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

By Brent E. Newton[1]

I. Introduction

Except for the criminal penalties for crack cocaine offenses,[2] no specific federal non-capital penalty structure has been more widely criticized than USSG § 2G2.2 and the corresponding federal penal statutes, 18 U.S.C. §§ 2252 & 2252A.[3] Together, those provisions govern penalties for child pornography offenses other than those involving actual production of child pornography (henceforth, "non-production offenses").[4] Indeed, one of the leading sources of criticism has been

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[2] The history of federal crack cocaine penalties is thoroughly chronicled in Smita Ghosh, *Congressional Administration During the Crack Wars: A Study of the Sentencing Commission*, __ U. PENN. J. OF L. & SOCIAL CHANGE __ (forthcoming in Fall 2019).

[3] Carol S. Streiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27 (2013).

[4] *See, e.g.*, *United States v. Jenkins*, 854 F.3d 181 (2d Cir. 2017); *United States v. Pyles*, 862 F.3d 82, 98 (D.C. Cir. 2017) (Williams, J., dissenting); United *States v. Grober*, 624 F.3d 592 (3d Cir. 2010); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. R.V.*, 157 F. Supp.3d 207 (E.D.N.Y. 2015); Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Nullification*, 30 GA. ST. U. L. REV. 375 (2014); Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G RPTR. 108 (2011).

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

Although the best solution to the problems with section 2G2.2 would be to completely scrap the current guideline and rewrite it from scratch, such a change by the Commission would require congressional authorization. As I discuss below, Congress appears unwilling to allow the Commission to completely rewrite the guideline. However, as I also explain, there is a partial – and quite significant – fix available without congressional permission. That partial fix could be best accomplished by the Sentencing Commission in an amendment to section 2G2.2. If the Commission does not amend the guideline, then my proposal provides a detailed roadmap for federal district judges to "vary" from the current, broken guideline pursuant to the authority granted by the Supreme Court in *United States v. Booker* [6]and *Kimbrough v. United States*.[7]

[5] *Jenkins*, 854 F.3d at 190.

[6] 543 U.S. 220 (2005) (permitting district judges to "vary" below the sentencing guidelines, which the Court declared "effectively advisory").

[7] 552 U.S. 85 (2007) (affording sentencing judges discretion to vary from the sentencing range recommended by the federal sentencing guidelines based on a "policy" disagreement with a

II. The Evolution of the Child Pornography Statutes and Guidelines

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

The criminalization of child pornography offenses is a relatively recent occurrence in the history of American criminal justice. It was not until 1977 that federal law first addressed it – by outlawing production and *commercial* distribution and receipt of child pornography – but did not criminalize non-commercial distribution, receipt, and possession of child pornography until several years later.[8] Yet, despite its belated action in outlawing child pornography,

specific guideline). The Courts of Appeals are divided on the question of whether a district court may vary below section 2G2.2's recommended sentencing ranges based on a "policy" disagreement with the guideline. The majority of circuits permit such a variance. *See United States v. Morrison*, 771 F.3d 687, 692-93 (10th Cir. 2014); *United States v. Halliday*, 672 F.3d 462, 474 (7th Cir. 2012); *United States v. Henderson*, 649 F.3d 955, 963 (9th Cir. 2011); *Grober*, 624 F.3d at 592 (3d Cir.); *Dorvee*, 616 F.3d at 184 (2d Cir.); *United States v. Stone*, 575 F.3d 83, 91-94 (1st Cir. 2009); *see also United States v. Pyles*, 851 F.3d 1329, 1333-34 (D.C. Cir. 2017) ("We . . . conclude that, even if a district court retains discretion to vary from the child-pornography Guidelines based on a policy disagreement with them [having previously cited *Stone*, *Grober*, and *Henderson*], a district court does not necessarily abuse its discretion by agreeing with (and applying) those Guidelines."). The Fifth and Eleventh Circuits have rejected such "policy" variances. *United States v. Miller*, 665 F.3d 114, 120-21 (5th Cir.2011) (2012); *United States v. Pugh*, 515 F.3d 1179, 1201 & n.15 (11th Cir.2008). The Sixth Circuit has permitted "policy" variances from section 2G2.2, *United States v. Brooks*, 628 F.3d 791, 799-800 (6th Cir. 2011), but also has rejected the specific argument that such a policy variance is appropriate based on the fact that several of the aggravating factors in section 2G2.2 were required by Congress. *United States v. Bistline*, 655 F.3d 758, 761-64 (6th Cir. 2012).

[8] U.S. SENTENCING COMM., REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 4 & nn. 22-23 (2012) (hereafter "2012 COMMISSION REPORT"). Congress outlawed non-commercial receipt and distribution in 1984, and outlawed simple possession in 1990. *Id.*

Congress very quickly came to consider such offenses to be among the most serious in the federal system.

