Congress of the United States
Washington, DC 20515

February 14, 2012

The Honorable Patti B. Saris
Chairwoman
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Judge Saris:

We are aware that the Commission will be conducting a Public Hearing on Federal Child Pornography Crimes on Wednesday, February 15, 2012, in Washington, D.C. We write to express our support for consistent and appropriate punishment in the United States for offenses related to child pornography. Based on the Commission's own sentencing statistics and a survey of the Federal judiciary, we are deeply concerned that the Federal judiciary fails to appreciate the severity of child pornography to the victims and to society at large.

Internet child pornography is one of the fastest growing crimes in America, increasing at an average of 150% *per year*. These disturbing images litter the Internet and pedophiles can purchase, view, or exchange this material with virtual anonymity. Technology has made it increasingly difficult for law enforcement to keep up with the explosion in child pornography-related crimes. It is, therefore, of the utmost importance that federal child pornography sentences, including possession sentences, are sufficiently serious to deter this horrific crime.

The rash of significant downward departures in this area, particularly with regard to possession crimes, belies a fundamental misunderstanding of child pornography and its victims. National Center for Missing and Exploited Children (NCMEC) President and CEO, Ernie Allen, explained at a hearing before the House Judiciary Committee's Crime, Terrorism and Homeland Security Subcommittee on July 12, 2011, that "these images are crime scene photos. According to law enforcement data, 19% of identified offenders in a survey had images of children younger than 3 years old; 39% had images of children younger than 6 years old; and 83% had images of children younger than 12 years old. Reports to the [NCMEC] CyberTipline include images of sexual assault of toddlers and even infants."[1]

As the Department of Justice has reported, "the child victims are first sexually assaulted in order to produce the vile, and often violent, images. They are then victimized again when these images of their sexual assault are traded over the Internet in massive numbers by like-minded people across the globe."[2] One widely-viewed victim of child pornography has stated in

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[1] *Testimony of Mr. Ernie Allen, President and CEO of the National Center for Missing and Exploited Children*, Hearing on H.R. 1981 before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, 112th Congress, July 12, 2011, at 3.

[2] *The National Strategy for Child Exploitation Prevention and Interdiction, A Report to Congress,* U.S. DEPT. OF JUSTICE, Aug. 2010, *available at* http://www.projectsafechildhood.gov/docs/natstrategyreport.pdf (hereinafter

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her victim impact statement, "I wonder if the people I know have seen these images[.] I wonder if the men I pass in the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers, and traded around, I feel out of control. They are trading my trauma around like treats at a party, but it is far from innocent. It feels like I am being raped by each and every one of them."[3] Treating the possession of child pornography as a victimless crime, as many judges seem to do, is simply unconscionable.

It is also important not to lose sight of the strong connection between possession of child pornography and the actual victimization of young children. Several studies have shown a clear correlation between the possession of child pornography and hands-on victimization. A 2009 study by Michael Bourke and Andres Hernandez found that as many as 85% of inmates convicted of child pornography possession also admitted to molesting a child.[4] And, recent cases indicate that the link between possession and victimization may be a growing trend.

For example, a recent federal investigation, Operation Delgado, demonstrates the growing connection between possession and distribution of child pornography and actual sexual abuse of children. Initiated by Immigration and Customs Enforcement agents, Operation Delgado uncovered an international child pornography ring that operated an Internet forum known as "Dreamboard."[5] The forum was based in the United States, but had nearly 600 participants who spanned across five continents. U.S. Attorney General Eric Holder described that "[i]n order to become part of the Dreamboard community, prospective members were required to upload pornography portraying children under 12 years of age or younger . . . Once given access, the participants had to continually upload images of child sexual abuse in order to maintain membership. The greater the content they provided, the greater the content they were allowed to access. Members who created and shared images and videos of themselves molesting children received elevated status and greater access. . . . Some of the children featured in these images and videos were just infants and in many cases, the children being victimized were in obvious and also intentional pain, even in distress and crying, just as the rules for one area of the bulletin board mandated. They had to be in distress and crying."[6]

Following the 2005 Supreme Court ruling in *U.S. v. Booker*, Federal courts are free to sentence criminals to terms well outside those prescribed by the Sentencing Guidelines. The percentage of sentences that follow the Guidelines has declined precipitously in the seven years since *Booker*. In the vast majority of cases, the departing sentences result in lowered sentences for convicted criminals. By far, the greatest percentage of downward departure sentences are for those possessing and producing child pornography – a startling 40% variance rate in child

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National Strategy).

[3] Al Baker, In Court, a Victim Gives Voice to Sex Abuse, N.Y Times, June 9, 2011, at

[4] Michael L. Bourke & Andres E. Hernandez, The 'Butner Study' Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders, 24 J. Fam. Violence 183, 184 (2009).

[5] Terry Frieden, *72 charged in online global child porn ring*, CNN, Aug. 3, 2011, *available at* http://articles.cnn.com/2011-08-03/justice/us.child.porn.ring_1_sexual-abuse-bulletin-board-images-and-videos?_s=PM:CRIME.

[6] *Id.*

pornography offenses since *Booker*. The table below reports the percentage increase in non-government sponsored, below Guideline range sentences since the PROTECT Act was passed in 2003:[7]

Offense	Percentage increase of sentences below Guidelines (non-Government Sponsored)
Child Pornography Possession	+29.9%
Child Pornography Production	+17.1%

You have acknowledged this disparity for child pornography offenders, noting in a recent interview with the website "The Third Branch":

> "A recent study of federal district judges found that seventy percent felt that penalties for receipt and possession of child pornography were too high – a sentiment likely responsible for a more than forty percent variance rate."[8]

A *Boston Globe* article published earlier this week brings our concerns into focus. The article highlights a case in which a child pornography possessor was sentenced to less than two years in prison -- forty-two months below the guideline range. We were surprised to read that you were the sentencing judge and that in justifying your variance, you stated, "As far as I'm concerned, there are some problems with the guidelines."[9]

We are concerned that the disturbing departure rate, coupled with the opinions expressed by you and members of the Judiciary in the Commission's survey, demonstrates a misunderstanding of the seriousness of child pornography crimes – including possession – and Congress' intent regarding punishment of these offenses. The imposition of significantly reduced sentences for the possession of child pornography ignores the ample evidence demonstrating the ongoing, continuous harm to the victim, the correlation between possession and child sexual abuse, and the fact that the demand for child pornography images by possessors feeds the production and therefore the sexual exploitation of children, including infants and toddlers.

We applaud the Commission for holding this hearing. We hope it will be used to shed light on the unfortunate trend in child pornography sentencing and trust that it will not be used as

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[7] Prepared Testimony of Judge Patti Saris before the Subcommittee of Crime, Terrorism and Homeland Security, October 12, 2011, pgs. 25-53.
[8] http://www.uscourts.gov/News/TheThirdBranch/11-09-01/From_the_Hill_to_the_Court_to_the_Commission.aspx
[9] http://articles.boston.com/2012-02-12/news/31052706_1_sentencing-guidelines-federal-judges-sentencing-commission

a means to justify this practice. It would be a disservice to the American people to have the Commission issue a report that advocates for the reduction in sentencing for a class of criminals who cause profound and lasting damage to their victims.

Sincerely,

Lamar Smith
Chairman
House Judiciary Committee

Charles E. Grassley
Ranking Member
Senate Judiciary Committee

F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime,
Terrorism, and Homeland Security