

S240156

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

SUPREME COURT
FILED

JAN 17 2018

Jorge Navarrete Clerk

Deputy

DON L. MATHEWS, MICHAEL L. ALVAREZ and WILLIAM OWEN
Plaintiffs and Appellants,

v.

XAVIER BECERRA and JACKIE LACEY
Defendants and Respondents.

*On Review From The Court Of Appeal For the Second Appellate District,
Division Two
2nd Civil No. B265900
After An Appeal From the Superior Court of Los Angeles County
Honorable Michael L. Stern, Judge
Case Number BC573135*

MOTION FOR JUDICIAL NOTICE

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MOTION FOR JUDICIAL NOTICE

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA SUPREME COURT.

Pursuant to Rule 8.252 of the California Rules of Court, and to Evidence Code sections 452 and 459, defendant and respondent, Jackie Lacey, through her counsel, requests this Court to take judicial notice of the following documents:

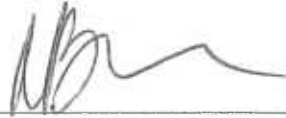
1. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress (2010) [relevant portions], attached hereto as Exhibit G.
2. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress (2016) [relevant portions], attached hereto as Exhibit H.
3. U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses (Dec. 2012) [relevant portions], attached hereto as Exhibit I.

This motion for judicial notice is based on the following points and authorities.

DATED: January 16, 2018

HURRELL CANTRALL LLP

By:



THOMAS C. HURRELL

MELINDA CANTRALL

MARIA MARKOVA

Attorneys for Defendant-Respondent JACKIE
LACEY

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE COURT MAY TAKE JUDICIAL NOTICE OF REPORTS TO CONGRESS.

California Rules of Court, Rule 8.252 provides the means for judicial notice on appeal. The rule provides in subdivision (a)(2) that the motion must state:

(A) Why the matter to be noticed is relevant to the appeal; (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and (D) Whether the matter to be noticed relates to the proceedings occurring after the order or judgment that is the subject of the appeal.

(Cal. Rules of Court, Rule 8.252(a)(2).)

In conjunction with its concurrently filed Consolidated Answer to *Amici Curiae* Briefs, Respondent asks this Court to take judicial notice of (1) U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (2010) [relevant portions] ("2010 DOJ Report"); (2) U.S. Dep't of Justice, *The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress* (2016) [relevant portions] ("2016 DOJ Report"); and (3) U.S. Sentencing Comm'n, *Report to the Congress: Federal Child Pornography*

Offenses (Dec. 2012) [relevant portions] (“Sentencing Comm’n Report”).

A. The Documents are Relevant to the Determination of the
Petition and Amici’s Arguments In Support Thereof.

The congressional reports are relevant to this Court's review as Petitioners' and Amici’s claim that the right to privacy of psychotherapy patients extends to the viewing of online child pornography, and that CANRA should only require therapists to report individuals which commercially participate in the exploitation of children or engage in physical or violent sexual abuse of children. This argument is squarely in conflict with the findings of congressional reports. According to the reports, the individual possessors of child pornography who methodically gathers images has the effect of validating the production of images, which leads only to more production. (See, 2016 DOJ Report, at Exhibit H.) Moreover, although some of the images are marketed by criminal organizations, a significant amount of the images are homemade and record the image producer’s ongoing sexual assault of a family member or neighbor. (See, 2010 DOJ Report, at Exhibit G.) Many of the images are also traded by non-commercial networks of individuals who share a sexual interest in child abuse. (*Id.*) Network members are not simply passive viewers. Rather, they are participants in the abuse driving the demand for fresh material. (*Id.*) Most offenders prosecuted for distribution of child

pornography trade with one another in a non-commercial manner in “child pornography communities,” where offenders engage in “personal” distribution to other individuals in the form of bartering images in Internet chat-rooms, and trading via specialized programs. (See, Sentencing Comm’n Report, at Exhibit I.)

Thus, these Reports to Congress are relevant to this Court's review. Defendant respectfully requests that judicial notice be taken of said Reports to Congress.

B. The Matters For Which Defendant Seeks Judicial Notice Were Not Presented to the Courts Below.

The matters set forth in the aforementioned documents were not presented to the courts below, and relate to proceedings occurring prior to the July 29, 2015 judgment, which is the ultimate subject of the instant review. The matters are subject to judicial notice under Evidence Code section 452 as detailed below.

C. Official Acts of Legislative and Executive Departments.

Defendant Lacey requests this Court to take judicial notice of the following documents: (1) U.S. Dep’t of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress (2010) [relevant portions]; (2) U.S. Dep’t of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress

(2016) [relevant portions]; and (3) U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses (Dec. 2012) [relevant portions].

