A Case for the Application of First Step Act Earned Time Credits to Offenses

Related to the Possession of Child Pornography

by Christopher A. Reilly[1]

Federal statutes 18 U.S.C. § 2252 and 2252A (provisions regarding possession-related child pornography offenses) are among the most widely criticized federal non-capital penalty structures.[2] In 2012, the United States Sentencing Commission submitted a 300-page report titled, Federal Child Pornography Offenses, that called for less harsh sentencing guidelines for these offenses.

The passing of the First Step Act in 2018 has effectively exacerbated the harshness of sentences relating to 2252 and 2252A by excluding these crimes from the ability to earn time credits toward the early release from prison.[3] Surprisingly, many "hands-on" sexual abuse of children crimes such as sex-trafficking of minors and enticement of minors to engage in illicit sex crimes are, in fact, eligible to receive these early release time credits. Even extremely violent crimes such as manslaughter and murder-for-hire contracts are eligible to receive credits toward early release from prison. [3]

The First Step Act (FSA) was enacted in 2018, in part, to provide for activities for federally incarcerated individuals to participate in activities that would help prepare them to integrate back into society after incarceration and to lower the amount of recidivism for certain federal offenses.[4] The FSA provides that "eligible" inmates earn "Time Credits" (ETCs) toward leaving prison early to prerelease custody or early transfer to supervised release for successfully completing approved "Evidence-Based Recidivism Reduction Programs" or "Productive Activities".[5] As required by the FSA, an inmate cannot earn FSA ETCs if that inmate is serving a sentence for a disqualifying offense. Specifically, the FSA enumerates 68 offenses for which inmates who are serving terms of imprisonment are ineligible including "certain activities

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[1] Registration #85653-380, federally incarcerated at Bastrop FCI, sentenced to a "below-guidelines" sentence of 200 months (close to the statutory maximum of 240 months) for Receipt & Transportation of Child Pornography offenses in Feb. 2018 (no criminal history).

[2] 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)

[3] 18 U.S.C. § 3632(d)(4)(D)

[4] 18 U.S.C. § 3632(d)(4)(A)(i)

involving material involving the sexual exploitation of minors".[6] This includes 18 U.S.C. § 2252 and 2252A which consists of a number of possession-related child pornography offenses including possession, receipt, transportation and distribution.

Crimes against children are particularly offensive and abhorrent to the public, and rightfully so. Child pornography offenses carry high penalties – many times exceeding the sentencing for manslaughter and murder in addition to the actual or attempted sexual abuse of a minor. Additionally, both the Sentencing Commission and Congress have recommended lifetime supervised release for all child pornography offenses.[7]

The purpose of this document is to provide pragmatic, empirical, objective evidence that supports the removal of possession-related child pornography offenses detailed in 18 U.S.C. § 2252 and 2252A from the ineligible crimes enumerated in The First Act of 2018 Section 3632(d)(4)(D). It is organized into three main parts:

1. Violent Crimes Eligible for The First Step Act: Numerous violent crimes are eligible to receive FSA ETCs which results in the defendants of these offenses spending less time in prison. This section illustrates the exacerbated widening of the proportionality of sentencing between possession-related child pornography cases and violent and hands-on sexual abuse crimes and the effect the application of FSA ETCs will have on sentencing.
2. The Harsh Sentencing for Child Pornography Offenses: Sentencing for child pornography crimes has been opined by the Sentencing Commission and a preponderance of federal judges as "irrational" and "unreasonably harsh". Lifetime supervised release is recommended by Congress and the U.S. Sentencing Commission[8], and most 2G2.2 enhancements are so ubiquitous that many first time offenders are sentenced close to statutory maximums.[9]
3. Risk of Recidivism: Many child pornography offenders are no more a risk to the public after incarceration than individuals not convicted of a child pornography

[6] DEPARTMENT OF JUSTICE, Bureau of Prisons, 28 CFR part 523 and part 541, FSA Time Credits at 29 (2022)
[7] U.S. Sentencing Commission, 2012 COMMISSION REPORT at 325-326
[8] U.S. Sentencing Commission, 2012 COMMISSION REPORT at 325-326
[9] See United States v Jenkins, 854 F.3d 181 (2nd Cir., 2017)

offense in the first place.[10] This section details with empirical evidence that child pornography recidivism rates justify the inclusion of the ability to earn FSA ETCs and that their participation in approved programs and activities would actually reduce recidivism rates resulting in safer communities. Further discussed is the history (and ultimate repudiation) of the often quoted research results that found recidivism rates among "sex offenders" as "frightening and high".

As a first-time incarcerated individual sentenced close to the statutory maximum for a possession-related child pornography offense, my hope is that this research would result in the removal of 18 U.S.C. § 2252 and 2252A offenses from the list of ineligible First Step Act crimes resulting in the ability to earn FSA ETCs toward the early release from prison.

