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RECIDIVISM AMONG ONLINE SEXUAL OFFENDERS: FEDERAL AUTHORITY, EMPIRICAL EVIDENCE, AND APPLICATION AT SENTENCING

A Reference for Defense Counsel

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I. Purpose and Scope

Defense counsel in non-production child sexual exploitation material cases regularly ask a version of the same question: what is the federal guideline that recognizes that online sexual offenders have a low recidivism rate? The question has a short answer that surprises most people who ask it, and a longer answer that is considerably more useful. This report supplies both, sets out the primary federal sources and the empirical literature underneath them, and addresses the use of that material in sentencing mitigation. It is the first of three companion reports. The second addresses the risk assessment itself — the instruments that fit an online-only examinee, when the evaluation should be conducted relative to testimony at findings, and how the result is put before the court. The third addresses the Sex Offender Treatment Program at the Naval Consolidated Brig Miramar and the effect of sentence length on access to it. All three are maintained at <https://arizonaforensics.com/online-sex-offense/> and are described in Part IX.

Two boundaries should be stated at the outset. First, I am a forensic psychologist, not an attorney. The legal authorities discussed here are identified so that counsel can pull and verify them; the characterizations of case law are offered as orientation, not as legal advice, and circuit law varies. Second, nothing in this report suggests that possession, receipt, or distribution of child sexual exploitation material is a victimless offense or that any individual defendant presents a low risk. Group data do not resolve individual cases. The value of this material to the defense lies precisely in its correct and disciplined use; overstated, it invites a cross-examination that damages the client more than silence would have.

II. The Short Answer

There is no provision of the United States Sentencing Guidelines that recognizes a low recidivism rate among online sexual offenders. Section 2G2.2 contains no finding, application note, or background commentary to that effect. Counsel who cite “the guideline” for this proposition will be corrected, and the correction will cost credibility at the moment it is least affordable.

The federal recognition exists, but it is located in three other places: two reports of the United States Sentencing Commission to Congress and to the public, and one publication of the United States Department of Justice. Those three documents are federal authority in the sense that matters for sentencing advocacy — they are the government’s own assessments, produced by the agencies charged with studying the question, and they are not defense advocacy. The reports are:

1. United States Sentencing Commission, Federal Sentencing of Child Pornography: Non-Production Offenses (June 2021).

2. United States Sentencing Commission, Report to the Congress: Federal Child Pornography Offenses (December 2012).
3. United States Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office), Sex Offender Management Assessment and Planning Initiative (SOMAPI), Chapter 4, “Internet-Facilitated Sexual Offending.”

Each is discussed below. The framing counsel should adopt is that the Sentencing Commission and the Department of Justice have studied this population and reported what they found; the guideline simply has not caught up with the findings.

III. The Three Federal Authorities

A. The Sentencing Commission’s 2021 Non-Production Report

The Commission’s June 2021 report is the most current federal treatment of the subject and should be the primary citation. It updates and expands the Commission’s 2012 report and is based on a study of federal non-production offenders — that is, offenders convicted of possession, receipt, transportation, or distribution, as distinct from offenders who produced material.

The recidivism findings are drawn from a cohort of 1,093 non-production offenders who were released from incarceration or placed on probation in 2015 and tracked for three years. Within that period, 27.6 percent were rearrested for any offense, which means that 72.4 percent had no recorded rearrest of any kind. Of the full cohort, 4.3 percent — 47 individuals — were rearrested for a sex offense. A further portion of the rearrests were for failure to comply with sex offender registration requirements, which is a regulatory violation rather than new sexual offending, and counsel should press that distinction whenever an aggregate rearrest figure is offered by the government as a proxy for sexual dangerousness.

The report is equally useful for what it establishes about the guideline itself. In fiscal year 2019, more than 95 percent of non-production offenders received enhancements both for use of a computer and for the age of the victim depicted; 84.0 percent received the enhancement for sadistic or masochistic material or material depicting an infant or toddler; and 77.2 percent received the enhancement for 600 or more images. Enhancements that apply to nearly every defendant do not distinguish among defendants. That is the structural point developed in Part VI.