Repeated amendments to the statutory provisions and repeated congressional directives to the Sentencing Commission to amend section 2G2.2, from 1990 until 2012,[9] have resulted in some of the most severe federal non-capital penalties – for typical cases – among all common offense types.[10] The average prison sentence today for offenders convicted of non-production child pornography offenses is 101 months (or nearly 8 and ½ years).[11] Notably, that average sentence is noticeably below the average guideline range minimum – 139 months – called for by section 2G2.2.[12] As an indication of the relative severity of child pornography penalties among all federal offense types, the average sentence and guideline minimum are

[9] *See* 2012 COMMISSION REPORT, at 4-5; *see also* U.S. SENTENCING COMM., THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009) (discussing the many amendments to the guidelines since 1987). The full list of congressional legislation concerning section 2G2.2 is contained in Appendix E of the Commission's 2012 report. Most of that legislation either required the Commission to amend the guidelines or directly amended the guideline.

[10] The statutory ranges of punishment for child pornography offenders convicted of their first such offense are 0 to 20 years of imprisonment for simple possession offenses and 5 to 20 years of imprisonment for receipt and distribution offenses. *See* 18 U.S.C. §§ 2252(b) & 2252A(b). For offenders with prior convictions for sex offenses (including prior child pornography convictions), the ranges of punishment increase significantly – to a mandatory minimum of 10 years for possession offenses (with the same 20-year maximum) and a mandatory minimum of 15 years for receipt and distribution offenses (and a maximum of 40 years). *See id.*

[11] U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 44 (2019).

[12] *Id.* at 51.

higher than the corresponding averages for federal drug-trafficking offenses serious enough to carry mandatory minimum statutory penalties.[13] Furthermore, the averages for those drug-trafficking offenders reflect much higher average criminal histories than those for child pornography offenders – meaning the actual penalty levels for child pornography offenders are actually significantly higher than those for comparable drug-trafficking offenders.[14]

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

[13] U.S. SENTENCING COMM., MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 41 (2017) (Figure 25, showing average sentence for federal drug-trafficking offenses carrying mandatory minimums is slightly below 100 months and average guideline minimum for such cases around 130 months).

[14] Only 47.9% of drug-trafficking offenders today in are Criminal History Category I compared to 78.3% of non-production child pornography offenders. *See* U.S. Sent. Comm'n, *QuickFacts: Drug Trafficking Offenses* 1 (2018); U.S. SENT. COMM'N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 41 (2019).

offenders in terms of their culpability and dangerousness. The current guideline, in particular, treats the overwhelming majority of offenders as if they are the worst offenders on the spectrum. And, for that reason, sentencing judges sentence below the guideline ranges in the vast majority of cases today.

B. The Evolution of Section 2G2.2

Section 2G2.2 has evolved from a simple guideline carrying very low penalty ranges in the original 1987 *Guidelines Manual*[15] to the current complex guideline carrying severe penalty ranges. The current guideline, which has changed little since 2003, is set forth below:

Section 2G2.2 [current version]

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

[15] The 1987 version of 2G2.2 had a base offense level of 13 and two potential enhancements (a two-level enhancement if the pornography depicted a child under 12 years of age and a minimum five-level enhancement for distribution, with additional levels for "retail values" exceeded $100,000). Thus, for an offender in Criminal History Category I of the Sentencing Table, the most severe penalty range (without any adjustments from Chapter Three of the *Guidelines* and assuming a retail value of $100,000 or less) was 33-41 months (offense level 20/CHC I).

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

(3) (Apply the greatest):

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by **5** levels.

(C) If the offense involved distribution to a minor, increase by **5** levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by **2** levels.

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

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by **2** levels.

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

(C) at least 300 images, but fewer than 600, increase by **4** levels; and

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for

	the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

III. The (Many) Problems with Section 2G2.2

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

- Most of the enhancements in section 2G2.2 (*e.g.*, "use of a computer," the number-of-images enhancement) were promulgated during an earlier era of computer and internet technologies when the enhancements were intended to apply only in atypical or aggravated cases. As a result of today's computer and internet technologies, including peer-to-peer (P2P) file-sharing, however, the vast majority of the antiquated enhancement provisions apply to typical defendants.[16]
- The guideline penalty ranges for typical offenders have increased substantially because of the many enhancements added to section 2G2.2 after 1987. Many defendants, including those with no prior criminal records, thus have guideline ranges at or near the statutory maximum range of punishment. Furthermore, the average guideline range for non-production offenders is not much lower than average guideline ranges for much more serious sexual offenses (*e.g.*, child prostitution and rape of a child between 12 and 17).[17]
- There exists a wide range of defendants in terms of their culpability and dangerousness. Because the vast majority of the enhancement provisions in section 2G2.2 apply to typical defendants, the guideline does a poor job of distinguishing among defendants in terms of their relative culpability and dangerousness.[18]
- Because several of the provisions in section 2G2.2 were required by

[16] 2012 COMMISSION REPORT, at 313.

[17] *Id.* at 315-16; *see also id.* at 137.