1. CRIMES ELIGIBLE FOR THE FIRST STEP ACT EARNED TIME CREDITS

Section 18 U.S.C. 3632(d)(4)(D) of the FSA details the crimes which are ineligible to receive ETCs if serving a term of imprisonment for conviction under any of the provisions listed therein. The following sections highlight certain (but not exhaustive) violent crimes that are not excluded under 18 U.S.C. § 3632(d)(4)(D) and the effect FSA ETCs have on the respective sentence.[11]

a. Voluntary and Involuntary Manslaughter and Murder-For-Hire

United States v Joe, 785 Fed. Appx. 528 (10th Cir., 2019)

Mr. Joe was charged and found guilty of voluntary manslaughter in violation of 18 U.S.C. § 1112. The victim was Joe's brother, who suffered from cerebral palsy and was paralyzed on the left side of his body. The cause of death was determined to be "chop wounds" that were inflected by Mr. Joe with an axe. The wounds were mainly on

[10] Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender, Psychology, Public Policy, and Law, Vol. 24, No.1, at 59 (2018), see also U.S. Sentencing Commission's 2012 COMMISSION REPORT at 299-310

[11] All FSA ETC calculation assume 54 days per year of good time, 12 months of pre-trail jail time (where no FSA ETC credits are earned), 15 days of FSA ETC per eligible month and no loss of good time or FSA ETC days.

the left side of the victim's body, including his face, neck, chest, abdomen, and left arm. Mr. Joe received a sentencing enhancement for killing a vulnerable victim. He was sentenced to 78 months' incarceration. Mr. Joe is eligible to earn 555 days of FSA ETCs which would reduce his time in prison to 4 years for "chopping up" his disabled brother.

US v Cienfuegos, 462 F. 3d 1160 (9th Circ., 2006)

Cienfuegos was engaged in an altercation with a number of individuals. He then got into his car and drove into six vehicles, causing a nearby crowd to rapidly disperse. Ms. Noline, a bystander, tripped and fell as she ran to avoid the path of the Cienfuegos's vehicle. Cienfuegos ran over Ms. Noline with his car, hit a tree and then backed up and ran over her again. Ms. Noline died as a result of her injuries. Cienfuegos pled guilty to assault resulting in serious bodily injury in violation of 18 U.S.C. § 1152 and involuntary manslaughter in violation of 18 U.S.C. § 1112. Mr. Cienfuegos was sentenced to 51 months in prison followed by 3 years of supervised release. If sentenced today, Mr. Cienfuegos would be eligible to receive 330 days of FSA Time Credits and allow him to leave prison 11 months early.

United States v Harriman, 970 F. 3d 148 (8th Cir., 2020)

Mr. Harriman held a two-hour meeting with a hitman (who happened to be an undercover FBI agent) during which Harriman hired the hitman to kill his ex-wife and her boyfriend. The meeting culminated in a written murder-for-hire contract between Harriman and the hitman. A jury convicted Harriman of two counts of murder-for-hire, in violation of 18 U.S.C. § 1958. The district court sentence Harriman to 240 months' imprisonment and three years' supervised release. Mr. Harriman is eligible to earn up to 1,935 days of FSA ETCs which would allow him to leave prison over 5 years early.

b. <u>Conspiracy to Commit Sex Trafficking</u>

United States v Lucious, 2022 U.S. Dist. LEXIS 14871 (10th Cir., 2022)

In 2021, Mr. Lucious pled guilty to Conspiracy to Commit Sex Trafficking, in violation of 18 U.S.C. § 1594(c). The case states that one of Lucious' victims, who he

was sex trafficking, was a 14-year old who did not have a home or parents to look out for her and regularly used alcohol, marijuana, cocaine, ecstasy and codeine. The court sentenced Lucious to a term of imprisonment of 60 months followed by a 5-year period of supervised release. With good time and 405 days of FSA ETCs, Mr. Lucious's 60 months' sentence for sex trafficking a 14-year-old becomes 37.7 months – shortly more than 3 years.

United States v Wagoner, 2021 U.S. Dist. LEXIS 11762 (4th Cir., 2021)

Ms. Wagoner pled guilty to conspiring to commit sex trafficking, in violation of 18 U.S.C. § 1954(c). Wagoner conspired to engage in sex trafficking of a female minor who was 16 years old. Wagoner used Backpage.com to solicit individuals for prostitution, arranged "dates" and collected the proceeds. The PSR reflected a final offense level of 35 and a criminal history category of IV because of her prior convictions and due to the fact that she was on federal supervised release while committing the instant offense. Wagoner's advisory sentencing guidelines called for a sentence ranging between 235 and 293 months; however, the court imposed a 96-month sentence. Wagoner's time in prison becomes 58.6 months after good time and 705 days of FSA ETCs (a little less than 5 years for sex trafficking a minor).

c. <u>Unlawful Sexual Abuse of a Minor</u>

Roddam v United States, 2021 U.S. Dist. LEXIS 109871 (5th Cir., 2021)

Roddam was convicted of coercion and enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). The victim (a 13-year old girl) was coerced "multiple times" to sneak out of her house to engage in sexual acts with Roddam. She was found by a medical examiner to have vaginal bruising, a perineum abrasion, an anal tear and anal bruising. Mr. Roddam was sentenced to 168 months' imprisonment. His 14-year sentence becomes 8.3 years after good time and 1,320 days of FSA ETCs for the actual sexual abuse of a 13-year-old girl.