These Reports to Congress were prepared by the U.S. Department of Justice and the United States Sentencing Commission, therefore, are judicially noticeable as an official act of the executive branch of the United States under Evidence Code section 452(c). (Evid. Code, §§ 452, subd. (c); *Scheidig v. General Motors Corp.* (2000) 22 Cal.4th 471, 476, fn. 2 [93 Cal.Rptr.2d 342] (taking judicial notice of report to Congress).) Moreover, Evidence Code section 452(h) permits judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452(h).) Here, not only are the Reports to Congress documents from a judicial department of the United States, their contents are not reasonably subject to dispute and sets forth facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. (See *id.*)

DATED: January 16, 2018

HURRELL CANTRALL LLP

By:



THOMAS C. HURRELL

MELINDA CANTRALL

MARIA MARKOVA

Attorneys for Defendant-Respondent JACKIE

LACEY

[PROPOSED] ORDER GRANTING JUDICIAL NOTICE

IT IS HEREBY ORDERED that the Motion for Judicial Notice of respondent JACKIE LACEY is granted. The Court shall judicially notice the following documents, which are attached to the Motion for Judicial Notice:

1. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress (2010) [relevant portions], attached hereto as Exhibit G.
2. U.S. Dep't of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress (2016) [relevant portions], attached hereto as Exhibit H.
3. U.S. Sentencing Comm'n, Report to the Congress: Federal Child Pornography Offenses (Dec. 2012) [relevant portions], attached hereto as Exhibit I.

DATED: _____, 2018

Chief Justice



U.S. Department of Justice

**The National Strategy for
Child Exploitation Prevention
and Interdiction**

A REPORT TO CONGRESS

AUGUST 2010

State and federal investigators and prosecutors universally report seeing dramatic increases in the number of child pornography images traded on the Internet, the number of child pornography offenders, and the number of children victimized by child pornography. They also report an increase in the sadistic and violent conduct depicted in child pornography images and that they are encountering more young victims than before—particularly infants and toddlers. In addition, law enforcement officers and prosecutors interviewed for this Assessment universally report connections between child pornography offenses and sexual contact offenses against children.

The Internet and advances in digital technology have provided fertile ground for offenders to obtain child pornography, share child pornography, produce child pornography, advertise child pornography, and sell child pornography. The Internet also has allowed offenders to form online communities with global membership not only to facilitate the trading and collection of these images, but also to facilitate contact (with each other and children) and to create support networks among offenders. Rather than simply downloading or uploading images of child pornography to and from the Internet, offenders also use current technologies to talk about their sexual interest in children, to trade comments about the abuse depicted in particular images—even as images are shared real-time—to validate each other’s behavior, to share experiences, and share images of themselves abusing children as they do so.

This Section provides an overview of the Threat Assessment findings as they relate to child pornography which include the following: (1) research that indicates child pornography poses a danger to both the victims and other children; (2) indicators that suggest a significant increase in the proliferation of child pornography; (3) evidence that child pornographers are becoming more sophisticated in the production and distribution of materials; and (4) information that organized crime syndicates are involved in the child pornography trade. In addition, this Section outlines some of the steps that law enforcement agencies are taking to identify the most dangerous child pornographers.

1. Child pornography offenses present a real threat to children.

The children whose abuse is captured in child pornography images suffer not just from the sexual abuse graphically memorialized in the images, but also from a separate victimization, knowing that the images of that abuse are accessible, usually on the Internet, and are traded by other offenders who receive sexual gratification from the children’s distress. According to academic researchers, medical professionals, and child pornography victims themselves, knowing that all copies of child pornography images can never be retrieved compounds the victimization. The shame suffered by the children is intensified by the fact that the sexual abuse was captured in images easily available for others to see and revictimizes the children by using those images for sexual gratification. Unlike children who suffer from abuse without the production of images of that abuse, these children struggle to find closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images. This harm is best described by the mother of a victim.

interests in children and their desires and experiences abusing children, that behavior also becomes normalized, increasing the risk that it drives some to act on those desires. Academic research also supports the conclusion that repeated viewing of the images, exposure to the community of other offenders, and the resulting normalization of the aberrant behavior, along with the community's encouragement of sexual abuse of children, increases the risk that offenders will sexually abuse children.³³

d. The children most vulnerable and at risk are those the offenders can easily access and manipulate.

No matter what the motivation to produce child pornographic images—self-gratification, status in and entrée to exclusive online groups, or profit—most often, the offenders turn to children who are most easily available to them. It is no surprise then, that most sexual abuse of children can be attributed to those who have a relationship of trust and authority relative to the child in addition to ready access to the child. National Center for Missing & Exploited Children (NCMEC) data indicates that the vast majority of identified child pornography victims (69% of their data set) were abused/exploited by people familiar to the children. In the NCMEC data set these people included parents, other relatives, neighbors, family, friends, babysitters, coaches, and guardians' partners; only a small fraction of victims (4% of the NCMEC data set) were victimized by individuals with whom the child had no relationship.³⁴ The abuse typically happens in the privacy of a home—away from prying eyes—and the victim is easily manipulated and shamed or scared into submission and silence.

