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A Partial Fix of a Broken Guideline: A Proposed Amendment to Section 2G2.2 of the United States Sentencing Guidelines

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A PARTIAL FIX OF A
BROKEN GUIDELINE: A PROPOSED
AMENDMENT TO SECTION 2G2.2 OF
THE UNITED STATES SENTENCING
GUIDELINES

By Brent E. Newton[†]

ABSTRACT

The current sentencing guideline for non-production child-pornography offenses is fundamentally broken, as evidenced by the fact that only 28.4% of defendants sentenced under U.S. Sentencing Guidelines section 2G2.2 receive within-range sentences and 69.1% of defendants receive downward variances or departures (unrelated to their substantial assistance or participation in a fast-track program). The vast majority of child-pornography defendants receive downward variances from their guideline ranges based on sentencing judges' subjective senses of what appropriate sentences should be. Because judges have no meaningful national benchmark from which to render sentencing decisions, widespread sentencing disparities exist – in conflict with the central purpose of the Sentencing Reform Act of 1984. In addition, because the current guideline fails to offer any meaningful benchmark, federal prosecutors around the country engage in a wide variety of different charging and plea-bargain practices resulting in significant sentencing disparities among similar defendants.

Although the best solution to the problems with the current child pornography sentencing scheme would require congressional intervention, Congress appears unwilling to make any changes in the statutory handcuffs currently on the Commission. Therefore, this Article sets forth a detailed proposed amendment to section 2G2.2 that could be adopted by the Commission without congressional authorization. If the Commission does not amend the guideline, then this proposal provides a detailed roadmap for federal district judges to “vary” from the current, broken guideline pursuant to the authority granted by the

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Supreme Court in *United States v. Booker* and *Kimbrough v. United States*.

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INTRODUCTION

Except for the criminal penalties for crack cocaine offenses,¹ no specific federal non-capital-penalty structure has been more widely criticized than U.S. Sentencing Guidelines (“USSG”) § 2G2.2 and the corresponding federal penal statutes, 18 U.S.C. §§ 2252 and 2252A.² Together, those provisions govern penalties for child pornography offenses other than those involving the actual production of child pornography (henceforth, “non-production offenses”).³ Indeed, one of

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1. The history of federal crack cocaine penalties is thoroughly chronicled in Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, U. PA. J.L. & SOC. CHANGE (forthcoming).
 2. See Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 27–28 (2013); see also U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (U.S. SENTENCING COMM’N 2016); see also 18 U.S.C. §§ 2252, 2252A (2012).
 3. See, e.g., *United States v. Jenkins*, 854 F.3d 181, 188 (2d Cir. 2017); *United States v. Pyles*, 862 F.3d 82, 98 (D.C. Cir. 2017) (Williams, J., dissenting); *United States v. Grober*, 624 F.3d 592, 596 (3d Cir. 2010); *United States*

the leading sources of criticism has been the United States Sentencing Commission, whose 300-plus-page report to Congress in December 2012, *Federal Child Pornography Offenses*,⁴ contained a compelling case for changing both the guideline and, to a lesser degree, the statutes. The Second Circuit has interpreted the Commission's report as "effectively disavow[ing] § 2G2.2."⁵

The best solution to the problems with section 2G2.2 would be to completely scrap the current guideline and rewrite it from scratch. Yet such a wholesale revision by the Commission would require congressional authorization in view of the number of prior statutory directives mandating that the Commission amend section 2G2.2 in many ways. As I discuss below, Congress appears unwilling to allow the Commission to completely rewrite the guideline. However, as I also explain, there is a partial—and quite significant—fix available without congressional permission. That partial fix could be best accomplished by the Sentencing Commission via an amendment to section 2G2.2. If the Commission does not amend the guideline, then my proposal provides a detailed roadmap for federal district judges to "vary" from the current broken guideline, pursuant to their authority under *United States v. Booker*⁶ and *Kimbrough v. United States*.⁷

v. Dorvee, 616 F.3d 174, 180 (2d Cir. 2010); *United States v. R.V.*, 157 F. Supp. 3d 207, 249–50 (E.D.N.Y. 2016); Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 GA. ST. U. L. REV. 375, 385 (2014); Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 108 (2011).

4. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES (2012) [hereinafter 2012 COMMISSION REPORT].
5. *Jenkins*, 854 F.3d at 190.
6. 543 U.S. 220 (2005) (declaring the sentencing guidelines "effectively advisory," thus permitting district judges to vary below the guidelines).
7. 552 U.S. 85 (2007) (affording sentencing judges the discretion to vary from the sentencing range recommended by the federal sentencing guidelines based on a "policy" disagreement with a specific guideline). The Courts of Appeals, however, are divided on the question of whether a district court may vary below section 2G2.2's recommended sentencing ranges based on a policy disagreement with the guideline. The majority of circuits permit such a variance. See *United States v. Morrison*, 771 F.3d 687, 692–93 (10th Cir. 2014); *United States v. Halliday*, 672 F.3d 462, 474 (7th Cir. 2012); *United States v. Henderson*, 649 F.3d 955, 963–64 (9th Cir. 2011); *Grober*, 624 F.3d at 599–600; *Dorvee*, 616 F.3d at 188; *United States v. Stone*, 575 F.3d 83, 91–94 (1st Cir. 2009); see also *United States v. Fry*, 851 F.3d 1329, 1333–34 (D.C. Cir. 2017) ("We . . . conclude that, even if a district court retains discretion to vary from the child-pornography Guidelines based on a policy disagreement with them [having previously cited *Henderson*, *Grober*, and *Stone*], a district court does not necessarily abuse its discretion by agreeing with (and applying) those Guidelines."). The Fifth and Eleventh Circuits have rejected such policy variances. See

I. THE EVOLUTION OF THE CHILD PORNOGRAPHY STATUTES
AND GUIDELINES

A. *The Rapid Ascent of the Criminalization of Child Pornography
Offenses*

The criminalization of child pornography offenses is a relatively recent occurrence in the history of American criminal justice. It was not until 1977 that federal law first addressed it by outlawing the production and *commercial* distribution and receipt of child pornography; but the law did not criminalize *non-commercial* distribution, receipt, and possession of child pornography until several years later.⁸ Yet, despite its belated action in outlawing child pornography, Congress very quickly came to consider such offenses to be among the most serious in the federal system.