[18] *Id.* at 320-25.

Congress (*e.g.*, use-of-a-computer, number-of-images, and sado-masochistic images enhancements) – and not added by the Commission in the normal course of administrative rule-making – the Commission cannot remove them without congressional approval.[19]

- Because section 2G2.2 is outdated and overly severe for typical defendants, the vast majority of sentencing judges refuse to sentence defendants within the recommended guideline ranges and prosecutors increasingly enter into plea bargains with defendants for non-guideline sentences – leading to significant sentencing disparities because there is no meaningful sentencing benchmark.[20]

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

> [T]he Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases: (i) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technologies); (ii) the degree of an offender's involvement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and (iii) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.[21]

[19] *Id.* at 322; *see also id.* at E-1 (Appendix E).

[20] *Id.* at 317-18.

[21] 2012 COMMISSION REPORT, at xvii-xviii.

The Commission also observed that: "The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders' collecting behavior and insufficient emphases on offenders' community involvement and sexual dangerousness. As a result, penalty ranges are too severe for some offenders and too lenient for other offenders. The guideline thus should be revised to more fully account for these three factors and thereby provide for more proportionate punishments."[22]

Little has changed since the Commission identified the problems and proposed a general solution in December of 2012.[23] Although the Commission has not issued a revised report on child pornography offenders during the past seven years – something that would be beneficial to do in view of the continuing controversy about child pornography sentencing[24] – my own regular review of child

[22] *Id.* at xviii.

[23] The Commission did amend section 2G2.2 in 2016 in a manner that marginally improved one of the existing enhancements and also added a new enhancement. The 2016 amendment required a *mens rea* for the two-level distribution enhancement and added a *quid pro quo* requirement for the five-level distribution enhancement. It also added a new four-level enhancement for possessing child pornography depicted a baby or toddler (as an alternate enhancement to the existing sado-masochistic enhancement). *See* USSG, App. C, amend. 801 (Nov. 1, 2016). Yet, as discussed below, the within-range rate for the guideline two years after those changes is even lower than it was in 2012.

[24] As discussed below, the Commission's 2012 report proposed that any guideline amendment account for three main factors: (1) the extent of the defendant's collecting behavior; (2) the extent of the defendant's involvement with other child pornography offenders in (usually virtual internet) "communities" devoted to child exploitation; and (3) the defendant's history of sexually exploitative or abusive conduct. *See* 2012 COMMISSION REPORT, at 320. The report had significant empirical data concerning the third factor, *id.* at 169-206, and had limited data about

pornography cases in the Commission's files through 2017 revealed virtually no changes in the statistics and trends discussed in the 2012 report. All of the main problems remain. Indeed, Commission sentencing data show that, if anything, more judges today perceive serious problems with the guideline than ever before. The most telling statistic – the within-range rate for section 2G2.2 – currently stands at 28.4 percent.[25] It was 32.3 percent in 2012, when the Commission issued its report.[26] The current average *extent* of downward variances is 40.1 percent – meaning in those cases in which judges vary downwardly, they impose sentences that are on average 40.1 percent below the average guideline *minimum.*[27]

It is notable that the current 28.4 percent within-range rate is actually artificially inflated by the relatively common practice of plea agreements in which the parties stipulate that the guidelines should apply in a particular way – usually by

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

[25] U.S. SENT. COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-91 (2018) (Tab. 32, showing 402 of all 1,414 section 2G2.2 cases had within-range sentences). Of all section 2G2.2 cases, 888 (or 62.8%) had downward "variances" and another 88 (6.3%) had downward "departures" (other than for substantial assistance or fast-track). *Id.* "Variances" and "departures" are discussed in *United States v. Myers*, 503 F.3d 676, 684-85 (8th Cir.2007).

[26] U.S. SENT. COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2012) (Tab. 28, showing 567 of all 1,755 section 2G2.2 cases (32.3%) had within-range sentences).

[27] U.S. SENT. COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2018).

removing the use-of-computer enhancement or the sado-masochism enhancement – in order to reduce a defendant's guideline range.[28] Judges who follow those plea agreements and sentence within the stipulated guideline ranges are classified as having imposed "within-range" sentences by the Commission – when in fact their sentences are effectively downward "variances."

In the nearly seven years since the Commission issued the report, Congress has not given any indication that it intends either to amend the penal statutes governing child pornography offenses or to give the Commission authority to amend the provisions of section 2G2.2 required by Congress. Not even a single subcommittee hearing in either house has been held in response to the Commission's lengthy report identifying the many problems with the statutes and guidelines.

It is fair to conclude that Congress does not intend to act, despite the perpetual chorus of criticism directed at the guidelines, from many federal judges, the Commission, practitioners, and commentators. It is regretful, but understandable. Child pornography is a quintessential "third rail" of politics.[29] No legislator stands

[28] *See* 2012 COMMISSION REPORT, at 222-23. The Commission's analysis of all 1,117 section 2G2.2 cases in 2010 with guideline stipulations in plea agreements found that 16.9% of all such cases had stipulations that were "inconsistent with the relevant facts set forth in" presentence reports or in the factual statement in plea agreements themselves. *Id.* at 223. My own review of section 2G2.2 cases in subsequent years found that this practice only increased since 2010.