While some of these images clearly depict children in great distress, others depict the children as appearing compliant. The abuse is rarely a one-time event, but rather an ongoing victimization that can last and progress for many years. The offender usually takes great care to groom the child so the sexual behavior becomes normalized. Additionally, because the abuser is typically a person the child trusts, it is easier to convince the child to agree to sexual acts. Thus, a 12-year-old child in a sexually abusive image may appear compliant, but that same child, when first abused at age 6, could have presented a completely different image to the viewer. It is important to note that depictions showing a so-called “compliant child” also provide collectors of child pornography support for their delusion that the child is not suffering abuse, a conclusion that lets them rationalize their collection of images and brings them potentially closer to contact abuse themselves.

Grooming usually involves normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child's barriers. This gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child's immaturity and subservience, serves to break down the child's resistance. These children have a difficult time understanding what is happening to them and why and have very little control over their circumstances.

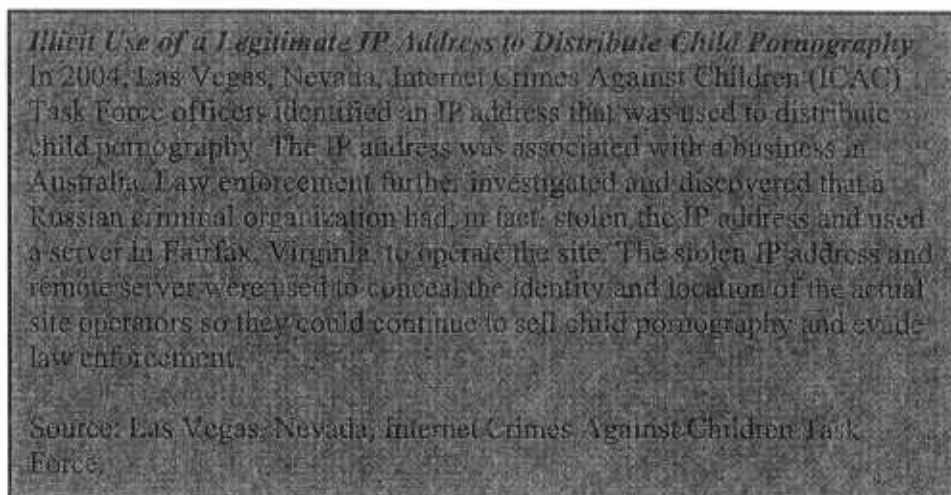
³³ Although some offenders interviewed for research studies have made the claim that viewing child pornography prevents them from engaging in contact offending, *see* Appendix C, *Quayle*, no empirical studies have been identified supporting those claims.

³⁴ *See* Appendix D, NCMEC Child Victim Identification Program.

2. Child pornographers are increasing their efforts to avoid being identified.

Technology has increased the production and distribution of child pornography and is being utilized extensively by pornographers to help avoid being caught. For example, offenders often connect to the Internet using free Wi-Fi, a wireless system at public access points or connect to unsecured wireless routers installed in private residences rather than accessing Internet sites from their personal Internet accounts. Offenders also use anonymizers, software applications that enable them to access the Internet while hiding the source computer's identifying information. In many instances, offenders hide their actual Internet Protocol (IP) addresses³⁸ by using proxy servers.³⁹ Even when offenders do not employ these measures, often identifying information through IP addresses is not retained for long periods by Internet Service Providers, which

unintentionally provides anonymity to offenders.⁴⁰ Offenders also diminish the ability of law enforcement officials to investigate child pornography by storing images in encrypted files and by erasing images



using evidence eliminating software. Offenders also increasingly access streaming web cam video to view victims in real time without actually producing or storing images or videos that

³⁸ An IP address is a numeric address that is assigned to devices participating in a computer network utilizing the Internet. Most DSL and cable Internet subscribers have "sticky dynamic" IP addresses which are changeable but do not change often. When an ISP provides dynamic IP address service, the user's identification is reassigned at login to a new node (computer) in the IP network and is always different. The ISP assigns the user an IP address which is traceable only to the ISP and does not reveal information on the user except through the ISP.

³⁹ A proxy server is a computer system or an application program that acts as a go-between for requests from clients seeking resources from other servers.