B. The Sentencing Commission’s 2012 Report to Congress

The 2012 report retains independent value for two reasons. First, its follow-up period is far longer than the 2021 study’s three years. The Commission examined 610 offenders sentenced under the non-production guideline in fiscal years 1999 and 2000 and followed them for an average of 8.5 years after reentry into the community. Known sexual recidivism was 7.4 percent — 45 of 610. Of those 45, 22 individuals, or 3.6 percent of the full cohort, were arrested for or convicted of a sexual contact offense; 14 offenders, or 2.3 percent, for a subsequent child pornography offense; and the remaining nine, or 1.5 percent, for a non-contact sex offense involving obscenity or commercial sex. When the government argues that a three-year window is too short to be meaningful, the 2012 figures are the answer: extending the window to more than eight years produces a contact-offense rate below four percent.

The report’s breakdown of the general recidivism figure is also worth having at hand. The overall rate was 30.0 percent — 183 of 610 offenders — and those failures split almost evenly between new criminal offenses and supervision violations: 15.9 percent (97 offenders) were arrested for a new criminal offense of any kind, while 14.1 percent (86 offenders) violated conditions of

supervision or failed to register without any new arrest. Of the 97 arrested for a new offense, roughly four in five were arrested only once. The Commission further observed that recidivism accumulated at a relatively steady rate for approximately the first three years after release and grew much more slowly thereafter — a finding that bears directly on the length of supervision a court needs to impose to capture the period of actual risk.

Second, the 2012 report is where the Commission set out its institutional criticism of § 2G2.2. The Commission concluded that the guideline produces overly severe ranges for some offenders on the basis of outdated and disproportionate enhancements, while producing unduly lenient ranges for others, and it recommended revision. That conclusion has never been withdrawn, and the guideline has not been revised in response to it. As of this writing the Commission’s 2025–2026 amendment cycle does not include a proposed amendment to § 2G2.2; counsel should confirm current status before filing, as amendments take effect on November 1.

The Commission also cautioned, appropriately, that a known recidivism rate is lower than an actual recidivism rate. That caveat is discussed in Part V, because counsel will encounter it — usually deployed against the defense — and should be prepared to address it directly rather than to appear to have overlooked it.

C. The SMART Office’s SOMAPI Chapter on Internet-Facilitated Offending

The Sex Offender Management Assessment and Planning Initiative is a Department of Justice publication produced by the SMART Office within the Office of Justice Programs. Chapter 4, authored by Michael C. Seto, addresses internet-facilitated sexual offending specifically. It reports a meta-analysis of nine follow-up studies comprising 2,630 internet offenders tracked for an average of slightly more than three years, with the following results: approximately one in twenty, or 4.6 percent, committed a new sexual offense; 2.0 percent committed a new contact sexual offense; and 3.4 percent committed a new child pornography offense.

The chapter’s characterization is as important as its numbers. It states that online-only internet offenders present a relatively low risk for sexual recidivism compared with offline contact sexual offenders, and that these rates belie the idea that all internet offenders pose a high risk of future contact offending. This is the executive branch, in its own publication, describing a distinct subgroup that poses a comparatively low risk of hands-on offending. There is no more useful single sentence in the federal literature for a sentencing memorandum.

Dr. Seto made the same point directly to the Commission. In a paper prepared for the United States Sentencing Commission dated February 6, 2012, he wrote that although not all new offenses are detected and observed recidivism will increase with time, “these data belie the idea that online child pornography offenders are very high risk to reoffend,” while adding — and counsel should quote the qualification along with the conclusion — that “there is heterogeneity, as in other offender populations, and risk assessment is necessary to identify those who are of greatest concern.” Quoting both halves is what makes the citation durable.

IV. The Empirical Record on Non-Contact Online Offenders

A. Why Counsel Should Go Past the Federal Reports

The federal reports summarize research; they do not replace it. A sentencing memorandum that cites only the government’s summaries is vulnerable to the response that the summaries are dated — the SOMAPI chapter rests on a 2011 meta-analysis, and the 2012 report follows offenders sentenced in 1999 and 2000. The underlying research has continued, and it has moved in the defense’s direction, with larger samples and tighter estimates. The strongest presentation pairs the

federal authority with the current primary literature, and the most persuasive feature of that literature is its consistency: independent samples, in different countries, across two decades, using different definitions of recidivism, converge on the same range.

