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Project Safe Childhood

In This Issue

Introduction

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Deputy Attorney General

The abuse, neglect, exploitation, and trafficking of children cause profound harm to both the child victim and society. Ensuring that our children grow into adulthood without experiencing sexual trauma or physical abuse is more than a criminal justice issue: it is a moral imperative. That is why the Department of Justice has set as one of its key priorities the protection of vulnerable populations. And there couldn't be a more vulnerable population than children who are the victims of sexual exploitation, whether that victimization occurs through Internet-facilitated crimes such as the production, distribution, and possession of child pornography, by commercial sex trafficking of children, or by the victimization of children in Indian Country.

Since its creation in 2006, the Project Safe Childhood program, initially focused on Internet-facilitated crimes against children, has been hugely successful. The initiative fostered cooperation between federal, state, and local law enforcement and resulted in a substantial increase in prosecutions, along with an increase in education and awareness programs to compliment increased enforcement efforts. In 2011 Project Safe Childhood was expanded to include all crimes against children, including commercial sex trafficking of minors, child sex tourism, the failure of sex offenders to register, and crimes against children in Indian Country. Not surprisingly, the Project Safe Childhood program continues to exceed expectations. For example, the Department has significantly increased its investigation and prosecution of trafficking cases, taking a victim-centered approach, in close partnership with state and local law enforcement and non-governmental organizations that operate in this area.

As a former Assistant United States Attorney and United States Attorney for the Northern District of Georgia, I understand the unique difficulty that these cases impose on prosecutors, law enforcement, and victim-witness coordinators. I commend the Project Safe Childhood community, along with the Child Exploitation and Obscenity Section, for consistently coming together to offer each other substantive support on case-related matters and creating a network that facilitates open discussion on overall well-being for those of you who work these cases on a daily basis. I thank you on behalf of the Department for your continued efforts on these very important matters.

Despite our ongoing efforts, work still remains to be done. As technology changes, so does the threat environment to our children. Offenders are increasingly using encryption and other techniques in an effort to conceal evidence of their unlawful activities from law enforcement. As discussed in this Bulletin, offenders are migrating to Tor, where some of the most egregious images depicting the sexual abuse of children have been found. But regardless of the means that offenders use to victimize children, we will be there to identify, investigate, and prosecute them no matter where they seek to hide.

New Developments in SORNA

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I. Introduction

Over the last two decades, Congress has enacted various measures setting "minimum standards" for states and the principal U.S. territories regarding their sex offender registration and notification systems. The most recent set of standards can be found in the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901–16962 (2015), whose terms also apply to certain federally-recognized tribes. There has been one subsequent enactment affecting the SORNA registration standards, which directs that sex offenders be required to provide their Internet identifiers to the registries. *See* Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224 (2008) (codified at 42 U.S.C. § 16915a (2015)). Two sets of guidelines have also been issued to assist in the implementation of SORNA: one in 2008, The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38030–38041 (July 2, 2008); and the other in 2011, Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1630–1639 (Jan. 11, 2011). For a thorough summary of SORNA's requirements, see Bonnie Kane's article, "Sorna: A Primer." Bonnie Kane, *SORNA: A Primer*, 59 U.S. ATTORNEYS' BULL. 43, 43–53, *available at* http://www.justice.gov/sites/default/files/usao/legacy/2011/09/08/usab5905.pdf.

As of May 1, 2015, 17 states, 3 territories, and 86 federally-recognized Indian tribes have substantially implemented SORNA. Even among these implemented jurisdictions, there are variations in registration and notification laws, and reports detailing every implemented jurisdiction's system vis-à-vis SORNA's requirements can be found on the Web site of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) at http://www.smart.gov/sorna.htm. The General Accountability Office (GAO) issued a comprehensive report on the efforts and challenges in implementing SORNA in 2013. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS (2013), *available at* http://www.gao.gov/assets/660/652032.pdf.

This article will focus on three specialized topics that have emerged during the implementation of SORNA over the last 9 years: (1) the implementation and enforcement of SORNA in Indian Country, (2) the application of SORNA to persons convicted of a sex offense in military courts, and (3) the tracking of foreign travel by persons required to register as a sex offender under SORNA.

II. Indian Country

SORNA created a mechanism by which certain tribes could elect to become responsible jurisdictions regarding the registration and notification of sex offenders who live, work, or attend school on their lands. *See* 42 U.S.C. § 16927 (2015). As of May 1, 2015, there are more than 160 federally-recognized tribes operating as SORNA registration jurisdictions. These tribes either have established, or are in the process of establishing, a sex offender registration and notification program. It is important to note, however, that SORNA also created a mechanism by which certain tribes could opt out from state jurisdiction regarding the registration and notification of sex offenders who live, work, or attend school on their lands. *See id.*; Public L. No. 83-280, ch. 505, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162

(2006)). Generally speaking, the tribes that have been eligible to become SORNA registration jurisdictions are those who are *not* "PL-280" tribes.

A. SORNA implementation in Indian Country

Eighty-six tribes have substantially implemented SORNA. Of these tribes, the vast majority utilize the Model Tribal Code, which was developed by Indian law experts in conjunction with the SMART Office and fully covers *all* of SORNA's requirements. In some cases, there are tribes that have *more rigorous* registration requirements than the states in which they are located, particularly those tribes located in states that have not substantially implemented SORNA. For example, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) was one of the first tribes to substantially implement SORNA and meet all of SORNA's requirements in doing so. CTUIR is located entirely within the State of Oregon, which falls short of many of SORNA's provisions. *See* Maxine Bernstein, *Sex Offenders in Oregon: State Fails to Track Hundreds*, THE OREGONIAN (Oct. 2, 2013), http://www.oregonlive.com/sex offenders/special-presentation/ (The State of Oregon only posts 2.5 percent of its registered sex offenders on its public sex offender registry Web site.).

GAO recently issued a comprehensive report regarding SORNA implementation in Indian Country. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-23, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: ADDITIONAL OUTREACH AND NOTIFICATION OF TRIBES ABOUT OFFENDERS WHO ARE RELEASED FROM PRISON NEEDED (2014), *available at* http://www.gao.gov/assets/670/666975.pdf.

B. Validity of tribal court convictions

Legal issues unique to Indian Country impact the registration of tribal sex offenders and the enforcement of sex offender registration requirements against persons who either reside on tribal lands or were convicted by tribal courts. For example, because some tribal courts use different standards regarding the right to counsel as compared to state or federal courts, it is sometimes argued that prosecuting a person based, in part, on an underlying tribal conviction (for example, in a failure to register prosecution based on an underlying tribal sex offense conviction) violates the Sixth Amendment. Although no case is specifically on point, case law from the domestic violence arena supports the argument that an uncounseled tribal conviction is not constitutionally infirm and can form the basis of a federal prosecution based, in part, on that underlying conviction. *See United States v. Shavanaux*, 647 F.3d 993, 997–98 (10th Cir. 2011); *United States v. Cavanaugh*, 643 F.3d 592, 603 (8th Cir. 2011); *contra United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014).

C. Tribal registration versus state registration

Further complications may arise when an offender exclusively lives, works, and/or attends school on lands of a tribe operating as a SORNA jurisdiction. In such a case, can the offender be compelled to register with the state within which that tribal land is located? This question has formed the basis of litigation, particularly in the desert Southwest. For example, in New Mexico, the state cannot impose a duty to register on enrolled tribal members, living on tribal land, who have been convicted of federal sex offenses. *State v. Atcitty*, 215 P.3d 90, 98 (N.M. 2009). At the same time, in neighboring Arizona, persons living in Indian Country are required to keep their registration current with both the tribe and the state, or else run the risk of a federal prosecution for failure to register under 18 U.S.C. § 2250. *See, e.g.*, *United States v. Begay*, 622 F.3d 1187, 1189 (9th Cir. 2010) (SORNA requires convicted sex offenders to update their sex offender registration with the State of Arizona), *abrogated on other grounds by*, *United States v. DeJarnette*, 741 F.3d 971 (9th Cir. 2013). Even so, a tribal member in Arizona residing on tribal land cannot be prosecuted under *state* law for failure to register, unless a tribe's registration responsibilities have been delegated to the state via SORNA's delegation procedure. *State v. John*, 308 P.3d 1208, 1211 (Ariz. Ct. App. 2013).

III. Military

SORNA requires offenders convicted by military tribunals of registerable sex offenses to register with any jurisdiction where they live, work, or go to school, subject to the limitations described below. *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013). Through a series of statutory and administrative cross-references, SORNA requires that persons register as a sex offender whenever they have been convicted of a U.S. Code of Military Justice (UCMJ) offense listed in Department of Defense (DoD) Instruction 1325.07, which was revised in 2013. U.S. Dep't of Defense, Instruction 1325.07: Administration of Military Correctional Facilities and Clemency and Parole Authority, Enclosure 2, App'x 4 (2013).

Because of the specialized legal standing of much of the land held by the DoD, there are practical challenges to successfully detecting, monitoring, and tracking persons affiliated with DoD who are required to register as a sex offender. However, if a person resides, works, or attends school on a military base, depending on the source and manner in which the Federal Government obtained and holds the land housing that base, a state or territory might have no jurisdiction over the person's activities on the base. In other words, the base may be a "federal enclave" where only federal law applies. *See generally* U.S. CONST. art. I, § 8, cl. 17 (the Enclave Clause). Because of this, in some locations there may be sex offenders present on such military bases whose registration requirements the states cannot effectively enforce as a practical matter because those offenders live, work, and attend school solely on land considered to be a federal enclave with exclusive federal law enforcement jurisdiction.

A. Policy for identifying and monitoring DoD-affiliated registered sex offenders

The Federal Government does not register sex offenders. However, in part because of the jurisdictional limitations described above, the DoD adopted policies and procedures to independently track and monitor sex offenders who are either active duty members, civilian employees, contractors, or dependents of active duty members located on U.S. military installations at home and abroad. U.S. Dep't of Defense, Directive-Type Memorandum (DTM) 15-003: Registered Sex Offender (RSO) Identification, Notification, and Monitoring in DoD (2015); *see* U.S. Dep't of the Army, Army Regulation 190-45, Military Police: Law Enforcement Reporting § 2-7 (2007).

B. Bar on enlistment and commission

Over the coming years, the number of persons on active duty who are required to register as a sex offender should steadily decrease. In 2013 Congress enacted a provision that prohibits any person convicted of a felony sex offense from enlisting in or being commissioned as an officer in the Armed Forces. The National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 523, 126 Stat. 1632, 1636 (2013) (codified at 10 U.S.C. § 504 (2015) (note); 32 C.F.R. 66.6 (2015) (expanding the prohibition to any person required to register as a sex offender)). Branch policies generally require that any person convicted of a sex offense under the UCMJ be processed for administrative separation from the Service if their sentence did not involve discharge or dismissal. *See* U.S. Dep't of Defense, Army Directive 2013-21: Initiating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex Offenses (2013).

C. Public disclosure of courts-martial for sex offenses

There has also been a recent effort to make public information about individuals who have been court-martialed for any sex offense. The U.S. Marine Corps, Navy, and Air Force now all publicly disclose information about such convictions. *See generally* THE JUDGE ADVOCATE GENERAL'S CORPS, AIR FORCE SEXUAL ASSAULT COURT-MARTIAL CONVICTIONS: 2010–OCTOBER 2014 (2014), *available at* http://www.afjag.af.mil/shared/media/document/AFD-130917-061.pdf (4-year summary of Air Force Courts-Martial for sexual assault); AMERICA'S NAVY, http://www.navy.mil/listStories.asp?x=2 (list of

courts-martial published each month); Marine Corps General and Special Court-Martial Dispositions, http://www.hqmc.marines.mil/Portals/61/Docs/Courts-Martial141202.pdf (Oct.–Dec. 2014) (summary of court martial dispositions posted quarterly). In addition, Congress recently passed a measure that will require DoD to directly provide information about any UCMJ-convicted sex offender for inclusion in the National Sex Offender Registry (NSOR) (the FBI law enforcement-only database) and the National Sex Offender Public Registry Web site (NSOPW), although the mechanism by which this will be accomplished is yet to be determined. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, § 502 (May 29, 2015).

D. Legal issues

Given the unique structure of the military justice system, certain legal issues arise that are distinct from those in civilian courts. For example, an offender unsuccessfully challenged a state-level requirement to register based on a conviction of a sex offense under the UCMJ. He argued that a court-martial in a military court should not be included in the definition of "federal court." *Billingsley v. Alabama*, 115 So. 3d 192, 198 (Ala. Crim. App. 2012) (affirming the conviction because "violating provisions of the [UCMJ]—a law of the United States—carries consequences under [state] law").

Another issue is whether the military offense is "comparable" to a registerable state offense. "In at least one state, an offender convicted under Article 134 of the UCMJ for an offense relating to child pornography was not required to register because of the difficulty in comparing the UCMJ offense to a [registerable] state offense. *Doe v. Sex Offender Registry Board*, 2014 Mass. Super. LEXIS 13 (Mass. Super. Ct. 2014)." OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 5 (2014), *available at* http://www.smart.gov/caselaw/handbook_sept2014.pdf. Many states only require registration for military offenses that have elements "comparable" to a registerable state offense.

IV. International

The SMART Office serves as co-chair for the International Tracking of Sex Offenders Working Group (IWG) and has spearheaded the policy efforts to improve the ability of domestic law enforcement to track registered sex offenders who enter or depart the United States. Three items of interest to U.S. Attorneys regarding the work of the IWG are: (1) the notice of international travel required by SORNA, (2) foreign countries that have sex offender registration systems, and (3) the process for revoking or rescinding an offender's passport.

A. Notice of international travel

In 2011 the SORNA Supplemental Guidelines were issued by the Department of Justice, adding a requirement to SORNA's baseline standards that jurisdictions were required to have their offenders inform them of any intended international travel at least 21 days prior to that travel taking place. U.S. DEP'T OF JUSTICE, SUPPLEMENTAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 1637–38 (2011); Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630-01, 1637-38 (Jan. 11, 2011). Per these standards, offenders are to provide authorities with information regarding their itinerary and intended destinations, among other items. SORNA: INFORMATION REQUIRED FOR NOTICE OF INTERNATIONAL TRAVEL, http://www.smart.gov/international_travel.htm. Registration jurisdictions are required to provide this information to the National Sex Offender Targeting Center of the U.S. Marshals Service, which then works with INTERPOL to transmit information about such offenders to destination foreign countries. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-200, REGISTERED SEX OFFENDERS: SHARING MORE INFORMATION WILL ENABLE FEDERAL AGENCIES TO IMPROVE NOTIFICATIONS OF SEX OFFENDERS' INTERNATIONAL TRAVEL (2013),

available at http://www.gao.gov/assets/660/652194.pdf (providing information about the tracking system under development by the IWG).

B. Foreign country sex offender registration systems

To date, 24 foreign countries have some form of nationwide or provincial sex offender registration system. A handful of these systems are more akin to what we would consider a CHRI (criminal history record information) database as opposed to a "registry," but are included for the sake of thoroughness. The following countries have laws governing sex offender registration and notification at the national and/or provincial level: Argentina, Australia, Bahamas, Canada, France, Germany, Ireland, Jamaica, Kenya, Maldives, Malta, New Zealand, Nigeria, South Africa, South Korea, Taiwan, Trinidad & Tobago, United Kingdom and its commonwealth nations (Bermuda, Gibraltar, Guernsey, Isle of Man, Jersey, Pitcairn Islands), and the United States. South Korea, the Province of Western Australia, and two Canadian provinces also make some information publicly available via Web sites, while other countries have different community notification procedures. For example, there is a disclosure scheme in place in the United Kingdom authorizing law enforcement to provide details of certain sex offenders to the public. *See* GOV.UK, http://www.homeoffice.gov.uk/crime/child-sex-offender-disclosure.

The SMART Office recently issued the Global Overview of Sex Offender Registration and Notification Systems, *available at* http://www.smart.gov/pdfs/GlobalOverview.pdf, which provides more information on these foreign registration and notification systems.

C. Revoking or rescinding a sex offender's passport

There are certain circumstances in which a sex offender's passport can either be revoked or their application for a passport denied: (1) when a valid federal or state felony arrest warrant is out against the individual, or (2) when a criminal court order, parole, or probation condition forbids departure from the United States. The fact of the issuance of a warrant or the entry of a court order, standing alone, will *not* be transmitted to the Department of State, and the individual will still be able to travel on their existing passport, or apply for a duplicate passport in the event the original has been "surrendered" to the court. To ensure that a particular offender's passport is revoked, or any new application for passport is denied, law enforcement *must* contact the Department of State and provide all necessary information regarding the offender. More information on what is required is available from the Passport Services Office of Legal Affairs at (202) 485-6400.

V. Conclusion

Nine years after its passage, the implementation of SORNA continues across the United States. In the course of implementation, stakeholders continue to uncover issues and develop solutions to improve the monitoring and tracking of registered sex offenders. These efforts have been particularly beneficial in Indian Country as well as the military, and efforts to track registered sex offenders entering and departing the country continue. Practitioners are encouraged to contact the SMART Office with any additional questions.❖

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Civil Commitment of Sexually Dangerous Persons: Legal Challenges to the Adam Walsh Act

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I. Civil commitment procedures under the Adam Walsh Act

Title III of the Adam Walsh Child Safety and Protection Act of 2006 (Adam Walsh Act) created the Civil Commitment Program for Dangerous Sex Offenders, now codified at 18 U.S.C. § 4248, with additional provisions contained in § 4247. Section 4248 authorizes the Attorney General, individuals authorized by the Attorney General, and the Director of the Bureau of Prisons (BOP) to certify that an individual in one of three statutorily defined categories is a "sexually dangerous person," thereby instituting a civil commitment proceeding in the district where that person is confined. The three categories of persons who may be subject to civil commitment as sexually dangerous persons are: (1) persons in the custody of BOP, (2) persons committed to the custody of the Attorney General after having been found by the district court to be suffering from "a mental disease or defect rendering him mentally incompetent" pursuant to § 4241(d), and (3) persons for whom all charges are dismissed "solely for reasons relating to the mental condition of the person." 18 U.S.C. § 4248(a) (2015).

A "sexually dangerous person" is defined as someone "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." *Id.* § 4247(a)(5). An individual is "sexually dangerous to others" if that individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *Id.* § 4247(a)(6); *see also* 28 C.F.R. § 549.91(b) (2015) (expanding the definition of "sexually dangerous person" to include persons "assessed as sexually dangerous to others by a Bureau [of Prisons] mental health professional").

The civil commitment process is usually commenced by the BOP Sex Offender Certification Review Branch (SOCRB). The SOCRB reviews all inmate histories prior to their release from BOP custody to determine whether there is any record of attempted or actual sexual violence or child molestation. Inmates with a recorded history of sexual violence or child molestation are subject to an assessment of empirically-based static and dynamic risk factors. Psychological and legal records are also reviewed. A wide range of factors is incorporated into the assessment, including criminal history, social and family support, physical and psychological well-being, prison conduct, and other data. The BOP Certification Review Panel (CRP) is responsible for the final certification determination. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 8 (2014), *available at* www.bop.gov/resources/pdfs/legal_guide.pdf.

When the CRP certifies to a federal district judge that the prisoner: (1) previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that illness, abnormality, or disorder is "sexually dangerous to others," the statute automatically stays the prisoner's release from

custody, thereby providing the Government with the opportunity to prove its claims at a court hearing. 18 U.S.C. §§ 4247(a)(5)–(6), 4248 (2015); BUREAU OF PRISONS, LEGAL RESOURCE GUIDE 8. The district court in the district where the inmate is located will conduct a hearing and determine the merits of the CRP's finding. 18 U.S.C. § 4248(a) (2015). At the hearing, the prisoner "shall be represented by counsel" and shall have the opportunity, if he chooses, "to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine" the Government's witnesses. *Id.* §§ 4247(d), 4248(c). If the court finds by clear and convincing evidence that the inmate is a sexually dangerous person, the inmate is placed in the custody of the Attorney General as a civil commitment and held for treatment and possible release, oftentimes subject to supervised conditions, following a periodic review by the court. *Id.* § 4248(d)–(g).

Once the committed person is in the custody of the Attorney General, the Government must "make all reasonable efforts to cause" the state where that person was tried, or the state where he or she is domiciled, to "assume responsibility for his custody, care, and treatment." *Id.* § 4248(d). If either state agrees to assume that responsibility, the Attorney General "shall release" the committed person "to the appropriate official" of that state. *Id.* If neither state will assume such responsibility, then "the Attorney General shall place the person for treatment in a suitable [federal] facility" until such time as a state agrees to assume responsibility, or the person "is no longer sexually dangerous to others" (with or without ongoing treatment), and is thereby released. *Id.* The statute provides for ongoing psychiatric and judicial review of the committed person's case, including judicial hearings at the request of the committed person, at 6-month intervals. *Id.* § 4247(e)(1), (h); *see United States v. Cooke*, No. 5:09-HC-2034-FL (E.D.N.C. Dec. 17, 2013) (order requiring a showing of improvement to support a request for a hearing).

The statute requires the director of the federal facility to prepare annual reports regarding the individual's mental condition and whether the need for the individual's continued commitment persists. 18 U.S.C. § 4247(e)(1)(B) (2015). These reports must be submitted to the district court that ordered the commitment. *Id.* The director of the facility is also required to notify the committed individual of any available rehabilitation programs. *Id.* § 4247(e)(2).

A civilly committed individual is afforded several avenues to a discharge from federal custody. When the director of the facility where the prisoner is housed determines that the "person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen," of care or treatment for his or her condition, the director shall "promptly file a certificate to that effect" with the district court. *Id.* § 4248(e). The court, in turn, "shall order the discharge" or, on the Government's motion or the court's initiative, schedule a hearing to determine if discharge is appropriate. *Id.* Counsel for the prisoner or a legal guardian may also move for discharge and, if denied, renew the motion repeatedly every 180 days. *Id.* § 4247(h).

At a discharge hearing, the committed individual is afforded the same rights to counsel, to present evidence, and to subpoena and cross-examine witnesses that were afforded to him or her at the commitment hearing. If the court determines by a preponderance of the evidence that the committed individual is no longer sexually dangerous to others if released unconditionally or if released under a required regimen of treatment, then the court must order the appropriate discharge. *Id.* § 4248(e). The committed person also has a right to seek habeas relief. *Id.* § 4247(g).

Litigation surrounding the civil commitment process of the Adam Walsh Act has oftentimes focused on constitutional challenges to the Act's procedures. However, challenges to the Adam Walsh Act were preceded by constitutional challenges to earlier state civil commitment procedures. Indeed, the Supreme Court's analysis of state civil commitment proceedings clearly informed the development of the Adam Walsh Act civil commitment provisions.

