a stop to
21 these communities and rescue exploited children in
22 some cases.

23

1 Masking is different than encryption. It
2 is not an obfuscation of data; it is an obfuscation
3 of a network address. Now there are many ways of
4 mask your IP address, including simple proxies.
5 There are more complicated examples such as VPN
6 services that are available worldwide. The most
7 complicated or multi-proxy networks such as Tour.
8 And these systems have been designed for many other
9 legitimate reasons. VPNs are critical to businesses
10 across the world, for example.

11 Just because a user is behind a mechanism
12 that masks their network address doesn't mean they
13 are doing anything illegal, that's for sure.
14 However, those that are engaged in CP trafficking or
15 trade and then intentionally mask their IP address
16 can be viewed as more serious offenders.

17 Does the masking cause more harm directly?
18 No. But similarly, a bank robber that wears a mask
19 can receive a sentencing enhancement.

20 So this concludes my testimony. I thank
21 you for your time. These views are based upon by
22 training and experience working alongside law

23

1 enforcement for many years. And the three areas that
2 I've described, considered alongside other testimony
3 that's presented today, are a good basis for
4 distinguishing more serious CP traders from less
5 serious offenders.

6 Thank you.

7 CHAIR SARIS: Thank you. Questions?

8 COMMISSIONER HOWELL: One of the questions
9 that I have is how much are guidelines, which are
10 intended to guide judges in determining an
11 appropriate sentence, also guide the forensic
12 investigations that are done by law enforcement? You
13 know, I have seen a number of child pornography cases
14 where the number of images are provided for
15 sentencing, the type of images are provided for
16 sentencing, tracking what are child pornography
17 guideline enhancements called for.

18 A number of other questions that a
19 sentencing judge might have are not necessarily
20 immediately provided. So I have certainly gotten the
21 impression that the forensics performed by these
22 federal law enforcement in support of federal
23

1 prosecutions are really totally focused on our
2 guidelines.

3 Is that a correct impression?

4 MR. FOTTRELL: Certainly that is a factor.
5 With computer forensics resources, the number of
6 computer forensics examiners is limited. We don't
7 have an infinite supply of forensics examiners. And
8 if they are doing investigations, they are going to
9 meet the needs of the prosecutor and meet the needs
10 of the investigation. Sometimes that is based on
11 sentencing enhancements. So what is the value of
12 doing more work than the sentencing enhancements
13 provide for? There is no benefit in doing that.

14 I think what some of the sentencing
15 enhancements can change is, it's not just the content
16 of the images, it's the conduct of the offender. I
17 think all of the panelists have mentioned that. It's
18 like conduct is important: the length of time the
19 person has been engaged in the activity; the types
20 and techniques that they're using to hide their
21 identity. They are known more by their conduct, not
22 the contents of the file that they possess. So

23

1 sometimes sentencing enhancements can reflect more of
2 their overall conduct and less then specifically the
3 content that they possess. That might help those
4 issues.

5 COMMISSIONER HOWELL: Right. And I think
6 that the guidelines are a little bit - are more
7 focused on the number of images, what the type,
8 content of the image is, as opposed to - I really
9 liked this phrase, "the socialization factors" that
10 are things that, you know, that the forensics are
11 certainly intrinsically capable of providing some
12 information about.

13 MR. FOTTRELL: Yes.

14 COMMISSIONER HOWELL: And so in terms of
15 the burdens, given limited resources, for example is
16 it a burdensome issue, or a fairly trivial task to
17 add to law enforcement's burden to answer questions
18 like the number of unique images, as opposed to the
19 total number of images? And how burdensome is it
20 also to give the number of times that files were
21 actually viewed, as opposed to just saved?

22 And my third question is: How burdensome

23

1 is it for law enforcement to be able to provide
2 information about the length of time, based on a
3 digital forensic analysis, a particular defendant has
4 been collecting child pornography?

5 Are those fairly – in other words, are
6 those fairly trivial questions to answer in a digital
7 forensics examination? Or are those highly
8 burdensome?

9 MR. FOTTRELL: I think the answer to all
10 three of those questions relies heavily on training.
11 It's the training associated with the investigator,
12 the training associated with the forensics people.
13 The difficulty in training in the past is some of the
14 technologies are very rapid. As these technologies
15 emerge, it takes time for the forensics to evolve so
16 that we know how to extract the relevant information.

17 It takes time to convey that information
18 to the prosecutors, and to the judges, and then to
19 the trials. So there is certainly a training aspect
20 associated with it.

21 I think what is nontrivial is the fact
22 that, as we are moving to larger and larger
23

1 collections of child pornography, burdening the
2 computer forensic examiner to just say these are all
3 child pornography images, in 1996 where a large
4 collection of child pornography might have been
5 300,000 images, it's very feasible for a forensics
6 examiner and a prosecutor to go through them in a
7 reasonable amount of time. In 2012, 3.5, 4.5 million
8 images on a defendant's computer is more common, in
9 my investigations.

10 It would be difficult for me to go through
11 in every case 3.5 million images and to categorize
12 them and to sort them into specific detail. So there
13 has to be a balance -

14 COMMISSIONER HOWELL: Well you never
15 look - you mean, don't you run hash-value sets to
16 identify the known images of child pornography first?

17 MR. FOTTRELL: Sure.

18 COMMISSIONER HOWELL: So you don't
19 actually look at three million images?

20 MR. FOTTRELL: You're right, it's not
21 feasible for me to look at 3,000 images - or three million
22 images. But there is an important reason to do that.

23

1 So we work closely with the National Center for
2 Missing and Exploited Children. Somebody needs to
3 look at those images. Somebody needs to find new
4 victims, new abuse, new things that have not been
5 before seen.

6 So it might not be my responsibility to
7 help the prosecutor in doing that, but certainly
8 those images need to be looked at and new victims
9 identified, new abuse – there is value in looking at
10 all of those images. And there's cost and training
11 associated with doing, and burdens associated with
12 doing that.

13 CHAIR SARIS: Did you have –

14 COMMISSIONER HOWELL: Do you have anything
15 to add to that about how burdensome – how trivial or
16 nontrivial a task it would be to answer those three
17 basic questions?

18 MR. GRANT: Certainly. I will give the
19 defense perspective here, because I have performed
20 well over 150 of these cases, multiple devices. The
21 audit trail and the intent, in my opinion, is doable.
22 I think it falls more towards the trivial than it

23

1 does the complex area.

2 It doesn't involve looking at each
3 individual picture, but more or less looking at
4 patterns. You can quickly, by having an entire
5 forensics examination, sort items by date. You can
6 look at specific areas that are well known to
7 forensics examiners that show the audit trail of what
8 the person was looking at, in what order they looked
9 at them, where they moved them, did they create a
10 folder. If they did, what date, what time.

11 The other factors coming into play,
12 especially when we're looking at large amounts of
13 these, I think the largest we came across in Western
14 New York was about a half a million images that was
15 our largest, most of them hover around the 8- 9,000
16 mark. But even with those numbers, what happens is
17 we start looking at dates. And if all of these
18 create-dates of these files are within seconds of
19 each other, that is an instant indication that the
20 person mass-downloaded them.

21 So they didn't just select a specific type
22 of picture. If they are all within a certain

23

1 timeframe, seconds, we can easily deduct forensically
2 that they were all grabbed and stated to download at
3 the same time. Because peer-to-peer software works
4 when a person says to download the file, it
5 immediately builds an empty shell that represents
6 what the file would look like when it starts the
7 download. It gets the create-date from that time.

8 So the create-date alone lets us know when
9 the person started the download. And if you see
10 patterns, it is pretty quick to see what they're
11 doing.

12 You can also look and find out if a person
13 is previewing the software, or the image or video,
14 before it is completed. It will actually add another
15 suffix, or prefix to the file name. You'll see
16 "preview-." So you can look at these pretty quickly
17 in peer-to-peer cases, at least, that you can deduct
18 whether they did massive downloads, whether they
19 looked at them. You can look at the Windows Registry
20 and see when they did.

21 The other important factor is create-date,
22 modify, and accessed. Quickly looking at the access-

23

1 date, you can tell if a file – if they all have the
2 same access date, then they're not individually
3 looking at these. They are downloading them. They
4 may be moved to a "saved" folder, but that could be a
5 factor of the software.

6 But without the other audit trails that
7 you can quickly find, I think it would be more
8 trivial to be able to look at patterns and see what
9 people are doing. And I do this on a regular basis
10 in the cases that I do. So that's my perspective in
11 this.

12 MR. LEVINE: I just wanted to add that
13 everything you are saying is very much from the
14 perspective of the actions that the user took to view
15 what they do at their computer. But they are still
16 on a peer-to-peer network. And when they mass
17 download that, there's also – I think there are a lot
18 of other contexts that go along with what you're
19 saying. So did they mass download from a search that
20 was for, you know, 1YO, right? Was that the mass
21 download –

22 CHAIR SARIS: For what?

23

1 MR. LEVINE: One-Y-O, one-year-old.

2 Once they have those files, maybe they
3 looked at them, maybe they didn't, but if they left
4 their computer on for a very long period of time they
5 perhaps have an intent to contribute to keep the
6 peer-to-peer network alive. So I think there's a lot
7 of levels of intent, and there's a lot of actions
8 going on here that all have to be evaluated the way
9 that you're saying.

10 CHAIR SARIS: Commissioner Jackson.

11 VICE CHAIR JACKSON: Yes. I wanted to ask
12 about the means by which we can distinguish more or
13 less serious offenders. I know that all of you have
14 sort of touched on that.

15 Mr. Fottrell, you talked about going from
16 singular, to one-to-one, to the group experience.
17 And I am just wondering whether there is sort of an
18 inevitable and natural progression from one stage to
19 the other such that you could say that the least
20 serious offenders are in the singular-experience
21 stage? And I guess my thought is, in looking at some
22 of the testimony that other people will have later in
23

1 the day, I was surprised at some testimony with
2 respect to the motivations of offenders, and that
3 there are people who get involved with this kind of
4 activity who may not be pedophiles who may not be
5 necessarily interested really in the child
6 pornography but have other motivations with respect
7 to the use of the technology and the being in the
8 group and, you know, there are lots of reasons
9 perhaps why people might engage in this.

10 And so I'm wondering whether you could say
11 that there is a - that there could be a less-serious
12 child pornography offender who is engaging in the
13 type of conduct in the group experience level because
14 their motivation is the challenge, or to use the
15 technology? They're very sophisticated
16 technologically, but they aren't necessarily that
17 interested in the child pornography piece of it?

18 MR. FOTTRELL: I think it's difficult to
19 say that the singular-experience are not dangerous.
20 There are certainly examples of that. If somebody is
21 using a peer-to-peer network and they are searching
22 for "one-year old", or they're searching for a very
23

1 sadistic content, that would certainly make them
2 serious.

3 So I think it comes back to their conduct
4 is certainly an indication of their seriousness. I
5 think the progressions that you are seeing from a
6 singular experience to one-on-one, to a group
7 activity shows or demonstrates the length of time an
8 offender is using technologies. And I think the
9 progression is, they may start off with one
10 technology but then as they develop and gain
11 experience they are going to use multiple
12 technologies.

13 Just like I started out riding a bicycle,
14 then I learned to drive a car, I take the train to
15 work, so I am using multiple technologies to commute,
16 just as offenders are going to be using multiple
17 technologies to commit their offenses. And as you
18 are growing and learning new technologies, there are
19 benefits of learning those technologies. You're
20 communicating with other people. You're learning
21 about security and encryption issues. You're
22 learning to hide your identity. And you're refining

23

1 your interests. You're finding other people that
2 have a similar interest in the same kind of material
3 that you have, and you're validating each other's
4 behavior, and you're working as a team. So you're
5 not a single – you're not a soldier of one anymore,
6 now you're part of a group. You're part of a tribe
7 of people that are working towards a – so as you're
8 gaining that socialization aspect, you are a more
9 serious offender.

10 VICE CHAIR JACKSON: Does anybody who is
11 new in the child pornography community come in at the
12 socialization level, is what I'm asking. So someone
13 who really is – you're suggesting that the neophytes
14 start in the singular, you know, and then they work
15 their way up.

16 And I just want to know, could there be
17 someone, for example, who has a lot of experience
18 with Napster and peer-to-peer, and in the music
19 context, or in something that has nothing to do with
20 child pornography, and they come into the whole child
21 pornography world already at the group experience
22 level?

23

1 MR. FOTTRELL: I have not seen that. I
2 think it's a great question. I have not seen that.
3 What I think I have seen, though, is there are some
4 very sophisticated offenders.

5 For example, in one of my previous
6 investigations this person was like their chief
7 technical officer. He was basically the leader. He
8 was the smart guy in the group. He would teach
9 everybody about how to use encryption. He would
10 teach everybody how to hide their identity, how to
11 use proxies to hide their identity.

12 He was clearly interested in child
13 pornography, but his interest – the types of images
14 that he liked and he preferred were not very
15 explicit, were not extremely young. He was
16 interested in, you know, post-pubescent girls.
17 Whereas, other people in the group that he was
18 helping, sections of those groups were focused on
19 prepubescent victims, infants and toddlers; some of
20 the other people in that group were focused on
21 sadomachistic content.

22 His interests were more generic, but he
23

1 was part of that larger group, providing assistance to
2 the entire group. Even though that's not what – even
3 though he didn't care about those specific interests,
4 he was helping the group that did.

5 All of the people that are in this group
6 experience, their entry into this thing is their
7 common desire to trade child pornography, their
8 common interest in child pornography. That's the
9 starting point to enter into these clubs.

10 CHAIR SARIS: Does anyone else have a
11 response?

12 MR. GRANT: In my opinion, I'm not seeing
13 that clarity on that. I mean, with today's
14 technology and groups being only a click away,
15 peer-to-peer being a click download and easy search
16 terms, what we're seeing is somebody that clicks on a
17 keyword, and in a lot of cases starts out with
18 music – and I've seen patterns in some of my
19 examinations where you can clearly see that years ago
20 they started downloading music, and then it graduates
21 to pornography, and then adult pornography, and then
22 intermixed with child pornography.

23

1 I don't feel that with today's technology
2 that you are required to be at a certain level to get
3 into any of these groups. I think you can quickly
4 join them. Obviously there's private groups that
5 require a certain level, as was mentioned here,
6 before you can get in, a certain type of picture; but
7 as far as a neophyte getting into a peer-to-peer and
8 quickly downloading thousands of images, I can't see
9 where that would put them in a different category
10 than anybody else. They just happen to have that
11 technology at their fingertips today because it's
12 available.

13 CHAIR SARIS: Dabney, did you -

14 COMMISSIONER FRIEDRICH: No, thank you.

15 CHAIR SARIS: Vice Chairman Carr.

16 VICE CHAIRMAN CARR: I think Commissioner
17 Jackson's question underscores something we have to
18 struggle with, which is victimization at both ends.
19 If I am a pedophile and I am downloading these images
20 and it's going to make me a worse person who is going
21 to go out and victimize children, that's one thing;
22 as opposed to just being someone who is obsessive and

23

1 compulsive and likes to collect things and sort them.

2 If my activity in having and creating a
3 demand for these things causes bad things to happen
4 at the production and supply end, then it doesn't
5 really matter what I'm doing with these things or not
6 doing with them. That damage is still occurring at
7 the other end.

8 And it is something that we have to
9 struggle with in deciding what the policy issues
10 should be with the guidelines, because as everyone in
11 this room knows, this is one of the most difficult
12 and controversial guidelines we deal with. Because
13 at one extreme, how harshly should someone be
14 punished who just sits in his basement and looks at
15 images, and there are people who say that guy is not
16 really a very bad person who deserves a lot of
17 punishment. And there are others who say, but what
18 he is contributing to or causing at the other end is
19 creating a lot of harm no matter how bad a person
20 that guy is outside of his basement.

21 CHAIR SARIS: Would you like to all
22 comment on that?

23

1 MR. LEVINE: I would like to speak to
2 that. So I would add to your comments about, like
3 you said, at one spectrum there is someone who is
4 just looking at images. And then there is a question
5 of what demand are they creating and what supply does
6 that generate.

7 I would say in the middle are people that
8 are just looking at images, but are running a web
9 server for instance that collects these images for
10 others to download.

11 Now if you're running a peer-to-peer
12 client, what it means to be a peer is you are both
13 client and server. And so if you amass a collection,
14 a substantial collection of images and you're just
15 looking at them but you leave that software up, you
16 are, I would say, as culpable as any web provider, as
17 any web server, to do the same. So I think there's
18 perhaps someone in between the spectrum that you
19 gave.

20 VICE CHAIRMAN CARR: And I think part of
21 your point, Mr. Grant, was that some people cause a
22 lot of sharing to go on even though they're not

23

1 interested in doing that, because things are being
2 shared while they're just downloading them without an
3 intent or desire to share them, but the nature of the
4 technology is that it is being shared?

5 MR. GRANT: Exactly, sir. And that would
6 still be my point at this question as well.

7 VICE CHAIR JACKSON: So, Mr. Grant, how
8 would you go about distinguishing? I mean, I got
9 from your testimony that, you know, technology
10 changes things like speed and content and encryption
11 and cleaning that are not going to be distinguishing
12 factors anymore because of the nature of technology.
13 So in your experience, who are the more serious child
14 porn offenders? What factors do you look at to say
15 this person is really serious, as opposed to perhaps
16 someone else?

17 MR. GRANT: Well one, because it's a
18 policy procedure I'd hate to defer that, but I would
19 like to defer that question to this afternoon, as
20 well, so that it could be handled a little bit
21 better.

22 I can speak at least with my experience
23

1 that I don't see in my examinations over years with
2 the Federal Defenders that there is one set that
3 immediately puts a person outside. Most of our cases
4 have been involved with somebody who is just
5 unknowing sharing. I mean, that's what these cases
6 come in. There's hundreds of files, or there's
7 absolutely no evidence that they even tried to delete
8 these things. And that's the case more than not,
9 that they're not hiding.

10 Occasionally we see where they move from a
11 machine to a portable device. Many times that's just
12 a factor that the portable device is a backup system.
13 So everything gets backed up to the portable device,
14 which brings into the factor are there duplicates?
15 Are thumbnails being counted? All of that.

16 So I am not in my experience over the
17 years seeing any distinct area that's going to put
18 that person to the next level. I just don't see
19 that.

20 VICE CHAIR JACKSON: Even the half-a-
21 million images guy?

22 MR. GRANT: The half-a-million images?

23

1 Actually, the half-a-million images wasn't even
2 peer-to-peer, it was websites. So it was just simple
3 keyword searches and downloading. I mean, it's
4 amazing. What happens is, the Internet has
5 eliminated boundaries. And what happens is,
6 regardless of what the laws are, web searches can
7 take you over to the Netherlands, it can take you
8 into countries that have these websites that offer
9 this information. And you can grab this and download
10 things quickly because of the speed.

11 So regardless of size, the half-a-million
12 images didn't turn out to be the intent of the
13 person. It just happened to be the technology, and
14 he had an extremely highspeed machine and was
15 downloading lots of files through web browsing
16 keyword searches.

17 COMMISSIONER WROBLEWSKI: And how do you
18 come to the conclusion that it wasn't his intent? If
19 he deliberately typed in the keyword, he deliberately
20 said "download" it, I'm not saying he said to
21 download 500,000, but he -- so explain to me. Because
22 what it seems like you're suggesting is that you're
23

1 trying to minimize, no matter what anybody does on
2 the Internet, it always tends to be a mistake, an
3 accident, the masking has another reason for it, the
4 communities have another reason for it. Explain to
5 me how it's not intent to be typing certain words
6 into certain parts of the search engine?

7 MR. GRANT: Well I apologize if it came
8 off that way. It wasn't that it wasn't intent in
9 regard to receiving, or finding, or looking for.
10 Because obviously keyword searches are important.

11 The fact was the saving. There was no
12 archiving downloading. There wasn't any moving.
13 There wasn't any sorting. There wasn't any of the
14 other factors that come into play in regard to
15 knowingly having these or collecting. It was just a
16 matter of a ongoing Internet search download look.

17 There was even cases where people were not
18 even aware that when you look at a picture on the
19 Internet that it's actually being saved to your
20 computer. So we've actually had to go through and
21 educate, as well, that just because it's on the
22 Internet it is also on your computer. And in some

23

1 cases, even when it wasn't shown.

2 Because if you bring up a webpage, which
3 is important, and it has a picture at the top, but it
4 has 20 pictures below that webpage and you haven't
5 scrolled to see those other 20 pictures, they still
6 are on your computer. There's no forensics evidence
7 that shows you scrolled through that webpage to look
8 at those other pictures unless you affirmatively
9 click on them.

10 So you can have evidence of hundreds and
11 hundreds of thousands of pictures, but there's no
12 forensics evidence that shows that the person knew of
13 all of those pictures through other forensics means.

14 CHAIR SARIS: You're saying they're
15 automatically saved?

16 MR. GRANT: Automatically. If you load a
17 webpage and let it completely load with hundreds of
18 pictures, thumbnails and all of that, but don't
19 scroll because it's a very long webpage, you yourself
20 have not viewed it but the computer is saving all of
21 those images, and it's in the Internet cache. That's
22 a difficult thing to grasp because how do you

23

1 determine whether the person intended to have that or
2 not?

3 And what happens is, you look for other
4 factors, in my opinion. And that's kind of where, if
5 you see something, you have to take the initiative to
6 investigate further and not just assume.

7 So if I see a lot of images on a webpage,
8 what I look for is: Is there any evidence that the
9 person scrolled to a specific picture and clicked on
10 it? Because if they did that action, it would then
11 create another Internet history record that you can
12 clearly see that he did scroll, he went to the
13 bottom, and he went onto that picture.

14 So there is evidence. There's other
15 factors, what we call forensics artifacts, audit
16 trails, that need to be looked at before you can come
17 to that decision.

18 CHAIR SARIS: Mr. Fottrell, do you want to
19 comment? I saw you just eagerly like moving forward
20 there.

21 MR. FOTTRILL: Yes. I'll go back to your
22 point about being a collector online, a person that's

23

1 just impulsive and collecting things. Collecting
2 things is important, whether I collect stamps,
3 whether I collect pictures of butterflies, whether I
4 collect baseball cards, it's the conduct. I mean,
5 it's not just the obsession, it's the conduct that's
6 associated with it. So if you're spending only one
7 day doing that, or if you spent the last 20 years,
8 whether you're collecting baseball cards.

9 But I think in this case we're not talking
10 about baseball cards; we're talking about child
11 pornography images. And they're not "pictures."
12 They're people. The people in these pictures are
13 real people.

14 And what was interesting to me – and there
15 will be other witnesses from the National Center
16 today talking about that – what I recall is, some of
17 the victims of this abuse, they're saying – I mean
18 what their statements have said is, like, the abuse
19 that I endured when these images were created is bad.
20 But what's worse is the fact that now I'm afraid to
21 leave my house because is the person in the
22 supermarket, is the person on the bus, did this

23

1 person have access to these pictures?

2 So that abuse, the ongoing dissemination
3 of those images, in some cases is more damaging than
4 the abuse itself. So I'm just trying to remember
5 it's not just pictures, it's people.

6 CHAIR SARIS: Did you want to say
7 anything? Oh, I've got Dabney over here. Go ahead.

8 COMMISSIONER FRIEDRICH: Mr. Fottrell,
9 you've testified that the victims are getting
10 younger, and the images more violent.

11 MR. FOTTRELL: Yes.

12 COMMISSIONER FRIEDRICH: Can you estimate
13 for us, we've heard, based on law enforcement
14 statistics, that the number of images of children
15 under six is now over half? Is that correct?

16 MR. FOTTRELL: I can just give you my
17 experience. It's a very good question, and Mr.
18 DeBrotta this afternoon will have more concrete
19 examples. I've been doing this for about 20 years.

20 One of the cases that we were involved in
21 in 1996, there was only one series of pictures
22 involving infants and toddlers. Out of a collection

23

1 of like 3- or 400,000 images, there might have been a
2 dozen infants and toddlers.

3 In our investigations today, now, I mean
4 like in the last one year, and in the last two years,
5 there is certainly a prolific increase in the number
6 of infants and toddlers. Like I have not been
7 engulfed in just abuse of infants, zero to two, the
8 large number of images that I'm seeing today, is
9 extremely large compared to what it was even five
10 years ago or ten years ago.

11 Now with the advances of technology, the
12 advances of being able to move those pictures, they
13 are circulating much easier today.

14 The other thing that we're seeing is more
15 customized – with the advent of digital cameras and
16 cellphones and webcams, it is very easy to create
17 those images and circulate them in realtime. So you
18 are seeing abuse. We have a greater ability to
19 capture images than we had. There's more digital
20 cameras. There's more technology. It's very easier
21 to produce this content and distribute it widely than
22 there was ten years ago. It's more of both the

23

1 communication ability and the ability to produce
2 images that have really increased the type of images
3 that are around.

4 I think one of the factors that plays into
5 this, to be crass, it's like not the same-old/same-
6 old; that somebody's been collecting child
7 pornography for 10 or 15 years, they've seen it all
8 already. So what's in it for them? There is an
9 overwhelming desire to get the new stuff, to get the
10 younger stuff. So the same-old/same-old isn't
11 cutting it anymore. They're looking for more extreme
12 content, more younger content, something they haven't
13 really seen before. And that is driving some of this
14 interest in creating younger and younger material.

15 COMMISSIONER FRIEDRICH: And more violent
16 material?

17 MR. FOTTRELL: And more violent material.

18 CHAIR SARIS: Anything else?

19 (No response.)

20 CHAIR SARIS: Thank you very much.

21 MR. FOTTRELL: Thank you.

22 MR. GRANT: Thank you.

23

1 (Pause.)

2 CHAIR SARIS: We are a few minutes early,
3 but I'm hoping we have our next panel here.

4 (Pause.)

5 Are you all set? All right, since we
6 finished a few minutes early on that panel, thank you
7 for being here a little bit early. I would like to
8 introduce the next panel called Child Pornography
9 Offending – Pathways, Community, Treatment.

10 We begin with Dr. Gene Abel? Did I
11 pronounce that correctly?

12 DR. ABEL: That's correct.

13 CHAIR SARIS: He is the medical director
14 of the Behavioral Medicine Institute of Atlanta and
15 the founder and president of Abel Screening, Inc.
16 Dr. Abel is a board-certified psychiatrist with a
17 specialization in diagnosing and treating sexual
18 problems. He is the inventor of the Abel Assessment
19 for Sexual Interest, which is a widely administered
20 test and is part of a complete psychosexual
21 evaluation. Dr. Abel is a clinical professor of
22 psychiatry, formerly of Columbia University School of

23

1 Medicine, and currently at the Morehouse School of
2 Medicine and at Emory School of Medicine. Welcome.

3 Jennifer McCarthy is the assistant
4 director and coordinator of the Sex Offender
5 Treatment Program at the New York Center for
6 Neuropsychology and Forensic Behavioral Science. For
7 the past 16 years Dr. McCarthy has evaluated and
8 provided individual and group therapy for sex
9 offenders in the federal system who is supervised in
10 both the Eastern and Southern Districts of New York.

11 She also evaluated and treats sex
12 offenders who are in the process of community
13 reintegration under the jurisdiction of the Federal
14 Bureau of Prisons.

15 Welcome to you, as well.

16 Dr. Abel?

17 DR. ABEL: Chairman Saris, and committee
18 members, I appreciate you inviting me. I have been
19 studying the issue of child sexual abuse since 1969.
20 I have a database with 150,000 individuals evaluated
21 for sexual problems.

22 I am going to talk about a number of
23

1 issues, some of which I think are important, and I
2 think they're important in a handout I left there,
3 but my real focus is going to be on child porn and
4 its relationship to past sexual behavior.

5 No mass disorder afflicting mankind has
6 ever been brought under control by attempts to treat
7 afflicted individuals. All of this child pornography
8 relates to people who want to look at child
9 pornography, and so it is really important to kind of
10 understand why it is that people want to do that.

11 I am going to talk about a kind of a river
12 or problems. At the top of this river, there are no
13 victims. At the bottom, there are lots of victims.
14 And as Vice Chair Carr pointed out, there are victims
15 are both ends.

16 One, just having the pictures, looking at
17 them, people are abused by that. And I think child
18 molestation, child pornography use, are both very
19 bad. On the other end are people who look at child
20 porn and also get involved with molestation of kids.
21 And I'm going to talk about treating the abuser,
22 screening individuals who are at risk to molest

23

1 children; how abuse impacts on boys and girls to
2 develop sexual interest in children.

3 An important thing is the definition of
4 "pedophilia." This is the DSM-IV-TR. That's
5 psychiatric jargon for our current terminology that's
6 used. I'm certain that you're aware of it.

7 Sexually aroused, having fantasies, or
8 actually being involved in child molestation, any of
9 those three contribute to a diagnosis of pedophilia.
10 The child has to be, generally, 13 or younger, and
11 the duration is important in that they have to
12 maintain this interest for at least six months.

13 So if a person molests a child one time,
14 they couldn't be diagnosed as a pedophile. It has to
15 be something over time. They have to be 16 years of
16 age. And there has to be a five-year difference between
17 the child and the perpetrator.

18 Why is that important that we understand
19 what pedophiles do? Because individuals who have
20 pedophilia molest 88 percent of all child victims,
21 and they commit 95 percent of sex acts against
22 children. That's why it's important.

23

1 The references are generally at the bottom
2 of the slide.

3 The next is a little complicated, but it's
4 the realities of life. This is an examination of
5 85,000 adult males. You look for the yellow bar,
6 which is how many of these 85,000 were involved in
7 child sexual abuse. The answer is 23 percent. And
8 then you see that kind of off-colored "use of
9 pornography," 27 percent. Of this, 85,000 males were
10 involved.

11 Here's similar data on 3,000 –

12 VICE CHAIRMAN CARR: Excuse me? What is
13 that universe of 85,000 people?

14 DR. ABEL: This is data gathered
15 throughout the United States and Canada. In every
16 state in the United States they had individuals who
17 were assessed. The assessment results has to come
18 through Atlanta, Georgia, and that constitutes this
19 giant database that I'm drawing upon.

20 VICE CHAIRMAN CARR: So that's 85,000 –
21 that's not randomly selected people?

22 DR. ABEL: Oh, no. It's not randomly

23

1 selected. They are individuals who were assessed
2 somewhere in the United States or Canada who came in
3 for assessment.

4 VICE CHAIRMAN CARR: Thank you.

5 DR. ABEL: From throughout all the states
6 and portions of Canada.

7 Here is the same data from females, 3,000
8 of them. Look for the yellow bar which shows that 19
9 percent were involved in child sexual abuse - 11,
10 sorry, and 7.9 were using pornography.

11 Here's a little scary information. Here's
12 19,000 adolescent males, and you'll see that 53
13 percent were involved in child sexual abuse; 32
14 percent looking at pornography.

15 COMMISSIONER HOWELL: Could I go back to
16 Commissioner Carr's question? Are these 19,000, the
17 85,000, the 3,200 women, are they people who came in
18 for an assessment because they were referred by law
19 enforcement? Are these people who have been -

20 DR. ABEL: It's about a third law
21 enforcement, and two-thirds other sources.

22 COMMISSIONER HOWELL: I see.

23

1 DR. ABEL: From throughout the United
2 States.

3 COMMISSIONER HOWELL: Okay. And they were
4 referred for assessment for some kind of deviant
5 sexual behavior?

6 DR. ABEL: Some kind of sexual problem.
7 And the kinds that they are involved in is listed
8 along the vertical line, various things that they
9 were involved with.

10 So you see the child sexual abuse really
11 common in adolescent boys. This would be 12 to 17
12 years of age. Here's 853 adolescent females. You
13 can see child sexual abuse. Forty-eight percent were
14 involved in child sexual abuse. And a high percentage
15 were looking at pornography.

16 Here's a list of how molesters go about
17 molesting. I'm not going to give you any detail
18 about this, but it's kind of the standard way that
19 they operate.

20 Here's a scary piece of information. Look
21 at the top two bars going off to the right. Of 7,495
22 adolescent males, 35 percent reported they'd never

23

1 been blamed for molesting a child but they had. The
2 same number, 35 percent of adolescent females who
3 were questioned about this, who answered the question
4 "have you ever been blamed for molesting a child?"
5 they said, "no." The next question was: "Did you
6 molest a child?" The answer is "Yes." Scary
7 information.

8 Now there's a standardized treatment for
9 any kind of paraphilia, including individuals who
10 look at child pornography, or pedophiles. I am not
11 going to go into the details of that, other than we
12 can objectively measure sexual interest in the
13 laboratory. And the treatment really boils down to
14 item number 13. That is, the standard treatment
15 around the United States is cognitive behavioral
16 treatment with a strong relapse prevention component.

17 How effective is that treatment? It's
18 quite effective. Treating adults, 93 to 95 percent
19 success if probation is involved, and if polygraphs
20 are done every six months, and if cognitive
21 behavioral treatment is used.

22 The reason I'm presenting this data is

23

1 because initially we did a study in 2004, got these
2 results, and then Stephen Gray out in Arizona took
3 the same treatment model, the standard cognitive
4 behavioral treatment with a strong relapse prevention
5 component, and applied that to a population there in
6 Arizona.

7 Our follow-up was six-and-a-half years.
8 His follow-up was 12 years. This is the success
9 rate – provided, probation is involved so there's
10 teeth to ensure treatment, and polygraphs we find
11 exceedingly helpful.

12 How effective is treatment for adolescent
13 child sexual abusers? It's effective. Not quite as
14 good, maybe because they're younger, more impulsive,
15 93 percent success. There's the reference at the
16 bottom of the slide.

17 Now what increases the likelihood that a
18 molested child will molest others? Here's an
19 important thing I wanted you to understand. A number
20 of kids are molested. We are quite concerned about
21 their victimization. But at the same time, a certain
22 percentage of those – not all, by a long shot – develop
23

1 into having sexual interest in children and molest
2 other children.

3 We have actually been investigating that
4 for quite some time. And once again, remember the
5 majority of abused children do not become abusers.
6 But we did a study of 2,800 sexually abused boys,
7 divided them in two, and you'll see here's five items
8 from their histories that separate those who are
9 going to molest others from the boy victims who are
10 not going to molest others. There's five of the
11 items. Here's the rest of the items. There's nine
12 of them.

13 So actually if we're concerned about
14 preventing individuals becoming child abusers, we
15 ought to be attentive to the characteristics of the
16 abuse that separate out abused boys who will abuse
17 others from abused boys who won't.

18 We did a similar study with females.
19 Here's the results. There aren't as many items with
20 females, but these are the items. Many of them are
21 identical to the factors for boys going on to
22 molesting other boys.

23

1 I think this is important to present, just
2 so you have a better understanding of the background
3 of this problem. Actually, when these kids are
4 abused, whether they're girls or boys, it's about age
5 seven, and they start abusing – I'm just talking about the
6 kids who were abused who become abusers – they become
7 abusers about four years later.

8 In other words, there's a four-year window of
9 opportunity to do something about stopping these kids
10 from going on to abusing others.

11 Now let's get more to the point of
12 pornography. Here's the data on the four age groups:
13 adult males, adult females, adolescent males,
14 adolescent females, and you see the percentages that
15 were involved in looking at pornography.

16 And the question I'm going to give you a
17 pretty good answer for is: Is the use of child
18 pornography related to child molestation in the past?
19 Is there something else? And we specifically looked
20 at solicitation. Solicitation means travelers.
21 That's the jargon. They go to meet a child. But
22 let's deal with the first thing, those who look at

23

1 child pornography.

2 This gets a little complicated. If you'll
3 bear with me, I love numbers, unfortunately. And so
4 these are my crib notes. We have four groups of
5 individuals we looked at.

6 Group one: Yes, they'd looked at child
7 pornography. No, they had not solicited – gone to
8 meet a child.

9 Group two: No, they hadn't looked at
10 child pornography. Yes, they had gone to meet a
11 child. These were frequently sting operations.

12 Group three: Had done both, looked at
13 child pornography and solicited.

14 Group four: Now these were child – in this
15 group, these were child molesters included in this
16 group. There's 23 percent of them, 23 percent had
17 been involved in child sexual abuse. On this group
18 on the right, no pornography, no solicitation.

19 Now we took those 1,000 individuals. In
20 this case, these were males. And we tried to look at
21 what is correlated with individuals actually
22 molesting a child. So here is the big take-home

23

1 message, and those dark numbers are important.

2 First of all, when we looked at all of
3 these 1,000 together and we tried to see could we
4 separate out those who had molested, depending upon
5 their child pornography use, or the referral source,
6 but we couldn't. But we fortunately asked a simple
7 question: Were you referred to the criminal justice
8 system? Were you arrested for viewing child
9 pornography? And what is the relationship between
10 that and actually molesting a child?

11 Now these are odds ratios. If you're
12 twice as likely to molest a child, the odds ratio
13 would be 2.0. If you're less likely to molest a
14 child, the answer would be something like .5.

15 It's peculiar, looking at this, that
16 individuals referred for viewing child pornography
17 had a less, smaller odds ratio for having molested a
18 child. The same with those referred for soliciting
19 children. That doesn't make sense.

20 And the reason is because if individuals
21 are referred for having been arrested for viewing
22 child pornography, they shut up about what kind of
23

1 behavior they've been involved in. And those who are
2 arrested for soliciting a child, they shut up about
3 what kind of child sexual abuse they've been involved
4 in.

5 So where do we find information about the
6 relationship between viewing pornography and
7 soliciting? If you recall, in group four, these
8 individuals had come through the door not because
9 they had been arrested for child pornography, for
10 that reason, not because of solicitation; they were
11 child molesters. And we looked at that group. And
12 when we looked at that group, that is where we found
13 the data: that viewing child pornography increases
14 the likelihood of an individual having molested a
15 child in the past by 2.3. That means twice as
16 likely. Remember, if it's not one way or another, it
17 would be 1.0.

18 Soliciting a child, that's much more
19 correlated with a history of having molested a child;
20 it's 4.3, four times as likely.

21 And then, we said well what does this
22 mean? People who are arrested for child pornography,
23

1 they shut up. People who are arrested for
2 soliciting, meeting a child, they shut up about their
3 past behavior. But if you look at a group of child
4 molesters not referred for those reasons, then you
5 see the relationship. That is, these two behaviors,
6 soliciting or the use of child pornography, increased
7 the odds ratio that they'd been involved in child
8 molestation in the past.

9 And then we combined the two, and the
10 individuals who have the highest rates of molesting
11 are those that both look at child pornography and
12 solicit - have gone to solicit children. Now the odds
13 ratio is 9.9, or 10 times as more likely to have
14 molested children in the past.

15 The reason this is important is that, if
16 you look at a large group of individuals who have
17 been arrested and you try and see a relationship
18 between them in some way and molesting a child, if
19 you look at - you have to look at why they were
20 referred. What was the reason for the arrest?
21 That's what is important.

22 You have to separate out those people who
23

1 were arrested for looking at child pornography, those
2 who were arrested for soliciting, and you try and get
3 history about having you molested? And what you find
4 in the literature is it's a low occurrence. It is a
5 low occurrence.

6 Why is that? Because they've lumped them
7 all together. When you ask what's the reason for the
8 referral, they hide what they've been involved with
9 in the past. If you get people who are arrested for
10 child molestation, then they come clean about having
11 looked at child pornography in the past, having
12 solicited in the past. Then you see these high
13 ratios, odds ratios.

14 So what I'm trying to point out to you is,
15 the literature, the scientific literature, is
16 confusing because everyone is lumped together and you
17 have to separate out those who were referred for
18 these specific reasons because they're going to
19 conceal what they've done in the past, and take a
20 look at individuals who are just addressed for child
21 molestation – a terrible crime, but look at that group
22 and that's where you can see this relationship

23

1 between the use of child pornography and the
2 solicitation being really critical for increasing
3 their risk for having molested in the past.

4 You combine it together, the number is
5 really large, a ten times' increase.

6 Try and ignore this slide. I just want to
7 point out that in the United States heterosexual
8 males normally have sexual attraction to 14, 15, 16,
9 17-year-old girls. And homosexual males normally
10 have sexual interest in adolescent 13, 14, 15, 16,
11 17-year old boys. It's normal. You're not supposed
12 to act on that. You're not supposed to do something
13 about it, but it is the norm. As a matter of fact,
14 when we looked at these large numbers of sexual
15 interest, what we found was in looking at younger age
16 images versus adolescent images versus adult images,
17 we found that the adolescent images did not correlate
18 with the younger age. They correlated with the older
19 age. Do you follow that?

20 Okay, let me say it again. We have a
21 tremendous amount of information related to what sex
22 offenders, child molesters, those who use

23

1 pornography, look at. We have images, all clothed;
2 and we have images of individuals five or under,
3 individuals 6 on up to age 12; then we have images of
4 adolescents, 14, 15, 16, 17; then we have images of
5 older people. And you do what's called a factor
6 analysis and you see what clings together.

7 The two younger groups cling together.
8 The adolescents cling with the adults. It's normal.
9 You're not supposed to act on it, but it's normal. I
10 mention this because there is a lot of interest in
11 teen porn, right? It's so easily available. Can we
12 identify individuals who have a high risk of
13 molesting children? The answer to that is: Yes.

14 The reason we got interested in this is
15 because the Bureau of Justice statistics reported
16 that of children in custody in the United States,
17 10.3 percent have been molested while they were in
18 custody. 10.3.