United States v Dugger, 2020 U.S. Dist. LEXIS 241249 (5th Cir., 2020)

Mr. Dugger was convicted of attempted coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b). Dugger admitted that he knowingly attempted to persuade a minor to engage in sexual activity. He further admitted that by persuading a minor under the age of 12 years old to engage in oral and vaginal intercourse constitutes a violation of the laws of The State of Texas, including Aggravated Sexual Assault. Mr. Dugger was sentenced to 188 months' imprisonment and 10 years' supervised release. He is eligible to receive 1,500 days (49.3 months) of FSA Time Credits which would help reduce his 15.7-year sentence to 9.2 years in prison.

West v United States, 2020 U.S. Dist. LEXIS 66809 (11th Cir., 2020)

Mr. West responded to an online post regarding a father who claimed he was sexually active with his 9-year-old daughter and had been since she was 2 years old. West asked the father (an undercover FBI agent) if he ever considered sharing his daughter for money. The agent agreed to accept $120 to allow West to have sex with his fictitious 9-year-old daughter. West went to agreed-upon restaurant where he was promptly arrested and subsequently convicted of attempted coercion and enticement of a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b). West was sentenced to 135 months' imprisonment and 15 years of supervised release. Mr. West is eligible to reduce his time in prison by 34.5 months of FSA ETCs. With good time, West's prison time will be 6.7 years for the actual attempted sexual abuse of a 9-year-old.

d. <u>Transportation of Minors – Traveling Across State Lines</u>

United States v Rodarmel, 731 Fed. Appx. 760 (10th Cir., 2018)

Ms. Rodarmel was charged in an eight count indictment including violating 18 U.S.C. § 1591 (sex trafficking of a child), 18 U.S.C. § 2423(a) (transporting a minor in interstate commerce with the intent that the minor engage in sexual activity), and 18 U.S.C. § 2251(b) (a parent assisting another person in the use of the parent's child to produce child pornography). These charges stemmed from Ms. Rodarmel's decision to

drive her own 13-year-old daughter from Missouri to a hotel room in Kansas to have sex with an adult man.

Ms. Rodarmel pled guilty to violating U.S.C. § 2423(a), transportation of a minor in interstate commerce to engage in sexual activity. Ms. Rodarmel was sentenced to 204 months (17 years) in prison followed by 10 years of supervised release. Although Ms. Rodarmel trafficked her own daughter, she is still eligible to receive up to 1,635 days (4.5 years) off of her sentence from FSA ETCs.

United States v Sloan, 2021 U.S. Dist. LEXIS 31788 (10th Cir., 2021)

Sloan pled guilty to knowingly transporting a person less than 18 years of age for the purpose of engaging in illegal sexual activity in violation of 18 U.S.C. § 2423(a). During the plea hearing, the judge asked Sloan to state in his own words what he did to commit the offense:

"On June 11, 2017, in Tulsa, OK, and elsewhere, I knowingly transported a minor female from Texas to Tulsa with the intent that she engage in sexual activity for which I could be charged with a criminal offense under Oklahoma law. Specifically, I intended to have sex without her consent and, in fact, did have sex with her without her consent." The plaintiff prepared a testimony that Sloan sexually assaulted or raped her multiple times during this trip to Tulsa.

The court accepted Sloan's guilty plea and sentenced Sloan to 180 months in prison and 10 years of supervised release. Mr. Sloan is eligible to receive up to 1,320 days of FSA ETCs which would reduce his time in prison to 9.2 years from 15 years (including good time), which is 30% less than the average sentence of 154.4 months for the receipt of child pornography. [12]

2. HARSH SENTENCING FOR CHILD PORNOGRAPHY CRIMES

There are numerous resources which express opinions regarding the harsh sentencing of child pornography offenses. For example, the United States Sentencing Commission's Special Report to Congress: Federal Child Pornography Offenses, pp. 10-15 (Dec. 2012),

[12] see Haney v United States, 2018 U.S. Dist. LEXIS 164808 (8th Cir., 2018)

questioned "the appropriateness of the current guidelines scheme in 2G2.2 for non-production cases where the offenders used the internet to receive and distribute child pornography. It also criticizes current statutes and guidelines defining penalties for non-production child pornography offenses, including "overly severe penalty ranges for typical offenders – particularly those receipt or possession offenses, the failure to meaningfully distinguish among offenders in terms of their culpability and dangerousness, and 'the lack of proportionality in sentence length between possession offenders and contact offenders who have sexually abused a child".