B. Seto, Hanson, and Babchishin (2011)

This is the meta-analysis on which the SOMAPI chapter draws, and it is worth citing directly because it answers two separate questions. The first is how many online offenders have a history of contact offending. Across 21 studies comprising 4,464 offenders, approximately one in eight — 12 percent — had an officially known contact sexual offense history at the time of the index offense. In the six studies with self-report data (N = 523), roughly 55 percent admitted a contact offense; that figure is routinely cited by the government and is addressed in Part V.

The second question is recidivism. Across nine studies comprising 2,630 offenders followed between 1.5 and 6 years, 4.6 percent committed a new sexual offense of some kind, 2.0 percent a new contact sexual offense, and 3.4 percent a new child pornography offense. The authors concluded that the data suggest a distinct subgroup of online-only offenders who pose a relatively low risk of committing contact sexual offenses in the future. Their stronger formulation, at page 137, is that online offenders who had no history of contact offenses “almost never committed contact sexual offenses.”

C. The Study-by-Study Record

The following studies are the individual follow-ups underlying the meta-analytic figures, together with several that postdate them. Counsel preparing a sentencing memorandum should cite two or three of these directly rather than relying on a pooled number alone, because the convergence across independent samples is itself the argument.

- Seto and Eke (2005). 201 adult male child pornography offenders identified through police databases; average time at risk 2.5 years. Fifty-six percent had a prior criminal record and 24 percent had prior contact sexual offenses. During follow-up, 17 percent offended again in any way and 4 percent committed a new contact sexual offense. Offenders with prior records, and those with prior or concurrent contact offenses, were the most likely to reoffend — the first clear statement of the subgroup finding.
- Endrass et al. (2009). 231 men charged following a Swiss police operation, with criminal records reviewed over a six-year follow-up. Using a broad definition of recidivism that included ongoing investigations and charges as well as convictions, 3.9 percent recidivated with a hands-off sexual offense and 0.8 percent — two men — with a hands-on sexual offense. The authors concluded that consuming child pornography alone is not a risk factor for committing hands-on sex offenses, at least for those who had never committed one, and that the prognosis for such offenders is favorable.
- Osborn, Elliott, Middleton, and Beech (2010). A United Kingdom community sample of convicted internet offenders assessed with Risk Matrix 2000 and Static-99. None of the offenders was convicted of a further sexual offense during a follow-up of between one and a half and four years. The authors concluded that both instruments overestimate the risk posed by internet offenders — a finding counsel should keep in reserve for any case in which the government’s evaluator has scored a contact-sample instrument.
- Eke, Seto, and Williams (2011). An extension of the Seto and Eke sample to 541 men with an average follow-up of 4.1 years. For the full sample, 32 percent had any new charge; 4 percent were charged with a new contact sexual offense; an additional 2 percent with historical, previously undetected contact offenses; and 7 percent with a new child pornography offense. The subgroup figures are the ones to use. For the 108 men with

child pornography offenses and no violence, contact sexual recidivism was 1.9 percent and child pornography recidivism 8.4 percent. For the 163 men whose histories included contact offending, contact sexual recidivism was 8.7 percent.

- Wakeling and colleagues (2011, as cited in Seto, 2013, p. 209). Any recidivism was uncommon — 8 percent after one year and 11 percent after two — and roughly three-quarters of the sexual recidivism observed was internet-related. Neither Risk Matrix 2000 nor OGRS3 significantly predicted recidivism among internet-only offenders, because the base rate was too low to leave variance to predict.
- Seto and Eke (2015), the CPORT development study. Among 266 men followed five years, 29 percent committed a new offense of any kind, 11 percent a new sexual offense, 3 percent a new contact sexual offense against a child, and 9 percent a new child pornography offense. Within that sample, the 135 men with child pornography offenses only showed 24 percent any reoffense, 3 percent contact sexual, and 7 percent child pornography recidivism, against 49 percent any reoffense for the 90 men with additional violent or non-violent offending.
- Faust and colleagues (2015). A multilevel comparison of 428 non-contact child pornography offenders with 210 child contact offenders, each group confined to its own offense category. The child pornography group showed 19.2 percent probation violations, 1.6 percent non-contact or child pornography reoffending, and 3.0 percent contact offending, against 38 percent probation violations and 5.7 percent contact offending in the contact group. Controlling for background characteristics and timing, contact offenders were at much greater risk of arrest for a new crime or a non-sexual violent crime.
- Henshaw, Ogloff, and Clough (2017). A critical review and meta-analytic comparison of child pornography offenders with contact sexual offenders, useful as a single secondary citation summarizing the differences between the two populations.