19 if you look at the breakdown, it's about
20 9.3 were molested by staff, not by other kids in that
21 system. We went to the FBI. Ken Lanning had been
22 reporting on what are the characteristics of
23

1 individuals who molest children for quite some time?
2 We went to some earlier work by Big Brothers and Big
3 Sisters, done by Attorney Wolff for that organization,
4 and there was a study out of Chicago attempting to
5 develop a formula for identifying people at risk.

6 And actually, we can do that using
7 information from the FBI. Right now, most of these
8 organizations use criminal background checks.
9 Criminal background checks are really crummy at
10 identifying people at risk. It's less than .2
11 percent. And we can get that percentage up to 70.

12 I let you know this because you might not
13 know that we're actually able to say this is a person
14 of high risk and they shouldn't be working with
15 children. Does that change their risk? No. But if
16 you don't allow them to work with children, that
17 helps protect the children.

18 CHAIR SARIS: We're in the red. How much
19 longer do you have?

20 DR. ABEL: Oh, it looks like none.

21 CHAIR SARIS: I love hearing you, it's
22 just -

23

1 DR. ABEL: It looks like none.

2 CHAIR SARIS: No, no, no. I want you to
3 keep going, but -

4 DR. ABEL: Well, you'll have - what I have
5 left are some specific answers to the questions
6 that -

7 CHAIR SARIS: Keep going, then because we
8 have some extra time left over from the other panel.

9 DR. ABEL: Whatever you say. The
10 questions that I was given by Kira Antell, what
11 percentage of offenders viewing child pornography are
12 for sexual gratification? We assume it's the
13 majority.

14 Why do heterosexual men buy Playboy - if
15 anybody buys Playboy anymore? To look at the
16 pictures. Why? Because they're interested in the
17 pictures.

18 This whole landscape has changed. Forty
19 years ago the Postmaster General would just wait for
20 the information to come in from Europe by mail, and
21 it would land in the mailbox, and they'd go arrest
22 the person.

23

1 Now, a 14-year-old boy or girl can use
2 their smartphone, take pictures of their boyfriends
3 or girlfriends, send them to other people, or send
4 pictures of themselves back, or they can download
5 5gigs of pornography in no time at all.

6 The landscape has changed, and with that
7 unfortunately your dilemmas have increased because
8 now you are forced to deal with younger and younger
9 individuals who can manufacture, so to speak, child
10 pornography. I mean, that's just the reality.

11 If you want to take pictures that are
12 exciting to pedophiles, they can go to the mall, or
13 go to a water park. Unfortunately, kids will take
14 pictures similar to what pedophiles who are
15 interested in child pornography want to see.

16 What factors cause people to seek sexual
17 gratification from child pornography? Early sexual
18 experiences, masturbation fantasies, being abused,
19 are some of the factors. I think these early
20 experiences are really important, and we know very
21 little about them.

22 Here is a nice article I wrote but didn't

23

1 have the answers, but it really does look at what are
2 the earliest factors leading individuals to develop
3 sexual interest in kids. We aren't doing any
4 research in that area.

5 Number three: Do most offenders who
6 obtain child pornography do it for sexual
7 gratification or pedophilia tendencies? And the
8 answer is: Yes, and yes.

9 My experience with sex offenders,
10 pedophiles, those who collect kiddy porn, is pretty
11 extensive. Maybe 60 to 70 percent of all the cases
12 referred nowadays come through the vehicle of being
13 arrested for child porn. This is very common. This
14 is the way it is in the United States. People look
15 at things because they find them sexually exciting.

16 Which are the more likely to molest?
17 Pedophiles or nonpedophiles who obtain child
18 pornography? We assume pedophiles. We assume
19 pedophiles.

20 Now a lot of people say, I really don't
21 have any interest in these child pictures, this child
22 pornography. I'm not interested in that, I just

23

1 collect it. That's a bunch of baloney. It sounds
2 good initially, but when you talk to these people
3 that really doesn't turn out to be the case.

4 Do child pornography viewers have
5 increased histories of past sexual contact with
6 minors? Yes. That's why I made the two points about
7 those slides.

8 Are there valid risk assessment
9 instruments to predict the sexual recidivism by child
10 pornography offenders? We don't have that - I don't
11 have that, at present. That is a next-project,
12 probably for Dr. Seto who you will be talking to a
13 little later.

14 In my view, number eight, in my view
15 sentencing for child pornography when no child has
16 been abused should be significantly less than for
17 child sexual abuse, but probation should remain. I
18 would agree that individuals who are into concealing,
19 making it easy for people to download, hey, get after
20 them. But as the defense attorney reported seeing a
21 lot of cases by dumb people who download information
22 they don't even know many times what they were

23

1 downloading, that is a reality.

2 And outside of the federal system, in
3 state systems where I've testified on these cases
4 before, the judges are really in desperate straits
5 because they don't have good information about making
6 these kinds of decisions.

7 Lastly, from the clinician's point of view
8 the criminal justice system must be prepared to deal
9 with more 12- to 17-year-olds generating, obtaining,
10 and viewing child pornography. Sorry about that.
11 That's just what's happening.

12 And I'm done.

13 CHAIR SARIS: Thank you. Well worth the
14 extra few minutes.

15 DR. ABEL: Thank you.

16 CHAIR SARIS: Ms. McCarthy. Do you have a
17 clicker, too?

18 MS. MCCARTHY: I think there's only one
19 clicker. Is that right?

20 DR. ABEL: No, this is it. There it is.

21 MS. MCCARTHY: All right. I want to thank
22 the Commission for having me here today also. Today

23

1 I am going to talk about the assessment, treatment,
2 motivating factors that might lead some people to
3 download child porn, and treatment interventions.

4 With regard to the assessment of child
5 porn offenders, these are the issues that we deal
6 with. Initially we will do – well, not necessarily
7 "initially," all in this order – but a clinical
8 interview, which will look at an individual's
9 history, pertaining to childhood history, medical
10 history, psychiatric history, education, criminal
11 history, substance abuse, et cetera, et cetera.

12 Also we will do an assessment of
13 personality, psychopathology, probably using the
14 MCMI, or MMPI; an assessment of the sexual history
15 offline. Also, the Internet sexual history online.
16 Assessment of sexual interest by the Abel Assessment
17 or the PPG. Also we look at social skills: How
18 socially adequate, socially inadequate an individual
19 may be. Cognitive distortions with regard to child
20 abuse in general, or child pornography. And also
21 there may be other assessment measures based on the
22 person themselves.

23

1 For example, if they have cognitive
2 limitations, neuropsychological deficits, they might
3 be included in the assessment process.

4 If collateral information is available, we
5 will obviously also review that, which is not always
6 the case, unfortunately. And also if I do have the
7 opportunity to look at the child porn collection
8 itself, I will do that.

9 All right. Motivations to collect this
10 material. Essentially, according to the research
11 they can be broken down into nonsexual/sexual
12 motivations.

13 There is reason to believe that some
14 people do look at this material for curiosity, and it
15 leads no further than that. Also, we have
16 collectors. And essentially the gratification is
17 gotten from collecting the material alone. They may
18 be collecting adult porn; they may be collecting
19 other types of porn related to fetishes or different
20 paraphelias, and it is not necessarily the content of
21 the material. It is essentially the gratification is
22 gotten from the collection – the collecting behavior

23

1 individuals are concerned, these guys have an
2 interest in minors. We have the type that is purely
3 fantasy only, that they have no interest in taking
4 the behavior offline. They want to collect as many
5 pictures as possible because they are sexually
6 interested in minors, but it is purely to feed their
7 own fantasy.

8 And then we have probably the more
9 dangerous ones that have a sexual interest in minors,
10 and they actually use the pornography – whether it's
11 child or adult pornography – to potentially groom
12 victims online, or to groom potential victims I
13 should say, sorry, online.

14 And then we have the guys who have
15 indiscriminate sexual interests. They have an
16 interest in pornography in general. They may have an
17 interest in violent themes in adult pornography, as
18 well as child pornography. They may have other
19 paraphiliac interests, and they collect adult
20 pornography because of that.

21 They may have cybersex with adults online.
22 They may, how should I say, basically essentially

23

1 they have paraphiliac sexual interests. So they run
2 the gamut. There is no specific interest. They
3 possibly need more serious, more violent images to
4 satiate and they get habituated to the porn that
5 they're looking at online, so they need more and more
6 and more serious and violent stuff to satisfy their
7 sexual needs.

8 Okay, the treatment with these guys, as
9 Dr. Abel did say, would usually follow a cognitive
10 behavioral framework. However, I must stress that it
11 needs to be individually based. We can't just treat
12 them all the same, one-size-fits-all. It never
13 works.

14 Also, we've got to consider, as opposed to
15 treating sex offenders who have no online activity,
16 they're not child pornography offenders, with the
17 child pornography guys we've got to consider the
18 dynamic process of the Internet itself. What I mean
19 by that is, you know, we've got to look at it as a
20 continuum: Did the guy start out looking at adult
21 pornography and then as the process continued he
22 ended up with the child pornography because he has

23

1 got indiscriminate sexual interests? Did he get
2 online and go straight away for the child
3 pornography? Et cetera, et cetera.

4 Did his activity escalate from isolation
5 with regard to downloading the material? Or did he
6 start getting involved with online communities? Did
7 he trade it with other people? Did he start out
8 straight away trading it? Or can we see it as a
9 process, a dynamic process, throughout his time on
10 the Internet prior to arrest?

11 Also a major consideration, the function
12 of collecting this material. Going back to the
13 motivations, was it because he's primarily interested
14 in having sex with minors? Or interested in sexual
15 activity depicted in these images with minors?

16 The level of emotional disconnection to
17 the material. A lot of the times, you know, and it
18 kind of goes to the next point I make about cognitive
19 distortions, you know, these guys will say as part of
20 their thinking errors, "they're only pictures."
21 Obviously they're not "only pictures."

22 And this also can speak to their level of
23

1 intimacy deficits and antisociality as well with
2 regard to "I'm not seeing these kids as victims."
3 And then, as I said, the cognitive distortions with
4 regard to collecting the material: They're only
5 pictures. I didn't take the pictures. I've never
6 molested anyone. Et cetera, et cetera. So they are
7 attempting to distance themselves emotionally and
8 cognitively from responsibility for having these
9 pictures.

10 With regard to treatment interventions,
11 here again the assessment and their idea of what
12 motivates an individual to be involved with child
13 pornography will inform the interventions we're going
14 to use with them.

15 Obviously with somebody that has a primary
16 sexual interest in minors, we're going to seriously
17 look at high-risk factors in relation to we're going
18 to use behavior modification techniques, possibly.
19 We're going to really keep tabs on their sexual
20 fantasies, their masturbation habits, their
21 engagement in high-risk environments, behaviors, et
22 cetera, et cetera, et cetera.

23

1 Other aspects of the treatment
2 interventions, as Dr. Abel said, are relapse
3 prevention, identifying high-risk factors, and
4 educating them and helping them manage these
5 factors.

6 As part of the interventions, too,
7 psychopharmacology may be used with regard to the
8 more compulsive ones, like SSRIs, which are usually
9 used for OCD or depression actually, or anything like
10 that. And then you move on to the antiandrogen
11 medication. Like I mean these are for seriously high
12 risk, because there's a lot of side effects to this
13 medication.

14 So, you know, there's a lot of thought
15 that goes into considering whether suggesting even
16 whether somebody should take these antiandrogen
17 medications. If this is the case, they obviously
18 would meet with the psychiatrist to discuss the side
19 effects, et cetera. Nobody is going to be forced to
20 take these medications. It would just be
21 recommended.

22 Also, we get involved, you know, in life-

23

1 enhancing training based on the Good Lives model
2 with regard to what their values and their morals are
3 in life, and what kind of goals they may have in
4 life. And basically design treatment around helping
5 them achieve those goals in a healthy manner.

6 Like I mean you could see for example
7 somebody with relationship deficits who possibly went
8 on the Internet to be more social, et cetera, et
9 cetera. So you could see it as a coping mechanism.
10 Also, for sexual/emotional self-regulation.

11 So we could point out that their use of
12 the Internet and the whole behavior involved around
13 downloading child pornography was an attempt to meet
14 a specific goal in their life; however, it was an
15 unhealthy attempt to meet the goal. So what we need
16 to do is teach them and work with them to come up
17 with healthy mechanisms to reach the same goals that
18 maybe the Internet activity or involvement in child
19 pornography provided for them.

20 We also use the polygraph in treatment, as
21 Dr. Abel pointed out the relevance of that. Three
22 types of polygraphs. We've got the sexual history

23

1 polygraph, which is usually done – well, I should say
2 it usually takes into consideration behavior prior to
3 the arrest. It's usually done about four to six
4 months after they enter treatment.

5 Obviously one of the main questions on a
6 sexual history polygraph for a child pornography
7 offender is whether they have ever had sexual contact
8 with a minor. That's a primary question. If the guy
9 comes in with a child pornography offense and not a
10 solicitation offense – and I agree with Dr. Abel,
11 based on my own research, that it's very important to
12 look at whether they've solicited minors online as
13 well as being involved in child pornography, because
14 in my own research guys that engage in both of these
15 behaviors were more likely to be in a contact group.

16 So if a child pornography offender comes
17 in with just child pornography alone, we will look at
18 the sexual history – on the sexual history polygraph,
19 if he has had contact with minors online in a sexual
20 manner.

21 Also, for example, if a guy tells us he
22 never masturbated to child pornography, that would be

23

1 a typical question on the sexual history polygraph.
2 Other questions may involve looking at, we'll say,
3 child modeling websites, erotic stories involving
4 minors. So now we're taking it above and beyond
5 just the child pornography, which kind of serves to
6 inform us the level of involvement this guy has, or
7 his level of interest in children, for example.

8 Because if you have the guy with the child
9 pornography, he's also looking at modeling websites,
10 he's also involved in erotic stories, obviously I can
11 safely say that this guy has probably a sexual
12 interest in minors.

13 The next type of polygraph, we don't do
14 these in order, specifically. The sexual history
15 polygraph will come first, probably. But we have
16 specific-issue polygraphs that will deal with
17 literally one issue in relation to this offense.
18 We'll say a person took a sexual history polygraph
19 but he failed the question on contact.

20 Now essentially, to my knowledge, you fail
21 one question on a polygraph, you fail the whole
22 polygraph. We might go back after talking to him

23

1 about the failure in treatment for a couple of weeks.
2 We might go back and just give him a specific-issue
3 polygraph, meaning one issue about the contact
4 question.

5 The maintenance monitoring polygraph,
6 maintenance polygraphs usually deal with treatment
7 issues. For example – and this is like throughout
8 treatment we would give these polygraphs – for
9 example, if I have a guy that we have established he
10 has a primary sexual interest in minors, and he's
11 telling us, no, I have no more fantasies, I never
12 fantasize. All adults, adults, adults. You know, I
13 never masturbate to my fantasies. I'm really working
14 the program, et cetera, et cetera. Obviously on a
15 maintenance polygraph I want to know if this guy is
16 fantasizing about minors – because he's telling us
17 he's not.

18 We do know he is interested primarily in
19 minors. So it would make sense that he is
20 fantasizing about minors. So on a maintenance
21 polygraph we would ask these kind of questions.

22 If he says, you know – and we do

23

1 questionnaires before the polygraphs in order to
2 prepare them and give them ample opportunity to tell
3 us if they're engaging in behavior that is deviant or
4 unhealthy, et cetera, et cetera. Also a maintenance
5 polygraph might include if they're looking at adult
6 pornography, because in the grand scheme of their
7 offense cycle or their offense process, adult
8 pornography may have been a contributing factor to
9 the ongoing, I guess the trajectory of their
10 involvement with child pornography.

11 The monitoring polygraph usually deals
12 with probation issues. And sometimes the treatment
13 and probation issues would overlap. Obviously
14 probation is interested in if they've had contact
15 with minors, if they're using unauthorized computers
16 as the treatment providers are interested in, are
17 they using unauthorized computers, and what are you
18 using them for?

19 Also, unauthorized contact with minors
20 would come up on either/or polygraph, essentially.
21 This is an extremely useful tool with regard to
22 treatment compliance and gathering more information

23

1 that informs the treatment goals, the treatment
2 needs, and the interventions we need to give them.

3 When, as far as our program is concerned,
4 we use – when we're doing polygraph exams, there's
5 contact between the probation officer and obviously
6 the polygraph examiner. So we're all involved in the
7 process. And I think Dr. Abel referred to this. We
8 use the Containment Model, which essentially means
9 that each of us are involved: the treatment
10 provider, the polygraph examiner, the referral
11 agent – whether it's the, you know, the probation
12 department, et cetera, et cetera. We all work
13 together in order to manage this offender. We all
14 share information, et cetera, et cetera.

15 Now as far as the digital evidence is
16 concerned, obviously from the previous testimony they
17 know better than I do what you can do with, as far as
18 a forensics analysis is concerned. However, I want
19 to stress that when we get referrals for treatment,
20 it is very rare these days now we can get the
21 presentence investigation report. And I'm kind of
22 working on that with one of the prosecutors and the

23

1 Department of Probation in the Eastern District to
2 see if we can - I think the Department of Probation is
3 writing the court to see if we can have access to
4 that material.

5 However, even in the day we could get
6 them, pertaining to the instant offense, the only
7 information we got in the presentence report with
8 regard to the instant offense is basically an example
9 of the images the person had in their collection.

10 Now I am not talking about the whole
11 collection. I am talking about the images this guy
12 was convicted of. There may be some information
13 about the interview at the time of arrest, and more
14 times than not the guy is going to tell me later "I
15 never said that, I never said that," et cetera, et
16 cetera.

17 So obviously the historical information
18 about the person's life is very valuable because it
19 may contradict or agree with what he's told us, as
20 well. But as far as the evidence pertaining to the
21 actual crime, it is very sparse with regard to the
22 presentence investigation reports.

23

1 Never have I ever seen a forensic analysis
2 report, ever, as far as in the assessment or
3 treatment of these individuals. And I actually, even
4 listening to the testimony this morning, was shocked
5 and amazed at what these analyses can tell us. And
6 there would be for us in treatment, or even
7 assessment with regard to what treatment needs a
8 person needs, or interventions they need, if we have
9 information from the report to say this guy focused
10 primarily on images that were depicting minors under
11 the age of 12, that's extremely valuable information
12 with regard to treatment.

13 Also, the trajectory of the online
14 activity, as I talked about earlier. Did he start
15 out with the adult porn? Or when did you last – he
16 first downloaded the images, we'll say, in July 2010,
17 and that's when he last accessed the images. Or he
18 accessed them a week later and has not accessed them
19 since, eight months later, nine months later. That
20 will give us some idea with regard to the interest
21 this guy has in this material.

22 Also – and I didn't hear anybody talk about

23

1 the idea of a ratio between child pornography and
2 other activity online with regard to pornography;
3 like the ratio, hypothetically, between adult porn
4 and child porn on the Internet. In my own research,
5 I found that it was not necessarily the amount of
6 child porn in an individual's collection; it was the
7 ratio between adult porn and child porn that was a
8 significant factor that distinguished contact from
9 noncontact offenders.

10 So I think – and obviously – I spoke with a
11 forensic analyst last week, and the things that – the
12 issues that I – the points that I've made up here is
13 what he told me that they are capable of doing, and
14 obviously, you know, based on the testimony
15 previously it has been reinforced.

16 The ratio of images: Were they
17 predominantly adolescents? Were they predominantly
18 minor – you know, prepubescents? The type of
19 activity. The gender. These are all crucial – this
20 is all crucial information that would inform the
21 treatment process, and also help us inform
22 supervision as we work with probation and polygraph

23

1 examiners with regard to what we need to focus to
2 prevent reoffense.

3 Obviously, it was on the previous slide,
4 but another interesting thing is whether somebody
5 specifically searched for specific types of activity
6 involving children is different from somebody who
7 follows popup links. We'll say somebody was involved
8 in adult pornography and they start looking at the
9 more barely legal kind of stuff, or they put in
10 "young girls." And because they put in "young
11 girls," they get popups for more child pornography
12 related stuff, and they start clicking on the popups.
13 I would consider, psychologically speaking, that type
14 of person may be different from the type that just
15 generally goes into a search engine or a peer-to-peer
16 network and says "12-year-olds with their daddies."
17 There's a difference between these two people as far
18 as risks is concerned.

19 Also, the history of the websites visited
20 again would show us - oh, I'm on red.

21 CHAIR SARIS: You know what -

22 MS. MCCARTHY: Sorry, okay, you get the

23

1 gist.

2 CHAIR SARIS: This is so interesting and
3 important, and we've got time. So finish.

4 MS. McCARTHY: No, I didn't even look at
5 the red whatever it is. I'm off on a tangent. I'm
6 on a roll here.

7 CHAIR SARIS: Not at all. It's
8 extraordinarily interesting.

9 MS. McCARTHY: But anyway, okay, I won't
10 keep it – essentially what I'm trying to say is,
11 digital evidence is extremely, extremely important
12 with regard to informing the assessment, the
13 treatment, and the management of these guys in the
14 community. Ultimately, the goal is to prevent
15 reoffense and hold people responsible. And the more
16 collateral information we have as far as the
17 treatment provider is concerned, the more we can
18 address it and challenge and hold people responsible
19 for their actions, basically.

20 Thank you.

21 CHAIR SARIS: Thank you.

22 MS. McCARTHY: You're welcome.

23

1 CHAIR SARIS: So, questions?

2 VICE CHAIRMAN CARR: Dr. Abel, what's the
3 definition of "paraphiliac"?

4 DR. ABEL: That's the general term for the
5 various kinds of unusual sexual interests. It means
6 that they've had this interest for at least six
7 months in duration; they have fantasies about it;
8 they have urges to get it. You know, like a public
9 masturbator would be a paraphilia, a voyeur would be
10 a paraphilia. Pedophilia is a paraphilia. There is
11 a list of these in DSM-IV-TR. That is the official
12 nomenclature for the American Medical Association,
13 and it is what you guys must rely upon because those
14 are the definitions.

15 VICE CHAIRMAN CARR: And I think you
16 mentioned that if the kids were abused by the time
17 they're seven, they often will start molesting other
18 children by the time they're 11?

19 DR. ABEL: Well first of all, most kids
20 who are abused do not become abusers.

21 But we now know, what are the
22 characteristics of the abuse that generally occurs at
23

1 age seven, and four years later they then start to
2 act, pointing out that, my goodness, look for these
3 characteristics of the abuse and you could prevent
4 some of these kids becoming pedophiles.

5 VICE CHAIRMAN CARR: And of course those
6 kids, by definition, are not yet pedophiles because
7 they're only 11?

8 DR. ABEL: That's correct. But -

9 VICE CHAIRMAN CARR: But do they tend to
10 become pedophiles?

11 DR. ABEL: Yes, that's what I'm - oh, yes,
12 they do, because persistent sexual interest over time
13 equals pedophiles; when they're old enough, then they
14 could be diagnosed as something like this. My point
15 is that these sexual interests develop at a very
16 early age. That's something you ought to be aware
17 of, because it's going to cause you all sorts of
18 grief. Because now with technology, a 14-year-old
19 can take pictures and do videos and it's going to
20 change the environment that you're dealing with. But
21 of course that's why we're having this meeting,
22 because of your awareness of that.

23

1 CHAIR SARIS: Ketanji?

2 VICE CHAIR JACKSON: I had mistakingly
3 assumed that child pornography offenders are
4 pedophiles. So I'm trying to understand this
5 category of nonpedophiles who obtain child
6 pornography. And are those the people who you are
7 saying are the nonsexually motivated offenders?

8 MS. MCCARTHY: Um-hmm.

9 VICE CHAIR JACKSON: Do I have that right?

10 DR. ABEL: I think you ought to keep your
11 previous definition, quite frankly.

12 VICE CHAIR JACKSON: Oh, okay.

13 DR. ABEL: There are individuals who
14 collect. And sometimes they'll collect ten gigs of
15 images, and they won't look at them. They are
16 collectors. But that's kind of rare.

17 There are people who collect just for
18 collecting purposes, you know, but the majority of
19 these individuals are collecting over time. If
20 they're collecting over time, then they have interest
21 over time. If it's greater than six months, they
22 meet the definition of pedophilia. So that's why I

23

1 say in general I would keep your old definition as
2 being accurate.

3 But I would agree that there are other
4 reasons that people get involved in looking at child
5 pornography, but I'll put my nickel on pedophilia.

6 COMMISSIONER HOWELL: I thought -

7 VICE CHAIR JACKSON: And - sorry.

8 COMMISSIONER HOWELL: That's interesting,
9 because I thought that part of the definition of
10 pedophilia is they had to act on their sexual contact
11 with children?

12 DR. ABEL: Not true.

13 COMMISSIONER HOWELL: No? Okay.

14 DR. ABEL: If you look at the definition
15 again, it could be "or." And most people think,
16 well, all pedophiles have to have acted. While I was
17 in New York City we looked at 530 child molesters in
18 a NIMH-supported grant project. My job was to talk
19 to any individual who said that they had this
20 interest but hadn't acted on it.

21 I evaluated about five people out of the 500
22 who said they'd not acted on it. In reality what

23

1 they meant was, I'm not a pedophile because I just
2 fondled the child. Or I'm not a pedophile because I
3 just had oral sex but not penetration anally or
4 vaginally. Or, I'm not a pedophile because I did not
5 use violence during my sexual contact. They have all
6 of these excuses for why they weren't pedophiles.

7 I want you to understand that we believe
8 everyone lies. We don't trust any of these folks.
9 I'm sorry. We just assume they are all lying to us.
10 That's why we are – and we agree that polygraphs are
11 not perfect. We know that. But they are exceedingly
12 useful, and we assume that they lie a lot.

13 You also ought to be aware that it's only
14 6.6 percent of individuals who had sexual interest in
15 children have that interest only. The majority, the
16 vast majority, have adult sexual preferences just
17 like you and I. It's as if these things run on
18 separate tracks. They have an adult track, and they
19 have this child track. But it's a small percentage
20 who are exclusively interested in children and
21 nothing else.

22 COMMISSIONER HOWELL: Sorry.

23

1 VICE CHAIR JACKSON: That's okay. I was
2 just going to say as a follow-up to that, Ms.
3 McCarthy, is it your experience that this category of
4 nonsexually motivated child pornography offenders is
5 very small? Because you had them broken out in your
6 slide: the nonsexually motivated. And that I found
7 just so interesting, because I assumed that everyone
8 who was involved in this kind of activity was
9 sexually motivated. So the people who are in this
10 for either the collection, or the people who are
11 loners and find status in their participation in the
12 community, but would be categorized as nonsexually
13 motivated, how many are we talking about?

14 MS. McCARTHY: Well to best help give you
15 a certain kind - a number related to it, when I did my
16 dissertation, I did it on child pornography offenders
17 and the relationship to child molestation. I think I
18 had 271 participants. And 52 percent of them were
19 diagnosed with pedophilia; 48 percent were not. And
20 not all of them masturbated to child pornography,
21 either. And that was based on either (a) they told
22 us they did or - if they told us they did, okay they
23

1 did. If they told us they didn't, we polygraphed
2 them. So we didn't just go by their self-report.

3 And the numbers were high there with
4 regard to – like they were in the forties as well,
5 percentagewise, with regard –

6 CHAIR SARIS: Is that 40 percent?

7 VICE CHAIR JACKSON: Forty-eight percent.

8 MS. MCCARTHY: Forty-eight percent were not –
9 52 percent were diagnosed with pedophilia. I think only
10 6 percent, as Dr. Abel said a second ago, were
11 diagnosed with primary interest in minors. The rest
12 of them were diagnosed, as we would say,
13 nonexclusive, also had an interest in adults, which
14 is good for treatment because you can focus on that
15 interest, basically. But also there was upwards of
16 40-something percent that did not masturbate to child
17 pornography.

18 COMMISSIONER HOWELL: One of the
19 responsibilities that we have is making
20 recommendations to sentencing judges about how long
21 people should, once they've served an incarcerative
22 period, how long they have to be on supervised
23

1 probation.

2 So you've both talked about how treatment
3 of people who possess child pornography can be
4 effective. How long does the treatment last? Three
5 years? Two years? I mean, I know it may vary by
6 individual, but how long is the variance and how long
7 is sort of the average time, at a minimum, that you
8 need?

9 DR. ABEL: Well if you look at recidivism,
10 it usually occurs within the first five years. So I
11 would say certainly for five years. But in studies
12 in England where they followed untreated pedophiles
13 for long periods of time, 22 years, there were still
14 offenses 22 years out. But my point is that the
15 majority of these individuals are going to relapse
16 soon. And so my personal thought on this - this is
17 just my personal thought - is that the amount of time
18 that they serve in prison should be limited, so that
19 they can make a living and care for their families,
20 but the probation should be long because that's
21 really important. So if it went 10 years, I wouldn't
22 at all want to fight against that.

23

1 COMMISSIONER HOWELL: That was my – I had a
2 separate question, not about the risk of recidivism,
3 but how long does effective treatment take? I mean,
4 you said that treatment can be effective. How long
5 do people have to stay in treatment for it to be
6 effective?

7 DR. ABEL: You're talking about the first
8 part, the important part of implementing cognitive
9 behavioral treatment, it takes about 120 contacts.
10 That could be done in a year, or that could be done
11 in three months if they came every day, four hours a
12 day. It could be bunched up.

13 But then the maintenance of that, the
14 maintenance is really long, and the maintenance as
15 far as I'm concerned is just as important as the
16 treatment. Because I don't care what treatment you
17 have, it doesn't count unless it's maintained over
18 time.

19 CHAIR SARIS: And "really long" is how
20 long, would you say?

21 DR. ABEL: Well at least five years.

22 CHAIR SARIS: At least five years.

23

1 DR. ABEL: I tell my patients, we think
2 you should be in maintenance until you die, plus
3 three months.

4 (Laughter.)

5 DR. ABEL: Maybe that's too long, but I
6 would say five years for sure, and I wouldn't argue
7 about ten.

8 VICE CHAIRMAN CARR: And when you talk
9 about recidivism, are you talking primarily of
10 viewing pornography? Or molesting a child?

11 DR. ABEL: Both.

12 VICE CHAIRMAN CARR: But which is the more
13 common recidivism?

14 DR. ABEL: Well the easiest is to look at
15 child pornography. That's the easiest. And so the
16 recidivism is going to be a little higher there
17 because it's so easy to access.

18 COMMISSIONER HOWELL: And, Dr. Abel, I did
19 have some difficulty reconciling two different
20 concepts. Because I know that you said that there's
21 no valid risk assessment tool for measuring
22 recidivism, but at the same time - I think I

23

1 understood that correctly?

2 DR. ABEL: For predicting.

3 COMMISSIONER HOWELL: For predicting
4 recidivism, and you also say that it is possible to
5 identify those at high risk to molest children, which
6 is somewhat different, you know, a contact offense as
7 opposed to viewing child pornography, but clearly
8 contact offenses on the minds of federal judges when
9 they're sentencing a child porn offender.

10 So can you use your tool for identifying
11 those at high risk to molest children as in some
12 ways, you know, a helpmate in assessing the risk of
13 recidivism? Or are the two totally separate, or how
14 can one effective tool be used and the other -

15 DR. ABEL: The problem is, we have
16 hundreds and hundreds of individuals that can be used
17 to predict their risk to reoffend against a child.
18 The numbers are large. Therefore, our ability to do
19 logistical equations to predict is really good.

20 However, looking at relapse with child
21 porn, that's new. And therefore the number is lower.
22 And the problem is the numbers. Remember that we're

23

1 dealing with individuals who would go back in the
2 slammer if they were caught, right? If they relapse,
3 they have a high risk of going back into the slammer.

4 So they're going to make every effort to
5 protect the truth of the matter. So the dilemma here
6 is you have to therefore get some large numbers.

7 And, quite frankly, we don't have the large enough
8 numbers in part because there's no cooperation in the
9 United States between one state and another. They
10 aren't very cooperative. Everyone wants to be
11 independent.

12 Canada has a real advantage. They've got
13 great researchers there, and they have a coordinated
14 effort. They are able to gather information
15 systematically across the various territories. That
16 is wonderful. And it is unfortunate that in the
17 United States we don't have that.

18 So the answer to your question is: Yes.
19 Applying that scientific approach could be applied to
20 child pornography users? Yes. Has it? No. But I
21 defer to Dr. Seto because that's his - I'm certain
22 he's working on that. I bet you he will give you a

23

1 much better answer. I still think it is too early,
2 though, but he should have the answer for that.

3 COMMISSIONER FRIEDRICH: I'd like to
4 address this question to both of you.

5 Dr. Abel, certainly in your testimony you
6 pointed out clearly that the actual incidence of
7 child abuse statistics are much greater than what's
8 actually reported, right?

9 DR. ABEL: Not today, but I have put that
10 in great detail in the past.

11 COMMISSIONER FRIEDRICH: Well anyway, my
12 question is: Looking at not just child pornography
13 and not just sex abuse, but basically any criminal
14 dangerous behavior, is the incidence, the actual
15 occurrence of that, much greater than what actually
16 is officially reported? And by that, I mean either
17 in a presentence report, or an arrest report?

18 I have heard statistics mentioned that
19 that number is potentially twice as high, if not
20 higher? Can either of you comment on that?

21 DR. ABEL: I can comment, because I was
22 the culprit in reporting this information when we had

23

1 a certificate of confidentiality from the federal
2 government, and that is why I was in New York City
3 doing this study that can't be done now because you'd
4 never pass an ethics committee. But back in the day,
5 in the early '70s, that's the very thing that we were
6 looking at.

7 What we found was that there was
8 tremendous variance in the number of molestations
9 that had occurred, for example, or the number of
10 other behaviors that had occurred, tremendous
11 variance, and the media grabs the outliers. That is,
12 if you have 500 people in it, and you have one person
13 who has really abused a lot of kids, the media will
14 look at the average, because the average is inflated
15 by this one person.

16 You should look at the medians. The
17 medians are roughly, roughly about ten molestations
18 for individuals who molest kids, especially the boys.
19 For those who molest girls, it's about 2-point-
20 something. If you look at the medians, if you look
21 at the median number, kind of the center of the data
22 so you don't get tricked by the very high number of a

23

1 few people. So it's kind of a surprise to people
2 that a lot of boys are abused. And the reason for
3 that is because if you look at the victim statistics,
4 it's going to be predominantly females who report
5 being abused.

6 But if you take a look at that data and
7 you separate out those who weren't touched, just
8 looking at the touched people, it's predominantly
9 boys, about 63 percent; the others are females. And
10 it's because those who molest boys molest at a high
11 number. They're smaller numbers, but they are higher
12 numbers.

13 We are just starting to realize that
14 molestation of boys is occurring with all this stuff
15 in the news, but that's been known a long time.

16 COMMISSIONER FRIEDRICH: So this data is
17 just referring to actual child abuse, not child
18 pornography?

19 DR. ABEL: Absolutely. This was back in
20 the '70s when we were focusing on how many abuses
21 were occurring, and we had that certificate of
22 confidentiality so that we didn't have to report. Of

23

1 course we didn't have the details of any known
2 victims, so there wouldn't be a victim to report.
3 But that was the study supported by NIMH that we did
4 at that time.

5 COMMISSIONER FRIEDRICH: So to make sure I
6 understand, that number ranged between two to eight
7 times as much abuse as is actually reported, depending
8 on whether -

9 DR. ABEL: No, it's about - those who
10 molest boys molest on average, median, is about ten.

11 COMMISSIONER FRIEDRICH: Ten.

12 DR. ABEL: Those who molest girls is 2-
13 point-something victims.

14 COMMISSIONER FRIEDRICH: Okay.

15 COMMISSIONER FRIEDRICH: Dr. McCarthy -

16 VICE CHAIRMAN CARR: The mean number of
17 boys molested is ten? That means -

18 DR. ABEL: No, the mean number of abuses
19 by a person who abuses boys is ten.

20 VICE CHAIRMAN CARR: Ten boys.

21 DR. ABEL: Yes, ten boys.

22 VICE CHAIRMAN CARR: Okay. Now each of

23

1 those boys could have been abused many times?

2 DR. ABEL: That's correct.

3 VICE CHAIRMAN CARR: And they stop? Or
4 it's just ten over many, many years? Or it's all over
5 the map, and it tends to be ten boys?

6 DR. ABEL: We gathered the information
7 going back as far as we could, from designated points
8 in their lives when they weren't and were molesting,
9 and we counted those up by yearly - Dr. Judith Beck
10 and I, Becker, and I did that - at the time that we
11 saw them. Then we stopped counting.

12 VICE CHAIRMAN CARR: And some of those
13 individual boys were abused for years?

14 DR. ABEL: Absolutely.

15 CHAIR SARIS: And, Dr. McCarthy, did you
16 have a view?

17 MS. MCCARTHY: It is reported throughout
18 the literature that the sexual abuse of minors is
19 under-reported. And this could be because of various
20 like cultural aspects. Also, the frequency with
21 which boys reported, like from the victim's
22 perspective themselves, boys report versus girls

23

1 report. So it's always been known that even with the
2 criminal justice statistics, we don't really know if
3 we're actually getting an accurate account.

4 COMMISSIONER FRIEDRICH: But also isn't
5 that true with respect to any sexual abuse offense,
6 not just minors?

7 MS. McCARTHY: I'm sorry?

8 COMMISSIONER FRIEDRICH: Isn't that true
9 with respect to all sex abuse offenses, that they're
10 under-reported?

11 MS. McCARTHY: Yes, in general; yes.

12 COMMISSIONER FRIEDRICH: By minors.

13 MS. McCARTHY: Yeah, and as well as that,
14 you know, like the relationship to the perpetrator,
15 as far as predominantly victims know their
16 perpetrators. And depending on the age of the
17 victim, if the victim is older, they might understand
18 the criminal consequences if I do report that my
19 father or my brother has molested me. Or, the effect
20 it is going to have on the family.

21 So there's various reasons why victims
22 themselves will not, unfortunately, report the abuse.

23

1 COMMISSIONER FRIEDRICH: Do you agree that
2 the actual number is at least twice as high?

3 MS. McCARTHY: I honestly could not
4 comment on that. I don't know. I could not say
5 twice as high.

6 CHAIR SARIS: Commissioner Wroblewski?

7 COMMISSIONER WROBLEWSKI: Thank you very
8 much, Judge Saris. And thank you both, Dr. McCarthy
9 and Dr. Abel, for being here. The testimony has been
10 fascinating.

11 One thing that I've been trying to do as I
12 was listening to you is translate between the world
13 that you live in, the world of clinicians and
14 research, to the world that we live in, which is
15 criminal justice.

16 So in your world, you're talking to these
17 offenders at great length for great periods of time
18 doing all kinds of assessments. In criminal justice,
19 that most of the time doesn't happen because
20 offenders have a constitutional right not to talk to
21 us, and they have lawyers who tell them not to talk
22 to us. And so we are left in a very, very different
23

1 situation than the world that you are in.

2 But here are some of the takeaways that I
3 heard from you that I think help in the world that we
4 live in, and I just want you to tell me if you think
5 I've gotten this right, or not so right.

6 Number one, that the assessments
7 themselves actually help, but not all that much
8 because I think the words you said, Dr. Abel, they
9 all lie. And especially those who are involved in
10 child pornography lie about their involvement in
11 molestation, or contact offenses, or solicitation.

12 Two, what I heard was, forensics, computer
13 forensics are very, very valuable information, maybe
14 the best information.

15 And so, Dr. McCarthy, I heard you say,
16 look, I talk to them at great length, but if I could
17 only get access to this computer, because the
18 computer will tell me what they looked for, what they
19 were searching for, and so forth.

20 You also said, Dr. McCarthy, that the
21 images and the collection help - not completely - but
22 help define the risk. And I think you both said that

23

1 the involvement with community, that when they go
2 beyond just looking by themselves and work in
3 communities, that that helps define the risk. And,
4 that the forensics have to go far beyond, though, the
5 collection to help define the risk.

6 Is all of that a fair characterization of
7 what I heard?

8 DR. ABEL: On the first part, you live in
9 your world. When we see child molesters through the
10 door, they've cleared the criminal justice system
11 mostly. It's a completely different animal. They
12 are surprisingly forthcoming.

13 It isn't because we have sparkling
14 insight, or wonderful personalities, it's that we're
15 in a different system and we are trying to help them
16 block, stop, and never do this again. Whereas, up to
17 the point that they are convicted, it's an entirely
18 different thing.

19 Any lawyer in his right mind will say:
20 Shut up. Don't say anything. Don't tell anything.
21 And I have to be in the room any time you talk.

22 So it's a different world we live in. I

23

1 agree with you that you are late in the game from our
2 vantage point in that offenders are surprisingly
3 straightforward, and surprisingly – surprisingly not
4 crazy and not antisocial. It's surprising.

5 Anyone who works with offenders with
6 arrests, they find them to be – except for this
7 issue – they're rather straightforward folks. It's
8 startling. We expect them to be wild and crazy.
9 They are not. And they are not crazy that they're
10 going to report everything in front of the criminal
11 justice system. They are not going to do that. And
12 that's the very point I was trying to make with that
13 two complicated slides, that when they have been
14 arrested for (a) child pornography, they don't tell
15 you what their actual behavior has been, whether
16 they've been arrested for and referred for going to
17 meet a child. They clam up about that.