II. Constitutional litigation regarding civil commitment proceedings prior to the Adam Walsh Act

A. Federal civil commitment law before the Adam Walsh Act

Federal civil commitment proceedings date back at least to the 19th century, when Congress provided for the commitment of prisoners in federal custody who were deemed mentally ill. *See, e.g.*, Act of Aug. 7, 1882, ch. 433 (22 Stat. 302) 330; Act of June 23, 1874, ch. 465, § 1 (18 Stat. 251) 251–252. Legislation passed in the 20th century, originally implemented in 1949, provides that persons in federal criminal custody, including those whose terms of incarceration are about to expire, may be civilly committed upon a determination that they suffer from a mental disease or defect and are dangerous. *See* Act of Sept. 7, 1949, ch. 535, § 1 (63 Stat. 686) 686–88 (codified as amended at 18 U.S.C. §§ 4241–4243, 4245–4246); *see United States v. Volungus*, 595 F.3d 1, 6 (1st Cir. 2010).

In *Greenwood v. United States*, 350 U.S. 366 (1956), the Supreme Court upheld the civil commitment of a pretrial detainee, and thus upheld the potentially indefinite pretrial commitment of a mentally incompetent defendant. The Court reasoned that civil commitment, as provided in 18 U.S.C. § 4246, was constitutional under the Necessary and Proper Clause as "an assertion of authority, duly guarded, auxiliary to incontestable national power." *Id.* at 375; *see Jackson v. Indiana*, 406 U.S. 715, 726 (1972) (recognizing that *Greenwood* settled any question of the Federal Government's "substantive power to commit"); *see also Jones v. United States*, 463 U.S. 354, 367–70 (1983) (stating that indefinite commitment of a dangerous person acquitted by reason of insanity does not violate due process). These early cases did not address civil commitment proceedings for sex offenders who may have a predisposition to reoffend.

Prior to the passage of the Adam Walsh Act in 2006, the Supreme Court had two opportunities to examine the constitutional issues surrounding state civil commitment proceedings and sex offenders. Both cases involved application of the Kansas Sexually Violent Predator Act, enacted in 1994.

B. *Kansas v. Hendricks*, 521 U.S. 346 (1997)

The State of Kansas invoked the Kansas Sexually Violent Predator Act for the first time to commit Leroy Hendricks, an inmate with an extensive history of child molestation, who was scheduled to be released from prison shortly after the Act went into effect. Hendricks challenged the law on substantive due process, double jeopardy, and ex post facto grounds. The Kansas Supreme Court invalidated the Act, finding that the Act's pre-commitment condition of a "mental abnormality" did not satisfy what the court believed was the "substantive" due process requirement that civil commitment must be predicated on a finding of "mental illness." *See Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (citing *In re Hendricks*, 912 P.2d 129, 138 (Kan. 1996)). The State of Kansas petitioned for certiorari and Hendricks subsequently filed a cross-petition raising double jeopardy and ex post facto claims.

Hendricks had been convicted in 1984 of taking indecent liberties with two 13-year-old boys. After serving nearly 10 years of his sentence, he was scheduled for release to a halfway house. Shortly before Hendricks' scheduled release, the State of Kansas filed a petition in state court seeking his civil confinement as a sexually violent predator. In August 1994, Hendricks moved to dismiss the petition, alleging a series of federal constitutional violations. The court reserved ruling on the Act's constitutionality and concluded that there was probable cause to support a finding that Hendricks was a sexually violent predator. Hendricks was ordered to be evaluated at a state mental hospital. *Id.* at 353–54.

Hendricks subsequently proceeded to trial before a jury on the question of whether he qualified as a sexually violent predator. His own testimony at trial revealed an extensive history of child sexual molestation and abuse dating back nearly 40 years, involving both male and female children. Treatment efforts were unsuccessful, and Hendricks was diagnosed as a pedophile in 1972. Hendricks admitted at

trial that he repeatedly abused children whenever he was not confined. He acknowledged that his behavior harmed children and he expressed hope that he would not sexually molest them again, but conceded that the only way he could refrain from sexually abusing children was "to die." *Id.* at 355. He agreed with the physician's diagnosis that he suffered from pedophilia and that he was not cured of the condition. Other witnesses testified about Hendricks' behavior and diagnosis, including two of his stepchildren who had been sexually abused by Hendricks, and mental health caregivers who had sought to treat him. *Id*. at 354–55.

The jury found beyond a reasonable doubt that Hendricks was a sexually violent predator. The trial court determined that pedophilia qualifies as a "mental disorder" as defined by the Act and ordered Hendricks committed, the first person to be committed under the Act. On appeal, the Kansas Supreme Court accepted Hendricks' due process claim and declared that in order to support an involuntary civil commitment process, the state was required to prove by clear and convincing evidence that the person is both mentally ill and a danger to himself or to others. The court determined that "the Act's definition of 'mental abnormality' did not satisfy what it perceived [was the Kansas Supreme] Court's 'mental illness' requirement in the civil commitment context." *Id.* at 356. The majority did not address Hendricks' double jeopardy or ex post facto claims in its opinion. The dissent examined and rejected each of Hendricks' constitutional claims. *Id.* (citing *In re Hendricks*, 912 P.2d at 140–56 (Larson, J., dissenting)).

The State of Kansas petitioned for certiorari and Hendricks subsequently filed a cross-petition raising double jeopardy and ex post facto claims. *Id.* at 350. Accepting certiorari, the Supreme Court upheld the constitutionality of the Kansas Act, reversing the Kansas Supreme Court. *Id.*

Writing for the majority, Justice Clarence Thomas began his analysis by noting that the liberty secured by the Constitution is not an absolute right guaranteeing that all persons at all times will be free from restraint. Rather, there are manifold restraints to which all people are subject in support of the common good. *Id.* at 356–57 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (upholding the constitutionality of a compulsory state vaccination law as a valid exercise of the state's police power)). One well-established basis for restraint is the forcible civil detainment of individuals who are unable to control their behavior and who pose a danger to public health and safety. The Supreme Court has consistently upheld involuntary commitment statutes where confinement is consistent with constitutional procedures and standards. *Id.* at 357 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (Louisiana statute that allowed for continued confinement of defendant found not guilty by reason of insanity, on the basis of defendant's antisocial personality, notwithstanding a hospital review committee report that found no evidence of mental illness and recommended conditional discharge, violated due process)); *see also Addington v. Texas*, 441 U.S. 418, 426–27, 433 (1979) (in order to commit an individual to a mental hospital in a civil proceeding, the state is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: (1) the person sought to be committed is mentally ill, and (2) the person requires hospitalization for his or her own welfare or the protection of others).

The Kansas Act required a finding of dangerousness, either to oneself or to others, as a prerequisite to involuntary commitment. Commitment proceedings could be initiated "only when a person has been convicted or charged with a sexually violent offense and suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." *Hendricks*, 521 U.S. at 357 (quoting KAN. STAT. ANN. § 59-29a02(a) (2015)) (internal quotation marks omitted). In upholding the constitutionality of the Kansas Act, the Supreme Court noted that it has sustained civil commitment statutes previously where a finding of dangerousness was coupled with proof of some additional factor, such as "mental illness" or "mental abnormality." *Id.* at 358 (citing *Heller v. Doe*, 509 U.S. 312, 314–15 (1993) (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual)); *see Allen v. Illinois*, 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 271–72 (1940) (Minnesota statute permitting commitment of dangerous individual

with "psychopathic personality"). The Kansas Act required a pre-commitment determination of a "mental abnormality" or "personality disorder," combined with a finding of future dangerousness, to support an involuntary commitment. *Hendricks*, 521 U.S. at 358. Hendricks was diagnosed as suffering from pedophilia, "a condition the psychiatric profession itself classifies as a serious mental disorder." *Id.* at 360. His admitted lack of self-control, combined with a court finding of future dangerousness, distinguished Hendricks from other dangerous persons more properly adjudicated through criminal proceedings. Therefore, the Act's application to Hendricks satisfied substantive due process. *Id.*

The Supreme Court also considered and rejected the constitutional challenges raised in Hendricks' cross-petition regarding double jeopardy claims and ex post facto allegations. Hendricks argued that his civil commitment under the Kansas Act amounted to double jeopardy because the Act was essentially a criminal statute, and his so-called civil commitment was predicated on criminal conduct for which he had already been convicted. A determination of whether a proceeding is civil or criminal begins with statutory construction. The Kansas Act was located in the probate code and not the criminal code, thereby indicating that the Kansas legislature intended the commitment statute to be a civil one. Furthermore, commitment under the Kansas Act "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." *Id.* at 362. There is no suggestion of retribution because the Act "does not affix culpability for prior criminal conduct." *Id.* Rather, evidence of previous criminal behavior is used to demonstrate the accused's mental condition and to predict propensity for future criminal conduct. *Id.* at 361–62. The Supreme Court explained that the Kansas Act contains no element of scienter, which also sets it apart from most criminal statutes. In addition, there can be no suggestion that the Act operates as a deterrent to future crime, because, by definition, one suffering with a "mental abnormality" or "personality disorder" that precludes the exercise of adequate self-control is not subject to deterrence. *Id.* at 362.

The state's use of safeguards traditionally found in criminal trials, such as a jury trial with a burden of proof beyond a reasonable doubt and court-appointed counsel for indigents subject to an involuntary commitment trial before a state judge, did not transform a civil proceeding into a criminal proceeding. The state decision to provide "procedural safeguards applicable in criminal trials does not itself turn the proceedings into criminal prosecutions." *Id.* at 348 (citing *Allen*, 478 U.S. at 372). The fact that a person is detained involuntarily does not lead inexorably to the conclusion that the Government has imposed punishment, because, as previously noted, the state may restrict the freedom of the mentally ill and those persons who pose a threat to public safety. *Id.* at 363; *see also Seling v. Young*, 531 U.S. 250, 267 (2001) (inmate being held pursuant to the State of Washington's sexually violent predator statute petitioned for writ of habeas corpus, arguing that the law was unconstitutional; held that "[a]n Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and *Ex Post Facto* Clauses").

The Supreme Court was also unpersuaded by Hendricks' argument that previous court decisions required a finding of "mental illness," not of "mental abnormality" or "personality disorder," as provided by the Kansas Act. Rejecting this distinction, the Supreme Court noted that it had "traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Hendricks*, 521 U.S. at 359. The Court concluded that "[t]o the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria . . . ." *Id.* at 360.

The Supreme Court also disposed of Hendricks' ex post facto claim, noting that because it had already determined that the Kansas Act did not impose punishment, it did not implicate the Ex Post Facto Clause. Further, the Act did not criminalize conduct that was legal before its enactment. To the extent that a defendant's previous behavior was taken into account, that information was used exclusively for evidentiary purposes. *Id.* at 370–71.

The two additional issues addressed by the Supreme Court focused on whether commitment under the Act was indefinite and whether future treatment was a precondition for civil confinement. Commitment under the Act, the Court concluded, was only *potentially* indefinite, because the maximum amount of time between judicial proceedings for anyone committed pursuant to the Act was 1 year. The statute provided for a yearly review process, and if the state intended to detain an individual beyond a year, a court would need to find, beyond a reasonable doubt, that the individual satisfied the same conditions required in the initial commitment. *Id.* at 364 (citing KAN. STAT. ANN. § 59-29a08).

Hendricks reiterated his contention that the Kansas Act was punitive because it failed to offer any legitimate treatment. Without treatment, he urged, confinement amounts to punishment. The Supreme Court rejected the suggestion that available treatment is a precondition to civil commitment, noting that "[t]o conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions." *Id.* at 366. The Court also noted that Hendricks was indeed receiving treatment and was housed in a special unit operated by the Kansas Department of Health and Social and Rehabilitative Services, segregated from the general prison population in a facility not operated by employees of the Department of Corrections, but "by other trained individuals." *Id.* at 368.

The Supreme Court summarized its findings in one succinct paragraph:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if . . . possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent. We therefore hold that the Act does not establish criminal proceedings and that involuntary confinement pursuant to the Act is not punitive. Our conclusion that the Act is nonpunitive thus removes an essential prerequisite for both Hendricks' double jeopardy and *ex post facto* claims.

Id. at 368–69.

C. *Kansas v. Crane*, 534 U.S. 407 (2002)

Some 5 years after its *Hendricks* decision, the Supreme Court reviewed the application of *Hendricks* in deciding another Kansas sex offender in *Kansas v. Crane*, 534 U.S. 407 (2002). Michael Crane was a previously convicted sex offender who, according to at least one of the state's psychiatric witnesses, suffered from both exhibitionism and antisocial personality disorder. After the jury trial, Crane made a motion for summary judgment, arguing that while the state proved he had a personality disorder, it did not prove he was unable to control his dangerous behavior. The Kansas trial judge rejected the argument that civil commitment required a finding of his inability to control his behavior and ordered Crane's civil commitment. *See In re Crane*, 7 P.3d 285, 287, 290 (Kan. 2000).

On appeal, the Kansas Supreme Court reversed, interpreting the Supreme Court's decision in *Hendricks* to require a finding that the defendant cannot control his behavior. *Id.* at 290. The state sought review, contending that the Kansas Supreme Court incorrectly read *Hendricks* as requiring that the state must always prove that the individual subject to civil commitment is completely unable to control his behavior. *See Crane*, 534 U.S. at 411.

The U.S. Supreme Court began its analysis by clarifying that "*Hendricks* set forth no requirement of *total* or *complete* lack of control." *Id.* However, it disagreed with the State of Kansas over the issue of whether *some* lack-of-self-control determination was constitutionally required. Returning to the reasoning of its *Hendricks* decision, the *Crane* Court noted that the Kansas Act required a finding of a "mental

abnormality" or "personality disorder" that makes it "difficult, if not impossible, for the dangerous person to control his behavior." *Id.* (quoting *Hendricks*, 521 U.S. at 358). The *Crane* Court reiterated the constitutional importance of distinguishing between a dangerous sexual offender subject to civil commitment and other dangerous persons who are perhaps more appropriately addressed through criminal court proceedings. Civil commitment must not be used for retribution or general deterrence. A critical distinguishing feature of the civil commitment process is the "special and serious lack of ability to control behavior." *Id.* 412–13.

The *Crane* Court stressed that it did not imbue the phrase "lack of control" with "a particularly narrow or technical meaning." *Id.* at 407. Inability to control behavior is not demonstrable with mathematical precision. "It is enough to say that there must be proof of serious difficulty in controlling behavior." *Id.* at 413. The lack of self-control, combined with the severity of the mental abnormality or personality disorder, must be sufficient to distinguish the dangerous sexual offender, subject to civil commitment, from "the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* (citing *Hendricks*, 521 U.S. at 357–58). The Court eschewed bright-line rules, noting that "the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." *Id.* (citing *Hendricks*, 521 U.S. at 359). Because the trial court had made no finding on the issue of Crane's ability to control his dangerous behavior, the judgment was vacated and the case remanded. *Id.* at 415.

III. *United States v. Comstock* and the constitutionality of the Adam Walsh Act

A. The history

The Adam Walsh Act was enacted in 2006. The drafters had the benefit of the Supreme Court's opinions in *Hendricks* and *Crane*, and it is clear that the Adam Walsh Act is partly modeled on the Kansas Sexually Violent Predator Act. Nevertheless, the Supreme Court quickly had an opportunity to examine the constitutionality of the Adam Walsh Act's civil commitment procedures in *United States v. Comstock*, 560 U.S. 126 (2010) (*Comstock*). This case joined for appeal five cases involving civil commitment proceedings initiated against five individuals in the Eastern District of North Carolina in late 2006, shortly after the Adam Walsh Act was passed.

Three of the five defendants at issue had previously pled guilty in federal court to possession of child pornography; a fourth had pled guilty in federal court to sexual abuse of a minor; and the fifth had been charged in federal court with sexual abuse of a minor and had been found mentally incompetent to stand trial. Before the district court, each of the five moved to dismiss their respective civil commitment proceedings on constitutional grounds, claiming that the commitment proceedings were criminal—not civil—in nature, and thereby in violation of the Double Jeopardy Clause. They also claimed that the proceedings violated the Ex Post Facto Clause and the Sixth and Eighth Amendments; that they were denied substantive due process and equal protection under the law; that they were denied procedural due process because the Act allowed for a showing of sexual dangerousness by clear and convincing evidence rather than beyond a reasonable doubt; and finally, that Congress exceeded its authority under the Commerce Clause and the Necessary and Proper Clause.

The district court agreed that § 4248's civil commitment scheme could not withstand constitutional scrutiny and dismissed the proceedings. *United States v. Comstock*, 507 F. Supp. 2d 522, 526, 560 (E.D.N.C. 2007). On appeal, the Fourth Circuit, in *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009) (*Comstock I*), upheld the district court's dismissal of the proceedings, finding that Congress exceeded its constitutional authority in enacting § 4248. The Fourth Circuit did not reach any of the other constitutional challenges raised by the five respondents in the district court.

B. The Supreme Court opinion

The Supreme Court granted the Government's request for certiorari, limited to the question of Congress' authority under the Necessary and Proper Clause, Article I, Section 8, because there was a split in the circuits on this question. *Comstock*, 560 U.S. at 132–33 (citing *United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010) (civil commitment of a sexually dangerous person already in federal criminal custody was within the scope of congressional power as conferred by the Necessary and Proper Clause); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009) (same)). The High Court reversed the Fourth Circuit, concluding that the Constitution grants Congress legislative power sufficient to enact the civil commitment procedures of the Adam Wash Act, as provided in 18 U.S.C. § 4248. *Id.* at 133.

The Court began its analysis, by citing the oft-quoted definition of the Necessary and Proper Clause provided by Chief Justice Marshall in *McCulloch v. Maryland*:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 134 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

The Court then enumerated the five factors it was constrained to consider in determining whether the Necessary and Proper Clause granted Congress the authority sufficient to enact § 4248.

Factor one: First, the *Comstock* Court noted that it must consider whether the statute "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004) (upholding Congress' authority under the Necessary and Proper Clause to enact a criminal statute in furtherance of federal power granted by the Spending Clause)). If indeed Congress possesses the enumerated power, the Court has previously made clear that Congress' "choice of means" for executing that authority is very broad. *Id.* at 135 (citing *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934); *Champion v. Ames*, 188 U.S. 321, 355 (1903) (referred to in *Comstock* as the *Lottery Case*)). The Court explained that the Necessary and Proper Clause, for example, has consistently been construed as providing to Congress the authority to enact criminal laws in furtherance of its authority to regulate commerce, to enforce civil rights, to spend funds for the general welfare, and to create prisons.

Factor two: Having defined the breadth of the Necessary and Proper Clause, the *Comstock* Court went on to examine its second consideration: the reasonableness of the relationship between the Adam Walsh Act civil commitment procedures and preexisting federal law. The Court emphasized that "the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id.* at 137. Federally sanctioned civil commitment procedures date back at least to 1855 and the establishment of St. Elizabeth's Hospital in the District of Columbia, which provided for commitment of any person "who had been charged with a crime and who was insane or later became insane during the continuance of his or her sentence in the United States penitentiary." *Id.* at 138 (quoting Act of Feb. 7, 1857, ch. 37, §§ 5–6 (11 Stat. 158) (internal quotation marks omitted). This authority was subsequently expanded so that before the end of the 19th century, Congress had created a national, federal civil commitment program such that any person charged with, or convicted of, a federal offense could be confined in a federal mental institution until the completion of the prisoner's federal sentence. *Id.* at 138.

Beginning in 1948, Congress enacted a series of statutes to provide for civil commitment for individuals who are, or who become, mentally incompetent at any time after their arrest and before the expiration of their federal sentence. 18 U.S.C. §§ 4241, 4244, 4247–4248 (2015). These statutes incorporated certain procedural safeguards, including judicial review of the findings of the Bureau of Prisons' examiners. *See id.* §§ 4242, 4246, 4247. They also provided for the "continued" civil

commitment of an individual due to be released from prison because of the expiration of his sentence, where "release would create a substantial risk of bodily injury to another person or serious damage to property of another," subject to certain procedural requirements. *See id.* §§ 4246(d), 4247; *Comstock*, 560 U.S. at 140–41.

The 2006 Adam Walsh Act, 18 USC § 4248, differed from earlier statutes in that it focused on individuals who, due to mental illness, are sexually dangerous. The *Comstock* Court emphasized that many sexually dangerous individuals were likely *already* subject to civil commitment under § 4246. "Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949." *Comstock*, 560 U.S. at 142. Therefore, the Court reasoned that the Adam Walsh civil commitment provisions did not significantly expand federal law pertaining to civil commitment. *Id.*

Factor three: The third factor considered by the *Comstock* Court was whether Congress had "reasonably extended its longstanding civil-commitment system" by exercising its constitutional power to "protect nearby (and other) communities from the danger federal prisoners may pose." *Id.* Finding that Congress had done so, the Court provided the analogy of a federal prisoner infected with a communicable disease that threatens others. Under these circumstances, the Court reasoned that it would be "necessary and proper" for the Federal Government to refuse to release the prisoner from custody at least until the threat diminished. "And if confinement of such an individual is a 'necessary and proper' thing to do, then how could it not be similarly 'necessary and proper' to confine an individual whose mental illness threatens others to the same degree?" *Id.* at 142–43. The Court reasoned that § 4248 was "reasonably adapted" to Congress' power "to act as a responsible federal custodian." *Id.* at 143.

Factor four: The fourth point in the *Comstock* Court's analysis of whether the Adam Walsh Act civil commitment procedures were "necessary and proper" underscored that the Act correctly accounts for state interests. Both the respondents and the *Comstock* dissent urged that § 4248 violated the Tenth Amendment because it interferes with state authority in an area of the law typically reserved for state sovereignty. Looking to the text of the Tenth Amendment, the Court focused on the Amendment's first clause: "The powers not delegated to the United States by the Constitution . . . ." U.S. CONST. amend. X. Powers "delegated to the United States" include those enumerated powers set forth in Article I "along with the implementation authority granted by the Necessary and Proper Clause." *Comstock*, 560 U.S. at 144. Thus, "[v]irtually by definition" the power to legislate civil commitment proceedings for sexually dangerous federal detainees is not reserved to the states. *Id.* (citing *New York v. United States*, 505 U.S. 144, 156 (1992) ("[I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.")). Furthermore, the Act expressly accommodates important state interests. Section 4248(d) provides that the Attorney General must inform the state(s) in which the federal prisoner "is domiciled or was tried" that the prisoner is being detained, and the Attorney General must encourage the states to assume custody of the individual. If one of the states agrees to assume responsibility, the Attorney General must release the prisoner to the appropriate state official. Either state has the right, at any time, to assert authority over the committed individual, which will prompt a transfer of that individual from federal to state custody. *Id*. at 144–45.

Factor five: Fifth, the Court considered whether the links between § 4248 and an enumerated Article I power were too attenuated to pass constitutional muster. In furtherance of its authority to enforce "necessary and proper" federal laws, Congress has the implied power to punish and imprison individuals who violate laws. This authority includes the authority to commit individuals who, due to mental illness, are sexually dangerous. *Id*. at 137–38, 146–47 (citing *Greenwood v. United States*, 350 U.S. 366 (1956)).

> Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the

> safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release.

Id. at 147.

In support of its analysis, the Court emphasized that § 4248 "is narrow in scope" and "has been applied to only a small fraction of federal prisoners." *Id.* at 148. Thus, far from operating as an unconstitutional general "police power," § 4248 is a "reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.*

The Supreme Court reversed and remanded the case back to the Fourth Circuit but noted that its narrowly tailored holding did not decide any claims pertaining to equal protection of the law, substantive or procedural due process, or any other rights guaranteed by the constitution. *Id.* at 149–50.

C. The Fourth Circuit on remand

On remand, the Fourth Circuit reconsidered the case in *United States v. Comstock*, 627 F.3d 513 (4th Cir. 2010) (*Comstock II*), and focused on the issue unresolved by the Supreme Court decision: the original district court finding that the Adam Walsh Act civil commitment procedures were unconstitutional because the Act violates the Due Process Clause of the Constitution. The Act authorizes a civil commitment if a court finds by "clear and convincing evidence" that an individual "has engaged or attempted to engage in sexually violent conduct or child molestation" and is "sexually dangerous to others." 18 U.S.C. §§ 4247(a)(5), 4248(d) (2015). The district court in *United States v. Comstock*, 507 F. Supp. 2d 522, 559–60 (E.D.N.C. 2007), previously held that the Due Process Clause requires the Government to establish the first of these findings by proof beyond a reasonable doubt, therefore concluding that the "clear and convincing evidence" standard was constitutionally inadequate.

The Fourth Circuit in *Comstock II* began its analysis by emphasizing that the respondents faced a "daunting task" in their due process challenge to the civil commitment proceedings of the Adam Walsh Act. *Comstock II*, 627 F.3d at 518. "[A] court presumes that congress has complied with the Constitution," and deference must be afforded to congressional judgment even in the face of constitutional challenges raised by litigants. *Id.* (citing *United States v. Morrison*, 529 U.S. 598, 607 (2000); *Walters v. Nat'l Ass'n of Radiation Surviors*, 473 U.S. 305, 319–20 (1985)). The Fourth Circuit emphasized that "respondents mount only a facial challenge to the Act," and "courts generally disfavor such . . . challenges." *Id.* Indeed, a facial challenge will not prevail if a "statute has a 'plainly legitimate sweep.' " *Id.* at 519 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). The Supreme Court previously held that a state could civilly commit a person without satisfying a "beyond a reasonable doubt" burden of proof, and that clear and convincing evidence sufficed to justify the civil commitment of mentally ill persons. *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 427–31, 432–33 (1979)).

Respondents argued that, in point of fact, § 4248 required a prior criminal act finding before an individual could be civilly committed. Therefore, under the Supreme Court's reasoning in the *In re Winship* decision, a beyond a reasonable doubt standard must apply to this finding. *Id.* In *In re Winship*, the Court explained that a juvenile delinquency proceeding, where a juvenile found to be "delinquent" could lose his liberty for a term of years, is comparable in seriousness to a felony prosecution. Consequently, a juvenile who commits an act which, if done by an adult, would constitute a crime, is constitutionally entitled to a proof beyond a reasonable doubt standard when charged with violations of a criminal law. *See In re Winship*, 397 U.S. 358, 365, 366 (1970). *Comstock II* made short work of this argument, noting that "[n]othing in the Act requires that the finding of past conduct constitute criminal behavior." *Comstock II*, 627 F.3d at 520. The Act mandates a finding that a person "has engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. § 4247(a)(5) (2015). The Act and accompanying regulations do not limit either "sexually violent conduct" or "child molestation" to

criminal activity, and the Fourth Circuit concluded that both terms were broad enough "to encompass noncriminal conduct such as unlawful, tortious conduct." *Comstock II*, 627 F.3d at 520 (citing 28 C.F.R. §§ 549.92, 549.93 (2015)). Further, the Fourth Circuit noted that the Supreme Court previously held that a civil commitment proceeding, unlike the juvenile delinquency proceeding in *Winship*, "can in no sense be equated to a criminal prosecution." *Id.* at 521 (quoting *Addington*, 441 U.S. at 418, 427–28).

The factual issues surrounding findings of "sexually violent conduct" and "child molestation" represent only the *beginning* of the inquiry in a civil commitment proceeding. The district court making the civil commitment determination must also determine if the individual "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. §§ 4247(a)(5)–(6), 4248(d) (2015). Indeed, *Kansas v. Hendricks* stands for the proposition that use of past criminal conduct may be introduced in civil commitment proceedings for legitimate evidentiary purposes. Accordingly, the Fourth Circuit in *Comstock II* rejected respondents' due process challenge to the clear and convincing standard mandated by § 4248 and remanded the case to the district court. *Comstock II*, 627 F.3d at 525.

IV. Civil commitment legal challenges after *United States v. Comstock*

A. Constitutional challenges post-*Comstock*

In the aftermath of the *Comstock* decisions, there have been several significant courts of appeals decisions examining the constitutionality and scope of the Adam Walsh Act civil commitment procedures. Many of these cases are from the Fourth Circuit, where a number of civil commitment proceedings were held in abeyance, pending the outcome of the *Comstock* case. As a result, several defendants raised constitutional challenges that their due process rights were violated because the Government failed to provide a speedy judicial remedy for their claims. The leading example is *United States v. Timms*, 664 F.3d 436 (4th Cir. 2012).

In October 2008, while *Comstock I* was pending before the Fourth Circuit, the Government filed a certificate in the Eastern District of North Carolina, seeking to commit Timms as a "sexually dangerous person" under § 4248. At the time, Timms was in BOP custody, serving a 100-month sentence for soliciting and receiving child pornography by mail. He was scheduled to be released from BOP in November 2008, but because the Government filed a certificate, his release was stayed pending disposition of the *Comstock* cases. Timms' commitment hearing was finally held in May 2011, 31 months after Timms had been scheduled to be released from BOP. The parties presented evidence as to whether Timms satisfied the § 4248 criteria for civil commitment as a "sexually dangerous person." The district court's order, however, ultimately did not address the merits of this issue. Rather, the district court made three determinations on the constitutional issues raised by the defendant. First, the court rejected defendant's contention that § 4248 is a criminal rather than a civil proceeding. Second, relying on the analysis of *Comstock II*, the court rejected the defendant's claim that § 4248 requires a "beyond a reasonable doubt" burden of proof. However, the district court agreed with Timms that, as applied to him, § 4248 deprived him of equal protection under the Fifth and Fourteenth Amendments, and of due process under the Fifth Amendment, and dismissed the civil proceedings. *Id.* at 443.

On appeal, the Fourth Circuit cited its previous analysis in *Comstock II* in support of its determination that § 4248 is indeed a civil, and not criminal proceeding, with no requirement of proof beyond a reasonable doubt. *Id.* at 455–56 (citing *Comstock II*, 627 F.3d at 519–24). Furthermore, the Fourth Circuit rejected the district court's finding of an equal protection violation. *Id.* at 449. The court emphasized that civil commitment of sexually dangerous persons in the custody of BOP following their incarceration does not violate equal protection rights, even though the civil commitment proceedings do not apply to sexually dangerous persons not in BOP custody. "Congress rationally limited § 4248's scope

to sexually dangerous persons within BOP custody based on Congress' limited police power and the federal interest in protecting the public from reasonably foreseeable harm from such persons." *Id.*

The Fourth Circuit rejected Timms' due process claims based upon the 31-month delay between the conclusion of Timms' federal prison sentence and the hearing on the Government's application to have him civilly committed as a sexually dangerous person. While the court found the delay "troubling," it found that the delay did not rise to a due process violation, given the specific exigencies in the case. *Id.* at 450. The district court attributed the "grim delay" to the Government, but the Fourth Circuit recognized that the case was properly placed in abeyance, pursuant to the district court's *sua sponte* initiative, while the constitutional challenges to § 4248 were resolved. Moreover, Timms did not request a hearing in the civil commitment proceedings for nearly 2½ years. Consequently, the Government could not be held responsible for the delay. *Id.* at 453. Based on the unique circumstances of this case, the Fourth Circuit concluded that the district court erred in finding a due process violation as applied to Timms. *Id.* at 454–55; *accord United States v. Bolander*, 722 F.3d 199, 216–17, 220 (4th Cir. 2013) (5-year delay between conclusion of inmate's prison sentence and hearing on Government's application to have him civilly committed did not violate due process where the inmate had moved for a continuance and proceedings remained under a cloud of uncertainty pending the *Comstock I* & *II* decisions).

B. Distinguishing legal custody and physical custody of BOP

More recent appellate court decisions analyzing the Adam Walsh Act civil commitment process have focused on the precise wording of § 4248(a) and the distinction between legal custody and physical custody in BOP. The first appellate court to address the issue was the Seventh Circuit in *United States v. Hernandez-Arenado*, 571 F.3d 662 (7th Cir. 2009), where the Government filed a petition to civilly commit an alien who was being housed in a BOP facility, even though his detention was pursuant to an Immigration and Customs Enforcement (ICE) detainer from the Department of Homeland Security. Section 4248 states that civil commitment for sexually dangerous persons may be instituted against "a person who is in the custody of the Bureau of Prisons." 18 U.S.C § 4248(a) (2015). The question confronted by the Seventh Circuit turned on whether "physical custody" was sufficient to bring an alien ICE detainee within the ambit of the Adam Walsh Act. *Hernandez-Arenado*, 571 F.3d at 664–65. Noting that the term "custody" has different meanings in different contexts, the court attempted to give context to the term. Many persons held in the custody and care of BOP are not convicted offenders serving active prison sentences. In addition to ICE detainees, BOP houses material witnesses and persons subject to civil contempt. The Seventh Circuit concluded that these individuals did not come within the scope of the Adam Walsh Act and that physical custody in BOP—without more—was insufficient to subject a prisoner to civil commitment proceedings under § 4248. *Id.* at 667.

One year later, the Fourth Circuit reached a similar result in *United States v. Joshua*, 607 F.3d 379 (4th Cir. 2010), a case where the Government petitioned to commit a court-martialed Army officer housed in BOP. Notwithstanding the defendant's physical location in BOP, the Fourth Circuit focused on the defendant's legal status: he had been convicted and sentenced in a military court-martial, pursuant to the Uniform Code of Military Justice (UCMJ), and was serving his sentence in a BOP facility under a Memorandum of Agreement entered into under the statutory authority of the UCMJ. The court explained that Congress granted the Attorney General responsibility for prosecuting federal crimes, but the Attorney General has no authority to enforce the UCMJ against military personnel. Furthermore, the military penal system is distinct and separate from BOP. Defendant's physical presence in BOP did not satisfy the "in custody" provision of § 4248. The army was responsible for the defendant's legal custody. The Fourth Circuit held that in order for a prisoner to be subject to civil commitment proceedings as provided in § 4248, BOP must have "ultimate legal authority over a person's detention." *Id.* at 388. The district court's dismissal of the Government's petition was affirmed. *Id.* at 391.

Another Fourth Circuit case that addressed what it means to be in the custody of BOP for purposes of § 4248 is *United States v. Savage*, 737 F.3d 304 (4th Cir. 2013). The defendant was convicted

under the District of Columbia Code (D.C. Code) and was serving a sentence in BOP when the Government initiated proceedings to have him certified as a sexually dangerous person. Defendant argued that he was not "in custody" within the meaning of § 4248(a). The Court of Appeals began by distinguishing its earlier decision in *Joshua*, noting that District of Columbia offenders are placed in BOP custody by statutory authority. *Id.* at 307–08 (citing D.C. CODE § 24-201.26 (2015)). The court therefore concluded that for purposes of § 4248, District of Columbia offenders are subject to possible civil commitment because they are in the legal custody of BOP when they are incarcerated. *Id.* at 309–10.

Much of the post-*Comstock* litigation involving § 4248 is fact-specific and focuses on whether the Government has met its burden of establishing an individual's future sexual dangerousness by clear and convincing evidence. *See, e.g.*, *United States v. Perez*, 752 F.3d 398, 411 (4th Cir. 2014) (district court was not clearly erroneous in finding that respondent was a "sexually dangerous person" where respondent, who suffered from pedophilia, did not dispute that he engaged in child molestation offenses); *United States v. Caporale*, 701 F.3d 128, 139–42 (4th Cir. 2012) (affirming district court's order that defendant be freed from custody, finding that, contrary to the district court's legal determination, the inmate did indeed suffer from a qualifying mental impairment by virtue of his inability to function normally in society as a result of his fixation on underage, pubescent boys, but ultimately concluding that the district court was not clearly erroneous in crediting expert testimony that the inmate possessed sufficient volitional control to prevent himself from committing sexually violent conduct or child molestation in the future); *United States v. Shields*, 649 F.3d 78, 90 (1st Cir. 2011) (respondent was a "sexually dangerous person" within the meaning of the §§ 4247(a)(5)–(6), 4248); *United States v. Carta*, 592 F.3d 34, 44 (1st Cir. 2010) (upholding district court's determination that inmate diagnosed with "paraphilia not otherwise specified" met statutory definition of "sexually dangerous person"). Because these analyses are fact-based, they do not offer much in terms of guidance to federal prosecutors, except to emphasize the importance of qualified expert testimony.

C. Procedural issues in civil commitment proceedings

Several Fourth Circuit decisions also implicated procedural issues pertaining to civil commitment proceedings. For example, in *United States v. Wood*, 741 F.3d 417 (4th Cir. 2013), the Fourth Circuit concluded that the district court's standing order did not interfere with the inmate's access to expert assistance because the inmate could move the court, pursuant to Federal Rule of Civil Procedure 26(b)(4)(D), to retain a non-testifying expert to examine the inmate and consult with counsel. It further explained it found no abuse of discretion in admitting the defendant's previous arrest reports because they were admissible in a civil commitment proceeding under Federal Rule of Evidence 703 (permitting experts to testify to opinions based on inadmissible evidence reasonably relied upon in forming their opinions) in a proceeding where the district court was the trier of fact and "evidentiary gatekeeping function[s were] relaxed." *Id*. at 425. In another case, *United States v. Edwards*, 777 F. Supp. 2d 985, 998 (E.D.N.C. 2011), the court held that the *Brady* doctrine applies in civil commitment proceedings.

D. Civil commitment as a collateral consequence

Finally, there remain the collateral consequences of a plea to a child exploitation offense. Does the constitutional right to due process mandate that a defendant's plea of guilty to a child pornography offense require that the defendant be advised of the possibility of a subsequent civil commitment under the Adam Walsh Act? The leading case on this important issue is *United States v. Youngs*, 687 F.3d 56 (2d Cir. 2012). The defendant in *Youngs* was charged in the Western District of New York with producing and possessing child pornography. He entered guilty pleas to both offenses, following a detailed Rule 11 colloquy before the district court judge. During the colloquy, the defendant was apprised of the minimum and maximum sentences he faced, the terms of his supervised release, the resulting forfeiture of his computer, and his obligations under the Sex Offender Registration and Notification Act, 42 U.S.C. § 16913. He responded affirmatively that he understood all of these consequences. He was

sentenced to terms of imprisonment of 120 and 240 months, to run concurrently, and to a supervised release term of 40 years. The defendant gave notice of appeal. *Id.* at 58.

On appeal, the defendant challenged the validity of his plea because he had not been informed that he faced the possibility of civil commitment under the Adam Walsh Act following the completion of his prison sentence. The defendant had not raised this issue in the district court prior to his guilty plea, so the standard of review on appeal was plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. The Second Circuit referenced several of its previous decisions for the proposition that "district courts need not inform a defendant of collateral consequences during the plea colloquy." *Id.* at 60 (citing *United States v. Salerno*, 66 F.3d 544, 550–51 (2d Cir. 1995); *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974)).

The Second Circuit expressly rejected defendant's reliance on the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), for the proposition that a defendant must be informed about possible collateral consequences prior to entering a guilty plea. *Padilla* held that defense counsel's incorrect advice to his client about the risks of deportation constituted ineffective assistance of counsel, in violation of the Sixth Amendment. Distinguishing *Padilla* from the present case, the Second Circuit emphasized that *Padilla* addressed the Sixth Amendment obligation for defense counsel to correctly advise the client of the consequences of a guilty plea, which is greater than the Fifth Amendment obligations of a district court to advise the defendant at the Rule 11 colloquy. *Youngs*, 687 F.3d at 62 (citing *Libretti v. United States*, 516 U.S. 29, 50–51 (1995)). Furthermore, *Padilla* dealt with the virtual certainty of deportation following a noncitizen's conviction for certain offenses, in contrast with the "remote and uncertain consequence as civil commitment." *Id.*

Further distinguishing *Padilla*, the Second Circuit emphasized that the Adam Walsh Act provides the Government with discretion to choose whom to certify for possible civil commitment, and once the Government initiates the proceedings, it still must prove by clear and convincing evidence that the defendant is sexually dangerous to others. Ultimately, the decision lies with the district court in a civil commitment proceeding. The Second Circuit concluded that "the likelihood of [a defendant's] civil commitment is uncertain, both at the time of his plea and at the completion of . . . incarceration." *Id.* at 63; *accord United States v. Streich*, 560 F. 3d 926, 932 (9th Cir. 2009) (defendant's claim that inclusion in the presentence report of information regarding psychosexual treatment he received for a prior conviction created a risk of a potential civil commitment was not ripe for review, because a possible civil commitment was contingent upon future events that might not ever occur); *see generally Steele v. Murphy*, 365 F.3d 14, 18–19 (1st Cir. 2004) (affirming denial of defendant's petition for a writ of habeas corpus because the state court reasonably applied Supreme Court precedent in determining that failure to inform petitioner, before he pled guilty, of possible commitment as a "sexually dangerous person" did not violate his Fourteenth Amendment due process rights); *George v. Black*, 732 F.2d 108, 110 (8th Cir. 1984) (affirming denial of defendant's petition for a writ of habeas because his nolo contendere plea was not involuntary by virtue of the fact that the trial judge failed to inform the petitioner that he would be subject to a mental health commitment proceeding after his release from prison, because the actual commitment to an institution was not a direct consequence of his plea).

The Second Circuit decision in *Youngs* did not entirely foreclose collateral attacks based upon a failure to inform the defendant of the potential consequences of civil commitment. As noted, the *Youngs* decision hinges upon the fact that the district court's obligations arise under the Fifth Amendment. The case does not address any constitutional deficiency created by defense counsel's failure to advise a defendant of the consequences of a guilty plea, as governed by the Sixth Amendment. In *Youngs*, the issue of a collateral attack premised on ineffective assistance of counsel was left for another day. Furthermore, the Second Circuit created some potential uncertainty in a footnote, where the court opined that "district judges might well want to include the risks of potential post-sentence long-term civil commitment when allocuting defendants who plead guilty to offenses subjecting them to that risk," noting that "[w]hile such a warning is not required, it . . . could affect defendants' assessment of the costs and

benefits of a guilty plea, and alerting defendants . . . could forestall later claims . . . that they were misadvised by counsel." *Youngs*, 687 F.3d at 56, 63 n.6.

The *Youngs* court also recognized that *affirmative* misrepresentations by defense counsel regarding civil commitment *may* deprive a defendant of his Sixth Amendment right to the effective assistance of counsel. *Id.* at 62 n.4 (citing *Bauder v. Dep't of Corrections*, 619 F.3d 1272 (11th Cir. 2010) (per curiam)). *Bauder* was an appeal by the State of Florida of the district court's granting habeas corpus relief to a defendant who was affirmatively misadvised, prior to his plea to an aggravated stalking offense, that a guilty plea would not expose him to the possibility of a state civil commitment. The Eleventh Circuit explained that defense did not fail because of his "inability to anticipate a ruling on the interpretation of the Florida civil commitment statute." *Bauder*, 619 F.3d at 1275. Instead, it was counsel's affirmative representation that pleading guilty would *not* subject the defendant to civil commitment. *Id.*

The Adam Walsh Act civil commitment provisions are still relatively new. As can be seen from the cases cited above, a collateral attack on the constitutionality of a defendant's guilty plea remains a possible avenue, especially for defendants who are challenging the effectiveness of counsel in their initial criminal proceeding and who will typically seek post-conviction relief pursuant to 28 U.S.C. § 2255. Most collateral attacks are subject to the 1-year statute of limitations. However, § 2255(f)(4) leaves open the limitations period for 1 year after such time as "the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

V. Conclusion

The Adam Walsh Act civil commitment proceedings represent an important component in the Government's strategy to protect adults and children from sexually dangerous persons. The number of commitments is likely to remain very small. At the outset of the Adam Walsh Act, the overwhelming majority of civil commitment proceedings were initiated in the Eastern District of North Carolina (EDNC). Ten cases were brought in the District of Massachusetts and five cases were brought in four other districts. Currently, all federal civil commitment proceedings pursuant to the Adam Walsh Act are adjudicated in EDNC, where Federal Correctional Institution-Butner is located. To date, approximately 147 § 4248 cases have been filed in EDNC, which averages 15 to 20 new certifications each year. Interview with Resident Assistant Rudy E. Renfer, Jr., Chief, Civil Division, Eastern District of North Carolina, U.S. Attorney's Office, in Raleigh, N.C. (Apr. 16, 2015).

Indeed, for the most dangerous offenders, civil commitment affords a final remedy to protect our communities from sexual predators. ❖

ABOUT THE AUTHOR

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Targeting Sex Trafficking

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I. Why we should care

Nelson Mandela said, "There can be no keener revelation of a society's soul than the way in which it treats its children." Nelson Mandela, President, South Africa, Launch of the Nelson Mandela Children's Fund (May 8, 1995). This statement serves as a guiding principle for those who investigate and prosecute crimes against children. However, children who are victimized by sex traffickers are sometimes overlooked as victims who need our protection and help.

Sex trafficking victims are simply a commodity to their traffickers. Unlike dealing drugs, which involve a one-time use commodity, victims can be sold over and over and over again. Additionally, unlike drugs, which one can test to determine their illegality, victims rarely self-identify as "victims" and often are not interested in seeing their traffickers prosecuted. Additionally, despite their age as minors, these victims are often viewed by law enforcement, prosecutors, and the public as co-conspirators in their own crimes because they "consented" to engage in the sex trafficking.

This paper is intended to serve as a primer of areas to consider when investigating and prosecuting juvenile sex trafficking offenses. There are a variety of statutes available to help vindicate the rights of victims and hold traffickers accountable. Additionally, traffickers may not work in isolation. This paper ends with one of the few published decisions addressing a successful prosecution of a criminal street gang engaged in an enterprise of sex trafficking of juveniles and adults. Our goal is to provide a guide for prosecutors who handle, or are considering handling, these challenging but rewarding cases.