D. Baskurt, Babchishin, Hilkes, and Seto (2025)

This meta-analysis is the current state of the evidence and, in my judgment, the single most useful citation available to the defense on this question. It aggregates 30 non-overlapping samples comprising 25,978 individuals, with a mean follow-up of 4.72 years. The pooled rates from official sources were 5.93 percent for any sexual recidivism, 1.53 percent for contact sexual recidivism, 4.08 percent for recidivism with exploitation material specifically, and 12.01 percent for any recidivism of any kind. The confidence intervals are narrow because the sample is large.

The finding with the greatest forensic significance is the separation between subgroups. Individuals whose offense history was confined to child sexual exploitation material reoffended with a contact sexual offense at a rate of 0.56 percent, while those with mixed histories — that is, with a known prior or concurrent contact offense — did so at 8.80 percent. That is roughly a sixteen-fold difference, and it reproduces, in a sample two orders of magnitude larger, exactly the split that Seto and Eke reported in 2005. It establishes the proposition that matters most at sentencing: the relevant question is not whether the defendant is an “internet offender” in the abstract, but whether the record establishes any contact offending. Where a thorough investigation has found none, the applicable estimate is the lower one, and counsel should say so with precision.

E. The Specialist Pattern

Taken together, these studies show something more specific than a low rate. Online offenders who reoffend are substantially more likely to commit a further online offense than a contact offense — the pattern of a specialist rather than a generalist. In Wakeling’s sample roughly three-quarters of the sexual recidivism was internet-related; in Eke, Seto, and Williams the child pornography

recidivism rate for the non-contact subgroup was more than four times its contact recidivism rate; in Baskurt and colleagues the pooled exploitation-material rate of 4.08 percent was nearly three times the contact rate of 1.53 percent. This matters at sentencing because the government's theory of dangerousness is almost always a contact-offense theory. The data support a considerably narrower concern, and a narrower concern is addressable through supervision conditions directed at internet access and monitoring rather than through additional years of custody.

Dr. Seto's own summary of this literature, in his 2013 volume, is as direct as anything in the field. Observing that the low base rate of sexual recidivism among online-only offenders leaves little variance to predict, he wrote that "the most accurate risk statement is to assume that an online-only offender with no prior criminal history of any kind is not going to sexually reoffend" (Seto, 2013, p. 211). Counsel should note the two conditions embedded in that sentence — online-only, and no prior criminal history of any kind — and should not offer the quotation in a case where either is absent.

F. Resolving the Apparent Paradox

The government will point out, correctly, that pedophilia is among the strongest predictors of sexual recidivism in the meta-analytic literature (Hanson & Morton-Bourgon, 2005), and that child pornography offenders are more likely than contact offenders to show pedophilic arousal. How can a population enriched for pedophilia show a low recidivism rate? Dr. Seto addresses this directly, and counsel should have the answer ready because it is the most common conceptual attack in this area.

The resolution is the motivation-facilitation model. Contact sexual offending requires both motivation — pedophilic or hebephilic interest — and facilitation, meaning the traits or circumstances that permit a person to act on interest: psychopathy, antisocial attitudes, criminal history, poor self-regulation, or situational disinhibition through intoxication, acute stress, or depressed mood. Many online offenders have the motivation and lack the facilitation, and their scores on measures of psychopathy, antisocial belief, and criminal history are correspondingly low. Seto goes further, framing child pornography offending as a risk factor for sexual offending in the general population but a marker of comparatively lower risk within an identified sexual offender population — not because viewing material is cathartic, but because it identifies a subgroup whose members are, on the whole, less antisocial (Seto, 2013, pp. 213–214).

This is also why an evaluation must address interest and disinhibition separately before addressing their conjunction. An examinee with deviant interest and intact self-regulation, no antisocial history, no substance use problem, and stable functioning is in a materially different position from one with the same interest and none of those controls. An evaluation that treats arousal findings as dispositive of risk has skipped the analysis.

G. Base Rates and Desistance

Two further findings put the figures above in context, and both are frequently absent from government and probation risk opinions.