18 But if you ask people who are just regular
19 child molesters, they will reveal these other things.
20 And that's very informative. I point that out
21 because the literature is misunderstanding that
22 issue.

23

1 Sorry for -

2 CHAIR SARIS: Ms. McCarthy?

3 MS. McCARTHY: Can I just respond to that?

4 I don't know if you can look at it as "they all lie."

5 I would look at it as they possibly minimize what

6 they did.

7 Like I mean obviously someone will come in

8 and say "I never did it." Someone accessed my

9 computer. I had nothing to do with it. My computer

10 was hacked. Et cetera, et cetera. You know, you

11 could write a book on it.

12 But then you have the other guys, which

13 I'm talking about the guys I've seen, the majority

14 will minimize what they've done. They possibly say,

15 "I only had nude pictures." There again, if we had

16 the forensics analysis: No, you didn't. And we've

17 got to talk about that.

18 With regard to the community issue, there

19 again there's different levels of community. You can

20 have johnny offender involved in a pedophile

21 community online where they're actually discussing

22 molesting kids, as we speak, so to speak. And you

23

1 have offenders saying, oh, can you send me the
2 pictures of you doing this with her, or him, et
3 cetera, or the video. I would consider that a more
4 dangerous person than a guy that's in a chat room
5 talking about pictures, and can you just send me
6 whatever you have.

7 The first instance, we have an individual
8 that is actually contributing literally to the
9 molestation of a particular child, because they're
10 requesting pictures depicting a, b, c, or videos.
11 That's one kind of community.

12 Then you have the other community where
13 essentially they're trading or asking about pictures,
14 but not specifically requesting certain types of
15 pictures.

16 CHAIR SARIS: Okay, so Judge Hinojosa and
17 then Judge Howell, and then we're going to try and
18 take a quick break.

19 COMMISSIONER HINOJOSA: Do you have an
20 opinion with regards to the effectiveness of
21 in-custody treatment programs versus programs that
22 are like yours where people come in voluntarily as
23

1 opposed to in-custody treatment programs? And how
2 long would those need to be in order to be effective?
3 And what is your opinion, if you have any, with
4 regards to that?

5 MS. McCARTHY: I don't have an opinion
6 with regard to whether they're more effective than in
7 the community, or how effective they are, to be
8 honest. However, what I will say is, in-custody
9 programs have different issues to deal with than
10 those in the community.

11 Like when we're dealing with offenders in
12 the community in treatment, we have to be aware of
13 what they are doing right now. In-custody, they're
14 not going to have access to the Internet. They're
15 not going to be walking around the streets,
16 obviously, where children are. Et cetera, et
17 cetera.

18 So we have to consider all these other
19 issues about what they are doing right now in the
20 community, and we there again employ the polygraph.
21 I don't know to the extent they employ polygraphs in
22 in-custody, in prison situations. There are not that
23

1 many treatment programs, unfortunately, in the
2 federal system for these offenders.

3 I have had offenders who have come out of
4 in-custody treatment programs, and this could purely
5 be because of the offenders themselves, and they're
6 still reticent about, or resistant to talking about
7 their offense, to which I usually respond, you've
8 been in treatment for two years. I would
9 imagine - not "assume" because that's a thinking
10 error - I would imagine that by now after two years in
11 treatment you would be more comfortable talking about
12 your offense.

13 So it gives me some inclination to the
14 extent of which they participated in treatment while
15 they were in custody, if after two years of treatment
16 they can't identify the fact that they minimized and
17 justified their involvement with their offense. Or
18 they're still in a level of denial.

19 Again, I have to stress, I am not saying
20 this is because of the treatment program itself.
21 It's possibly related to the individual.

22 COMMISSIONER HOWELL: Well I actually was

23

1 going to follow up a little bit on the same issue
2 that Judge Hinojosa raised, because one of the issues
3 that I myself have been presented with is the results
4 of a Butner Study from 2009, as a sentencing judge,
5 by prosecutors; the letter that our chairman just
6 mentioned this morning from senior Members of the
7 House and Senate Judiciary Committee specifically
8 cite the results of this 2009 Butner study.

9 So, and specifically I'm quoting Chairman
10 Smith, Ranking Member Grassley, you know: "A 2009
11 study by Michael Bourke and Andres Hernandez found
12 that as many as 85 percent of inmates convicted of
13 child pornography possession also admitted to
14 molesting a child."

15 So the criticisms that have been made, and
16 I think we're going to hear testimony later today
17 from people who criticize the research methodology
18 used in the Butner Study, and I think that Dr.
19 Hernandez has himself subsequently, after the report
20 came out, has also said himself that there are some
21 research methodological issues that raise questions
22 about the reliability of some of the information that

23

1 he obtained because, not that the inmates in that
2 study were truthful and forthright, or were
3 minimizing, but that in fact quite contrary to what
4 you've both said they were exaggerating their prior
5 conduct.

6 Faced with this, as mere lawyers or
7 judges, on the Commission with what the research and
8 the critique that different people are giving to
9 people who are in treatment and how reliable the
10 information is, how are we supposed to reconcile
11 that? And I guess, to be more specific, do you think
12 that offenders who are in custody treatment say
13 different things than when they're out of custody and
14 in treatment with one of you guys, for example?

15 DR. ABEL: The Hernandez study at Butner
16 has a lot of critiques, and as a matter of fact it
17 was originally sent for publication, withdrawn,
18 discussed, sent back, and there's still criticisms
19 about it. And that's all in the literature, the
20 criticisms of it. That's one study. I wouldn't get
21 too excited about one study.

22 My experience –

23

1 COMMISSIONER HOWELL: It's a study with a
2 lot of traction, though.

3 DR. ABEL: Yes. I'm impressed that it
4 comes forward now, at this time, when there's been so
5 much criticism of it. I mean, it reflects the
6 traction that it has.

7 COMMISSIONER HOWELL: And that's what I've
8 told some of the prosecutors who have presented it to
9 me in court: Hasn't this been highly criticized?

10 But what I'm hearing from you, maybe we
11 should be giving it more credence than I thought the
12 critics were saying we should. Because they're in
13 treatment, and instead of minimizing they might be
14 making more forthright comments.

15 DR. ABEL: Well if you don't participate
16 in that program, you're out of the program. So it's
17 a very select group.

18 COMMISSIONER HOWELL: Right.

19 DR. ABEL: And I don't think the
20 incarcerated treatment programs are very extensive
21 throughout the United States.

22 Canada is a different story. But in the

23

1 United States, they are very limited because they
2 don't have the resources. And many times they are
3 viewed as an education about treatment so when you
4 leave the prison you will know what to expect when
5 real treatment begins. Quite frankly, that's what it
6 is in Georgia.

7 You know, they are taught that they can't
8 really – they don't have the resources, they don't
9 have the facilities, they don't have the specialists
10 to do the treatment, and so they say, well, we give
11 you, they don't call it "treatment light" but that's
12 what it is, and I just want to tell you I believe
13 that's what it is because when individuals come out
14 of that treatment they have minimal understanding, as
15 was already pointed out. Except in Canada. I think
16 Canada is much more organized in that regard. But my
17 basis is the United States.

18 CHAIR SARIS: Anyone else? Is anyone
19 dying – because I think everyone here is dying to take
20 a break.

21 (Laughter.)

22 CHAIR SARIS: This was extremely helpful

23

1 and informative, and I wish – you know, I'm hoping we
2 can reflect a lot of this in our report, and thank
3 you very much.

4 DR. ABEL: Sure. Thank you.

5 MS. McCARTHY: Thank you.

6 CHAIR SARIS: How about we come back here,
7 we're going to be a little late now, at 11:30, a 15-
8 minute break.

9 (Whereupon, a recess was taken.)

10 CHAIR SARIS: That was the quickest break
11 we could have had, but we need to stay on schedule.
12 We're maybe running ten minutes behind, but this is a
13 fabulous panel and it is on Possible Relationships
14 Between Sexually Dangerous Behavior and Child
15 Pornography.

16 On the panel is Michael Seto, who is a
17 consultant in the Integrated Forensic Program of the
18 Royal Ottawa Health Care Group. Previously Dr. Seto
19 worked at the Center for Addiction and Mental Health
20 in Toronto, Canada. He is also an associate
21 professor at the University of Toronto, and teaches
22 as an adjunct professor at a number of universities.

23

1 His research is mainly in the area of pedophilia,
2 sexual offending against children, child pornography,
3 risk assessment, mentally disoriented offenders,
4 psychopathy, and program evaluation, a mouthful.

5 Richard Wollert provides psychological
6 services as a solo private practitioner specializing
7 in the assessment and treatment of sex offenders.
8 Previously he worked under contract to provide mental
9 health services to offenders convicted of federal sex
10 offenses, and also directed a mental health clinic
11 focused on assessment and treatment of sex offenders.
12 He served on the faculties of Lewis & Clark College,
13 the University of Saskatchewan, and Portland State
14 University.

15 Welcome. I don't know if you were here
16 for the earlier iteration, which is basically we have
17 this light system. When it's getting towards the
18 end, a yellow light goes off, and then a red. But
19 typically we're so enthralled, if you want another
20 couple of minutes go for it.

21 So, Dr. Seto.

22 MR. SETO: Thank you very much, and good

23

1 morning. I want to thank the Commission first for
2 the opportunity to appear and speak today.

3 I have prepared a written submission, so
4 for this presentation what I would like to do is
5 focus on what I hope are the key points in order to
6 maximize the time for questions. I was really
7 impressed with the scope and quality of the questions
8 this morning, and I would like to make sure we have
9 as much time as possible for that.

10 My aim today is to present you with the
11 scientific research on child pornography offenders
12 and their offenses, starting first with an overview
13 of what we know about these individuals in terms of
14 their characteristics; and then spending the majority
15 of my time talking about what we know about their
16 sexual offense histories, their risk to offend, and
17 the kinds of factors that are useful in knowing which
18 individuals are at higher risk for further sexual
19 misconduct.

20 Here's the overview. It sounds like a
21 lot, but I'm actually going to try and be as brief as
22 possible.

23

1 The first thing, and I think everyone in
2 the room is aware of this, is, my interest certainly,
3 both from a research and clinical point of view, is
4 with regards to the increasing pressures on the
5 criminal justice and mental health and social service
6 systems, for that matter, with regard to this
7 category of crimes.

8 And so this is a report from the U.S.
9 Department of Justice looking at federally sentenced
10 offenders. You can see here that the important part
11 is the red line. The numbers of individuals coming
12 into the federal system for transportation offenses,
13 or contact sexual offenses, has been relatively
14 stable over a period of years; whereas you can see
15 from the red line that the number of child
16 pornography cases has been increasing steadily. And
17 there's data from a variety of sources.

18 Later today we're going to hear from Janis
19 Wolak, from the Crimes Against Research – the Crimes
20 Against Children, not crimes against research –

21 (Laughter.)

22 MR. SETO: We all make mistakes, but

23

1 Crimes against Children Research Center, showing that
2 the number of arrests has tripled in the United
3 States from 2001 to 2009. So obviously of great
4 concern to everyone involved.

5 In terms of what we know about the
6 characteristics of child pornography offenders, this
7 is my summary of a number of different studies. The
8 citations there aren't necessarily the only studies
9 that speak to that; they're just I think particularly
10 helpful citation.

11 I am introducing this here because some of
12 this information I think is quite relevant to
13 thinking about risk assessment and making decisions
14 about people down the line.

15 I understand of course that sentencing
16 serves a variety of functions: punishment,
17 deterrence, and so forth, reflecting social values.
18 But in my mind, sentencing is also about protecting
19 the public, and protecting children in particular in
20 this case, and so risk for future sexual offending
21 is, I hope, a central concern.

22 The first thing I would like to point out
23

1 is, quite remarkably this is an extraordinarily male
2 phenomenon. Across studies in the United States and
3 Canada, typically 99 percent or more – so essentially
4 very few female child pornography offenders have been
5 identified. That might not be surprising to some
6 folks, but it is surprising to me because it's an
7 even more male prevalence than for sexual offending
8 in general where you typically see in Canadian and
9 U.S. data perhaps 90 to 93 percent of let's say
10 incarcerated sex offenders are male.

11 Quite striking for me, I don't know what
12 the explanation for this is, child pornography
13 offenders are disproportionately Caucasian. They're
14 disproportionate to the offender population. They're
15 disproportionate to the general population. There's
16 something about perhaps some cultural or ethnicity
17 factors that might explain why there's this
18 disproportionality.

19 This question has come up in the comments
20 and questions from earlier presentations. Our
21 research, and I think the research of others,
22 suggests that on average child pornography offenders
23

1 are likely to have pedophilia. In the study cited
2 there where we were looking at their sexual arousal
3 patterns in the laboratory, about 61, 62 percent of
4 child pornography offenders clearly showed a sexual
5 preference for children.

6 And across studies, I would say it's
7 reasonable to say that a majority of child
8 pornography offenders would be diagnosed with
9 pedophilia. Now that does leave room for other
10 motivations, which was one of the issues that came
11 up. People have talked about more indiscriminate
12 sexual behavior where they may not only be accessing
13 child pornography, but also accessing other unusual
14 pornographies such as bestiality, sadomasochism,
15 fetishism, and so forth. I'll talk a little bit
16 about that later.

17 There's some research that shows that on
18 average child pornography offenders have a higher IQ,
19 score higher on intelligence tests than contact
20 offenders, and are better educated than contact
21 offenders. That isn't to suggest that they're super
22 bright or particularly educated. They're just closer

23

1 to the population average than contact offenders who
2 tend to be below average on those two dimensions.

3 And certainly relevant, as I will discuss
4 later in my presentation, compared to contact sex
5 offenders, child pornography offenders have less
6 criminal history in terms of prior felony
7 convictions, in terms of – you know, however you look
8 at it, in terms of number of priors, or do they have
9 a juvenile history, and so forth. They have less
10 criminal history.

11 VICE CHAIRMAN CARR: These contact
12 offenders include adult-on-adult offenders, right?

13 MR. SETO: Some of these studies, that's
14 true. The studies that I'm paying the most attention
15 to are where they compare them to contact offenders
16 against children as the most, I think, direct
17 comparison group.

18 Actually, before I get to that part, the
19 other thing I want to talk about is – and it's not
20 represented in the slides – but it's in my written
21 submission, is that there's been a number of
22 comparison studies now that have compared child
23

1 pornography offenders to contact offenders with child
2 victims on a variety of other dimensions.

3 Some of the things I want to highlight
4 there, I talked about age and education and criminal
5 history. There's also research done by my research
6 team, and also the teams of others present in the
7 room, that have looked at psychological risk factors
8 that have been identified in the sex offender
9 research literature.

10 In particular, child pornography offenders
11 seem to be distinguished from contact offenders in
12 terms of the likelihood of pedophilia, or other
13 deviant sexual interests. They differ on
14 psychological measures of sexual preoccupation where
15 on average child pornography offenders score higher
16 in terms of being preoccupied by sexual thoughts and
17 fantasies, having difficulty controlling their sexual
18 urges and so forth.

19 And those are all psychological factors
20 that in the at least mainstream sex offender research
21 field have been shown to be predictive of sexual
22 offending in the future. So those are important

23

1 differences to highlight.

2 VICE CHAIR JACKSON: Sorry? You said they
3 differ as to pedophilia?

4 MR. SETO: Pedophilia, yes.

5 VICE CHAIR JACKSON: Are they more or less
6 likely than the contact offender?

7 MR. SETO: Thank you for the question.
8 They are more likely to have pedophilia than contact
9 offenders, which might seem counterintuitive. I
10 think a lot of people would imagine, why would anyone
11 have sexual contact with a child if they weren't
12 sexually interested in children?

13 And I think the best explanation is that
14 certainly sexual motivations are an important
15 motivation, the dominant motivation, but some of the
16 offenders who sexually victimize children aren't
17 necessarily motivated by a sexual preference for
18 children. They could be opportunistic offending;
19 highly antisocial individuals, for example, might be
20 less discriminating about the choice of the sexual
21 target. Substance abuse comes into play. A lot of
22 contact sexual offending against children is

23

1 committed in the context of incest, which has some
2 different dynamics at play.

3 Whereas, in our view given the amount and
4 scope of pornography that's available online to
5 anyone, really, purposely selecting a particular kind
6 of content to me says something about your sexual
7 interests.

8 So even if I never had an – and this I
9 think has come up in terms of having that digital
10 evidence, having those forensic analyses
11 available – even if I never spoke to a person about
12 their sexual history and about their sexual
13 interests, if I knew the contents of their harddrive
14 and their browsing behavior, I would be able to say
15 something meaningful about their sexual history.

16 You know, if somebody denies pedophilia,
17 denies any sexual interest in children, yet they have
18 large amounts of child pornography and relatively
19 small amounts of other kinds of pornography, I am
20 pretty skeptical in that case.

21 Speaking to that, I've mentioned a number
22 of studies that have looked at the motivations of
23

1 child pornography offenders. And I think it is fair
2 to say that that evidence is consistent in the sense
3 of many child pornography offenders, but not all,
4 being sexually interested in children, being sexually
5 interested in this material.

6 This relationship I think is robust enough
7 that I know that for the task force that is looking
8 at the psychiatric diagnostic criteria for the next
9 version of this diagnostic manual, the DSM that's
10 been mentioned today, persistent use of child
11 pornography is being considered as one of the factors
12 to consider.

13 So not only what are your sexual thoughts,
14 fantasies, what are your sexual arousal patterns,
15 what is your history of sexual contact with children,
16 but what is your use of child pornography.

17 CHAIR SARIS: And does it also come into
18 play in the paraphilia?

19 MR. SETO: Oh, paraphilia being the
20 broader category, and pedophilia being one example of
21 paraphilia.

22 The association between pedophilia and
23

1 child pornography offending, however, is not one-to-
2 one, as we've been discussing. Some child
3 pornography offenders are not pedophilic, and other
4 explanations have been proffered, including
5 compulsive sexual behavior, so-called pornography or
6 sexual addiction, and I think that there's some room
7 for those other motivations or explanations for this
8 conduct. But my sense is that those are minority
9 explanations. I think the dominant – certainly the
10 ones to start with as a kind of working hypothesis is
11 pedophilia.

12 Okay, now I'm ready to move onto this. In
13 terms of contact offending history – and I want to
14 break this into two different issues, because I want
15 to make sure, as much as possible, that I am clear
16 here. This is looking backwards. This is, once
17 someone is identified in a clinical setting or in a
18 criminal justice setting as having committed child
19 pornography offenses, looking backwards what is their
20 history in terms of contact sexual offending?

21 These are the results of a peer-reviewed
22 study that was published in early 2011 where we

23

1 identified a total of 21 studies by different
2 researchers. A lot of those studies were from the
3 United States, but not exclusively so, representing a
4 total of over 4,400 online offenders, most of whom
5 were in trouble for child pornography offending.

6 What we were able to glean from those
7 studies were the percentages who had contact sexual
8 offending histories based on official criminal
9 records for 21 studies of those 22 studies, and in a
10 smaller subset of studies, 6 of those studies, where
11 there was self-report information as well.

12 So typically in the context of either
13 self-report provided in treatment, or as a result of
14 polygraph interviewing.

15 And you can see here that about one in eight
16 of the online offenders had an official record. So it's
17 about 12, 13 percent. But approximately one in two, a
18 little over half, admitted having committed contact
19 sexual offense in the past for those six studies that
20 had self-report.

21 So to me the impact of this review of
22 available research is, one, it does highlight the

23

1 discrepancy, which I think was one of the questions
2 that came up, a discrepancy between what has happened
3 and what is officially known. You can see there the
4 size of the discrepancy. But I think also, even if
5 one assumes that those individuals who did have
6 contact offenses in their past but still denied it
7 even upon treatment, and even upon polygraph
8 interviewing, even if we assume that there are some
9 number of those individuals as well, I think that the
10 self-report data belie the assumption that all child
11 pornography offenders have necessarily sexually
12 offended directly against children.

13 So in other words, 55 percent we can argue
14 or debate what the adjustment factor ought to be, but
15 I don't think there's a plausible set of explanations
16 to bring that 55 percent up to close to 100 percent.

17 Now earlier today there was mention of the
18 so-called Butner Study by Bourke and Hernandez
19 published in 2009 which looked at the sexual offense
20 histories of a sample of federally incarcerated child
21 pornography offenders at the Butner Institution.

22 I think it is worth pointing out that, I

23

1 know that that is frequently cited in the federal
2 courts, and certainly it is relevant because it is
3 the federal population, but in our analysis of the
4 available research that one study was a statistical
5 outlier.

6 What they found in their sample of 155
7 child pornography offenders is about a quarter had an
8 official criminal record of contact offending, but 85
9 percent admitted to a history of contact offending
10 upon treatment, and I think about half of those cases
11 they also underwent polygraph examinations.

12 And so what I'm saying is that that 85
13 percent value is unusually high compared to the other
14 research that is available.

15 COMMISSIONER HOWELL: So does that mean
16 that that was not one of the studies you included in
17 the six studies -

18 MR. SETO: It is one of the studies -

19 COMMISSIONER HOWELL: - you included in
20 your self-report?

21 MR. SETO: Yes, it is one of the six
22 studies.

23

1 COMMISSIONER HOWELL: So it - okay.

2 MR. SETO: It is one of the six studies.

3 It certainly is relevant data. It counts. But what
4 I'm saying is, when you look at that set of six
5 studies, this is an unusual study in terms of the
6 high value that it reported.

7 Now I know that different explanations
8 have been proposed for this finding, and, you know,
9 there's certainly a lot of debate about the merits of
10 these criticisms. But I know that, you know, one
11 criticism that's been raised is about the composition
12 of this study sample.

13 My understanding is that at the time the
14 Butner sex offender treatment program was the only
15 treatment program available for child pornography
16 offenders in the federal system, and so there might
17 have been some selection effect going on, that people
18 were purposely sent to Butner because there was this
19 treatment program there, and perhaps that selection
20 was associated with their perceived risk.

21 And I also know that there's been claims
22 made in courts that there was an incentive for

23

1 disclosing offenses, even if they didn't occur. I'm
2 not here to be the final arbiter there, but I just
3 wanted to make sure that the Commission is aware of
4 this study, which I know it is, but also aware of
5 those criticisms and how it plays out relative to -

6 COMMISSIONER HOWELL: But you certainly
7 thought it was sufficiently reliable for you to
8 include it in your own study, and include it as one
9 of the six self-reports.

10 MR. SETO: Yes. Yes. I mean, the thing
11 about reviews of this kind is, if we want to, we
12 could look at each individual study and I know with
13 confidence, including my own research, that there are
14 legitimate criticisms of each of those studies in
15 terms of methodology, in terms of sampling, in terms
16 of sometimes the analyses that were conducted.

17 I think the value of these kinds of
18 reviews is that, contrary to the idea it's garbage
19 in/garbage out, I think that one of the advantages of
20 this kind of review is you are taking up studies that
21 are quite diverse in terms of those various issues,
22 and you are trying to like see the signal despite the

23

1 noise in them.

2 So in other words, if all of the studies
3 had the same problem, then I would really question
4 the conclusion that could be drawn from those
5 studies. But the criticisms specifically of this
6 Butner study don't necessarily apply to the other
7 studies that had self-report, or they apply to a
8 lesser degree.

9 In terms of the second question – so that's
10 looking backwards. That's in terms of their prior
11 contact sexual offending history. Now this slide is
12 about looking forward. In the same review, we're
13 able to identify nine studies where they follow child
14 pornography offenders after they've been convicted,
15 after release from custody. Early days, because this
16 is an emerging area of research, but followed for an
17 average of 3-1/2 years post-opportunity.

18 You can see here the recidivism rates that
19 were reported after those – in those nine studies.
20 Broken down according to contact sexual offenses,
21 which is approximately 2 percent, 2.1 percent to be
22 precise. And for new child pornography offenses

23

1 specifically, which was 3.4 percent.

2 Some individuals committed both kinds of
3 offenses. And if you combined these two kinds of
4 offenses and just say did somebody sexually reoffend,
5 it was 5 percent of the sample who sexually
6 reoffended in that time.

7 Now I realize one of the caveats of this
8 kind of research that relies on official records is
9 that not all new offenses are reported to
10 authorities. Not all new offenses result in
11 successful prosecution and conviction. And of course
12 it's a fairly short follow-up period. I'm sure that
13 the observed recidivism rates will go up with time,
14 although I also agree with Dr. Abel in his comment
15 earlier that typically in offender follow-up studies
16 you see a lot of new offenses, if they are going to
17 take place, in that first five, six, seven years
18 post-opportunity.

19 CHAIR SARIS: And when you say
20 "recidivism," this is -

21 MR. SETO: Officially recorded new
22 criminal - depending on the study, it's new criminal

23

1 charges or convictions.

2 CHAIR SARIS: And for child porn or
3 contact?

4 MR. SETO: Correct.

5 So to me, the import of these studies is
6 that I think this does also contradict an assumption
7 that necessarily child pornography offenders are a
8 high risk to sexually reoffend, either in terms of
9 further child pornography offending, or in terms of
10 contact sexual offending against children.

11 I think the fairest conclusion to draw is,
12 like other offender populations, there's
13 heterogeneity in risk to reoffend, and in my mind the
14 important task for – certainly for my research team an
15 important task is to identify the factors that are
16 useful in identifying the high-risk individuals,
17 because I think that all the purposes of sentencing
18 and forward, treatment, supervision, et cetera, I
19 think that they all could be more effective and more
20 efficient if they are informed by knowledge of risk.

21 VICE CHAIR JACKSON: Do these recidivism
22 studies say anything about treatment? In other

23

1 words, are these people – is this pool of people
2 people who underwent treatment, and so therefore we
3 have these ratios? Or are they just people who were
4 released?

5 MR. SETO: It's sort of average. There's
6 mixes of treatment. I see I have the orange light,
7 so this is a test of if I'm interesting enough or
8 not.

9 (Laughter.)

10 CHAIR SARIS: We don't need to take a vote
11 to say keep going.

12 MR. SETO: I'll either be cut off mid-
13 sentence, or I'll be able to make it through.

14 CHAIR SARIS: You know, some of the
15 circuit courts do that. Boomp, you're done.

16 (Laughter.)

17 CHAIR SARIS: But you can keep going.

18 MR. SETO: Okay, well I'm glad to hear
19 that. This is actually the last slide I want to
20 present. I was going to also summarize what we've
21 discussed, but I feel like we've covered it very
22 well.

23

1 This is emerging research as well on the
2 risk factors for sexual recidivism across a number of
3 studies. And I won't read them all. They're there
4 on the list for everyone to see. But I think the
5 worthwhile comment to make here is that a lot of
6 these factors aren't going to be a surprise to any
7 judge who has dealt with criminal cases.

8 These are established criminal risk
9 factors. Right? Things like the age of the
10 offender. Things like their criminal history.
11 Things like have they failed on supervised probation
12 or parole before? Do they have substance abuse
13 problems? These are classics, if you will.

14 So I find reassurance in that, because it
15 tells me that we are certainly on some solid
16 foundation in terms of understanding the factors that
17 predict who goes on to sexually reoffend amongst this
18 population, and that we can build on existing
19 knowledge. We don't have to start fresh and say we
20 have to throw everything out the window and try and
21 identify the unique factors, or the special factors
22 for this population. We've got a solid base in terms

23

1 of things like criminal history, age, and so forth.

2 VICE CHAIRMAN CARR: You have "Non-
3 Internet child pornography" up there.

4 MR. SETO: Yes. This is a study, actually
5 the Faust, et al., study which was with a federally
6 incarcerated population of child pornography
7 offenders. And they found in their analysis of their
8 follow-up data that having nondigital - I shouldn't
9 really say non-Internet because it's not about how
10 they got it, it's whether it was digital or not
11 digital.

12 So the fact that somebody still is old-
13 school in terms of having actual photographs or
14 videos or magazines, or other kinds of real objects,
15 that was predictive of sexual rearrest in that study,
16 as opposed to somebody who had exclusively a digital
17 collection.

18 Now one thing that's not listed there,
19 because we're still looking at those data and
20 preparing it for a peer-reviewed publication, is - and
21 I want to make this point, and this is my final
22 point - to echo some of the comments that you've heard

23

1 earlier this morning, is the value of knowing not
2 just whether somebody has been convicted of child
3 pornography offenses, but having some sense of the
4 scope and the parameters of those offenses down the
5 line, is that in one of our studies, which was really
6 focused actually on available information to law
7 enforcement because – and this is a study with my
8 colleague, Angela Eke, who works with the Ontario
9 Provincial Police, their focus was really on we're
10 overloaded with cases. We're overwhelmed. We cannot
11 catch up.

12 More cases come over the transom than we
13 are even prepared to have them, now even with more
14 officers and more resources. We have to prioritize.
15 So can you help us identify a short checklist of
16 factors that we can use to prioritize our
17 investigations and pursue those? We're not saying
18 we're ignoring the rest, but we have to prioritize.

19 And so we focused really in that study on
20 factors that could be available to police in their
21 investigations. And one of the factors that's coming
22 out as predictive of sexual recidivism is the ratio

23

1 of child pornography content depicting boys, relative
2 to the [content] depicting girls.

3 Now my sense of child pornography law by
4 and large is it's focused on the age of the depicted
5 person, and there's other factors that are
6 considered, but the law doesn't distinguish between
7 whether it's pictures of – images of boys or images of
8 girls. But from a risk assessment point of view,
9 that information is important.

10 So somebody coming into a risk assessment
11 situation where all we know is that they were
12 convicted of child pornography, we don't know as much
13 about their risk to offend as if we knew that their
14 child pornography offending was really focused on
15 boys as opposed to girls.

16 CHAIR SARIS: So just a higher risk for
17 boys?

18 MR. SETO: A higher risk, correct, which
19 very much parallels what we know about sex offender
20 risk in general, where those offenders who have
21 victimized boys are at a higher risk to reoffend than
22 those who victimize girls. So that is very much in

23

1 keeping with what we know about the role of
2 pedophilia and sexual interests of this kind and the
3 likelihood of doing it again.

4 CHAIR SARIS: Thank you.

5 MR. SETO: With that, I thank you very
6 much for your patience.

7 CHAIR SARIS: Thank you.

8 Doctor Wollert, right?

9 MR. WOLLERT: Doctor Wollert, yes. Yes.
10 Doctored around for 32, 33 years now.

11 I want to tell the Commission before I
12 start that I'm something of a skeptic. So what you
13 are going to hear from me is probably different from
14 what you heard from other people. Dr. Seto and I
15 agree that it is good to disagree, because that
16 stimulates the advance of science.

17 I am also not very much on high tech, so I
18 may not be able to coordinate this, but I will do my
19 best. I also want to thank Dr. Seto for going into
20 the red zone there, because I expect I'm going to do
21 the same thing.

22 (Laughter.)

23

1 MR. WOLLERT: Thank you, Michael.

2 MR. SETO: Sure.

3 MR. WOLLERT: Chairperson Saris, other
4 members of the United States Sentencing Commission,
5 thank you very much for giving me this opportunity to
6 present my views on research results and treatment
7 observations that bear on the sentencing guidelines
8 for federal child pornography offenders.

9 I am a forensic clinical psychologist,
10 lead developer of the MATS-1 actuarial test, former
11 full professor of psychology. From 1999 to 2009 I
12 treated federal sex offenders, including child
13 pornography offenders – and I shall refer to them as
14 CPOs – in the Portland, Oregon, area.

15 I have consulted with federal public
16 defenders, probation officers, and judges. I have
17 also testified in federal and state courts in CPO
18 cases. I know that many believe that pedophiles and
19 undetected molesters are predisposed to watch child
20 pornography on the Internet.

21 It is also believed that this causes
22 recurrent sexual misconduct. I call this the

23

1 Pornographic Attraction Theory, or the PAT. The PAT
2 has probably influenced the child pornography
3 sentencing guidelines of the Commission to some
4 extent.

5 Also, since 2006, the Bureau of Prisons
6 has invoked the PAT as a rationale for certifying
7 federal prisoners as sexually dangerous persons who
8 are eligible for post-prison civil commitment. I
9 have been involved in 200 state and federal sexually
10 dangerous person proceedings. This may account for
11 some of the differences between my view of pedophilia
12 and Dr. Seto's view of pedophilia.

13 The critical elements of the PAT are
14 unconfirmed. Considerable study of the PAT will
15 undoubtedly be launched by behavioral scientists in
16 the next decade. The rest of my testimony consists
17 of four sections.

18 The first reviews aspects of the
19 Commission's guidelines for sentencing CPOs that may
20 reflect the PAT's influence.

21 The second summarizes Dr. Michael Seto's
22 meta-analysis of online sex offenders as it relates to
23

1 the PAT.

2 The third focuses on what research with
3 federal CPOs tells us about the PAT.

4 The last combines these findings from
5 science with my views as a clinician.

6 The Commission was established as an
7 independent entity under the Judicial Branch in 1984.
8 One-hundred and twelve CPOs were sentenced under the
9 guidelines from '94 to '95. Federal prosecution was
10 pursued in 37 percent of 306 charged cases. Twenty
11 percent of the prosecution cohort was involved with
12 the production of child pornography. Only 31 percent
13 of the cases involved use of the computer.

14 From '94 to '06, the number of federal
15 prosecutions for child pornography increased
16 relatively more than the number of prosecutions for
17 other sex offenses. This increase is charted in
18 Figure 1 from a 2007 Bureau of Justice Statistics
19 Bulletin. I believe Dr. Seto showed the same chart.

20 Going to 2007 to 2009 prosecution cohorts,
21 only 10 percent to 11 percent of all pornography
22 defendants were sentenced for production in that era;

23

1 97 percent used computers by this time. Only 20
2 percent had previously been convicted of a felony.
3 The prosecution rate had risen to 60 percent.

4 The guidelines have become more punitive,
5 in spite of their application to a current population
6 that seems less dangerous than the population from
7 the early '90s. Table 1 shows the average sentence
8 length for a first-time CPO is now three times what
9 it was for both first-time and recidivist CPOs in
10 '94. So, '94 to now.

11 The average sentence length for first-time
12 CPOs is also now only ten months less than what it is
13 for pornography recidivists. Judges are concerned
14 about applying the CPO guidelines. Former Senator
15 Arlen Specter observed that each year the federal
16 judges' departure rate for child pornography
17 increases significantly. In '09, over 1600 CPOs were
18 sentenced in cases involving possession and
19 distribution. Fifty-three percent were sentenced below
20 the guideline range. The departure rate was 58 percent
21 in 2010. It was 62 percent in 2011.

22 In 2009, the Commission established a
23

1 review of the child pornography guidelines as a
2 policy priority for the guidelines amendment cycle
3 ending May 1st, 2010. It subsequently extended this
4 commitment. The present hearing provides a chance to
5 reconsider the guidelines in light of research on the
6 PAT.

7 Most studies, as Dr. Seto mentioned to me
8 earlier, and as research indicates, that relate to
9 the PAT were disseminated after 2008. Michael Seto
10 and colleagues condensed the results of 22 studies
11 into a couple of averages that estimated the percent
12 of online sex offenders who had committed contact sex
13 offenses. They also averaged nine follow-up studies to
14 estimate a single recidivism rate for the future.

15 Most online sex offenders were CPOs in
16 Dr. Seto's study. His team found that over 12
17 percent of over 4,000 offenders had an officially
18 known contact sex offense history. A
19 nonrepresentative group of 523 offenders provided
20 self-report information. Fifty-five percent, as you
21 heard earlier, reported contact sex offending.

22 The Seto group also stated that most
23

1 follow-up times were under four years; 3.4 percent of
2 the online offenders recidivated with a contact sex
3 offense, and 3.6 percent recidivated with a child
4 pornography offense.

5 Such findings led them to conclude that
6 there is a distinct group of online offenders whose
7 only sex crimes involve child pornography. Online
8 offenders rarely go on to commit contact sex
9 offenses. Seto's averaging approach, like all
10 research, has limitations – and Dr. Seto has
11 acknowledged that.

12 One is that it focuses on online
13 offenders, not federal child pornography offenders.

14 Two, it misses studies disseminated
15 recently.

16 Three, it gives equal weight to studies
17 that vary in quality of design. This is important
18 because many studies are poorly designed.

19 The most relevant body of research for
20 evaluating the PAT's applicability to federal CPOs
21 consists of studies on federal CPOs. This category
22 includes three projects.

23

1 Data on incarcerated federal sex offenders
2 in treatment at Butner were reported in the first
3 project. That is, CPOs. My colleagues and I argued
4 that the Butner results were artifacts of a badly
5 flawed research design.

6 As an alternative, we reported data for
7 federal CPOs in community-based treatment. Most
8 recently, U.S. Probation Officer Lawrence Andres
9 reported another – reported data for another group
10 like ours in a memo to senior U.S. Judge Jack
11 Weinstein.

12 The next section describes the Butner
13 studies, our criticisms, our research, and
14 Mr. Andres's data. Where are we now? Okay.

15 This is the Butner Study. In 2000,
16 Hernandez proposed that CPOs can be equally predatory
17 and dangerous as extrafamilial offenders after he
18 administered questionnaires and polygraphs to 54 CPOs
19 in treatment at Butner.

20 The reason for this claim was that the
21 CPOs under study disclosed more molestations in
22 treatment than they did during their federal PSIs.

23

1 They administered the same procedures, Bourke and
2 Hernandez, to a larger group of CPOs after this.
3 They estimated 26 percent in this group had
4 previously committed either a charged or undetected
5 molestation per their presentence reports, which
6 described a total of 75 sex crimes.

7 The percentage figure grew to 85 percent,
8 from 26 percent to 85 – oh, I'm sorry; I told you I
9 was going to have technical difficulties [referring
10 to Power Point].

11 So, anyway, some 26 to 85 percent when
12 treatment disclosures were added in. While the
13 number of reported victims at the end of treatment
14 was 1,777. It also concluded that the findings of
15 this study underscore the importance of prison-based
16 sex offender treatment for CPOs.

17 My colleagues and I criticized stringently
18 and trenchantly the Butner studies because of their
19 research design flaws. One troubling feature was
20 that the welfare of Hernandez's subjects was
21 dependent on their standing in his program. We
22 personally interviewed or counseled CPOs who had been
23

1 there. They told us they were fearful of program
2 termination and being transferred to a general prison
3 population where they'd be harassed as sex offenders.

4 Another problem was that Hernandez could
5 define a "sex offense" any way he wanted. He could
6 even count a dating relationship between a college
7 freshman and a high school junior as an offense. It
8 was also possible – impossible to verify the accuracy
9 of reports, because CPOs were told not to identify
10 their victims.

11 Finally, we were told that staff members
12 expected each program participant to add to his list
13 of disclosed offenses as he progressed through
14 treatment, and completed polygraph exams.

15 Now it is well known in psychology that
16 in experiments subjects will act the way a researcher
17 wants them to act, if they know what the researcher
18 wants. Aspects of the research situation that tip
19 subjects off to these hopes are called "demand
20 characteristics."

21 In the Butner study, it was a simple
22 matter for offenders – it was obviously a simple

23

1 matter for offenders in treatment to figure out what
2 Hernandez wanted from them. That is, disclosures of
3 offenses. we concluded that almost any offender
4 faced with the pressures built into the Butner
5 program would generate many possible false
6 disclosures.

7 We also criticized Hernandez for
8 concentrating on the number of self-reported sex
9 crimes escaping adjudication because it is peripheral
10 to addressing the issue of most import for the public
11 and for probation supervisors. And that is the
12 actual rate, the obtained rate, of recidivism.

13 I have personally treated 3,000 sex
14 offenders convicted of either contact sex offenses or
15 noncontact offenses like peeping or public indecency.
16 Between 1999 and 2009 I provided psychological
17 services to 55 CPOs under federal supervision in the
18 Portland area.

19 This set represented a near-exhaustive
20 sample of federal CPOs in Portland. I treated all of
21 the CPOs myself. My impression of this group
22 conflicted with the picture presented by Hernandez.

23

1 Overall, they struck me as ashamed of their
2 pornography offenses, motivated to succeed, well
3 educated, responsive to treatment, compliant with
4 supervision, and nonrecidivistic.

5 To further analyze the features of this
6 group, I compiled a computerized spreadsheet in '09
7 on all CPOs who had been in my program from their
8 file documents. I recorded each CPO's birth date,
9 marital status, his date of admission, and his status
10 on ten possible offense-related risk factors such as
11 Dr. Seto showed you on the last slide. They are
12 basically risk factors from the static 99, which
13 includes a noncontact sex offense.

14 I also recorded the date whenever a client
15 absconded from supervision, died, or was taken into
16 custody. This made it possible to automatically
17 calculate each person's time at risk in the
18 community.

19 Identical information for another 17 CPOs
20 under a federal contract in Iowa by Dr. Jason Smith
21 was obtained after this to increase the size of our
22 database.

23

1 Analyzing our survival data, we found that
2 two out of 72 CPOs were taken into custody for
3 possessing child pornography over an average risk
4 period of four years. No one was arrested on charges of
5 child molestation. Ninety-two percent succeeded in
6 completing their supervision without being revoked.
7 No one who successfully completed supervision was
8 charged with a contact or noncontact sex offense.
9 Fourteen percent had previously been convicted of
10 contact sex offenses, which was similar to the rate
11 reported by Dr. Seto earlier.

12 We used our raw data to compute point
13 totals for Static-99R, an actuarial for estimated
14 sexual recidivism risk among contact sex offenders.
15 The average 99R score for our cohort was one point.
16 In this case, the 99R's actuarial table leads to a
17 five-year expected recidivism rate of 4 percent.