The United States Sentencing Commission Sourcebook of Federal Sentencing Statistics S-91 (2018) (Table 32) showed only 402 (28%) of all 1,414 non-production child pornography section 2G2.2 cases had within-range sentences while 888 (62.8%) had downward variances. Of these downward variances, the imposed sentence was, on average, 40.1% below the average guideline minimum.[13]

In 1997, there were 230 federal non-production child pornography offenders. Of those offenders, the mean sentence imposed was 20.59 months and 55 (23%) received probation. Ten years later, there were 1,170 federal non-production child pornography offenders and of those, the mean sentence imposed was 91.3 months, a 443% increase. Of those 1,170 cases, only 25 (2.1%) were sentenced to probation (a 91% decrease). [14] In 2019, the average sentence for non-production child pornography offenses was 101 months (a 491% increase from 1997).[15]

United States v C.R., 792 F. Supp. 2d 343 (2nd Cir., 2011)

This case states that 71% of judges responding to the survey, "Sentencing Commission Survey of Federal Judges, January 2010 – March 2010", thought mandatory minimum sentences was too high for Receipt of Child Pornography charges. A substantial majority,

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[13] U.S. Sent. Comm., Sourcebook of Federal Sentencing Statistics (2018)

[14] US Sentencing Comm., Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System 44 (2019)

[15] Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines at 2 (2009)

71%, strongly agreed or somewhat agreed that the "safety valve" exception to drug mandatory minimums should be expanded to apply to Receipt of Child Pornography crimes. Furthermore, the results of this survey show that 72% of federal judges view the sentencing guidelines for possession and receipt of child pornography as "unreasonably harsh".

Senior United States District Judge, Jack B. Weinstein, in a 2016 Statement of Reason for Sentencing Pursuant to 18 U.S.C. 3553(c)(2)[16] stated that the Guidelines for child pornography offenses were not supported by a [U.S. Sentencing] Commission study; they were amended at the direction of Congress.[17] The Commission has sought – but has not been granted – authority from Congress to amend the current child pornography provisions to make them more appropriate.[18] While the 2G2.2. Guidelines are generally developed by the Sentencing Commission through empirical studies focused on data about past sentencing practices, this is not the case for child pornography offenses, the Guidelines were amended at the direction of Congress. The Commission opposes the higher penalties imposed by the legislature.[19] Specifically, the Commission quoted in their 2012 U.S. Sentencing Commission, Federal Child Pornography Offenses, "as a result of recent changes in the computer and internet technologies, that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degree of culpability." The Commission concluded that revisions are needed to more fully differentiate among offenders based on their culpability and sexual dangerousness.[20]

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[16] Jack B. Weinstein, Sr. United States District Judge, Statement of Reasons for Sentencing Pursuant to 18 U.S.C. 3553(c)(2), 188 F. Supp. 3d 152, 168, 2016 U.S. District LEXIS 66063 (E.D.N.Y, 2016)

[17] See Dorvee, 616 F. 3d at 184-186 (2nd Circuit, 2010); see also US v Diaz, No. 11 CR-CR-821, 2013 U.S. Dist. LEXIS 11386, 2013 WL 322243, at 3 (E.D.N.Y. Jan. 28, 2013) (providing that the authority for a non-Guidelines sentence "is at its greatest when the offense Guideline at issue is not the product of the Commissions empirical analysis and technical expertise.")

[18] See U.S. Sentencing Comm'n, Federal Child Pornography Offenses (December 2012), at 322 ("[T]he Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific Congressional directives or legislation directly amending the guidelines."); see also Dorvee, 616 F.3d at 185 (detailing the Commission's opposition to Congressionally-mandated changes.)

[19] See U.S. Sentencing Comm'n, The History of the Child Pornography Guidelines (Oct. 2009)

[20] Id. at 311

United States v Dorvee, 616 F. 3d 174, 184, 187-88 (2nd Cir., 2010)

The circuit court in this case found that enhancements for child pornography cases provided under 2G2.2 were "irrational" and directed district courts to "take seriously the broad discretion they possess in fashioning sentences under 2G2.2" because those guidelines were not developed using an "empirical approach".

a. <u>Ubiquitous Enhancements</u>

Many enhancements associated with child pornography are so inherent to the crime itself, it is difficult to differentiate between less and more serious offenders as required by 18 U.S.C. § 3553. Additionally, enhancements become so ubiquitous that most offenders qualify for sentences close to statutory maximums regardless of criminal history.

United States v Jenkins, 854 F.3d 181 (2nd Cir., 2017)

In the Circuit Court's brief in overturning a within guidelines sentence for possession and transportation of child pornography for being substantively unreasonably, the Circuit Court states the following:

Consistent with 18 U.S.C. § 3553(a)(4), the district court's starting point was U.S.S.G. 2G2.2, the guidelines governing child pornography offenses. In U.S. v Dorvee, we held that this guideline "is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what 3553 requires." [21]

First, we observe that the Sentencing Commission has not been able to apply its expertise of penalties "at the direction of Congress", despite "often openly opposing the Congressionally directed changes". Second, we noted that four of the sentencing enhancements were so run of the mill and "all but inherent to the crime of conviction" that "an ordinary first-time offender is therefore likely to qualify for a sentence of at least 168-210 months" based on an offense level increased from the base level of 22 to 35. We emphasized that this range was likely to be unreasonable because it was "rapidly approaching statutory maximum for child pornography possession offenses, and because the offense level failed to sufficiently distinguish between "the most dangerous offenders" who "distribute

[21] 616 F.3d 174, 184 (2nd Cir., 2010)

child pornography for pecuniary gain and who fall in higher criminal history categories" and those who distribute for personal, non-commercial reasons. Also, we held that this range demonstrated "irrationality in 2G2.2." because it was substantially more severe than for an adult "who intentionally seeks out and contacts a 12-year-old on the internet, convinces the child to meet and to cross state lines for the meeting, and then engages in repeated sex with the child."

