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Court Rejects Judge's Assertion of a Child Pornography Gene

By **BENJAMIN WEISER**

A federal appeals court in Manhattan overturned a six-and-a-half-year sentence in a child pornography case on Friday, saying the judge who imposed it improperly found that the defendant would return to viewing child pornography “because of an as-of-yet undiscovered gene.”

The judge, Gary L. Sharpe of Federal District Court in Albany, was quoted as saying, “It is a gene you were born with. And it’s not a gene you can get rid of,” before he sentenced the defendant, Gary Cossey, in December 2009.

A three-judge panel of the United States Court of Appeals for the Second Circuit said in ruling on the defendant’s appeal, “It would be impermissible for the court to base its decision of recidivism on its unsupported theory of genetics.”

Judges Amalya L. Kearse, John M. Walker Jr. and Rosemary S. Pooler ruled that a sentence relying on findings not supported in the record “seriously affects the fairness, integrity and public reputation of judicial proceedings.”

The panel ordered that Mr. Cossey be resentenced by a different judge, a step it said was taken only where a judge’s fairness or the appearance of fairness was in doubt. “This is one such instance,” the panel said.

Judge Sharpe, appointed to the bench by President George W. Bush, has been a district judge since 2004. His chambers declined to comment.

Mr. Cossey, who had pleaded guilty to one count of possession of child pornography, said at his sentencing that he felt therapy was “helping me tremendously in a lot of ways,” a transcript shows.

But the panel said that Judge Sharpe had rejected two psychological evaluations that found Mr. Cossey was “at a low to moderate risk to reoffend,” and that the judge told Mr. Cossey that the “opinions of the psychologists and the psychiatrists as to what harm you may pose to those children in the future is virtually worthless here.”

Prosecutors argued that Mr. Cossey might again violate the law because he was found to have continued viewing child pornography after an initial investigation by the Federal Bureau of Investigation, the ruling said.

The panel quoted Judge Sharpe as telling the defendant, “I’m not sure there’s any answer for what I see here beyond what I’m about to tell ya,” and predicting that in 50 years, Mr. Cossey’s conduct is likely to be found to have been caused by a gene.

“You are what you’re born with. And that’s the only explanation for what I see here,” the judge said.

Mr. Cossey’s lawyer, George E. Baird Jr., declined to comment, as did William C. Pericak, a prosecutor in the United States attorney’s office in Albany.