Repeated amendments to the statutory provisions and repeated congressional directives to the Sentencing Commission to amend section 2G2.2, from 1990 until 2012,⁹ have resulted in some of the most severe federal non-capital penalties—for typical cases—among all common offense types.¹⁰ Today, the average prison sentence for offenders conv-

United States v. Miller, 665 F.3d 114, 120–21 (5th Cir. 2011); United States v. Pugh, 515 F.3d 1179, 1201 & n.15 (11th Cir. 2008). The Sixth Circuit has permitted policy variances from section 2G2.2, *see* United States v. Brooks, 628 F.3d 791, 799–800 (6th Cir. 2011), but it has also rejected the specific argument that such a policy variance is appropriate based on the fact that several of the aggravating factors in section 2G2.2 were required by Congress. United States v. Bistline, 655 F.3d 758, 761–64 (6th Cir. 2012). Even in those circuits currently disallowing a "policy" disagreement variance from section 2G2.2 in view of Congress's role in developing the guideline, a variance based on my proposal would not run afoul of congressional intent insofar as my proposal is consistent with the congressional directives to the Commission concerning section 2G2.2.

8. 2012 COMMISSION REPORT, *supra* note 4, at 4 n.22–23. Congress outlawed non-commercial receipt and distribution in 1984; it outlawed simple possession in 1990. *Id.*
9. *Id.* at 4–5; *see also* U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009) (discussing the many amendments to the guidelines since 1987). The full list of congressional legislation concerning section 2G2.2 is contained in Appendix E of the Commission's 2012 report. Most of that legislation either required the Commission to amend the guidelines or directly amended the guideline. 2012 COMMISSION REPORT, *supra* note 4, at app. E-1.
10. The statutory punishment ranges for child-pornography offenders convicted of their first such offense are zero to twenty years of imprisonment for simple possession offenses and five to twenty years of imprisonment for receipt and distribution offenses. *See* 18 U.S.C. §§ 2252(b), 2252A(b) (2012). For offenders with prior convictions for sex offenses (including prior child-pornography convictions), the ranges of punishment increase significantly:

icted of non-production child pornography offenses is 101 months (or nearly 8-and-one-half years).¹¹ Notably, that average sentence is noticeably below the average guideline range minimum—139 months—called for by section 2G2.2.¹² As an indication of the relative severity of child pornography penalties among all federal offense types, their average sentence and guideline minimums are higher than the corresponding averages for federal drug-trafficking offenses serious enough to carry mandatory minimum statutory penalties.¹³ Furthermore, the averages for those drug-trafficking offenders reflect much higher average criminal histories than those for child pornography offenders—meaning the actual penalty levels for child pornography offenders are actually significantly higher than those for comparable drug-trafficking offenders.¹⁴

The comparison to federal drug-trafficking offenses is not intended to diminish the seriousness of federal non-production offenses. They are, generally speaking, serious offenses that almost always warrant imprisonment. Yet there is a wide spectrum of non-production offenses: from the indiscriminate downloading of digital files used solely for self-gratification,¹⁵ to the active trading of files in sophisticated child pornography online “communities,”¹⁶ to the use of child pornography to “groom” children into participating in sexually-explicit activities, or even to facilitate rape.¹⁷ As discussed below, the current penalty scheme does a woefully inadequate job of distinguishing among child pornography offenders in terms of their culpability and dangerousness. The

to a mandatory minimum of ten years for possession offenses (with the same twenty-year maximum) and a mandatory minimum of fifteen years for receipt and distribution offenses (and a maximum of forty years). *See* 18 U.S.C. §§ 2252(b), 2252A(b) (2012).

11. U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 44 (2019).
12. *Id.* at 51.
13. U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 36 (2017); *see also id.* at 41, fig.25 (showing that the average sentence for federal drug-trafficking offenses carrying mandatory minimums is slightly below 100 months and the average guideline minimum for such cases is around 130 months).
14. Only 47.9% of drug-trafficking offenders today are in Criminal History Category I compared to 78.3% of non-production child-pornography offenders. *See* U.S. SENTENCING COMM’N, QUICKFACTS: DRUG TRAFFICKING OFFENSES 1 (2018); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 41 (2019).
15. 2012 COMMISSION REPORT, *supra* note 4, at 77.
16. *Id.* at 53.
17. *Id.* at 109.

current guideline, in particular, treats the overwhelming majority of offenders as if they are the worst offenders on the spectrum. And, for that reason, federal district judges today sentence below the guideline ranges in the vast majority of cases.

B. The Evolution of Section 2G2.2

Section 2G2.2 has evolved from a simple guideline, carrying very low penalty ranges in the original 1987 *Guidelines Manual*,¹⁸ to the current complex guideline, carrying severe penalty ranges. The current guideline, which has changed relatively little since 2003, is set forth below:

Section 2G2.2 [current version] ¹⁹
(a) Base Offense Level: <ul style="list-style-type: none">(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).(2) 22, otherwise
(b) Specific Offense Characteristics <ul style="list-style-type: none">(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.(3) (Apply the greatest):<ul style="list-style-type: none">(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.(C) If the offense involved distribution to a minor, increase by 5 levels.

18. The 1987 version of section 2G2.2 had a base offense level of thirteen and two potential enhancements: a two-level enhancement if the pornography depicted a child under twelve years of age and a minimum five-level enhancement for distribution, with additional levels for “retail values” exceeding \$100,000. Thus, for an offender in Criminal History Category I of the Sentencing Table, the most severe penalty range (without any adjustments from Chapter Three of the *Guidelines*, and assuming a retail value of \$100,000 or less) was thirty-three to forty-one months (offense level 20/CHC I). See U.S. SENTENCING GUIDELINES MANUAL §§ 2.75, 5.12 (U.S. SENTENCING COMM’N 1987).

19. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (U.S. SENTENCING COMM’N 2018).