18 The average 99R score for the 11 CPOs with
19 prior convictions for contact sex offenses was 3
20 points. In this case, the 99R table leads to a five-
21 year expected recidivism rate of 7.5 percent. These
22 results, being over-estimates of our obtained CPO

23

1 recidivism rate, supports the view that the 99
2 developers have stated that it should not be used to
3 estimate recidivism risk among CPOs with no contact
4 sex offenses.

5 Our results parallel results obtained by
6 Wakeling in another study. She found one percent of
7 a cohort – one percent of a cohort of CPOs had high
8 scores, only one percent, on the Risk Matrix 2000
9 actuarial instrument.

10 She also found that the 6.7 percent sex
11 recidivism rate for generalist sex offenders – which
12 is those with contact sex offenses – with low
13 actuarial scores, was four times higher than the 1.6
14 percent rate for child pornography offenders.

15 In the case of *U.S. v. C.R.*, U.S.
16 Judge Jack Weinstein directed the Eastern District of
17 New York to prepare a report on the treatment and
18 supervision of CPOs under the district's supervision.
19 You have heard from Dr. McCarthy about that program.
20 These individuals were in her program.

21 Probation Officer Lawrence Andres sent
22 Judge Weinstein a memo in May of 2011 indicating the

23

1 District had supervised a total of 108 CPOs since
2 1999. Mr. Andres stated that approximately 20
3 percent disclosed a prior victim either via clinical
4 polygraph examination or self-report during the term
5 of supervision.

6 Mr. Andres told me a "prior victim" was
7 defined as a person under 18 years old. So a prior
8 victim could be someone who was being dated by a
9 college freshman.

10 Regarding the issue of recidivism, Mr.
11 Andres informed Judge Weinstein that only one CPO had
12 committed a new contact sex offense while under
13 supervision. Eighty-seven percent of the New York cohort
14 also succeeded in not having their supervision violated.

15 Okay, I don't know what's happening with
16 my [Power Point] – thank you.

17 So the time frame for Mr. Andres's group
18 was the same as ours. The groups were much the same.
19 When you combine the data for ours with Mr. Andres's,
20 they're federal CPOs, they're from the same
21 underlying population, the overall base rate of
22 contact sex offense recidivism is six-tenths of 1

23

1 percent. That is a very low number.

2 The New York district also used some of
3 the self-report measures that Bourke and Hernandez
4 used: 20 percent of the New York supervisees made
5 new disclosures – 20 percent, not 59. Fifty-nine
6 percent did so in the Hernandez and Bourke program.

7 Statistical testing indicated that that
8 difference is highly significant. This analysis
9 shows how easy it is to manipulate self-report data
10 in a clinical setting. It is also possible that a
11 comparison group of offenders, which was not taken,
12 on supervision for nonsexual crimes, say for
13 substance abuse or some other sort of crime, might
14 have reported the same number of undetected sex
15 crimes as the New York CPOs.

16 So here are five conclusions about federal
17 CPOs that emerge from our research:

18 The average estimated risk per existing
19 actuarials was low. The recorded contact sex offense
20 recidivism rate was very low. A minority, about 15
21 percent, had been convicted of contact sex offenses
22 prior to their index pornography conviction. Ninety

23

1 percent successfully completed probation.

2 Lastly, using self-report to count prior
3 offenses produces unreliable results – at least the
4 way it has been done so far.

5 Our findings hold diagnostic and
6 prognostic implication at odds with the PAT. For
7 example, they suggest a fairly low percentage of CPOs
8 meet criteria for pedophilia as defined by the
9 American Psychiatric Association.

10 They also suggest that most CPOs succeed
11 on supervision and avoid recidivating because they do
12 not meet the criteria for what the Code – or what the
13 Federal Register defines as "Serious difficulty in
14 refraining from sexually violent conduct or child
15 molestation.

16 CHAIR SARIS: I wanted to flag that we
17 want to make sure there's time for questions here.
18 Do you have another few minutes?

19 MR. WOLLERT: Two minutes.

20 CHAIR SARIS: Two minutes is perfect.

21 MR. WOLLERT: I'll be done.

22 CHAIR SARIS: Okay.

23

1 MR. WOLLERT: I'll be done and out of
2 here. Thank you.

3 These conclusions are consistent with the
4 results of four studies of Internet CPOs in other
5 countries by Andres, by Frye, by Wakeling, and by
6 Webb. Our findings also apply to the feasibility of
7 developing actuarials for identifying prior contact
8 offenders and predicting future contact offenders.

9 The base rate occurrence of these problems
10 is low. The level of accuracy attainable by
11 actuarial instruments is moderate, or modest. There
12 are legal constraints to consider:

13 Uncharged criminal conduct may generally
14 only be considered in sentencing if proved by a
15 preponderance of the evidence. What does
16 "preponderance" mean? I don't know. Perhaps 50 to
17 80 percent certainty. Well, if you combine the
18 assumed base rates I've talked about and the test
19 accuracy probabilities, it is mathematically unlikely
20 that the expected identification rate of prior and
21 future misconduct will reach this preponderance
22 standard.

23

1 Wakeling has conducted research on this,
2 and she found no significant ROC curves. None will
3 be found, given these low base rates and moderate
4 test accuracy.

5 I agree with Dr. Seto that there's a
6 distinct group of online sex offenders. I would say
7 that the PAT is a highly contagious theory. It's
8 refractory to strong doses of evidence to the
9 contrary.

10 I'm not saying that we shouldn't be
11 concerned with safety, accountability, or human
12 suffering. Life involves endless uncertainty and we
13 cannot prevent all possible tragedies. If we
14 habitually dedicate scarce resources to guard against
15 low incidence events, we won't have resources to
16 attain other objectives of more utility.

17 My view is that we should invest on this
18 latter side of the equation. With this in mind, I
19 have three recommendations:

20 One is to increase efforts to support the
21 reintegration of CPOs into the community sooner
22 rather than later.

23

1 Most of the online offenders I have
2 treated didn't view child pornography the first time
3 they obtained sexually explicit information or
4 material over the Internet. They started with adult
5 pornography, went to adolescent, went to child.

6 This is not consistent with a pedophilic
7 explanation of accessing child pornography. It is
8 more consistent with a learning theory explanation of
9 child pornography where the person started at one
10 point, satiated to that exposure, perhaps reinforced
11 it by masturbating, went on to another level.

12 Comparative research should therefore
13 study the value of these alternative theories and not
14 just focus in on a mental disorder theory.

15 My last recommendation is to look at child
16 pornography offending from a public health
17 perspective as well as a criminological one. Each
18 pack of cigarettes, for example, informs the consumer
19 that smoking is hazardous to your health. I have not
20 seen any warnings on the Internet or TV that viewing,
21 possessing, and distributing child pornography is a
22 very serious crime that will result in a ten-year

23

1 federal prison sentence. I believe they should be
2 added, however, to the menus of options we use to
3 combat this crime.

4 I want to thank you again very much for
5 asking me to testify at this important hearing.

6 Thank you.

7 CHAIR SARIS: Thank you. Questions?

8 COMMISSIONER HOWELL: Well actually you
9 ended on one of the questions that I have, and that
10 when we're deciding whether and what recommendations,
11 if any, to make to Congress about child porn
12 penalties, one question that looms to mind is: Do
13 more severe penalties deter this type of offender?

14 As both of you have said, you know, child
15 porn offenders are better educated, they're smart
16 people -

17 MR. WOLLERT: No.

18 COMMISSIONER HOWELL: - they have
19 resources. So if you increase the penalties, they'll
20 probably have the resources to know more about it.
21 So is -

22 MR. WOLLERT: No. I mean, I've had people
23

1 who have had all types of penalties. One year of
2 probation. One year in work release. Five years.
3 And the recidivism rate is very low regardless. I
4 think the most effective thing to do is, I do think
5 that interventions are useful. I believe in the
6 deterrence logic. That is, a person should be
7 exposed to penalties for committing crimes.

8 I think that there's a diminishing margin
9 of returns as far as punishment. The best - I believe
10 the best policy is to have a proportionate sentence
11 followed by treatment in the community where a person
12 can try out things that they've learned in treatment,
13 plus the supportive help of a federal probation
14 officer, which I believe is invaluable for community
15 outreach as far as a treatment provider is concerned.

16 COMMISSIONER HOWELL: Does it make any
17 difference in your studies of risk factors, or for
18 risks of recidivism how long people served in prison?

19 MR. WOLLERT: No.

20 COMMISSIONER HOWELL: I mean, your
21 findings seem fairly uniform, actually. So I guess
22 their prior criminal history doesn't make a -

23

1 MR. WOLLERT: No, the low base rate -

2 COMMISSIONER HOWELL: - difference, and
3 also the time they've spent in prison doesn't make a
4 difference?

5 MR. WOLLERT: The low base rate will
6 prevent you from finding any really seriously
7 meaningful correlations. When you have a base rate
8 of recidivism that is on the order of 1 percent to
9 say 3 percent for contact sex offenses, you cannot
10 predict either forwards or backwards what a person
11 had in the past, or what they have in the future.
12 You just can't get there with a base rate like that.
13 It's mathematically impossible.

14 So figure out how to invest your resources
15 in a policy that will support the integration of a
16 person in the community while providing for
17 management so that the community is safe.

18 CHAIR SARIS: Dr. Seto, do you agree?

19 MR. SETO: With which part?

20 (Laughter.)

21 MR. SETO: I'll start with the beginning
22 question, which is: Would more severe penalties

23

1 deter behavior?

2 The thing about punishment is, we know
3 from lots and lots of research, in order for it to be
4 effective it needs to be speedy, and it needs to be
5 highly certain, or close to certain.

6 And the thing about child pornography
7 offending is, it's clear to me that the numbers of
8 people involved in this far exceeds the capacity to
9 arrest, investigate, and prosecute. And so, even
10 faced with very stiff penalties, you know, numbering
11 many years, each individual user is probably making
12 at least a semi-rational decision that their
13 particular chance of getting caught is quite low.
14 And realistically that's true.

15 If you look at studies that have looked at
16 IP addresses, which doesn't quite correspond to
17 number of people but is an approximation, the number
18 of IP addresses involved in this kind of traffic far
19 exceeds the number of people who have been identified
20 by the criminal justice system.

21 And so, you know, also evidence I didn't
22 cite in my presentation, we have a study we're just

23

1 finishing up now where we looked at a nationally
2 representative survey of Scandinavian – young
3 Scandinavian men. And one of the questions in this
4 anonymous survey was whether they had viewed child
5 pornography. And 4 percent of those individuals said
6 yes. Now it might have been only once, and they
7 might have been horrified and shut down their browser
8 and never looked at it again, but, you know, we're
9 not going to be able to address this problem, in my
10 mind, sufficiently with just increasing criminal
11 justice penalties.

12 I mean, obviously penalties are part of
13 it. Criminal justice is a very important part of it.
14 But I would say that a comprehensive response to this
15 problem of child pornography offending has got to
16 involve criminal justice. It's got to involve
17 prevention. It's got to involve mental health,
18 social services, and so forth.

19 I mean one of the things I – I was here in
20 the fall at the Attorney General's summit on child
21 exploitation, and one of the people who got up and
22 spoke was a federal district attorney, a U.S.

23

1 attorney, pardon me, and he said something which I
2 thought I would never hear actually in the United
3 States, which was: "This is not a problem we can
4 arrest our way out of."

5 I thought, he's absolutely right. It is
6 part of the response, but it is not a sufficient
7 response.

8 To my mind - sorry, the last comment is, to
9 my mind sentencing has to serve multiple functions,
10 but if one of those functions is protection of the
11 public, then I think it needs to be proportionate to
12 the risk posed.

13 So there might be a need for quite severe
14 penalties, but in my mind those severe penalties
15 ought to be reserved for this higher risk group who
16 are involved, let's say, in production of child
17 pornography, who have a known history of contact
18 offending, who have a prior criminal history of any
19 kind, et cetera, et cetera.

20 There are certainly factors that can help
21 drive those kinds of sentencing decisions, but just
22 sort of upping the ante for everyone I don't think

23

1 is going to have the desired impact.

2 Last comment - I lied. That was -

3 (Laughter.)

4 MR. SETO: That was a penultimate comment.

5 My last comment is, and I realize this is an
6 imperfect analogy certainly in terms of perceptions
7 of the seriousness of the crime and our moral outrage
8 at it, but I think the Sentencing Commission is in a
9 similar situation as it has been with regards to drug
10 offenses, right, where the systems have been
11 overloaded with people who are charged and convicted
12 for possession of illegal narcotics.

13 I know that that has caused, you know,
14 huge repercussions in terms of overcrowding in
15 prisons and, you know, strain on the criminal justice
16 system, the courts, and everything else. I think we
17 are in a similar boat here. You know, so these kinds
18 of considerations I think are very important because,
19 though it's a small percentage of the federal prison
20 population at this time, given these trends that
21 people have been describing here you could see, or at
22 least I could see, over the next 10, 20 years a

23

1 situation where the federal system is essentially
2 overloaded with possession of child pornography
3 offenders. And then, what are we going to do?

4 MR. WOLLERT: I agree with Dr. Seto, with
5 the exception of the drug offense situation, which I
6 haven't studied. But in terms of the child
7 pornography offender resolution and how to deal with
8 it, I agree with him.

9 CHAIR SARIS: Commissioner Wroblewski?

10 COMMISSIONER WROBLEWSKI: Just one quick
11 correction for the record is that the vast, vast
12 majority, 90-plus percent, of the federal drug
13 offenders are distributors. They're not possessors.

14 But, Dr. Wollert, I just want to ask you -
15 I want to get back to sort of the facts in the
16 studies that you were talking about.

17 MR. WOLLERT: Yes, yes.

18 COMMISSIONER WROBLEWSKI: Because I
19 actually didn't hear all that much disagreement
20 between you and Dr. Seto. Your studies seemed to
21 focus on recidivism. The studies by the probation
22 officer, Mr. Andres, focused on recidivism.

23

1 MR. WOLLERT: Yes.

2 COMMISSIONER WROBLEWSKI: Dr. Seto said
3 that in his studies there's not a lot of recidivism.
4 He quoted a total of 5 percent, including contact and
5 child pornography recidivists combined.

6 MR. WOLLERT: Right.

7 COMMISSIONER WROBLEWSKI: So there I
8 didn't see - I didn't hear a lot of disagreement.

9 MR. WOLLERT: No.

10 COMMISSIONER WROBLEWSKI: But I heard you
11 create this strawman called "the PAT," -

12 MR. WOLLERT: Yes.

13 COMMISSIONER WROBLEWSKI: - and then knock
14 it down.

15 MR. WOLLERT: Yes.

16 COMMISSIONER WROBLEWSKI: And I want to
17 understand why you were knocking it down so much, and
18 why you disagreed not just with Dr. Seto but
19 apparently Dr. Abel, Dr. McCarthy, many other studies
20 which suggest that more than half of child
21 pornography offenders are pedophiles.

22 MR. WOLLERT: Right.

23

1 COMMISSIONER WROBLEWSKI: And that a very
2 significant number – I think Dr. Seto's number was 10
3 percent had a conviction or some sort of criminal
4 justice signal for a contact offense, but there was
5 over 50 percent had admitted, self reported a contact
6 offense, combining lots of other studies, and
7 obviously looking at the assessment.

8 Tell me why, number one –

9 MR. JACOBSON: And in answering, can you
10 start by defining it? Help me to understand what you
11 mean by "the PAT."

12 MR. WOLLERT: There are two assumptions.
13 One is that pedophiles are prone to look at child
14 pornography. So it is assumed that child pornography
15 offenders are pedophiles.

16 MR. JACOBSON: Okay.

17 MR. WOLLERT: The second is that by
18 viewing child pornography offenses, it predisposes
19 them – or viewing child pornography predisposes them
20 to commit sex crimes. And neither of those are
21 confirmed.

22 Now this was a compound, compound,
23

1 compound question, so you may have to get -- I'm going
2 to try to address each one of those things.

3 COMMISSIONER WROBLEWSKI: The short
4 version is, your research is about recidivism. I
5 don't doubt what you're saying about recidivism. A
6 lot of other of the researchers talk about what
7 happened before the arrest. And I don't understand
8 why the two can't live side by side.

9 MR. WOLLERT: Well, there's two points.
10 The idea that you're able to identify someone who is
11 a past sex offender, which seems to flow from the 55
12 percent assumption, I don't think that's necessarily
13 been shown.

14 I think that the assumption is that
15 somehow self-reported recidivism rates bear some
16 semblance to the truth as far as what has actually
17 happened. The self-reported recidivism rates, or
18 prior contact sex offenses, range from the teens, in
19 the teens, up into 59, 60 percent.

20 Now that is a huge variation. The chances
21 of being able to identify prior-contact sex offenses
22 using any sort of instrument if you have a low real

23

1 rate is going to be low. I don't know how you're
2 going to ever find out who has and who has not
3 committed these sex offenses.

4 So the assumption that self-reported
5 rates, and that everybody who is a pedophile is – is
6 potentially I think very misleading. Because I can
7 see that in a court setting the argument would be
8 made that this is true when I don't think that there
9 is any solid evidence that it's true.

10 On the other hand, there is solid evidence
11 that we have a low recidivism rate. So this is not
12 to have one thing talk against the other. I think
13 that we should recognize that the self-reported rates
14 using that is much more likely to be unreliable than
15 using actual behavioral data.

16 And as far as the whole issue of
17 pedophilia, you know that – I'm concerned about a
18 serious mental disorder. From my background, the
19 people that I am most concerned about is those people
20 who have a preferential attraction to children, or
21 some deviant sexual object. Preferential. Not an
22 alternative attraction; preferential is the dangerous

23

1 group, who have a current and stable attraction.
2 That is, who had the attraction in the past, had the
3 attraction in the interim, and have the attraction
4 currently. You must have a current disorder in order
5 to have a DSM diagnosis. It must be currently
6 present, not something from the past.

7 And last, intensity is important to a DSM
8 disorder. That is, it has to be intense enough to
9 motivate behavior insistently pressuring the person,
10 insistently for expression, and where the person has
11 some volitional impairment. They lack volitional -
12 they have a volitional conflict that part of them
13 does not want to do what it is that they have urges
14 to do, and part of them does. And the part that does
15 want to do those things becomes volitionally
16 dominant.

17 It is a - because of my clinical experience
18 and my experience in sexually dangerous person
19 proceedings, I regard that individual as somebody you
20 particularly need to focus on in treatment and
21 supervision.

22 CHAIR SARIS: Thank you. I'm just going

23

1 to go to Dabney.

2 COMMISSIONER FRIEDRICH: Dr. Seto, just to
3 follow up on a point you made a few moments ago, if
4 we're going to try to draw distinctions between the
5 most dangerous child pornography defendants and
6 others, did I hear you correctly to say we should
7 consider things like criminal history and actual
8 criminal record, but also other evidence of sexual
9 acts? In other words, evidence beyond just purely
10 convictions? Sexual behavior that's reliable of
11 course, but that's in the defendant's past, apart
12 from actual convictions?

13 MR. SETO: Sorry, could you give me an
14 example of the kind of sexual behavior you'd be
15 referring to?

16 COMMISSIONER FRIEDRICH: Well it could be
17 anything from prior evidence of using child
18 pornography, or touching, or any other sort of
19 sexually dangerous behavior but that has not been
20 charged and convicted. Is that the sorts of -- because
21 I understood you in your testimony to say that it's
22 not just the prior convictions but it's also this

23

1 other sexual behavior that we know these offenses
2 aren't reported, we know they don't always result in
3 convictions, but nonetheless it's important evidence
4 for a judge or for the Commission to consider in
5 separating the more dangerous from the other child
6 pornography –

7 MR. SETO: I didn't understand the
8 question at first. I would agree with that
9 statement. That, you know, in an ideal world, which
10 we don't currently live in, sentencing would be able
11 to take into account a risk assessment that looked at
12 all these relevant factors. Official criminal record
13 is part of that, but there's other information.

14 Like you say, for example a substantiated
15 child protection complaint that never resulted in
16 prosecution, but where, you know, the investigators
17 found credible evidence of sexual contact with a
18 child. That would be relevant behavior. It's not
19 crystallized, if you will, in terms of a criminal
20 justice finding, but certainly to me that's relevant
21 evidence.

22 It's relevant evidence, you know, a
23

1 clinical assessment of pedophilia. Not all child
2 pornography offenders are pedophiles. We do agree on
3 that point. And so it would be useful to know
4 whether the person would meet the clinical definition
5 or not.

6 I mentioned that one of the variables that
7 people are identifying in our research that we're
8 identifying in the follow-up work is that admitted
9 sexual interest in children was actually one of the
10 factors that predicted sexual recidivism. It seems
11 hard to believe that somebody might be willing to
12 acknowledge that in the context of being investigated
13 by police, but we have found that, at least in the
14 Canadian context where there actually might be an
15 effect of the fact that the penalties are an order of
16 magnitude lower than in the U.S. context, in the
17 course of the interviews with police some of these
18 men do admit they were turned on by the material.
19 They were attracted to children.

20 And typically that is in the context of
21 them saying, and this was a substitute, you know, so
22 that I never ever would sexually touch or offend

23

1 against a child. But nonetheless, that admission
2 turns out to be predictive.

3 MR. WOLLERT: May I just add my two cents'
4 worth there?

5 COMMISSIONER FRIEDRICH: Sure.

6 MR. WOLLERT: You know, undetected crimes
7 have never been – we've never been able to factor them
8 into actuarials, which is the best prediction of
9 behaviors – not past behavior, it's actuarials – and
10 we've never been able to factor undetected crimes
11 into that. So you would have to face that hurdle and
12 somehow be able to factor this into an actuarial.

13 The second point is, regarding the issue
14 of pedophilia, Rheinhard did a very interesting study
15 in Germany – or Austria, from Austria. He diagnosed
16 people with exclusive pedophilia. I talked earlier
17 about having to be specific when you have a severe
18 mental disorder versus those who are just general
19 pedophiles without exclusively being interested in
20 children.

21 The probability – the correlation was .3
22 for the exclusive pedophiles – they were molesters,

23

1 but with subsequent molestation or contact sex
2 offenses. It was a .3 correlation. For the general
3 pedophiles, it was 0.

4 Now if you translate that into conditional
5 probabilities, the probability of exclusive
6 pedophiles reoffending after being taken, convicted
7 of one crime, is over 40 percent. The probability of
8 a contact sex offender who is diagnosed with
9 pedophilia reoffending is about 10 percent. Big
10 difference. So in terms of severity, it really is
11 worthwhile to do a careful assessment like Dr. Seto
12 said admitting sexual interest in children in the
13 sense of enough to perhaps experience intense urges
14 that could be translated into action. That is a
15 significant part of assessment.

16 CHAIR SARIS: I think it is lunch time.
17 So this was fabulous. Thank you so much. We are
18 going to come back here, my aspiration is 1:30, but I
19 know a lot of you have to go somewhere and get lunch,
20 so I'm going to try and make it as close to 1:30 as I
21 can. The morning has been amazing, and the afternoon
22 will be as well. All right, we will go for 1:40, I'm

23

1 being encouraged by Commissioner Carr. So 1:40. See
2 you then. Thank you, very much.

3 MR. SETO: Thank you.

4 MR. WOLLERT: Thank you.

5 (Whereupon, at 12:47 p.m., the hearing was
6 recessed, to reconvene at 1:40 p.m., this same day.)

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AFTERNOON SESSION

(1:46 p.m.)

CHAIR SARIS: Let's get going. Thank you all who have returned, and we have this afternoon a law enforcement perspective. We are going to start off with Janis Wolak – did I pronounce that correctly?

MS. WOLAK: Yes.

CHAIR SARIS: Okay, great – is a senior researcher at the Crimes Against Children Research Center at the University of New Hampshire. She has directed national studies about youth Internet use and three national juvenile online victimization studies which are national surveys of local, state, and federal law enforcement agencies about crimes related to the Internet and other new technologies. She has provided training and served on expert panels nationally and globally in the field of Internet-related child sexual exploitation. Welcome.

Steven DeBrotta has served as an AUSA, an assistant United States attorney in the Southern District of Indiana since 1991; is a member of the General Crimes Unit. He specializes in child

1 exploitation cases, computer crime, complex fraud
2 cases, and environmental crime. He is a special
3 emphasis coordinator for child exploitation cases,
4 the chairperson of the Indiana Interagency
5 Environmental Crimes Task Force, and the chairperson
6 of the Project Safe Childhood Task Force. Welcome to
7 you.

8 MR. DeBROTA: Thank you.

9 CHAIR SARIS: And Kirk Marlowe is a 23-
10 year veteran of the Virginia State Police. Captain
11 Marlowe currently serves as the commander of the
12 Department's High Tech Crimes Division and 45-agency
13 Northern Virginia-District of Columbia Internet
14 Crimes Against Children Task Force.

15 Ms. Wolak.

16 MS. WOLAK: Thank you. Thank you for
17 inviting me. It is really an honor to speak to you.

18 I do want to say, this panel is the law
19 enforcement perspective. I have enormous respect for
20 the work that law enforcement does in this area, and
21 also am incredibly grateful for the assistance they
22 have given us in our research. But I am not speaking

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1 from the law enforcement perspective. I am speaking
2 here as a researcher who has done a lot of research
3 with the assistance of law enforcement agencies.

4 My colleagues and I at the Crimes Against
5 Children Research Center have studied the criminal
6 justice response to child pornography and other
7 technology-facilitated child sexual exploitation
8 crimes for more than a decade now. And what I am
9 going to talk about today is our data that talks
10 about sentencing discrepancies between state and
11 federal court.

12 I do want to warn you that I am going to
13 mention the word "statistics" more than once, and I
14 hope that doesn't have people nodding off. I'm
15 really not going to go into details about our
16 numbers. I put tables and figures and numbers into
17 the written statement that you all have, and my
18 colleagues and I are preparing a paper on this topic
19 that will have even more detail. But today I'm
20 really just going to talk to you about our findings.

21 So first to tell you some about our
22 research so you understand how we did it and what the
23

1 limitations are.

2 The data come from three systematic
3 surveys of local, state, and federal law enforcement
4 agencies that were funded by the Department of
5 Justice OJJDP.

6 How we did our research: Well, the goal
7 of our research was to look at the numbers of
8 technology-facilitated child sexual exploitation
9 crimes. And by that, I mean – and by that, I include
10 child pornography possession, child pornography
11 production, cases where people are soliciting
12 undercover, investigators who are posing online as
13 minors, and cases where sex offenders are using the
14 Internet to meet minors, and also cases of more
15 conventional child sexual abuse cases where people
16 are using technology in various ways to facilitate
17 those crimes.

18 Our methodology was to create a stratified
19 sample of more than 2,500 law enforcement agencies.
20 We did this back before we did our first study. And
21 our first study was done in the year 2000, or mid-
22 2000 to 2001; and then we did subsequent studies that

23

1 covered 2006 and 2009.

2 We have a stratified sample of law
3 enforcement agencies, over 2,500. It includes all of
4 the agencies that are most likely to have Internet-
5 related cases. We send them mail surveys. We say,
6 have you had any of these – have you made arrests in
7 any of these types of cases?

8 If they say 'yes,' we ask them to list the
9 case numbers and give us contact information for the
10 investigators. We call up the investigators. We do
11 very detailed interviews with the investigators about
12 these cases and about the dynamics of the cases, the
13 characteristics of offenders, and also ultimately
14 what happened in the case.

15 It's a little more complicated than that.
16 I won't go into all our sampling methods and all of
17 that, but just so you understand where our data come
18 from.

19 So we've examined nationally
20 representative samples of cases where offenders were
21 arrested for child pornography possession, as I said,
22 in 2000, 2006, and 2009. And I should say, quite a

23

1 few people who were arrested for child pornography
2 also commit other types of offenses. What I've done
3 for this analysis is exclude everyone who has
4 committed any other type of sexual offense. So these
5 are child pornography – these crimes only involve
6 child pornography possession and sometimes
7 distribution. Anyone who produced child pornography
8 has been excluded.

9 What we found in 2000 was that there were
10 about 1,000 arrests for child pornography possession.
11 About one-quarter of those cases resulted in federal
12 charges. About three-quarters of them were handled
13 in state courts.

14 And the sentencing, when you compare state
15 and federal, the sentencing was fairly similar.
16 About 80 percent of the offenders who were sentenced
17 to incarceration were sentenced to five years or less,
18 and about 15 percent were sentenced to more than five
19 years incarceration.

20 In our most recent study in 2009, we found
21 there were about 3,800 arrests that only involved
22 child pornography possession. About one-third of

23

1 these were handled at the federal level, and two-
2 thirds were handled at the state level.

3 Most of the offenders in the federal
4 cases – 65 percent – were sentenced to more than five
5 years in prison, compared to only about 20 percent of
6 the offenders in the state cases that were sentenced
7 to more than five years in prison. In other words,
8 the sentences in federal courts have increased
9 substantially at least in terms of the number, the
10 percentage of offenders who get more than five years,
11 while the sentences in state courts have increased a
12 little bit but not really substantially.

13 Now the federal cases were more serious in
14 some ways than the cases that were seen in courts.
15 We had variables that represented most of the
16 sentencing enhancements as I understand them in the
17 federal sentencing guidelines. And they didn't
18 exactly correspond because we created most of the
19 survey back in 2000. But there were more cases in
20 federal courts that had more than 1,000 images, that
21 involved violent or sadistic images, that involved
22 offenders who distributed images.

23

1 We also had variables for whether they had
2 past offenses, past sexual offenses, past arrests for
3 nonsexual offenses, that looked at the ages of the
4 children in the images, although that didn't
5 differentiate between state and federal like some of
6 the other variables did.

7 So as I said, the federal cases were more
8 serious in some ways but we can control statistically
9 for those elements of seriousness through an analysis
10 called "logistic regression" is what we used. And
11 when we did this, we found that offenders in federal
12 cases were still twice as likely to be sentenced to five
13 or more years even when we controlled for whether the
14 case involved violent or sadistic images, more than
15 1,000 images, an offender that distributed, or the
16 various variables that I just described to you.

17 So even accounting for these differences
18 in seriousness, simply being charged in federal
19 rather than in state court increases the likelihood
20 that someone is going to get five or more years.

21 Now my colleague, David Finkelhor, and I
22 did do some thinking about what could have – you know,

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1 what could influence this result. And first of all,
2 our data does have some limitations. We got all of
3 our data from law enforcement investigators. They
4 didn't always know the outcome of cases, or they
5 didn't always know the exact sentence someone got.
6 We didn't doublecheck with records or anything like
7 that.

8 And there may have been elements of
9 seriousness that we didn't measure and so we couldn't
10 capture in our analysis. So that is certainly one
11 possibility. Although we do have a lot of confidence
12 in our data, we always have to look at the
13 limitations.

14 And secondly, the federal sentencing
15 guidelines may simply explain the difference in and
16 of themselves.

17 But we also think there are other things
18 that could contribute – oh, and there also – I do want
19 to mention one other limitation of our data. We
20 could not account for variations among states, and we
21 do know there are variations among states, but we
22 didn't have enough cases to do that. So we had to

23

1 glome them all together - "glome" being one of those
2 technical statistical terms.

3 (Laughter.)

4 MS. WOLAK: But we also think it could
5 happen that judges and prosecutors in state courts
6 may have a different orientation than the ones in
7 federal courts. For example, they may see more cases
8 that involve child molestation, or child sexual
9 abuse, and so when they see a child pornography
10 possession case they may view it in contrast to these
11 other cases.

12 On the other hand, in federal courts
13 prosecutors and judges may have more training about
14 the seriousness of child pornography possession
15 crimes. They may have more experience that shows
16 them how serious those cases are.

17 They may also see more advocacy among law
18 enforcement investigators. For example, the
19 investigators that feel the most strongly about child
20 pornography possession cases may press to have
21 federal charges brought, and so that could impact the
22 sorts of sentences.

23

1 Now I do want to stress that the
2 discrepancy between state and federal sentencing that
3 we've identified doesn't address the question of what
4 is an appropriate sentence. Because some people will
5 say the federal sentences are too harsh, and some
6 people will say the state sentences are too lenient.
7 We are simply documenting that there does appear to
8 be a considerable difference in cases of equal
9 seriousness based on whether or not federal charges
10 are brought.

11 Thank you.

12 MR. DeBROTA: Thank you for the
13 opportunity to address you. It might help in
14 understanding my perspective a little bit if I just
15 give you slightly more information on my contact with
16 these cases.

17 I began prosecuting crimes against
18 children cases and child pornography cases in 1991,
19 working with the Indiana State Police and the Postal
20 Inspection Service. At that time, those cases
21 principally were cases involving the produced images
22 by a contact offender who took pictures typically

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1 with a Polaroid camera, sometimes 35 millimeter
2 camera, or they involved the delivery of videotapes
3 in a sting operation.

4 In 1993, we began working with the FBI
5 when they did a wiretap on Innocent Images chat
6 rooms, which at the time were a place offenders could
7 meet and trade images. And we began thereafter
8 seeing a wide variety of the evolution of these
9 cases.

10 From a fairly early perspective, I came to
11 believe that a prosecutor or investigators in this
12 area had a responsibility to visually examine the
13 images, principally to see if we could locate the
14 child victim who might be in the images.

15 So to this end - in the early days this was
16 controversial - we looked at many, many thousands of
17 images that we had available at the time, and we
18 began noticing that you could find the kids. And
19 having done that a couple of times, the impetus to do
20 so, as you could imagine, was very great.

21 So from the early days of doing these
22 cases, I personally examined a very large amount of

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1 this material. In 1996, I think the largest
2 collection of child pornography recovered in the
3 world was recovered in Indiana from a man whose
4 screen name was nelix.

5 He had 300,000 images with no duplicates,
6 and he had them sorted into thousands of folders, and
7 he got those principally in two ways: through social
8 networking in a group that was prosecuted as part of
9 what was called Operation Wonderland. Wonderland was
10 a chat room that had people worldwide, including him.
11 And another chat room called Our Place.

12 We gained some insight into their
13 activities in two ways. One, through visually
14 examining all the pictures; and two, he turned on the
15 chat logging feature thereby for a nine-month period
16 essentially wiretapped the group, generating a
17 6,000-page chat log which I read personally, as well
18 as the investigators.

19 During the course of that, we identified
20 pictures in his collection that were produced by
21 other people we caught in Indiana in unrelated cases.
22 So it again proved the point, we had to carefully

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1 examine these images. In particular, the sorting of
2 the collections, because it became very easy to
3 identify his paraphilias by looking at what he
4 collected and valued. We think that's an accurate,
5 objective measure of his true interests and
6 activities and, more to the point, we noticed in
7 reading the chat and looking at what other people in
8 the group are collecting and taking from him and so
9 forth, we could tell what their paraphilias were as
10 well.

11 This was an insular group that traded in a
12 password-protected IRC chat room in 1996. I think
13 the most dangerous group of offenders worldwide.
14 People in that group were responsible for producing a
15 number of the images that you would see in any case
16 you have involving girl offenders, including a very
17 widely trafficked image, set of images, whose victim
18 is now around 19.

19 Okay, in that process I can tell you that
20 in 1996 there were no readily traded series on the
21 Internet involving infants and toddlers in any
22 numbers. There were none.

23

1 In 1998, we prosecuted David Condiff. He
2 was using IRC FServe distribution. You saw an
3 example of that earlier today. At the time, that was
4 running wild – FServe distribution was. And it was
5 very easy to find a public IRC chat room and with
6 very little sophistication you could download files
7 from him. He had 635 people he sourced files to, we
8 knew from various information.

9 He had one series involving a toddler or
10 younger. It was called the "tot rape series." This
11 left an indelible mark on my work, because I really
12 wanted to find that kid. We did not succeed. So I
13 can tell you that readily traded child pornography in
14 1998 did not include, to my certain knowledge,
15 infants and toddlers.

16 In November of 2010, we caught in
17 Bloomington, Indiana, a target named David Bostic.
18 David Bostic has pled guilty and been sentenced to
19 producing child pornography involving victims who
20 were under age four. The youngest victims were only a
21 few months old. He did this on 36 occasions. He
22 distributed this material to about 60 people

23

1 worldwide who were nepiphiles. There's been a lot of
2 questions today with precision on who's a pedophile.
3 He's a nepiphile. He's not interested in anyone
4 after they clear about age five.

5 CHAIR SARIS: Could you spell that?

6 MR. DeBROTA: N-E-P-I-phile. Nepiphile.

7 They even call themselves that, because we
8 have chat and e-mails as well where they refer to
9 themselves as nepi fans, nepiphiles, and so forth.

10 Okay, now the amount of material they
11 trafficked pointing at that particular sexual
12 attraction, that fetish, was vast. And they also,
13 within the group, encouraged each other to produce
14 the material because it was hard to find, and that
15 occurred. And then they trafficked that newly
16 created material.

17 We charged a bunch of them, and we're
18 still prosecuting that case. But what it points up
19 is, I think it is an absolute fact that the nature of
20 this material from when I started in 1991 to the
21 present has gotten much worse. And I don't see how
22 anyone looking at that same data set could reach any

23

1 other conclusion.

2 I will note, sadly, there's probably one
3 other person in the world that can answer that
4 question other than myself, and that happens to be
5 Mr. Fottrell, because he's also been doing these
6 cases that long. But almost everyone else you could
7 talk to will tell you they've been doing X number of
8 exams for Y period of time, but there's frankly
9 hardly anyone else that's been involved in the cases
10 for this period of time, or who thought it was
11 valuable to sort of analyze the behavioral pattern of
12 these offenders the way we did in thinking we could
13 get in their head by seeing what they collected and
14 valued.

15 I think it is critical to know what
16 someone collects and values as a measure of their
17 true interest and activities, immune from the bias of
18 what they may say, or what their history is, or the
19 uncertainty of anything else. So I still think there
20 is utility, for example, in the sentencing guidelines
21 saying someone has sadistic images, because that
22 tells us a bit about them, or the number of images

23

1 because it tells us maybe how long they were doing
2 it, which was one of your concerns, and a valid one.
3 And it also could tell you the degree of harm,
4 because how many children were affected and those
5 things.

6 But right now, there is no obvious way to
7 differentiate between nepiphiles and someone older,
8 and I think that is a flaw. Because I do think it
9 matters that the target group they're attracted to is
10 incapable of speech. And from a law enforcement
11 perspective, you can imagine how complicated it would
12 be to prove a case involving the molest of an infant
13 or a toddler.

14 Okay, we basically have self-reported
15 information from the offender. We have somebody who
16 witnessed something. We have the pictures. And we
17 hopefully have chat or something like that.

18 Now if you take a look at collections of
19 offenders and you worry about the question of
20 duplicates, I can tell you that in 20 years I've
21 prosecuted directly about 200 cases, probably
22 consulted on 400 more, I've never charged a duplicate
23

1 or used it as a sentencing consideration because I've
2 never had to.

3 Okay, so I appreciate that's a totally
4 valid concern, but on the ground it hasn't been a
5 problem that I've really encountered. I don't count
6 duplicates even though the law might say I could
7 because it's never come up. It's not been a problem.

8 Okay. I do know there are technological
9 ways of dealing with the duplicates such as hashing.
10 That's pretty easy to do, okay? So that was one of
11 the questions.

12 A second question though was asking about
13 the percentage of certain material as against a total
14 collection. That's frighteningly complex. Here's why.
15 If you want to know what percentage of child
16 pornography there is in an offender's computer, you
17 would have to know how much adult material they have.

18 For example, we don't have a data set of
19 all the Internet adult material. I'm going to guess
20 that's probably half a billion pictures and videos.
21 We don't have that. We would have to accumulate that
22 to have an automated mechanism. And we would have to

23

1 run that against a computer and get a number. Then
2 we've got to run the child pornography and get a
3 number and do the math.

4 I think we shouldn't set sentencing
5 questions, unless they're of paramount value to you,
6 on that basis because the overhead to the judicial
7 system will be vast. Judges will have to call balls
8 and strikes in that calculation, and I'm worried how
9 much time that would take – unless it's got paramount
10 value for you. And I'm not sure that it would.

11 Now telling how sorted someone's
12 collection is, or how long they've been doing
13 something, is much, much easier to do. If it's of
14 value to know the answer of how long someone has been
15 doing something – and I agree that's greatly valuable;
16 do they have a long-standing persistent pattern of
17 behavior? Did they collect six weeks, six years? Or
18 a guy we caught last week, 15 years, chatting every
19 day. That matters, and it ought to. That is pretty
20 easy to determine.

21 First off, we interview these people.
22 They may tell us. Okay. And most of the time, if

23

1 they think we'll get the answer anyway forensically,
2 they're going to say I've been doing this eight or ten
3 years, or two to three years, or whatever. That's a
4 normal question we see. And we could get at that by
5 looking at some forensic information in their computer
6 in a relatively straightforward manner. I think we
7 could do that.

8 But the more forensics we need to answer a
9 particular sentencing question, the more vital that
10 question needs to be for you. So if you think it's
11 going to have utility in predicting the harm their
12 behavior caused, their future recidivism, whatever
13 else you want, I can try to give you a scaled answer
14 on how bad the burden would be on an investigator.

15 Now the people I work with from Homeland
16 Security, the FBI, the Postal Service, the State
17 Police, all the IGs, lots of state and local
18 agencies, these are people who are very proud of
19 their work. They are very dedicated.

