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Prosecution Dilemmas and Challenges for Child Pornography Crimes: The Third National Juvenile Online Victimization Study (NJOV-3)

Wendy Walsh, Janis Wolak, & David Finkelhor

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Abstract

Results from the National Juvenile Online Victimization (NJOV) Prosecutor Study indicate that prosecutors use a mix of strategies to handle defendants who possess large amounts of child pornography (CP). Prosecutors reported difficulties with computer forensics and the police investigation, but not so much with defense strategies. One-quarter of prosecutors who dealt with CP cases had one that went in front of a jury in the past 2 years. Nearly half of prosecutors would like clearer guidelines about the types of CP cases accepted for federal prosecution.

Purpose

The prosecution of child pornography possession has increased in recent years, as the internet has enhanced its availability and law enforcement has refined its techniques for its detection. But this prosecution has raised many issues about the consistency in standards, problems with the statutory framework, and the suitability of the punishments being sought. This bulletin explores prosecution dilemmas and challenges for child pornography crimes. It examines 1) charging decisions and difficulties encountered; 2) the resolution of child pornography cases; and 3) prosecutor experience with other aspects of cases, such as risk assessment, judges' rulings, and referring for federal prosecution. The appendix provides results on additional questions. The data come from wave 3 of the National Juvenile Online Victimization (NJOV) Study.

Arrests for Child Pornography (CP)

Arrests for crimes involving CP possession grew significantly between 2000 and 2009.¹ In 2009, US law enforcement agencies made an estimated 4,901 arrests for CP possession, almost 3 times as many as in 2000 and a 33% increase over 2006 arrests. In 2009, almost all arrested CP possessors were men, and the largest age groups were age 40 or older (41%) or age 26 to 30 (33%). About 1 in 5 arrested CP possessors was age 18 to 25 and 7% were 17 or younger. Most arrested offenders had images of children ages 6 to 12, images of girls and images that depicted sexual penetration. About two-thirds (65%) had CP videos. In 2009, 29% of arrested CP possessors were dual offenders (i.e. CP possessors who also committed a concurrent

sex crime against a minor). Arrested CP possessors generally have many images, 21% of those arrested in 2009 had more than 1,000 still images and only 21% of possessors had fewer than 50 images (unpublished data, 2012). Given the growth and complexity of these crimes, it is critical to better understand dilemmas and challenges prosecutors encounter.

What is child pornography?

Possession of child pornography (CP) is a felony under federal law and in every state. The federal statutes that criminalize CP possession define "child" as age 17 or younger, and CP as the "visual depiction...of sexually explicit conduct" (18 USCS 2256). Sexually explicit conduct includes acts such as intercourse, bestiality, and masturbation, as well as "lascivious exhibition of the genitals or pubic area." This generally excludes images of naked children who are not being depicted with the intention to arouse sexual interest. Most states mirror federal law, although there is some variation in the definition of child and the content that is proscribed.

CHARGING DECISIONS AND DIFFICULTIES ENCOUNTERED

Although many offenders arrested for CP possess more than one image, one of the issues for prosecutors is whether there is a tipping point for charging –are cases with only one image enough to prosecute? How are charging decisions made when an offender has lots of CP images? For example, are defendants charged for the entire CP collection or for some of the images? Another key issue to understand is the types of difficulties prosecutors encounter, such as what types of defenses are formally raised. Understanding the decisions and issues prosecutors face will help enhance our understanding about effective ways to prosecute child pornography.

A mix of strategies used to handle charging defendants who possess large amounts of CP

Many prosecutors noted that charging decisions were done on a case by case basis and that the number of images used in charging is picked based on the prosecutor's discretion, but there is no maximum or minimum.