- (D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.
- (E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.
- (4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by **4** levels.
- (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
- (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.
- (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by **2** levels;
 - (B) at least 150 images, but fewer than 300, increase by **3** levels;
 - (C) at least 300 images, but fewer than 600, increase by **4** levels; and
 - (D) 600 or more images, increase by **5** levels.
- (c) Cross Reference
 - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

II. THE (MANY) PROBLEMS WITH SECTION 2G2.2

The Sentencing Commission’s 2012 report to Congress sets forth the many problems with section 2G2.2. They can be summarized as follows:

- Most of the enhancements in section 2G2.2 (*e.g.*, “use of a computer,” the number-of-images enhancements) were promulgated during an earlier era of computer and internet technologies when the

enhancements were intended to apply only in atypical or aggravated cases. But as a result of today's computer and internet technologies, including peer-to-peer ("P2P") file-sharing, the vast majority of those antiquated enhancement provisions now apply to typical defendants.²⁰

- The guideline's penalty ranges for typical offenders have increased substantially because of the many enhancements added to section 2G2.2 after 1987. Thus, many defendants, including those with no prior criminal records, have guideline ranges at or near the statutory maximum. Furthermore, the average guideline range for non-production offenders is not much lower than the average guideline ranges for much more serious sexual offenses (*e.g.*, child prostitution and rape of a child between twelve and seventeen).²¹

- There exists a wide range of defendants in terms of their culpability and dangerousness. Because the vast majority of the enhancement provisions in section 2G2.2 apply to typical defendants, the guideline does a poor job of distinguishing among defendants in terms of their relative culpability and dangerousness.²²

- Because several of the provisions in section 2G2.2 were required by Congress (*e.g.*, use-of-a-computer, number-of-images, and sado-masochistic-images enhancements) and not added by the Commission in the normal course of administrative rule-making, the Commission cannot remove them without congressional approval.²³

- Because section 2G2.2 is outdated and overly severe for typical defendants, the vast majority of sentencing judges refuse to sentence defendants within the recommended guideline ranges and prosecutors increasingly enter into plea bargains with defendants for non-guideline sentences, leading to significant sentencing disparities because there is no meaningful benchmark.²⁴

The Commission's 2012 report not only identified the many problems with section 2G2.2 but also recommended to Congress that an amended guideline should reflect three main factors related to child-pornography offenders' culpability and dangerousness:

[T]he Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases: (i) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims

20. 2012 COMMISSION REPORT, *supra* note 4, at 313.

21. *Id.* at 315–16; *see also id.* at 1.

22. *Id.* at 320–25.

23. *Id.* at 322; *see also id.* at app. E-1.

24. *Id.* at 317–18.

depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technologies); (ii) the degree of an offender’s involvement with other offenders — in particular, in an Internet “community” devoted to child pornography and child sexual exploitation; and (iii) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.²⁵

The Commission also observed that:

The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders’ collecting behavior and insufficient emphases on offenders’ community involvement and sexual dangerousness. As a result, penalty ranges are too severe for some offenders and too lenient for other offenders. The guideline thus should be revised to more fully account for these three factors and thereby provide for more proportionate punishments.²⁶

Little has changed since the Commission identified these problems and proposed a general solution in December of 2012.²⁷ Although the Commission has not issued a revised report on child-pornography offenders during the past seven years—something that would be beneficial to do in view of the continuing controversy about child pornography sentencing²⁸—my own regular review of child-pornography

25. *Id.* at xvii–xviii.

26. *Id.* at xviii.

27. The Commission amended section 2G2.2 in 2016 in a manner that marginally improved one of the existing enhancements and also added a new enhancement. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 801 (U.S. SENTENCING COMM’N 2016). The 2016 amendment required a *mens rea* for the two-level distribution enhancement and added a *quid pro quo* requirement for the five-level distribution enhancement. *Id.* at 144–46. It also added a new four-level enhancement for possessing child pornography depicting a baby or toddler (as an alternate enhancement to the existing sado-masochistic enhancement). *Id.* at 142–44. Yet, as discussed below, the within-range rate for the guideline two years after those changes was even lower than it was in 2012. U.S. SENTENCING COMM’N., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 91 tbl.32 (2018).

28. As discussed below, the Commission’s 2012 report proposed that any guideline amendment account for three main factors: (1) the extent of the defendant’s collecting behavior; (2) the extent of the defendant’s involvement with other child-pornography offenders in (usually online) “communities” devoted to child exploitation; and (3) the defendant’s history of sexually exploitative or abusive conduct. *See* 2012 COMMISSION REPORT, *supra* note 4, at 320. The report had significant empirical data concerning the third factor, *id.* at 169–206; it had limited data about offenders’ community

cases in the Commission's files through 2017 revealed virtually no changes in the statistics and trends discussed in the 2012 report. All of the main problems remain. Indeed, the Commission's sentencing data show that, if anything, more judges today perceive serious problems with the guideline than ever before. The most telling statistic—the within-range rate for section 2G2.2—currently stands at 28.4%.²⁹ It was 32.3% in 2012, when the Commission issued its report.³⁰ The current average *extent* of downward variances is 40.1%; that is, in those cases in which judges vary downwardly, they impose sentences that are on average 40.1% below the average guideline *minimum*.³¹

It is notable that the current 28.4% within-range rate is actually artificially inflated by the relatively common practice of plea agreements in which the parties stipulate that the guidelines should apply in a particular way—usually by removing either the use-of-computer enhancement or the sado-masochism enhancement—in order to reduce a defendant's guideline range.³² Judges who follow those plea agreements and sentence within the stipulated guideline ranges are classified by the Commission as having imposed “within-range” sentences³³ when in fact their sentences are effectively downward “variances.”

In the nearly seven years since the Commission issued its report, Congress has not given any indication that it intends either to amend the penal statutes governing child-pornography offenses or to give the Commission authority to amend the provisions of section 2G2.2

involvement, *id.* at 193, but it did not provide empirical data about offenders' collecting behavior. An updated report could include data about all three factors using more recent federal child-pornography cases.

29. SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 27, at 91 tbl.32 (showing that only 402 of all 1,414 section 2G2.2 cases in 2018 had within-range sentences). Of all section 2G2.2 cases, 888 (or 62.8%) had downward *variances* and another 88 (6.3%) had downward *departures* (other than for substantial assistance or fast-track). *Id.* Variances and departures are discussed in *United States v. Myers*, 503 F.3d 676, 684–85 (8th Cir. 2007).
30. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATUTES tbl.28 (2012) (567 of all 1,755 section 2G2.2 cases had within-range sentences).
31. SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 27, at 101 tbl.40.
32. See 2012 COMMISSION REPORT, *supra* note 4, at 222–23. The Commission's analysis of all 1,117 section 2G2.2 cases in 2010 with guideline stipulations in plea agreements found that 16.9% of those cases had stipulations that were “inconsistent with the relevant facts set forth in” either pre-sentence reports or the factual statement in plea agreements themselves. *Id.* at 222–23. My own review of section 2G2.2 cases in subsequent years found that this practice has only increased since 2010.
33. U.S. SENTENCING COMM'N, FED. SENTENCING: THE BASICS 8, 11 (2015).

required by Congress. No subcommittee in either the House or the Senate has held a hearing in response to the Commission's lengthy report identifying the many problems with the statutes and guidelines.