In FY2019, the Sentencing Commission reported enhancements for non-production child pornography cases which illustrates the ubiquitous nature of these enhancements and demonstrates the difficulty in differentiating the seriousness of various child pornography offenses along with the risk that many first-time, casual child pornography users risk being sentenced to statutory maximums:

- 99.4% - pictures involving prepubescent victims
- 96.5% - number of images enhancement (79.3% involving 600 or more images)
- 96.2% - use-of-computer enhancement
- 96.3% - pictures involving victims under 12 years of age
- 78.8% - sadistic or masochistic images
- 52.2% - images of infants or toddlers
- 40% - enhancement for distribution

These enhancements, in the Sentencing Commission's view, "cover conduct so ubiquitous that they now apply in the vast majority of cases sentenced under 2G2.2."

b. <u>A 2G2.2 Illustration</u>

To illustrate the exacerbating effect the First Step Act has on the disparity of already irrational sentencing, below is the examination of two statistically relevant defendants. The first is convicted of downloading and sharing child pornography and the second, a "hands-on" sex crime against a minor.

Defendant #1 is a 50-year-old man who is convicted of Distribution of Child Pornography in violation of 18 U.S.C. § 2252A(2)(a), which is ineligible to receive FSA ETCs. He receives the following enhancements:

- Photo depicting a minor less than 12 years of age (+2)
- Use of computer enhancement (+2)
- Possessed a photo involving bondage (+4)
- Emailed pictures to one person expecting to receive pictures in return (+5)
- Greater than 600 images (+5)
- Timely Acceptance & Responsibility (-3)
- Criminal history category of I
- Base level offense of 22
- Total offense level of 40 (almost a life sentence)
- Final offense level of 37 (210-262 months) [22]
- Assuming he receives the low end of the guidelines, his sentence is 210 months
- Good Time calculation: 945 days
- FSA ETC calculation: 0 days
- Sentence after Good Time and FSA ETCs: 14.9 years

Defendant #2 is also a 50-year-old man but he goes online and intentionally seeks out a 12-year-old girl, crosses state lines and has repeated sex with her in violation of 18 U.S.C. § 2422, which is eligible for FSA ETCs. He receives the following enhancements per U.S.S.G. § 2G1.3(a)(3):

- Use of a computer (+2)
- Commission of a sex act (+2)
- Unduly influencing a child (+2)
- Timely Acceptance & Responsibility (-3)
- Criminal History Category of I
- Base level offense of 28
- Total offense level of 34
- Final offense level of 31 (108-135 months)
- Assuming he receives the low end of the guidelines, his sentence is 108 months
- Good time calculation: 486 days
- FSA ETC calculation: 810 days
- Sentence after Good Time & FSA ETCs: 5.4 years

Defendant #1, who downloaded and shared child pornography will spend 276% more time in prison then will Defendant #2 who crosses state lines and has repeated sex with a 12-

[22] The Progression of 2G2.2 Sentencing Guidelines range for the same offense from 1987 to present: 1987: 12-18 months, 1991: 27-33 months, 1996: 41-51 months, 2000: 70-87 months, 2003: 121-151 months, 2004: 210-262 months

year-old. This is an all-too-common illustration of the current state of the current Sentencing Guidelines and the effect The First Step has on the widening of the sentence disparity between violent sex crimes and possession-related child pornography offenses. The ability for 2252 and 2252A offenses to receive FSA ETCs will help reduce this gap and as the continuing research will show, will provide for the reduction of recidivism rates.

3. THE REAL RISK OF RECIDIVISM

a. Sex Offender Recidivism is not "Frightening and High"

Many recent cases involving sex offenders are denied, at least in part, because the belief stemming from research conducted in 1986 (which was ultimately repudiated by the author in 2016) that sex offender recidivism is "frightening and high". The cases that follow cite the Supreme Court case that initially referenced the results of this study which stated that recidivism among sex offenders is "frightening and high" and "as high as 80% of sex offenders reoffend".[23]

United States v Hahn, 2020 U.S. Dist. LEXIS 34461 (8th Cir., 2020)

In denying Hanh's motion for compassionate release pursuant to the First Step Act, the court stated, "Because the risk of recidivism is high among sex offenders, the public safety factor warrants the defendant's motion be denied." Smith v Doe, 538 US 84, 103, 123 S. Ct. 114, 155 L. Ed. 2d 164 (2003) ("The risk of recidivism is "frightening and high.")