[29] *United States v. R.V.*, 157 F. Supp.3d at 266 ("For a congress person, addressing child pornography is akin to stepping onto the third rail.").

to gain any political capital, and may in fact stand to lose a substantial amount of it, by introducing legislation to reform child pornography penalties (unless if the proposal raises already draconian penalties). Therefore, the Commission need not give Congress any additional time to act.

Once the Commission has a voting quorum of Commissioners,[30] it could begin the process of considering whether to amend section 2G2.2, to the extent that it is permitted to so in view of the legislative constraints. As discussed below, although constraints do exist, the Commission actually has a substantial amount of discretion to amend the guideline, if it wishes to do so. As I also explain below, my proposal is entirely consistent with the findings and broader recommendations made by the Commission in the 2012 report. In the report, the Commission recognized that, even without congressional authorization, the Commission "is able . . . to amend the child pornography" in a "limited manner."[31] My proposal is more than limited, yet significant changes would be necessary to improve the current dismal rate of within-guideline range sentences imposed.

[30] Because of unfilled vacancies, the Commission currently only has two voting Commissioners – two short of the needed four-Commissioner quorum. U.S. SENTENCING COMM'N, 2018 ANNUAL REPORT 2-3 (2019) (noting that, as of second quarter of 2019, only two voting Commissioners sat on the Commission).

[31] 2012 COMMISSION REPORT, at 322.

The proposed amendment, if adopted, would be similar in nature to the Commission's significant amendment of the illegal reentry guideline, section 2L1.2, in 2016. That amendment substantially recalibrated the aggravating factors of the illegal reentry guideline based on data showing that sentencing judges were varying below the guideline ranges in cases with the most severe enhancements.[32] Notably, my proposal is not a dramatic across-the-board reduction in penalty levels for all child pornography offenders. Such an amendment likely would be dead on arrival when Congress engaged in its 180-day review of the amendment pursuant to 28 U.S.C. § 994(p). Similar to the Commission's 2016 amendment to section 2L1.2, my proposal would lower penalty levels for many offenders but would still result in relatively severe ranges for most offenders and quite severe ranges for the worst offenders. The recalibration of the illegal reentry guideline resulted in a significantly higher percentage of cases in which judges impose sentences within the guideline range.[33] I predict that such a recalibration of section 2G2.2 would have an even greater impact on its within-range rate.

[32] *See* USSG, App. C, amend. 802 (Nov. 1, 2016) ("[C]omment received by the Commission and sentencing data indicated that the existing 16- and 12-level enhancements for certain prior felonies committed before a defendant's deportation were overly severe. In fiscal year 2015, only 29.7 percent of defendants who received the 16-level enhancement were sentenced within the applicable sentencing guideline range, and only 32.4 percent of defendants who received the 12-level enhancement were sentenced within the applicable sentencing guideline range.").

[33] *Compare* 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-82 (59.2% within-range rate), *with* 2018 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 91 (69.3% within-range RATE).

IV. A Partial (But Meaningful) Solution to the Problems

At the outset of this section, I set forth a proposed amendment to section 2G2.2 and then offer a section-by-section explanation for my proposal, including an explanation about how the Commission could amend the guideline in the manner that I propose consistent with the existing congressional restraints.

A. Proposed Amendment

My proposed amendment is as follows:

Amended Section 2G2.2

(a) Base Offense Level:

(1) **22**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **24**, otherwise

(b) Specific Offense Characteristics

(1) *Reductions in Offense Level*

(A) If (i) subsection (a)(2) applies; (ii) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (ii) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

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

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

(2) *Increases in Offense Level*

(A) (Apply the greatest):

(i) If the offense involved: (a) distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the

minor to engage in prohibited sexual conduct; or (b) distribution to an adult that was intended to cause the sexual exploitation of a minor in violation of 18 U.S.C. § 2251 or cause the procurement of a minor for other illegal sexual purposes, increase by **8** levels.

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

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

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

(B) (Apply the greatest):

(i) If the offense involved material that portrays (i) sadistic or masochistic conduct or other depictions of violence;[34] or (ii) sexual abuse or exploitation of an infant or toddler, increase by **4** levels; or

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

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

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

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

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

(D) (Apply the greatest):

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

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

(ii) If the defendant engaged in sophisticated collecting activity for at least two years, increase by **4** levels.[35]

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

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

B. Section-by-Section Explanation of Proposed Amendment

1. Base Offense Levels

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

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

levels, the amendment's base offense levels actually effectively reduce the existing base offense levels. This is because the amendment's base offense levels account for two levels for use of a computer and five levels for possessing 600 or more images – two aggravating factors, both required by congressional directives, that apply in the vast majority of cases today.[36] Therefore, for the vast majority of cases, the amendment effectively would reduce the two base offense levels by five and three levels, respectively – *i.e.*, from 22 and 18 to 17 and 15. The latter two base offense levels (17 and 15) are the lowest that the Commission may go under

[36] USSG § 2G2.2(b)(6) & (b)(7)(D); *see also* U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based (Fiscal Year 2018)*, at 46 (use-of-a-computer enhancement applied in 96.6% of cases, and enhancement for possessing 600 or more images applied in 76.7% of cases), available at *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Guideline_Based.pdf*.