The first concerns the baseline. Hanson (2018), reviewing long-term recidivism research, identifies the rate at which men without a sexual offense history commit a sexual offense as approximately 1 to 2 percent over a five-year period, and uses that rate as the threshold at which an individual with a prior sexual offense can be said to have desisted — that is, to present no more risk than a man drawn from the general population. Set that threshold beside the pooled contact sexual recidivism rates for this population: 1.53 percent for online offenders generally and 0.56 percent

for those whose offending is confined to exploitation material. The measured rate of contact sexual offending by an online-only offender sits at or below the baseline rate for men with no sexual offense history at all. Counsel should present this comparison carefully and without rhetorical flourish, because the samples and follow-up windows are not matched, but the point is sound and it reframes what “dangerousness” means in this category.

The second concerns the passage of time. In an aggregated sample of 7,740 individuals followed up to 25 years, the risk of a further sexual offense declined by approximately half for every five years lived sexual-offense-free in the community — an initial 8 percent five-year risk falling to about 4 percent after five years offense-free and about 2 percent after ten. Individuals scoring in the lowest Static-99R category were below the desistance threshold at release; those in the below-average category crossed it after three to six years, and those in the average category after eight to thirteen. Among 394 individuals followed for 20 to 25 years, a single sexual recidivist appeared, a five-year rate of 0.3 percent (Hanson, 2018; see also Hanson, Harris, Helmus, & Thornton, 2014). The Sentencing Commission’s own finding that recidivism in this population accumulates chiefly during the first three years after release points the same direction. Together these bear directly on the length of supervised release a court needs to impose in order to cover the period in which risk actually exists.

H. Characteristics of the Population

Two further sources help counsel establish that the individual before the court resembles the studied population. Babchishin, Hanson, and Hermann (2011) found that online offenders, compared with contact offenders, were less antisocial, scored similarly or lower on offense-supportive attitudes, intimacy deficits, and emotional problems, and were more likely to show pedophilic arousal on phallometric assessment. The last point is not favorable to the defense and should not be concealed; it is, however, precisely the finding that separates sexual interest from behavior, and it is taken up in Part IV.F.

Wolak, Finkelhor, and Mitchell (2011) found that 70 percent of prosecuted online offending cases involved child pornography only, without solicitation or contact charges, and that the offenders were overwhelmingly male, disproportionately young, and generally without prior arrests, violence, or substance use histories. The Sentencing Commission’s fiscal year 2025 data are consistent: of 1,432 child pornography offenders sentenced, 98 percent were male, the average age was 41, and 74 percent fell in Criminal History Category I — little or no prior criminal history at all. The population the research describes and the population appearing in federal court are the same population.

V. The Government’s Counter-Case

A. The Detection Objection

The government’s standard response is that official recidivism understates actual recidivism because most sexual offending is never detected. Counsel should meet this directly rather than ignore it, for three reasons.

First, the criticism is true but non-selective. Every recidivism figure in criminal justice, for every offense category, is a detection-based figure. If undetected offending invalidates the 1.53 percent contact reoffense rate, it equally invalidates the comparison rates the government relies upon, and it leaves the court with no empirical basis for any sentence. The objection cannot be applied to one side of the ledger only.

Second, the underreporting objection cuts less deeply here than in contact cases. Non-production defendants are typically identified through digital forensic investigation of a device that captures a long historical record of conduct. Where a forensic examination of the full device history, browser artifacts, peer-to-peer logs, and communications has found no evidence of contact offending, solicitation, or communication with minors, the absence is a meaningful negative finding rather than a gap. Counsel should establish on the record what was searched and by whom, and should have the evaluator state it in the report.

Third, the research itself distinguishes new offending from pseudo-recidivism. Eke, Seto, and Williams (2011) reported new contact offenses and historical, previously undetected contact offenses separately — 4 percent and 2 percent respectively — precisely because conflating them misstates prospective risk. Where the government cites a combined figure, the disaggregated one should be put in front of the court.

B. The Butner Study and the Self-Report Figure

The government's strongest single card is the self-report data — the finding that approximately 55 percent of online offenders in six studies admitted a contact sexual offense — and, behind it, Bourke and Hernandez (2009), a study of 155 federally incarcerated child pornography offenders at Butner in which 24 percent had an official record of contact offending but approximately 85 percent disclosed a history of contact offending after participating in treatment and, in about half of the cases, polygraph examination.