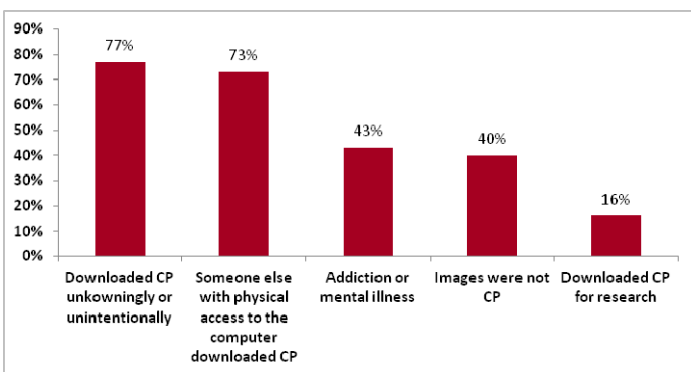
Nearly all prosecutors said that one or two images would be enough to prosecute if statutory elements were present but that they usually always find more. One prosecutor noted that he has never had a case with fewer than 10 images; while another prosecutor noted that he has never had a case with fewer than 20 images.

There was a wide range in the strategies used regarding charging defendants who possess large amounts of CP. Some prosecutors noted that there was no point charging beyond a certain level; with some mentioning not going beyond 10-15 counts and others mentioning 30 or so counts. Other prosecutors said they could only charge 1 count or 1 charge no matter how many images. Another strategy mentioned was to pick a small group of the worst 1 to 5 images and only charge for those images; while other prosecutors grouped the images into categories, such as by the date or the type of image and then charged based on the number of different categories of images. Other strategies were to charge for every picture, charge 1 count for each type of media (i.e. computer, cell phone, external hard drive) or each location images were found (regardless of the number), or to only charge for those images with identified victims.

Rather than difficulties with formally raised defenses, prosecutors encountered difficulties with computer forensics or the police investigation

Child pornography crimes can be difficult for prosecutors because prosecutors need to prove that the defendant knowingly possessed the images. In order to explore what types of defenses prosecutors are encountering, we asked prosecutors what types of formally raised defenses they had experienced in the past two years.

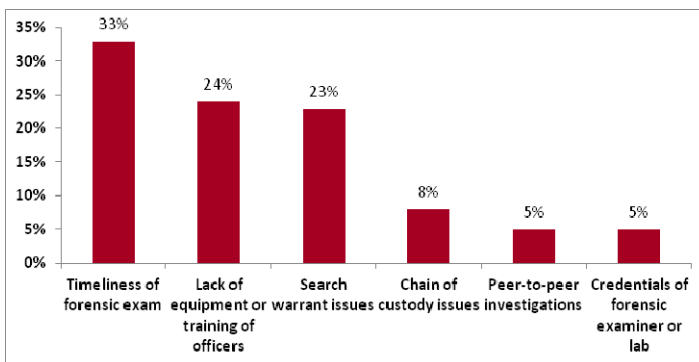
Figure 1. Types of formally raised defenses prosecutors encountered



One-third of prosecutors (31%) reported that these defenses created real difficulty, such as a significantly reduced plea, dismissal of charges, or losing the case.

More than difficulties with formally raised defenses, 62% of prosecutors encountered difficulties with computer forensics or the police investigation.

Figure 2. Difficulties with computer forensics or the police investigation



When prosecutors had any of these difficulties, only 16% reported that charges against the defendant were ultimately dismissed because of problems with the police investigation or forensic exam. When this occurred, the vast majority of prosecutors (79%) reported that this occurred in only one case.

Half of prosecutors (56%) handled a case where the defense formally raised technology related issues that required the prosecutor to explain technical details to a judge or jury. When this happened, 75% of prosecutors reported being mostly or very satisfied with resources their office had to explain technical evidence or rebutting technical defenses.

RESOLUTION OF CP CASES

Using data from the NJOV3 law enforcement data in 2009, 72% of arrested CP offenders were charged with state crimes.¹ Case outcomes were known in 63% of cases with state charges. Eighty-four percent of cases in which outcomes were known ended with guilty pleas and 5% with convictions after trial. Charges were dropped or dismissed in 7%. There was some other outcome, such as suspect died, or respondents did not know the outcome in 4%. No cases ended in acquittals after trial.