II. 18 U.S.C. § 1591: Sex trafficking of children or by force, fraud, or coercion

The Victims of Trafficking and Violence Protection Act of 2000 (P.L. 106-386), the Trafficking Victims Protection Reauthorization Act of 2003 (H.R. 2620), the Trafficking Victims Protection Reauthorization Act of 2005 (H.R. 972), and the Trafficking Victims Protection Reauthorization Act of 2008 (H.R. 7311), provide the tools to combat trafficking in persons, both worldwide and domestically. The stated purpose of the first act was "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. § 7101(a) (2015). Together, these four pieces of legislation address adult and juvenile human trafficking that involves forced labor and sex trafficking. One of the cornerstones of the Trafficking Victims Protection Act is the sex trafficking statute, codified as 18 U.S.C. § 1591, which deals with sex trafficking of minors and traffickers of adults who use force, fraud, and coercion.

The statute criminalizes anyone who knowingly

> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(a) (2015). Prosecutors should note that the reference to advertising, patronizing, and soliciting was added to the statute in late May 2015. Justice for Victims of Trafficking Act of 2015 (JVTA), Pub. L. No. 114-22, 129 Stat. 227, §§ 108, 118 (2015).

Additionally, violations of this statute apply not only to the traffickers who benefit from the commercial sex act with minors, but also to the customers as well. The Eighth Circuit explicitly held that § 1591 applies to both "suppliers and consumers" of commercial sex acts. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013). The court held that looking at § 1591 itself, there was no "customer exception." *Id.* at 1068. Under § 1591(a)(1), a person violates the statute if they "obtain[]" or "transport[]" a child for the purpose of a commercial sex act. The recent addition of the verbs "patronizes" and "solicits" to the statute further corroborates that the statute may be applied to customers. (While customers who committed their conduct prior to May 29, 2015 cannot be charged with patronizing or soliciting, they still could be charged with recruiting, enticing, or obtaining minors.)

The statute provides a minimum penalty of 15 years' imprisonment if the offense involved a minor who was under the age of 14, or if the offense involved the use of force, fraud, or coercion. The statutory minimum is 10 years if the offense did not involve force, fraud, or coercion to traffic a minor who was over the age of 14. The statutory maximum is life imprisonment. Section 1594 criminalizes a conspiracy to commit a § 1591 offense and carries no mandatory minimum, but permits a statutory maximum of life. Defendants convicted under either offense are required to register as sex offenders pursuant to the Sex Offender Registration and Notification Act.

Prosecutors can seek restitution for victims pursuant to § 1593, and restitution awards can include lost wages derived from prostitution activities. *See United States v. Cortes-Castro*, 511 F. App'x 942, 947 (11th Cir. 2013); *United States v. Mammedov*, 304 F. App'x 922, 926–27 (2d. Cir. 2008); *United States v. Webster*, Nos. 08-30311, 09-30182, 2011 WL 8478276, at *3 (9th Cir. 2011). Forfeiture is also available pursuant to § 1594(d). Section 105 of the JTVA expands the scope of the forfeiture provision for trafficking cases, allowing the Government to forfeit property traceable to property that was used in the offense. Additionally, the Attorney General has the power to satisfy restitution obligations by transferring forfeited assets.

Two areas of litigation commonly seen by prosecutors in this area involve jurisdiction and knowledge regarding the age of the juvenile victim.

A. Jurisdictional hook: interstate or foreign commerce

The first topic of litigation regarding jurisdiction involves the ability of Congress to pass the Trafficking Victims Protection Act (TVPA). Courts have determined that the Commerce Clause afforded

Congress the constitutional authority to pass 18 U.S.C. § 1591. Specifically, Congress has expressly determined that sexual trafficking has a substantial effect on interstate commerce. *See* 22 U.S.C. § 7101(b)(12) (2015); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (holding purely intrastate prostitution activity under § 1591 "contribute[s]" to the interstate and international market that Congress seeks to stop, thus meeting the interstate commerce element). The link between sex trafficking and interstate commerce is analogous to the link between drug trafficking and interstate commerce, which the courts have held Congress may regulate under the Commerce Clause. *See United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2009); *United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996); *United States v. Kim*, 94 F.3d 1247, 1249–50 (9th Cir. 1996). An act or transaction that is economic in nature and affects the flow of money in the stream of commerce to any degree, however minimal, "affects" interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005); *United States v. Feola*, 420 U.S. 671, 677 n.9 (1975); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–56 (1964); *United States v. Evans*, 476 F.3d at 1178; *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004), *vacated on other grounds*, 544 U.S. 902, *opinion reinstated*, 412 F.3d 1251 (11th Cir. 2005); *see also* 22 U.S.C. § 7101(b) (2015).

The second topic of litigation regarding jurisdiction deals with whether specific offense conduct is "in or affecting interstate or foreign commerce." Prosecutors can use a variety of evidence to prove the necessary effect on interstate or foreign commerce. Conduct that is in or affecting interstate commerce may include the use of a hotel, a cell phone, the Internet, or use of condoms manufactured outside the state. *See Heart of Atlanta Motel, Inc.*, 379 U.S. at 255–56; *United States v. Santos*, 352 F. App'x 223, 224 (9th Cir. 2009) (cell phone usage); *United States v. Evans*, 476 F.3d at 1179 (use of hotel serving interstate travelers and of condoms that traveled in interstate commerce and were manufactured out of state). Prosecutors need not prove the defendant knew his or her actions had an effect on interstate or foreign commerce. *United States v. Phea*, 755 F.3d 255, 265 (5th Cir. 2014).

B. Knowledge of victim's age

Another common area of litigation is proof of the defendant's knowledge of the age of the minor being trafficked. From 2003 through December 2008, prosecutors had to prove that a defendant had actual knowledge of the age of the juvenile to sustain a conviction. However, on December 23, 2008, § 1591 was amended with the addition of part (c):

> (c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 State 5044, § 222 (2008).

Unfortunately, the language of § 1591(c) created some confusion, as it only referred to whether the defendant "knew" the victim was a minor, while § 1591(a) referred to whether the defendant knew or recklessly disregarded the victim's age. In a case of first impression, the Second Circuit interpreted the statutory language to mean:

> In a prosecution under § 1591, the government may satisfy its burden of proof with respect to the defendant's awareness of the victim's age by proving any of the following beyond a reasonable doubt: (1) the defendant knew that the victim was under eighteen, (2) the defendant recklessly disregarded the fact that the victim was under eighteen, or (3) the defendant had a reasonable opportunity to observe the victim.

United States v. Robinson, 702 F.3d 22, 34 (2d Cir. 2012). Congress fixed this issue in the JVTA by amending the language so that it reads "the Government need not prove that the defendant knew, or

recklessly disregarded the fact, that the person, had not attained the age of 18 years." (The legislation also adds the verbs patronizes and solicits, but not advertises, to Section 1591(c).) However, in passing the act, Congress did not specify that the amendment should be applied retroactively. Thus, it is unclear what impact this legislation has on pending cases. In cases with conduct that predates this legislation, prosecutors should always ask the court to provide a deliberate ignorance or conscious avoidance instruction to the jury.

C. Consent is not a defense

Consent by a minor is not a defense as a minor cannot consent to be sexually exploited. *United States v. Robinson*, 508 F. App'x 867 (11th Cir. 2013) (unpublished) (minors cannot consent to engage in prostitution); *United States v. Raplinger*, 555 F.3d 687, 691–92 (8th Cir. 2009) (consent is not a defense to child pornography charges); *United States v. Dhingra*, 371 F.3d 557, 565, 567 (9th Cir. 2004) (consent not a defense to charges of soliciting a minor in violation of 18 U.S.C. § 2422(b)).

D. Victim issues

Prosecuting sex trafficking cases can be extremely challenging. Victims are sexually and physically assaulted by their traffickers and also subjected to victimization by the customers. Some victims may be exposed to violence as a result of being trafficked by a gang, while others are controlled by their traffickers with the use of drugs. These factors can create an environment of fear and reluctance on the part of victims to be involved in the investigation and prosecution of the traffickers.

Prosecutors working cases involving victims should familiarize themselves with the Attorney General Guidelines for Victim-Witness Assistance (AG Guidelines), particularly Section III.L.1 on child victims. Prosecutors should also review 18 U.S.C. § 3509, which deals with the rights of child witnesses and victims, and 18 U.S.C. § 3771, discussed in the AG Guidelines, that covers general rights of crime victims. Section 113 of the JTVA amended § 3771, allowing victims the right to be informed in a timely manner of any plea bargain or deferred prosecution agreement, to be informed of their rights as provided under § 3771 and 42 U.S.C. § 10607, and be provided the contact information for DOJ's Victims' Rights Ombudsman.

Prosecutors are encouraged to work with their Victim-Witness Coordinators to ensure that the victim's rights are being protected.

III. Other federal statutes

While § 1591 provides a powerful tool to combat sex trafficking, it is by no means the only statute on which prosecutors can rely in making charging decisions. Given the challenges inherent in these cases and the victim issues, prosecutors can contemplate using some of the other statutes listed below.

A. 18 U.S.C. § 2421: Mann Act

This statute criminalizes the act of transporting any individual in interstate or foreign commerce with the intent that the individual engage in prostitution or any sexual activity for which any person can be charged. As the statute focuses on the transportation, there is no age requirement for the individual being transported. Nor does the statute require that the defendant physically transport the individual; facilitation of the travel by arranging the transportation is sufficient to sustain a conviction. *United States v. Holland*, 381 F.3d 80, 87 (2d Cir. 2004) (persuading women to travel, purchasing bus fares, and traveling with the women was sufficient to show the defendant "transported" the women within the meaning of the statute). The statute also criminalizes the attempt to transport. The statutory maximum is 10 years' imprisonment, with no mandatory minimum.

If your case deals with multiple victims being transported at the same time, there is only *one* violation of the Mann Act. *See Bell v. United States*, 349 U.S. 81, 83 (1955) (holding that the transportation of two women in the same vehicle in violation of the Mann Act constitutes a single offense).

B. 18 U.S.C. § 2422: Enticement and coercion

Section 2422(a), similar to the Mann Act, addresses crime inherently involving movement from one location to another. However, the statute criminalizes an individual who knowingly persuades, induces, entices, or coerces any individual to travel to engage in prostitution or any sexual activity for which a person can be charged. This charge can be used for both adult and children victims who travel. There is no statutory minimum, and the statutory maximum is 20 years' imprisonment.

In contrast, § 2422(b) criminalizes the use of the mail or any facility of interstate and foreign commerce to persuade, induce, entice, or coerce a juvenile to engage in prostitution or any other criminal sexual activity. Like § 1591, this statute does not require any travel. A conviction can be supported by entirely intrastate criminal activity, so long as a facility of interstate commerce is used—cell phones, Internet, etc. The statutory minimum is 10 years' imprisonment, and the statutory maximum is life.

C. 18 U.S.C. § 2423(a): Transportation of a minor

This statute criminalizes the specific act of transporting a minor in interstate or foreign commerce to engage in prostitution or any criminal sexual activity. Like § 2422(b), the statutory maximum is 10 years' imprisonment, and the statutory maximum is life.

D. 18 U.S.C. § 1952: Interstate travel or transportation in aid of racketeering enterprises

Section 1952 criminalizes travel and the use of the mail or any facility of interstate or foreign commerce with intent to: (1) distribute proceeds of any unlawful activity, (2) commit any crime of violence to further unlawful activity, or (3) otherwise promote, manage, establish, carry on, or facilitate the same, any unlawful activity, and thereafter performs or attempts to perform an act described above. Section 1952(b) defines "unlawful activity" to include "prostitution offenses in violation of the laws of the State in which they are committed or of the United States." Maximum penalties for this offense vary, but if death occurs, custodial sentences may be up to life imprisonment. *See* 18 U.S.C. § 1952(a)(3)(A)–(B) (2015).

E. 18 U.S.C. §§ 1961–1962: Racketeer Influenced and Corrupt Organizations (RICO)

Primarily used to combat activities by traditional organized crime groups such as La Cosa Nostra and La EME, RICO may be used to target gangs involved in human trafficking and prostitution. Its elements are: (1) the existence of a conspiracy or agreement between two or more persons to participate in the affairs of an enterprise through a pattern of racketeering activity (that is, at least two racketeering acts that have a relationship to each other and that amount to, or pose a threat of, continued criminal activity), (2) the defendant deliberately joined or became a member of the conspiracy or agreement with knowledge of its purpose, (3) the defendant agreed that someone who was a member of the enterprise, not necessarily the defendant, would commit at least two racketeering acts, and (4) the activities of the enterprise in some way affected interstate or foreign commerce. Definitions of terms are located in § 1961. "Racketeering activity" includes a laundry list of criminal activity, such as prostitution-related activity under § 1952, and various child exploitation offenses, such as child pornography and enticement/travel activity under §§ 2421–2423. The maximum penalty is 20 years in custody, absent special allegations that raise the maximum penalty. 18 U.S.C. § 1963(a) (2015).

Prior approval by the Organized Crime and Gang Section is required for filing all RICO charges. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.00 (2015).

F. Child pornography statutes

Child pornography statutes can be used if a juvenile trafficking victim has had videos or images taken that depict the juvenile engaged in sexually explicit conduct. A trafficker who produces the image or video of a juvenile engaged in sexually explicit conduct can face a minimum of 15 years' imprisonment and a statutory maximum of 30 years. 18 U.S.C. § 2251 (2015). A trafficker who distributes the image or video can face a minimum of 5 years' imprisonment and a statutory maximum of 20 years' imprisonment. *See id*. §§ 2252(a)(2), 2252A(a)(2). A trafficker who simply possesses an image or video faces up to 10 years' or 20 years' imprisonment, depending on the age of the juvenile depicted in the image or video. *See id*. §§ 2252(a)(4), 2252A(a)(5). Charging a defendant with child pornography offenses does not require any proof of a commercial sex act or force, fraud, or coercion.

G. Restitution/forfeiture

Be mindful that a prosecutor's ability to seek restitution and forfeiture will be conditioned on the types of charges brought in a sex trafficking case. As stated above, restitution and forfeiture are available for § 1591 offenses. The same is true for charges brought as child pornography offenses because restitution and forfeiture are required pursuant to § 2259 and § 2253, respectively. However, charges brought pursuant to § 2422 and § 2423 do not have a mandatory restitution requirement and are governed by § 3663 and § 3663A. Nevertheless, forfeiture can be obtained pursuant to § 2428.

IV. *United States v. Pipkins*: Sex trafficking, RICO, and "reckless eyeballing"

One of the first published decisions discussing the use of RICO to combat criminal street gangs involved in prostitution was *United States v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004), *vacated on other grounds*, 544 U.S. 902 (2005). The defendants were pimps who operated in Atlanta, Georgia, using adult and juvenile females as prostitutes. Many of the pimps aided each other by bailing out each other's girls if in jail, training younger pimps, and organizing private prostitution parties. The Eleventh Circuit went into great detail about the lifestyles of the pimps and the prostitutes and the terminology that is common to sex trafficking. The court discussed the nature of the "game."

> Both pimps and prostitutes generally referred to their activities as "the game." To the pimps, an important component of the game was domination of their females through endless promises and mentally sapping wordplay, physical violence, and financial control. The pimps created a system in which their prostitutes were incapable of supporting themselves or escaping their reliance on the pimp. A prostitute lived either in her pimp's home or in a room at a motel or boarding house paid for by the pimp. The pimp provided clothes for his prostitute, as well as money for the prostitute to fix her hair and nails. The pimp also provided condoms to the prostitute, or money to buy condoms. Also, the pimp frequently used threats of violence to control his prostitutes, or rewarded his prostitutes with drugs for meeting monetary goals. Other times, a pimp dispensed drugs to a prostitute to ensure that she was able to function through the night and into the early morning hours.

Id. at 1285. As the court noted, "[a] prostitute could be punished for merely looking at another pimp; this was considered 'reckless eyeballing.' " *Id.* at 1286. The court also detailed rules and consequences for breaking the rules of the "game."

> [The prostitute] was required to surrender all of the money from her dates; if she did not, she would be guilty of "cuffing." She was also required to unquestioningly obey

her pimp and treat him with respect; if she did not, she was "out of pocket." At the whim of her pimp, a prostitute was obligated to have sexual intercourse with him, another pimp, or even another prostitute.

The pimps sometimes brutally enforced these rules. Prostitutes endured beatings with belts, baseball bats, or "pimp sticks" (two coat hangers wrapped together.) The pimps also punished their prostitutes by kicking them, punching them, forcing them to lay naked on the floor and then have sex with another prostitute while others watched, or "trunking" them by locking them in the trunk of a car to teach them a lesson.

Id. The rules and brutality inflicted by the pimps applied equally to all prostitutes, as there was no age distinction among the victims in the eyes of the pimps.

Fifteen defendants were charged in a 265-count indictment that included a variety of federal statutes, including conspiracy to violate RICO, alleging that these pimps were part of an enterprise involved in the trafficking of women and girls for prostitution. Two pimps went to trial and were found guilty. On appeal, they argued sufficiency of the evidence, claiming that there was no evidence of an enterprise and that there was no effect on interstate commerce.

The court rejected both arguments, finding that so long as there was evidence that defendants operated in any RICO enterprise, whether or not the enterprise included everyone, the evidence was sufficient. *Id.* at 1289–94. The court noted that "an enterprise could be as amorphous as a 'pick-up' basketball game." *Id.* at 1289 n.4. The court found evidence of several separate enterprises and that defendants participated in at least one of them. *Id.* at 1290.

As to the second issue, the court held that the use of cars on interstate freeways, the crossing of state lines, and the use of electronic media (pagers, cell phones, and telephones) was sufficient evidence to prove the enterprise was engaged in and affected interstate commerce. *Id.* at 1295. ❖

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Navigating a Nationwide Investigation: The View from a U.S. Attorney's Office

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I. Introduction

Many of us settle into routines. For some child exploitation prosecutors, that may include a steady diet of peer-to-peer child pornography cases. For other prosecutors, it may involve the review of financial statements and tax returns in pursuit of white-collar convictions or proffers to further a drug investigation. Occasionally, law enforcement discovers something in your district that has nationwide or even global implications and disrupts your routine. Such an event occurred in our district in 2012.

Three child pornography Web sites operating on the Tor network were discovered on a server located in Nebraska. At the time, our knowledge of Tor was limited to what we learned at Project Safe Childhood conferences. As interesting as those presentations were, it seemed highly unlikely we would encounter a major child exploitation enterprise on the Tor network being hosted in the heartland. Imagine our surprise when the Child Exploitation and Obscenity Section (CEOS) invited us to assist in a nationwide investigation to take down the members and users of the Web sites. CEOS initiated and spearheaded the investigation. This is our story of that journey and the lessons learned.

II. The investigation

In 2012 a foreign law enforcement agency alerted the FBI to the presence of a computer server hosting three child exploitation Web sites in Omaha, Nebraska. The Web sites were hidden services on the Tor network. The Web sites, their administrator, and the Web site's users operated under the cloak of anonymity provided by the Tor network. Tor, a subpart of the Internet, uses a series of volunteer computers to relay communications, obfuscating from law enforcement the true Internet Protocol (IP) addresses of both the users and the sites.

The three sites were social networking Web sites whose primary purpose was to advertise and distribute child pornography in a secret and secure manner. Two of the sites included discussions of matters pertinent to the sexual abuse of children, including tips on how to sexually exploit children and avoid detection. Members were encouraged to upload new child exploitation images and video. One site had a rules page that described the site as "a communication tool for fellow pedos to discuss their interests and share content." The "rules" encouraged users to be nice to one another. The Web sites fostered a sense of community among those who exploited children.

One site, which operated similar to Facebook, consisted of more than 8,000 worldwide members. More than 28,000 files depicting the sexual exploitation of young children had been uploaded to the site.

Visitors to this site wrote more than 107,000 exploitative messages and were encouraged to participate in polls. This site also allowed users to create and join groups that were organized around specific child sexual abuse interests. For example, one group available to members was "0-2 Year Little Girls Private Sharing Group 2012." The site had more than 5,600 users, 3,000 message threads, and 24,000 postings. Another site existed in an image board format that contained more than 6,000 child exploitation images.

We were completely unaware that three large-scale, global child pornography sites were operating in our district. While we knew of the Tor network, neither our office nor any of our federal investigative agencies had undertaken a Tor-related investigation. How would we prosecute the administrator of the sites residing within our district? How would we identify and prosecute other members of these sites who were seemingly bulletproof due to the anonymizing features of Tor? What should be done with those individuals in other countries identified through the investigation? Fortunately, CEOS and the FBI developed a plan.

III. The plan

The Web sites were run by a single administrator, Aaron McGrath. By day, McGrath worked at a data center. He administered his Web sites through his laptop computer, often from his residence. The most effective way to identify the members and users of the three Web sites was to arrest McGrath while he was administering to one or more Web sites. The plan was to seize his laptop computer before he had an opportunity to activate encryption, and then seize the servers hosting the Web sites. Then, with court approval, we planned to use an investigative technique on the Web sites in an attempt to identify the true IP addresses of the members and users.

We obtained search warrants for McGrath's residence, to seize his laptop computer, and for his place of work, to seize the servers. A ruse was planned to separate McGrath from his computer before he could activate the encryption.

Agents ultimately entered the house, surprising McGrath. They were able to seize the laptop just as he closed it, but before the encryption activated. They proceeded to a data center where they removed the servers housing the three Web sites.

IV. Identifying targets on anonymous networks

After the servers were seized, court approval was obtained to intercept and monitor site users' communications and deploy an investigative technique in an effort to identify the IP addresses of users who accessed the Web sites. While the FBI monitored the Web sites, session information was captured documenting areas of the sites that users visited.

Offenders' use of the Tor network made identifying true IP addresses extremely difficult. Nonetheless, the investigative technique succeeded in identifying some of the sophisticated users belonging to these communities of like-minded exploiters who believed they were operating anonymously.

Other additional targets were identified through more traditional investigative means. IP addresses that resolved to foreign countries were provided by the FBI to appropriate foreign entities. Further investigation of U.S.-based targets was coordinated through appropriate FBI Field Offices.

V. Nationwide investigation

Because the investigation touched numerous U.S. districts, it was designated a Nationwide Investigation and a proposal was submitted to the Child Exploitation Working Group of the AGAC. This advisory committee consists of six prosecutors from U.S. Attorneys' offices and a trial attorney from

CEOS. At the completion of the working group's review process, the U.S. Attorneys' offices were notified and the investigation packets were sent out.

Those individuals who had been conclusively identified were indicted in the District of Nebraska. Those who were at the time only identified by an IP address were also indicted in the District of Nebraska as "John Does." It was important to work with the PSC Coordinators in the districts where targets were located to obtain their offices' assistance and to evaluate legal issues pertaining to the use of "John Doe" arrest warrants. The John Doe warrants were to be executed after a search of the target residence confirmed that the individual arrested on the warrant was the same individual accessing the Web site. We also coordinated regarding requests for pretrial detention. The cooperation from the districts was outstanding. Anyone who has had the privilege of being a PSC Coordinator, or who has sought assistance from the PSC community, knows of the exceptional assistance its members provide. AUSAs went the extra mile to assist with the operation at every stage.