Four responses are available, and counsel should use all of them rather than attempting to dismiss the study. First, Bourke and Hernandez was a statistical outlier in the Seto, Hanson, and Babchishin meta-analysis — not a characterization by the defense but the finding of the meta-analysis itself. Second, the sample was federally incarcerated offenders selected into an intensive treatment program, which is not representative of non-production defendants generally and is emphatically not representative of a defendant with no criminal history. Third, participants had an incentive to disclose previously undetected offenses as a condition of treatment participation, and disclosures obtained under polygraph in that setting are of contested reliability. Fourth, and most importantly, the study concerns historical disclosure, not recidivism. It says nothing about what any defendant will do after sentencing.

What should be conceded is the underlying point, which is not controversial: some child pornography offenders have committed officially undetected contact offenses. That concession costs the defense nothing, because the sentencing question is prospective risk, and the recidivism literature addresses prospective risk directly.

C. The Turner Critique: The Government's Playbook

Counsel should read Turner, Hanks, Blanch, and Sparks, "The Sentencing Battleground: Understanding the Current Psychology Research and Refuting Defense Psychology and Risk Assessment Reports at Sentencing," published in the United States Attorneys' Bulletin in July 2015. It is the training document for federal prosecutors on how to attack a defense risk assessment in exactly this case category, and it is publicly available. Every defense attorney and every retained evaluator in this area should have read it.

Dr. Turner's stated grounds of attack are the following, and each identifies a defect a competent report simply does not have:

1. Limited or inaccurate citation of the research literature. Answer: cite primary sources, quote qualifications along with conclusions, and ensure the reference list matches the text exactly.
2. Current research has limited follow-up times. Answer: the 2012 Commission study ran 8.5 years and the CPORT development sample 8.3 years; cite the long-follow-up studies rather than the short ones.
3. Child molestation and pornography offenses go unreported. Answer: as in Part V.A above.
4. Failure to conduct case-by-case assessments. Answer: the evaluation must be individualized, and a report that recites group data without scoring instruments on this examinee deserves the criticism.
5. Failure to consider factors that increase risk, or misapplication of mitigating factors. Answer: address the aggravating features of the case — sadistic content, boy content, sorting and organizing of the collection, duration of interest, active rather than passive distribution, solicitation, attempted contact — explicitly, and say what weight each received.
6. Failure or inadequacy in diagnosing antisociality, including psychopathy. Answer: state the basis on which antisociality was assessed and, if psychopathy is scored, the instrument used.
7. Failure to assess sexual deviance by not conducting a complete psychosexual evaluation. Answer: a sentencing risk opinion should rest on a full evaluation, not a records review alone, and if it rests on less, the report must say so.
8. Use of varying diagnoses to explain viewing behavior that are unsubstantiated by research. Answer: do not attach a diagnostic label — “internet addiction” and its relatives above all — that the diagnostic manual does not support.
9. Inappropriate application of risk assessment tools. Answer: the companion report on risk assessment takes this up in full.

The practical significance of this list is that it describes the report the government is prepared for. A thorough, individualized, candidly limited evaluation is outside the playbook, and a thin one walks into it.

VI. Why § 2G2.2 Does Not Track Risk

A. The Guideline’s Origin

The federal courts of appeals have recognized that § 2G2.2 was not developed through the Sentencing Commission’s ordinary empirical method. In *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), the Second Circuit observed that sentencing guidelines are typically developed by the Commission using an empirical approach based on data about past sentencing practices, but that the Commission did not use that approach in formulating the child pornography guidelines, which were shaped instead by successive congressional directives. The court concluded that the guideline’s enhancement structure pushes offenders toward the statutory maximum without regard to differences in culpability. In *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010), the Third Circuit affirmed a substantial downward variance grounded in the sentencing court’s policy disagreement with the guideline, on essentially the same reasoning.

The general authority to vary on policy grounds comes from *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009), with the standard of review supplied by *Gall v. United States*, 552 U.S. 38 (2007). Counsel must check current authority in the governing circuit; the leading child pornography decisions are now more than fifteen years old, and circuits differ in how receptive they have been.