Although only a minority of CP cases are resolved by trial, due to the nature of CP images, there are a number of special issues that pertain when CP cases are resolved in trial. One is the viewing of CP images by juries and courtrooms.

A minority of prosecutors had a CP case go to trial in the past 2 years

One-third (33%) of prosecutors had a CP case go to trial in the past 2 years. One-quarter (26%) of prosecutors in the sample had a CP case in front of a jury in the past 2 years.

Figure 3. Number of CP trial cases in the past 2 years

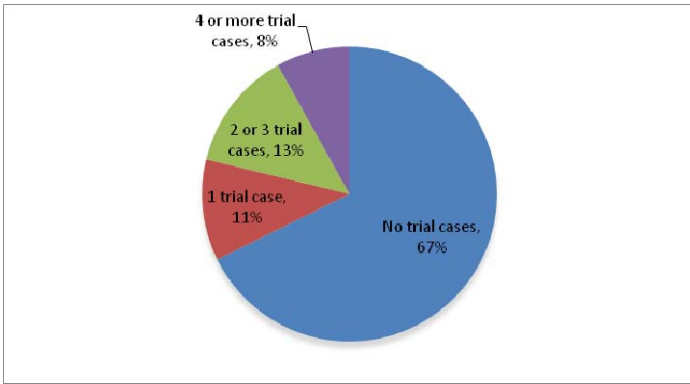
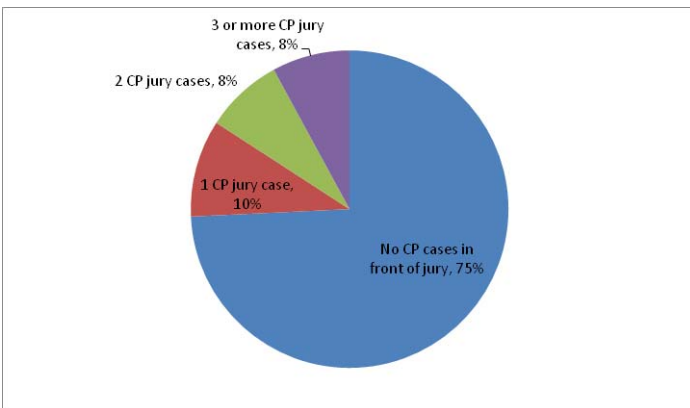


Figure 4. Number of CP trial cases in front of a jury in the past 2 years



Images were displayed to the jury in a variety of ways

- Displayed on a large screen/tv that only the jury and judge could see (35%)
- Displayed on a large screen/tv that the whole courtroom could see (30%)
- Used still images that were passed to the jury or described by experts (18%)
- It depended on the case and the judge (9%)
- Displayed them on individual monitors for the jury (8%)

Half (55%) of prosecutors had the defense object to introducing the images into evidence in front of the jury (claiming for example that the images were inflammatory). The majority of prosecutors (70%), however, said that defense attorneys were not successful in keeping images out of evidence.

Another critical aspect of CP trial cases is the process used to prove that images depicted actual, not computer generated children. In 2002, the Supreme Court ruled that criminal sanctions apply only to images depicting “real” children and that virtual or computer generated images were not considered “real” children.² The burden is on the government, therefore, to prove that an image of child pornography depicts actual children.

Multiple methods used to establish that the CP depicted actual children

These included testimony that the identities of children were known (43%); allowing the jury or judge to decide for themselves if the images were actual (32%); or testimony, such as from a pediatrician, that images were not virtual or computer generated (24%). A physician, for example, may be able to testify that characteristics such as the proportions, body fat distribution, and skin tone of the children depicted are consistent with those of real children.