By building in the two enhancements required by Congress into the new base offense levels, the Commission would not be reducing penalties for offenders subject to those enhancements, and therefore would be in compliance with the congressional directives. Regarding the most extensive congressional directives – added by the PROTECT Act of 2003 – Congress stated that: "With respect to cases covered by the amendments made by subsection (i) of this section, the Sentencing Commission may make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, *except that the Commission shall not promulgate any amendments that, with respect to such cases [i.e.. cases with the number-of-images enhancement and sado-masochism enhancement], would result in sentencing ranges that are lower than those that would have applied under such subsection*." Pub. L. 108-21, Title IV, § 401, Apr. 30, 2003, 117 Stat. 668 (Apr. 30, 2003) (emphasis added). Although inartfully drafted, that statutory language certainly appears to have been intended to prevent the Commission from lowering the four-level enhancement for sado-masochistic images and the two- to five-level enhancement based on the number of images possessed. Congress surely did not intend to prohibit the Commission from simply adding five levels into the base level for *all* child pornography defendants and then permitting a five-level reduction for the rare defendant who possessed less than the minimum number of images (10) required for the current two-level enhancement. Such an amendment would not "result in sentencing ranges that are lower than those that would" apply before such an amendment.

existing congressional directives.[37] As explained below, reducing the base offense levels in this manner would give the Commission leeway to add new aggravating factors as part of the overall recalibration.

In addition, the two new base offense levels, when combined with the adjustment in section 2G2.2(b)(1), equate simple possession offenses with simple receipt offenses. After the adjustment (in the case of a defendants convicted of receipt who did not distribute), both types of offenses effectively receive a base offense level of 22 – compared to 24 for distribution offenses. This change was made in recognition of the Commission's 2012 report's finding that simple possession offenses and simple receipt offenses are identical.[38]

2. Amended Specific Offense Characteristics

My proposed amendment's new specific offense characteristics are intended to minimize the effect of the outdated enhancements, eliminate double-counting of

[37] *See* 2012 COMMISSION REPORT, at Appendix E, at E-1. In 2004, the Commission chose to make the two base offense levels higher than Congress required. That choice perhaps made sense when the vast majority of offense characteristics did not apply to a typical defendant. However, now that the vast majority of specific offense characteristics apply to a typical offender – resulting in extremely high guideline ranges – the Commission should effectively reduce the two base offense levels, together with a recalibration of the aggravating factors in the specific offense characteristics.

[38] *See* 2012 COMMISSION REPORT, at xx (noting the Commission's finding that "the typical case in which an offender was prosecuted for possession was indistinguishable from the offense conduct in the typical case in which an offender was prosecuted for receipt").

aggravating factors, and better account for the three main factors identified by the Commission in its 2012 report.

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

This new section includes the existing two-level reduction for defendants convicted of receipt of child pornography but who did not distribute child pornography (thus punishing offenders who merely received child pornography in the same manner as the guideline punishes simple possessors). It also includes two additional reductions – one for possessing less than the minimum number of images (10) that currently triggers an enhancement for possessing certain numbers of images; and a second for not using a computer in the commission of the offense.[39] Because virtually all defendants use computers in the commission of their offenses and also possess 10 or more images, these two provisions would rarely ever apply. But they are included to give effect to the outdated congressional directives mentioned above.

[39] The minimum 10-images number was chosen for simplicity's sake rather than having a tiered reduction along the lines of the current number-of-images enhancement in section 2G2.2(b)(7). As noted above, the vast majority of offenders today receive the five-level enhancement for possessing 600 images or more.

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

This amended section includes several changes to the current guideline's main enhancements. First, is simplifies and recalibrates the existing six-prong enhancement for distribution of child pornography. The amendment has only four prongs. It increases the enhancements for distribution to a minor from 5, 6, or 7 levels to 6 or 8 levels. One of the three factors identified by the Commission as warranting an increased sentence is sexually abusive, exploitative, or predatory conduct, particularly toward children. Therefore, the amended guideline increases the existing penalty for distributing child pornography to minors. It also includes an eight-level enhancement for cases involving a defendant who distributed child pornography to another adult with the intent of having the recipient either produce new child pornography with a child or provide access to a child for illegal sexual purposes.[40]

The third prong provides a four-level enhancement for *quid pro quo* exchanges of child pornography, typically done in "closed" peer-to-peer communities, such as Gigatribe or traditional password-protected internet "bulletin boards."[41] The fourth prong – which amended the existing two-level enhancement

[40] The existing version of the distribution enhancement only provides for a five-level enhancement for such distribution. *See* USSG § 2G2.2(b)(3)(B) & comment. (n. 1).