It is fair to conclude that Congress does not intend to act, despite the perpetual chorus of criticism directed at section 2G2.2, from many federal judges, the Commission, practitioners, and commentators.³⁴ Its inaction is regretful, but understandable. Child pornography is a quintessential example of a political "third rail."³⁵ No legislator stands to gain any political capital—and may in fact stand to lose a substantial amount of it—by introducing legislation to reform child pornography penalties (unless their proposal raises the already draconian penalties). Therefore, the Commission need not give Congress any additional time to act.

Once the Commission has a voting quorum of Commissioners,³⁶ it could begin the process of considering whether to amend section 2G2.2 to the extent that it is permitted in light of the legislative constraints. As discussed below, the Commission actually has a substantial amount of discretion to amend the guideline if it wishes to do so. As I also explain below, my proposal is entirely consistent with the findings and the broader recommendations made by the Commission in its 2012 report. In the report, the Commission itself recognized that, even without congressional authorization, the Commission "is able nevertheless to amend the child pornography guidelines in a . . . limited manner."³⁷ My proposal is more than limited. Yet significant changes would be necessary to improve the current dismal rate of within-guideline-range sentences imposed.

The proposed amendment, if adopted, would be similar in nature to the Commission's significant amendment in 2016 of the illegal re-entry guideline, section 2L1.2.³⁸ That amendment substantially recalibrated the aggravating factors of the illegal re-entry guideline based on data showing that sentencing judges were varying below the guideline ranges in cases with the most severe enhancements.³⁹ Notably, my

34. *See* United States v. R.V., 157 F. Supp. 3d 207, 266–67 (E.D.N.Y. 2016).

35. *Id.* at 266 ("For a congressperson, addressing child pornography is akin to stepping onto the third rail.").

36. Because of unfilled vacancies, the Commission currently only has two voting Commissioners, two short of the four needed for a quorum. *See* SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 27, at 2–3.

37. 2012 COMMISSION REPORT, *supra* note 4, at 322.

38. U.S. SENTENCING GUIDELINES MANUAL *supp.* to app. C at 137 (U.S. SENTENCING COMM'N 2018).

39. *See id.* ("[C]omment received by the Commission and sentencing data indicated that the existing sixteen- and twelve-level enhancements for certain prior felonies committed before a defendant's deportation were overly severe. In fiscal year 2015, only 29.7% of defendants who received the sixteen-

proposal is not a dramatic, across-the-board reduction in penalty levels for all child pornography offenders. Such an amendment likely would be dead on arrival when Congress engaged in its 180-day review of the amendment pursuant to 28 U.S.C. § 994(p).⁴⁰ Similar to the Commission’s 2016 amendment to section 2L1.2, my proposal would lower penalty levels for many offenders, but it would still result in relatively severe ranges for most offenders and quite severe ranges for the worst offenders. The recalibration of the illegal re-entry guideline resulted in a significantly higher percentage of cases in which judges imposed sentences within the guideline range.⁴¹ I predict that such a recalibration of section 2G2.2 would have an even greater impact on the within-range-sentencing rate.

III. A PARTIAL (BUT MEANINGFUL) SOLUTION TO THE PROBLEMS

At the outset of this section, I set forth a proposed amendment to section 2G2.2. I then offer a section-by-section explanation for my proposal, including an explanation about how the Commission could amend the guideline in the manner that I propose without violating the existing congressional directives.

A. Proposed Amendment

My proposed amendment is as follows:

Amended Section 2G2.2	
(a)	Base Offense Level:
(1)	22 , if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).
(2)	24 , otherwise
(b)	Specific Offense Characteristics
(1)	<i>Reductions in Offense Level</i>
(A)	If (i) subsection (a)(2) applies; (ii) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (iii) the defendant did not

level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4% of defendants who received the twelve-level enhancement were sentenced within the applicable sentencing guideline range.”).

40. See 28 U.S.C. § 994(p) (2012) (creating the 180-day review period).

41. Compare U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-82 (2016) (59.2% within-range rate in 2016, the year before the amendment to section 2L1.2 went into effect), with SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 27, at 92 (69.3% within-range rate in 2018).

intend to traffic in, or distribute, such material, decrease by **2** levels.

(B) If the offense did not involve the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, decrease by **2** levels.

(C) If the offense involved less than 10 images, decrease by **5** levels.

(2) *Increases in Offense Level*

(A) (Apply the greatest):

(i) If the offense involved: (a) distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (b) distribution to an adult that was intended to cause the sexual exploitation of a minor in violation of 18 U.S.C. § 2251 or cause the procurement of a minor for other illegal sexual purposes, increase by **8** levels.

(ii) If the offense involved distribution to a minor for any other purpose, increase by **6** levels.

(iii) If the defendant distributed in exchange for other material involving the sexual exploitation of a minor, increase by **4** levels.

(iv) If the defendant was convicted under 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7), and knowingly engaged in distribution, other than distribution described in subdivisions (A)(i)–(iii), increase by **2** levels.

(B) (Apply the greatest):

(i) If the offense involved material that portrays (i) sadistic or masochistic conduct or other depictions of violence;⁴² or (ii) sexual abuse or exploitation of an infant or toddler, increase by **4** levels; or

(ii) If the offense involved material that depicts a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

42. A new application note would define “sadistic or masochistic conduct” to mean “conduct that appears to have been intended to cause pain or humiliation” (or words to that effect). This definition would narrow the current definition provided by courts in eleven of the twelve federal circuit courts, which treat sexual penetration of a pre-pubescent minor as *per se* sadistic conduct without considering whether the specific sexual act in question actually did so or appeared to be designed to do so. See 2012 COMMISSION REPORT, *supra* note 4, at 34–35.

- (C) If the defendant engaged in activity involving the sexual abuse or exploitation of a minor (other than acts accounted for in subsection (b)(2)(A)(i) or (ii)), increase as follows:
- (i) If the defendant engaged in three or more such acts, each on a separate occasion, increase by **9** levels;
 - (ii) If the defendant engaged in two or more such acts, each on a separate occasion, increase by **6** levels; or
 - (iii) If the defendant engaged in one such act, increase by **3** levels.
- (D) (Apply the greatest):
- (i) If the defendant engaged in sophisticated collecting activity, increase by **2** levels;
 - (ii) If the defendant engaged in sophisticated collecting activity for at least two years, increase by **4** levels.⁴³
- (c) Cross Reference
- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

As explained below, this proposed amendment to section 2G2.2 is intended to accomplish two goals: (1) to modernize the guideline in terms of its enhancements so that it reflects the broad range of offenders' conduct today; and (2) to reflect the three main relevant sentencing factors identified by the Commission in its 2012 report.