20 And I've got to tell you, there's the
21 question of sentencing policy, frankly, and then
22 there's what I need them to do. What I need them to

23

1 do is help find kids. Okay? So I don't need them to
2 look through a collection principally to drive a
3 sentencing computation; I need them to look through
4 the collection to find the kid. That's really what I
5 need them doing.

6 So we want to have sentencing calculations
7 as efficient as possible to getting you what you
8 need. When you talk about the information I provide
9 courts, that's the last step in the process. When I
10 prepare information for a presentence, I'm not doing
11 an elaborate description of everything in the
12 investigation. I'm not giving them a forensic exam
13 report. I'm trying to lay out why the specific
14 offense characteristics apply as they do.

15 So presentence reports in my district and in
16 my state, and in the prosecutors' offices federally
17 that I've talked to, the same thing is true. So you
18 cannot get an accurate measure of someone's true
19 interests and activities exhaustively by reading just
20 a PSR. You'd have to do more than that.

21 So if you need more information, or the
22 sentencing criteria ought to be greater to call us to
23

1 do more things, certainly we could do that. But we
2 should constantly balance the drain on the judicial
3 resources and the litigant's resources versus do you
4 really need that piece of information.

5 Now in many instances, I know few federal
6 judges spend time looking at these pictures. But if
7 we have sentencing enhancements that call for, for
8 example, a number of images at 100,000 as an
9 enhancement, no one will agree to that and you'll
10 have to call balls and strikes on that.

11 I have had cases where we counted up to a
12 few thousand because of how we alleged the case, and
13 it takes quite a while, actually. You have to worry
14 about the angle the child is in, the degree of
15 clarity. You may have to match up pictures. You
16 have their face and chest over here with their
17 genital or pubic hair over there. It's complicated.
18 It would take a long time.

19 So again, forensic rules, forensic
20 demands, judicial demands, play into the sentencing
21 policy. It has to be worth it, you know, to really
22 advance what you want to try to do.

23

1 The people who work these cases are
2 volunteers. We're giving them requests for
3 information, boots on the ground. What they try to
4 do is they get information to do a search warrant.
5 We go and we do a danger assessment.

6 It doesn't matter very much to us what the
7 opening allegation is, whether they're a peer-to-peer
8 cases, or a known molester with a camera, we don't
9 really care very much. We want to go in and do a
10 danger assessment first based on the interview of the
11 target. And what we do in Indiana is we do an on-
12 scene triage of their computer. We actually look at
13 the stuff, and we interview them about that.

14 In other districts they do it different
15 ways. Not everyone does that. In some districts
16 they use polygraphs at that time. But our goal is to
17 do an objective danger assessment and decide what to
18 do then forward.

19 If we think they are an offender working
20 in isolation, we will do one level of forensic exam.
21 We'll call that a level one. That's a confirmation
22 exam. We want to confirm why we were there and get
23

1 some ideas about them, and so forth.

2 If we think they are networking with other
3 people where we can trace communication links to
4 victims, to other offenders and so forth, we can
5 catch groups, that's a level two exam. It is much
6 more robust, much more time consuming and so forth.
7 So when we caught the group of nepiphiles, we did
8 that.

9 A level three exam is one where there is
10 some forensic issue like someone is claiming that
11 they didn't understand something, or the computer did
12 it automatically. That's sort of a trial exam for
13 sort of trial purposes.

14 About 90 percent of my cases are resolved
15 in level one and two, because the person will confess
16 on-scene more than 90 percent of the time. The child
17 pornography we already knew they had, they will
18 identify and confirm. And we can go on to then work
19 on finding kids and doing those things. So that's
20 what happens about 90 percent of the time.

21 One in ten cases goes to trial either
22 because there's a fact issue, or because the person

23

1 is in so much trouble there's no incentive to plead.
2 We prioritize in our ICAC and with the U.S.
3 Attorney's office high-impact offenders.

4 CHAIR SARIS: ICAC?

5 MR. DeBROTA: ICAC, I'm sorry, Internet
6 Crimes Against Children Task Force, ICACs, yeah. And
7 he works with one, as well.

8 High-impact offenders, which means almost
9 all of the offenders we've prosecuted the last three
10 or four years were not just generic passive recipient
11 peer-to-peer people. They were the other kind.

12 And we principally worked at putting
13 together collective cases. So we helped do Operation
14 Nest Egg. That group, the Cache PBS had 535 members,
15 down from 1,000.

16 Now a question that was asked earlier:
17 could somebody be a member of a collective group and
18 still be a neophyte? That was a question. It's an
19 excellent question.

20 In my experience, that's impossible. In
21 the 535 members of that group, to get in it you had
22 to already demonstrate you were willing to distribute

23

1 child pornography within the group. You had to do
2 that, so they knew you weren't a cop. And you had to
3 be vouched for by another member.

4 Then they periodically culled the
5 membership. That's how it went from 1,000 to 535.
6 That same methodology was true all the way back to
7 the Wonderland and Our Place cases in 1996. So I
8 doubt there is an example of a person in a collective
9 group who is not there for a good reason.

10 So that gives you a general idea of what
11 our approach is here. I can provide any kind of
12 forensic result information to what sort of a
13 sentencing factor you may want, but I see my time has
14 expired. So thank you for this opportunity.

15 CHAIR SARIS: Thank you.

16 MR. MARLOWE: Thank you for the
17 opportunity. My comments are very brief. I would be
18 more than happy to answer any follow-up questions
19 related to the information.

20 Our task force is combined of 43 state,
21 federal, and local agencies. So the mission itself
22 kind of extends beyond the jurisdictional boundaries,

23

1 the badge color, and the uniform color, and that sort
2 of thing. So it's admirable on their part there.

3 I selected a couple of major dynamics that
4 the task force as a whole faces. One seems to be the
5 misinformation that continues to grow that the folks
6 that we're dealing with are merely looking at nude
7 pictures of youth, when in fact there are gruesome
8 acts of violence against the most innocent citizens
9 that we have. So we are in a constant battle there
10 to bring it back to the real issue at hand.

11 The other issue is when we do the forensic
12 work we are only able to recover a small amount of
13 the images from the actual media that we have in
14 front of us. So the images, once they're out into
15 the virtual world, they continue to circulate. The
16 victims are revictimized over and over again from
17 that situation.

18 And then the direct correlation between
19 those who choose to possess this type of material and
20 being hands-on offenders. Quite often the child
21 pornography is a way into the door, and then we find
22 out there's a whole other sinister world there that
23

1 we otherwise would not have known about had we not
2 initiated this type of investigation.

3 Another challenge that we are encountering
4 deals with the fact that many of the predators that
5 we encounter are professional people within their
6 respective communities. They are law enforcement
7 officers, teachers, doctors, lawyers, this sort of
8 thing. So they don't come before the courts with
9 these long, lengthy criminal histories in a lot of
10 situations. It may be their very first time that
11 they come into the system. So they may be viewed
12 differently. There's inconsistencies with regards to
13 that.

14 With regards to the images themselves, our
15 investigators and examiners who are forced to view
16 thousands of these images maybe even for a single
17 case, they're discussed with the prosecutors, but
18 there's inconsistencies with the pictures being
19 viewed beyond that point. They are left to a
20 description from a prosecutor to describe that.

21 Frankly, just like in all lines of work, some are
22 better at that than others, and so often the true

23

1 nature of the gruesome act is not conveyed to the
2 court.

3 My colleague here mentioned the forensic
4 situation. It's done differently all around the
5 country. We do on-scene triage with regards to
6 forensics to get information, but quite often those
7 cases still need a full-blown forensics before they
8 go to trial. So that backlogs the system for three
9 to six months on any given case.

10 The last point I'd just like to emphasize
11 is dealing with, as technology is improving the
12 electronic service providers are better at reporting
13 to the National Center. So that volume continues to
14 grow. And so as that volume comes into the National
15 center, they are vetting that and pushing that out to
16 the ICACs.

17 Just an example. Last year, our small
18 ICAC worked 534 cyber tips from the National Center.
19 That is up from 351 the year before. So we can only
20 anticipate that number to continue to grow. And as
21 that grows, that forces us into more of a reactive
22 strategy, thereby we're responding to tips from the

23

1 public, from the service providers, instead of being
2 proactive and going out and combatting this problem.

3 So I offer those as just a little insight
4 into some of the dynamics that we face. There are
5 certainly many variables that affect the system, so
6 no one person or one discipline is to blame. It's a
7 team effort to try to move forward and make it better
8 for everyone.

9 Thank you.

10 CHAIR SARIS: Well thank you. Questions?

11 COMMISSIONER HOWELL: Mr. DeBrotta and
12 Mr. Marlowe, I appreciate your comments about the
13 resources that it takes to do the forensics
14 examinations. And it is one of those issues that,
15 should the Commission decide to make any
16 modifications to our child porn possession guideline
17 in terms of what the specific offense characteristics
18 are, as you could tell from the thrust of my earlier
19 questions, it's that balancing of resources in
20 investigation for 90-plus percent of the cases where
21 the defendant has pleaded guilty and is not going to
22 trial requiring a full-blown forensic examination,

23

1 but also makes sense to sentencing judges and why
2 penalties should be increased in particular cases is
3 one of those issues that the Commission has to work
4 with.

5 I mean, we have heard from a number of
6 judges and other critiquers of the current guideline
7 that it is broken. And one of the reasons it is
8 broken is because of overlapping specific offense
9 characteristics, and so on. And so having specific
10 offense characteristics that make sense to judges in
11 terms of measuring culpability, and at the same time
12 not taxing the resources of law enforcement so that
13 the backlogs grow even larger in these cases, is one
14 of the challenges that we have.

15 And so if the Commission gets to the point
16 of making changes to the guidelines, I know that
17 we're going to call on, you know, expertise as to the
18 burdens that modified specific offense
19 characteristics would pose.

20 The question that I have, and I was very
21 interested in Ms. Wolak's testimony about the
22 comparison between penalties for state versus federal

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1 crimes. And it does seem, even though you didn't go
2 into specifics about what the state statutory schemes
3 were, but just based on your analysis that generally
4 federal defendants convicted of child porn offenses
5 are serving less time than similarly – than defendants
6 convicted of similar crimes at the state level.

7 MS. WOLAK: More time.

8 COMMISSIONER HOWELL: They're serving more
9 time in the federal level. I'm sorry if I misspoke.

10 So if I could ask Mr. Marlowe and Mr.
11 DeBrotta, what – I'm sorry, Captain Marlowe, I'm
12 sorry –

13 MR. MARLOWE: That's all right.

14 COMMISSIONER HOWELL: What are some of the
15 factors that do go into whether you take a case
16 federally or take it to the state? And does it
17 confirm the research that Ms. Wolak's organization
18 has come up with in terms of the severity and that
19 sort of thing?

20 MR. MARLOWE: We find it varies, too,
21 depending on the rural jurisdictions versus the more
22 urban jurisdictions, as well. We've had similar

23

1 offenses where we've encountered somebody with the
2 same number of images, a similar case in a rural
3 jurisdiction may be sentenced to 30 years, to where
4 in an urban jurisdiction it's three to five years.

5 So - and that varies. As far as whether we
6 take it federal or state, in that situation usually
7 we're talking to the prosecutor, looking at the
8 totality of the case to see if that particular
9 prosecutor is technically savvy enough to deal with
10 that particular case.

11 Because in a lot of situations we're
12 encountering jurisdictions that haven't prosecuted
13 these type of cases. And so they're not comfortable
14 with the technology. Or we're dealing with a
15 traveler that traveled to meet a young person to have
16 sex with them, and they never showed up. So they're
17 wondering, can we prosecute this type of case? So
18 they lack that.

19 So in that case, we may go to our federal
20 partners and ask for assistance, or our attorney
21 general's office, or something of that nature. So
22 there's no one thing that I can say, well, if this
23

1 happens then we go federal. We kind of take a step
2 back and look at the totality of the case. We're
3 fortunate in that our geographical region is somewhat
4 small, so we have the prosecutors attend our meetings
5 and we know them personally, and this sort of thing;
6 as opposed to an ICAC or Internet Crimes Against
7 Children Task Force that has a large geographical
8 region where they may not be in close contact with
9 all of their prosecutors.

10 So I would say the majority of our cases
11 go federal simply because we're right here. You
12 know, this is a topic that is very important. The
13 federal prosecutors in this region are very
14 interested in dealing with this issue, and so they're
15 very energetic to take the cases.

16 COMMISSIONER HOWELL: Mr. DeBrotta? I
17 mean, for example what do the – how does the state,
18 you're from –

19 MR. DeBROTA: Indiana.

20 COMMISSIONER HOWELL: – Indiana, how do
21 the Indiana State penalties compare to the federal?
22 Does that play a role do you think in whether you
23

1 take a case or don't take a case?

2 MR. DeBROTA: It absolutely does. I'm in
3 one of the states where the federal penalties are
4 substantially higher, depending on what crime we're
5 comparing it to.

6 So for example the possession of child
7 pornography crime under Indiana law carries a maximum
8 penalty of three years; where you would expect they would
9 serve 18 months of that. If the presumptive sentence
10 is 18 months, they would serve nine months.

11 So the decision to refer a case, a
12 federal-quality possession case to state court is to
13 basically potentially convey a fairly serious
14 sentencing benefit.

15 The Seventh Circuit has said – and I can't
16 speak for the rest of them – they've said, this
17 doesn't matter. The one argument foreclosed in the
18 Seventh Circuit on disparity as the state versus
19 federal, they've said it's irrelevant. So that's not
20 a big argument that I see in my cases.

21 Where this issue hits my desk first is on
22 the question of prosecutive screening. So there's a

23

1 large number of factors I use to decide whether to do
2 a case. I think I work in a zero sum game. If I
3 decide to do a case of one type, it forecloses in the
4 same amount of time with the same resources my
5 ability to do a different case.

6 For example, last year we charged
7 approximately 42 crimes against children cases. The
8 vast majority of those were cases involving actual
9 production of child pornography, mass distribution,
10 definitely one-to-one distribution.

11 We had a couple of cases that would be
12 passive recipient cases of the sort of – there's been
13 some questions about these kinds of cases up to
14 today, and I'll just state as a parenthetical, this
15 is not the heartland of cases you should worry about.
16 It's not. It may be in some jurisdictions; it's not
17 everywhere true that that's what all this is about,
18 but I didn't want to create a safe harbor for one
19 type of case by not doing any LimeWire cases.

20 So we do a couple of them. We tend to do
21 them with value-added defendants – a teacher, a day
22 care worker, someone with a prior conviction, and so

23

1 forth. And even there we tune those cases to their
2 behavior.

3 So for example you could use peer-to-peer
4 file trading and use very specific searches. You
5 could, for example, search for the name of a series
6 familiar to you, or that you think you created and
7 you want to see if someone else who you gave it to is
8 betraying you. So the tool can be used by
9 sophisticated offenders as well as unsophisticated
10 ones.

11 But in the main we concentrate on people
12 who are active distributors with social networking,
13 because what we've noticed is high technology in
14 social networking has fundamentally changed how
15 offenders interact with each other and their child
16 victims.

17 We have to recognize that reality. So the
18 number one criteria for me is: How does this person
19 engage in social networking? And I would suggest
20 that from a sentencing model you should be concerned
21 about that.

22 Also, I want to know if they have a long-

23

1 standing persistent pattern of behavior. Because
2 frankly I don't prosecute anyone that doesn't have
3 one. Okay? If this was a one-off accident, I've not
4 seen that case. I have not prosecuted that case in
5 20 years. I don't know if anybody else has. But the
6 people that I prosecute intentionally did what they
7 did, intentionally collected what they collected.

8 As an aside, if it was an accident they're
9 not even guilty, you don't have to sentence that
10 person. But what I try to look for, I look for
11 social networking. I look at the nature of the
12 material. We almost all the time consider a danger
13 factor if they have S&M material, bestiality,
14 nepiphilia material. A large number of images,
15 that's a screening factor. The forensic trail
16 between the offenders. We like to follow those
17 trails. We look for that.

18 We look for contact offending. We look
19 for children in the home or they have access to with
20 their job. We look for prior convictions or
21 admissions of sexual abuse.

22 By the way, I've never had one example of
23

1 someone admit in an interview in their home they
2 molested a kid where it was not true. I have no
3 false negatives of that in 20 years. Okay? And in
4 the last year or two, we're getting that admission
5 well over 50 percent of the time.

6 We also ask the question: Who are you
7 sexually attracted to? And we get, children. We
8 don't get something else. We're getting that answer.
9 And we ask: Do you masturbate to the image? And
10 we're getting, "Yes."

11 COMMISSIONER HOWELL: Can I just ask you
12 one follow-up questions about that? Because, you
13 know, oftentimes before people are sentenced you get
14 a lot of information about them, clearly, including
15 their family/community ties, or that they have a
16 family. And, you know, oftentimes you hear, for
17 every defendant who has a family, they really want to
18 see their child grow up. Okay? Very common.

19 When you're dealing with a person
20 convicted of child porn possession and they have
21 small children at home, you could raise a question of
22 whether or not, you know, that person has access to
23

1 small children and whether those children are at
2 risk.

3 Have you seen cases involving child
4 pornography possessors where, or producers, where
5 they have put at risk their own children?

6 MR. DeBROTA: Oh, certainly. Yes.

7 COMMISSIONER HOWELL: They use their own
8 children?

9 MR. DeBROTA: Most producers produce
10 material, with an exception, most produce material
11 involving children they have some control over. So,
12 and one way of scaling that is, there's a sentencing
13 enhancement for are you the parent, custodian of the
14 child. That applies virtually every time in my
15 production cases. That's a way of scaling that.

16 The narrow exception is we have people
17 using the Internet to chat with a child, and getting
18 them on the other end to display themselves in a way,
19 or engage in some conduct. Our youngest victims of
20 that go down to age eight and nine. But we're seeing
21 that, as well.

22 So that is going to be a stranger, but
23

1 it's going to be an Internet scenario. But the vast
2 majority of the production cases involve
3 interfamilial or a close circle of access to the
4 offender in the cases that I've seen.

5 As to the question of whether or not an
6 offender poses an acute risk to their children, the
7 only real good way to answer that question, other
8 than obviously yes, is if you had a very detailed
9 analysis of a kind that we hear is the goal from the
10 mental health professionals. We never have that at a
11 sentencing hearing. There's a lot of tactics to
12 this. Very few defense attorneys want their clients
13 really to go through an assessment. They don't want
14 to be polygraphed or plethysmographed.

15 COMMISSIONER HOWELL: Right. So -

16 CHAIR SARIS: One more and then we're
17 going to go to Judge Hinojosa, Vice Chair Jackson,
18 and then Commissioner Friedrich.

19 COMMISSIONER HOWELL: As a regular course,
20 you know, I typically in child porn cases, I
21 typically order that the presentence investigation
22 report be disseminated to any treatment providers,

23

1 either in prison or out of prison during supervised
2 release. This is a standard part of the order.

3 I have never considered whether or not to
4 direct that the forensic examination of the computer
5 also be disseminated. And it sounded as if from the
6 social scientists and the clinicians that we heard
7 from this morning that that would be incredibly
8 valuable information. Have you ever seen that done?

9 MR. DeBROTA: No.

10 COMMISSIONER HOWELL: And what would be
11 your reaction to that, from law enforcement's
12 perspective?

13 MR. DeBROTA: We have a practical
14 difficulty we'd have to surmount.

15 COMMISSIONER HOWELL: Which would be what?

16 MR. DeBROTA: The images themselves
17 attached to the forensic report.

18 COMMISSIONER HOWELL: I'm not talking
19 about the computer. I'm talking about the forensic
20 examination results, whatever that might be.

21 MR. DeBROTA: Yes.

22 COMMISSIONER HOWELL: Which are not always
23

1 fully disclosed in the PSI. But clearly from the
2 clinician's perspective actually having the forensic
3 examination results or report would be helpful to
4 them in their treatment.

5 So have you ever seen that done, that a
6 court orders as part of the sentencing, in addition
7 to the PSI going to treatment providers, also the
8 forensic examination results?

9 MR. DeBROTA: Never. Never.

10 COMMISSIONER HOWELL: What would you think
11 about that?

12 MR. DeBROTA: Done in a controlled way
13 with some rules put in place, if it's going to be
14 helpful to them, that might work. Some forensic exam
15 reports, though, don't have a lot of words in them.
16 They tend to be hyperlinks on a FTK report. If you
17 haven't seen one of these, it's hard to conceptualize
18 this -

19 COMMISSIONER HOWELL: I've seen them.

20 MR. DeBROTA: Okay. It'd be a click here
21 for sadistic images, click here for child
22 pornography. So to get any meaning out of that,

23

1 you'd have to click there and read it. That's the
2 standard.

3 Now our reports have words in them, and
4 they say things. So those reports would make sense.
5 I've never had anyone ask for one, actually, either,
6 though. But in our district, all of the judges do
7 make available the presentence for this purpose. I
8 hope that's standard. I don't actually know that.

9 COMMISSIONER HOWELL: I think it is
10 standard.

11 MR. DeBROTA: I hope it is. It should be
12 standard.

13 The other thing we learned is, then the
14 Bureau of Prisons will read the PSR and make
15 decisions that might affect treatment. So what goes
16 in PSRs actually turns out to be quite critical.

17 What's frequently not in PSRs is what the
18 person actually did. In our district, for example,
19 there's testimony on the factual basis for the plea,
20 and there's a separate sentencing memo. And you
21 would really need all of that, because we actually
22 tell the story more in the factual-basis document

23

1 than we do in the presentence.

2 CHAIR SARIS: Judge Hinojosa.

3 COMMISSIONER HINOJOSA: Ms. Wolak, back to
4 the state/federal disparity, and you touched on this
5 in your study, I mean it's obviously very easy on the
6 federal side to look at the number of images based on
7 the enhancements that have been used with the
8 sentencing guidelines and whether there's sadism and
9 masochism and all the other enhancements. It can't
10 be that easy with regard to some of the state cases,
11 can it, so that someone can just make the statement
12 that obviously there are more severe cases in federal
13 court versus state cases?

14 Or did you find in your study that you
15 were easily able to determine the number of images in
16 the state cases as well as the sadism and the
17 masochism and all the other enhancements that are
18 used in the federal system?

19 MS. WOLAK: When we interviewed
20 investigators, we asked the same questions, whether
21 they were federal investigators or state
22 investigators. And we asked them questions like:

23

1 How many images did this offender have? Did any of
2 the images show violence beyond sexual abuse? For
3 example, bondage or brutal rape?

4 So we asked a whole series of questions
5 like that. And that's what we based our – and that
6 became our data that we used in the analysis.

7 COMMISSIONER HINOJOSA: And so you did
8 find that there were more serious cases in the
9 federal system than in the state system? Because I
10 know at the end you close – you're saying that there were
11 similar types of cases being sentenced differently
12 between the state and the federal system. So then
13 you must have found that in the state system they
14 were less serious than the federal system?

15 MS. WOLAK: Well what we found was, when
16 we compare – when we put the state cases in one
17 column, the characteristics of seriousness, and we
18 put the federal in the other, we find that a higher
19 proportion of federal cases had certain qualities
20 that we called "seriousness."

21 They were more likely to have 1,000 images.
22 They were more likely to involve someone who

23

1 distributed images. They were more likely to involve
2 sadistic or violent images, for example.

3 So that's what we measured. And then we
4 used another analysis technique where we could put
5 each factor in and control for all the other factors.
6 So we found you're more likely to get a sentence of
7 five or more years if you have more than 1,000
8 images.

9 But even controlling for all of those
10 things, when you add in federal charges the
11 likelihood is twice as high that you'll get a
12 sentence of five or more years, if that explains it.

13 CHAIR SARIS: Commissioner Carr.

14 VICE CHAIRMAN CARR: Mr. DeBrotta, I think
15 you mentioned, maybe not in your district, but that
16 in some districts at the point when they first
17 confront a person they do polygraphs right there, if
18 they can.

19 MR. DeBROTA: That's correct.

20 VICE CHAIRMAN CARR: And I was just
21 wondering if you know, anecdotally, what the results
22 have been of those?

23

1 MR. DeBROTA: I do. I think Ms. Hakes is
2 going to describe that in greater detail. The
3 district is the Northern District of Ohio, and I
4 think you will find it illuminating. It's around 70
5 percent, but I'll let her describe that more fully.

6 In our cases, because we're there focusing
7 on are they a contact offender, we get a high number
8 of disclosures. So it happens a lot. For example,
9 just in January, four out of four.

10 But I'll say this, too. We are deciding
11 what house to search based on criminal trade craft we
12 can associate with the likelihood of offending. A
13 classic example is people who do GigaTribe are more
14 likely to be contact offenders than people who do
15 LimeWire, in my view. So if I have a choice between
16 one of those two cases, other things being general
17 deterrence off the table, I'm going to do the
18 GigaTribe case first because we keep getting a
19 higher-quality target that way. So it just depends.

20 CHAIR SARIS: Commissioner Jackson.

21 VICE CHAIR JACKSON: Yes. Mr. DeBrotta, I
22 appreciate your practical on-the-ground view of how

23

1 this works. And I just had two questions about the
2 things you said that I didn't think I understood.

3 One was about duplicates not being a
4 problem?

5 MR. DeBROTA: Yes.

6 VICE CHAIR JACKSON: Is that because the
7 offenders that you see are culling, and organizing,
8 or they're not getting duplicates?

9 MR. DeBROTA: Oh, I see.

10 VICE CHAIR JACKSON: Do you understand
11 what I mean?

12 MR. DeBROTA: Yes, I do. It depends. To
13 give you an idea of the degree of the obsessions
14 these defendants have, I'm aware of a case from 2009,
15 a member of a collective group, he had 980,000 JPEGs.
16 That's just one type of file.

17 He had no duplicates. They were all in
18 folders, perfectly accurately sorted, with no S&M
19 material, none; no boys. No adult men. All little
20 girls. No one over 12. Okay? And he testified at a
21 trial and said he sorts his collection every night
22 for a few hours.

23

1 So that's one methodology of looking at
2 sort of degree of the file sorting. Now not
3 everybody does that kind of file sorting. He didn't
4 have any duplicates because he checked. Okay? So
5 his lack of duplicates is extremely enlightening,
6 right? I mean, it's proof of intent.

7 In a generic case, if you have a large
8 number of files, in order to not have a legal issue,
9 or have a jury wonder are we picking on somebody, I
10 don't charge duplicates. And I've never had a case
11 where the number of image enhancement really turned
12 on it. But I will say this:

13 Two of my selection criteria for cases are
14 how many images does this person have? Frankly,
15 videos at 75 images, that never causes trouble
16 either, because the cases that I tend to prosecute,
17 the people usually have well in excess of 600 files,
18 let alone images or videos, and so forth.

19 VICE CHAIR JACKSON: My second question
20 was about this notion of the adult material, the
21 child material. We heard earlier, and I certainly
22 appreciate your true statement, the bigger the burden
23

1 the more important the question should be, but we've
2 heard testimony that suggested that this notion of
3 what the ratio is between adult pornography and child
4 pornography is a predictor -

5 MR. DeBROTA: Yes.

6 VICE CHAIR JACKSON: - of future
7 dangerousness. And so I didn't quite understand what
8 you were saying about whether or not it's hard to
9 figure that out, or not. And why would you need to
10 know the universe of - couldn't you just look at the
11 person's computer and figure out what the ratio is?

12 MR. DeBROTA: Well let's take David
13 Condiff, for example. He has 300,000 child
14 pornography images, but he probably had half again
15 that many adult material images. So he has 600,000
16 total files. We counted them, okay? So he's a 50
17 percent collector of child pornography compared with
18 adult material, right? But is that very significant
19 as compared with he has 300,000 child pornography
20 images?

21 I mean, maybe we don't really need to know
22 the percentage when you get to 300,000. I hope not.

23

1 But what I can tell you is, if we need to have a
2 district judge somewhere call balls and strikes on
3 that, they're going to have to start looking at
4 images. And I'm very concerned that - I can tell you
5 from personal experience what it takes out of you to
6 do this kind of work.

7 VICE CHAIR JACKSON: Sure.

8 MR. DeBROTA: And I don't want to have
9 court staff have to do this, federal judges have to
10 do this, unless it's just really important. Okay?
11 But the number-of-images enhancement I think tells
12 you a lot about long-standing pattern of behavior.
13 But really what it tells you is how much harm there
14 was from this crime: how many kids are in these
15 pictures.

16 We can do that relatively straightforward.
17 But the percentage number, although it would be nice,
18 it would be enlightening and I agree it would be nice
19 to know is it 50 percent of their collection or 5, do
20 we really need to know that?

21 If we do, okay, we'll try to find a
22 mechanism. We have hashed values for some of the

23

1 child pornography images, although not the new ones,
2 the ones I really want to focus on – I want to find
3 the kid. We don't have hashed values of adult
4 pornography. We would have to create that. How
5 would we do that?

6 And someone would have to look at a
7 picture and go, it's an adult, it's not an adult. We
8 don't want to have to do that to somebody. The group
9 that would have the best information about this
10 though is NCMEC. They have dozens of people who have
11 the obligation, and we should honor it to look at
12 these pictures. They're doing that. They can tell
13 you what would really be involved in that burden.

14 I really don't want to have to litigate it
15 unless it's of paramount importance to our sentencing
16 decisions. I don't think it is, actually. I would
17 decline a case if somebody had a million images and
18 two or three child pornography images. That's a
19 state case. That's not what I'm seeing.

20 I'm seeing big collections with screening
21 factors that I think would be sentencing factors.

22 VICE CHAIR JACKSON: Thank you.

23

1 CHAIR SARIS: Commissioner Friedrich.

2 COMMISSIONER FRIEDRICH: Mr. DeBrotta,
3 earlier you talked about some of the selection
4 criteria you use in deciding whether to accept a
5 case -

6 MR. DeBROTA: Yes.

7 COMMISSIONER FRIEDRICH: - federally. And
8 I'm wondering, when we look at our data across the
9 country, we see just enormous disparities in the way
10 in which prosecutors are charging these child
11 pornography offenses. In I think less than half of
12 the cases where prosecutors could charge the receipt
13 with the five-year man-min, they're charging, more
14 often than not, simple possession.

15 So I'm wondering. Is there kind of an
16 informal guideline system using some of the criteria
17 you've mentioned that influences your decisions in
18 that way? Or is it just individual prosecutors
19 across the country applying the Holder Memorandum in
20 the way they want? Because we just see it makes an
21 extraordinary difference in sentencing.

22 MR. DeBROTA: I think there's two answers.

23

1 On step one, do we open a case and begin an
2 investigation pre-search warrant, are we going to
3 look at this case? The more we know about the
4 offender the more we can make a decision that is
5 based on danger assessment.

6 If the search has already been done, and I
7 already know what kind of material they have, is it
8 S&M or not, how many images, most of the time in my
9 district we open the case before the search. And
10 it's a federal warrant. That's our model.

11 We are not doing a lot of adoptive cases.
12 So we usually don't know that when we decide to do
13 the investigation. So we're basing it on their known
14 criminal trade craft and our perception of their
15 degree of sophistication.

16 So lets's say we see somebody doing
17 something not very sophisticated, but we're going to
18 go do a search warrant and then see. We're going to
19 do a danger assessment there, and then we're going to
20 start making the next decision. Do we prosecute the
21 person?

22 There will be some number of offenders -

23

1 the classic is a juvenile. If it's a juvenile, it's
2 a state case. I don't prosecute juveniles. So
3 that's going this way. It doesn't happen very much,
4 but it could.

5 I'm going to then do a danger criteria on
6 deciding am I prosecuting this person? In my cases,
7 I don't tend to charge people I don't think should
8 not receive a five-year mandatory minimum. I work in
9 my analysis. Am I prepared to stand in front of one
10 of you and say this person deserves five years?

11 If I'm not, that's a state case. Okay?

12 COMMISSIONER FRIEDRICH: So you personally
13 don't charge the possession -

14 MR. DeBROTA: With rare -

15 COMMISSIONER FRIEDRICH: - you just make
16 sure it goes - I mean, because possession and receipt
17 are one and the same?

18 MR. DeBROTA: With rare exceptions. My
19 possession cases usually are because of a forensic
20 difficulty, and I'll give an example in a second, or
21 the person has a mandatory minimum ten years because
22 they have a prior and we caught them with a floppy

23

1 disk and no computer, or a thumb drive, they were at
2 the library, and we don't have the library computer,
3 something along those lines, a lack of proof. So
4 we'll use the mandatory minimum of ten, with a prior,
5 no problem.

6 My believe is if you have a prior and we
7 catch you looking at more child pornography, that's
8 important. So I will do that case.

9 There's a lot of confusion sometimes on
10 the ease with which we can jump between possession
11 and receipt. In a real-world context with a jury,
12 they don't want to hear he got it from the Internet.
13 They want to hear in June of 2010 he got it through
14 LimeWire.

15 Sometimes we can't tell how exactly they
16 got the file. I also have cases where we can't - we
17 don't know that they -

18 COMMISSIONER FRIEDRICH: Wait, can I stop
19 you there?

20 MR. DeBROTA: Yes.

21 COMMISSIONER FRIEDRICH: Can you explain
22 that more? Because I think it's the rare case where

23

1 you're not going to be able to show through your
2 forensics.

3 MR. DeBROTA: I can give a simple example.
4 Somebody downloads. This was brought out earlier
5 today. Let's say hypothetically somebody marks for
6 download on LimeWire 10,000 files, and downloads all
7 10,000. Okay? They then look at them and they
8 determine 1,000 of them are child pornography. And
9 then they move them to an archival folder called "My
10 Child Pornography." That's where we find them.

11 If I don't have an admission to them
12 intentionally getting them, if I don't have any
13 metadata because they used web wiping software or
14 something, I may not have the full story of exactly
15 what day and how they got them. But I know they
16 collected them. They valued them. They're guilty of
17 knowing possession. Okay? There's a lack of proof
18 on the receipt.

19 Now we have receipt cases where we know
20 the whole story. They did a web search for PTHC or
21 something. And then they got the file. And we can
22 forensically tell the whole story.

23

1 But in my opinion, forensically proving
2 receipt has been oversold. It's actually easier to
3 prove where they're doing it, distribution, than it
4 is receipt. Receipt is tricky. Distribution, the
5 forensics evidence tends to be easier. But there's a
6 lot of misunderstanding about you can always flip
7 between the two, and it's not always the case.

8 I can only speak for our charging
9 decisions. If I'm not prepared to stand up and ask
10 for five years, why am I charging the case? Because
11 it's a zero sum game. I have an, unfortunately,
12 infinite supply of people that I can prosecute for
13 these crimes. So I have to put these resources where
14 we can best use them. And in my judgment we should
15 go for the more serious cases, and that is our model.
16 That is the one we train people to do, go for high-
17 impact offenders.

18 CHAIR SARIS: When you say "our model," is
19 that Indiana or is that the national model?

20 MR. DeBROTA: Okay, for what it's worth,
21 I've trained probably 10,000 people on the Indiana
22 Model on how to catch contact offenders, how to use

23

1 on-scene triage. The way the Indiana ICAC does it,
2 it's one of the ICACs that's a leader in offender
3 interviewing, on-scene computer forensics, trying to
4 catch high-impact offenders.

5 We also are very much interested in
6 linking together and doing collective cases. So you
7 might not have seen this, but we will prosecute
8 people in other states and bring them to Indiana and
9 prosecute them for conspiracy, and so forth,
10 enterprises in Indiana. So we do those.

11 That's what we think is our best use of
12 the resources we have.

13 COMMISSIONER FRIEDRICH: But across the
14 country, do you think nearly 48 percent are charging
15 receipt because they really can't prove it? Putting
16 your practices aside in your district, do you think
17 it's a problem -

18 MR. DeBROTA: Some percentage they
19 probably can't prove it. Some percentage they don't
20 have the resources to tell the difference. Some
21 places they don't think that that will be supported
22 by the local bench and they may be getting pressure

23

1 to not charge it.

2 Well, but there are offices that if they
3 get a lot of pushback they're going to adjust their
4 practices to get through the day. So I don't work in
5 one of those places. There's seven judges I've
6 worked with in the Southern District of Indiana, and
7 they have repeatedly said that the sentences they
8 imposed were appropriate for them, and they
9 appreciated the information we were giving them.

10 So I can just speak to that.

11 COMMISSIONER FRIEDRICH: Oh, I understand.
12 But those offices that are reacting to the bench, do
13 you know whether they have informal criteria that
14 they apply in deciding which one of those they're
15 really going to fight the bench on and charge that
16 five-year?

17 MR. DeBROTA: I hope so. I don't really
18 know that. If you heard me give a lecture to
19 conference, I say to my fellow AUSAs, we really need
20 to try to catch the worst of the worst. We need to
21 believe that we can actually locate kids. It does
22 work.

23

1 An operation we started involving the
2 nepipholes, we had 24 children that we took away from
3 the hands of those offenders in just an 18-month
4 period of time. And I think that has to be the goal.
5 And the rest of it, getting a sentence in a
6 particular case, you know, advocating for the
7 government, all of those things, it has to fit with
8 that goal.

9 But I want to get through the sentencing
10 process as efficiently as possible, and so do my
11 friends at the Federal Public Defender's office.
12 Frankly, we argue about 3553 factors way more than we
13 argue about the guidelines. That's how it works in
14 Indiana. We go on to that where everybody seems to
15 be comfortable we can make the arguments we need to
16 make. We're not arguing about the number of images,
17 or whether there's S&M; we're arguing about 3553
18 factors, the rest of the story, right? And that
19 seems to be what the people are interested in on the
20 bench, and so forth, as well.

21 That's our approach.

22 CHAIR SARIS: Is there anyone else?

23

1 (No response.)

2 CHAIR SARIS: Thank you very much for
3 coming in and for the work you all do. Thank you.

4 We are going to take just a five-minute
5 break, and then we'll switch over for the Victim's
6 Perspective.

7 (Whereupon, a recess was taken.)

8 CHAIR SARIS: Welcome. Somebody is
9 playing music.

10 VICE CHAIR JACKSON: It's pretty. I heard
11 it.

12 CHAIR SARIS: So it's getting late in the
13 day, but a very important perspective is the victim's
14 perspective. On this panel is Michelle Collins, who
15 is the director of the Exploited Child Unit at the
16 National Center for Missing and Exploited Children,
17 NCMEC? Is that what you call it?

18 MS. COLLINS: That's right.

19 CHAIR SARIS: She directly oversees the
20 cyber tip line, the congressionally mandated
21 recipient of reports on child exploitation for the
22 public and all U.S.-based Internet service providers.

23

1 Ms. Collins spearheaded the creation of the Child
2 Victim Identification Program, and worked with
3 programmers to create the Child Recognition and
4 Identification System.

5 Then we have Sharon Cooper, an adjunct
6 professor of pediatrics at the University of North
7 Carolina, Chapel Hill School of Medicine; and the
8 executive director of Developmental Forensic
9 Pediatrics PA, which provides clinical care for
10 children with disabilities and victims of child
11 maltreatment. She is also a forensic pediatrician at
12 the Southern Regional Area Health Education Center,
13 and a physician in the Child Medical Evaluation
14 Program under the auspices of the University of North
15 Carolina, Chapel Hill.

16 And Susan Smith Howley is the chair of the
17 Commission's Victims Advisory Group, a position she's
18 held since 2009. She's worked with the National
19 Center for Victims of Crime since 1991, serving as
20 its director of Public Policy since 1999. She also
21 currently serves on the National Advisory Committee
22 on Violence Against Women.

23

1 Welcome to all three of you. We'll start
2 with Ms. Collins. Thank you.

3 MS. COLLINS: Well thank you very much for
4 inviting the National Center for Missing and
5 Exploited Children to come today and speak with you.

6 I would like to start just briefly by
7 explaining the role of the National Center for
8 Missing and Exploited Children, and how it is that we
9 have some information to offer you today as you're
10 holding this hearing.

11 As you know, the National Center is a not-
12 for-profit organization authorized by Congress,
13 working in partnership with the Department of
14 Justice. We are a public-private partnership, and
15 for 27 years we have acted as the Nation's
16 clearinghouse on missing and exploited children.

17 One of our key programs is the Cyber
18 Tipline that was referenced just a few minutes ago.
19 It's the online reporting mechanism for incidents of
20 child sexual exploitation. Members of the public, as
21 well as electronic service providers, are able to
22 report incidents of child sexual exploitation, for

23

1 the most part child pornography and other types of
2 crimes against children.

3 We receive reports in eight types of
4 crimes against children. The majority of those are
5 regarding child pornography, possession, manufacture,
6 and distribution.

7 Reports are being made by members of the
8 public as well as a federal law that requires that
9 electronic service providers report any incidents of
10 apparent child pornography. If they become aware of
11 content on their servers that they believe to be
12 apparent child pornography, they report it to law
13 enforcement via the Cyber Tipline.

14 To date we have received over 1.3 million
15 Cyber Tipline reports, and that is since 1998. Ninety-
16 two percent of those were related to child pornography.
17 And those companies I was mentioning, the electronic
18 service providers, they have provided and reported
19 9.8 million images and videos of child pornography to
20 the Cyber Tipline.

21 The other key program that we operate is
22 the Child Victim Identification Program, and the

23

1 acronym is CVIP. So if I say that, that's what that
2 means. It was created in 2002 and it has a dual
3 role.