Most prosecutors don’t accept reduced case outcomes

About one-quarter of prosecutors had a case in the past 2 years in which a CP defendant was allowed to plead to a misdemeanor rather than a felony (22%), or in which sex offender registration was not required when a defendant pleaded guilty (21%). When we asked prosecutors to describe the circumstances, about half of prosecutors said it had to do with the specific nature of the case, such as a possession only case or a problematic search warrant. Other circumstances in which prosecutors reduced case outcomes included a young offender or an offender who had no priors and few images. Very few prosecutors mentioned that reduced case outcomes were related to difficulties proving the age of the victims in the images.

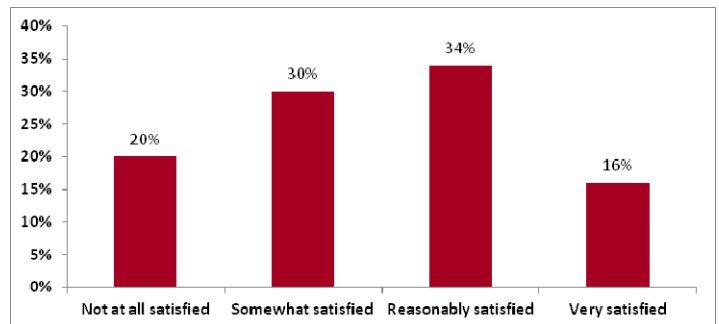
PROSECUTOR EXPERIENCE WITH OTHER ASPECTS OF THE CASE

The prosecution of CP cases often involves working through additional elements of a case, such as understanding the risk assessment evaluation, handling judges’ rulings about CP, and deciding when to refer a case for federal prosecution.

Risk assessment is important but many prosecutors are critical of it

Risk assessments include various forms, including sex offender assessment (84%), drug or alcohol evaluation (52%), polygraph (29%), or some other psychological evaluation (54%).

Figure 5. Prosecutor satisfaction with risk assessment



About half of prosecutors had additional comments about the risk assessment system. The majority of prosecutors with additional comments (66%) said that the system was flawed, with many prosecutors noting that the purpose of prosecution is the current crime and not predicting a future crime; that assessments were not trusted; that it was not possible to predict human behavior; and using self report information by an offender was problematic.

A minority of prosecutors noted that judges’ rulings have had negative impact on CP cases

One in five prosecutors (19%) reported that judges made rulings on CP cases that had affected how or whether their office pursues these cases. The majority (74%) reported that the ruling had a negative impact on the pursuit of CP cases. The most common rulings were related to limits about what could be charged, such as specifying that transferring images to another medium does not constitute creation/distribution or limiting the ability to file multiple counts. Other rulings included overruling the mandatory minimum sentencing requirements, suppressing images because of search warrant problems, suppressing images in general, and requiring images be given to defense.

Only 7% of prosecutors had a case that caused them particular concern because judges had not adhered to the sentencing guidelines. Most of these prosecutors said the judge sentenced the defendant to probation.

Half of prosecutors would like to see guidelines on which CP cases will be accepted for federal prosecution

In federal cases, the mandatory minimum for downloading images is five years in prison without parole and those who download particularly lewd images or possess a large number of images often get sentences of 15 to 20 years.^{3,4} Because of the strict sentences there are many examples of courts making individualized assessments to arrive at sentences that diverge from the calculated guidelines range.^{5,7} In addition to the strict sentencing guidelines and the individualized assessments of those guidelines, the relatively high social status of many arrested for CP can also complicate these cases. In 2009, for example, 53% of those arrested for possessing CP had full-time employment, 25% were married, and 47% had at least some college/technical training or were college graduates (unpublished data, 2012).

In the past 2 years, 48% of prosecutors have referred a CP case for federal prosecution. Of those who had not referred a case, 15% of prosecutors said that it generally worked the other way around and the federal prosecutors referred CP cases to them or federal prosecutors took the CP cases they want.