[41] 2012 COMMISSION REPORT, at 48-53, 92-95, 148-52. The amended provision narrows the current enhancement, which applies to distribution "in exchange for any valuable consideration,

for simple distribution (in current section 2G2.2(b)(F) – no longer applies to offenders convicted of distribution or receipt offenses. Applying the two-level distribution enhancement to distribution and receipt offenders is duplicative of the enhanced offense levels that such defendants already receive for distribution in the base offense levels and the adjustment in current section 2G2.2(b)(1).[42] Thus, the fourth prong of the amended distribution provision only applies to the offenders convicted of possession offenses who in fact engaged in distribution (other than the types described in the first three prongs). Such defendants should be treated in the same manner as defendants convicted of distribution or convicted of receipt but who in fact distributed. Finally, the amended distribution provision also deletes the current *commercial* distribution enhancement in section 2G2.2(b)(3)(A) because no child pornography offenders prosecuted today distribute for pecuniary gain.[43]

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but not for pecuniary gain." USSG § 2G2.2(b)(3)(B). That breadth of that enhancement encompasses offenders who may have exchanged pornography for the mere ability to download more child pornography files or download in a faster manner. *See* USSG § 2G2.2, comment. (n.1). Such offenders should not be equated to offenders who trade child pornography for more child pornography.

[42] In the current guideline, a defendant receives a base offense of 22 if he is convicted of distribution. If a defendant was convicted of receipt but actually distributed, he also receives an offense level of 22. If he was convicted of receipt but did not distribute, his offense is reduced bv two levels to 20. *See* USSG § 2G2.2(a) & (b)(1).

[43] 2012 COMMISSION REPORT, at 149 (noting that none of the 1,080 section 2G2.2 offenders in 2010 engaged in commercial distribution).

Second, the amended guideline merges two of the existing specific offense characteristics – a two-level enhancement for possessing images depicting pre-pubescent minors (currently in section 2G2.2(b)(2)) and a four-level enhancement for possessing sadomasochistic images or images of babies or toddlers (currently in section 2G2.2(b)(4)). The former enhancement applies to virtually all cases today and was not required by Congress (and thus can be merged into another enhancement provision without contravening any congressional directive).[44] Merging it into the other enhancement while requiring a court to apply only the greatest enhancement (+2 or +4, but not both) would reduce the double-counting that currently occurs because both enhancements apply in the vast majority of cases.[45]

Third, the proposed amendment includes a tiered enhancement for a defendant's "pattern of activity," which is currently a single five-level enhancement for a defendant who has a history of committing two or more acts of

[44] *See* 2012 COMMISSION REPORT, App. E, at E-1.

[45] Double-counting currently occurs because virtually all images depicting sado-masochistic conduct also involve a pre-pubescent minor. In 2018, the 2-level enhancement for possession of an image of a pre-pubescent minor applied in 94.1% of cases, and the sado-masochistic or baby/toddler enhancement applied in 84.1% of cases. *See* U.S. Sent. Comm'n, *Use of Guidelines and Specific Offense Characteristics Guideline Calculation Based (Fiscal Year 2018)*, at 45, available at *https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Guideline_Based.pdf*.

sexual abuse or exploitation of a minor. The new, tiered enhancement would provide for a three-, six-, or nine-level enhancement for defendants depending on whether they previously committed one, two, or three (or more) prior acts of sexual abuse or exploitation of a minor.[46] This amended enhancement better reflects the Commission's belief that, when child pornography defendants have histories of sexually abusive, exploitative, or predatory conduct toward children, they should be punished more severely by providing for incremental enhancement levels depending on the extent of that history. This change does not *lower* the congressionally-required five-level enhancement for two or more acts, [47] so it would not violate the congressional directive. Indeed, it *increases* that enhancement by one or four levels for defendants who currently receive the five-level enhancement for two or more predicate acts.

Finally, the proposed amendment includes a new two-level enhancement for defendants who engaged in "sophisticated collecting activity," such as organizing an extremely large number of child pornography files in a complex folder structure. For offenders who engaged in such sophisticated collecting behavior for at least two years, their enhancement is four rather than two levels in recognition of

[46] The enhancement would not apply to acts of distributing child pornography to minors because the defendant already would receive a significant enhancement for that behavior under the amended distribution enhancement.

[47] *See* 2012 COMMISSION REPORT, App. E, at E-1.

the prolonged nature of their offense. This new enhancement reflects another factor identified by the Commission in its 2012 report.