4 First, we assist federal, state, and local
5 law enforcement agencies as well as prosecutors with
6 determining which seized images contain children who
7 have already been identified by law enforcement.

8 And secondly, we assist law enforcement in
9 identifying and locating those children who still may
10 be in an abusive situation.

11 CVIP, the Child Victim Identification
12 Program, was created because the NCMEC analysts were
13 repeatedly seeing the same images of child victims.
14 So we began keeping track when we learned that law
15 enforcement had actually identified them and rescued
16 them from the abusive situation.

17 This project took on additional
18 significance after the Supreme Court held that if a
19 real child was not used in the production of an
20 image, it was protected speech.

21 So what CVIP analysts do each day is we
22 assist law enforcement by analyzing and reviewing

23

1 collections of child pornography that they seize from
2 offenders, and we determine which contain child
3 victims who have already been identified.

4 Local and federal law enforcement officers
5 can submit these copies of seized images to federal
6 law enforcement agents who are stationed, or located
7 at the National Center headquarters in Alexandria,
8 Virginia. By combining our proprietary software and
9 visual reviews, our analysts are able to identify
10 which files contain children who have been identified
11 by law enforcement.

12 We then provide a report back to the
13 submitting law enforcement agent providing them with
14 that information. Our reports act as a pointer
15 system, containing detailed information about the law
16 enforcement officers who identify each child. We do
17 not have child victim information, and we do not
18 distribute child victim information. We provide the
19 information to the law enforcement officer who can
20 provide assistance.

21 These officers then can provide the
22 evidence for the child's identity to be used in
23

1 court. To date we have reviewed more than 62 million
2 seized images and videos of child pornography at the
3 request of law enforcement.

4 So what is child pornography, and what is
5 it that we're seeing? And that's what we're really
6 here to talk about today.

7 As you know, child pornography images are
8 evidence of the criminal sexual victimization of a
9 child. The images are viewed, collected, and traded
10 amongst offenders for their personal sexual
11 gratification.

12 For a little bit of terminology, the term
13 "series." Collectors often try to get every image
14 available within a particular series, a child victim
15 series. And oftentimes they refer to these with a
16 child's name or a series name.

17 A series might contain ten images, or
18 hundreds of images. However, not all images will
19 depict the same content. For example, a series may
20 contain a large amount of images. Some are
21 nonabusive and some are abusive. In addition, within
22 a series you may have one child, or multiple
23

1 children.

2 While the series names are not always the
3 victim names, and typically not, we don't disclose
4 publicly series names in order to protect the child's
5 privacy.

6 Today we would like to share some data
7 that we have from within our program. Because of our
8 specific role of assisting law enforcement, we review
9 an enormous amount of child pornography. And as a
10 result, we are uniquely situated to provide a
11 snapshot of what the problem of child pornography
12 looks like from our perspective.

13 Law enforcement has been doing a
14 remarkable job of identifying these cases and rescuing
15 the child victims. And in fact, at the end of 2011
16 law enforcement had identified 4,103 child victims.
17 And that's globally. The majority of the children
18 that we know who have been identified are here in the
19 United States, but that can very much be pointed to
20 the fact that law enforcement here in the U.S. is
21 aware of CVIP and provides us with that information.

22 So in 2010, law enforcement agencies

23

1 submitted nearly 14.2 million images and videos to
2 CVIP for review. The following year, last year, 2011,
3 they submitted more than 22 million images and videos
4 to be reviewed.

5 This increase can be partially attributed
6 to more law enforcement agencies who are aware of
7 this resource. However, the increase may also be due
8 to highspeed Internet access and digital storage
9 capacity, which has made it easier for child
10 pornography possessors to collect a large volume of
11 illegal material.

12 And to prepare for today's hearing, we
13 took a look at some of the images that are most
14 frequently submitted by law enforcement. And we did
15 find some useful information about the kinds of
16 material that these offenders are trading, as well as
17 about the victims.

18 Of the identified victims whose images
19 were frequently submitted to us by law enforcement,
20 43 percent of the children depicted in the images
21 were boys, and 57 percent depicted in the images were
22 girls.

23

1 And regarding the age of the victims, 76
2 percent of these images depict the abuse of
3 prepubescent children, including 10 percent which
4 depict infants and toddlers. And 24 percent depict
5 pubescent children.

6 Now we use the term "prepubescent" to
7 describe any child who does not show signs of sexual
8 maturation, and the term "pubescent" is used to
9 describe children who show signs of sexual
10 maturation. Often those are middle and high school
11 students.

12 From the inception of the CVIP program
13 there have always been a percentage of images
14 submitted by law enforcement which depict infants and
15 toddlers. This suggests that there always has been a
16 demand for pornographic images of these very young
17 children, yet this demand fuels the production of
18 more of these images.

19 These victims are often pre-verbal and
20 therefore they are more isolated from the outside
21 world. And as a result, there are fewer
22 opportunities to be able to identify these child
23

1 victims of abuse.

2 We continue to receive many seized images
3 and videos of infants and toddlers who are not yet
4 identified for those reasons. And within the data
5 that I'm giving you today, I am not including
6 unidentified child victims. We are counting this
7 based on the children that we know and their ages
8 that we know.

9 So the most frequently submitted images of
10 identified victims for the last five years revealed
11 the kind of sexual abuse that is most often inflicted
12 upon these child victims who are abused and
13 photographed.

14 Eighty-four percent of the series contain
15 images or videos depicting oral copulation; 76
16 percent of the series contain images depicting anal
17 or vaginal penetration; 52 percent, more than half,
18 of the series contain images depicting the use of
19 foreign objects or sexual devices; 44 percent of the
20 series contain images depicting bondage or
21 sadomasochism; 20 percent of the series contain
22 images depicting urination and/or defecation; and 4

23

1 percent of the series contain images depicting
2 bestiality. And those are the identified children
3 that we're seeing day in and day out. That's the
4 type of abuse they are being subjected to.

5 To note, this data should not be applied
6 to individual offenders' collections. This is a
7 reflection of the types of sexual abuse seen in
8 popularly traded images.

9 While law enforcement has identified 4,103
10 victims of child pornography, we know that there are
11 many more unidentified victims who have not yet been
12 rescued from their abusive situations. And until
13 these children are identified by law enforcement,
14 they will continue to be at risk to be sexually
15 exploited.

16 We look at who is abusing these children,
17 the children that we're seeing in the images in the
18 videos being sexually abused. Most of the child
19 pornography victims are being abused by somebody that
20 they know.

21 These offenders have legitimate access to
22 the children they're abusing. These are people the
23

1 children should have been able to trust. Of the
2 child victims that have been identified by law
3 enforcement, the vast majority were victimized by an
4 adult that they knew and they trusted.

5 In 22 percent of the cases it was a parent
6 or a guardian. In 10 percent it was another
7 relative. Forty-seven percent of the children that we
8 see depicted in child pornography were sexually abused
9 by a family friend.

10 Notably, and this was brought up earlier,
11 a small but growing percentage of identified victims
12 produced the sexually explicit material of
13 themselves. According to NCMEC data, these images
14 are not as frequently found in child pornography
15 collections that law enforcement are seizing.
16 However, the frequency with which they're being
17 submitted to NCMEC is increasing.

18 And regardless of how their images are
19 collected, the child victims depicted nonetheless
20 sustain harm and damaging consequences, suffering
21 shame and fear of public embarrassment.

22 Congress, the Supreme Court, issue experts

23

1 and this Commission have all recognized the extreme
2 harm inflicted upon the victims of child pornography.
3 Child victims suffer at the hands of the offender who
4 has sexually abused them, and this harm is compounded
5 when the abuser memorializes the abuse by taking
6 photos and distributing them on the Internet.

7 Child victims also suffer knowing that
8 offenders may use images of their abuse to entice or
9 manipulate other children into sexually abusive acts.
10 Congress has addressed each of these distinct harms,
11 criminalizing the production, distribution,
12 possession, receipt, and viewing of child
13 pornography.

14 Child victims may experience depression,
15 withdrawal, anger, feelings of guilt, responsibility
16 for the abuse, as well as betrayal and a sense of
17 powerlessness and low self-esteem. It is impossible
18 to calculate how many times a child' pornographic
19 image may be possessed and distributed online. Each
20 and every time an image is viewed, traded, printed,
21 or downloaded, the child in that image is being
22 revictimized.

23

1 As one child victim, who is now an adult,
2 said in a victim impact statement to the court,
3 quote: "When I was told how many people had viewed
4 these images and videos, I thought my pulse would
5 stop. Thinking of all those sick perverts viewing my
6 body being ravished and hurt like that makes me feel
7 like I was raped by each and every one of them." End
8 quote.

9 So how are the offenders able to view
10 these illegal images and videos? Recent technology
11 such as smartphones and thumb drives and cloud
12 computing have made it easier for offenders to
13 collect and store their child pornography.

14 Other technological tools such as
15 anonymizers and encryption have enhanced an
16 offender's ability to evade detection by law
17 enforcement. And the size of an offender's
18 collection is not necessarily a mere reflection of
19 these technological advances, it suggests an active
20 participation in the child pornography market, which
21 is a market in which the demand fuels the ongoing
22 victimization of children.

23

1 So in closing, NCMEC is proud of the
2 services we provide to federal, state, and local law
3 enforcement and will continue to work with these
4 agencies in their efforts to investigate and
5 prosecute these crimes, to identify and rescue child
6 victims. However, there are many more child victims
7 of sexual abuse who have not yet been found, and who
8 still suffer at the hands of their abusers.

9 Because child pornography victims often do
10 not disclose their abuse, they are relying on law
11 enforcement to identify and rescue them. And, they
12 are relying on all of us. This public hearing is
13 raising awareness that these images are a reflection
14 of sexual abuse, and that children are being abused
15 and photographed in communities across this nation.

16 While today I have discussed NCMEC data in
17 a very empirical way, we never forget that the
18 victims depicted in these images are real children.
19 Their images are evidence of their sexual abuse.

20 Once law enforcement identifies a child
21 victim, they learn the child's story and they learn
22 that these children are in our communities. They may

23

1 play on your child's baseball team, or dance in your
2 daughter's ballet class, or sit next to your child on
3 a school bus.

4 We will continue to work with law
5 enforcement to ensure that all child victims get the
6 help and the justice they deserve.

7 Thank you for your time.

8 CHAIR SARIS: Thank you. Dr. Cooper

9 DR. COOPER: Thank you very much,
10 Chairwoman Saris. And it is truly an honor for me to
11 be able to chat with you this afternoon about the
12 issue of the victimization of children who have been
13 pornographically photographed.

14 As a pediatrician who has seen children
15 who are abused for 35 years, the last 15 years of my
16 career I have been focused on children who have been
17 sexually exploited.

18 I will be referring to child pornography
19 images predominantly for the rest of my testimony as
20 child abuse images, or child sexual abuse images.
21 This is the internationally accepted term for this
22 kind of contraband because it helps to debunk the

23

1 myth that these are images of children who are
2 voluntarily modeling; that these are not really
3 children, they're all morphed images; that these are
4 adults made to look like children; and most of all,
5 to do away with the myth that this is a victimless
6 crime.

7 Because people have thought for a long
8 time that this was a victimless crime, in 2005 myself
9 and other colleagues wrote the first major textbook
10 on child sexual exploitation to discuss and provide
11 for the field, the medical field, the legal field,
12 and the social science field, this issue of what
13 really happens to children and adults who are
14 involved in this particular form of abuse.

15 Child pornography or child sexual abuse
16 images is what I called "insult to injury." The
17 injury is child sexual abuse. The memorialization is
18 the insult to those children who have been sexually
19 abused.

20 There are several types of child sexual
21 exploitation, and I want to just outline them for you
22 because child sexual abuse images are a common thread
23

1 through each of the types of child sexual
2 exploitation that we recognize today.

3 The first of course is what we have been
4 talking about all day today, and that is the issue of
5 child pornography. However, I have been asked by
6 judges in the past on many occasions: Help me to
7 understand how when a person downloads, possesses, or
8 trades these images it's revictimizing a child.

9 And so in one particular case that I
10 testified in, I explained to the judge that these are
11 cases very similar to voyeurism cases where the child
12 is being abused inside her home, or wherever she may
13 be, and the offender is a voyeur who is looking in a
14 virtual window at this child being abused. And the
15 offender is not there looking in the window in order
16 to rescue the child, but they're there for the
17 purpose of gaining sexual gratification.

18 And not only are they gaining sexual
19 gratification, they are calling others to come and
20 look in that window, as well. Which is the epitome
21 of just extraordinarily egregious invasion of privacy
22 for a child, and for their worst nightmare, that form

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1 of child sexual abuse.

2 It was in the University of Cork College,
3 Ireland, where I first became more knowledgeable
4 regarding some of the issues of offenders, and we've
5 had those who have already spoken about offenders so
6 I won't spend a great deal of time in that particular
7 area except to say that in the textbook by Max Taylor
8 and Ethel Quayle called "Internet Child Pornography,"
9 published in 2003, the most common motives of
10 offenders for collecting these images was, first, for
11 sexual gratification, but second, as a plan for
12 action.

13 I think recognizing this plan for action
14 needs to remain on the front part of our agenda when
15 we think about what kind of threat these individuals
16 are to children.

17 So the second type of sexual exploitation,
18 aside from that form that we call child pornography,
19 is interfamilial prostitution of children. For a
20 long time we failed to recognize interfamilial
21 prostitution. It was the research of Dr. Richard
22 Estes from the University of Pennsylvania in 2001

23

1 that helped us to recognize that one of the leading
2 causes of children running away from home was the
3 fact that they were being prostituted from within
4 their home.

5 Now this prostitution is not necessarily
6 just for money. Sometimes it's for food, clothing,
7 and shelter by a non-offending parent. And sometimes
8 it's for influence.

9 It was an aha-moment for Child Protective
10 Services workers whom I have been training now for
11 the last at least 10 or 12 years about this
12 phenomenon to come to recognize that those children
13 who say, "but I did tell my mom that he was sexually
14 abusing me," and the mother who said, "No, that's not
15 true," we always thought that that mother just was in
16 denial. We never considered the fact that the mother
17 may in fact be making that child available to that
18 boyfriend or stepfather, whoever else has stepped
19 into that home, for food, clothing, and shelter and
20 is willing to sell her child for that purpose.

21 So this issue of interfamilial
22 prostitution now, today, often entails the use of

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1 child sexual abuse images. I would like to draw your
2 attention to a case recently in North Carolina of
3 Frank Lombard who had sold his five-year-old adopted
4 child, a son, a foreign-national child that he had
5 adopted, to numerous offenders who traveled to Durham
6 for the purpose of having sex with that child.

7 And, fortunately, an undercover agent was
8 the last person that he attempted to sell his child
9 to. Frank Lombard's screen name was "pervdad4fun"
10 and he was in fact in a network with other
11 individuals who were selling children, and who were
12 intentionally adopting children for the purpose of
13 selling them for the production of child pornography
14 and interfamilial prostitution – not for money, but
15 for networking.

16 I think that the third type of child
17 sexual abuse is that of cyber enticement. When we
18 think about cyber enticement today, it's giving a new
19 definition to the term "child sex ring." Back in the
20 early '90s and late '80s, we used to think of satanic
21 worshipers as individuals involved in child sex
22 rings, but that's not what a child sex ring is today.

23

1 Today a child sex ring is often a family
2 that is sexually abusing their child on demand by
3 live webcamming, who is involved with other families
4 who meet on a regular basis, and where there's live
5 discussion about what type of sexual abuse they'd
6 like to see depicted in the live streaming video.

7 When we think about individuals who are
8 cyber enticers, we recognize that these are the types
9 of individuals who contact youth on a regular basis,
10 according to Janis Wolak's research and others, and
11 in at least 64 percent of the time they have
12 contacted youth from anywhere from one to six months
13 on a daily basis, grooming them to finally become
14 what our literature now refers to as "compliant
15 victims," children who readily leave their home
16 because they think they are in love with the person
17 who has been grooming them for some period of time.

18 It is within this context that we
19 frequently see a cajoling of those victims to self-
20 produce images, and to respond to the request for the
21 fact that if you truly love me you'll send me a
22 picture of you pleasuring yourself, one of the more
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1 common terms that's usually used in these types of
2 victims.

3 In those children that I have evaluated
4 who have been victims of cyber enticement, the guilt
5 and self-blame and shame is much greater than we
6 would see in your typical child sexual abuse victim.
7 Because not only has the child been sexually abused
8 after they've met with this person, but all of their
9 family, and all of their sphere of nurturers in their
10 lives continue to point a finger at them, and how
11 could they be so stupid as to have done this?

12 When I talk to parents in my clinics of
13 children who have been cyber enticed, I try to remind
14 them: Why are you holding a child to have the same
15 cognitive skill level as a 36-year-old offender? Why
16 would you think your child should be that smart?

17 It is yet another one of those unrealistic
18 expectations that exist for children who are
19 exploited in this manner. Today, enticement
20 involving the production of child abuse images, self-
21 produced images, is coming into the world of video
22 gaming for our children. And in fact we have

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1 children as young as nine who have been cajoled to send
2 images of themselves to those who are playing online
3 video games with them. And that is one of the
4 reasons that this particular Sentencing Commission
5 discussion with all of the ramifications of the
6 production of images, but also the collecting and
7 distribution of images, is so important.

8 The fourth type of sexual exploitation is
9 child sex tourism, usually associated with a person
10 who is going to travel in order to have sex with a
11 child. The child may reside at the destination point
12 for those offenders, or the child may be taken to a
13 destination point with an offender – often a child's
14 theme park. That's a very common way in which child
15 sex tourists will meet.

16 The resulting sexual abuse images that are
17 distributed to collectors from these particular types
18 of environments are often going to be traded and
19 possessed in many places, and we know that the United
20 States is both a country of origin and destination
21 for child sex tourists.

22 The fifth type of child sexual
23

1 exploitation is commercial sexual exploitation of
2 children, sometimes for domestic minor sex
3 trafficking when we're talking about children who are
4 not trafficked from outside our country into our
5 country.

6 We are focusing quite a bit these days on
7 domestic minor sex trafficking victims, but many of
8 us fail to recognize that child pornography is
9 another component of the victimization here.

10 Sometimes these images are produced as a
11 form of breaking down the resilience of a child who
12 may try to escape from a trafficker. This process of
13 sexual assault associated with videotaping of that
14 sexual assault by the trafficker early on in the
15 process of grooming and breaking in of a victim is
16 well described by victims to us. And in some federal
17 investigations, evidence of those DVDs found at the
18 homes of offenders have validated the fact that these
19 children have been exploited in this manner.

20 Researchers have found that in 49 percent
21 of American trafficked women, pornography was made
22 during the exploitative victimization. And the

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1 overwhelming majority of women who have been brought
2 into trafficking were brought in as underage minors.

3 The additional impact upon children who
4 are being trafficked with respect to the issue of
5 production of pornographic images entails the use of
6 communication technology through 3G and 4G
7 technology.

8 When 3G technology first came out in Japan
9 in 2003, the incidence in the prostitution of
10 children in Japan rose by 49 percent. And so it
11 helps us to understand how taking a picture of a
12 child and sending it to a potential client and saying
13 is this the one that you want takes us away from the
14 Internet, takes us away from a computer-based form of
15 victimization, but yet nevertheless is why the United
16 Nations' study on violence against children in 2005
17 said we can't refer to these just as ICAC cases
18 anymore, Internet crimes against children, we have to
19 refer to them as ICT cases, information and
20 communication technology crimes against children,
21 just because it's not always on the Internet.

22 When I have conducted clinical interviews

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1 of victims of sexual abuse images, there is an
2 inevitable and constant theme that children share
3 with me: the invasion of their privacy.

4 Even when I have evaluated middle-school-
5 aged children who were exploited as preschoolers and
6 whose images are circulated today on the Internet,
7 the invasion of privacy is what they speak of the
8 most.

9 These children and adults often tell me
10 that they live what I refer to in my writing as "the
11 double life." A double life is where a child tries
12 to go to school, and tries to interact with other
13 people as if all is well. But, who are highly
14 vigilant and fearful whenever they come into contact
15 with a computer, especially a computer within a
16 social gathering.

17 They have maybe an irrational belief that
18 somehow or another when kids are video gaming or
19 doing other things, the pictures of their sexual
20 abuse are going to come up. And it causes them to
21 feel constantly concerned.

22 It has added to the diagnosis that we
23

1 typically see of child sexual abuse victims, those
2 diagnoses of post-traumatic stress disorder,
3 depression, and anxiety. We now have a new diagnosis
4 for these types of victims. And that is,
5 "nondelusional paranoia." Children who are
6 constantly worried all the time, as are their
7 parents, that other people are looking at them.

8 One victim discussed with me her insomnia
9 and how she couldn't sleep at night, and often would
10 get up and walk around the house and look out the
11 windows. And I asked her what was she looking for
12 when she looked out the windows? And she said, "I'm
13 looking for the people who are looking back in at
14 me."

15 Despite the fact that the National Center
16 for Missing and Exploited Children has captured 45
17 million, now 63 million images, these numbers are
18 still under-estimated because most investigators who
19 are determining that child pornography images exist
20 are going to look at only prepubescent images.

21 We know that puberty begins at the age of
22 nine for girls in the United States, and is complete by

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1 the time they are 13 to 14. So when you have a child
2 who is 14 or 15 whose images have been made, they are
3 still children but they won't be counted as child
4 pornography images because their bodies will not be
5 discernable from those of adult women.

6 For boys, that age of onset of puberty is
7 around 11 to 12. So we know that we still have a
8 highly underestimated number of images and victims on
9 the Internet.

10 Offenders who download, possess, and trade
11 in child sexual abuse images with a certain typology
12 such as sadistic imagery promote the further
13 commission of these kinds of crimes against children.

14 One victim who was abused in this manner
15 described to me: In the seven years after she had
16 been abused, that she still lived in a state of being
17 terrified. She had a compulsion that I found as
18 evidence of this nondelusional paranoia that when she
19 and her mother would go to the mall, she would always
20 look around and look at the security cameras in the
21 mall, and she would ask her mother, even though this
22 was a straight-A student who from a cognitive

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1 perspective should have been better, she would ask
2 her mother were people watching her on those cameras.

3 From the perspective of mental health
4 treatment for victims of sexual abuse images,
5 research has shown that the majority of clinicians
6 feel ill-prepared in order to provide appropriate
7 therapeutic purposes and services for these
8 children.

9 And though clinicians are often
10 experienced in the treatment of child sexual abuse,
11 they will readily tell you: We don't know. We don't
12 have an understanding of how to handle children who
13 have been pornographically – we just don't know.

14 In a case that I testified in in Kentucky
15 where three eight-year-old children were sexually abused
16 and pornographically photographed for a year, and who
17 then had mental health services by three separate
18 therapists for two years before we went to trial, in
19 reviewing the mental health records not a single
20 therapist had ever touched on the pornographic
21 victimization of these children – in two years of
22 therapy – which is a wakeup call. Because we do know

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1 that these children deny the fact, or will not bring
2 up the fact that they have been abused in this
3 manner.

4 Research out of the UK has helped us to
5 understand why. Children, nearly 100 children who
6 were evaluated said: I don't talk about this because
7 the images make it look like I just let it happen; I
8 don't talk about it because sometimes he made me
9 smile; I don't talk about it because I was the
10 recruiter for other kids in my school that he said
11 for me to have come and spend the night on a
12 sleepover and then he sexually abused them; I don't
13 talk about it because I had to have sexual contact
14 with another child and it makes me feel worse. And
15 the fifth reason that children said they don't talk
16 about it with therapists, or they don't tell in the
17 first place, is because the offender says, "You should
18 have stopped this. It's your fault this all
19 happened."

20 I would like to conclude my comments and
21 remarks with you, as the red light is on, by telling
22 you that when we think about the issue of children
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1 who are victimized in this manner, I so applaud the
2 fact that you are trying to figure out the best way
3 to keep them safe.

4 We have had a lot of discussion earlier
5 about recidivism rates of children, but please
6 remember that most of the metanalysis studies of
7 recidivism have been based upon rearrest rates. When
8 you recognize that children who have been sexually
9 abused and pornographically photographed don't tell
10 more than people who have been sexually abused
11 without pornography, then you will understand that
12 these are the type of children who are not going to
13 make a disclosure.

14 This will be a major hindrance to rearrest
15 rate, and I think it will help us have to think
16 carefully about recidivism in child pornography
17 victimization.

18 Thank you very much for your attention.

19 CHAIR SARIS: Thank you. Ms. Howley?

20 MS. HOWLEY: Good afternoon, Madam Chair,
21 and members of the Commission:

22 Before I launch into my testimony, I feel

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1 like I do need to clarify that I am no longer a
2 member of the NAC for OVW. My term ended. But I do
3 want to give you a note of hope that I am heading an
4 effort funded by OVC to address the very problem that
5 Dr. Cooper just mentioned, that we don't really know
6 how to respond and help these victims.

7 So with the University of New Hampshire
8 and the National Children's Alliance, we will be
9 looking at how can therapists and other professionals
10 best respond to victims of these child sexual abuse
11 images.

12 The Victims Advisory Group today will
13 focus our testimony on the danger of this offense and
14 the impact on direct victims. And then, what that
15 information suggests for the response to
16 perpetrators.

17 As has already been discussed a lot today,
18 the proliferation of child abuse images increases the
19 risk of future victimization and harms the victims
20 who are the subject of those images.

21 Firstly, it increases the risk of
22 victimization because repeated exposure to those

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1 images normalizes the sexual assault of children,
2 promoting cognitive distortions. A meta analysis of
3 published research on the effects of pornography
4 found that the results of clear and consistent
5 exposure to pornographic material puts one at an
6 increased risk for developing sexually deviant
7 tendencies, committing sexual offenses, experiencing
8 difficulties in one's intimate relationships, and
9 accepting the rape myth.

10 Those who collect such images also
11 increase the demand for additional images, raising
12 the risk of future victimization. And, as you've
13 heard, child sexual abuse images are often used to
14 groom future victims in an attempt to persuade them
15 that such acts are normal and pleasurable.

16 And of course these crimes risk
17 significant harm to the children who are the subject
18 of these abusive images.

19 Firstly, each of these victims who is
20 depicted suffers the harms normally associated with
21 being a victim of sexual abuse. Those are long
22 documented and include a higher risk of developing
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1 significant mental health disorders such as anxiety
2 or depression or post-traumatic stress disorder; a
3 higher risk for substance abuse; sexual behavior
4 problems; sexual dysfunction; an increased risk of
5 future sexual victimization; an increased risk of
6 suicide; and higher rates of life-time health
7 problems including obesity, heart disease, stroke,
8 and many other health issues.

9 The connection of child sexual abuse to
10 these lifelong outcomes can become clearer when
11 considered in the light of the framework proposed by
12 Doctors David Finkelhor and Angela Browne, who
13 identified four traumagenic dynamics that link such
14 abuse to psychological injury.

15 These are: traumagenic sexualization;
16 betrayal; stigmatization; and powerlessness.

17 Traumatic sexualization refers to, quote,
18 "a process in which a child's sexuality, including
19 both sexual feelings and sexual attitudes, is shaped
20 in a developmentally inappropriate and
21 interpersonally dysfunctional fashion as a result of
22 sexual abuse." And in my written testimony I include
23

1 a longer explanation of just exactly how that happens
2 through child sexual abuse.

3 "Betrayal" refers to the child's discovery
4 that someone on whom he or she depended has harmed,
5 lied to, used, manipulated, or blamed the victim.
6 Because child sexual abusers are generally known to
7 the victim, as you've heard before, and groom their
8 victims over time, betrayal is a logical reaction to
9 the abuse.

10 "Powerlessness" results from the repeated
11 violation of a child's body or personal space and the
12 inability to stop the abuse. It increases when
13 children are unable to get help from other adults.

14 "Stigmatization" refers to the shame,
15 guilt, and negative self-image resulting from the
16 abuse. This feeling may be increased when the
17 offender stresses the need for secrecy, or insists
18 the victim is at fault or brought on the abuse. It
19 increases when others react with shock or hysteria
20 after the abuse is revealed, or when they blame the
21 victim or impute other negative characteristics to
22 the victim.

23

1 Such a framework for thinking about the
2 harm caused by sexual abuse helps to explain the
3 resulting anxiety, depression, lack of self-worth,
4 increased risk for suicide and substance abuse,
5 sexual dysfunction, and other consequences. So
6 victims of child sexual abuse imagery suffer all
7 those consequences and, in addition, they suffer new
8 layers of impact.

9 For example, perpetrators may use images
10 of the child to perpetuate the crime by maintaining
11 the child's continued cooperation by threatening to
12 reveal the images to parents or others, reinforcing
13 that stigmatization and powerlessness that comes from
14 the original abuse.

15 When victims learn that the offender not
16 only sexually abused them but then benefitted with
17 the distribution of images of that abuse, whether
18 financially or through increased status as you heard
19 about earlier, this can compound that sense of
20 betrayal that they already suffered as a result of
21 the abuse.

22 As child victims come to understand the
23

1 nature of the Internet and the permanence of the
2 image, they may fear that any person they know,
3 whether classmates, co-workers, church members,
4 neighbors, or any stranger they pass on the street
5 may have seen images of their abuse.

6 As one victim described it, I wonder if
7 the people I know, if the men I pass in the grocery
8 store, have seen them? This realization can
9 intensify the victim's feelings of stigmatization
10 that they already had from the original abuse.

11 Victims may be further sexually
12 traumatized by realizing that men they know, and many
13 they may never know, have received pleasure, have
14 received sexual gratification, by the images of their
15 rape or abuse. And by recognizing that this could be
16 happening at any moment in the day.

17 As one victim stated: Whenever her image
18 is discovered in another collection, quote, "it makes
19 me feel again like I was being abused by another man
20 who had been leering at pictures of my naked body
21 being tortured."

22 Victims' feelings of self-blame may be

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1 increased if, as you heard, they were smiling in the
2 images – and many offenders insist the victim smile,
3 because they know that will be used by collectors of
4 the images to deny the wrongfulness of the abuse.
5 And, they fear that it will be used by perpetrators
6 to groom another child.

7 And above all, victims suffer feelings of
8 powerlessness from knowing they can never put an end
9 to this; that there is no way to guarantee the images
10 of their abuse will all be found and destroyed, and
11 in every likelihood they will continue in circulation
12 or in private collections.

13 It is important to realize that many of
14 these additional impacts may be triggered every time
15 another offender is found to have a copy of the
16 victim's images in his collection. While the
17 greatest effect of the creation, trading, and viewing
18 of child abuse images is on the individual victim,
19 others are harmed as well, particularly the
20 nonoffending parent of the victim.

21 So these effects include: blaming
22 themselves for not discovering the abuse; not knowing

23

1 how to help their child cope with the psychological
2 and other effects; being powerless to put an end to
3 the circulation of the images – and I've attached the
4 statement of a nonoffending stepparent to my
5 testimony to further illustrate this.

6 I turn now to the VAG's attempt to answer
7 the very questions posed by this Commission:

8 You asked first about offender typologies
9 and how guidelines might appropriately distinguish
10 between less and more serious offenders.

11 We certainly can't speak to the typology
12 of offenders, but we note that all offenses involving
13 the creation, distribution, and collection of child
14 sexual abuse images are harmful, whether or not they
15 are coupled with a hands-on offense, because they all
16 work to normalize the sexual abuse of children.

17 You asked about offender culpability
18 regarding the nature of the images.

19 Again, all images promoting the sexual
20 abuse of children are harmful, but we would agree, as
21 has been said earlier, that those that depict
22 violence or in some way dehumanize the child should
23

1 be dealt with more severely. It would also be useful
2 to consider indications that an offender specifically
3 sought such images, indicated by requests for such
4 images, or the number of such images in a collection.

5 You asked about whether the volume of
6 images possessed or distributed should be a factor.

7 Certainly the number of images reflects
8 the number of victims harmed and thus is relevant.
9 And the number of images of a particular victim may
10 be relevant because victims may feel more distressed
11 to know that an offender had more than one image of
12 them.

13 As one victim stated, if someone has one
14 picture of me, it's different than someone who has
15 numerous pictures because then I feel as though they
16 enjoyed looking at me and makes me feel even more
17 victimized.

18 But as has already been said today, the
19 mere volume of images no longer connotes the same
20 intentionality that it once did when images were
21 traded through the mail. So other factors may be
22 important such - as you've already heard today - such

23

1 as the number of times images were collected, the
2 span of time over which images were collected; the
3 extent to which the images were catalogued; anything
4 that indicates an offender's real intentionality and
5 involvement with this large collection of images.

6 With regard to the volume of distribution,
7 victims note that any distribution is harmful because
8 even one distribution opens the door to further
9 distribution.

10 As one victim noted: My father supposedly
11 only shared the images of me with one peer, and they
12 became the most prolific series of child pornography
13 in the world.

14 But other factors that relate to the
15 degree of distribution may be relevant, including the
16 extent to which the offender took deliberate actions
17 to facilitate distribution such as taking steps to
18 provide easier access to specific images in his
19 collection; the frequency of distribution, the span
20 of time over which images were distributed; and
21 whether images were intentionally distributed widely.

22 In examining the form of distribution,
23

1 again any distribution increases both the actual harm
2 and the risk of future victimization, but courts
3 might best consider whether the images were made
4 publicly available, which potentially increases
5 access to or exposure to child abuse images beyond an
6 established community of perpetrators; whether the
7 images were shared with minors, which could indicate
8 grooming of future victims; whether distribution was
9 in response to communication with the recipient and
10 indicated an intention to facilitate or promote other
11 offending or similar factors.

12 You asked about other types of offender
13 behavior that might be relevant.

14 We would say that these would include
15 whether child abuse images were shown to another
16 child. Again that would be an indication of
17 grooming. Whether the participant participated in a
18 chat room or other social group dedicated to child
19 abuse images, thereby contributing to the
20 normalization of child sexual abuse and lowering
21 inhibitions against offending. Whether the child
22 participated – whether the offender participated in a

23

1 chat room that incited additional production of child
2 abuse images, or sexual abuse of children. And, in
3 addition, if after participating or observing such a
4 group he or she failed to report that activity to
5 authorities. And whether a producer of child sexual
6 abuse images threatened to expose a victim unless the
7 victim cooperated in the production of additional
8 images.

9 You've asked about accounting for an
10 offender's past and future sexual dangerousness.

11 We believe sentencing judges should have
12 as much information as possible about the
13 dangerousness of an offender beyond criminal
14 convictions.

15 Most child sexual abuse remains undetected
16 for reasons well understood. Dr. Cooper listed a
17 number of those. They can include embarrassment and
18 shame; expectations of blame; fear of not being
19 believed; the expectation that disclosure might not
20 help.

21 Children may fail to disclose exploitation
22 and child abuse images because they don't understand

23

1 having participated in something that was wrong; they
2 may be trying to block out the memories.

3 So for all these reasons, it has been
4 estimated that fewer than ten percent of those who
5 will acknowledge the abuse state that their abuse was
6 ever reported to authorities.

7 What's more, much of the abuse that is
8 reported is not going to result in a conviction due
9 to either lack of evidence, unwillingness of the
10 child's family to undergo the strain of a criminal
11 case, concern about the offender, lack of support for
12 the child and family by other family members, or many
13 other reasons.

14 So first of all, most child sexual abuse
15 will never be disclosed. Most of what's disclosed is
16 not going to result in a conviction.

17 At the same time, many studies out there
18 indicate that many offenders who have been convicted
19 only of possession offenses have in fact committed
20 hands-on offenses that they will self-identify. I
21 referenced the Butner Study and another one. The
22 point being that simply looking at prior convictions
23

1 does not tell you whether someone has committed a
2 hands-on offense.

3 So we would suggest anything that can give
4 judges more information about the likelihood that an
5 offender committed a hands-on offense, including
6 arrests, including reports to child protective
7 services – whether substantiated or unsubstantiated,
8 especially in states where "unsubstantiated" just
9 means not enough evidence. Now it's not that one
10 unsubstantiated offense means anything, but if you
11 see a pattern – there's an unsubstantiated offense
12 here, and here, and here, and here – that starts to be
13 relevant. Because remember, this is a crime that is
14 largely hidden. So you're going to have to figure
15 out ways to get at indications that an offender is
16 dangerous.

17 You asked about the proper roles of
18 imprisonment and judicial supervision.

19 Certainly the sentences in cases involving
20 child abuse images should reflect the seriousness of
21 these offenses. Even for those convicted only of
22 possession offenses, the fact that an offender

23

1 intentionally collected such images indicates they
2 received some sort of pleasure or sexual
3 gratification, and they could not have received that
4 benefit if someone else did not abuse the child. So
5 these are child sexual abusers by proxy.

6 Imprisonment and supervision should also
7 reflect the need to protect the safety of victims and
8 other children.

9 I know I'm out of time. I want to make
10 another couple of points because you specifically
11 asked about possible changes to statutes or
12 guidelines that could account for the different types
13 of harm suffered by the victims of child pornography.

14 The first change that we would like to see
15 would have to be made by Congress, and that would be
16 to amend the restitution statute for child
17 pornography offenses. That's 18 U.S.C. 2259. That
18 statute defines the full amount of a victim's loss to
19 include costs for medical services, physical and
20 occupational therapy, transportation, temporary
21 housing, and child expenses, child care expenses,
22 lost income, attorney's fees, and, quote, "any other

23

1 loss suffered by the victim as a proximate result of
2 the offense."

3 A question has arisen whether that
4 "proximate cause" requirement applies to all of those
5 other costs. Victims' advocates would say, no, it
6 does not even as written, but clarification would be
7 very helpful.

8 Remember, the nature of this offense is
9 such that the victim's harm results from the totality
10 of the offense. Committing the sexual abuse, the
11 capturing of the images, the dissemination of the
12 images, the collection of images by other people
13 around the country, these types of harms are all
14 reasonably foreseeable.

15 Requiring a victim to artificially
16 apportion the psychological harm and the tangible
17 results such as substance abuse problems, or school-
18 or work-related problems, to each defendant who
19 contributed is overly burdensome and thwarts the
20 public policy goal of providing full recompense to
21 these victims.

22 Beyond making that important statutory
23

1 change, we would recommend – as this Commission is
2 well aware, judges have differed widely in the
3 amounts of restitution that has been ordered, ranging
4 up to \$3 million, as low as \$2,000. We would
5 recommend that Congress set a presumptive amount of
6 restitution due in such cases, which could be
7 increased where a victim can articulate specific
8 additional harms.

9 As guidance, Congress could look at 18
10 U.S.C. 2255, which sets out a civil remedy for child
11 sexual exploitation offenses, including child sexual
12 abuse image offenses. That statute allows a victim
13 to recover actual damages and states that a victim,
14 quote, "shall be deemed to have sustained damages of
15 no less than \$150,000 in value".

16 Any type of floor for restitution orders
17 would provide a more just and uniform response to
18 victims.

19 Finally, you asked about the proper role
20 of sentencing as an effort to reduce the market for
21 child pornography.

22 We agree that sentencing does not appear
23

1 to be the perfect tool to reduce the market for child
2 sexual images, but it is one of the few tools
3 available. Through sentencing we express to society
4 and to the individual and family members harmed that
5 we recognize the seriousness of this offense.

6 I do want to draw your attention to the
7 fact that the VAG received answers to each of these
8 questions from a victim, and those are attached to my
9 testimony.

10 Finally, the seriousness of crimes
11 involving child sexual abuse images warrants a strong
12 response to offenders. As one victim has stated:

13 Unlike other forms of exploitation, this
14 one is never ending. Every day people are trading
15 and sharing videos of me as a little girl being raped
16 in the most sadistic ways. They are being
17 entertained by my shame and pain. I only ask that
18 those who have exploited me be brought to justice, to
19 hopefully deter some others from doing the same, and
20 to lessen my shame.

21 Thank you.

22 CHAIR SARIS: Thank you. Do you have a
23

1 question?

2 VICE CHAIR JACKSON: I do have a question.

3 Gosh, there are so many horrible, horrible impacts
4 that it is hard to know where to begin, but one that
5 is particularly interesting to me is this idea of
6 traumatic sexualization that you raised, Ms. Howley.

7 And I wanted to get a sense actually from
8 Dr. Cooper. We had testimony earlier about the fact
9 that not the majority, not most, but some victims of
10 sexual abuse go on to abuse others. And I'm trying
11 to get a sense of whether in your work with victims
12 you follow victims, and do you concur with the
13 previous testimony about this, you know, four-year
14 window; it's usually a certain period of time within
15 which someone who has been victimized, if they're
16 going to go on to victimize someone else, that that
17 might happen. Do you see that in your work?

18 DR. COOPER: Not in child pornography
19 victims. I haven't seen that in child pornography
20 victims specifically. I have seen that in some child
21 sexual abuse victims, and I've seen it more commonly
22 in boy victims as compared to girl victims.

23

1 What we also know, though, is that the
2 research of Dr. Cathy Spatz Widom reveals that when
3 children are – when girl children have any type of
4 criminal justice, juvenile justice outcome related to
5 their lives, girls who have been sexually abused are
6 28 times more likely to be arrested as juveniles for
7 prostitution than a child who has never been sexually
8 abused.

9 So we may see an offender in a male victim
10 versus a child who ultimately sexually self-
11 objectifies and becomes a victim in female victims.
12 So hopefully that helps to answer your question.