⁴⁰ In the United States, there is no federal statute or regulation requiring providers to keep user IP information for any length of time, or at all. Some U.S. providers only keep the information for a few days. In a 2009 survey of 100 U.S. Internet crimes investigators, 61 percent of the investigators reported that they had had investigations detrimentally affected because data was not retained; and 47 percent reported that they had had to end an investigation because data was not retained. (Source: Internet Crime Investigators Survey: Internet Service Provider Interactions, Dr. Frank Kardasz, Sgt./Project Mgr. Phoenix PD / AZ ICAC Task Force.) In Europe, a current EU directive requires member countries to draft laws requiring their providers to keep user IP records for at least 6 months and up to 2 years." In March 2010, the German Constitutional Court struck down such a law. See <http://www.thelocal.de/national/20100302-25603.html>

Further, producers of child pornography are increasingly taking precautions to hide their identities and the identities of their victims in images and videos. Before production, many offenders hide or cover their faces and the faces of the victims. They also remove items within a setting that would allow law enforcement to identify the location. After production, offenders edit, or “scrub,” images and videos for the same reasons. Unlike images of child pornography produced years earlier in which the offender and victim are prominently visible, in many recent images and videos, the offenders’ goal is to make the setting “sterile”; the total focus is centered on the rape of the child victim, a focus which has mass appeal to the prurient interests of many other offenders.

3. Organized criminal groups are involved in the production and distribution of child pornography.

Organized criminal groups are becoming more prevalent in child exploitation investigations. Such groups include commercial enterprises that produce and distribute child pornography material for profit as well as non-commercial enterprises that produce and distribute child pornography images not for material gain, but to fuel the group members’ common sexual interest in minors.

a. Many organized commercial enterprises that advertise and distribute child pornography do so for profit.

Such enterprises are responsible for extremely large-scale distribution of child exploitation material, and, as a result, have netted significant profits. From a profit perspective, commercial distribution of child exploitation material over the Internet can be safer, less expensive, and more lucrative than many other criminal enterprises. For example, as compared with traditional drug trafficking enterprises, selling child pornography over the Internet: (1) provides greater anonymity, (2) eliminates risks associated with having to physically transport contraband to buyers, and (3) involves an intangible product, an image, which can be sold millions of times over without having to replenish supply.

Groups engaged in the online business of advertising and distributing child pornography typically operate largely outside of the United States, but have an international customer base. These groups present significant investigative challenges for U.S. law enforcement. The primary challenges U.S. law enforcement face in investigating the commercial distribution of child pornography over the Internet are: (1) identifying who is involved in the commercial enterprise and (2) obtaining information and assistance from other countries, which is critical to investigating such cases. These groups are able to capitalize on the lack of regulation of Internet activity in many countries, as well as the fact that many countries lack strong legislation banning the sale of child pornography. Because these groups operate over the Internet, they are able to reach a huge market while employing various technological means to hide their tracks, such as the use of proxy servers and payment sites that do not maintain transactional records.

The Internet Watch Foundation (IWF) reports, during a one year period, identifying 1,536 domains that carry child pornographic content. According to the IWF, 74 percent of those

domains are commercial purveyors of child pornography.⁴³ However, many of these domains are short lived, often less than 100 days, with limited activity. Immigration and Customs Enforcement (ICE) estimates the number of commercial web sites closer to 250 that actively maintain and display child pornography at a given moment.⁴⁴

As illustrated by case examples,⁴⁵ organized commercial enterprises engaged in the advertisement and distribution of child pornography images pose significant threats to society as well as challenges to law enforcement. These groups have the ability to operate virtually and anonymously from anywhere in the world, thus facilitating the ongoing dissemination of child exploitation material. By using the Internet as their means of distribution, these groups are able to engage in mass distribution of child pornography images to a customer base that far exceeds law enforcement resources. In addition, because of the transnational nature of many of these groups, even multiple arrests of individuals who play roles in running the enterprises in one country do not necessarily end the enterprises' operations. For all of these reasons, organized commercial enterprises present a significant threat to the safety of children in that, with virtual anonymity, they facilitate the continued dissemination of child exploitation images and fuel the demand of those who seek such material.

Commercial child pornography is not limited to the Internet model discussed. Frequently, USPIS uncovers U.S.-based offenders using simple mail order catalogs either mailed or e-mailed to customers, to advertise child pornography and then fulfill orders by mail shipments. These offenders, reluctant to use computers, often have been involved in collecting child pornography for years—many before the advent of the Internet—and often are contact offenders.⁴⁶

b. Some organized criminal groups seek child exploitation material for reasons other than profit.