Figure 6. Percentage of cases declined for federal prosecution

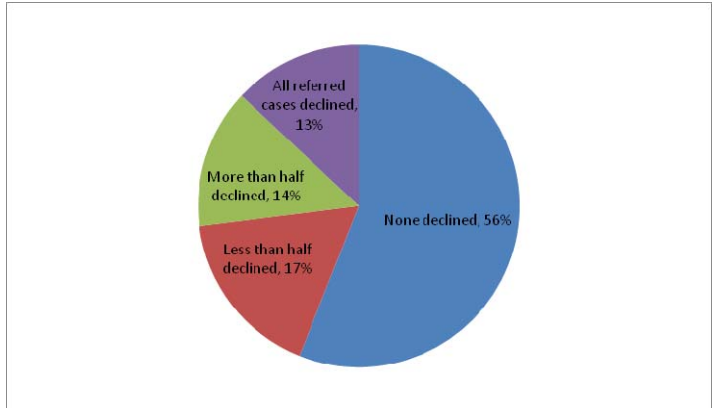
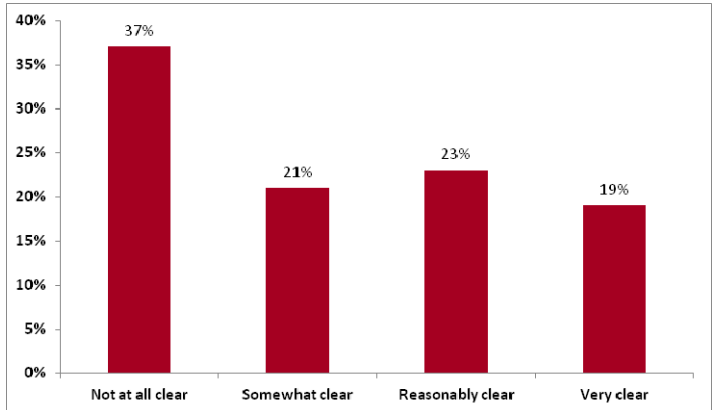


Figure 7. Prosecutors’ perceptions about how clear it is that CP cases will be accepted for federal prosecution



Just over half of prosecutors (52%) wished to see guidelines on which CP cases would be accepted for federal prosecution. Prosecutors mentioned specifically that they would like to know the number of images needed to be accepted for federal prosecution, what specific acts are necessary, what prior offender history is required, or that interstate commerce or multi-jurisdiction cases should always be accepted.

DISCUSSION

Several findings merit more discussion. One is the issue about how charging decisions are made, especially when defendants had many images. It appears that this complex process varies by prosecutor and by jurisdiction. For example, some prosecutors reported they would charge one charge per image, while others reported that they do not charge per image. Many prosecutors noted that there is often no point going beyond a certain level; however defining what that level is appears to vary and is often based on the prosecutor’s discretion. Furthermore, the fact that many prosecutors mentioned the need for additional legislation around charging indicates that this is an area in need of more discussion.

A second issue is the fact that approximately two-thirds of prosecutors noted difficulties arising from the computer forensics examination or the police investigation. Difficulties included the lack of timeliness of the computer forensics exam, lack of equipment or training of officers, and issues with search warrants. This suggests the need for more laboratories, equipment, technicians and training of police in CP investigation. The risk assessment system also appears to need refinement. Although many prosecutors noted that the defense ordered these assessments, prosecutors also commented that the whole risk assessment system was flawed.

A third issue concerns the role of federal prosecutors. Although many prosecutors had referred cases, many prosecutors nonetheless wanted guidelines about what would be accepted. They were not at all clear which cases would be accepted.

Prosecutors are a crucial link in efforts to discourage the creation and dissemination of CP. As technology and criminal behavior changes, research needs to continue to help prosecutors develop tools and strategies to deal with these complex crimes.