13 VICE CHAIR JACKSON: I think so. I mean,
14 I'm trying to figure out, I guess, what we do with
15 prior sexual abuse history for current offenders.
16 And maybe this doesn't come into play based on your
17 experience in child pornography cases because you're
18 saying that doesn't happen very much –

19 DR. COOPER: Well I think we don't have
20 that trajectory yet –

21 VICE CHAIR JACKSON: Yes, to figure it
22 out.

23

1 DR. COOPER: - to show that.

2 VICE CHAIR JACKSON: I'm trying to get my
3 mind around whether or not prior abuse is an
4 aggravator, as we've heard, because it makes people
5 who have prior abuse in their past more likely to be
6 at risk of offending; or, is it a mitigator because
7 they themselves were victims of this behavior, and
8 perhaps their crimes reflect, you know, the traumatic
9 sexualization effects that you're talking about.

10 DR. COOPER: If I could respond to that, I
11 think first of all most children who have been
12 sexually abused do not go on to become offenders.
13 But I think what makes a big difference is any type
14 of cognitive behavioral therapy or trauma focused
15 behavior therapy that children receive. The
16 majority, unfortunately, still in our country of
17 children who have been sexually abused don't get any
18 mental health services.

19 Our country, as you know, has a paucity of
20 mental health services' availability. And because of
21 this, the children at greatest risk to go on to
22 become offenders are going to be those children who

23

1 have no mental health – have not had any mental health
2 intervention, number one.

3 Number two, who have been multi – victims
4 of polyvictimization, not just child sexual abuse but
5 also neglect, and physical abuse, and who therefore
6 are going to be at higher risk to have really
7 unresolved issues of anger, self-blame, and potential
8 antisocial behaviors as the outcome.

9 So I would say that those victims who do
10 go on to become offenders – and there's a great study
11 out of DePaul School of Law entitled "The Victim As A
12 Victimizer," is the name of the study, and it's
13 really looking at traffickers, sex traffickers, 25
14 sex traffickers, 100 percent of whom all are male and
15 100 percent of them had been sexually abused as
16 children. Just as another reference for you to
17 consider.

18 CHAIR SARIS: Commissioner Carr.

19 VICE CHAIRMAN CARR: Ms. Collins, I think
20 you were here when Mr. DeBrotta, the federal
21 prosecutor, testified earlier. And it was the first
22 time, maybe just because I haven't heard it presented

23

1 before, that he seemed as or more interested in
2 finding the kids as in what the sentence was going to
3 be. And he also said that unfortunately there are so
4 many cases that he can prosecute, he can really
5 concentrate on the ones that are going to get at
6 least a five-year mandatory minimum or something
7 above that.

8 But have you seen a greater interest among
9 federal prosecutors in, you know, a lot of what I
10 need to do here is go find the kids? Because that
11 was a somewhat novel presentation to me.

12 MS. COLLINS: It was wonderful to hear.
13 And, honestly, I have seen an amazing difference in
14 the last ten years. I feel that obviously all the
15 individuals, prosecutors, federal/local law
16 enforcement officers, obviously care about the
17 children and would love to find them.

18 I feel much like Steve DeBrotta mentioned.
19 When you see some successful cases, people recognize
20 it can be done, but it can only be done with global
21 networks. Because individuals are seizing computers
22 here in the United States containing photographs of
23

1 children who may actually be in Germany. So we need
2 to have that networking.

3 I think what I kind of noticed years ago
4 was that when the Supreme Court ruling happened in
5 2002 and all of a sudden, you know, there have – we
6 only know of about a dozen children at that time who
7 had been identified, and it was just word-of-mouth
8 that we heard of it. Once this ruling came out and
9 law enforcement – or the prosecutors were really
10 depending on knowing whether the children had been
11 identified, people started submitting information
12 saying, hey, I just worked a case. This child is now
13 ID'd. And so really I think that that's the silver
14 lining around, you know, that ruling also is that it
15 really encouraged cooperation and collaboration and
16 sharing information.

17 And you have the Project Safe Childhood
18 initiative that also did an awful lot in raising the
19 awareness of who the victims are, who the offenders
20 are, that started in 2006. And we are very
21 enthusiastic about seeing the interest of federal
22 prosecutors and law enforcement in identifying the

23

1 kids.

2 CHAIR SARIS: Commissioner Jackson?

3 VICE CHAIR JACKSON: I'm sorry, I'm
4 monopolizing, so two questions.

5 One is whether NCMEC receives information
6 from both state and federal? Or is this just a
7 federation operation?

8 MS. COLLINS: It's both state, federal,
9 and international.

10 VICE CHAIR JACKSON: So it's anybody -

11 MS. COLLINS: Yes, yes.

12 VICE CHAIR JACKSON: Then the other
13 question was the issue of child pornography victims
14 being victimized by the knowledge of their photos
15 being out there. How is it that they know?

16 I mean, you know, there was talk of each
17 time, you know, the child victim - just procedurally,
18 who tells them? And can they opt out of being told
19 if they don't want to know?

20 MS. HOWLEY: Yes, they can. What happens
21 in federal cases is that victims have a right under
22 the CVRA, the Crime Victims Rights Act, to be

23

1 notified. So often it's the parents who get
2 notification for the first few years until the child
3 reaches majority, and then they have their own right
4 to be notified.

5 And yes, the parents can opt out. The
6 child can opt out. Or the child, now adult, can opt
7 out. But many victims feel that they have an
8 obligation not to opt out because someone should make
9 an impact statement and make it clear to the court
10 that this causes real harm. So they're putting their
11 own healing off so that they can continue to do this,
12 because they feel an obligation to.

13 VICE CHAIR JACKSON: Interesting.

14 CHAIR SARIS: Did you have a question?

15 COMMISSIONER WROBLEWSKI: I've got
16 actually two questions, one for Ms. Howley and Ms.
17 Collins, and one for Dr. Cooper.

18 On restitution, one way to address the
19 issue you were just talking about is, instead of
20 going about restitution case by case, one at a time,
21 where the victim has to put a victim impact statement
22 and so forth, one idea that's been floated around is

23

1 to create a victim restitution fund where there would
2 be a presumptive amount of money that would be
3 ordered in every case, or based on the number of
4 images, or some such.

5 Does your organization, does the Victims
6 Advisory Group, does your organization support
7 something like that in terms of legislation?

8 And while you're thinking about that, Dr.
9 Cooper, you mentioned that you were at least a little
10 suspicious about the narrative that was presented in
11 a couple of the earlier panels about recidivism. The
12 narrative that was presented about perpetrators, or
13 that in these kinds of crimes they're largely
14 educated, when they're caught they're ashamed,
15 they're nonrecidivists. You seem to have some
16 skepticism about that?

17 DR. COOPER: No, what I was speaking of
18 was the often-touted studies regarding recidivism
19 rates in child sexual exploitation, child sexual
20 abuse, most commonly Dr. Karl Hanson's research,
21 which is really focused on rearrest rates, with the
22 recidivism rate cited as 13 percent.

23

1 I get asked that question even though I'm
2 a pediatrician, I don't want to know the answer, but
3 I get asked that question on the witness stand. So
4 sometimes I have to respond to it. And I think that
5 when we look at recidivism, we have to know that most
6 recidivism studies are based upon rearrest rates.
7 And if you are waiting for an offender who has
8 already been incarcerated to then be rearrested for
9 having sexually abused yet another child, you are
10 likely not to see that rearrest right away.

11 Those individuals will have become
12 smarter, and children are not going to tell. So that
13 is why I think that looking at very low recidivism
14 rates based upon rearrest may give us a false sense
15 of security.

16 COMMISSIONER WROBLEWSKI: Thank you.

17 MS. COLLINS: Regarding your question,
18 also following up on Ms. Howley's answer regarding
19 notification, the actual process of what's in place
20 is that when OVA, the Office of Victims Assistance,
21 hears from the families or the child who is now an
22 adult whether or not they've opted in or opted out of
23

1 notification, they will then contact the National
2 Center and inform us that on this series that child
3 victim or that family wants to be notified.

4 In our internal system we flag that that
5 series wants to be notified, this series opted out,
6 this series opted in. For any federal submissions
7 that law enforcement send us, we review all of the
8 images. If we find images of one particular series
9 where the victim wants to be notified, our system
10 already includes that on the report.

11 So when we send it back out to the
12 submitting agency, at the same time we notify them we
13 notify the Office of Victims Assistance so they can
14 begin the initial process of notifying the victim.
15 And then also the prosecutor would have the
16 information to use in terms of getting a victim
17 impact statement that would also be on file with the
18 Department of Justice.

19 I don't have the exact number in front of
20 me, but it is over 300 victims or their families are
21 now asking for notification when their child's
22 images, or when their own images are being seen.

23

1 Having spoken with some of the families and some of
2 the parents regarding this decision, very much what
3 you mentioned, Ms. Howley, was they don't want to not
4 know. But at the same time, some of them start
5 getting the notifications and in some cases they're
6 getting dozens and dozens and dozens a week on some
7 of the more popular traded series.

8 We would certainly support any effort that
9 would streamline the ability for these families and
10 for these children to get restitution, as well as to
11 get the help that they need. In many cases, you have
12 some victims who do have representation, who have
13 found somebody who may actually take on their cause
14 and push this forward. But in many cases we have
15 local victims who aren't even aware of any of the
16 resources that may actually be available to them. So
17 somehow, you know, evening the playing field I think
18 for many of the victims is absolutely necessary.

19 CHAIR SARIS: Specifically, would you like
20 this fund? Is this a good idea? Would that be the
21 streamlining you're thinking of?

22 MS. COLLINS: I think it would certainly

23

1 add some consistency to the fact that some victims
2 now have representation who are fighting, rightfully,
3 for them; and then others simply don't. So having
4 something streamlined and organized would be helpful.

5 CHAIR SARIS: Do you all agree?

6 MS. HOWLEY: Well we haven't taken a
7 formal position, but I agree there is a lot of merit
8 in considering a restitution fund. Because right now
9 there's so much disparity, depending on how the
10 assets a particular offender may have, which
11 particular cases the victim's image was discovered
12 in. There's so many victims who might not know until
13 after the fact that their image was part of a
14 collection. So having a restitution fund I think
15 would solve a lot of those disparity issues and give
16 more victims access to restitution.

17 CHAIR SARIS: Commissioner Friedrich.

18 COMMISSIONER FRIEDRICH: Ms. Collins, I
19 wanted to follow up with you about your testimony on
20 the Victim Identification Program you have.
21 Dr. Cooper I think testified that NCMEC does not
22 catalogue anything except prepubescent children? Is

23

1 that right?

2 DR. COOPER: Predominantly.

3 MS. COLLINS: Well actually it's a matter
4 of what law enforcement is submitting to us. Law
5 enforcement, when they identify a child who has been
6 sexually abused or pornographically photographed,
7 they will submit the images to us. That is why
8 within our system we have classified, of our
9 identified child victims, 76 percent of them are
10 prepubescent, typically under the age of ten.

11 The smaller version, I believe what
12 Dr. Cooper may have been referencing, the fact that
13 it looks very small percentagewise of the pubescent
14 is that law enforcement are not necessarily working
15 those investigations and identifying those children.
16 They may look at the photograph and think that it may
17 be an adult or an 18-year-old, when in fact it's a
18 15-year-old. So it never gets to the point that they
19 actually submit it.

20 COMMISSIONER FRIEDRICH: But the 24
21 percent that you say depict pubescent children, those
22 you've identified because law enforcement has

23

1 happened to say this person is -

2 MS. COLLINS: Yes.

3 COMMISSIONER FRIEDRICH: Okay. And then
4 you broke down the kinds of sexual abuse that are
5 most often depicted in the images. Do you have that
6 broken down by these different categories, like the
7 infants and toddlers, and the prepubescent? Is that
8 information you could provide us? Or is it only -

9 MS. COLLINS: No, that's absolutely - I
10 don't have it here, but we could crunch those numbers
11 and get that to you.

12 COMMISSIONER FRIEDRICH: Because we hear
13 frequently that the infants and toddlers are pictures
14 of naked infants and toddlers. And I'm wondering to
15 what extent these percentages are - would apply to the
16 various subgroups as well as across the board.

17 Do you have a sense, even though you don't
18 know the exact numbers, do you have a sense that you
19 could comment on that now?

20 MS. COLLINS: Well certainly we can crunch
21 those numbers for you. I think that would be very
22 interesting for us to know also.

23

1 Secondly, unfortunately the – I'm thinking
2 of one of the really commonly seen series of an
3 infant, a young boy. You see bondage. You see oral
4 copulation. You see penetration. I'm thinking – and
5 that's certainly a very, very violent series, but I'm
6 actually thinking of multiple infant series, images
7 and videos, I'm not – off the top of my head, we'll
8 need to demonstrate it with numbers – but I'm not
9 really seeing very much of a difference in terms of
10 the type of sexual abuse being inflicted on them. We
11 do have oral copulation. We have penetration. We
12 have bondage. And a lot of sadomasochistic type
13 tendencies with some of those images in terms of
14 urination and so forth.

15 So the images of the infants I do believe,
16 just beyond their age, the sexual abuse depicted is
17 very common to what I stated there. But we will pull
18 together those numbers for you.

19 COMMISSIONER FRIEDRICH: Thank you.

20 VICE CHAIR JACKSON: Could I ask about the
21 infants? Is the identification process more
22 difficult with the younger children? I mean, I would

23

1 assume that it is, so that your pool of unidentified
2 children victims may contain a larger percentage of
3 younger children because it's harder to identify
4 them. Am I wrong about that?

5 MS. COLLINS: You're absolutely correct.
6 And it kind of runs counterintuitive to what I would
7 initially think would be, you know, the younger they
8 are the more likely somebody would notice that
9 something was wrong. But the fact is, in terms – you
10 know, the children are obviously in different home
11 environments where much of this is occurring.

12 The children, you know, when we actually
13 have information leading to where a child might be,
14 or a region, law enforcement don't have as many
15 options. They can go to pediatricians, they can go
16 to daycare centers, but if those two don't recognize
17 them, very often a baby looks like a baby and they
18 have to look for the adults in the pictures as the
19 best clue.

20 DR. COOPER: And if I could add to that,
21 as we learned in our case in Delaware where we had
22 more than 100 children who were infants and toddlers

23

1 and who were sexually abused and pornographically
2 photographed, there is not this index of suspicion.
3 People would not ever suspect that an infant or a
4 toddler would be a victim of child sexual abuse.

5 So the issue of protection is not as
6 vigilant as it is with older children.

7 CHAIR SARIS: Judge Hinojosa.

8 COMMISSIONER HINOJOSA: I guess back to
9 the restitution point, the courts have varied as to
10 what amounts of restitution, and whether it's full
11 amounts or partial amounts, and some courts have said
12 they are not necessarily direct victims, and the
13 restitution statute doesn't cover this. But how
14 effective has this been if people are being sent to
15 prison for long periods of time, and I guess the
16 question is to Ms. Collins, do you keep records as to
17 how much, if any, of these restitution amounts have
18 been paid?

19 MS. COLLINS: We do not. We are actually
20 not involved in any of the restitution proceedings.
21 When asked, we provide helpful information to the
22 victims or the victim's representatives to let them

23

1 know about the proliferation of their series, but
2 perhaps that might be a better question to another
3 panelist.

4 MS. HOWLEY: Right. We actually don't
5 know the percentage of restitution that's paid, and
6 that itself is a problem that we don't know that.
7 But the National Center for Victims of Crime just
8 finished a project to show how relatively easy it
9 would be to increase the amount of collection if only
10 the criminal justice system will focus on the
11 collection.

12 I mean, one problem has been that too
13 often that's not been a priority for probation, or
14 parole, or whoever.

15 COMMISSIONER HINOJOSA: And is this a
16 study on child pornography, or cases in general, as
17 to how much restitution has been paid?

18 MS. HOWLEY: Oh, the numbers that we do
19 have about restitution are just in general.

20 COMMISSIONER HINOJOSA: Child pornography
21 as well as any other case?

22 MS. HOWLEY: Right.

23

1 CHAIR SARIS: Anything else?

2 (No response.)

3 CHAIR SARIS: All right, thank you very
4 much. We will move on to our last panel for the day.

5 (Pause.)

6 The last, but by no means least, is our
7 panel on Courts, the Executive Branch, and the
8 Defense Bar.

9 Our panel is Judge Casey Rodgers, the
10 chief judge of the United States District Court for
11 the Northern District of Florida. Previously, Chief
12 Judge Rodgers was a magistrate judge in the Northern
13 District of Florida, and before that practiced both
14 as in-house counsel and in private practice. She
15 also served in the U.S. Army. So, welcome.

16 JUDGE RODGERS: Thank you.

17 CHAIR SARIS: Thank you for coming.

18 Francey – is that Francey?

19 MS. HAKES: Yes, ma'am.

20 CHAIR SARIS: Francey Hakes – I'm Patti –
21 Francey –

22 (Laughter.)

23

1 CHAIR SARIS: - is the National
2 Coordinator for Child Exploitation Prevention and
3 Interdiction in the Office of the Deputy Attorney
4 General at the Department of Justice where she is
5 charged with formulating and implementing a national
6 strategy to combat child exploitation. Ms. Hakes
7 also serves as an assistant United States attorney
8 for the Northern District of Georgia. Welcome.

9 MS. HAKES: Thank you.

10 CHAIR SARIS: Deirdre von Dornum? Is that
11 right? Has been an assistant federal defender
12 representing indigent defendants in the Southern and
13 Eastern Districts of New York, the Court of Appeals
14 for the Second Circuit, and the U.S. Supreme Court,
15 for ten years. Her practice involves trial and
16 appellate litigation of a full range of federal cases
17 from housing fraud to child pornography, to piracy -

18 MS. von DORNUM: The poor Somali pirates.

19 (Laughter.)

20 CHAIR SARIS: All right. Welcome. We
21 begin with Judge Rodgers.

22 JUDGE RODGERS: Good afternoon. Thank you

23

1 for inviting me. It looks like I'm in the other
2 unenviable position of keeping you all awake at what
3 I know has been a very long day and we're at the end
4 of it now.

5 But it is my pleasure to be here. I am
6 honored to be here on behalf of the Criminal Law
7 Committee, and I appreciate the opportunity to
8 address the Commission this afternoon on such an
9 important issue to the Judiciary in the area of the
10 child pornography guidelines.

11 We do applaud the Commission for setting
12 these guidelines. As you know, these guidelines have
13 become increasingly troublesome for judges. Today,
14 as has been mentioned earlier I'm sure in other
15 testimony, but there is an overwhelming percentage of
16 district judges who are dissatisfied with these
17 guidelines, particularly the guideline in the area of
18 possession and receipt. And that is where I would
19 like to focus my comment.

20 I want to stress from the beginning that
21 judges I think would be the first to agree that child
22 sex crimes are gravely serious offenses. In our

23

1 courtrooms we see and we hear about the unspeakable
2 acts of some of these offenders, and the unimaginable
3 harm that's suffered by the child victims. And thus,
4 we do appreciate the need for severe punishment in
5 this area.

6 However, judges also know from their own
7 experiences with their own dockets that within the
8 spectrum of child sex crimes there are a number of
9 offenses ranging from aggravated child sexual abuse
10 on the one end, to child pornography and obscenity
11 offenses on the other, all representing varying
12 degrees of harm and levels of culpability, and thus
13 judges understand that these sentences, although
14 punitive, they must be measured and proportionate to
15 the seriousness of the particular offense that is
16 involved.

17 Unfortunately, with all due respect, in
18 the area of child pornography the guidelines have not
19 produced measured and proportionate sentences. And
20 as a result, we have seen a growing number of
21 departures and variances by judges in these cases.

22 I think this is due in large measure to
23

1 the way that these guidelines have evolved over the
2 past two decades or so with congressional directive
3 after congressional directive, even direct
4 legislative amendment, all aimed at increasing
5 penalties in this area, eliminating judicial
6 flexibility, and often without any evidence-based
7 input from the Commission.

8 And these guidelines thus have actually,
9 in my view, frustrated rather than promoted the goals
10 of proportionality and uniformity that lawmakers
11 sought with the passage of the Sentencing Reform Act.

12 The Judicial concern over
13 disproportionality is a valid one. As you have
14 heard, I know you had regional hearings in 2010, I
15 believe, maybe 2011, but as you've heard from
16 countless judges across the country, the multiple
17 large-level offense characteristics enhancement in
18 section 2G2.2 have been applied too frequently, and
19 they fail to distinguish harmful conduct. And many
20 judges feel that the base offense levels for
21 possession and receipt are set too high.

22 These factors combine to produce what I

23

1 have outlined in my written testimony as the skewed
2 result that even a first-time possession or receipt
3 offender with no pattern of activity enhancement and
4 no criminal history will not receive a recommended
5 guidelines sentence near the bottom of the statutory
6 range, or even one that includes the mandatory
7 minimum sentence for receipt cases.

8 If this type of offender doesn't get the
9 benefit of the low end of the statutory range under
10 the guidelines, I doubt that anyone ever will. And
11 in fact in my experience, no one ever does, or can,
12 the way that these guidelines are currently designed.

13 This has created a frustrating sentencing
14 anomaly for judges. On the one hand, Congress has
15 provided a broad statutory range for possession and
16 receipt offenses. This indicates that Congress
17 contemplated both a wide spectrum of culpable
18 conduct, as well as a broad range of appropriate
19 sentences for these two offenses.

20 On the other hand, Congress has issued
21 directives in past amendments to these guidelines
22 that ratchet sentences up to the high end of the
23

1 statutory range, in effect ignoring the very
2 statutory framework that they gave us judges to work
3 with.

4 Congress insists that judges should not be
5 departing and varying from 2G2.2, but the guideline,
6 this guideline, is completely at odds with the
7 Sentencing Reform Act, which as you know requires
8 judges to consider not only the guidelines but also
9 other factors, including the nature and circumstances
10 of the offense, and the history and characteristics
11 of the defendant.

12 This is impossible to do under 2G2.2 which
13 in many cases completely removes even criminal
14 history from the sentencing equation. This
15 irreconcilable conflict is what is actually driving
16 the high rates of departure and variances. This
17 occurs as judges struggle to impose sentences that
18 are just and reasonable for the offenders who stand
19 before them.

20 This scene is routinely played out in
21 courtrooms across the country, including in my own
22 district. In preparation for my testimony, I asked
23

1 my probation office in my district to compile a
2 report setting out the characteristics of our typical
3 possession and receipt offenders, and also the
4 frequency with which the specific offense
5 characteristics apply.

6 And before I go any further, if it's all
7 right with you, I would like to publicly thank my
8 probation office for the work that they did in
9 assisting me with that report.

10 A lot of these statistics are provided for
11 you in my written testimony and set forth more fully
12 there. I do have charts, and the source data if you
13 are interested, back in my chambers and I'll be happy
14 to provide that. But I would like to emphasize a few
15 of these statistics today, because I am fairly
16 confident that these statistics are representative of
17 what you will find in other districts.

18 I would note that the filings of child
19 pornography cases in our district, in the Northern
20 District of Florida, have consistently been above the
21 national average. And in the past two years, they
22 were more than double the national average.

23

1 But in our district, the statistical
2 profile for the typical possessor and receiver of
3 child pornography is nearly identical for those two
4 offenders. These stats are also consistent with what
5 you all heard presented this morning by Drs. Seto and
6 Wollert – Seto, excuse me, and Wollert. But 100
7 percent of the offenders in our cases are white
8 males; 38 percent are between the ages of 35 and 45;
9 90 percent were employed at the time of the
10 commission of the offense; a majority are educated,
11 having graduated either from high school or in many
12 instances college; and over 80 percent have little or
13 no criminal history.

14 As for the frequency of the offense
15 characteristics, our statistics show the following in
16 receipt and possession cases:

17 In 90 percent of the cases, the level, two
18 levels for use of a computer is applied; 100 percent
19 of receipt cases – 100 percent of receipt cases – and
20 46 percent of possession cases, the two levels for
21 material involving a prepubescent child is applied;
22 80 percent of receipt cases, and 61 percent of
23

1 possession cases, the four levels for sadistic,
2 masochistic, or violent conduct is applied. And in
3 more than 80 percent of possession and receipt cases,
4 the 5-level increase for over-600 images from the
5 image table the five levels is applied.

6 And in fact, we usually see numbers that
7 extend well beyond the image table. Most frequently,
8 our images, the numbers span from the range of 1,000
9 to 100,000 images.

10 The impact of these four offense
11 characteristics, which again apply in the
12 overwhelming majority of these cases, creates, I
13 think you can characterize it, as a serious
14 imbalance, unlike anything else that we see in the
15 guideline.

16 As I mentioned, in these cases no one
17 scores out anywhere near the bottom of the range. In
18 fact, in our district not one person charged or
19 convicted of receipt and sentenced for receipt in the
20 seven years from 2004 to 2011, had a guideline range
21 that included the mandatory minimum. All began well
22 above it. And again, that is despite the fact that
23

1 in receipt cases in our district anyway, 85 percent
2 of those offenders were Criminal History Category I.

3 This imbalance has also created a problem
4 of proportionality within the guidelines as a whole.
5 We see crimes involving similar yet arguably more
6 egregious conduct that carry lower ranges.

7 For example, in section 2A3.2, which is
8 the guideline for Criminal Sexual Abuse of a Minor
9 Under the Age of Sixteen, the guideline range is 51
10 to 63 months for a first-time offender. That's after
11 applying offense enhancements and before adjusting
12 for acceptance.

13 In 2A3.3, which addresses criminal sexual
14 abuse of a ward, a first-time offender who uses a
15 computer to misrepresent his identity to persuade a
16 minor to participate in sexual conduct scores out at
17 27 to 33 months. And that is before adjusting for
18 acceptance.

19 The same calculation for a first-time
20 offender under 2G2.2 for possession or receipt, the
21 ranges are much higher. Possession yields a range of
22 108 to 130 months. Receipt, 135 to 168 months.

23

1 Again, this is before acceptance, adjustment for
2 acceptance.

3 But these unwanted sentencing disparities
4 not only frustrate judges, they erode the public's
5 confidence in the fair administration of justice.
6 And in our view, a complete restructuring of the
7 child pornography guideline is needed, and I would
8 respectfully recommend that you consider starting by
9 separating out receipt and possession from
10 trafficking.

11 This was the original design of the child
12 pornography guidelines when possession was added, and
13 in my view it makes much more sense than the current
14 framework. Receipt is, by nature, more akin to
15 possession and in fact, as the Commission has
16 acknowledged, it is a logical predicate to
17 possession.

18 Possession and receipt could be separated
19 from the trafficking guideline, and a downward
20 departure could be applied, or adjustment could be
21 applied for possession cases in those small, very
22 small number of cases that include, I hate to use the
23

1 word "simple" for possession, but I think you know
2 what I mean, simple possession.

3 Separating receipt and possession from the
4 trafficking guideline would also permit the
5 Commission to construct a set of offense
6 characteristics that are more finely tuned to the
7 actual facts of receipt and possession cases that we
8 see as judges.

9 The specific offense characteristics in
10 Chapter Two are supposed to take into account the
11 different ways that a crime may be committed that
12 might not be distinguished in the statute, but that
13 should make an important difference in the terms of
14 the punishment that is imposed. They are intended to
15 identify real aggravating or mitigating factors.

16 There is a wide range of culpable conduct
17 in child pornography offenses, even among receipt and
18 possession offenders that should be incorporated into
19 the offense characteristics.

20 I have noted distinctions in my own
21 possession and receipt cases over the years. Some of
22 the things that I have noted that have stood out to

23

1 me include the following. I just made these notes.

2 This is not in my written testimony:

3 The lengths to which an offender has gone
4 to obtain material, such as using specific search
5 terms to pinpoint particularly graphic and violent
6 materials;

7 Using Internet message boards and chat
8 rooms;

9 Paying to obtain access to member-only
10 websites, or to join files, or networks, peer-sharing
11 networks through which material is shared or viewed;

12 Using various payment methods or layers of
13 transactions to make the purchase appear legitimate,
14 such as using a PayPal account;

15 Obtaining material from foreign countries
16 where production is more prevalent and less regulated
17 and beyond the reach of law enforcement in the United
18 States;

19 And then finally, using technology to
20 execute and conceal the offense, such as highly
21 technical or advanced computerized security measures,
22 or encrypting sites.

23

1 These types of conduct I think are more
2 reflective of possession and receipt offenses, and
3 thus they paint a more realistic picture of the
4 increasingly harmful conduct in those cases, as
5 opposed to the currently overly broad enhancements
6 that are much more relevant I think to production,
7 advertisement, and in many instances trafficking or
8 distribution.

9 Also, in separating out the possession and
10 receipt cases from trafficking, I would urge you to
11 promulgate base offense levels for these offense that
12 are independent of the mandatory minimum for receipt.
13 Tethering the base offense levels to the mandatory
14 minimum, especially for possession offenses to which
15 it doesn't apply, has I think contributed to this
16 problem of disproportionate ranges.

17 I would also urge the Commission to seek
18 repeal of the mandatory minimum sentence for receipt
19 offenders. Again, there does not appear to be any
20 meaningful distinction between receipt or possession,
21 yet the 60-month mandatory minimum applies to one and
22 not to the other.

23

1 To make matters worse, because of the
2 mandatory minimum we have widely disparate charging
3 practices for what in many cases is essentially the
4 same conduct.

5 Drug cases aren't treated like this. In
6 such cases, the user, although that individual is
7 still in the chain of culpability and responsible for
8 creating demand in the market, is not subject to a
9 mandatory minimum. Presumably because the user or
10 possessor of drugs does not reflect the typical
11 worst-case offender for whom the mandatory minimum
12 was designed.

13 Alternatively, if Congress is not amenable
14 to repealing the mandatory minimum sentence with
15 regard to receipt, then I would urge the Commission
16 to recommend repeal of the congressionally imposed
17 restrictions on departures and to recommend that
18 Congress provide a safety valve for receipt, at least
19 for receipt and possession offenders. Permitting
20 more guidelines-based departures I think will promote
21 uniformity by giving judges much-needed flexibility
22 in fashioning appropriate sentences.

23

1 Regarding the offender side of the
2 equation and the need to protect the public from
3 further crimes or future crimes of these offenders, I
4 would ask the Commission to consult the science,
5 which you are now doing.

6 This would be to determine, obviously,
7 whether there is a reliable measure of the risk of
8 dangerousness for child pornography offenders,
9 particularly those involved in the viewing of these
10 images. The issue of dangerousness and the judge's
11 need to protect the public, indeed protect our
12 children, of future crimes by sex offenders is what
13 keeps many us us judges awake at night, particularly
14 those of us who see a large number of these cases.

15 But we simply cannot lump everyone
16 together – and you have heard this today – but lump
17 everyone together and assume that everyone charged
18 with a sex offense poses the same level of risk, and
19 therefore must be taken out of society for lengthy
20 periods of time, or supervised for life.

21 Judges need reliable, evidence-based
22 factors to inform us of the risk posed by these

23

1 offenders, including the likelihood that they will
2 engage in a contact offense, and further study I
3 think on this is imperative.

4 In conclusion, the Criminal Law Committee
5 commends the Commission for the valuable role that
6 it's played in the evolution of the guidelines as a
7 whole.

8 We also again applaud the Commission for
9 considering now the particular problems that are
10 posed by this particular guideline. Although no one,
11 and certainly not me, is suggesting that these
12 defendants do not deserve to be punished, these
13 sentences must be proportionate to the sentences – to
14 the seriousness, excuse me, of the particular
15 offenses in the cases that are before us. And we
16 must also take into account the actual risk that is
17 posed by the particular defendant who stands before
18 us in the courtroom.

19 So I thank you very much for I guess
20 allowing me to go over, but listening to my comments
21 today.

22 CHAIR SARIS: You're welcome.

23

1 JUDGE RODGERS: Thank you.

2 CHAIR SARIS: Thank you, Judge Rodgers.

3 Ms. Hakes.

4 MS. HAKES: Thank you. I wanted to thank
5 the Commission for inviting me to come and speak here
6 on behalf Department of Justice on this critical
7 issue of the child pornography guidelines.

8 First I have to start off with an apology.
9 I know that you got our written statement late last
10 night, and I apologize for that. I hope that you
11 have had a chance to read it, and if you haven't that
12 you take the time to read it. I am not going to
13 rehash what's already in the testimony. I would like
14 to summarize it for you, especially in the interest
15 of time.

16 There have been a lot of questions today,
17 and I suspect there might be some questions still,
18 and I want to make sure I leave time for that.

19 I wanted to give you a little bit more
20 about where I'm coming from and my perspective as the
21 National Coordinator for Child Exploitation
22 Prevention and Interdiction.

23

1 I have been a prosecutor now for just
2 about 16 years. I started in 1996 as a state
3 prosecutor and specialized in crimes against
4 children. My first trial as a state prosecutor was
5 an aggravated child molestation case three weeks into
6 the DA's office in Georgia.

7 In 2002, I joined the U.S. Attorney's
8 Office and became a specialist in child exploitation
9 crimes, specifically those crimes facilitated by the
10 Internet, as we're here to talk about today,
11 typically.

12 When I came to the Deputy Attorney
13 General's Office on a detail from my U.S. Attorney's
14 Office in Atlanta in January of 2010, I was charged
15 with overseeing the Department of Justice's efforts
16 with respect to child exploitation. That is,
17 preventing, protecting, deterring, and interdicting
18 these offenses.

19 We also have recently formulated and are
20 in the process of implementing the first ever
21 national strategy for child exploitation prevention
22 and interdiction. The Attorney General announced the
23

1 strategy and launched it in August of 2010, and we
2 submitted it to Congress.

3 In that national strategy, the Department
4 for the first time ever compiled a lot of data,
5 information, and interviews with prosecutors,
6 investigators, and social scientists in what was for
7 us the first-ever threat assessment of the threat
8 that these kinds of crimes pose to the children of
9 our country.

10 It also contained inside the national
11 strategy a review of all of the efforts that are
12 currently ongoing inside the Department of Justice to
13 fight against these crimes.

14 And third, set out certain goals and
15 priorities for us to accomplish as a way forward.
16 Chiefly among them was enhanced collaboration and
17 cooperation among all of our partners, like the
18 National Center for Missing and Exploited Children,
19 the Internet Crimes Against Children Task Forces,
20 which we fund, the FBI, our global partners, all of
21 our nongovernmental partners like PROTECT and other
22 child advocacy organizations.

23

1 One of the things that was very
2 disturbing, as you've heard from some of the
3 witnesses today, in the threat assessment were
4 trends. And I wanted to talk for just a moment about
5 what I've seen as a prosecutor since 1996.

6 I don't quite have Steve DeBrotta's
7 experience – he indicated he was first experienced in
8 these crimes back in the early '90s; I come a little
9 bit later because I'm so much younger than Steve
10 DeBrotta is –

11 (Laughter.)

12 MS. HAKES: – don't tell him I said that.

13 But in 1996, my first contact was for
14 victims who had been offended against in contact
15 offenses. I didn't become aware really of the child
16 pornography or child sexual abuse images until I
17 joined the U.S. Attorney's Office.

18 And I used to say when I was an assistant
19 district attorney that the hardest thing I've ever
20 done as a professional was look into the eyes of a
21 child who had been sexually abused and try to fight
22 for justice for her or for him. I was wrong.

23

1 Because it is much, much harder, as Steve
2 DeBrotta indicated, it is much, much harder looking
3 into the eyes of the victims in these child
4 pornography cases, most of whom we'll never know,
5 most of whom we'll never identify, and most of whom
6 we'll never rescue.

7 One of the things that we keep in mind as
8 prosecutors and policymakers at the Department of
9 Justice are words from our victims. And one
10 particular victim made a huge impression on me in the
11 last few years. It is specifically why the
12 Department of Justice believes that these cases merit
13 serious sentences.

14 This victim when she was rescued by the
15 Postal Inspection Service, from years of very serious
16 abuse from an offender who was close to her, she told
17 the Postal Inspector in a letter to him: I knew that
18 you'd come. I was waiting for you. I know that you
19 saw my pictures, and I hoped that you saw in my
20 pictures that in my eyes, while I was doing these
21 horrible things, while these horrible things were
22 happening to me, my eyes were asking you to come and

23

1 rescue me. And I knew that you would come.

2 And that is what we face. We face
3 hundreds, thousands, hundreds of thousands, millions
4 of images of these sexual victimization of children,
5 and children whose eyes are begging us to come and
6 rescue them.

7 And so we always keep that in mind when we
8 formulate our policy, when we prosecute our cases,
9 when we make our decisions.

10 In the last ten years of working in the
11 U.S. Attorney's Office I, like Steve DeBrotta and as
12 Michelle Collins from NCMEC testified, have seen a
13 dramatic increase in the absolute horrific nature of
14 these images. Like Steve and Michelle, I too have
15 had to see images of infants and toddlers being
16 abused in the vilest ways that - well, I would say
17 "that you can imagine," but I'll be honest, you
18 can't.

19 It is absolutely beyond the imagination of
20 most of us what these children are experiencing. And
21 as Michelle and Steve indicated, infants and toddlers
22 are especially difficult to locate and rescue.

23

1 Because they are so young, it is so difficult for us
2 to find people who can recognize them.

3 So first of course primarily when crafting
4 appropriate sentences and when considering whether or
5 not the guidelines need to be amended, changed, or
6 reconsidered, or recalibrated as the Department
7 indicates in the statement that we submitted, we
8 think primarily first of the victims and the harm
9 that these crimes, including simple possession, cause
10 to victims.

11 You heard very eloquently from the last
12 panel of the harm that is caused to victims. One of
13 the things I think Judge Rodgers touched on a little
14 bit that I would like to re-emphasize is that
15 sentencing is about many things – as of course you
16 know. One thing it is about is punishment.
17 Traditional, good old-fashioned punishment for the
18 crime that's been committed.

19 There's been a lot of talk today, and it
20 has been fascinating, and I've worked frequently with
21 Dr. Seto, about risk. And Dr. Abel talked about
22 risk. And there's been a lot of talk about future
23

1 harm and risk to victims and the community,
2 dangerousness. I as a prosecutor have argued about
3 dangerousness many times, but I certainly would ask
4 the Commission to keep in mind, as I'm sure you will,
5 that punishment is also – sentencing is also about
6 punishment, and these crimes are very serious crimes
7 indeed.

8 The harm to the victims, as you have
9 heard, is really simply immeasurable. I have heard,
10 and I heard the question earlier about some people
11 have said that we ourselves, the Department of
12 Justice, or law enforcement generally, are actually
13 the ones kind of victimizing these children by
14 sending them constant notifications. I think
15 Michelle Collins said some get 10 or 12 a week: Hey,
16 you're a victim.

17 And so then I think some people think that
18 we're arguing you should be punished, and you should
19 give restitution, and these victims are being harmed,
20 but yet we're the ones telling them that they're
21 being harmed. But what other kind of crime is there
22 where we question the victim's right to be notified

23

1 that they've been victimize? What other kind of
2 crime would we hesitate to tell them that they have a
3 right to restitution for mental health services?
4 What other kind of crime would we not do everything
5 we can to find the victims so that we can rescue
6 them, so that they can get services, so that they can
7 be treated?

8 We know that offenders possessing these
9 images drive the market. And I know all of you have
10 heard this, but I want to give you a real-world
11 example.

12 In 2006 officials in Australia first
13 started seeing a series of images, and in deference
14 to the National Center I will not name the title of
15 the series, but began seeing a series of images of a
16 young girls who over a period of two years where they
17 hunted for her, she appeared to have progressed in
18 age from around age five to around age nine.

19 This became a global search for this child
20 because, as she got older, the images became ever
21 more horrific. Her abuser started taking video
22 images of her. There was sound. He was using
23

1 horrific techniques on the child in what can only be
2 described as incredibly painful sexual assaults.

3 Increasingly, he was using images of a
4 butcher knife placed against the child's genitals,
5 her throat, her eye, in a very threatening way. He
6 wore masks while he was abusing this child, to
7 protect his own identity.

8 In 2008, this offender, James Bartholomew
9 Huskey, was identified and located in the Northern
10 District of Georgia, where I prosecuted him.

11 When the defendant was interviewed, he was
12 asked when this child over whom he had complete
13 control was five, what prompted you to begin abusing
14 her? And his answer was that he was trading child
15 pornography before that, and he ran out of child
16 pornography to trade. And he could no longer receive
17 fresh images if he didn't have anything new to trade,
18 and he had complete access to this five-year-old girl
19 and so began four years of a nightmare for that child
20 who will for the rest of her life experience the
21 horror over and over again, and who is now one of the
22 most top-traded series in the world.

23

1 We also know from things like the Butner
2 Study, which there's been certain criticism of – I
3 will say that having worked closely with Dr. Michael
4 Bourke, who is one of the co-authors of the Butner
5 Study and is now the head of the BAU at the U.S.
6 Marshals Service, that there has –

7 CHAIR SARIS: "BAU" is?

8 MS. HAKES: I'm sorry, Behavioral Analysis
9 Unit, I apologize, Behavioral Analysis Unit at the
10 Marshals Service, that the Butner study used
11 polygraphs to verify both when an offender had not
12 disclosed conduct and when he had.

13 So there's been some allegation that
14 offenders had reasons to make up incidences of prior
15 sexual molestation of children, and I just wanted the
16 Commission to know that the authors of the study
17 indicated to me that they used polygraphs to verify
18 that information in addition to a lack of disclosure.