B. Section-by-Section Explanation of Proposed Amendment

1. Base Offense Levels

As shown above, the proposed amendment has two alternate base-offense levels, 24 and 22, while the guideline's current alternate base offense levels are 22 and 18. Although at first blush it appears that the amendment's base offense levels are more punitive than the existing guideline's two base offense levels, the amendment's base offense levels

43. A new application note would define "sophisticated collecting activity" in a manner that captures offenders who engaged in conduct such as maintaining extremely large collections (*e.g.*, over 500 different video files or 5,000 different images) or maintaining their collections in a complex file structure in order to satisfy the defendant's prurient interests.

actually effectively reduce the existing base offense levels. This is because the amendment's base offense levels account for two levels for use-of-a-computer and five levels for possessing 600 or more images. Those two aggravating factors apply in the vast majority of cases today and both are required by congressional directives.⁴⁴ Therefore, for the vast majority of cases, the amendment would effectively reduce the two base offense levels by five and three levels, respectively (*i.e.*, from 22 and 18, to 17 and 15). The latter two base offense levels (17 and 15) are the lowest that the Commission may go under existing congressional directives.⁴⁵ As explained below, reducing the base offense levels in this

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44. U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2(b)(6)–(b)(7)(D) (U.S. SENTENCING COMM'N 2018); *see also* U.S. SENTENCING COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS 46 (2018) [hereinafter SPECIFIC OFFENSE CHARACTERISTICS] (use-of-a-computer enhancement applied in 96.6% of cases, and enhancement for possessing 600 or more images applied in 76.7% of cases), *available at* https://www.usss.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Guideline_Based.pdf [<https://perma.cc/FK69-5E22>].

By building in to the new base offense levels the two enhancements required by Congress, the Commission would not be reducing penalties for offenders subject to those enhancements; and, therefore, it would be in compliance with the congressional directives. Regarding the most extensive congressional directives—added by the PROTECT Act of 2003—Congress stated that: “With respect to cases covered by the amendments made by subsection (i) of this section, the Sentencing Commission may make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, *except that the Commission shall not promulgate any amendments that, with respect to such cases [i.e. cases with the number-of-images enhancement and sado-masochism enhancement], would result in sentencing ranges that are lower than those that would have applied under such subsection.*” PROTECT Act of 2003, Pub. L. No. 108-21, § 401(j)(3), 117 Stat. 668, 673 (emphasis added). Although unartfully drafted, that statutory language certainly appears to have been intended to prevent the Commission from lowering the four-level enhancement for sado-masochistic images and the two- to five-level enhancement based on the number of images possessed. Congress surely did not intend to prohibit the Commission from simply adding five levels into the base level for *all* child-pornography defendants and then permitting a five-level reduction for the rare defendant who possessed less than the minimum number of images required for the current two-level enhancement (ten). Such an amendment would not “result in sentencing ranges that are lower than those that would” apply before such an amendment.

45. *See* 2012 COMMISSION REPORT, *supra* note 4, at app. E-1. In 2004, the Commission chose to make the two base offense levels higher than Congress required. That choice perhaps made sense when the vast majority of offense characteristics did not apply to the typical defendant. Now, however, that the vast majority of specific offense characteristics apply to a typical offender—resulting in extremely high guideline ranges—the Commission

manner would give the Commission leeway to add new aggravating factors as part of the guideline's overall recalibration.

In addition, the two new base offense levels, when combined with the adjustment in section 2G2.2(b)(1), equate simple possession offenses with simple receipt offenses. After the adjustment (in the case of a defendant convicted of receipt, but who did not distribute), both types of offenses effectively receive a base offense level of 22, compared to 24 for distribution offenses. This change was made in recognition of the Commission's finding in its 2012 report that simple possession offenses and simple receipt offenses are identical.⁴⁶

2. Amended Specific Offense Characteristics

My proposed amendment's new specific-offense characteristics are intended to minimize the effects of the outdated enhancements, eliminate the double counting of certain aggravating factors, and better account for the three main factors identified by the Commission in its 2012 report.

i. New Section 2G2.2(b)(1)

Amended Section 2G2.2(b)(1)
(b) Specific Offense Characteristics
(1) <i>Reductions in Offense Level</i>
(A) If (i) subsection (a)(2) applies; (ii) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (iii) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.
(B) If the offense did not involve the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, decrease by 2 levels.
(C) If the offense involved less than 10 images, decrease by 5 levels.

This new section includes the existing two-level reduction for defendants convicted of receipt of child pornography but who did not distribute child pornography (thus punishing offenders who merely received child pornography in the same manner as simple possessors). It also includes two additional reductions: one for possessing less than

should effectively reduce the two base offense levels, together with a recalibration of the aggravating factors in the specific offense characteristics.

46. *Id.* at xx (noting that "the typical case in which an offender was prosecuted for possession was indistinguishable from the offense conduct in the typical case in which an offender was prosecuted for receipt").

the minimum number of images (ten) that currently triggers an enhancement for possessing certain numbers of images; and a second for not using a computer in the commission of the offense.⁴⁷ Because virtually all defendants both use computers in the commission of their offenses and possess ten or more images,⁴⁸ these two provisions would rarely ever apply. Nonetheless, they are included to give effect to the outdated congressional directives mentioned above.

ii. New Section 2G2.2(b)(2)

Amended Section 2G2.2(b)(2)
(b) Specific Offense Characteristics (2) <i>Increases in Offense Level</i> (A) (Apply the greatest): <ul style="list-style-type: none">(i) If the offense involved: (a) distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (b) distribution to an adult that was intended to cause the sexual exploitation of a minor in violation of 18 U.S.C. § 2251 or cause the procurement of a minor for other illegal sexual purposes, increase by 8 levels.(ii) If the offense involved distribution to a minor for any other purpose, increase by 6 levels.(iii) If the defendant distributed in exchange for other material involving the sexual exploitation of a minor, increase by 4 levels.(iv) If the defendant was convicted under 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7), and knowingly engaged in distribution, other than distribution described in subdivisions (A)(i)–(iii), increase by 2 levels. (B) (Apply the greatest): <ul style="list-style-type: none">(i) If the offense involved material that portrays (i) sadistic or masochistic conduct or other depictions of violence;⁴⁹ or (ii)

47. The minimum-images number of ten was chosen for simplicity's sake rather than having a tiered reduction along the lines of the current number-of-images enhancement in U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (U.S. SENTENCING COMM'N 2018). As noted above, the vast majority of offenders today receive the five-level enhancement for possessing 600 images or more.