Unlike an organized commercial enterprise, whose sole motivation is to profit from the continued dissemination of child pornography images rather than any particular interest in the content, organized groups of individuals who seek and trade such material for no material gain are, arguably, more dangerous because they are solely motivated by a sexual interest in minors. This sexual interest fuels such groups' desire not only to build their own collection of images, but also to obtain new images of recent abuse and, in some instances, to share their own acts of molestation with other group members either through discussion or, worse, through transmission of live video showing the abuse. Typically, these groups set specific criteria for who may join. One criteria often used is a demonstration that a prospective member has a genuine interest in engaging in sexual conduct with minors, such as requiring a prospective member to transmit child pornography to the group to gain membership. In addition, such groups often employ

⁴³ See Appendix D, Governmental and NGO Reports and Data.

⁴⁴ A URL is the address of a resource (as a document or Web site) on the Internet that consists of a communications protocol followed by the name or address of a computer on the network and that often includes additional locating information (as directory and file names)—called also uniform resource locator, universal resource locator. A Web site is a group of World Wide Web pages usually containing hyperlinks to each other and made available online by an individual, company, educational institution, government, or organization. See Appendix D, Governmental and NGO Reports and Data.

⁴⁵ See Appendix A, Operation Falcon, Operation Avalanche, and Operation Joint Hammer.

⁴⁶ See Appendix A, Operation Insider.

The National Strategy for Child Exploitation Prevention and Interdiction



A REPORT TO CONGRESS - APRIL 2016



U.S. Department of Justice

**The National Strategy
for Child Exploitation
Prevention and Interdiction**

A REPORT TO CONGRESS

APRIL 2016

Because the term “child pornography” is used in federal statutes, it is also commonly used by lawmakers, prosecutors, investigators, and the public to describe this form of sexual exploitation of children, and it is the term used throughout this National Strategy. However, this term fails to describe the true horror that is faced by countless children every year. The production of child pornography creates a permanent record of a child’s sexual abuse. When these images are placed on the Internet and disseminated online, the victimization of the children continues in perpetuity. Experts and victims agree that victims depicted in child pornography often suffer a lifetime of re-victimization by knowing the images of their sexual abuse are on the Internet forever. The children exploited in these images must live with the permanency, longevity, and circulation of such a record of their sexual victimization. This often creates lasting psychological damage to the child, including disruptions in sexual development, self-image, and developing trusting relationships with others in the future.

Offenders who engage in the production, distribution, advertising, and possession of child pornography may represent any age, race, sex, occupation, socio-economic status, geographical area, or education level. These offenders may know their victims well, or not at all, and some specifically seek positions to gain direct access to potential child victims, such as a teacher, day care provider, member of the clergy, medical professional, or coach. The lack of a single offender profile inhibits law enforcement’s ability to mitigate the threat posed to child victims of these crimes. Offenders engaged in child pornography activities demonstrate a high capability to groom and control their victims through the appearance of love, by preying on a child’s need for acceptance, validation, and understanding, or through fear, manipulation, promises, lying, extortion, physical violence, or threats to avoid disclosure or discovery of their child sexual exploitation activities. Child pornography offenders routinely employ operational security measures to ensure their computer files and online activities remain hidden. Child pornography offenders tend to have a sophisticated understanding of a vast array of computer technologies that can facilitate, and hide, their criminal activity. The primary motivation for committing child pornography offenses is to achieve sexual gratification with children, or by viewing the photographic depictions of such activities.

Unfortunately no area of the United States, or country in the world, is immune from individuals who seek to sexually exploit children through child pornography. Wherever there are children, there can be adults who seek to produce child pornography and distribute it via the Internet. This production and distribution increases the demand for new and more egregious images, perpetuating the continued molestation of child victims, as well as the abuse of new children.

Children as young as days old to 17 years, both male and female, across all ethnic and socio-economic backgrounds, are potential targets of individuals who engage in child pornography activities. Based on information representing more than 10,000 identified children depicted in child pornography submitted to NCMC by law enforcement, 40% of all child pornography victims are between infancy and “tween” years. Child advocate personnel across the United States report that the ages of victims depicted in child pornography have significantly decreased in the past few years.

Investigations conducted by DOJ and its global partners show that child exploitation offenders often gather in communities over the Internet fostering the worldwide demand for new child pornography and providing their members with encouragement, validation, training, and status within these online

organizations. In fact, the trading of child pornography files within these online communities is just one component of a larger relationship that is premised on a shared sexual interest in children. This has the effect of eroding the shame that typically would accompany this behavior and desensitizing those involved to the physical and psychological damage caused to the children involved. This self-reinforcing cycle is fueling ever greater demand in the market for these explicit files. In the world of child pornography, this demand drives supply. The individual possessor of child pornography who methodically gathers one image after another has the effect of validating the production of the image, which leads only to more production.

Although group members typically only meet online, countless investigations and intelligence reports confirm that some online group members also physically meet in person throughout the United States and abroad to share actual victims and their child pornography collections. Due to the transnational nature of many of these groups, even multiple arrests of enterprise members in one country do not necessarily dismantle the entire enterprise.