Enquist v Washington, 2018 U.S. Dist. LEXIS 86491 (9th Cir., 2018)

Enquist, who is a transient sex offender, brought suit against the state of Washington's registration requirements for transient offenders. In the court's decision, it argued, "Even if Enquist is correct that transient and fixed address offenders are similarly situated, the state has advanced a rational basis for treating such individuals differently. The state asserts that it

[23] McKune v. Lile, 536 U.S. 24, 34 (2002)

has a "legitimate interest in tracking the shifting location of transient offenders. The court agrees because the "risk of recidivism posed by sex offenders is frightening and high." [24]

Doe v City of Apply Valley, 487 F. Supp. 3d 761 (8th Cir., 2020)

Four registered sex offenders brought suit against the City of Apply Valley's City Code Section 130.08 that prohibits them from residing within 1,500 feet of schools, child-care centers, places of worship and parks. John Doe filed this lawsuit to challenge the constitutionality of 130.08. The court stated, "Like the statutes that were upheld in Smith, Miller, and Weeks, 130.08 is rationally related to a legitimate, non-punitive purpose in part because "the risk of recidivism posed by sex offenders is frightening and high." [25]

United States v Spivey, 2020 U.S. Dist. LEXIS 115788 (4th Cir., 2020)

In denying Spivey's Emergency Motion for Compassionate Release, the court stated, "There are also serious concerns about the 'frightening and high risk of recidivism' posed by sex offenders." [26]

Jones v City of Suffolk, 936 F.3d 108 (2nd Cir., 2019)

Jones, a registered sex offender, argued the constitutionality of repeated visits to his home by a nonprofit agency to confirm he resided in his actual registered address. The court in its opinion argued that the government, undoubtedly, has a substantial interest in reducing sex-offender recidivism because "sex offenders have an unusually high rate of recidivism. [27]

b. The History of "Frightening and High"

In 2002, Robert Lile was a prisoner in Kansas enrolled in a prison therapy program that required him to complete a form detailing all his prior sexual activities, including any that might constitute an uncharged criminal offense. Mr. Lile had earned placement in a lower-security prison; however, his refusal to complete this form would be punished by his transfer

[24] Smith v Doe, Id (quoting McKune v Lile)
[25] 538 US at 103 (quoting McKune v Lile at Id).
[26] citing McKune v Lile
[27] Smith v Doe, Id. ("The risk of recidivism posed by sex offenders is frightening and high.") (quoting McKune v Lile)

to a higher security unit where he would live among the most dangerous inmates and lose significant prison privileges. Lile sued claiming that Kansas violated his 5th Amendment rights by punishing him for refusing to complete this form. His suit made it to the Supreme Court where the Court rejected his claim in a 5-4 vote. Justice Kennedy, justifying the denial of Lile's claim, wrote that the recidivism rate "of untreated offenders has been estimated to be as high as 80%." The treatment program, he explained, "gives inmates a basis… to identify the traits that such a 'frightening and high risk of recidivism.'" The following year in Smith v. Doe, 538 U.S. 84 (2003) the Court upheld Alaska's application of a law identifying all sex offenders on a public registry. Writing for the majority, Justice Kennedy's now Smith opinion recalled his prior McKune opinion: Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." [28]

There has been a tremendous influence on future cases given the impact of the language in Smith and McKune. A Lexis search of legal materials found that phrase in 91 judicial opinions, as well as briefs in 101 cases. Given this impression on lower courts and subsequent cases, it seems important to know whether those convicted of sex offenses indeed reoffend at an 80% rate that is both "frightening and high" and much greater than the rate for other offenders.

McKune provides a single citation to support its statement "that the recidivism rate of untreated offenders has been estimated to be as high as 80%.": The U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988). This Practitioner's Guide "itself provides but one source for the claim, an article published in 1986 in Psychology Today, a mass market magazine aimed at a lay audience." That article has this sentence, "Most untreated sex offenders released from prison go on to commit more offenses – indeed, as many as 80% do." But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert of recidivism." He is a counselor, not a scholar of sex crimes or re-offense rates, and the cited

[28] McKune v. Lile, 536 U.S. 24, 34 (2002)

article is not about recidivism statistics. It's about a counselor program for sex offenders he then ran in an Oregon prison - his unsupported assertion about the lower recidivism rate for those who complete his program.

In the end, the evidence for McKune's claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons.

Scholars Ira Ellman & Tara Ellman authored the article, "Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics, Constitutional Commentary, 495 (2015). The article states that the mistaken perception that [sex offender] registrants pose uniform, high, and enduring rates of re-offense has become embedded in both statutory and judicial language. The article explains that there was never any scientific basis for either the "rogue 80%" claim, or for the notion of "frightening and high" re-offenses among registrants.