48. See 2012 COMMISSION REPORT, *supra* note 4, at 41–42, 45.

49. A new application note would define “sadistic or masochistic conduct” to mean “conduct that appears to have been intended to cause pain or humiliation” (or words to that effect). This definition would narrow the current definition provided by courts in eleven of the twelve federal circuit

sexual abuse or exploitation of an infant or toddler, increase by **4** levels; or

(ii) If the offense involved material that depicts a prepubescent minor or a minor who had not attained the age of 12 years, increase by **2** levels.

(C) If the defendant engaged in activity involving the sexual abuse or exploitation of a minor (other than acts accounted for in subsection (b)(2)(A)(i) or (ii)), increase as follows:

(i) If the defendant engaged in three or more such acts, each on a separate occasion, increase by **9** levels;

(ii) If the defendant engaged in two or more such acts, each on a separate occasion, increase by **6** levels; or

(iii) If the defendant engaged in one such act, increase by **3** levels.

(D) (Apply the greatest):

(i) If the defendant engaged in sophisticated collecting activity, increase by **2** levels;

(ii) If the defendant engaged in sophisticated collecting activity for at least two years, increase by **4** levels.

This amended section includes several changes to the current guideline's main enhancements. First, it simplifies and recalibrates the existing six-prong enhancement for the distribution of child pornography. The amendment has only four prongs. It increases the enhancements for distribution to a minor from five, six, or seven levels to six or eight levels. One of the three factors identified by the Commission as warranting an increased sentence is sexually abusive, exploitative, or predatory conduct, particularly toward children.⁵⁰ Therefore, the amended guideline increases the existing penalty for distributing child pornography to minors. It also includes an eight-level enhancement for cases involving a defendant who distributed child pornography to another adult with the intent of having the recipient either produce new child pornography or provide access to a child for illegal sexual purposes.⁵¹

courts, which treat sexual penetration of a pre-pubescent minor as *per se* sadistic conduct without considering whether the specific sexual act in question actually did so or appeared designed to do so. *See* 2012 COMMISSION REPORT, *supra* note 4, at 34–35.

50. *Id.* at xviii.

51. The existing version of the distribution enhancement only provides for a five-level enhancement for such distribution. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2G2.2(b)(3)(B), 2G2.2 cmt. n.1 (U.S. SENTENCING COMM'N 2018).

The third prong provides a four-level enhancement for *quid pro quo* exchanges of child pornography, typically done in “closed” P2P communities, such as Gigatribe or traditional password-protected online “bulletin boards.”⁵² The fourth prong, which amends the existing two-level enhancement for simple distribution (in current section 2G2.2(b)(F)), no longer applies to offenders convicted of distribution or receipt offenses. Applying the two-level distribution enhancement to distribution and receipt offenders is duplicative of the enhanced offense levels that such defendants already receive for distribution in current section 2G2.2(b)(1).⁵³ Thus, the fourth prong of the amended distribution provision only applies to offenders convicted of possession offenses who in fact engaged in distribution (other than the types of conduct described in the first three prongs). Such defendants should be treated in the same manner as defendants either convicted of distribution or convicted of receipt but who in fact distributed. Finally, the amended distribution provision also deletes the current *commercial*-distribution enhancement in section 2G2.2(b)(3)(A) because it appears that no child-pornography offenders prosecuted today distribute for pecuniary gain.⁵⁴

Second, the amended guideline merges two of the existing specific offense characteristics: a two-level enhancement for possessing images depicting pre-pubescent minors (currently in section 2G2.2(b)(2)) and a four-level enhancement for possessing sado-masochistic images or images of babies or toddlers (currently in section 2G2.2(b)(4)). The former enhancement applies to virtually all cases today, and it was not required by Congress; thus it can be merged into another enhancement

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52. 2012 COMMISSION REPORT, *supra* note 4, at 48–53, 92–95, 148–51. The amended provision narrows the current enhancement, which applies to distribution “in exchange for any valuable consideration, but not for pecuniary gain.” U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)(B) (U.S. SENTENCING COMM’N 2018). The breadth of that enhancement encompasses offenders who may have exchanged pornography for the mere ability to download more child-pornography files or to download them in a faster manner. *See id.* § 2G2.2 cmt. n.1. Such offenders should not be equated to offenders who trade child pornography for more child pornography.
53. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(1) (U.S. SENTENCING COMM’N 2018). Under the current guideline, a defendant receives a base offense of twenty-two if he is convicted of distribution. If a defendant was convicted of receipt but actually distributed, he also receives an offense level of twenty-two. If he was convicted of receipt but did not distribute, his offense is reduced by two levels to twenty. *See id.* § 2G2.2(a), (b)(1).
54. 2012 COMMISSION REPORT, *supra* note 4, at 149 (noting that none of the 1,080 section 2G2.2 offenders in 2010 engaged in commercial distribution). If a defendant convicted of distribution did do so for pecuniary gain, a sentencing could “vary” upwardly and impose a higher sentence for that reason.

provision without contravening any congressional directive.⁵⁵ Merging it with the other enhancement, while requiring a court to apply only the greatest enhancement (plus two or plus four, but not both), would reduce the double counting that currently occurs because both enhancements apply in the vast majority of cases.⁵⁶

Third, the proposed amendment includes a tiered enhancement for a defendant's "pattern of activity," which is currently a single five-level enhancement for a defendant who has a history of committing two or more acts of either sexual abuse or exploitation of a minor. The new, tiered enhancement would provide for a three-, six-, or nine-level enhancement for defendants, depending on whether they previously committed one, two, or three or more acts of sexual abuse or exploitation of a minor.⁵⁷ This amended enhancement better reflects the Commission's belief that when child-pornography defendants have histories of sexually abusive, exploitative, or predatory conduct toward children, they should be punished more severely by providing for incremental enhancement levels depending on the extent of that history.⁵⁸ This change does not *lower* the congressionally required five-level enhancement for two or more acts,⁵⁹ so it would not violate the congressional directive. Indeed, it *increases* that enhancement by one or four levels for defendants who currently receive the five-level enhancement for two or more predicate acts. Nothing in that directive prohibits an increased enhancement.