The methods many offenders use to evade law enforcement detection have become increasingly sophisticated. Purveyors of child pornography continue to use various encryption techniques and anonymous networks attempting to hide their amassed collections of illicit child abuse images. Several sophisticated online criminal organizations have written security manuals to ensure their members followed preferred security protocols and encryption techniques in an attempt to evade law enforcement.

Not only is the production and distribution of these images perpetuating the demand for new material, the 2016 National Strategy survey shows that offenders also have increased their demand for more depraved and egregious content. This content has appeared most voluminously on the Tor anonymous network. In fact, DOJ has observed a significant volume of offenders using the Tor network to advertise and distribute child pornography and seeking to communicate undetected by law enforcement. The anonymity of Tor attracts users willing to post egregious content, adding to the millions of child pornography images and videos already available and distributed online.

Any social networking website, file-sharing website, photo-sharing site, gaming device, and mobile app can potentially facilitate child pornography activities. Due to the global nature of the child pornography threat and the countless online platforms and venues that can be used to facilitate child pornography, it is extremely difficult to gauge the full scope of the child pornography threat. However, several indicators demonstrate child pornography continues to be a significant and growing global threat.

V. GOALS AND OBJECTIVES FOR CONTINUING THE FIGHT AGAINST CHILD EXPLOITATION

As the preceding pages have demonstrated, the Department and its partners in the National Strategy Working Group have vigorously fought all aspects of child exploitation. As the threats to our children change, enforcement efforts, victim services, and outreach activities must change as well. This section of the National Strategy describes future goals and objectives in the fight against child exploitation over the next several years in four areas: investigations and prosecutions; outreach and awareness; victim services; and policy and legislative initiatives. The Department is committed to continuing to convene the Working Group members to ensure these goals are met.

A. Investigations and Prosecutions

As discussed throughout the National Strategy, the global networking of child exploitation offenders and their increased technological sophistication present new challenges to the investigation and prosecution of child exploitation cases. In addition, the vast number of offenders requires a focus on “high-value” targets where law enforcement can have the greatest impact. Cooperation across borders has become one of the most effective ways to carry on this work. And across all of these matters, law enforcement takes a victim-centered approach in pursuing justice.

The following pages describe goals for overcoming the challenges posed in fighting child exploitation offenders.

Target emerging technologies.

Recent technological advances have emboldened child sexual exploitation offenders, particularly those operating primarily online, to an unprecedented degree. For every innocuous need technology fills for law-abiding citizens, online sex offenders will find a malicious use. Among the most daunting, and the most prevalent, of those challenges is offender utilization of anonymization networks, including Tor and Freenet, to obscure their identities. These networks enable offenders to route all of their incoming and outgoing Internet traffic through a number of different locations anywhere in the world, so that law enforcement cannot use traditional means to ascertain the location of those offenders. Because of the veil of perceived anonymity provided by these networks, the most prolific and sophisticated offenders feel empowered to share through them enormous quantities of the most vile child exploitation images on a multitude of Internet bulletin boards.

Savvy offenders have also increasingly utilized encryption to protect not just their identities, but the actual child exploitation materials they create, share, and collect, from observation by law enforcement. Encryption is increasingly a standard feature of data storage devices, often resulting in the total inability of law enforcement to access customer data, even through lawful process or court orders. Yet another challenge is posed by innovations in mobile technology, especially those that enable the easy and anonymous production and sharing of videos, allowing offenders to entice naive and trusting minors to more readily share explicit images they make of themselves via the Internet.

FEDERAL CHILD PORNOGRAPHY OFFENSES



Patti B. Saris
Chair

William B. Carr, Jr.
Vice Chair

Ketanji B. Jackson
Vice Chair

Ricardo H. Hinojosa
Commissioner

Beryl A. Howell
Commissioner

Dabney L. Friedrich
Commissioner

Jonathan J. Wroblewski
Commissioner, Ex-officio

Isaac Fulwood, Jr.
Commissioner, Ex-officio

Figure 4-7¹³⁹

DOJ Presentation: Screenshot of Rules of Child Pornography Community

RULES

1. This forum is for nudes and non nude pictures, galleries, and videos of children, between the ages of 0-17, both female and males. That means, I don't want to see no older than 17 on this board, if I do, I will delete that post. So, no grannies!!!

3. For your safety and the safety of this board, please turn off your Java and Java scripts from your browsers. This will stop the forum from tracking your IP address, or from any officer from finding this site if your computer every winds up in there hands.

4. Please use a tor and proxy service, for your protection as well. Information is in the security section on a tor and proxy service provider.

5. Now, this is going to be the hardest for the members to follow, but for the safety of you, the board, and the members, use a NON Java/Java script uploader to upload your images. Information on some good NON Java/Java script uploaders are in the technical section of this forum.