3. Examples of How the Amended Guideline Would Work in the Real World

The following four hypothetical cases are realistic fact-patterns that reflect what judges regularly see in non-production child pornography cases. Following each scenario are the hypothetical defendants' guideline ranges under both the current guideline and my proposed amended guideline. Consistent with real cases, all fivee defendants are in Criminal History Category I and received a downward adjustment of three levels for acceptance of responsibility under USSG §3E1.1.

Scenario One: Non-aggravated Simple Possessor

The defendant used an "open" peer-to-peer (P2P) file-sharing program to download several child pornography videos but did not activate the sharing function (thus, the defendant did not distribute to anyone). One of the videos depicts limited penetration of a prepubescent minor but none depict intentional infliction of pain or humiliation. The defendant did not maintain an organized collection of child pornography files and had only downloaded child pornography for a few months before being arrested. The defendant has no known history of sexual abuse of exploitation of a minor. The defendant was convicted of one count

of possession of child pornography under § 2252(a)(4)(B) and faces a statutory range of punishment of 0-20 years of imprisonment.

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

Scenario Two: **Unsophisticated Possessor with History of Sexual Abuse**

The defendant's former landlord discovered that the defendant had left two dozen still images of post-pubescent but clearly underage females sexually exposing themselves. The images were printed from computer websites at some point in the past (but there was no evidence that the defendant himself was the one who had accessed the computer). Although he had never been convicted of a sex offense before, the defendant had been arrested and prosecuted 12 years before for sexually abusing a minor on five separate occasions. The case was resolved by a plea bargain to non-sexual assault of a child, for which the defendant served 180 days in jail. The presentence report established that the defendant had sexually

assaulted the minor on the five occasions. The defendant was convicted of one count of possession of child pornography under § 2252(a)(4)(B) and faces a statutory range of punishment of 0-20 years of imprisonment.

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

Scenario Three: Unsophisticated Passive Distributor

The defendant used an "open" peer-to-peer (P2P) file-sharing program to download several of child pornography videos but did activate the sharing function (thus, the defendant indiscriminately distributed to strangers but did not do so in a *quid pro quo* manner). Two of the videos depict penetration of prepubescent minors with indications of pain on the children's faces. The defendant did not maintain an organized collection of child pornography files and had only downloaded child pornography for a few months before being arrested. The defendant has no known history of sexual abuse of exploitation of a minor. The defendant was convicted of one count of distribution of child pornography under §

2252(a)(4)(B) and faces a statutory range of punishment of five to 20 years of imprisonment.

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	22	**Base Offense Level**	24
Pre-Pubescent Minor	+2	**Pre-Pubescent Minor**	
Simple Distribution	+2	**Simple Distribution (Possession Offenses)**	
Sado-Masochism/ Babies/Toddlers	+4	**Sado-Masochism/ Babies/Toddlers**	+4
Use of a Computer	+2		
600+ images	+5		
Acceptance	-3	**Acceptance**	-3
Final Offense Level [Guideline Range]	34 [151-188 months]		25 [57-71 months][48]

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

The defendant used a "closed" P2P file-sharing program to trade several child pornography videos with other P2P users in a *quid pro quo* manner. Several of the videos possessed by the defendant depict penetration of toddlers. The defendant maintained his collection of child pornography in a complex file structure, and a forensic computer analysis showed that he had collected child

[48] Because the defendant was convicted of distribution, which carries a 60-month mandatory minimum penalty, the defendant's actual guideline range is 60-71 months. *See* USSG § 5G1.1(c).

pornography for 18 months. The presentence report established that the defendant had sexually abused his 12-year old neighbor on one occasion in the past. The defendant was convicted of one count of distribution of child pornography under § 2252(a)(2) and faces a statutory range of punishment of five to 20 years of imprisonment.

Current Guideline Calculation		**Amended Guideline Calculation**	
Base Offense Level	22	**Base Offense Level**	24
Pre-Pubescent Minor	+2	**Pre-Pubescent Minor**	
Active Distribution	+5	***Quid Pro Quo* Distribution**	+4
Sado-Masochism/ Babies/Toddlers	+4	**Sado-Masochism/ Babies/Toddlers**	+4
Pattern of Activity		**Pattern of Activity**	+3
Use of a Computer	+2		
600+ images	+5		
		Sophisticated Collector	+2
Acceptance	-3	**Acceptance**	-3
Final Offense Level [Guideline Range]	37 [210-262 months]		34 [151-188 months]

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

The defendant used a "closed" P2P file-sharing program to trade several child pornography videos with other P2P users in a *quid pro quo* manner. The defendant also used a social media application to communicate with a 12-year female. He sent her child pornography videos using that social media application and asked her to travel to meet him in order to engage in the types of sexual activities depicted in those videos (which she declined to do). Several of the videos possessed by the defendant depict penetration of toddlers. The defendant maintained his collection of child pornography in a complex file structure, and a forensic computer analysis showed that he had collected child pornography for several years. The presentence report establishes that three decades earlier the defendant was convicted of sexually abusing his step-sister when she was six years old. In addition, the presentence report established that in the past decade the defendant had sexually abused a 12-year old neighbor. The defendant was convicted of one count of distribution of child pornography under § 2252(a)(2) and faces a statutory range of punishment of 15 to 40 years of imprisonment (based on his prior conviction).