B. Enhancements That Apply to Nearly Everyone

The empirical case for a policy disagreement is made by the Commission's own application data, set out in Part III.A. When more than 95 percent of defendants receive the computer-use and victim-age enhancements, 84.0 percent receive the sadistic or masochistic enhancement, and 77.2 percent receive the 600-image enhancement, those enhancements no longer perform the function enhancements exist to perform. They do not separate the more dangerous defendant from the less dangerous one; they raise the floor for everyone. The computer-use enhancement is the clearest illustration: it was drafted when computer distribution was an aggravating variant of a predominantly physical offense, and it now describes the entire offense category.

C. The Continuum of Culpability

Because the guideline sorts poorly, counsel must supply the sorting, and the research literature offers a defensible framework for doing so. The concept of a continuum of culpability entered this area through written submissions to the Sentencing Commission before its February 15, 2012 public hearing, and it distinguishes possession and receipt from distribution and distribution from production. Within distribution, the meaningful line is between passive and active. Passive distribution describes files made available through peer-to-peer software, frequently by a defendant who did not understand that the software shared his directory at all. Active distribution describes a defendant who interacts with others, participates in forums organized around the subject, and arranges trades. Within production, the meaningful line is between covert recording and the recording of contact offenses the defendant or an accomplice committed.

These distinctions are not sentencing law, and counsel should not present them as though they were. They are, however, the distinctions the research community draws, and they permit counsel to argue that a defendant whose conduct sits at the low end of every one of them has been assigned a guideline range built for conduct at the high end.

D. What Courts Actually Do

Sentencing outcomes reflect judicial dissatisfaction with the guideline rather than judicial indifference to the offense. In fiscal year 2025, 1,432 child pornography offenders were sentenced. The average guideline minimum was approximately 150 months; the average sentence imposed was 118 months. Only 38 percent of offenders were sentenced within the guideline range. Fifty-four percent received a downward variance, averaging a 37 percent reduction from the guideline minimum. A request for a below-guideline sentence in this category is therefore not an outlier request; it is what happens in the majority of these cases nationally, and § 3553(a)(6), which directs the court to avoid unwarranted disparities, points toward that mainstream rather than away from it.

VII. Application Under 18 U.S.C. § 3553(a)

A. Locating the Argument in the Statute

Recidivism evidence is not a free-floating mitigation theme. It attaches to identifiable statutory factors, and a memorandum that makes the connection explicit is more persuasive than one that recites data and leaves the court to place it.

- Section 3553(a)(2)(C) — protection of the public from further crimes of the defendant. This is the factor the recidivism literature addresses directly. Where the empirical estimate of further contact sexual offending for an online-only defendant is on the order of one percent, incapacitation has limited marginal work to do beyond a comparatively short term.

- Section 3553(a)(2)(B) — deterrence. Counsel should distinguish general from specific deterrence. The recidivism data speak to specific deterrence. General deterrence remains the government’s strongest argument in this category and should be addressed rather than ignored; the honest response is that general deterrence is served by conviction, registration, and a term of imprisonment, and that the marginal deterrent return on each additional year is not established by any evidence in the record.
- Section 3553(a)(2)(D) — provision of needed correctional treatment in the most effective manner. This is where a dynamic risk assessment earns its place, because the elevated dynamic items are the treatment targets, and because lengthy incarceration frequently delays rather than delivers the intervention.
- Section 3553(a)(1) — the history and characteristics of the defendant. The population data become individualized here: the absence of prior criminal history, of contact offending, of solicitation, of communication with minors, of production or trading for gain.
- Section 3553(a)(6) — unwarranted sentencing disparities, addressed through the Commission’s national sentencing data discussed in Part VI.D.

B. Stating the Figures Correctly

The most common error in defense sentencing memoranda in this area is the conversion of a group rate into an individual probability. A memorandum that states that the defendant has a 1.53 percent chance of committing a contact sexual offense has made a claim the research does not support and has handed the government an easy rebuttal. The defensible formulation reports the observed rate among individuals who share the relevant characteristics, in a named sample, over a named follow-up period.

Acceptable: “In a meta-analysis of 30 samples comprising 25,978 individuals followed an average of 4.72 years, individuals whose offending was confined to child sexual exploitation material were subsequently convicted of a contact sexual offense at a rate of 0.56 percent.”

Not acceptable: “Mr. ____ has a 0.56 percent chance of committing a contact offense.”