In addition to technological sophistication, child pornography communities value the production of new child pornography images. There is evidence that at least some child pornography offenders produce new child pornography in order to gain access to other child pornography images. One child pornography offender stated that individuals in his child pornography trading community “were reluctant to give me access to any of that material unless I could come up with any new material . . . it was then that I thought about . . . involving my daughter.”¹⁴⁰ One examination of three child pornography communities found a clearly defined hierarchy with producers, posters of new materials, and prolific re-posters at the top of the pyramid.¹⁴¹

¹³⁹ Fottrell Presentation, *supra* note 53.

¹⁴⁰ TAYLOR & QUAYLE, *supra* note 41, at 161; *see also* Testimony of Francey Hakes, National Coordinator Child Exploitation Prevention & Interdiction, to the Commission, at 382–84 (Feb.15, 2012) (on behalf of the U.S. Department of Justice) (recounting the case of an offender who was moved to produce increasingly violent child pornography images of a child in his control in order to have new images to trade).

¹⁴¹ Fortin, *supra* note 118, at 6. The study also found that a small number of users were responsible for most posting of images and most community members were “leechers” and failed to post images, provide technological information, or even actively participate in community discussions. *Id.*

researchers have found that some offenders progress from viewing child pornography to committing other sex offenses.¹⁴⁹ Other researchers, however, caution that inappropriate attitudes and beliefs have not been investigated sufficiently among child molesters to draw firm conclusions about the pathway from online child pornography offending to other sex offending.¹⁵⁰

4. *Child Pornography Communities and the Child Pornography “Market”*

In recent decades, criminal punishments for the production, distribution, receipt, and possession of child pornography in part have been based on the belief that such punishments will help “destroy” (or at least significantly reduce) the “market” for child pornography.¹⁵¹ Critics have contended that recent changes in Internet technology have undercut the ability of the criminal laws to affect the “market.”¹⁵²

To date, social science research has not addressed whether, or to what extent, criminal punishments have affected the commercial or non-commercial “markets” in child pornography since the advent of the Internet and P2P file-sharing. In view of the exponential growth in child pornography in recent years and the worldwide scope of offending, such research may be impossible to undertake.

The Commission’s analysis of fiscal year 2010 federal child pornography cases, which is discussed in Chapter 6, reveals that the typical §2G2.2 offender received and/or distributed child pornography using a P2P file-sharing program and not for financial gain.¹⁵³ Most offenders used open P2P file-sharing programs that did not require the offenders to trade images in order to receive new images or videos from another.¹⁵⁴ Approximately one quarter of federal offenders

¹⁴⁹ Kimberly Young, *Profiling Online Sex Offenders, Cyber-Predators & Pedophiles*, 5 J. BEHAV. PROFILING 1, 12–13 (2005); TAYLOR & QUAYLE, *supra* note 41, at 186–87; Burke et al., *supra* note 148, at 79, 81 (noting that it is uncertain that child pornography offenders “will progress towards hands-on offences” but “the longer sexual fantasies are maintained and elaborated on, the greater the chance that the behaviour will be acted out in real life”).

¹⁵⁰ See e.g., Calder, *supra* note 17, at 2; Ward & Siebert, *supra* note 17, at 328.

¹⁵¹ *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (noting the state’s interest in seeking “to destroy a market for the exploitative use of children”); *id.* at 110–11 (“[M]uch of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, [the] [s]tates have found it necessary to proscribe the possession of this material.”); see also NATIONAL STRATEGY, *supra* note 26, at 17–18 (“This growing and thriving market for child pornographic images is responsible for fresh child sexual abuse because the high demand for child pornography drives some individuals to sexually abuse children and some to commit the abuse for profit or status [on an on-line community].”).

¹⁵² See, e.g., Prepared Statement of Deirdre D. von Dornum, Assistant Federal Defender, Federal Defenders of New York, to the Commission, at 47–48 (Feb. 15, 2012) (on behalf of the Federal and Community Defenders) (“Child pornography thrives in cyberspace independent of an organized marketplace. . . . Because child pornography is free, widely available and easy to produce, it is not subject to the normal laws of supply and demand. . . . For this reason, it is unlikely that harsh punishment of an end user will do anything to destroy the market for child pornography.”).

¹⁵³ See Chapter 6 at 153–54.