19 So I will conclude – I think I am over
20 time – but I will conclude with saying that the
21 Department in our testimony has indicated that we
22 believe that the guideline could and should be

23

1 recalibrated, and that there are some things that we
2 believe are factors for the Commission to consider
3 that I think have already been mentioned today.

4 First, a deeper look at the offender's
5 relevant conduct is obviously critical, and something
6 that is definitely impactful when it comes to the
7 sentencing court's full picture of the defendant's
8 conduct. So we think that looking at chats, and
9 e-mails, and conduct with groups, those things are
10 all incredibly relevant and should be examined by the
11 Commission.

12 I heard earlier today someone on one of
13 the panel's say that they did not think that
14 socialization – that is, a person's participation in
15 these kind of groups – was relevant to a sentencing
16 determination or a determination of whether or not
17 the person poses a future risk. And I would argue
18 that it is in fact fomenting and fostering the
19 environment as is exemplified in the Huskey case, of
20 the sexual abuse of children.

21 And lastly, I think – the Department thinks
22 that technology that is purposely defeating law

23

1 enforcement, encryption techniques – the judge
2 mentioned some of these – the Department believes that
3 these are also factors that the Commission should
4 consider in any recalibration of the guideline, as
5 well as, lastly, things like images involving infants
6 and toddlers, especially those that involve
7 bestiality.

8 There was a question earlier about whether
9 or not the images of infants and toddlers contain
10 those sort of full horrific panoply of kinds of
11 abuse, and Michelle Collins answered that. And I
12 will say that in my own experience, the images of the
13 infants and toddlers appear to me to be even more
14 violent than those of the older children.

15 And, you know, I'm certainly not a
16 psychologist or a psychiatrist, I have no background
17 in that whatsoever, I will say, though that it
18 appears to me that there is a really good reason for
19 that. That is, because these children simply are
20 defenseless. They cannot tell. They cannot cry out.
21 They cannot say, "No." They cannot resist or fight.
22 And so I think that is a great way for us to look at

23

1 another factor that is important for the
2 consideration of the Commission in recalibrating the
3 guidelines.

4 I am happy to take any questions after Ms.
5 von Dornum has an opportunity to speak to the
6 Commission. Thank you very much.

7 CHAIR SARIS: Thank you. Ms. von Dornum.

8 MS. von DORNUM: Thank you for inviting me
9 here. I am in the fortunate position of echoing much
10 of what Judge Rodgers has already said to you. The
11 defenders are not always in that position, but we're
12 certainly happy to be here today.

13 Really I wanted to start off by saying
14 that the news from New York on the ground is very
15 positive. You heard some of that from Dr. McCarthy,
16 but I think it is important to know that in New York
17 we have seen that child pornography offenders can be
18 managed safely in the community. Not only can they
19 be, they have been and they are being so.

20 I am talking about the mine run of
21 offenders, the offenders that Judge Rodgers was
22 talking about. I know obviously these hearings are

23

1 wideranging on a number of topics, but I know that a
2 core issue in front of you is what to do about the
3 majority of possession and receipt offenders, the
4 offenders for whom routinely variances and downward
5 departures are being granted, and the reason why the
6 Second Circuit, among many other circuits, have said
7 that this guideline is broken. It is those offenders
8 for whom this guideline as it is currently written is
9 not based on empirical data and who is not accurately
10 capturing those offenders who we see as the majority
11 of our cases and who are in fact the majority of
12 child pornography offenders being convicted in the
13 federal system.

14 For those offenders, it is clear from the
15 work of the Probation Office in the Eastern District
16 of New York – and I know you've seen the memorandum
17 submitted that's been referred to in the earlier
18 testimony as well – that those offenders can be
19 treated through this containment model, through a
20 specialized program in conjunction with treatment
21 providers like Dr. McCarthy who testified this
22 morning.

23

1 In the Eastern District of New York, they
2 have supervised in a period of 13 years – which gives
3 you a great deal of data – over 100 child pornography
4 offenders, not just possession and receipt, also
5 distribution offenders, and in that time they have
6 only seen one new contact offense in a 13-year
7 period. And that is not simply based on was there
8 only one person that was convicted of a new crime.
9 That's based on polygraph, location surveillance,
10 surveillance of their computers, very close
11 monitoring.

12 This is not simply a question of did only
13 one person get caught. They are really watching
14 these people and testing them, and only one person
15 out of all of them went on to commit a new contact
16 offense.

17 I think that is a significant marker for
18 the types of sentences that should be contemplated
19 for this majority population, especially given that
20 the experience in New York is borne out by the social
21 science research.

22 You heard it this morning from Dr. Seto

23

1 and of course you've seen it in many of the papers
2 that I know you've been reviewing closely in these
3 analyses, the recidivism rates for child pornography
4 offenders who are arrested and convicted and
5 sentenced and supervised, the recidivism rate is very
6 low.

7 They do not need long jail terms to be
8 rehabilitated, and they appear to do very well with
9 probationary terms and carefully tailored supervision
10 and treatment.

11 And I'm not talking here about Mr.
12 DeBrotta's worst-case scenarios. He is seeing what we
13 would consider certainly outliers. The nationwide
14 defender perspective shows that Indiana has a
15 different category of cases, and he certainly
16 described some horrific cases. Those are not the
17 cases for which I believe the Commission is seeing
18 this high variance rate.

19 It's the run-of-the-mill possession,
20 receipt, and the more passive distribution cases.
21 Based on our experience, as well as all the social
22 science data, we believe that the current guideline
23

1 has resulted in excessively severe sentences for
2 noncontact child pornography offenders largely, as
3 Judge Rodgers said, because of this failure to
4 distinguish among the different categories of
5 offenders and offenses so that everyone is lumped in
6 at the top. And the enhancements, as written, apply
7 to everybody and don't tell the Judiciary anything
8 about who is more dangerous.

9 I wanted to talk a little bit about our
10 experience of who the typical child porn
11 offender – the pornography offender is. It is a
12 different offender than what Mr. DeBrotta described.

13 The majority of our clients either access
14 child pornography out of curiosity or impulse without
15 a specific sexual interest in children – which is one
16 of the things that Dr. McCarthy described that she
17 sees treating people day in and day out, as well as
18 in her dissertation research. Or, they do access
19 child pornography to satisfy sexual fantasies but
20 they don't commit contact sex offenses.

21 We do not see a large number of child
22 pornography offenders who are involved for financial

23

1 gain, or who are using the Internet to facilitate
2 these contact sex offenses. And the data shows that
3 the typical offender who is a first-time offender
4 with no previous convictions, no arrests for child
5 sex offenses, and no prior contact with authorities
6 who are responsible for investigating child sexual
7 abuse, that they're not predators. They're not
8 making social contact basically with anyone, let
9 alone certainly with children.

10 These are offenders who have been shown to
11 be extremely susceptible to supervision and
12 treatment. And I wanted to talk about just one case
13 that I had a little over five years ago, and enough
14 time has now gone by that we could see whether this
15 person would recidivate.

16 Now about five years ago I represented
17 someone in the Southern District of New York before
18 Judge Denise Cote who was a first-time child
19 pornography offender. He was indicted initially on
20 two counts, one for possession and the other one for
21 distribution and receipt. And he had been sharing
22 child pornography images in online chat rooms,

23

1 something else we've talked about today.

2 So he initially faced the five-year
3 mandatory minimum sentence. And when I met him, I
4 quickly learned that he was a 44-year-old man who
5 suffered from severe long-term depression, which he
6 had suffered from since high school. He was a
7 college graduate who had worked steadily his entire
8 life. He worked in his college's athletic department
9 after he graduated doing statistics and publicity.

10 He – because he was a very insecure person,
11 and in particular insecure because he was not
12 athletic unlike the people he so looked up to, he
13 rarely dated anyone. He didn't have many friends.
14 He was lonely. He was isolated. So he went on the
15 Internet for companionship.

16 In sports chat groups he began chatting
17 with other men, talking first about sports and then
18 they began sending him adult pornography. That then
19 turned into him being sent images of adolescent
20 girls, and in time to prepubescent girls.

21 And he was so desperate to have friends
22 that this was his community, and these were the

23

1 people that he felt like would accept him. He
2 fantasized about being a teenage boy again, and being
3 a teenage boy in relation to these teenage images,
4 not dominating them but as though he could go back
5 and redo his high school dating life.

6 And his pornography collection was a whole
7 range of some adult women, some clothed women – and
8 this goes back to some of the questions raised
9 earlier about do we care what the rest of the
10 collection is. His showed that he had maybe half
11 that were adult women. Even some, as I say, clothed.
12 The other half was adolescent and then prepubescent
13 girls.

14 And as soon as the FBI tracked him through
15 this online chat room, they went to his apartment.
16 He immediately confessed, you know, to having been in
17 these chat rooms and having swapped images.

18 He voluntarily – there was no immediate
19 arrest; they were just there talking to him. He
20 stopped all involvement, not just with child
21 pornography but stopped going on the Internet. He
22 took medical leave from his job. He moved back in

23

1 with his parents, and he was truly shocked by this
2 sort of shame and realization of how this had sort of
3 unfolded step by step from being in a ESPN chat room
4 to talking to the FBI about having prepubescent
5 girls. And horrified that he'd gone down that road
6 through his loneliness.

7 He underwent a psychosexual evaluation
8 that showed only a moderate sexual interest in
9 adolescent girls, which the evaluator thought was
10 normal, and no interest at all in prepubescent girls
11 despite his possession of these images. And he'd
12 never had any contact with a child sexually.

13 And his initial guidelines' calculation
14 put him at 97 to 121 months with a mandatory minimum
15 of five years. So, you know, he was facing that
16 mandatory minimum plus eight to ten years for having
17 started to look at these pictures through this sports
18 community, someone who would never have touched a
19 teenage girl, certainly not a young girl.

20 So we negotiated with the government, and
21 they investigated him further, had the FBI
22 investigate him further, and they agreed that he

23

1 posed absolutely no risk to children, despite having,
2 you know, engaged in this conduct.

3 So they agreed to drop the mandatory
4 minimum count despite the fact it applied, and I know
5 this is a lot of what you've seen in your coding
6 project and your research is this sort of informal
7 end-run around the mandatory minimum and around the
8 guidelines. And they offered a plea agreement to
9 possession alone, with a stipulated range of 46 to 57
10 months, half of what had been originally called for.

11 When we got to sentencing, Judge Cote – who
12 if you know her, you will know she is not at all a
13 soft touch; she's a former prosecutor herself and
14 takes these cases extremely seriously – she took into
15 consideration all of these mitigating factors about
16 how he got involved, what kind of person he was, the
17 steps he'd taken, how well he'd done on supervision,
18 as well as the seriousness of the offense, and she
19 gave him a term of five years of probation with no jail
20 time at all. So that he could be under the court's
21 supervision for a lengthy period but could be
22 incarcerated if he had any further involvement, if

23

1 there was recidivism. That was hanging over him.

2 He, because he lived in the Eastern
3 District, although he'd been prosecuted in the
4 Southern District, he was supervised by the office
5 whose report you've seen that was so successful, and
6 he hasn't had a single violation. He's concluded his
7 probation. Not a single problem. Not even a failure
8 to report. Nothing.

9 And if you think about it, if he had been
10 placed in federal prison for five years, or for ten
11 years, then his community would have become contact
12 sex offenders. He would have been completely
13 isolated from his family. He would have had no hope
14 probably of getting employed once he got out. And
15 his depression likely would have turned him into a
16 far more dangerous person than he was to start with.
17 Because, as you know, in the Bureau of Prisons, child
18 pornography offenders and contact offenders are not
19 separated.

20 There is very limited treatment, and the
21 treatment there is is everyone lumped together, the
22 child rapists in with the child pornography
23

1 possessors. And it just shows you that the guideline
2 as written does not capture these people who are the
3 majority of the offenders, and that the Judiciary and
4 the Department of Justice are being forced to come up
5 with these creative solutions.

6 We have put forth in our written
7 testimony – and I'm already out of time – but we've put
8 forth –

9 CHAIR SARIS: That's okay.

10 MS. von DORNUM: I'm sorry.

11 CHAIR SARIS: Go for it.

12 (Laughter.)

13 MS. von DORNUM: We've put in our written
14 testimony the problems that we see concretely with
15 the guideline as written. I'll just be very brief on
16 this because I know you have it there. The base
17 offense levels start out too high, as Judge Rodgers
18 said, for receipt and possession.

19 We also think a distinction needs to be
20 made, or at least be possible of being made under the
21 guideline between the passive distribution, the file
22 sharing, versus an active dissemination of images.

23

1 The enhancements as written, many of them
2 are from an era either before computers or are ones
3 that just bear no correlation to actual
4 dangerousness. And I understand the Department of
5 Justice's position is that if you have a lot of
6 images it makes you more dangerous, and that has a
7 superficial appeal, it sounds worse to have a lot of
8 images, but if you picture a single file sharing
9 where suddenly you have 10,000 images, you have no
10 idea what's in there, there's not any proven
11 correlation between number of images and
12 dangerousness. So I think that to be seriously
13 questioned, and certainly the video aspect.

14 And the nature of image enhancements, as
15 we've said in the regional hearings as well, are very
16 problematic because they impose this strict liability
17 framework where there doesn't even have to be a
18 showing that the person knew he had sadistic or
19 masochistic image, or an image of a child under 12.

20 And we think that has to be modified so
21 that it cannot be applied unless someone actually
22 accesses the image and knew he had it, and even

23

1 better whether they sought it out, which would seem
2 to be a greater indicator of dangerousness than
3 simply receiving it.

4 And I would just add that we do think
5 there are ways that actually more dangerous offenders
6 could be identified. Certainly people who view live
7 webcam images of sex abuse, people who order custom-
8 made pornography from producers, people who are
9 involved in this for financial reasons, a person who
10 first introduces an image to a wider market – and this
11 is a lot of what Ms. Hakes and Mr. DeBrotta were
12 talking about. These are the people who are really
13 having a direct impact on the victims.

14 And it's not that possession of child
15 pornography is not harmful, but it is the people who
16 are introducing new images and creating those images
17 who are really directly impacting those victims.

18 So we would ask the Commission to
19 seriously consider setting base offense levels for
20 this mine-run population at a level that permits
21 probation and closely tailoring the aggravators, the
22 specific offense enhancements, to conduct and role,
23

1 as opposed to the sort of forensic analysis of what's
2 on the computer, because the forensics don't answer
3 the dangerousness question; they just answer the
4 question of what kind of software did you have? Or
5 did you have a file-sharing program? And it doesn't
6 take us far enough, and it is not calibrated enough.

7 So thank you again for allowing me to
8 testify, and I'm certainly happy to answer any
9 questions.

10 CHAIR SARIS: Thank you. Commissioner
11 Friedrich.

12 COMMISSIONER FRIEDRICH: Judge Rodgers and
13 Ms. von Dornum, both of you touched in your written
14 testimony – not as much in your oral testimony here
15 today – on this pattern of activity involving the
16 sexual abuse or exploitation of a minor provision
17 that's currently in 2G2.2. And both of you – I think
18 Judge Rodgers, you've said historically the Criminal
19 Law Committee has opposed that being in the guideline
20 as opposed to Chapter Four.

21 So my first question is: What do both of
22 you mean by that? Do you mean we shouldn't

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1 consider – that that should not be a factor in the
2 sentencing decision, except if there's a prior
3 conviction? Is that the point you're making?
4 Because Chapter Four, you know, we do talk about
5 convictions as opposed to –

6 JUDGE RODGERS: Right. No, that's not my
7 position, that it should not be considered. I think
8 something can be constructed for Chapter Four. That is
9 the section of the guidelines that deals with the
10 offender. And this offense adjustment that's in
11 Chapter Two that deals with the pattern, to me that's
12 an offender-based factor to consider. It doesn't
13 make the offense more serious, in my view; it makes
14 the offender more serious, as we've heard from a lot
15 of the researchers and clinicians here today – but not
16 limited to prior convictions.

17 COMMISSIONER FRIEDRICH: So you agree with
18 the testimony of the experts that that does make an
19 offender who is appearing before you appear more
20 dangerous, and that they may be more likely to
21 reoffend in the future?

22 JUDGE RODGERS: Let me stress, obviously I

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1 am not a clinician, but that is definitely something
2 that I would want to know as part of any sentencing.
3 And I can't imagine that I wouldn't factor it in in
4 some way in a sentence.

5 I would prefer to have it evaluated in
6 Chapter Four, because to me that just structurally makes
7 more sense. You know, if I wasn't looking at the
8 guidelines and I was just looking at 3553, I would
9 factor it in under the offense and – excuse me,
10 history and characteristics of the offender. I would
11 not look at it as an offense characteristic because I
12 just don't see it as aggravating the specific
13 offense.

14 COMMISSIONER FRIEDRICH: But you do see it
15 as an aggravating factor whether it means the
16 defendant, him or herself, is more dangerous in the
17 future, or is simply more culpable with respect to
18 the instant offense?

19 JUDGE RODGERS: I don't think it makes
20 them more culpable, because I think it makes them
21 arguably more dangerous and more likely –

22 COMMISSIONER FRIEDRICH: But you don't

23

1 think that a defendant who has done it before, and
2 there's reliable evidence that the defendant has done
3 it before, regardless of whether there's a
4 conviction, you don't think that defendant should be
5 sentenced more severely simply because this is a
6 second or third or fourth time?

7 JUDGE RODGERS: I do, under Chapter Four.
8 I do.

9 COMMISSIONER FRIEDRICH: But not - that
10 doesn't make them more culpable in your mind, just
11 more dangerous?

12 JUDGE RODGERS: It doesn't make the - to
13 me, culpability looks at whether the offense is more
14 serious based on that conduct that that individual
15 engaged in. And so I just - you know, really, it's
16 just a structural inconsistency in my mind. You
17 don't treat other offenses this way in the guidelines
18 with the exception of the immigration 2L1.1 and 1.2.
19 And actually I've had this argument presented to me
20 on a number of occasions in the courtroom by defense
21 attorneys in those types of cases with the 16-level
22 enhancement for prior aggravated felonies.

23

1 In any event, I made I think the position
2 clear in my written testimony, and it makes more
3 sense to me as a judge to find that factor weighted
4 in Chapter Four. It could be an enhancement.

5 COMMISSIONER FRIEDRICH: An enhancement in
6 Chapter Four?

7 JUDGE RODGERS: Yes. You have enhancement
8 now in Chapter Four with career offenders. And it may
9 fall under, you know, a serious violent felony. But,
10 you know, those are going to be convictions.

11 I think that you could construct something
12 in Chapter Four to address this. It doesn't necessarily
13 have to be criminal convictions. Chapter Four addresses
14 recidivism, likelihood of recidivism, and need to
15 protect the public.

16 COMMISSIONER FRIEDRICH: Also advocated as
17 an alternative a safety valve provision with respect
18 to these sex offenses.

19 JUDGE RODGERS: Correct.

20 COMMISSIONER FRIEDRICH: Would that be a
21 favor? You know, the pattern, the prior activity of
22 a defendant's sexual abuse activity? Would that be

23

1 something in your view that should preclude a
2 defendant from getting safety valve relief like it
3 does in the drug context?

4 JUDGE RODGERS: Sitting here today, I
5 would say - I don't want to be held to this in the
6 future in a specific case - but theoretically, yes, it
7 would be a part of the - it would be an excluding
8 factor.

9 CHAIR SARIS: Did you have -

10 MS. von DORNUM: Sure. Certainly as to
11 convictions, which seem to be the greatest predictor
12 of recidivism in this area, we believe those should
13 be counted certainly as part of Chapter Four.

14 As you know, the defenders have long
15 objected to this broad use of relevant conduct, which
16 is sort of what this falls under, this idea of an
17 allegation having been made in the past and now it
18 can be counted against the offender. So it would
19 have to be done I think extremely carefully.

20 COMMISSIONER FRIEDRICH: Well obviously
21 there has to be sufficient reliability and
22 substantiation for a judge to even consider it, but

23

1 I'm saying assuming there's a preponderance of the
2 evidence the defendant has done this before on two
3 occasions. Is that not something, in your view, that
4 you think justifies a higher sentence, either because
5 that defendant is potentially more dangerous in the
6 future, or is more culpable in committing the instant
7 offense?

8 MS. von DORNUM: I certainly think that a
9 judge could take that into consideration under 3553.
10 I think we would be very concerned about the exact
11 wording in the same way that this language that's in
12 the current guideline, the pattern of activity sweeps
13 so broadly that it includes, you know, statutory acts
14 with a high schooler or a college student, that sort
15 of thing.

16 So we would be concerned, as we are with
17 other parts of the guidelines, about the use of
18 acquitted conduct, about the use of unsubstantiated
19 allegations. That's not to say, I certainly believe
20 that a judge could consider reliable substantiated
21 allegations as part of 3553.

22 We would have to see a specific proposal

23

1 as to language in Chapter Four, but certainly I agree
2 with Judge Rodgers that's something that a judge
3 could consider if it had sufficient indicia of
4 reliability.

5 CHAIR SARIS: Commissioner Jackson.

6 VICE CHAIR JACKSON: Yes. I just wanted
7 to ask Ms. von Dornum about the study that you talked
8 about at the beginning of your testimony with respect
9 to recidivism, and the fact that there was only one
10 new contact offense.

11 From what I understood from previous
12 testimony, the child pornography offense is itself a
13 serious crime. So even if the person doesn't go on
14 to become a contact offender, to what extent does
15 your study show recidivism with respect to child
16 pornography which revictimizes the person who is
17 depicted in the pictures and drives the market with
18 respect to that offense?

19 Do you understand what -

20 MS. von DORNUM: I do understand what
21 you're saying. And certainly both offenses are
22 serious. I know that a large part of what we're

23

1 talking about today is do people who look at images
2 go on to touch?

3 And that's not that child pornography
4 itself is not an offense, but I know part of what
5 underlies what we're all talking about is does
6 looking lead to touching, because that's why I was
7 focused on that. But certainly the Eastern District
8 also tracked were there new child pornography
9 offenses. And I hope you have the study, but if not
10 I'm happy to submit it to you.

11 In that study there was only the one
12 contact offense, and there were I believe - let me
13 just check the number - I believe there were two
14 people who reoffended as to possessing child
15 pornography. No one who reoffended as to
16 distribution or production, anything like that, but
17 there were two people who were found with child
18 pornography on their computers out of the hundred.

19 VICE CHAIRMAN CARR: Ms. Hakes, you're as
20 familiar as anyone in this room with the criticism of
21 this guideline and its uneven application, and you
22 have spoken eloquently and I would say accurately

23

1 about how horrible the victimization is to the
2 children that are involved in these things and the
3 need for punishment for people who traffick, receive,
4 and possess these things.

5 As I look at your written materials, the
6 Department does a good job of identifying some things
7 that are aggravating factors that are not currently
8 addressed in the guideline. But I want to ask you
9 this, because it's something I can't tell from your
10 presentation.

11 For the first-time offender who is a mere
12 possessor or receiver, if you will, who gets the
13 computer enhancement, the horrible nature of the
14 images enhancement, the number of images, but we're
15 left to complete speculation as to whether this
16 particular defendant has or would touch a child.

17 Are the current guidelines too harsh in
18 the run-of-the-mill case for that individual?

19 MS. HAKES: The Department is not prepared
20 today to say whether or not we think any particular
21 guideline or in any particular case the guidelines
22 are too harsh.

23

1 What I will say about the current
2 guideline with respect to punishment like you've just
3 described, where a first-time possessor but he checks
4 all the boxes for the enhancements for number of
5 images, severity, et cetera, but no prior criminal
6 history or maybe even no pattern of conduct, no
7 allegation of any other kind of conduct that we have
8 or know about, your question focuses on whether or
9 not it's too harsh in the sense that we don't know
10 whether or not he's such a high risk to reoffend. By
11 implication, and by some of the testimony today, he
12 could at a low risk to reoffend. And certainly there
13 would be people who would claim he was at a low risk
14 to reoffend.

15 And I respect the question, and I respect
16 the thrust of it, but I would ask you just to focus
17 on the underlying guideline that at this moment, one
18 of the reasons for the enhancement for number of
19 images is because – you know, I think sometimes it's
20 just really easy to forget. Number of images? We
21 throw it around. We talk about "images."

22 Well we're talking about numbers of
23

1 victims.

2 VICE CHAIRMAN CARR: Absolutely. And I'm
3 not discounting that for a moment. And of course the
4 risk to reoffend is also something that can be taken
5 care of to some extent by supervision, you know,
6 things that happen once you're out of prison.

7 But what Judge Rodgers refers to is, you
8 know, the extraordinary number of downward departures
9 and variances I think for the circumstances that I
10 describe where, who is anywhere near the bottom of
11 the prescribed range of sentences here?

12 MS. HAKES: Well, so one of the things
13 that we talk about in our written testimony is I
14 think some of the questioning by Judge Rodgers, and
15 many other judges, some of the questioning of whether
16 or not that particular sentence, say 108 months for
17 the kind of person that you've described – and I'm not
18 making a judgment today, nor does the Department have
19 a position on whether or not that, in and of itself,
20 is appropriate.

21 What we're saying is that the guidelines
22 are taking into account certain factors. But what

23

1 we've brought up in our testimony is that what you
2 don't know is very important. And we believe that
3 what you don't know about what other kind of things
4 that offender is doing online, how he received the
5 images, is there a certain focus on kind of images
6 inside the collection, all the other things that we
7 argue in our written testimony that would help you
8 understand the offender better, not just the fact
9 that he has 750 images and the fact that he has used
10 a computer, and the fact that he has children under
11 12, and the fact that he has S&M. No, no, but other
12 things that enable you to understand the full
13 character of the offense I think is what has caused
14 many judges to believe that the guidelines are out of
15 balance and that the penalties such as you've
16 described are too harsh.

17 These cases – you know, one of the things
18 we don't see questioned a lot are the money amounts
19 that we talk about in fraud cases, which are
20 driven – the penalties are driven by money and by
21 number of victims.

22 Well here we are driving a guideline for
23

1 very similar things: number of victims, and
2 character. And so we don't really question whether
3 or not what's his name from New York whose name I
4 can't now remember -

5 CHAIR SARIS: Madoff.

6 MS. HAKES: Madoff, thank you. Sorry, I'm
7 from Atlanta. We're so far from New York we forget.
8 Whether or not Madoff merited that ungodly sentence,
9 and practically no one argued against that - I'm sure
10 his attorneys did - but practically no one argued
11 against that because the number of victims was vast,
12 and the amount of money, and the damage in the
13 financial system was enormous.

14 Well the same analogy really applies in
15 these cases. And while we do believe that there are
16 things for the Commission to consider to recalibrate
17 the guideline to better inform sentencing courts and
18 prosecutors and the public of the nature of these
19 offenses and the offender, we also believe that
20 number of victims and character of images is a
21 critical factor because of the harm that it causes,
22 because of the market that it drives.

23

1 I mean, I don't use the example of James
2 Bartholomew Huskey just to throw out a producer at
3 you. I understand we're not here to talk about those
4 who produce, but those who collect. My point is that
5 Mr. Huskey produced so that he could collect. The
6 guy who told him he needed new images caused Huskey
7 in a sense to produce. And so therefore these crimes
8 of possession, while 108 months sounds high, you are
9 talking about a massive impact on the lives of every
10 child depicted in those images whether we know who
11 they are or not.

12 VICE CHAIRMAN CARR: And I started by
13 saying that I recognized that.

14 MS. HAKES: Yes, sir.

15 VICE CHAIRMAN CARR: But I think one of
16 the problems the judges seem to have is that the way
17 the guideline is structured is that the unknowns
18 about the defendant and his proclivities are resolved
19 against him in the way that the guidelines are
20 currently written. And as you said, you can't come
21 before us and say that the Department thinks 108
22 months is too harsh for that person as to whom it's a

23

1 first-time person who's a mere possessor that gets
2 all the boxes checked, but I think maybe we ought to
3 be able to expect the Department to take a position
4 on something like that.

5 I don't mean you, today.

6 MS. HAKES: Thank you.

7 VICE CHAIR JACKSON: And the further
8 problem -

9 MS. HAKES: Because I take the position
10 that, you know, I'm cleared to take, just so you
11 know.

12 VICE CHAIR JACKSON: And I think the
13 additional problem is the resource allocation problem
14 that we heard from previous panels; that some of the
15 unknowns that would permit judges to have a fuller
16 picture of the defendant and either ratchet down or
17 up based on that information are things that can't
18 collected in an efficient manner. Or that, you know,
19 we would rather spend the resources actually helping
20 these child victims rather than, you know, running
21 these elaborate forensic investigations.

22 So I think that's a further complication

23

1 to this notion of we need more information.

2 MS. HAKES: Well certainly there is a
3 balancing act. And I will say that we have indicated
4 that we do think a recalibration should be considered
5 by the Commission, and we have indicated the factors
6 that we think might be helpful to you.

7 While that's not taking a position on
8 whether 108 months is too harsh, I do think that goes
9 a long way toward indicating to you that we believe
10 there are things that can be done to improve the
11 guideline.

12 With that being said, Steve DeBrotta is
13 much smarter than I am when it comes to forensics.
14 He's a real whiz about it and leads the nation in a
15 lot of respects when it comes to new technologies and
16 how to use it to better capture the best kind of
17 cases that show us the most serious offender that we
18 should be focused on.

19 However, as we've said in our written
20 testimony, we do believe there are factors that would
21 give you a better understanding of an offender or the
22 offense conduct, and possibly even dangerousness in
23

1 the future and risk to society, and it would take
2 forensic resources.

3 Now I will be the first to admit that we
4 are stretched beyond all limits with respect to
5 forensic resources. NCMEC gets 20,000 cyber tips a
6 month from Internet service providers and the
7 public – 20,000. That might just be Internet service
8 providers. Twenty thousand a month from Internet
9 service providers.

10 We don't have enough agents, cops, and
11 prosecutors to handle that. It's impossible. So
12 while I acknowledge requesting further information on
13 the forensic front, and I certainly agree with Steve
14 DeBrotta that if more answers are going to require
15 more resources than those questions that require
16 those answers should be pretty important questions.
17 We acknowledge that those are questions that should
18 be answered – you should have answers to. And while
19 that might cause difficulty, and resources are
20 stretched, let's face it, there's nothing more
21 important.

22 The Attorney General has labeled this as
23

1 one of his top priorities. Therefore, we will get it
2 done. If you need it, we will get it done.

3 CHAIR SARIS: Judge Rodgers, and then
4 Judge Hinojosa -

5 JUDGE RODGERS: Oh, go ahead.

6 CHAIR SARIS: No, you go.

7 COMMISSIONER HINOJOSA: Go ahead.

8 CHAIR SARIS: Go ahead.

9 JUDGE RODGERS: Just to respond or speak
10 to that, judges - we make decisions based on facts. I
11 mean, not on unknowns. And this is what we face in
12 the courtroom, at least in my experience, is an
13 assistant U.S. attorney in the courtroom presenting
14 argument along the lines of Ms. Hakes, which you've
15 presented here.

16 It's appealing. And, and no one wants to
17 ignore that. Again, no judge wants the horrific
18 tragedy to occur on his or her watch. And so we
19 listen to those arguments.

20 Then we're presented on the defense side
21 of the courtroom with testimony, in many cases, from
22 psychologists, witnesses. That's the evidence in the

23

1 case before us, and that's what we have to base our
2 decisions on.

3 So, you know, I understand budgetary
4 concerns and stretched resources, but that's the kind
5 of information, reliable information, that judges
6 need in the courtroom.

7 And with all due respect, if I could
8 respond, Commissioner Hinojosa, very quickly to
9 something – clarify something that Commissioner
10 Friedrich asked me a moment ago about that four-level
11 pattern offense characteristic enhancement:

12 That would apply – I feel like I need to
13 clarify that – that would apply in a case of relevant
14 conduct because it would make that offense more
15 serious. And I've had that situation in my own
16 cases, one in particular that I'm thinking of as I
17 was sitting here going over in my head my response to
18 you just a moment ago, was an offender father who – he
19 was a father. He was charged with receipt and
20 distribution, I'm almost positive, but definitively
21 receipt. He was not charged with production.

22 He had thousands of images. Well, I don't

23

1 know much about the investigation, obviously, but
2 those images contained – the photos contained images
3 of him with his daughter, abusing his daughter.

4 Obviously, in that situation the receipt
5 offense was made more serious by virtue of that
6 conduct. And I didn't hesitate to apply the four
7 levels in that instance. And I don't know why he
8 wasn't charged with production, but he wasn't. That
9 was the case that was before me, the charge that was
10 before me. Maybe they didn't identify the female as
11 his daughter until late in the game, I don't know,
12 but I didn't hesitate to apply it in that case
13 because it was clearly relevant conduct.

14 CHAIR SARIS: Judge Hinojosa.

15 COMMISSIONER HINOJOSA: I was going to
16 touch on that also as a comment with regards to Judge
17 Rodgers' response, and especially when she mentioned
18 2L1.2, the illegal entry, which the reason it's in
19 there I think is because of the fact that the statute
20 itself goes from two years, to ten years, to 20 years,
21 depending on whether you had committed a felony or an
22 aggravated felony.

23

1 On 2L1.1, on the other hand, it is more
2 analogous to what you have just mentioned because it
3 is a specific offense characteristic of that
4 particular offense, the smuggling and transportation
5 or harboring, that that makes that defendant more
6 culpable than somebody who doesn't have these prior
7 convictions.

8 But a lot has been – obviously, a lot of
9 our discussions about sentencing involves Title 18,
10 section 3553, and that has been mentioned today, in
11 relationship to child pornography for example.

12 I know there are certain parts of, for
13 example, 3553(a) that defense attorneys like to
14 emphasize more than others, and prosecutors more than
15 others, and judges sometimes rely on portions of it
16 rather than the whole thing of the 3553(a), as well
17 as 3553 in general.

18 And comments have been made about
19 directives to the Commission by Congress. I think we
20 all can agree that Congress can set mandatory
21 minimums as well as maximums. They wrote 3553. They
22 send directives to the Commission with regards to how
23

1 the Commission should read 3553. And so the question
2 then becomes: Can we as judges really say, well,
3 that's just for the Commission and not for us?
4 Especially in light of the fact that 3553 has a whole
5 section on child crimes and sexual offenses.

6 And so can we as judges just say: Well,
7 that makes these guidelines less, and these are
8 directives to the Commission, and Congress, yes, they
9 did it, yes they wrote 3553, but it doesn't mean
10 anything to me as a sentencing judge when I'm trying
11 to determine what the 3553(a) factors mean because it
12 wasn't meant for me?

13 Can we honestly say that?

14 And the next question is: you also ask
15 the Commission to urge that Congress do away with the
16 receipt mandatory minimum. And the question is: Has
17 the Judicial Conference taken a stand? And have they
18 urged Congress to do away with that mandatory
19 minimum?

20 JUDGE RODGERS: Not specifically, but I
21 think you will hear perhaps tomorrow comments from
22 judges about, perhaps about mandatory minimums. But

23

1 I think the Conference has made its position clear on
2 mandatory minimums in general. So I'm assuming, but
3 I don't speak for them in that regard. I'm just
4 assuming that it would be no different with regard to
5 the specific mandatory minimum.

6 And I don't -- you know, I'm not -- I mean, I
7 hope it was clear that even possession and receipt
8 cases are deserving of punishment. I mean, if you
9 have all, I'm sure, done your homework, you know what
10 my sentences look like. And I think I varied in two
11 cases in the dozens of child pornography cases that
12 I've had. And I haven't imposed a sentence below 60
13 months in any case. And I have sentences where I've
14 departed upward ten times and imposed life sentences
15 in abuse cases, not possession or receipt.

16 So I don't want you to be left with the
17 impression that I'm here advocating probation. I
18 just -- I'm advocating a guideline that makes more
19 sense within the framework that we've been given by
20 Congress. And I just don't believe, we don't see it
21 in any other -- in any of the other cases, any of the
22 other offenses, excuse me, this kind of ratcheting

23

1 up. And I think part of this, and I may have alluded
2 to this, I believe I did, in my written testimony,
3 that reading between the lines, and I may not be
4 correct, that the Commission might not have
5 contemplated when that guideline – the base offense
6 level, moving off of the mandatory minimum, but the
7 base offense level was set, that perhaps it wasn't
8 contemplated how often and with what frequency that
9 nine levels was going to apply for the sadistic,
10 masochistic, and violent conduct, and then the five
11 levels for the images.

12 You knew how often the two levels for
13 computer and the two levels for prepubescent minor
14 depicted in the images, you knew how often that
15 applied, but I don't know that you realized – perhaps
16 you did – but that that would make sense to me if that
17 wasn't contemplated.

18 COMMISSIONER HINOJOSA: What about the
19 directives to the Commission in how we as sentencing
20 judges should look at those in trying to determine
21 how to read 3553?

22 JUDGE RODGERS: Well, Commissioner

23

1 Hinojosa, I have said in the courtroom on a number of
2 occasions that I have a great deal of respect for
3 Congress's authority to set sentencing policy. And
4 I've said that in these types of cases. And I still
5 do.

6 But we as judges, we have to work within
7 that framework of 3553(a), and I just don't see that
8 it's workable with this specific guideline. Again,
9 we haven't seen this in any other category of
10 offenses. I don't go into the courtroom frustrated
11 in other cases as I do in these cases, and I don't
12 think I'm - I think I'm fairly reflective of other
13 judges. You look like you -

14 COMMISSIONER WROBLEWSKI: Yes, I do. I
15 think one of the reasons that you're frustrated, at
16 least one of the things that we've heard over and
17 over during the day, is that in these kinds of
18 offenses there is oftentimes a lack of information,
19 which is what you're looking for.

20 JUDGE RODGERS: Yes.

21 COMMISSIONER WROBLEWSKI: The information
22 that we have, that the government has, that's

23

1 presented to you is limited. It's not complete.

2 It's not a complete set of information about this
3 person's background.

4 So we look to the science. And the
5 scientists who have testified here today have said,
6 quite differently than what Ms. von Dornum suggested,
7 that the majority of those who were looking at these
8 images are in fact pedophiles; that the majority of
9 those, Dr. Seto's testimony was that 55 percent under
10 self-report have in fact had contact offenses.

11 Now that information is not typically in
12 front of the judge. What's in front of the judge?
13 There's no victim in front of the judge. In fact,
14 many judges won't even look at the pictures. There's
15 no live victim in front of the judge.

16 And so this is a different kind – and I
17 understand why it's difficult for a judge when you're
18 presented with a forensic analysis that says in sort
19 of a very cold way there's X number of images, the
20 images came from a peer-to-peer network, the forensic
21 analysis is somewhat limited, and that's all you
22 know.

23

1 JUDGE RODGERS: We don't even have that.
2 Excuse me. We don't even have that from a witness.
3 We might have an argument, but we don't have it
4 tying – we don't have anyone tying that to the
5 specific facts in a case.

6 COMMISSIONER WROBLEWSKI: Right. And so I
7 think what the Commission is going to – is struggling
8 with and is going to be struggling with is how, given
9 the limited forensic resources that are out there,
10 given the explosion of this kind of crime and the
11 number of perpetrators out there and the number of
12 arrests that are now occurring, how do we get the
13 information?

14 And I think what the Department's point of
15 view is, the guideline needs to be recalibrated. How
16 do we recalibrate it so that all the information that
17 needs to be in front of the court is in fact in front
18 of the court so that appropriate decisions can be
19 made?

20 And I think that is the struggle that we
21 have in front of us as we close today and sort of
22 move on to the next –

23

1 MS. von DORNUM: Excuse me, may I just
2 respond briefly?

3 CHAIR SARIS: Yes.

4 MS. von DORNUM: Just so the record is
5 clear, I certainly did not say that anyone had
6 testified that a large proportion of child
7 pornography offenders were not pedophiles. What I
8 said is that the testimony was certainly from
9 Dr. Seto that there's a very low rate of recidivism.
10 And that's exactly what he testified to this morning.
11 Not that they're not pedophiles, but that they don't
12 recidivate.

13 He also testified that there is varying
14 studies about prior contact offenses. But what we're
15 talking about is future recidivism. Will they
16 reoffend? Will they have contact offenses, or child
17 pornography offenses? Not are they pedophiles. We
18 do not sentence people on their thoughts; otherwise,
19 every fraudster would be sentenced like Bernie
20 Madoff, right? Everyone wants to go big. You can't
21 sentence every fraudster like that, and you can't
22 sentence every child pornographer like that. You

23

1 have to look at the risk of recidivism.

2 The studies show that there's a very low
3 rate here, and a very high rate of success on
4 supervision, and that's exactly what our testimony
5 is, consistent with Dr. Seto.

6 CHAIR SARIS: Are we done? A long, but
7 fabulous day. You ended in a perfect way, but let me
8 just say this.

9 We couldn't have done this without all of
10 you coming. No one felt sleepy, because this was so
11 dynamic and I want to thank you for coming, everybody
12 here. Many of you stayed here the entire day, and I
13 just have to particularly thank the staff here who
14 put together such an amazing day for us, Ken Cohen.
15 So thank you – and who else is here? Kira. Kira,
16 there you are. Okay, thank you very much. It was
17 very educational. Thank you.

18 (Whereupon, at 5:35 p.m., Wednesday,
19 February 15, 2012, the Commission meeting was
20 recessed, to reconvene at 8:30 a.m., Thursday,
21 February 16, 2012.)