The distinction is not pedantic. It is the distinction that permits the opinion to survive cross-examination, and a court that has seen an expert overstate a figure once will discount everything else in the report.

C. What the Data Cannot Do

Counsel should anticipate and concede the following, because conceding them costs nothing and preserves credibility. Group data do not establish that this defendant will not reoffend. A low base rate does not answer the retributive component of § 3553(a)(2)(A), which concerns the seriousness of the offense and just punishment, and the harm to the children depicted is real and is not diminished by recidivism statistics. Recidivism evidence also does not address the government’s market-demand theory of harm. The argument this material supports is narrower and stronger for being narrow: incapacitation beyond a certain point purchases very little public safety in this subgroup, and the guideline range is not calibrated to that fact.

D. Supervised Release

The recidivism material bears on conditions of supervision as much as on length of custody. Two findings are directly useful. The Commission found that recidivism in this population accumulates chiefly during the first three years after release and grows slowly thereafter, and the desistance literature establishes that risk declines with age and with time lived offense-free. Together they

argue against lifetime or near-lifetime supervision as a default. Separately, the specialist pattern described in Part IV.E argues that the concern this population actually presents — further online offending — is addressable through internet monitoring and treatment conditions rather than custody. Protective and dynamic factors identified in a competent evaluation — stable housing, employment, treatment engagement, prosocial support, external monitoring — are the factors a court can act upon directly, and a well-drafted evaluation names them specifically so that counsel can propose a supervision package that answers the court’s concern at far lower cost.

VIII. Summary

There is no guideline provision recognizing low recidivism among online sexual offenders. The recognition exists in the Sentencing Commission’s 2021 and 2012 reports and in the Department of Justice’s SOMAPI chapter on internet-facilitated offending, and it is supported by a primary literature that is unusually consistent. Independent samples in Canada, Switzerland, the United Kingdom, Germany, and the United States, followed for periods ranging from eighteen months to more than eight years, produce contact sexual recidivism rates for non-contact online offenders clustering between roughly one-half of one percent and four percent. The current best estimate, from a meta-analysis of nearly 26,000 individuals, places contact sexual reoffending among individuals whose offending is confined to exploitation material at 0.56 percent, against 8.80 percent for those with mixed histories.

That material does its work under § 3553(a)(2)(C) and, secondarily, under § 3553(a)(1), (a)(2)(D), and (a)(6). It is strengthened rather than weakened by the concessions counsel should make: that group data do not resolve an individual case, that some offenders in this population have committed undetected contact offenses, that the retributive and general-deterrent components of the statute are untouched by recidivism evidence, and that the harm underlying these offenses is real. It is strengthened further by an evaluation conducted early, conducted fully, and reported with its limitations intact. Where the figures are stated as group rates rather than individual probabilities, this is among the better-supported mitigation arguments available in federal practice. Where it is overstated, or rests on an evaluation built to reach a conclusion, it is worse than nothing.

IX. Further Resources for Counsel

A fuller treatment of this subject matter, organized by offense type and updated as the literature develops, is maintained at <https://arizonaforensics.com/online-sex-offense/>. The collection is arranged into topic areas covering online offending generally, contact offenses, child pornography offenses, luring offenses, theories of internet compulsion, and risk assessment, and it carries the underlying research rather than summaries of it. Counsel preparing a sentencing memorandum or a cross-examination in this case category will find more there than a report of this length can hold.

Related material on the site addresses the mechanics of the evaluation itself: the types of psychosexual evaluation appropriate at the pretrial, presentencing, ongoing-needs, and release stages; the remote evaluation protocol; the expert request and the risk evaluation justification petition, with template and sample affidavits; and an example of a completed psychosexual risk assessment. Portions are access-restricted, and counsel should contact my office for the current credentials.

I have provided continuing legal education on these subjects for the State Bar of Arizona, for Air Force, Marine, and Navy judge advocate audiences, and for the Pima County Public Defender’s Office, on topics including online sexual offense, the anatomy of a psychosexual evaluation, the Daubert standard and psychological evaluations, and child sexual abuse allegations. Trial defense offices wishing to have this material presented as a training session are welcome to inquire.

I am also available to consult on individual cases, to review risk assessments produced by other evaluators, and to conduct psychosexual risk assessments in this case category, including by remote protocol in advance of trial. Counsel is welcome to contact my office directly.

Go forth, do good . . .

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