Finally, the proposed amendment includes a new two-level enhancement for defendants who engaged in "sophisticated collecting activity," such as organizing an extremely large number of child pornography files in a complex folder structure. For offenders who engaged in such sophisticated collecting behavior for at least two years, their enhancement is four rather than two levels in recognition of the prolonged nature of their offense. This new enhancement reflects another factor identified by the Commission in its 2012 report.

55. See 2012 COMMISSION REPORT, *supra* note 4, app. E-1.

56. Double counting currently occurs because virtually all images depicting sado-masochistic conduct also involve a pre-pubescent minor. In 2018, the two-level enhancement for possession of an image of a pre-pubescent minor applied in 94.1% of cases, and the sado-masochistic or baby/toddler enhancement applied in 84.1% of cases. See SPECIFIC OFFENSE CHARACTERISTICS, *supra* note 44, at 45.

57. The enhancement would not apply to acts of distributing child pornography to minors because the defendant would already receive a significant enhancement for that behavior under the amended distribution enhancement. See *supra* notes 50–54 and accompanying text.

58. See 2012 COMMISSION REPORT, *supra* note 4, at xvii–xviii.

59. See *id.* app. at E-1.

3. Examples of How the Amended Guideline Would Work in Practice

The following four hypothetical cases are realistic fact patterns that reflect what judges regularly see in non-production child pornography cases. Following each scenario are the hypothetical defendant’s guideline ranges under both the current guideline and my proposed amended guideline. Consistent with real cases, all five defendants are in Criminal History Category I and received a downward adjustment of three levels for accepting responsibility under USSG § 3E1.1.⁶⁰

Scenario One: Non-aggravated Simple Possessor

The defendant used an “open” P2P file-sharing program to download several child-pornography videos but did not activate the sharing function (thus, the defendant did not distribute to anyone). One of the videos depicts limited penetration of a prepubescent minor, but none depict intentional infliction of pain or humiliation. The defendant did not maintain an organized collection of child pornography files and only downloaded child pornography for a few months before being arrested. The defendant has no known history of sexual abuse or exploitation of a minor. The defendant was convicted of one count of possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) and faces a statutory punishment range of zero to twenty years of imprisonment.

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	18	Base Offense Level	22
Pre-Pubescent Minor	+2	Pre-Pubescent Minor	+2
Sado-Masochism/ Babies/Toddlers	+4	Sado-Masochism/ Babies/Toddlers	--
Use of a Computer	+2		
600+ images	+5		
Acceptance	-3	Acceptance	-3
Final Offense Level	28	Final Offense Level	21
[Guideline Range]	[78-97 months]	[Guideline Range]	[37-46 months]

60. See U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1, 3E1.1 (U.S. SENTENCING COMM’N 2018).

Scenario Two: Unsophisticated Possessor with History of Sexual Abuse

The defendant’s former landlord discovered that the defendant had left two dozen still images of post-pubescent but clearly underage females sexually exposing themselves. The images were printed from computer websites at some point in the past, but there was no evidence that the defendant himself was the one who had accessed the computer. Although he had never been convicted of a sex offense before, the defendant had been arrested and prosecuted twelve years prior for sexually abusing a minor on more than five separate occasions. That case was resolved by a plea bargain to non-sexual assault of a child, for which the defendant served 180 days in jail. The pre-sentence report established that the defendant had sexually assaulted the minor on the five occasions. The defendant was convicted of one count of possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) and faces a statutory punishment range of zero to twenty years of imprisonment.

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	18	Base Offense Level	22
Pattern of Activity	+5	Pattern of Activity	+9
Number of Images	+2		
Acceptance	-3	Acceptance	-3
Final Offense Level [Guideline Range]	22 [41–51 months]	Final Offense Level [Guideline Range]	28 [78–97 months]

Scenario Three: Unsophisticated Passive Distributor

The defendant used an “open” P2P file-sharing program to download several child-pornography videos but did not activate the sharing function (thus, the defendant indiscriminately distributed to strangers but not in a *quid pro quo* manner). Two of the videos depict penetration of prepubescent minors with indications of pain on the children’s faces. The defendant did not maintain an organized collection of child pornography files and had only downloaded child pornography for a few months before being arrested. The defendant has no known history of sexual abuse or exploitation of a minor. The defendant was convicted of one count of distribution of child pornography under 18 U.S.C. § 2252(a)(4)(B) and faces a statutory punishment range of five to twenty years of imprisonment.

Current Guideline Calculation	Amended Guideline Calculation
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Base Offense Level	22	Base Offense Level	24
Pre-Pubescent Minor	+2	Pre-Pubescent Minor	--
Simple Distribution	+2	Simple Distribution (Possession Offenses)	--
Sado-Masochism/ Babies/Toddlers	+4	Sado-Masochism/ Babies/Toddlers	+4
Use of a Computer	+2		
600+ images	+5		
Acceptance	-3	Acceptance	-3
Final Offense Level [Guideline Range]	34 [151–188 months]	Final Offense Level [Guideline Range]	25 [57–71 months] ⁶¹

Scenario Four: Active Distributor with Single Instance of Prior Sexual Abuse of a Minor and Sophisticated Collecting Behavior

The defendant used a “closed” P2P file-sharing program to trade several child-pornography videos with other P2P users in a *quid pro quo* manner. Several of the videos possessed by the defendant depict penetration of toddlers. The defendant maintained his collection of child pornography in a complex file structure, and a forensic computer analysis showed that he had collected child pornography for eighteen months. The pre-sentence report established that the defendant had sexually abused his twelve-year-old neighbor on one occasion in the past. The defendant was convicted of one count of distribution of child pornography under 18 U.S.C. § 2252(a)(2) and faces a statutory punishment range of five to twenty years of imprisonment.

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	22	Base Offense Level	24
Pre-Pubescent Minor	+2	Pre-Pubescent Minor	--
Active Distribution	+5	<i>Quid Pro Quo</i> Distribution	+4

61. Because the defendant was convicted of distribution, which carries a sixty-month mandatory minimum penalty, the defendant’s actual guideline range is sixty to seventy-one months. *See* 18 U.S.C. §§ 2252(b), 2252A(b) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(c) (U.S. SENTENCING COMM’N 2018).