The cooperation among the FBI field offices tasked with executing the search warrants and making the arrests was equally impressive. These offices coordinated the execution of 25 search warrants and additional subject interviews during a narrow time frame in the spring of 2013. This required diligent pre-search preparation by all involved offices. We provided a detailed overview of the case and discussed various legal issues pertaining to the John Doe arrest warrants, arrest protocols, issues relating to Miranda and the recording of interviews, and answered questions about the Tor network. Agents were able to get a sense of the importance of the operation. Computer forensic examinations of seized digital evidence were centralized to a single unit, which ensured consistency in the methods of examination and reports. It led to quicker responses and enhanced communication between the CEOS attorneys and the individual examiners.

VI. One of many successful searches

One warrant was executed in Germantown, Maryland. The subject was Timothy DeFoggi, Director of Cybersecurity Operations for the U.S. Department of Health and Human Services. Upon the entry of agents into his home to execute the warrant, DeFoggi fled from the lower level to the main level where he was found kneeling over his laptop with his hands on the keyboard. DeFoggi did not heed the agents' request to step away from the computer, and they physically removed it from him. As the agents seized his laptop, they observed a child pornographic video being downloaded from a Tor-network child pornography Web site, and that DeFoggi had activated a program to erase data from his computer.

The work done by the PSC community from coast to coast, and even as far as Guam, was impressive at all phases of the prosecution. The U.S. Attorney's Office in Guam facilitated the arrest of a member recently released from a prison in the Philippines. Arresting this individual in Guam, before he had an opportunity to flee, avoided any extradition concerns. Federal prosecutors throughout the United States reviewed search warrant applications, explained the use of John Doe warrants to their local magistrates, and ultimately processed the initial, identity, and detention hearings that ensued.

VII. Charging decisions

Other decisions to be made included prosecution venue and charges. Most prosecutions of site users were conducted in the District of Nebraska, where the pertinent servers had been located. This resulted in consolidated hearings regarding legal issues that arose during the case. For example, all but one of the defendants identified through the use of the court-authorized investigative technique brought motions to suppress the evidence based upon the execution of that warrant. After a consolidated 2-day hearing and extensive briefing, the district court decided the issue in the Government's favor. Further, although some defendants indicated a desire to raise a Daubert challenge to the investigative technique (which would have been more efficient to litigate in a single district), no such hearing has been held to date.

Having decided where to charge the defendants, the next question was what to charge. The first issue was who to charge with knowingly engaging in a child exploitation enterprise (CEE), in violation of 18 U.S.C. § 2252A(g). McGrath was the obvious choice as the site administrator. DeFoggi and another member, registered site users who actively participated on the site, were also charged with CEE. DeFoggi and other members were also charged with conspiracy to advertise child pornography in violation of 18 U.S.C. § 2251(d)(1)(e), conspiracy to distribute child pornography in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1), and accessing with intent to view child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B).

The second charging decision related to those individuals who were not members of the Web sites but whose IP addresses were captured by the investigative technique accessing and viewing child pornography while the FBI monitored the Web sites. Those individuals were initially charged under John Doe indictments and were arrested only after search warrants had been executed and their identities had been confirmed as the individuals accessing the Tor network or viewing images available on a particular Web site. These individuals were grouped in the same indictment according to the Web site they visited. Thus, there were separate indictments for the members of each of the three Web sites. The indictments were later superseded to add their names. Each individual was charged with the receipt and attempted receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2), and accessing with intent to view. Eight defendants were indicted for one Web site, 11 for the second, and 3 for the third.

Charging all users for the full range of their respective conduct was important in this case because it was the first time a group of Tor-based offenders was being prosecuted. As the trial judge repeatedly recognized at the sentencings, the offenders' use of technology to render their child pornography activity anonymous was significant. It meant that their identification was much more difficult and the crimes they could commit more overt. Therefore, the need to hold them properly accountable for their conduct was essential to send the message that anonymous networks will not provide a safe haven to offenders who exploit children.

The members charged with offenses ranging from engaging in child exploitation enterprise to conspiracy to distribute child pornography have all been sentenced. After a jury trial, DeFoggi was sentenced to 25 years, to be followed by a term of supervised release of life. The remaining sentences among this group ranged from 12 to 20 years of imprisonment. We have not yet completed all the cases against the other users. Two proceeded to trial and were convicted of receipt of child pornography and access with intent to view child pornography. Two more are awaiting trial. The remaining defendants have entered into plea agreements or entered pleas of guilty.

VIII. Conclusion

Our first nationwide investigation was very rewarding. All we needed to know about Tor investigations we learned from CEOS. From the time CEOS first reached out to our office to ask whether we would be willing to assist, through each of the trials, CEOS worked tirelessly to coordinate the operational plan and successful prosecutions. It was a privilege to work with CEOS trial attorneys and the multitude of FBI agents and task force officers who assisted in this investigation. During the operation, those in our office learned to stop asking "We are going to do what?" and just nod. We would encourage others, if given the opportunity, to participate in any CEOS or other DOJ component-led multidistrict investigation.❖

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Project Safe Childhood Wellness Issues and Peer Support

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Far and away the best prize that life has to offer is the chance to work hard at work worth doing.

Theodore Roosevelt, 26th President of the United States, Speech in New York (Sept. 7, 1903).

I. Introduction

Though we may not be personally aware of President Roosevelt's words, people who choose professions in public service embrace his sentiment. We in the Department of Justice endeavor to make the world a better, safer place—certainly a worthy objective. Whether we are engaged in prosecuting criminal acts relating to fraud, terrorism, drug trafficking, physical violence, environmental harm, cyber-attacks, firearms offenses, and everything in between, our goal is simple, yet also complex: justice. While the legal standards applicable in criminal prosecutions are the same regardless of the substantive crimes, the practical implications of handling the investigations and prosecutions are not. In this regard, Project Safe Childhood (PSC) cases are distinct.

Initiated in May 2006, PSC combines law enforcement efforts, community action, and public awareness. The program is premised on a unified and comprehensive strategy to combat child exploitation, with the ultimate goal to reduce the incidence of sexual exploitation of children. *See* PROJECT SAFE CHILDHOOD, http://www.justice.gov/psc. The scope of PSC has expanded since 2006. By memorandum issued on May 13, 2011, Deputy Attorney General James M. Cole announced that PSC would include non-Internet related crimes. Consequently, PSC now covers all federal child sexual exploitation crimes, including sex trafficking of children, sex tourism (interstate and international travel), and Sex Offender Registration and Notification Act (SORNA) violations. Many PSC prosecutions,

however, continue within the parameters of child pornography offenses. Those cases, by the very nature of the evidence involved, present unique challenges to investigation and prosecution team members.

This article is not intended to be an exhaustive resource on all matters related to wellness. Rather, it is designed to raise awareness of issues associated with working PSC cases, prompt further inquiry of those issues, and inform readers of resources that are available to address the issues.

II. Wellness issues

A. Secondary stress/vicarious trauma

Mental health professionals have recently been studying the impact of secondary stress, sometimes referred to as vicarious trauma, on members of law enforcement and prosecutors who work on child sexual exploitation cases. *See* MICHAEL L. BOURKE & SARAH W. CRAUN, BEHAVIORAL ANALYSIS UNIT, U.S. MARSHALS SERV., UNDERSTANDING SECONDARY STRESS FROM CHILD EXPLOITATION INVESTIGATIONS: A RESOURCE FOR TASKFORCE MEMBERS, FAMILY AND FRIENDS (2013); JANIS WOLAK & KIMBERLY J. MITCHELL, CRIMES AGAINST CHILDREN RESEARCH CTR., UNIV. OF N.H., WORK EXPOSURE TO CHILD PORNOGRAPHY IN ICAC TASK FORCES AND AFFILIATES (2009); Carolyn M. Burns, Jeff Morley, Richard Bradshaw & José Domene, *The Emotional Impact on and Coping Strategies Employed by Police Teams Investigating Internet Child Exploitation*, 14 TRAUMATOLOGY 20, 21 (2008). Attention has also been paid to the effects of secondary stress on judges, jurors, and court personnel. *See* Lee Norton & George Woods, *Secondary Trauma Among Judges, Jurors, Attorneys, and Courtroom Personnel*, ENCYCLOPEDIA OF TRAUMA: AN INTERDISCIPLINARY GUIDE 590, 591 (2012); Mike Long & Linda Albert, *A Traumatic Toll on Lawyers and Judges*, 80 IN SIGHT FOR OREGON LAWYERS AND JUDGES 1, 2–3 (2011), *available at* http://www.oaap.org/data/documents/insight/TraumaTollJan2011.pdf.

What does it all mean? Unfortunately, there is no single authoritative definition of secondary stress/vicarious trauma. Generally, the child victim of sexual abuse and exploitation experiences primary trauma and stress when the acts occur. It results from the direct exposure to the traumatic event. By contrast, secondary stress/vicarious trauma occurs when a person is indirectly exposed to the traumatic event. In the context of PSC work, viewing images or videos of children being sexually assaulted, listening to the audio that accompanies the videos of sexual assault, reviewing forensic interview recordings of victims, firsthand interviewing of child victims, and conducting interviews or proffers with child sex offender defendants, can all lead to secondary stress/vicarious trauma. *See* MICHAEL L. BOURKE & SARAH W. CRAUN, *supra*. Stressors like dealing with a negative coworker or repetitive mundane tasks are present in all workplace settings. Unlike normal workplace stress, however, secondary stress/vicarious trauma can have a perilous impact.

Secondary stress/vicarious trauma is different because it manifests in decreased functioning as a result of exposure to the traumatic experiences of another person. In addition, it can develop from a layering of stressors over a period of time, such as reviewing child pornography evidence for various stages of litigation in multiple cases. This accumulation can be slow and difficult to recognize—especially because everyone handles stressors (primary or secondary) in different ways. Drs. Bourke and Craun use an excellent comparison to the sun to illustrate this point. When we are exposed to the sun, we see it and feel its warmth, but we cannot see its powerful rays. We may be unaware of the extent of the burns we are receiving. It may be our loved ones who first notice the damage.

For others, however, realization of the internal harm may be painfully self-evident. Reviewing evidence, especially video, can lead to a sense of helplessness and inadequacy. An investigator once remarked that it is like standing in front of a window watching a horrible crime unfold. You see it. You hear it. Yet, there is nothing you can do to stop it. Physical illness may result. It can be difficult discussing feelings with loved ones or colleagues because the emotions are too raw. We may also try to

avoid sharing these feelings with loved ones or colleagues because we want to avoid traumatizing them as well.

Similarly, an unpleasant yet necessary facet of our jobs as prosecutors involves witness preparation and presentation. Listening to the child victim relive his or her trauma and asking pointed questions of the child in front of judges, jurors, and abusers is highly emotional and draining. Yet, we are expected to handle all of it with exemplary professionalism. We are not emotionless, yet emotions must be held in check. The layers of stress and trauma build up with no immediate source of outlet. It takes a toll, whether we want to acknowledge it or not.

While symptoms may vary according to the individual, symptoms of secondary stress/vicarious trauma can include some or all of the following:

1. Thoughts about work when not intending to have them
2. Irritability
3. Hypervigilance (constantly on guard of possible threats to self, loved ones)
4. Difficulty sleeping
5. Emotional numbness
6. Trouble concentrating
7. Difficulty expressing affection toward children
8. Feelings of discouragement about the future
9. Decreased interest in socializing
10. Increased expectation that bad things are going to happen
11. Avoiding people, places, things that remind of work
12. Disturbing images invading thoughts
13. Increased heart rate when thinking about work
14. Disturbing dreams
15. Problems with intimacy, and
16. Avoiding or becoming less responsive to cases, colleagues, family, and friends (decreased empathy)

It is important to note that these and other reactions are normal. We are emotional beings. Recognizing the symptoms, knowing when they are accumulating, and addressing them are key components to maintaining good mental and physical well-being.

B. Compassion fatigue

Compassion fatigue is often associated with care providers, but the following description shows its application in the PSC context.

> Affecting positive change in society, a mission so vital to those passionate about caring for others, is perceived as elusive, if not impossible. This painful reality, coupled with first-hand knowledge of society's flagrant disregard for the safety and well-being of the feeble and frail, takes its toll on everyone from full time employees to part time volunteers.

COMPASSION FATIGUE AWARENESS PROJECT, http://www.compassionfatigue.org/pages/compassionfatigue.html.

Similar to the layering effect of secondary stress/vicarious trauma, exposure to stories of trauma, pain, and suffering—particularly in a work environment where unrelenting demands outweigh available resources—can slowly exhaust a person's capacity for compassion and negatively transform their view of themselves and the world. *See* Mike Long & Linda Albert, *A Traumatic Toll on Lawyers and Judges*, 80 IN SIGHT FOR OREGON LAWYERS AND JUDGES 1, 2–3 (2011).

> This progressive erosion from hope and compassion to cynicism, demoralization, and emotional disengagement now has a name: compassion fatigue. Compassion fatigue [is] the cumulative physical, emotional, and psychological effects of being continually exposed to traumatic stories or events when working in a helping capacity. The risk of compassion fatigue for those who work with perpetrators or victims of trauma is real, but not inevitable.

Id. at 2.

Being able to recognize and analyze thoughts and feelings indicative of compassion fatigue is empowering and powerful.

C. Coping skills and strategies

Identifying the existence of secondary stress/vicarious trauma is a significant first step in addressing it. There are things that we can do to reduce the impact of secondary stress/vicarious trauma:

1. Get enough rest
2. Engage in regular exercise
3. Identify trusted people and confide in them
4. Rely on trusted coworkers who provide a supportive work environment
5. Include, rather than pull away from, the social support of family and friends
6. Use light-hearted humor
7. Develop or maintain interests outside work
8. Make best effort to leave work at work at the end of each day
9. Be aware of personal limitations
10. Set boundaries and know when it is time to take a break, step away, or seek reassignment to different case types, and
11. Trust your instincts (If you have considered seeking professional assistance, follow through.)

Your supervisors are aware of the unique nature of PSC casework and understand the potential toll that doing this work can take on someone. Do not be concerned that your supervisors will not support you if you announce that you need a break or other accommodation. Caring for your mental and emotional health is of paramount importance and should not be suppressed because you fear how this will appear to a supervisor. Do not ignore symptoms in the hope they will disappear.

Developing and implementing viewing strategies can be extremely helpful in minimizing the risk of secondary stress/vicarious trauma. Some suggestions concerning viewing strategies include:

1. Establish a "buffer zone" by viewing evidence somewhere other than your desk (for example, in a conference room or dedicated PSC work room)

2. Avoid, if at all possible, reviewing evidence at the end of the work day
3. Do not look at the evidence (if at all possible) on the weekend or when working alone in the office
4. Do not work on these cases at home
5. Remove photographs or other personal items associated with your friends and family from the evidence review area
6. Take detailed notes the first time you review materials to reduce the need to revisit images and videos in their entirety
7. For people new to the work, gradually review materials to acclimate yourself to the evidence
8. Mentally prepare *each time* prior to viewing materials
9. Take a short break after reviewing evidence including, if possible, a walk to separate yourself physically from the evidence
10. Assess whether it is necessary to view video and listen to sound at the same time and proceed accordingly
11. William Shakespeare observed that the eyes are the window to your soul—avoid looking into the child's eyes in video or still images
12. If a child in the evidence reminds you of someone you know, seek reassignment of that case, if possible, and
13. Set time limits for viewing and stick to them

III. Peer Support Team

You are not alone! By memorandum issued June 24, 2010, H. Marshall Jarrett, Director, Executive Office of U.S. Attorneys (EOUSA), announced the establishment of the Project Safe Childhood Peer Support Team. The Team is made up of Assistant U.S. Attorneys, Legal Support Team Members, and Victim-Witness Personnel from around the country. Team members have significant professional experience working on PSC cases. Additionally, they have received specialized training on peer-based counseling through EOUSA's Employee Assistance Program (EAP), and work closely with advisors Cheryl Niccum and Ed Neunlist to stay abreast of emerging issues. However, the Peer Support Team is not an extension of EAP. Members are not licensed counselors. All communications (whether by telephone, email, in person, or otherwise), are confidential. Calls to a Team member for help do not need to be included on any Department of Justice background check.

We are colleagues who have an interest in providing support to each other. We are, in the truest sense, "allies in the trenches."

A current list of Team members is set out below. We are always willing to talk through any issues you may be facing. Protecting children by prosecuting criminals who sexually exploit them is remarkably rewarding work. By that same measure, helping colleagues navigate the risks and challenges that come along with those cases is very gratifying. We want to work with you, at work most certainly worth doing.

AUSAs	District	Phone
Carin Duryee	Arizona	520-620-7427
Karin Fojtik	Utah	801-834-9443

Kimlani Ford	North Carolina, Western	704-338-3178
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John O'Brien	Michigan, Eastern	313-226-9715
Audrey Renschen	Alaska	907-727-2299
Alessandra Serano	California, Southern	619-546-8104
Nathan Stump	Illinois, Southern	618-444-1764
Michael Sullivan	Ohio, Northern	216-622-3977
Support Staff	**District**	**Phone**
Tanya Abraham	North Dakota	701-297-7418
Annette Cox	Virginia, Western	434-293-4283
Karen Ellison	Delaware	302-573-6280
Christie Jones	Georgia, Northern	404-581-6102
Senta Parker	California, Eastern	916-307-8614
Denna Rawie	Oregon	541-465-6907
Sheryl Wyman	Montana	406-829-3324
Advisors	**Office**	**Phone**
Cheryl Niccum	EOUSA	803-705-5621
Ed Neunlist	EOUSA	803-705-5027

The Peer Support Team is not the only tool available. EOUSA's Employee Assistance Program, http://usanetsp.usa.doj.gov/staffs/EAP/Pages/home.aspx, and Supporting Heroes in Mental Health Foundational Training (SHIFT), http://shiftwellness.org/, are excellent resources to address wellness issues.❖

ABOUT THE AUTHORS

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Guardians ad Litem and Victim Counsel in Cases With Child Victims and Witnesses

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There are a myriad of issues that can arise when a child is a victim or witness in a criminal case. Is the child competent to testify? Should the defense have access to the child's school records? What impact will a trial continuance have on the child? Fortunately, there are many resources to assist courts and prosecutors sort through these issues in a way that protects child victims and witnesses while also guarding the criminal justice process. Two important resources are guardians ad litem and victim counsel.

I. Statutory authority for guardians ad litem and victim counsel

Section 3509(h) of Title 18 provides that the court may appoint a guardian ad litem to protect the best interest of a child victim or witness. The guardian ad litem can attend all hearings and trial proceedings in which the child participates. He or she may have access to all reports and records necessary to advocate for the child. The guardian ad litem should find and coordinate the resources and social services the child needs and report to the court on the child's welfare. 18 U.S.C. § 3509(h) (2015).

Guardians ad litem are available only to victims of, or witnesses to, "a crime involving abuse or exploitation." *Id.* A "child" is a person under the age of 18, who is or is alleged to be "a victim of a crime of physical abuse, sexual abuse, or exploitation," or "a witness to a crime committed against another

person." *Id.* § 3509(a)(2). "Exploitation" is defined as "child pornography or child prostitution." *Id.* § 3509(a)(6). Thus, guardians ad litem are not available for victims of financial crimes, such as child identity theft. They are also not available to adults, even those who suffer mental or other impairments.

The Crime Victims' Rights Act of 2004 (CVRA), 18 U.S.C. § 3771, allows victims to be represented by counsel in the criminal case. Under the CVRA, victims have standing to file motions in the criminal case to assert their rights. *See* 18 U.S.C. § 3771(d) (2015). The CVRA defines a victim as a "person directly and proximately harmed as a result of . . . a Federal offense." *Id.* § 3771(e). It provides that where the victim is a minor, "the legal guardians of the crime victim . . ., family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter . . . ." *Id.* Because the CVRA protects only victims, witnesses are not entitled to counsel pursuant to the CVRA. However, there is no limit on type of crime, as in the statute on guardians ad litem, and victim counsel is permitted for adults.

II. Distinctions between guardians ad litem and victim counsel

Guardians ad litem and victim counsel fulfill similar roles. Both can assist the child in preparing to testify and answer the child's questions about the criminal justice process. Both can identify the child's needs and obtain resources for the child. Both can provide the court with information about the child's losses and the impact of the crime on the child. There are, however, some important distinctions between the roles, which may make one more appropriate than the other in a given case.

A. Best interests of the child

First, the guardian ad litem must act in the best interests of the child. *See* 18 U.S.C. § 3509(h) (2015). In some circumstances, this will mean that the guardian ad litem takes actions against the child's wishes. A guardian ad litem "is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences." AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 2 (1996), *available at* http://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.authcheckdam.pdf. For instance, if the child wishes to return to live with an abusive parent, the guardian ad litem can petition the court not to allow that to happen.

The child's attorney, in contrast, must advocate for the child's wishes. A child's attorney "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." *Id.* at 1. If the child wishes to submit a statement at the sentencing to argue that his father is not guilty and should be released, the attorney must advocate for that right to be heard, even if the attorney personally believes that release of the father would be a terrible outcome for the child.

B. Attorney-client privilege

Second, an attorney for the child is protected by attorney-client privilege. *Id.* at 3–4 ("The lawyer-client role involves a confidential relationship with privileged communications, while a guardian ad litem-client role may not be confidential.").

The federal statute on guardians ad litem states that "[a] guardian ad litem shall not be compelled to testify in any court action or proceeding concerning any information or opinion received from the child in the course of serving as a guardian ad litem." 18 U.S.C. § 3509(h)(2) (2015). However, this is not the same as an attorney-client privilege. The guardian ad litem may choose to testify about communications with the child where doing so would be in the child's best interest (again, even over the child's wishes). *See, e.g., United States v. Rouse*, 410 F.3d 1005, 1010 (8th Cir. 2005) (guardian ad litem testified at motion for new trial following minor victims' recanting of testimony on abuse); *United States v. Duncan*, No. CR07-23-N-EJL, 2007 WL 896418, at *4 (D. Idaho Mar. 22, 2007) (guardian ad litem provided an

affidavit discussing the impact of the criminal proceedings on the child in response to defense motion to continue trial).

C. Payment

A final distinction that may be crucial is that the guardian ad litem is paid by the court. *See* 18 U.S.C. § 3509(h)(1) (2015) ("The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem."). While the CVRA permits victims to have legal representation, it does not provide funding for that legal representation. There are some options for pro bono representation of victims in criminal cases, including through the American Bar Association (*see* http://apps.americanbar.org/litigation/committees/childrights/states/directory.pdf) and the National Crime Victims Law Institute, but these options will not be available in all jurisdictions and all cases.