¹⁵⁴ See *id.*; see also *supra* note 124 and accompanying text (discussing “impersonal” P2P programs such as LimeWire).

received child pornography from commercial websites, thereby fostering the commercial market; however, no federal offenders prosecuted for distributing child pornography in fiscal year 2010 did so by operating a commercial website.¹⁵⁵

The clearest example of a child pornography market appears to exist online where individuals trade with one another in a non-commercial manner in child pornography communities. In fiscal year 2010, the non-commercial child pornography market appeared most active in the approximately 25 percent of cases in which offenders engaged in “personal” distribution to another individual. These offenders engaged in behaviors including bartering images in Internet chat-rooms, trading via closed P2P programs such as Gigatribe, and participating in hierarchical child pornography communities.¹⁵⁶

E. RELATIONSHIP BETWEEN CHILD PORNOGRAPHY OFFENDING AND OTHER SEX OFFENDING

This section describes social science research that has attempted to distinguish child pornography offenders who also have engaged in other sex offending from those child pornography offenders who have not.¹⁵⁷ While “little is known about which [child pornography]

¹⁵⁵ See Chapter 6 at 149.

¹⁵⁶ See *id.* The minority of offenders who use commercial websites may be shrinking. See *id.* (finding that 38.5% of offenders used commercial websites in fiscal year 2010 compared to 17.5% in the first quarter of fiscal year 2012).

¹⁵⁷ See, e.g., Richard Wollert et al., *Federal Internet Child Pornography Offenders – Limited Offense Histories and Low Recidivism Rates*, in *THE SEX OFFENDER: CURRENT TRENDS IN POLICY & TREATMENT PRACTICE* Vol. VII (Barbara K. Schwartz, ed. 2012) (based on a study of 72 federal child pornography offenders in the United States who were treated by the authors during the past decade, the authors found that 20, or 28%, had prior convictions for a contact or non-contact sexual offense); Wolak et al., *Child Pornography Possessors: Trends*, *supra* note 67, at 34 (finding, based on 2006 data from surveys of approximately 5,000 law enforcement officials throughout the United States, that 21% of cases that began with investigations of child pornography possession “detected offenders who had either committed concurrent sexual abuse [offenses] or been arrested in the past for such crimes”); Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sex Offending by Men With Online Sexual Offenses*, 23 *SEXUAL ABUSE* 124, 124, 135–136 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight “online offenders” — the majority of whom were child pornography offenders — had an “officially known contact sex offense history,” but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on clinical “self-report” data); Michael L. Bourke & Andres E. Hernandez, *The “Butner Study” Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 *J. FAM. VIOLENCE* 183 (2009) (study of 155 federal child pornography offenders in the United States who participated in the residential sex offender treatment program at FCI Butner from 2002–05; finding that 85% had committed prior “hands on” sex offenses); Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 *BMC PSYCHIATRY* 43 (2009) (study of 231 Swiss child pornography offenders; finding that only 1.0% had prior convictions for “hands-on” sex offenses and an additional 3.5% had prior convictions for possession of child pornography); Caroline Sullivan, *Internet Traders of Child Pornography: Profiling Research – Update* (New Zealand Dep’t of Internal Affairs 2009) (finding that approximately 10% of 318 New Zealand child pornography offenders prosecuted from 1993–2007 “have been found to have criminal histories involving a sexual offence against a male or female under the age of 16 years”), [http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/\\$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf) .

possessors are most likely to be abusers,”¹⁵⁸ the association between sex offending and child pornography offenses is important.

The Commission undertook a special coding project to determine what percentage of child pornography offenders sentenced under the non-production guidelines also previously committed other sex offenses.¹⁵⁹ The Commission looked for incidents of criminal sexually dangerous behavior (“CSDB”) in such offenders’ presentence reports. As defined by the Commission, for purposes of this report, CSDB comprises three different types of criminal sexual conduct:

- **“Contact” Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender’s commission of a non-production child pornography offense;
- **“Non-Contact” Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct not involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender’s commission of a non-production child pornography offense; and
- **Prior Non-Production Child Pornography Offenses:** a non-production child pornography offender’s prior commission of a non-production child pornography offense if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender.

The results of the Commission’s CSDB research are discussed in Chapter 7.¹⁶⁰

1. *Distinguishing Child Pornography Offenders Who Have Committed Other Sex Offenses*

Other researchers have focused on distinguishing child pornography offenders who also have committed other sex offenses from those child pornography offenders who have not done so. The limited research suggests there may be differences between child pornography offenders who engaged in other sex offenses and those who have solely engaged in child pornography collecting and trading activities. Studies identify “two major dimensions of risk — sexual

¹⁵⁸ Wolak et al., *Child Pornography Possessors: Trends*, *supra* note 67, at 24.

¹⁵⁹ See Chapter 7 at 169-82.

¹⁶⁰ See *id.* at 182-206.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 300 South Grand Avenue, Suite 1300, Los Angeles, California 90071.

On January 16, 2018, I served true copies of the following document(s) described as **MOTION FOR JUDICIAL NOTICE** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Hurrell Cantrall's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 16, 2018, at Los Angeles, California.



Diane Neff

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