Indeed, both the author of Psychology Today article, as well as the author of the anthologized essay that cited it, have since recanted the claim on camera. [29, 30]

c. <u>The Support for Low Recidivism</u>

Recidivism refers to the number of times a prisoner reoffends after leaving prison. However, there are many dimensions of recidivism, including what type of crime that is committed during the re-offense and the type of crime the prior incarcerated individual committed. A person who was incarcerated for possession of child pornography who fails to register falls into the same "recidivism" category as a person convicted of a violent sexual abuse crime who is again convicted of a violent sex crime: they both recidivate. Recidivism, in this context, is the risk a person convicted of a child pornography offense poses to the public (a victim-related re-offense such as further child pornography crimes and/or a hands-on violent sex crime). Courts claim this rate of recidivism is "frightening and high", but empirical studies prove otherwise.

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[29] Jacob Sullum, "I'm appalled" says source of phony number used to justify harsh sex offender laws, Reason (Sept. 14, 2017)

[30] David Feige, A "Frightening" Myth about Sex Offenders, New York Times Video Op-Doc (Sept. 12, 2017)

According to a widespread study, the 2014 California Department of Corrections & Rehabilitation Outcome evaluation report, 5,522 (65.2%) of the 8,471 person convicted of [all] sex offenses released from the CDRC in the 2009-2010 fiscal year were returned to prison within three years of release. This seems like a high recidivism rate, but why were they returned to prison?

- 5,074 (91.9%) were returned on a non-sex parole violation
- 294 (5.3%) were returned for a new non-sex crime
- 109 (2%) were returned for a "Failure to Register" offense
- 45 (0.8%) were returned for a new sex offense

The results of this study show that only 45 of these 8,471 people who were incarcerated for any type of sex crime recidivated with another sex-related offense (0.5%). This is a result that proves nothing more than these "sex offenders" pose no higher risk than the general population (which will be discussed below). Some courts agree with these findings:

United States v Huseth, 2021 U.S. Dist. LEXIS 203827 (10th Cir., 2021)

"And there is no dispute that for Huseth – convicted of non-production possession of child pornography, with no evidence of sexual contact with children – the likelihood of recidivism is very low. Indeed, the Sentencing Commission's latest child pornography report includes statistics on this very question. The Sentencing Commission analyzed known recidivism rates of federal non-production child pornography offenders who had either distributed, received or possessed child pornography. The study tracked a three-year period - all such offenders who were released from prison or placed on probation in 2015. Known recidivism was defined as any of the following arrest events:

- An arrest that led to a felony or misdemeanor qualifying conviction
- An arrest that led to no evidence of acquittal or dismissal
- A reported technical violation of conditions or probation or supervised release that led to an arrest or revocation

The study analyzed "overall recidivism" and "sexual recidivism" rates (contact or no-contact sex offenses). The study found an overall recidivism rate of 27.6% among the non-production child pornography offenders tracked:

- 16% were arrested for a crime that was not a sex offense or related to their status as a sex offender
- 7.3% were arrested or had their term of supervised release revoked for failing to register as a sex offender.
- The sexual recidivism rate was 4.3%, with only 1.3% of offenders arrested for a contact sex offense.

In 2005, Michael Seto, a prominent expert in child pornography recidivism, engaged in a detailed examination of documented child pornographers. The goal was to determine what factors predict the likelihood that child pornography offenders would later commit a contact sexual offense. [31] The study followed 201 child pornography offenders for a period of years after their release from prison. "Only one of the offenders with only child pornography offenses committed a contact sexual offense in the follow-up period… Our finding does contradict the assumption that all child pornography offenders are at a very high risk to commit sexual offenses involving children." [32]

United States v Burnett, 2019 U.S. Dist. LEXIS 174966 (5th Cir., 2019)

"In fact, child pornography defendants as a whole have been found in empirical studies to pose a low risk of recidivism. Courts, as the U.S. Sentencing Commission, have acknowledged these low recidivism rates and the fact that child pornography offenders are not often found to have engaged in sexual abuse of children."

United States v Murray, 2021 U.S. Dist. LEXIS 249893 (11th Cir., 2021)

"The Bureau of Justice Statistics and the Sentencing Commission have all acknowledged these low recidivism rates and the fact that child pornography offenders are not often found to have engaged in sexual abuse of children."

[31] Michael C. Seto and Angela W. Eke, The Criminal Histories and Later Offending of Child Pornography Offenders, Sexual Abuse: Journal of Research and Treatment, Vol. 17, No. 2 (April 2005)
[32] Id. at 202, 208

United States v Garthus, 652 F.3d 715, 720 (7th Cir., 2011)

A pedophilic sex offender who has committed both a child pornography offense and a hands on sex crime is more likely to commit a future crime, including another hands-on offense, than a defendant who has committed only a child pornography offense.