A corollary to the court's payment of the guardian ad litem, however, is that the court has discretion whether to appoint a guardian ad litem. *See United States v. Sumner*, 119 F.3d 658, 663 (8th Cir. 1997). In contrast, if an attorney is available to the child, the child may have counsel without asking the court's permission.

III. Conclusion

Guardians ad litem and victim counsel can be useful tools for prosecutors and courts when cases involve child victims and witnesses. They can help the child understand and navigate the complexity of the criminal justice process. They can provide the court with information regarding the child's state of mind and readiness to testify, and the impact of the crime and the case on the victim. Where appropriate and available, they can greatly ease the stress of the criminal justice process on a child and help to ensure a fair and expeditious prosecution. ❖

ABOUT THE AUTHOR

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Victim Issues in PSC Cases in Indian Country

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Even though Project Safe Childhood includes all of the hands-on sexual abuse offenses against children in Indian Country, there are a number of issues that are particular to PSC cases in Indian Country, with many of them centering on victims and their specific needs. There are also cultural implications at play during the investigation and prosecution of cases in Indian Country that require all those working with such cases to understand, be familiar with, and be comfortable with those implications. Each Indian community is different, and thus it is important that all who work in Indian Country understand the specific community and its traditions. As with victims in many other types of cases, working Indian Country cases in person, in the community, and with repeated contacts to develop trust, is key. All those who work with Indian Country cases should also have current training and awareness in the areas of trauma-informed care, victim-centered casework, and the most recent information on the neurobiology of trauma. Having that knowledge will help explain and put into perspective victim behaviors, as well as provide resources for explaining such behavior to jurors at trial.

Investigations of child sexual abuse or child sexual exploitation cases in Indian Country may involve multiple law enforcement agencies, including tribal entities, the Bureau of Indian Affairs (BIA), and the FBI. A local police department or sheriff's office may also play a role, depending upon the situation. While the BIA and FBI have a general agreement about division of casework, local custom in each area of Indian Country differs. The uniformed officer who may first respond could be a tribal employee if the tribe has contracted to provide their own law enforcement services, or a BIA employee if BIA provides direct law enforcement services. BIA may also have a law enforcement presence through Special Agents who work cases jointly with FBI Special Agents. Given that the vast majority of FBI agents who investigate crimes in Indian Country do not reside in the communities to which they are assigned, and thus are not generally "first responders," they may have to travel significant distances to view a crime scene, interview victims and witnesses, and collect evidence. Federal and tribal officers may also rely on state or local officers if the crime occurred both on and off a reservation, or if witnesses or evidence is located away from Indian Country. It is crucial that the investigation team coordinate closely to make certain that all responsibilities are clearly assigned and that everyone understands their role in a specific investigation.

This same situation with multiple service providers could also occur with the victim services in a PSC case in Indian Country. FBI has 42 victim specialists assigned to Indian Country, who provide direct assistance to those who have suffered physical, emotional, and/or financial harm as a result of a federal crime in Indian Country. In addition, BIA currently has 10 victim specialists who often coordinate with their FBI counterparts on cases. Finally, many tribes also have a victim services program because tribes have concurrent jurisdiction to prosecute many of the PSC cases if they involve tribal members. Again, it is crucial that the specialists providing victim assistance coordinate services and communicate their

respective roles in order to be as effective as possible in serving a victim's needs. While the Attorney General Guidelines set a framework for responsibilities and timeframes between investigation and prosecution, many districts have developed extremely cooperative programs that create seamless services for victims.

It is highly likely that either a child protection team or a multidisciplinary team (MDT) will also play a part in reviewing the case through the mandatory reporter and referral process. MDTs are an excellent way for group review of a matter. They allow suggestions from team members and facilitate and encourage commitment to certain time frames for tasks to be completed. MDTs provide a corresponding reporting-back process for ensuring that cases are moving forward in a timely manner. MDT's may be coordinated by the USAO or investigative agency, meet monthly, and review all cases involving child victims.

The best case approach is a victim-centered, trauma-informed team model where law enforcement, victim services, behavioral health and medical providers, prosecutors, and others work together collaboratively and efficiently to create seamless services for victims. Disciplinary Teams ensure that victims are being well-served by the system in which they find themselves. Regular team communication and meetings from the beginning of an investigation can make a significant difference in the strength and speed of a case resolution.

Indian Country is often rural and characterized by small communities of people whose families have lived in the same area for years, and who know each other. Victims may be reluctant to report criminal activity, especially when a family member may be the perpetrator, for fear that the entire community will know what happened. Thus, privacy and confidentiality are paramount during the investigation and prosecution of a case. MDT members need to sign and abide by confidentiality agreements when discussing cases. Health care or mental health facilities must think about putting systems in place so that others waiting for appointments are not able to make assumptions about a victim who presents for care and treatment. Prosecutors should consider charging cases without using specific identifying initials and dates of birth in public documents and should use language such as "a child under the age of 12, withheld to protect privacy." In a small community, using initials or dates of birth to identify a victim often immediately reveals the victim's identity.

There is a significant lack of available mental health resources in Indian Country. Victims often do not want to use Indian Health Services behavioral health providers due to the lack of confidentiality, whether real or perceived. Most medical centers have the dental, vision, medical, and pharmaceutical services, all located in one place. Victims who seek mental health care can be seen going in and out of the facility. This increases their stress and their fear of private information being revealed to the public. In these instances, referrals should be made to other mental health programs, and these costs may be covered by the state victim's compensation programs.

Victim service providers should consider the cultural aspect during the case. Often, victims of crime in Indian Country feel that participating in healing ceremonies with a spiritual leader or medicine man is far more beneficial to help them heal from, and deal with, their victimization. Mental health professionals do not always have the ceremonial component and such ceremonies, like purification ceremonies or "healing the spirit" ceremonies, can be lifesaving to victims, particularly those who experience sexual violence.

Victims in Indian Country are often ostracized for reporting the crime. Support frequently goes to the defendant, who is perceived as the person who is being persecuted by law enforcement or the Government, and pressure is placed on the victim to recant the report so that the defendant is not taken from the community and the family can remain intact. Understanding this dynamic and how to provide support in that situation is critical. Retaliation by an offender or an offender's family is also a common occurrence in Indian Country. This makes it critically important that repeated contact with victims, and often witnesses as well, continue even after the initial investigation. Victims and witnesses should be

given specific information about what to do in the event that retaliatory behavior occurs, and the investigation and prosecution team must be willing to react immediately, investigate, and charge such behavior as it occurs.

The most successful prosecutions occur when there is teamwork and when victims feel supported and a part of the process. Although traveling long distances often presents a daunting challenge and obstacle in swiftly carrying out justice in Indian Country, prosecutors and victim specialists should make every effort to meet with victims in person, in their community, in a location and setting that is comfortable for the victim. That also gives the prosecutor the chance to view the crime scene or locations mentioned during the investigation and, therefore, paint a better picture for a jury during trial. Often, field visits lead to further investigation and additional evidence for use at trial. Meeting with a victim prior to any charging decision is also crucial, regardless of whether the case is ultimately prosecuted or declined. Likewise, it is also important for those making such a decision to convey that decision in person to the victim, especially if explaining a declination decision.

Given that PSC cases in Indian Country may be prosecuted in both tribal and federal court, either simultaneously or subsequently, coordination with the tribal prosecutor is important. Some districts have instituted regular coordination meetings between tribal and federal prosecutors to facilitate that coordination. Given that the tribes often have a much shorter statute of limitations, if a declination decision in the federal system is made in favor of a tribal prosecution, it is crucial that it be done in an expeditious manner so that there is enough time left for the tribal system to work effectively.

There are often practical issues that arise in PSC cases in Indian Country that may not occur as often elsewhere. Given that there are no federal courthouses in Indian Country and that few, if any, U.S. Attorneys' offices have office space in Indian Country, victims and witnesses may need to travel long distances to appear for court proceedings. In some western states, a victim may have to travel over 300 miles each way from a home reservation to court. Public transportation from Indian Country to court is almost non-existent, and many involved in criminal cases have no available form of personal transportation to readily attend court, attend follow-up medical or counseling appointments, or meet with law enforcement and prosecutors. Victim specialists need to assess the needs of individuals well in advance of a court appearance to allow for transportation issues to be addressed and resolved. Advances for payment of witness fees and expenses should be considered routine, rather than a special accommodation, and victim specialists should work with their U.S. Marshals Service office to develop that system. Personal identification to enter the courthouse and to cash advance checks may also be problematic and is another issue to resolve well in advance of the actual need. Victims or witnesses in Indian Country may also not have a debit or credit card that many hotels require, even when payment for the room fees are guaranteed on a government credit card by either the law enforcement or prosecution office. They also may not have readily available funds to be able to purchase meals when they are required to attend court proceedings a long distance from their home.

More PSC cases in Indian Country now involve technology, whether during the crime itself or afterwards. Internet access and cell phones are much more common in Indian Country than they were in the past. Consequently, investigators and prosecutors in hands-on offense cases involving children should also be aware of the technology and investigative ability to use that technology. Victim or witness tampering has become much more commonplace via social media or electronic communication, so investigators should also think about that possibility during the case. Investigators who routinely handle PSC cases involving that technology are available to assist Indian Country agents who may not be as familiar with how to capture texts on a cell phone or obtain information from Facebook.

Finally, it is still extremely important that the court hear from a victim, if the victim so chooses, on the issues in which victims may have input—defendant's pretrial release or detention, the terms of a plea agreement, or how a criminal case has affected his or her life during a victim impact statement at sentencing. Personal contact early and often with victims can assist in their availability and willingness to

participate more fully in the court process. Courts often remark how useful victim impact statements are when deciding what a defendant's sentence will be. In PSC cases in Indian Country, it is very important that either the victim specialist or the probation officer remain diligent in getting a victim impact statement so that the court can have that information. It may be that a social worker, if the child has been placed in foster or relative care, is the responsible party for providing that statement.

Victim issues in PSC cases in Indian Country are often distinctively different from victim issues in the more frequently-charged child exploitation cases. Those responsible for the investigation and prosecution of these cases need to be well-trained on victim-centered and trauma-informed practice in order for justice to be served. ❖

ABOUT THE AUTHORS

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The Sentencing Battleground: Understanding the Current Psychology Research and Refuting Defense Psychology and Risk Assessment Reports at Sentencing

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I. Introduction

Sentencing is a hotly contested battleground in child pornography cases. Unable to dispute the evidence plainly recorded on their computers, defendants frequently abandon claims of innocence, instead focusing their efforts on convincing courts that they pose no danger to children. Without evidence of "contact offenses," defendants argue, they do not deserve the lengthy sentences advised by the U.S. Sentencing Guidelines.

Internet sex offenders are one of the fastest-growing subpopulations of federal offenders, and child pornography offenders, in particular, are one of the most frequently arrested and prosecuted subtype of sex offenders (1, 2). In the United States, the number of child pornography cases prosecuted by federal prosecutors increased by over 1,000 percent from 1994 to 2006 (1). Many authors suggest that possession of illicit images of children acts as one step in a behavioral pathway that could lead to contact offending against children (3, 4). Indeed, this area is of primary concern for prosecutors, triers of fact, and society in general. However, defendants counter with studies suggesting the opposite—that non-contact child pornography offenders rarely pose a danger of reoffending. They frequently present "expert" psychological evaluations and risk assessments, opining that the offender poses no danger at all. Are these studies valid? Are they being cited correctly? Was the risk assessment properly done?

It may not be possible, or even desirable, for the Government to counter every defense expert psychological report by obtaining its own psychological evaluation and turning every sentencing hearing into a battle of the experts. However, an understanding of the current psychological literature can greatly assist law enforcement and prosecutors to search for evidence of risk factors during the course of the

investigation, decipher defense expert reports at sentencing, and assist courts to more accurately assess the risk a child pornography offender poses to children.

II. Why science matters: below-Guidelines sentences have become the norm

For defendants to succeed in convincing sentencing courts that they do not deserve a significant sentence for a child pornography offense because they pose no danger to children, they must first convince the court not to impose a sentence under the current Sentencing Guidelines. Therefore, it is helpful to understand the history of the Guidelines, the attacks made against them, and why now, more than ever, courts appear receptive to arguments that defendants should receive a reduced sentence, simply because there is no evidence that they committed other, more serious offenses.

Much has already been written about the history of the Sentencing Guidelines (5, 6). In short, the Sentencing Commission generally develops the Guidelines based on data about past sentencing practices (7). A number of the child pornography Guidelines provisions, however, were mandated by Congress—in other words, these provisions are not "empirically" based (8).

In 2005 the Supreme Court, in *United States v. Booker*, rendered the Guidelines effectively advisory (9). Two years later, in *Kimbrough v. United States*, the Supreme Court held that sentencing courts had the discretion to depart from the Guidelines for purely policy reasons—including a sentencing court's disagreement with sentencing guidelines that were not set using the Sentencing Commission's normal empirical approach (10). Together, *Booker* and *Kimbrough* gave defendants—and sentencing courts—who already disagreed with the high sentences advised by the Guidelines, the hook they needed to disregard them and look to other 18 U.S.C. § 3553(a) factors, such as psychological examinations and risk assessments, to guide their sentencing decisions.

This argument gained traction following an article published in 2008 by Assistant Federal Public Defender Troy Stabenow (11). He argued that judges should depart from the Guidelines because they "are not the product of empirical data, national experience, or independent expertise, and thus, do not satisfy § 3553(a)'s objectives" (12).

Significantly, Stabenow's criticism of the Guidelines relies, in part, on his citations to psychological literature. Stabenow argued that the high sentences dictated by the PROTECT Act were based on the fear that child pornography defendants are contact offenders, predisposed to engage in sexual relations with children. He claimed that "new studies focused purely on child pornography defendants have empirically demonstrated that many child pornographers are less dangerous than previously believed" (13). Citing to studies by Dr. Michael Seto and Angela Eke, Stabenow concluded that "empirical testing disproves the fear that the typical child pornography defendant will go on to molest children" (14). Furthermore, Stabenow suggests that, using the current psychological literature, it is possible to conduct an accurate risk assessment of defendants in order to reliably "separate 'fantasy' pedophiles from intentional contact offenders" (15). Stabenow's claim, based upon select psychological studies that most child pornography offenders pose no danger to children, is commonplace in defense sentencing briefs and even in defense expert psychologist evaluations. Defendants present their own risk assessments to the court, arguing that they pose no risk at all.

The U.S. Sentencing Commission, in its 2012 report to Congress (2012 Report), stated that by 2011 only 32.7 percent of non-production child pornography offenders received within-Guidelines sentences (6). This Report was the result of the Sentencing Commission's multi-year study of issues involved in child pornography sentencing, and contained a number of critical findings regarding child pornography offender behavior, risk factors, and recidivism rates (6). The Report was highly critical of § 2G2.2 (the Guideline most often used in child pornography cases) and called for substantial revisions.

On March 5, 2013, the Department of Justice responded to the 2012 Report, disagreeing with a number of the Sentencing Commission's findings (16). The Department agreed, however, that the current

Guidelines are imperfect and recommended a number of changes. No changes, however, have been enacted.

Defendants have taken advantage of the 2012 Report and the Department's response to it to argue that the Guidelines should be disregarded. While defendants have raised numerous creative arguments supporting low sentencing recommendations, none are as ubiquitous as the claim that a low sentence is warranted because the defendant poses no danger to children and is a low risk of recidivism. Defense experts often rely on the current psychology literature to support their assertions that the defendant poses a low risk of reoffending in the future. But are they citing this literature correctly? A familiarity with the current social science literature can greatly assist prosecutors in understanding these defense arguments, and countering them.

III. How to respond to psychological themes raised by defendant's sentencing papers

Non-contact, child pornography offenders are generally lumped into an all-inclusive "low risk" category. Unfortunately, limited research exists regarding these offenders, unlike the enormous body of psychological research conducted informing best practices when conducting risk assessments of *contact* sex offenders. Consequently, triers of fact are often mislead by defense experts who use either non-empirically supported mitigating factors (that is, PTSD, depression, "therapeutic" use of child pornography due to a personal history of sexual abuse as a child) or limited research findings (for example, "The Seto Study" (17)) to support their findings.

This section looks at what factors actually increase a child pornography offender's risk and examines how to counter arguments frequently made by defense experts in these cases by analyzing the content of a random sample of psychological evaluations utilized by defense attorneys in federal child pornography cases.

A. Defense counsels' oft-cited "Seto Study" and its limitations

In 2011 Dr. Seto and colleagues published a paper analyzing 21 separate recidivism studies. This paper suggested that child pornography offenders, in general, are at a low risk to reoffend sexually (4.6 percent recidivism rate) (17). Just as Stabenow cited Seto's earlier work in his criticism of the Guidelines, defense experts frequently cite Seto's 2011 paper during legal proceedings. Triers of fact are often influenced by this data because Seto is a well-respected researcher, the study is well designed, and, being in an area of criminal behavior that is relatively new to modern society, there is an absence of additional studies.

What defense experts and sentencing positions generally do *not* address are the limitations to this study. The Seto Study is characterized by important, inherent factors that result in what is likely a significant underrepresentation of the re-offense pattern of child pornography offenders. These factors are expressly addressed by the authors of the study—a fact which is not usually mentioned by defense experts (17).

The study fails to adequately address the need for case-by-case assessment: Presenting one article of generalized risk without assessing the unique, ideographic factors inherent in each individual case is remiss at best and dangerous at worst. Seto himself warns, "The fact that child pornography offenders as a group appear relatively low in risk for detected sexual reoffending does not mean, however, that offenders are homogeneous with regard to risk" (17). The author goes on to concede that "[w]e need research on the factors that predict recidivism in this population" (17).

While determining risk in child pornography offenders may be a new area of study, the practice of determining risk factors in various populations is not new. This limitation of Seto's study can be

explained by comparison to another area of risk assessment: suicide. Judges are often called upon to make decisions regarding involuntary commitment to inpatient mental health facilities for suicidal patients. Research indicates that suicide occurs in approximately 12.7 out of 100,000 deaths in the United States per year on average (18). This is far less than 1 percent of the population, yet we are aware as a society that certain *individuals represent a much higher risk than others in the group* for suicide, and do indeed warrant additional care. We know that, for example, military veterans are twice as likely to commit suicide (19) and lesbian/gay/bisexual/transgendered/questioning individuals commit suicide at a rate three times higher than the national average (20). Additional factors that increase risk include mental illness, lack of social support, access to means, family history of suicide, and prior attempts (21). Therefore, in terms of risk, an individual who is a returning Iraqi war veteran, who is homosexual, who lives alone, and who has a history of two prior attempts at suicide looks very different from the general studies that report suicide in less than 1 percent of the population. The same is true with all risk assessments, including an assessment involving the risk of recidivism among child pornography offenders.

The study analyzes offenders over a brief period of time: Ideally, a recidivism study follows released offenders over a long period of time—even decades. A primary weakness of the Seto Study is the brief period of time over which the offenders were followed. The average amount of time an offender had been in free society after release in the Seto Study is only 3.4 years. Even at the high end of "street time," the offenders had been released for only 6 years, and some offenders in the study had been released for only 1.5 years. Many or most of these offenders were also subject to restrictive supervision guidelines that limited their access to children, and often to the Internet (17).

As the follow-up time in any recidivism study is extended, the recidivism rate inevitably increases. For example, in a study conducted by Seto and Eke in 2005 (22), 201 registered male child pornography offenders were followed for an average of 2.5 years post release. A total of 4.5 percent of those offenders had been convicted of a new contact child sexual offense. In 2010 authors conducted a follow-up study with this same group of offenders (23). Interestingly, with the average follow-up time in the new study increasing to an average of only 5.9 years, the total number of these offenders with a new contact child sexual offense had doubled to 9 percent. This approaches the 10 to 15 percent marker identified as an average level of re-offense after 5 years among *contact* offenders (24). While some of these offenses occurred during the follow-up period, some were new convictions for older contact offenses that occurred *prior* to the instant child pornography offense (23). This raises another issue in the prosecution and sentencing of child pornography offenders: What is the likelihood that a child pornography offender has *already* committed a contact sex offense for which he was not caught, and how is it accounted for in a risk assessment?

Child molestation and pornography offenses are underreported: Another and, perhaps, most crucial point of contention in the Seto Study is the singular nature of sex offending among criminal behavior as an immensely underreported phenomenon. There is clearly a huge difference in detecting, for example, murder or bank robbery in a group of offenders being studied for reoffending versus detecting child molestation or viewing of child pornography. Research repeatedly indicates that an incredibly small number of sexual assaults are ever reported—with figures ranging from 2 to 13 percent in various studies (25, 26). Compounding this effect is the fact that a majority of victims of childhood sexual abuse that do disclose do not do so until adulthood due to the negative psychological and social ramifications inherent in the process of disclosure (26–28). Perhaps most germane to this discussion is the extremely small percentage of the reported cases that actually progress to arrest, prosecution, and/or conviction. Only a fraction, in fact, of this small percentage of reported cases of child abuse are even made known to law enforcement due to a variety of factors, including the various channels of disclosure across jurisdictions (mental health providers, Child Protective Services, family practitioners, etc.) (29). Additionally, of those that are disclosed to police, research has found that arrests are made in only 29 percent of cases—and for

children under age 6, only 19 percent of reported sexual abuse incidents result in arrest (30). As we follow the legal process, we inevitably find an even smaller percentage being prosecuted and an additionally smaller percentage ending in conviction.

This discrepancy is further born out in studies that examine rates of conviction versus self-report data among child sexual offenders. Studies that allow for self-reporting of number of victims and proliferation of offending by convicted child sex offenders (31) suggest higher prevalence and, perhaps, more accurate estimates of offense rates (17, 32). For example:

- Self-report data was evaluated in a clinical sample of 561 sex offenders with both contact and non-contact offenses. Collectively, the offenders in this study reported over 250,000 incidents of sexual offending. Furthermore, if child sex offenders providing self-report are able to do so anonymously, the differences in the number of crimes claimed and the number of convictions increase further (33).
- Another survey evaluated contact offenders and found that rapists reported an average of 5.2 rapes compared to only 2.8 documented rapes per offender. For the child molesters in the sample, there was an average of one conviction per offender. However, anonymous self-reporting revealed an average of 4.7 molestations per offender (34).
- Yet another study also found major discrepancies in official criminal records and self-report data. The 23 rapists in the sample averaged approximately 2 arrests per offender, yet they self-reported an average of 221 crimes per man. The 30 child molesters averaged 1.5 arrests, but self-reports revealed an average of about 666 crimes, including crimes against children and adults (35).
- Anonymous self-report data was obtained from 99 convicted sex offenders. Official records showed that 37 had been arrested a total of 52 times and charged with 66 offenses for contact offenses against a female adult—yielding an average of 1.8 victims per offender. Self-reporting, however, revealed an average of 11.7 victims per offender. The child molesters in this sample (n=67) had official records reflecting a total of 136 victims, but the men anonymously admitted to over 8,000 incidents of sexual contact with 959 children (32).
- In a recent study, 127 child pornography suspects with no known history of contact offending were interviewed regarding undetected contact offenses. Only 4.7 percent initially admitted to previously abusing at least one child. After administration of a tactical polygraph, an additional 52.8 percent disclosed undetected contact offenses (36).