Sado-Masochism/ Babies/Toddlers	+4	Sado-Masochism/ Babies/Toddlers	+4
Pattern of Activity		Pattern of Activity	+3
Use of a Computer	+2		
600+ images	+5		
		Sophisticated Collector	+2
Acceptance	-3	Acceptance	-3
Final Offense Level [Guideline Range]	37 [210–262 months]	Final Offense Level [Guideline Range]	34 [151-188 months]

Scenario Five: Active Distribution with a Significant History of Sexual Abuse of Minors and Sophisticated Collecting Behavior for Several Years

The defendant used a “closed” P2P file-sharing program to trade several child-pornography videos with other P2P users in a *quid pro quo* manner. The defendant also used a social media application to communicate with a twelve-year-old female. He sent her child-pornography videos using that social media application and asked her to travel to meet him in order to engage in the types of sexual activities depicted in those videos (which she declined to do). Several of the videos possessed by the defendant depict penetration of toddlers. The defendant maintained his collection of child pornography in a complex file structure, and a forensic computer analysis showed that he had collected child pornography for several years. The pre-sentence report establishes that three decades earlier the defendant was convicted of sexually abusing his step-sister when she was six years old. In addition, the pre-sentence report established that in the past decade the defendant had sexually abused his twelve-year-old neighbor on a single occasion. The defendant was convicted of one count of distribution of child pornography under 18 U.S.C. § 2252(a)(2) and faces a statutory punishment range of fifteen to forty years of imprisonment (based on his prior conviction).

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	22	Base Offense Level	24
Pre-Pubescent Minor	+2	Pre-Pubescent Minor	--

Distribution to a Minor with Intent to Commit a Sex Offense	+6	Distribution to a Minor with Intent to Commit a Sex Offense	+8
Sado-Masochism/Babies/Toddlers	+4	Sado-Masochism/Babies/Toddlers	+4
Pattern of Activity	+5	Pattern of Activity	+6
Use of a Computer	+2		
600+ images	+5	Sophisticated Collector	+4
Acceptance	-3	Acceptance	-3
Final Offense Level [Guideline Range]	43 [life]	Final Offense Level [Guideline Range]	43 [life] ⁶²

4. One Additional Proposed Fix: A Change in the Recommended Lifetime Term of Supervised Release in USSG § 5D1.2(b).

One final change that the Commission could accomplish without congressional permission would be to amend the policy statement in USSG § 5D1.2(b), which currently reads: “If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.”⁶³ “Sex offense” is defined as including non-production child pornography offenses in Chapter 109A of Title 18 of the United States Code.⁶⁴

In its 2012 report, the Commission noted that this guidelines’ recommendation for the maximum term was first included in section 5D1.2 at a time when the maximum term of supervision for child pornography offenses was three years.⁶⁵ When Congress raised the maximum term of supervised release for child-pornography offenses to life in 2003, the Commission’s policy statement in section 5D1.2 had the effect of recommending lifetime terms of supervised release for all

62. Because the statutory maximum is forty years, the actual guideline range is simply forty years. *See* 18 U.S.C. §§ 2252(b), 2252A(b) (2012); U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (U.S. SENTENCING COMM’N 2018).

63. U.S. SENTENCING GUIDELINES MANUAL § 5D1.2(b) (U.S. SENTENCING COMM’N 2018).

64. *Id.* § 5D1.2 cmt. n.1; 18 U.S.C. §§ 2241, 2243, 2244 (2012).

65. 2012 Commission Report, *supra* note 4, at 272.

child-pornography defendants.⁶⁶ The Commission, however, never intended to recommend lifetime supervision for all sex offenders.

The current guidelines' recommendation makes no sense for typical child-pornography offenders. According to the Commission's study of recidivism of child-pornography offenders, typical offenders are unlikely to recidivate upon release from prison.⁶⁷ The Commission should amend section 5D1.2 to state that a court should impose a substantial term of supervision—say, beyond ten years—only if the evidence in a particular case warrants such a term. Lifetime terms, which are burdensome on federal probation officers and cost the taxpayers a significant amount of money, should be reserved for the most serious, dangerous offenders.

CONCLUSION

The current penalty structure for non-production offenses is fundamentally broken: Only 28.4% of defendants sentenced under section 2G2.2 receive within-range sentences and 69.1% of defendants receive downward variances or departures (unrelated to their substantial assistance or participation in a fast-track program). The vast majority of child-pornography defendants receive downward variances based on sentencing judges' subjective senses of what appropriate sentences should be. Because judges have no meaningful national benchmark from which to render sentencing decisions, widespread sentencing disparities exist. Such disparities conflict with the central purpose of the Sentencing Reform Act of 1984.⁶⁸ In addition, because the current guideline fails to offer any meaningful benchmark, federal prosecutors around the country engage in a wide variety of different charging and plea-bargain practices, resulting in significant sentencing disparities among similar defendants.

The Commission's December 2012 report has fallen on deaf ears in Congress. As soon as it gets a voting quorum, the Commission should act to the extent it is permitted within the legislative constraints imposed by Congress concerning section 2G2.2. As this article demonstrates, the Commission actually has a substantial amount of leeway to amend the guideline consistent with both Congress's legislative directives and the Commission's recommendations in its 2012 report. Although the Commission may not adopt the specific offense levels in

66. *Id.* at 325–26.

67. *Id.* at 299–310.

68. *See* 28 U.S.C. § 991(b)(1)(B) (2012) (requiring the Sentencing Commission to promulgate guidelines that “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”); *see also id.* § 3553(a)(6) (similarly instructing sentencing judges “to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

my proposal, the Commission should at least recalibrate the aggravating factors in the existing version of section 2G2.2 to better reflect the three factors identified in the Commission's 2012 report and set penalty levels that account for the wide spectrum of offenders' conduct. In addition, the Commission should eliminate the duplicative aggravating factors identified above.

Amending section 2G2.2 in the manner proposed in this article would result in reductions in penalty ranges for many defendants, yet the sentencing ranges would still be relatively severe; very few defendants would have sentencing ranges with minimums of less than three or four years, and most defendants would have ranges with minimums between five and ten years. The worst defendants would have guideline ranges comparable to—or even higher than—the ones currently called for by the guideline (that is, at or near the life-sentence range). Moreover, the ranges for all child-pornography defendants would be based on the common-sense factors identified by the Commission in its report rather than the antiquated and often unduly severe factors in the current guideline. An amended guideline that is based on the three factors identified by the Commission, and that also eliminates the duplicative aggravating factors in the current guideline, would likely result in more consistent prosecutorial charging and plea-bargaining practices and also more within-range sentences by federal district judges. Thus, the current unacceptable degree of unwarranted sentencing disparities would be reduced.