How the National Juvenile Online Victimization (N-JOV) Study was conducted

The N-JOV Study collected information from a national sample of law enforcement agencies about the prevalence of arrests for and characteristics of technology-facilitated child sexual exploitation crimes. Three waves of the study have been conducted in 2001, 2006, and 2010. In all waves of the study, we used a two-phase process of mail surveys followed by telephone interviews to collect data from a national sample of the same local, county, state, and federal law enforcement agencies. First, we sent mail surveys to a national sample of more than 2,500 agencies. These surveys asked if agencies had made arrests for online sex crimes against minors during the respective one-year timeframes. Then we conducted detailed telephone interviews with law enforcement investigators about a random sample of arrest cases reported in the mail surveys.

An additional component of the Third N-JOV Study (N-JOV₃) was to conduct telephone interviews with prosecutors involved with technology-facilitated child sexual exploitation crimes. Law enforcement investigators who had made arrests for technology-facilitated child sexual exploitation crimes and participated in N-JOV₃ (N=818) provided the names of 545 state prosecutors involved with prosecuting technology facilitated crimes. Although the law enforcement sample included federal agencies, we were unable to obtain approval to include federal prosecutors in this study. Because law enforcement investigators provided the names of prosecutors to contact for this component of the study, it is also

important to keep in mind that this is a convenience sample of prosecutors. Thus, when it is reported that some "percent of prosecutors" had such an experience, this does not mean "percent of all prosecutors in the US" but simply "percent of this sample of prosecutors who have some experience in prosecuting CP."

The purpose of the N-JOV₃ Prosecutor Survey was to gather information about the experiences state prosecutors have when they prosecute technology-facilitated crimes against children – including prosecuting child pornography (CP), online undercover chat cases where an undercover agent was portraying a minor, online enticement cases involving identified victims, and when handling sexting cases. After receiving the names of prosecutors from law enforcement investigators, we sent letters to prosecutors explaining the purpose of the study. This was followed by telephone calls asking if they would like to participate in the study. For more information about the methodology see (http://www.unh.edu/ccrc/pdf/CV293_NJOV3%20Prosecution%20Study%20Methodology%20Report_1-18-13.pdf).

Between May and August 2011, telephone interviews were conducted with 378 prosecutors. The following table describes the final disposition of the sample.

| | Number | % |
|--|------------|------------|
| Number of prosecutor names | 554 | -- |
| Screened out (i.e. did not prosecute any child sexual exploitation cases in the past 2 years) | 72 | |
| Eligible cases | 482 | |
| Unable to contact (i.e. no agency or prosecutor contact after 8 attempted calls, repeated rescheduling with prosecutor and interview never done) | 46 | 10% |
| Refused to do interview | 26 | 5% |
| Pending when study closed | 32 | 7% |
| Completed interviews | 378 | 78% |
| Did not involve CP prosecution | 33 | |
| Subsample of prosecutors who have prosecuted child pornography cases in the past 2 years | 345 | |

Box on sample characteristics of prosecutors who have prosecuted CP (N=345)

It is important to note that prosecutors reported on all of their child pornography cases which may have included production, distribution, and/or possession. The crimes may have also included additional types of charges against the defendant in addition to the CP and were not limited to only those that involved CP only.

The respondents were experienced prosecutors

- 32% had 10 or more years experience
- 8% had 8 to 9 years experience
- 17% had 6 to 7 years experience
- 24% had 4 to 5 years experience
- 18% had 1 to 3 years experience
- 2% had less than one year experience

Association with Internet Crimes against Children (ICAC) Take Force

- 78% yes
- 22% no

Type of prosecution unit

- 45% worked for a general prosecution unit
- 23% worked with a sex crimes unit
- 11% worked with a juvenile victims unit
- 7% worked with a computer crimes unit
- 4% worked with a juvenile court unit
- 29% worked with other types of units

Attend training in how to prosecute Internet-related crimes

- 83% yes
- 17% no

Training was provided by a variety of agencies:

- 54% NDAA
- 51% NCMEC
- 43% ICAC
- 34% DOJ/OJJDP
- 50% other government agency
- 14% other place

Number of CP cases prosecuted in the past 2 years

- 36% prosecuted 1 to 5 cases
- 43% prosecuted 6 to 20 cases
- 20% prosecuted 21 or more cases

Number of CP cases prosecuted in career

- 15% prosecuted 1 to 5 cases
- 40% prosecuted 6 to 20 cases
- 46% prosecuted 21 or more cases

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We welcome inquires about our research. Please contact wendy.walsh@unh.edu.