Considering that many of the studies included in Seto's meta-analysis only used conviction data to determine recidivism, it becomes increasingly likely that the results indicate, at best, a serious underrepresentation of the actual re-offense rates of child pornography offenders.

B. Identifiable factors increase a child pornography offender's recidivism risk

A growing body of research identifies variables and characteristics of offenders, collections, images, online behavior, and demographics that are significantly related to a higher risk of reoffending with either additional child pornography offenses or by progressing to contact offending with children. As discussed in more detail below, such risk factors include living with or having access to children, drug and alcohol problems, antisocial peer networks, criminal attitudes or beliefs, antisocial behavior, and sexual deviance.

Defendants regularly cite certain social science literature, such as the Seto Study, for the proposition that child pornography offenders—as a homogeneous group—pose a low risk of recidivism. There are certainly individual child pornography offenders that pose a low risk to reoffend. There are also, however, in the group of child pornography offenders, individuals who represent a higher level of risk to reoffend.

The burning question becomes: How do we identify those at a higher level of risk of reoffending among child pornography offenders? This section examines this question by relying on empirical studies that examined and compared child pornography offenders with contact offenders and mixed offenders (those with both child pornography and contact offenses). Armed with the knowledge of risk factors identified by reputable, empirical, peer-reviewed studies, prosecutors can more accurately assess the risk of reoffending.

Access to children: A 2011 study examined the differences between child pornography offenders and mixed offenders who began with child pornography possession and progressed to contact offending (37). The findings indicated that the primary difference between the two groups was that the mixed offenders that started with child pornography possession were more likely to live with children or have access to children through their places of employment. In addition, they found higher proportions of drug and alcohol problems in these mixed offenders. Two years later, another study found that, overall, mixed offenders appear to present psychologically in a manner more commensurate with Internet offenders than contact offenders (38).

These findings can greatly assist prosecutors at sentencing because it is not uncommon for a defendant to claim that his drug and alcohol problem indicates that he poses a *lower* risk to children, because his child pornography offense was the result of drunk/high behavior, and not a sexual interest in children.

Criminal history/lifestyle: It is not uncommon for child pornography offenders to have no prior criminal history of any kind. This does not mean that most child pornography offenders have not previously engaged in criminal behavior. It may simply mean that they were not caught by the criminal justice system. Self-report studies reveal the prevalence of undetected contact offenses in child pornography offenders anywhere from none or very few to over 80 percent (31, 39). Although some studies have found evidence of a criminal history, most agree that the criminal history of child pornography users is significantly less prevalent, prolific, and significant than contact offenders (40–42). Another study confirmed this, indicating that child pornography offenders tend to display fewer factors associated with a criminal lifestyle compared to contact offenders (2). Additional research has found that child pornography offenders generally have fewer criminal attitudes or beliefs, criminal lifestyle endorsement, or antisocial peer networks (2, 23, 42). Mixed offenders proved to be more criminogenic when these findings were translated to them (43).

Antisocial behavior and sexual deviance: The 2012 Sentencing Commission Report proffered that, despite the limited research, a consensus exists that the two primary risk factors for repeat child pornography or escalated contact offenses are antisocial behavior and degree of sexual deviance. Antisocial behavior can generally be described as criminality in thought and behavior, general difficulties in self-regulation, and antisocial personality characteristics as outlined in the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM 5), such as entitlement, lack of empathy, and manipulation of others (44). One of the most effective and most popular instruments used to measure antisocial behaviors and personality traits is the Psychopathy Checklist-Revised (45). The PCL-R is a 20-item checklist of a variety of characteristics that are commonly found in individuals with psychopathy. It is also used as a risk measure for reoffending in many different contexts, given that the construct measured by the instrument—antisociality—is one of the most predictive variables in reoffending of any kind (45, 46).

Interestingly, among sex offenders, child molesters generally present with less criminal *behaviors* as measured on the PCL-R than do adult rapists. However, the "Factor 1" items on the PCL-R, which measure personality characteristics of psychopathy and antisociality as opposed to actual behaviors, are themselves predictive of the risk of reoffending among child molesters (46). Given this, and because research indicates a general pattern of less criminality among child pornography offenders than among

contact or mixed offenders, measuring the presence of characteristics of criminality by this instrument is an excellent manner to assess the degree of antisocial characteristics in a given offender and is, therefore, a key step in defining a significant portion of that offender's risk of reoffending.

Simply put, as a child pornography offender begins to increase in level of antisociality, that offender begins to look more like those who have offended or may offend against an actual child. Some traits that may be present as examples of antisociality that may not manifest as criminal charges are (45):

- Substance abuse
- Impulsivity
- Irresponsibility in financial matters
- Parasitic lifestyle
- Early behavioral problems (in childhood, such as suspensions, bullying, hurting animals, playing with fire)
- Sexual promiscuity
- Unstable work history
- Unstable relationship history
- Pathological lying
- A lack of emotional depth
- A lack of remorse
- A pattern of blaming others for one's own problems, and
- Any illegal behaviors not resulting in criminal charges

Another major variable that increases the risk of reoffending among child pornography offenders is sexual deviance (6, 17). Sexual deviance can be defined as any abnormal source of sexual attraction, especially one that involves non-consenting sexual partners (for example, children or non-consenting adults). The primary means of assessing sexual deviance is through a complete psycho-sexual evaluation. One area of sexual deviance often associated with child pornography offenders is pedophilia. Per the DSM 5, pedophilia is characterized by a pattern of sexual attraction to children lasting for at least a period of 6 months. Research supports the notion of using child pornography offending as a valid means of diagnosing pedophilia (47). Thus, forensic examination should address how long an offender has been downloading child pornography and, if possible, the amount of time spent viewing it. Forensic analysis of the number and type of images collected by an offender may also be important, because recent research suggests that these factors also speak to sexual deviance. There is conflicting research regarding whether the size of the child pornography collection is a distinguishing variable between contact and non-contact offenders. A 2010 study found contact offenders to possess significantly more child pornography than non-contact offenders (48). A 2014 study also found that mixed offenders (child pornography offenders with contact offenses) were more likely to have a larger collection of child pornography images than non-contact offenders (2). Another study controlled for the severity and violence of the images, and found that although non-contact (child pornography only) offenders had a greater overall number of child pornography images as compared to mixed offenders, they had a smaller proportion of the more severe and violent pornography, as compared to mixed offenders (43). In addition, the more severe the contact child sexual offense committed, the higher the proportion of penetrative child pornography images possessed (43).

A determination of masturbatory behavior is also crucial in diagnosing pedophilia. This is an important factor in any thorough risk assessment of a child pornography offender. In an attempt to deny

any sexual interest in children, defendants often proffer creative justifications for their child pornography offenses, such as "He was only trying to complete a collection," or "It was an OCD/Hoarding problem." Whether the offender masturbated to the images is a simple, but important, factor in examining sexual deviance in the face of such excuses. As discussed in more detail below, this behavior is often not addressed in defense experts' risk assessments.

IV. Current studies: a qualitative analysis of defense expert reports in federal child pornography cases

A. Method and results

Defense psychology exams commonly ignore the risk factors presented above and rely instead on non-empirically supported mitigating factors, inappropriate risk assessment tools, and simply advocacy—rather than science—to support their conclusions that a defendant's behavior does not warrant a significant sentence. In order to properly assess the types of claims related to psychology and social science literature being made by defendants (and their expert psychologists), a request was made via a Project Safe Childhood listserv to federal prosecuting attorneys to supply defense expert risk assessment evaluations or sentencing memoranda addressing psychological evaluations of offenders in child pornography cases. In response, prosecutors provided information on 17 distinct cases. In some cases, multiple documents were received for the same case (for example, a letter to the judge in support of the defendant from family members, a sentencing memorandum, an offender statement, and a defense expert psychological evaluation). In total, 13 complete psychological evaluations, 9 defense sentencing memoranda, 2 letters from family members of 2 offenders to the judge in each case in support of the offenders, 1 letter from a therapist of an offender to the judge, hospital records for 1 defendant, and 3 defense expert curriculum vitae were received. Of the nine defense sentencing memoranda, two were not used as they did not refer to a psychological evaluation. All 17 of the cases included in the study contained either a complete psychological evaluation by the defense expert or detailed reference to findings of a defense expert evaluation in the defense sentencing memorandum.

Documents were analyzed for diagnoses, instruments used, education level of experts, risk factors listed, and reasons or explanations made for accessing and viewing child pornography. Diagnoses were not made in all cases. A mood disorder diagnosis was rendered in four cases (Bipolar II, Schizoaffective Disorder (two cases), and Major Depressive Disorder). Adjustment Disorders were diagnosed in two separate cases, both referencing depression (Adjustment Disorder with Mixed Anxiety and Depressed Mood, Adjustment Disorder with Mixed Disturbance of Emotions and Conduct). Of the 17 evaluations viewed, 4 of them utilized a PTSD diagnosis due to military service as a means to defend the actions of a child pornography offender. Substance Use Disorders were diagnosed on two separate occasions (Cannabis Use, in remission; Alcohol use disorder), though alcohol abuse was discussed as a reason for viewing child pornography in six additional cases without a formal diagnosis. Obsessive-Compulsive Disorder (OCD) was diagnosed in one evaluation, as were Attention Deficit Hyperactivity Disorder (ADHD), and Learning Disorder by History. Sexual Disorders were diagnosed in four cases (Paraphilia with reference to Hebephilia, Rule Out Pedophilia, Sexual Disorder, and Not Otherwise Specified (NOS) (two cases)).

Various psychological assessment instruments were used in the evaluations. Tests were used that speak directly to an offenders sexual deviance, antisociality, or other factors used to address risk, including the M-Fast (test for malingering; one case), the MMPI-2 (a personality inventory; eight cases), the MCMI-III (a personality inventory and general diagnostic instrument; one case), the PAI (a personality inventory; two cases), AASI (sexual interest inventory; one case), the AASI screening instrument; one case), and the PCL-R (measure of psychopathy; five cases). The specific sex offender risk assessment instruments used were the SVR-20 (three cases), the Static-99 (one case), the SONAR (one case), and the RRASOR (one case). Other instruments used in the defense psychological evaluations of

the risk level of the child pornography offender were the Standard Progressive Matrices, Test of Nonverbal Intelligence, Bender Visual-Motor Gestalt Test with Recall (two cases); House-Tree-Person projective drawing test (two cases); Kinetic Family Drawing (two cases); Rorschach Inkblot Test (two cases), Adult Sentence Completion Test (two cases); Beck Depression Inventory (three cases); Beck Suicide Inventory (two cases); Beck Anxiety Inventory (two cases); Beck Hopelessness Scale (two cases); Mood Disorder Questionnaire (two cases); Aggression Questionnaire (two cases); Clinician Administered PTSD scale; and Michigan Alcohol Screening Test.

In assessing the training of the defense expert and their role in each case, it was determined that 13 experts were licensed psychologists, 3 were licensed marriage and family therapists, and 1 was a master's level clinician. Three experts that completed psychological evaluations were actually treating the offenders prior to the evaluation, which is in direct conflict with APA ethics codes related to conflict of interest (49).

B. Common problems

Non-empirically supported mitigating factors: The principal finding from defense experts' psychological evaluations is the reliance on non-empirically supported mitigating factors, reasons, or excuses for accessing and viewing child pornography. The most common reasons given for accessing child pornography were Major Depression, Posttraumatic Stress Disorder (PTSD), and the use of child pornography as a way to "treat" untreated sexual abuse experienced by the offender as a child. Depression was listed as a mitigating factor in 11 of the 17 evaluations. A general (but not an official diagnostic) reference to depression was utilized as a defense argument in four evaluations, and seven evaluations were centered on the defense argument that depression due to a history of sexual abuse endured by the offender as a child drove offenders to view child pornography as a form of "therapy." The remaining evaluations consisted of defense arguments, including profound intimacy skill deficits, use of Internet pornography as a source of sex education, use of child pornography as an outlet for undisclosed homosexual orientation, use of child pornography to relieve boredom, and compulsive "hoarding" behaviors.

Misidentification of risk factors as mitigating factors: There are many risk factors that increase a person's likelihood of reoffending. Such factors could rationally be viewed by prosecutors and courts as aggravating factors when considering the danger a defendant poses to the community. Many of these risk factors were present and addressed by defense experts in the cases reviewed. However, with one exception, the defense experts from the sample spun these risk factors as mitigating factors—reasons or excuses why the offender might have engaged in viewing child pornography in the first place. For example, in one case, the defense stated that the offender "did not present with any symptoms of paraphilia; however, he is easily influenced by others." Being easily influenced would be considered a risk factor for reoffending in the form of poor self-regulation (50). Other examiners described the offenders' use of alcohol in connection with viewing/collecting child pornography as coping strategies, used by offenders to deal with a history of abuse. In reality, the use of alcohol is a risk factor among sex offenders, not a mitigating one. Other mitigating factors used by experts that are actually risk factors for reoffending are proneness to boredom, a history of sexual experimentation with family members, and the desire or act of working in an environment where children are present. In multiple cases reviewed, examiners discuss the offender's emotionless or detached personality as a product of untreated sexual abuse or depression. However, the inability to express emotion and/or callousness is a risk factor for antisocial personality and reoffending. The lone exception occurred in one report where PTSD was listed as a risk factor—not for reoffending, however—but for progress in sex offender treatment.

Prosecutors report that another mitigating factor raised by defense experts—although not in the 17 reports examined—is that the defendant suffers from autism or Asperger syndrome (on the autism spectrum). There is no scientific support for the argument that autism/Asperger syndrome would cause

someone to be sexually interested in children or sexual images of children. While autism/Asperger syndrome may contribute to compulsive collecting behavior or a lack of victim empathy, these are not factors that decrease risk. To the contrary, poor self-regulation and victim empathy are risk factors that increase the likelihood of recidivism.

Non-objectivity: Along with non-empirically supported mitigating factors, prejudicial and emotional language was used in the majority of defense evaluations. Many of the defense examiners in the cases reviewed employed prejudicial language, such as "unfortunately," "thankfully," "looked on in horror," and "on a positive note," which shows favor and can influence the trier of fact's decision. Other examiners used statements like "unlike most pedophiles" and "his arrest was a blessing in disguise." Two examiners used statements like "his accessing of images on the computer was low in comparison to individuals who evidence paraphilia" without any mention of research (to include federal Sentencing Guidelines) that address average size of collections or what was considered "small" or "large."

In some cases, experts expressly argued for lower sentences, rather than confining their expert opinion to the realm of risk assessment and psychology. For instance, experts opined that defendants should not be incarcerated because the offender "will never get any significant help while incarcerated" and/or that "removing [the offender] from his current structure, even for a short term of imprisonment, will be highly disruptive to his life-saving treatment." One expert even opined that because the offender "possessed a limited amount of child pornography," the court "should not punish him as a collector." Another expert defended an offender's sexual interest in adolescent girls by stating that an adult heterosexual male's interest in adolescent girls was simply "normal," because girls of that age have developed secondary sexual characteristics. In fact, an adult male's ongoing sexual interest in adolescent girls is a sexual deviance specifically referred to as hebephilia.

Objectivity is of most importance when completing a psychological evaluation, regardless of the reason for referral. Such advocacy casts doubt on the validity of the experts' conclusions.

Use of incorrect risk assessment tools and undue reliance on personality and malingering tests: Risk level was addressed in each of the 17 cases reviewed, and all offenders were found by the defense experts to be a low risk or no risk to recidivate. To assess the child pornography offender's level of risk for reoffending, experts in this sample used the Static-99 (51), the Sex Offender Need Assessment Rating (52), the Rapid Risk Assessment for Sexual Offense Recidivism (24), the Sexual Violence Risk-20 (SVR-20) (53), and the Sex Offender Risk Appraisal Guide (SORAG) (54). All of these instruments, however, were created to assess degree of risk among *contact* offenders only. That is, the instruments were designed and created using data from offenders with *hands-on* offenses. Child pornography offenders were not included in the normative samples. Their validity in measuring risk among non-contact and child pornography offenders has not been established, and their use is not recommended empirically in the assessment of risk in these offenders.

As a means of measuring antisociality and sexual deviancy, as well as risk of recidivism, defense experts utilized the Abel Assessment for Sexual Interest (AASI) (55), the Abel Screen, and the Psychopathy Checklist-Revised (PCL-R) (45). As a means of assessing sexual deviance, the Abel instruments measure the amount of time a subject looks at deviant sexual images displayed before him or her on a screen and compares this with self-report data gathered from the subject. Due to lack of empirical support, the Abel instruments have been disqualified as evidence in some jurisdictions and are generally recommended for treatment purposes only (56, 57). By contrast, the PCL-R is an appropriate and effective means of measuring antisociality. However, in each of the defense exams reviewed, the experts provided only the whole scores for the PCL-R, with no reference to any specific portion of the test that could indicate the presence of risk factors. For instance, none of the expert reports provided the Factor 1 scores for the PCL-R. These scores are personality items, the portion of the total score that is proven to be predictive of risk among child molesters. Also not addressed were any specific antisocial behaviors not

explicitly listed by the PCL-R that are known to increase level of risk, such as substance abuse, unstable job history, poor self-control, etc.

Pedophilia, a paraphilia one would expect to commonly find in child pornography offenders, was diagnosed in only one report. Other reports attempted to set forth reasons why the offender was not a pedophile. For example, one expert explained that the offender was "not as much a pedophile as he was uninformed" and "incapable of intimacy." The expert continued, describing the defendant as "bored—without knowing how profoundly—and he is unaware of how bored he is or what he should do about this." Ultimately, the expert rationalized that the offender viewed child pornography not because he was sexually interested in children, but as a way to cope with his boredom. This rationalization is not supported in any social science literature. In a different case, an expert argued that the offender was not a pedophile because he "does not dress like a child." Dressing like a child is not a factor in diagnosing pedophilia.

In an effort to endorse positive symptoms of the offenders or to disprove the presence of risk factors, the defense experts administered personality and malingering tests. Examples of those assessments that were found in the reviewed cases are the Minnesota Multiphasic Personality Inventory (MMPI-2), the Personality Assessment Inventory (PAI), and the Miller Forensic Assessment of Symptoms Test (M-FAST). The MMPI-2 is an objective personality inventory consisting of 567 true/false items that assess test-taking attitudes, personality traits, and psychopathology (58). The PAI is a 344-item instrument that constitutes 22 non-overlapping scales covering constructs most relevant to a broad-based assessment of mental disorders (59, 60). The M-FAST is a 25-item screening interview for adults that helps assess the likelihood that an individual is feigning psychiatric illness (61). Though well-respected in the field, none of these instruments has been shown to be predictive of risk of reoffending (46), and none are appropriate for use in a psycho-sexual risk assessment.

Aside from the PCL-R, none of the tests or instruments used by the experts in these cases have ever been shown to be predictive of risk of re-offense in child pornography offenders, and the vast majority of instruments (projective tests such as the Rorschach Inkblot or the drawing tests, instruments used to measure depression or suicidality, measures of intelligence) have no bearing whatsoever on the risk of sex offenders in general. The M-FAST, for example, is a well-respected and sound instrument (like most of the instruments used). However, the M-FAST measures malingering of mostly bizarre atypical psychotic symptoms that are often endorsed by persons feigning serious mental illness (tactile and olfactory hallucinations, extremely bizarre thought processing, atypical delusional behavior, atypical presentation of auditory hallucinations).

What appears to be a recurrent theme in the defense evaluations is not only a lack of attention to variables that are empirically shown to relate to risk of reoffending (sexual deviance, antisociality, accepting attitudes of child sexual behaviors, placing oneself in a position through work or recreation to access children, sexual preoccupation), but a "throw everything and see what sticks" methodology. It is as if defense counsels' approach is, "If I can show my offender to be 'normal' on enough tests that look impressive but are unrelated to the issue of risk, then, by proximity and association, my offender will look 'normal' in regards to sexual deviance and risk to reoffend."

Failure to address masturbatory behavior and other case-specific evidence in the psycho-sexual evaluation: One of the key elements of a psycho-sexual evaluation is the psycho-sexual functioning of an offender. Masturbatory behavior—as well as sexual preoccupation and use of pornography—has been shown to be a risk factor of reoffending among sexual offenders (50, 62). Whether the offender masturbated to the images, how often, and how deviant images were, is crucial information in a risk assessment of a child pornography offender. It speaks directly to sexual deviance, attitudes toward sexualizing children, and preoccupation with sex. Failure to explore masturbatory behavior in a psycho-sexual evaluation is akin to not discussing the instant offense in an insanity evaluation. It is also terminally damaging to any argument that an offender was simply a "collector" or

"bored" or that he viewed child pornography because it was therapeutic to see that he was "not the only one who was abused"—all justifications found in the sample psychological evaluations.

Masturbation is critical to an accurate diagnosis of pedophilia, which is a sexual deviance. As outlined in the DSM 5, pedophilia is characterized by a pattern of at least 6 months of sexual attraction to children (44). Thus, a diagnosis of pedophilia should certainly address evidence of masturbation to images of children (evidencing a sexual attraction to children) and information about length of time spent accessing child pornography (evidencing whether this attraction lasted at least 6 months).

During the evaluation, the issue of masturbation should be carefully and thoroughly addressed. For this reason, adequate training in interviewing techniques is an invaluable asset for an evaluator. For example, it is easier for an offender to be less than forthright when asked, "Did you masturbate to child pornography?" than when asked, "Did you masturbate to the images with boys as well as the images with girls?" or "Did you masturbate more often to the videos or still images in your collection?" If an offender indeed did not masturbate to the images, the answer will be the same regardless of how the question is phrased.

Interestingly, masturbation was rarely addressed in the evaluations. Only three of the evaluations reviewed discussed masturbatory behavior.

Reliance on motivation for treatment: All 17 defendants were found by their experts to be low- to no-risk of reoffending. The reasoning in all 17 cases included that there was no prior criminal history and/or contact offenses and that the offender was motivated for treatment. Notably, none of the evaluations utilized a tactical polygraph portion to verify these claims. Motivation for treatment has been shown to have no significant correlation to reoffending sexually (50).