NARSOL, "The Digest", Vol. XIII, Issue 1, February 2020

Article "Next Step - Equal Justice" states, "According to the United States Sentencing Commission, people convicted of sexual offenses typically have the lowest recidivism rates of all categories of crimes." [33]

United States v Apodaca, 641 F.3d 1077 (9th Cir., 2010)

Current empirical literature casts serious doubt on the existence of a substantial relationship between the consumption of child pornography and the likelihood of a contact sexual offense against a child. For example, a recent study that followed 231 child pornography offenders for 6 years after their initial offenses found only 9 persons (3.9%) committed even a non-contact sexual offense. Only 2 persons (or 0.8%) committed a contact offense.[34] Individuals who have only possessed and/or viewed child pornography present substantially lower risk of harm than do individuals who have committed contact sex offenses. [35]

Widespread studies and judicial opinions support the fact that the sexual recidivism of persons convicted of child pornography offenses are low, not high. Studies and judicial opinions both refer to the fact that the recidivism rates for "contact" or "hands-on" sexual-

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[33] https://bit.ly/385lvXJ

[34] Jértme Endrass, The Consumption of Internet Child Pornography & Violent Sex Offending, 9 BMC Psychiatry 43 (2009), concluded that "the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on offenses. See also Michael C. Seto & Angela W. Eke, The Criminal Histories and Later Offending of Child Pornography Offenders) (2005) ("Our finding does contradict the assumption that all child pornography offenders are at the very high risk to commit contact sexual offenses involving children.")

[35] See e.g., L. Webb, J. Craissati & S. Keen, Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters, 19 Sexual Abuse 449, 463 (2007) (finding internet-only offenders "significantly less likely to fail in the community than child molesters" and concluding that "by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism") available at Seto & Eke, supra, at 207 and tbl.3 (finding that only 1.3% of internet-only offenders in the sample recidivated with contact sex offenses, in contrast to 9.2% of persons with prior internet and contact sex offenses.)

related crimes are indeed higher than those convicted of child pornography offenses, however, many of these offenses qualify for the application of FSA ETCs toward the early release from prison. The removal of 2252 and 2252A from the list of excluded crimes enumerated in the First Step Act would encourage these individuals to participate in recidivism reduction programs inspired by the possibility of leaving prison early. Although overall recidivism rates remain high for these offenders, the preponderance of reasons point to non-sexual recidivism such as the violation of one of the hundreds of restrictions placed on them by state-run sex offender registries, not the sexual recidivism the public is most concerned about. These crimes are punished harshly and the current 2G2.2 Guidelines ensure those convicted of them will spend many years in prison regardless of the ability to earn FSA ETCs. However, encouraging these offenders to participate in recidivism reduction programs will accomplish the goals of both the public and the 2G2.2 Guidelines: the lowering of sexual recidivism rates while continuing to punish these crimes with exceptionally harsh sentences.

4. Conclusion

Child pornography crimes are rightfully and particularly abhorrent to the public and need to be punished. However, these offenses are irrationally penalized with longer than necessary time in prison, have the strictest supervised release conditions in addition to hundreds (if not thousands) of sex offender registration requirements – many for lifetime, not to mention the dark shadow of the "sex offender" moniker that follows the person after their prison sentence as they try to reintegrate into society.

Prison times for possession-related child pornography crimes many times exceed those of violent crimes such as "chopping up" a handicapped relative with an ax, hiring a hitman to murder an ex-girlfriend, committing or attempting to commit the actual sexual abuse of a young child, sex-trafficking of a 12-year-old or bringing a daughter across state lines to have sex with and adult man. Exacerbating this fact is the ability of these more violent crimes to earn time credits toward early release from prison – many of which have higher recidivism rates than those of child pornography offenders who have no history of violence.

In particular, I was sentenced to 200 months' imprisonment and 20 years of supervised release for a first-time possession-related child pornography offense. Statistically speaking, this is a lifetime sentence considering I will be more than 80 years old prior to the retirement of the almost 17 years sentence and 20 years of supervised release. If the ability to earn time credits was retroactively applied to December of 2018, I would be able to earn approximately 4.1 years of FSA ETCs toward early release from prison. This would potentially be the difference in being present at my daughters' college graduations, weddings and even the birth of grandchildren. It would also allow 4.1 more years of productive work. At the time of this writing, I have completed 65 months of my sentence, but still have 105 months of prison time remaining – a truly inconceivable amount of time for a first time possession related offense.[36]

The First Step Act has widened the gap between the lack of proportionality in sentence length among child pornography offenders and those "contact" offenders who have either abused a child or taken affirmative measures to sexually abuse a child. The United States Sentencing Commission and the majority of Federal Judges have recently found that possession related child pornography crimes are irrationally punished without the benefit of empirical data and are calling for less harsh sentencing guidelines.

The removal of 18 U.S.C. § 2252 and 2252A crimes from the list of offenses excluded from the ability to earn FSA Time Credits would lower recidivism rates by encouraging their participation in recidivism reduction programs, provide for safer communities and close the gap between the sentence disparity between child pornography offenses and hands-on violent crimes.

The benefits of these First Step Act reintegration programs and the ultimate reduction in recidivism rates far outweigh any perceived risk to society. The ability for these offenses to earn time credits toward the early release from prison would be one step in the direction that both the Sentencing Commissions and Federal Judges alike are pointing.

Respectfully submitted.

[36] 200 months less 15% good time equates to a total of 170 months of prison time