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Appendix – Additional survey questions and results

| Computer forensic examination | Percentage of Prosecutors Reporting |
|--|-------------------------------------|
| <i>Does your office have a policy about whether a full computer forensics exam vs. a partial forensic examination should be conducted (in CP cases)?</i> | |
| Yes | 52% |
| No | 48% |
| <i>(For prosecutors with no policy) How does your office decide whether a full computer forensics exam vs. a partial forensic examination should be performed?</i> | |
| Depended on the case | 27% |
| Law enforcement makes the decision | 26% |
| Always a full exam | 19% |
| A preview first followed by a full exam | 16% |
| Decisions made in other ways, such as it depended on available resources or that the lab decides | 10% |
| Don't know how decisions were made | 4% |
| <i>What percentage of CP cases in past 2 years have had full computer forensic exams performed?</i> | |
| All CP cases | 60% |
| <i>In the cases you have handled, are defendants typically charged before or after computer forensics examination?</i> | |
| Before | 24% |
| After | 36% |
| Something else (i.e. depends on nature of case) | 40% |
| <i>Does your office use a credentialed computer forensics laboratory?</i> | |
| Yes | 79% |
| No | 21% |
| <i>(For prosecutors not using a credentialed lab) Is there debate in your office about whether to use a credentialed computer forensics laboratory?</i> | |
| Yes | 8% (n=9) |
| No | 92% |
| Discovery of CP images | |
| <i>In CP possession cases that you have handled in the past 2 years, how has discovery been handled? Is the defense given copies of images or allowed to examine the images, but not given copies (or something else)?</i> | |
| Given copies of images to defense | 17% |
| Allowed defense to examine images, but not giving defense copies | 77% |
| Something else (i.e. depends on the judge) | 7% |
| <i>Have you prosecuted any CP cases where there has been litigation regarding discovery of images?</i> | |
| Yes | 41% |
| No | 59% |

Appendix – Additional survey questions and results (continued)

| | Percentage of Prosecutors Reporting |
|--|-------------------------------------|
| <i>Did the defense ever prevail with litigation?</i> | |
| Yes | 44% (n=62) |
| No | 56% |
| Strategies to formally raised defenses | |
| <i>Types of effective strategies to formally raised defenses</i> | |
| Computer forensics | 60% |
| Conduct a complete and thorough investigation helped to respond to any defense | 33% |
| Use the images to respond to any defense | 5% |
| Refer the case to federal litigation or let a judge decide when responding to a formally raised defense | 3% |
| Expert witnesses | |
| <i>Has the defense used an expert witness in any of the child pornography possession or distribution cases you've handled (at any phase in the case, including sentencing)?</i> | |
| Yes | 42% |
| No | 58% |
| <i>Has an expert witness testimony created real difficulty for you? (like problems that were hard to overcome or the prosecution had to accept a significantly reduced plea or lost the cases)</i> | |
| Yes | 23.3% (n=34) |
| No | 76% |
| Don't know | 3.5% |
| Circumstances allow to plea to misdemeanor | |
| <i>(Prosecutors who had not accepted misdemeanors rather than felonies were then asked) Are there any circumstances where you would allow a defendant in a child pornography possession or distribution case to plead to a misdemeanor rather than a felony?</i> | |
| Would never accept a defendant in a CP possession (or distribution) case to plead to a misdemeanor rather than a felony. | 51% (n=126) |
| Only if there were serious evidentiary difficulties in the case, such as if something went drastically wrong with the case or there was a bad search warrant or issue with the proof in the case. | 29% (n=73) |
| Could be possible if there was something very unusual about the case, if the offender had other charges filed, or if it were a very minor situation. | 9% (n=22) |
| If the offender was very young. | 8% (n=20) |
| If the age of the victim(s) was questionable. | 3% (n=8) |