Offense was motivated by offender's own victimization as a child: In approximately five of the cases reviewed, the examiner used the argument that the offender's desire toward adolescent pornography was based on the offender's preoccupation with his own victimization as a youth. Another expert, using the same line of argument, stated that viewing child pornography was a means of "self-therapy" due to the offender's own history of abuse and was "a psychologically plausible explanation and consistent with the fact that treatment in group with other abuse victims is particularly effective psychological intervention for sexual trauma. It is also a well-established psychological phenomenon that individuals who have been subjected to sexual abuse, if left untreated, can reenact their abuse at a later stage in life." This statement is, simply put, completely false. Research across decades has shown that being sexually abused as a child is not a significant risk factor for reoffending among sex offenders (50). Further, it is not predictive or correlated with sexual offending in general—that is, being sexually abused as a child does not mean one is likely to grow up and commit a sex offense against a child at some point. (63). This fact is a major point of therapeutic relief for victims of childhood sexual trauma who are in treatment. Essentially, these victims learn that, despite what occurred to them in their childhood, there is not a likelihood that they will one day have an urge to offend against children or to develop a sexual attraction to children.

Compulsive behavior: One defense explanation for seeking out and viewing child pornography that was addressed in three evaluations was compulsive behavior, Obsessive-Compulsive Disorder, compulsive hoarding, and repetition compulsion. Some defense experts argued that the defendants' collections of the child pornographic material had more to do with obsessively downloading, organizing, and filing than with sexual gratification. One psychologist described the need for an offender to collect and keep over 7,000 child pornography images and videos as a manifestation of "compulsive hoarding." Other defense experts argued that the compulsive behaviors and addictive behaviors linked to PTSD may be a way for the person to "self-medicate" their feelings of anxiety, depression, anger, guilt, and shame related to a traumatic event. Furthermore, the experts argued that child pornography becomes the "drug of

choice for the person with PTSD who is trying to escape the myriad of negative symptoms caused by the disorder."

Perhaps the most important factor when considering the use of diagnoses claimed to be related to compulsive behavior, such as Major Depression or PTSD, as an excuse for child pornography viewing is the notion of volitional control. Such diagnoses do not control an offender's behavior. The decision to engage in viewing child pornography, especially over a period of time and with efforts made to hide the material from others, is an active and organized choice made by the offender. Criminals break the law for many reasons. Individuals rob banks for money, assault others out of anger or passion, etc. Certainly, many of these criminals throughout history have suffered symptoms of depression or anxiety—even PTSD. However, much like the above discussion explaining that suffering sexual abuse is not predictive of being a sexual abuser, research does not indicate any empirical link between anxiety disorders or mood disorders and viewing child pornography. Depression and anxiety (or learning disorders) do not alter one's sexual orientation. This is good news for combat veterans who suffer from PTSD, who do not have to sit at home wondering if today will be the day that they suddenly have an urge to view child pornography. Indeed, if viewing child pornography *is* a coping mechanism for an individual for any reason, that factor would register as a risk factor for reoffending. He has engaged in the behavior before; he demonstrates poor impulse control, irresponsibility, and a willingness to break the law to satisfy his own urges. And all of this occurs by choice as organized and goal-oriented behavior in the context of disorders (depression and PTSD) that have, after all, been empirically linked to a reduction in sexual interest and libido (44, 64–67). Furthermore, even if offense behavior is *not* volitional—for example, if an individual legitimately suffers from an obsessive-compulsive disorder that contributes to criminal activity—this is as much a risk factor as it is a mitigating factor. This is supported by the 2005 Hanson study that found general problems with self-regulation to be among the predictive risk factors for sexual recidivism (50).

Offender's youth *increases*, rather than decreases, risk: While not seen in any of the 17 sample cases reviewed, experienced prosecutors suggest that another variable frequently used as a protective factor by defense experts is age. Often, an offender's young age or immaturity is proffered as a mitigating factor—suggesting that the offense resulted from the poor judgment of youth and therefore the child pornography offense is not indicative of risk to children. On the contrary, research has consistently shown that a younger offender is significantly *more* likely to reoffend than offenders who are older, with risk declining as the offender ages (46, 50). Should an older offender similarly use age as a mitigating factor, it is important to remember that the finding that risk declines with age is a generalized finding based on large sample sizes and numerous studies. Case-specific variables may indicate a departure from this assignment of low risk of older offenders (if, for example, the instant offense occurred later in the offender's life, indicating a sexual drive and willingness to victimize others even at an older age).

Pornography collection is non-exclusive to child pornography: Another argument that may be made by experts—though not seen in the sample of 17 reports reviewed—is that the offender is at a lower risk due to the fact that his interest in pornography was not specific to children, that is, the offender viewed all types of pornography, and was only interested in increasingly "bizarre" or "taboo" images in order to satisfy sexual interest. Research suggests that this type of viewing pattern ("the sicker the better") would represent poor self-regulation, increased level of sexual deviance, and, obviously, use of pornography, which have all been shown to increase an offender's risk of reoffending (50). Additionally, it is important to note that whether a child pornography offender's collection is exclusive to child pornography is not determinative of whether that offender is a pedophile. Diagnostic criteria in the DSM 5 allows for a distinction to be made between pedophiles who are "Exclusive Type" or "Non-Exclusive Type"—in other words, only attracted to children or attracted to children as well as adults (44). Again, information about masturbatory behavior is crucial in assessing the degree of risk based on this claim.

C. What *should* an exam include?

In many respects, a sex offender risk assessment of a child pornography offender should be an examination of the past as well as the future. Given the research discussed at the beginning of this article indicating the prevalence of undetected earlier contact offenses among child pornography offenders, the use of a tactical polygraph should be administered whenever possible during an evaluation to assess for such offenses (36). The tactical polygraph can also inform findings about masturbatory behavior and length of time spent downloading and collecting images when such information is not clear based on computer forensic evidence. In addition, the polygraph examination allows for a more in-depth examination of thoughts and fantasies that may be experienced by child pornography offenders about acting on their sexual urges in the future. (For a description of how tactical polygraphs can be used, see The Use of Tactical Polygraph With Sex Offenders (36).

Ideally, evaluations should also include the administration of the PCL-R. Careful consideration should be given to the above discussion regarding literature on criminality among child pornography offenders. Namely, child pornography offenders, as a whole, present with less criminality than contact offenders. Certain antisocial behaviors such as a history of childhood behavioral problems, work instability, deliberate access to children, failure to accept responsibility for one's own actions, and substance abuse can be indicative of risk among child pornography offenders. Amount and organization of images, as well as degree of deviance and violence among images, should be assessed. The importance of the assessment of masturbatory behavior cannot be overstated. Currently, in the relative dawn of this genre of criminality and risk assessment, and without empirically supported actuarial instruments normed on this sub-population of offenders, attention to these variables and not to superfluous ones is the key to a more accurate risk assessment of child pornography offenders.

V. Evidence collection during the investigative stage: setting yourself up for success

Investigators and prosecutors should be familiar with the social science literature regarding risk factors and search for evidence of these factors as early as possible in the investigation stage. This will be invaluable later on at the sentencing stage, when prosecutors must counter a defendant's argument that he or she poses a low risk of recidivism. For example, most child pornography defendants agree to be interviewed in connection with the execution of a search warrant. All such interviews should include questions about whether the target masturbated to the child pornography images. Investigators should also inquire about prior sexual behavior. While it may be obvious that investigators should ask about contact with minors, it may be less obvious that they should inquire about sexual behavior with adults because sexual promiscuity and sexual deviance are also risk factors. If possible, offenders should be offered a polygraph on the day of the interview.

A search of offenders' homes can yield evidence of all manner of sexual fetishes. Investigators often take mental note of this evidence, but do not seize it, photograph it, or include it in their reports. Even if these fetishes do not directly relate to children and are not illegal, investigators should make a record of what they find, as it could later be relevant to an accurate risk assessment. Search of an offender's home also affords investigators the opportunity to note any evidence of substance abuse or financial problems. An adult offender who still lives in his parent's basement may be an outdated cliché of a sex offender, but such behavior would be evidence of a parasitic lifestyle, poor self-regulation, irresponsibility, and, possibly, emotional immaturity—all risk factors.

Investigators should also attempt to determine whether the offender is part of any groups that advocate antisocial behavior. Such groups are not limited to organizations that openly advocate violence or an overtly criminal lifestyle, such as outlaw motorcycle gangs. In this context, antisocial groups include child pornography message boards and other online groups that offenders use to communicate with each other about their sexual interest in children and child pornography. Of specific interest to a psychologist conducting a risk assessment would be the content of these communications. It is not

uncommon for offenders who chat online to "instruct" one another on successful means of grooming children for abuse. Insight into what means of rationalization are engaged in by an offender online are of special interest in formulating a psychological profile of the offender for purposes of a successful psychological evaluation and discussion of risk factors. Computer forensic examiners should also be on the lookout for evidence of antisocial behavior, such as the use of sophisticated technology to actively evade detection by law enforcement. Evidence of encryption, anonymization, and destruction of evidence would all be examples of antisocial behavior that should be considered as a possible risk factor. In addition, computer forensic exams should include an analysis of both the amount and type of child pornography that is found.

VI. Conclusion

It is no coincidence that these factors almost exactly align with the changes to the Sentencing Guidelines proposed by the Department of Justice in its March 5, 2013 response to the 2012 Report. The Department suggested enhancements for communication with others concerning the sexual abuse or exploitation of a minor, membership in formal groups dedicated to trafficking in or communicating about the sexual exploitation of children, the duration of the offense conduct, offender sophistication, image severity, and image quantity (16). Armed with as much knowledge about an offender as possible, prosecutors can evaluate whether a defense expert report appropriately took account of existing risk factors before declaring a defendant to be risk-free. This will assist prosecutors in advocating for a sentence that is appropriately tailored to the serious crime the defendant committed and more fully address the concerns of sentencing courts regarding whether the defendant poses a danger.

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Enhanced Sentences for Repeat Sexual Offenders Against Children

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I. Introduction

Sex crimes are among the most underreported, and sexual offenses against children likely even more so. As most Project Safe Childhood prosecutors are well aware, many (if not most) individuals whose crimes stem from a sexual interest in children engage in their offenses over a period of time before they are ever detected. Furthermore, many of the offenders who are identified and prosecuted have been previously accused or convicted of sexual offenses involving minors.

Congress recognized these realities and empowered federal prosecutors with a number of important tools. These tools enhance our ability to protect our children and our communities from the most dangerous offenders by substantially increasing the potential consequences for repeat offenses. These tools include enhanced statutory and guideline penalties upon conviction and mandatory revocation and prison terms for new offenses committed on supervised release. The following is a practical summary of these tools for federal prosecutors in the field.

II. Statutory sentencing enhancements: 18 U.S.C. §§ 2251, 2252, & 2252A

A. What are the enhanced penalties?

Child pornography defendants with qualifying prior convictions face significantly enhanced penalties at sentencing for violations of 18 U.S.C. §§ 2251, 2252, and 2252A. The statutory terms of imprisonment for these offenses, as increased by prior convictions, are:

OFFENSE	NO PRIORS	ONE PRIOR	TWO PRIORS
Possession or Access with Intent to View Child Pornography §§ 2252(b), 2252A(b)	0-20*	10-20	10-20
Child Pornography Distribution, Transportation, Receipt §§ 2252(b), 2252A(b)	5-20	15-40	15-40
Sexual Exploitation of Children; Advertising of Child Pornography § 2251(e)	15-30	25-50	35-life

See 18 U.S.C. §§ 2251(e), 2252(b), 2252A(b) (2015). With regard to the starred entry above, if the offense did not involve a prepubescent minor, or minor under 12, the statutory penalty range without any prior convictions is 0 to 10 years' imprisonment. 18 U.S.C. § 2252A(b)(2) (2015).

B. When do the sentencing enhancements apply?

The statutory penalty enhancements for child pornography offenders apply in cases where the defendant has a prior conviction under one of the following categories:

1. Title 18, Chapter 110 (sexual exploitation and other abuse of children)
2. Title 18, Section 1591 (sex trafficking of children or by force, fraud, or coercion)
3. Title 18, Chapter 71 (obscenity)
4. Title 18, Chapter 109A (sexual abuse)
5. Title 18, Chapter 117 (transportation for illegal sexual activity and related crimes)
6. Title 10, Section 920 (Article 120 of the Uniform Code of Military Justice: rape and sexual assault), or
7. A conviction under the laws of any state relating to:
    a. Aggravated sexual abuse
    b. Sexual abuse
    c. Abusive sexual conduct involving a minor or ward
    d. Sex trafficking of children, or
    e. The production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography

With regard to 7(c) above, the circuit courts that have addressed the issue explicitly found that the phrase "involving a minor or ward" in § 2252(b)(2) only modifies "abusive sexual conduct," and not the preceding clauses. Therefore, offenses against adult victims involving aggravated sexual abuse or sexual abuse will also trigger the enhancements. *See, e.g.*, *United States v. Mateen*, 764 F.3d 627, 632 (6th Cir. 2014) (en banc); *United States v. Lockhart*, 749 F.3d 148, 156 (2d Cir. 2014); *United States v. Spence*, 661 F.3d 194, 197 (4th Cir. 2011); *United States v. Hubbard*, 480 F.3d 341, 350 (5th Cir. 2007). Please note, however, that on May 26, 2015, the Supreme Court granted certiorari on the issue in *Lockhart v. United States* (No. 14-8358).

Following the Supreme Court's decision in *Descamps*, "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013), *reh'g denied*, 134 S. Ct. 41 (2013). Thus, in determining whether a prior conviction triggers the enhanced statutory penalties in a child pornography prosecution, "the modified categorical approach is appropriate only where a statute is divisible into qualifying and non-qualifying offenses . . . ." *United States v. Simard*, 731 F.3d 156, 161 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1874 (2014). *See also United States v. Davis*, 751 F.3d 769, 775 (6th Cir. 2014).

C. Does a prior conviction need to be alleged in a charging instrument or presented to a jury?

Because *Alleyne v. United States*, 133 S. Ct. 2151 (2013), did not overrule the *Apprendi* exception set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (facts related to prior convictions need not be presented to the jury), prosecutors are not required to allege prior convictions in a charging

document in order to trigger the enhanced penalties. Nevertheless, out of an abundance of caution, many U.S. Attorneys' offices routinely allege the existence of qualifying priors in child pornography cases. Some offices allege prior convictions in the substantive count itself, and others as a special allegation or separate document. Consult with your local office to determine the practice in your district.

III. Increased maximum sentences for repeat offenders

The maximum term of imprisonment for violations of Chapter 109A (sexual abuse) or Chapter 117 (transportation for illegal sexual activity and related crimes) is doubled for offenders with a "prior sex offense conviction," unless the mandatory life provision of 18 U.S.C. § 3559(e) applies. 18 U.S.C. §§ 2247, 2426 (2015). For purposes of these enhancements, "prior sex offense conviction" is defined as a violation of: (1) Chapters 109A, 110, or 117 of Title 18, or 18 U.S.C. § 1591, or (2) a state law that would have been an offense under those chapters, or that section, had there been federal territorial jurisdiction. *Id.* § 2426(b).

IV. Additional consecutive penalty for registered sex offenders: 18 U.S.C. § 2260A

Offenders are subject to an additional penalty of 10 years' imprisonment consecutive to any other punishment if they commit an enumerated federal offense involving a minor while required to register as a sex offender under federal or other law. *Id.* § 2260A. The enumerated offenses are 18 U.S.C.:

- § 1201 (kidnapping)
- § 1466A (offenses involving obscene visual representations of the sexual abuse of children)
- § 1470 (transfer of obscene material to minors)
- § 1591 (sex trafficking of children or by force, fraud, or coercion)
- § 2241 (aggravated sexual abuse)
- § 2242 (sexual abuse)
- § 2243 (sexual abuse of a minor or ward)
- § 2244 (abusive sexual contact)
- § 2245 (offenses resulting in death)
- § 2251 (sexual exploitation of children)
- § 2251A (selling or buying of children)
- § 2260 (production of sexually explicit depictions of a minor for importation into the United States)
- § 2421 (transportation of an individual with intent to engage in prostitution or criminal sexual activity)
- § 2422 (coercion and enticement)
- § 2423 (transportation of minors)
- § 2425 (use of interstate facilities to transmit information about a minor)

Violations of 18 U.S.C. § 2260A are stand-alone offenses, and need to be alleged in a charging document and proven to a jury beyond a reasonable doubt. *See generally United States v. Wellman*, 663 F.3d 224, 227 (4th Cir. 2011); *United States v. Carver*, 348 F. App'x 449, 452 (11th Cir. 2009).

V. Mandatory life sentence for repeated sex offenses against children

"A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed." 18 U.S.C. § 3559(e)(1) (2015). "Federal sex offense" for purposes of this statute means a violation of 18 U.S.C. §§ 1591 (sex trafficking of children), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2244(a)(1) (abusive sexual contact), 2245 (sexual abuse resulting in death), 2251 (sexual exploitation of children), 2251A (selling or buying of children), 2422(b) (coercion and enticement of a minor into prostitution), or 2423(a) (transportation of minors). *Id.* § 3559(e)(2)(A). However, convictions under 18 U.S.C. §§ 2422(b) and 2423(a) shall not serve as the basis for a mandatory life sentence if: (1) the sexual act or activity was consensual and non-commercial, (2) the sexual act or activity is not a felony in the state where it occurred, or (3) no sexual act or activity occurred. *Id.* § 3559(e)(3).

"Prior sex conviction" for purposes of this statute means "a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense." *Id.* § 3559(e)(2)(C). "State sex offense" means a felony offense under state law that consists of conduct that would be a federal sex offense if federal jurisdiction existed through interstate commerce or federal territorial jurisdiction. *Id.* § 3559(e)(2)(B).

For purposes of the mandatory life provision, "minor" means an individual less than 17 years old, and both the prior conviction and the current offense must involve a victim aged 16 or younger. *Id.* § 3559(e)(2)(D).

VI. Guideline enhancements

A. Pattern of exploitation by child pornography traffickers: U.S. Sentencing Guidelines § 2G2.2(b)(5)

In cases of child pornography trafficking calculated under U.S. Sentencing Guidelines § 2G2.2, there is a five offense level enhancement for defendants who have "engaged in a pattern of activity involving the sexual abuse or exploitation of a minor." U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(5) (2014). Under this Guideline:

> "[p]attern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, *whether or not* the abuse or exploitation (A) occurred during the course of the [present] offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

Id. § 2G2.2 cmt. n.1 (emphasis added).

The Guidelines define "sexual abuse or exploitation" as:

> (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)–(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; [or] (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States," [including attempts and conspiracies].

Id. A prior conviction still qualifies for this enhancement regardless of whether it receives criminal history points. *Id.* § 2G2.2 cmt. n.3. Prior instances of possession, accessing with intent to view, receipt, or trafficking in child pornography do not qualify for the five-level enhancement. *Id.* § 2G2.2 cmt. n.1.

B. Guideline enhancement for prior convictions: U.S. Sentencing Guidelines § 4B1.5

Which offenses of conviction qualify for the § 4B1.5 enhancements? Offenders who commit a "covered sex crime" and do not qualify as career offenders under U.S. Sentencing Guidelines § 4B1.1 are subject to additional enhancements for: (1) prior convictions, or (2) prior prohibited sexual conduct that did not result in a conviction. U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 (2014). This enhancement is triggered if the current offense of conviction is a "covered sex crime," that is, an offense against a minor, including attempts and conspiracies, in violation of:

- Chapter 109A of Title 18
- Chapter 110 of Title 18—*except for* trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense
- Chapter 117 of Title 18—*except for* transmitting information about a minor or filing a factual statement about an alien individual, or
- 18 U.S.C. § 1591

Id. § 4B1.5 cmt. n.2. For purposes of § 4B1.5, "minor" means an individual under 18, including undercover law enforcement officers purporting to be under 18. *Id.* § 4B1.5 cmt. n.1.

What prior convictions trigger enhancement under § 4B1.5(a)? The enhancement for individuals facing sentencing for a "covered sex crime" is triggered by at least one "sex offense conviction." *Id.* § 4B1.5(a). "Sex offense conviction" for purposes of this enhancement means an offense against a minor in violation of: (1) chapters 109A, 110, or 117 of Title 18 (not including trafficking in, receipt of, or possession of child pornography), or 18 U.S.C. § 1591, or (2) a state law that would have been an offense under those chapters, or that section, had there been federal territorial jurisdiction. *See* 18 U.S.C. § 2426(b) (2015); U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 cmt. n.3(A)(ii) (2014).

Individuals convicted of a covered sex crime who have a prior sex offense conviction are subject to an increased criminal history category and offense level, depending on the statutory maximum of the current offense of conviction, much like the Career Offender Guideline. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.5(a) (2014).

What patterns of activity trigger an enhancement under § 4B1.5(b)? If an offender facing sentencing for a covered sex crime does not qualify as a § 4B1.1 career offender, and does not have a prior conviction triggering enhancement under § 4B1.5(a), they may still be subject to a Guidelines enhancement under § 4B1.5(b). Under § 4B1.5(b), offenders who have engaged in a "pattern of activity" involving "prohibited sexual conduct" are subject to a 5-level increase in their offense level, which shall be no less than level 22, prior to acceptance of responsibility.

For purposes of § 4B1.5(b), "prohibited sexual conduct" means:

- Violations of chapters 109A, 110 (not including receipt or possession of child pornography), or 117 of Title 18 or 18 U.S.C. § 1591
- Violations of a state law that would have been an offense under those chapters had there been federal territorial jurisdiction, *regardless of whether these violations resulted in a conviction*
- Production of child pornography, *regardless of whether the production of child pornography resulted in a conviction*, or

- Trafficking in child pornography, not including receipt or possession, *only if the defendant sustained a felony conviction* for that trafficking in child pornography prior to the commission of the instant offense

See 18 U.S.C. § 2426(b) (2015); U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 cmt. n.4(A) (2014).

For the purposes of § 4B1.5(b), "pattern of activity means" that the defendant engaged in the prohibited sexual conduct with a minor on at least two separate occasions. U.S. SENTENCING GUIDELINES MANUAL § 4B1.5 cmt. n.4(B)(i) (2014). The occasions of prohibited sexual conduct triggering the § 4B1.5(b) enhancement do not need to have resulted in a conviction for the conduct and can include occasions during the course of the instant offense. *Id.* § 4B1.5 cmt. n.4(B)(ii). For example, in any case of sexual exploitation of children under 18 U.S.C. § 2251(a), a covered sex crime, if the defendant engaged in the sexual exploitation of a child on two or more occasions during the instant offense, the five-level § 4B1.5(b) enhancement will apply.

VII. Mandatory revocation and imprisonment for sex offenders on supervised release

If a defendant on federal supervised release who is required to register as a sex offender commits a new felony offense under Title 18 chapters 109A, 110, or 117, or under 18 U.S.C. §§ 1201 or 1591, the sentencing court *must* revoke the defendant's supervised release and sentence the defendant to a term of no less than 5 years' to lifetime imprisonment. *See* 18 U.S.C. § 3583(k) (2015). The U.S. Sentencing Guidelines suggests that any term of imprisonment imposed upon the revocation of supervised release "shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving," including a sentence imposed for the conduct that is the basis of the revocation. U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (2014). ❖

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