Current Guideline Calculation		Amended Guideline Calculation	
Base Offense Level	22	**Base Offense Level**	24
Pre-Pubescent Minor	+2	**Pre-Pubescent Minor**	
Distribution to a Minor With Intent to Commit a Sex Offense	+6	**Distribution to a Minor With Intent to Commit a Sex Offense**	+8
Sado-Masochism/ Babies/Toddlers	+4	**Sado-Masochism/ Babies/Toddlers**	+4
Pattern of Activity	+5	**Pattern of Activity**	+6
Use of a Computer	+2		
600+ images	+5		
		Sophisticated Collector	+4
Acceptance	-3	**Acceptance**	-3
Final Offense Level [Guideline Range]	43 [life]		43 [life][49]

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

One final change that the Commission could accomplish without congressional permission would be to amend the policy statement in USSG §5D1.2(b), which currently reads: "If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is

[49] Because the statutory maximum is 40 years, the actual guideline range is simply 40 years. *See* USSG § 5G1.1(a).

recommended." "Sex offense" is defined as include non-production child pornography offenses in Chapter 109A of Title 18 of the United States Code.[50]

In its 2012 report, the Commission noted that this recommendation was first included in section 5D1.2 at a time when the maximum term of supervision for child pornography offenses was three years. When Congress raised the maximum term of supervised release for child pornography offenses to life in 2003, that application note had the effect of recommending lifetime terms of supervised release for all child pornography defendants.[51] The Commission thus never intended that recommendation of lifetime supervision.

The recommendation makes no sense for typical child pornography offenders, who are unlikely to recidivate upon release from prison, according to the Commission's study of recidivism of child pornography offenders.[52] The Commission should amend section 5D1.2 to state that a court should only impose a substantial term of supervision – say, beyond 10 years – if the evidence in a particular case warrants such a term. Lifetime terms should be reserved for the most serious, dangerous offenders.

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[50] USSG §5D1.2(b), comment. (n.1).

[51] 2012 COMMISSION REPORT, at 325-26.

[52] 2012 COMMISSION REPORT, at 299-310.

V. Conclusion

The current penalty structure for non-production offenses is fundamentally broken, as evidenced by the fact that only 28.4 percent of defendants sentenced under section 2G2.2 receive within-range sentences and 69.1 percent of defendants receive downward variances or departures (unrelated to their substantial assistance or participation in a fast-track program). The vast majority of child pornography defendants receive downward variances based on sentencing judges' subjective senses of what appropriate sentences should be. Because judges have no meaningful national benchmark from which to render sentencing decisions, widespread sentencing disparities exist – in conflict with the central purpose of the Sentencing Reform Act of 1984.[53] In addition, because the current guideline fails to offer any meaningful benchmark, federal prosecutors around the country engage in a wide variety of different charging and plea-bargain practices resulting in significant sentencing disparities among similar defendants.

The Commission's December 2012 report has fallen on deaf ears in Congress. As soon as it gets a voting quorum, the Commission should act to the

[53] *See* 28 U.S.C. § 991(b)(1)(B) (requiring the Sentencing Commission to promulgate guidelines that "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct"); *see also* 18 U.S.C. 3553 § 3553(a)(6) (similarly instructing sentencing judges "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

extent it is permitted within the legislative constraints imposed by Congress concerning section 2G2.2. As this article demonstrates, the Commission actually has a substantial amount of leeway to amend the guideline consistent with both the legislative directives as well as with the Commission's recommendation in its report. Although the Commission may not adopt the specific offense levels in my proposal, the Commission should at least recalibrate the aggravating factors in the existing version of section 2G2.2 to better reflect the three factors identified in the Commission's 2012 report and set penalty levels that account for the wide spectrum of offender conduct. In addition, the Commission should eliminate the duplicative aggravating factors identified above.

Amending section 2G2.2 in the manner proposed in this article would result in reductions in penalty ranges for many defendants, yet the sentencing ranges would still be relatively severe – very few defendants would have sentencing ranges with minimums of less than three or four years, and most defendants would have ranges with minimums between five and ten years. The worst defendants would have guideline ranges comparable to – or even higher than – the ones currently called for by the guideline (at or near the life-sentence range). Moreover, the ranges for all child pornography defendants would be based on the common-sense factors identified by the Commission in its report rather than the antiquated and often unduly severe factors in the current guideline. An amended guideline

that is based on the three factors identified by the Commission and that also eliminates the duplicative aggravating factors in the current guideline likely would result in more consistent prosecutorial charging and plea-bargaining practices and also more within-range sentences by federal district judges. The current unacceptable degree of unwarranted sentencing disparities thus would be reduced.