Appendix – Additional survey questions and results (continued)

| | Percentage of Prosecutors Reporting |
|--|-------------------------------------|
| CP defendant had committed other sexual offenses against children | |
| <i>When handling a child pornography case, have you ever discovered new information as part of your prosecutorial work that suggested the defendant had committed other sexual offenses against children (e.g. molestation)?</i> | |
| Yes | 57% |
| No | 43% |
| <i>In what percentage of cases has this happened?</i> | |
| | Mean =19.2 (SD=20.3) median=10 |
| | 11% said 1-4% of cases |
| | 44% said 5-10% |
| | 14% said 11 -20% |
| | 20% said 21-49% |
| | 11% said 50-100% |
| <i>In your opinion, what investigative procedures (at any time during a case) are most effective in identifying child pornography offenders who have committed sexual molestation crimes against minors? (Prosecutors could identify more than one strategy)</i> | |
| Interviews of other people as the key investigative procedure (i.e. interviewing family members, children the offender came in contact with) | 39% |
| The offender assessment/investigation (i.e. interview of defendant by officer on scene, polygraph, criminal background) | 39% |
| computer forensics (i.e. extensive computer forensics to explore who the offender was communicating with, tracking computer activity) | 33% |
| The overall criminal investigation (i.e. the multi-disciplinary approach, completing a comprehensive investigation) | 20% |
| image ID (i.e. try to identify children in images by comparing images of local children) | 16% |
| The media (i.e. such as having people call in after seeing the offender's name in the paper or making sure there is a press release so if anyone has any information to report, they can do it) | 4% |
| Sentencing guidelines | |
| <i>Do any sentencing guidelines apply to child pornography cases in your jurisdiction?</i> | |
| Yes | 51% |
| No | 49% |
| <i>How often have sentencing guidelines been adhered to by judges in the cases you have handled?</i> | |
| Rarely | 5% |
| Less than half the time | 6% |
| More than half the time | 11% |
| Almost all of the time | 79% |

Appendix – Additional survey questions and results (continued)

| | Percentage of Prosecutors Reporting |
|---|-------------------------------------|
| <i>In your opinion, how fair are sentencing guidelines for possession of child pornography in your jurisdiction?</i> | |
| Too light for the crime committed | 38% |
| Just about right for the crime committed | 59% |
| Too heavy for the crime committed | 4% |
| Federal prosecution | |
| <i>What percentage of your cases have been referred for federal prosecution?</i> | |
| | Mean=22.9 (SD=25.5) median=10% |
| | 13.8% said 1-4% of cases |
| | 41.4% said 5-10% |
| | 11.0% said 11-24% |
| | 26.2% said 25-74% |
| | 7.6% said 75-100% |
| Additional legislation | |
| <i>In your opinion, how much of a priority are child sexual exploitation cases (whether or not the internet is involved) in comparison to other types of cases in your office?</i> | |
| High priority | 81% |
| Medium priority | 13% |
| Low priority | 2% |
| Other | 4% |
| <i>When thinking about all aspects of prosecuting child pornography cases, do you think your jurisdiction is in need of additional or revised legislation about child pornography?</i> | |
| Yes | 52% |
| No | 48% |
| <i>What legislation is most needed?</i> | |
| Sentences are too light (i.e. need for mandatory minimum sentences for possession, more strict sentences for repeat offenders, for those with more images, need a hierarchy of sentences, less discrepancy between state and federal sentences) | 43% |
| More guidance on charging offenders in general and those with high volumes of CP | 15% |
| More clarity around the definition of CP (i.e. should include erotica, need more consistency and clear descriptions) | 15% |
| Sexting legislation | 6% |
| Sentencing is too harsh | 4% |
| Clarity around discovery issues | 5% |