

Child Pornography and Sex Offenses

Revised 5/7/09

Discussion Outline

- Selected sex offense guidelines
- Departures/variances in sex offense cases
- Supervised release conditions
- Adam Walsh Act

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Main Sex Offense Guidelines

§2A3.1	18 U.S.C. § 2241	Rape
§2A3.2	18 U.S.C. § 2243	Statutory Rape
§2A3.4	18 U.S.C. § 2244	Sexual Abuse
§2G1.3	18 U.S.C. §§ 2422 & 2423	Travel Cases
§2G2.1	18 U.S.C. § 2251	Production of Child Porn
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Trafficking, Receipt, Possession of Child Porn

§2G2.2 (Trafficking/Receipt/Possession)

- 5 year mandatory minimum for receipt/trafficking offenses (18 U.S.C. §2252)
- Base offense level:
 - 18 for Possession Offenses
 - 22 for Trafficking or Receipt offenses
 - *See U.S. v. Davenport*, 519 F.3d 940 (9th Cir 2008) and *U.S. v Miller*, 527 F.3d 54 (2d Cir. 2009)
- Two level decrease (§2G2.2(b)(1)) for receipt if no intent to traffic or distribute material
 - Burden is on the defendant
 - *See U.S. v. Fore*, 507 F.3d 412 (6th Cir. 2007)

§2G2.2 (cont.)

- High Frequency of some §2G2.2 SOC's
 - Minor under 12 (2-level increase)
 - Distribution of material (2-7 increase)
 - S/M images/depictions of violence (4-level)
 - Use of a computer (2-level increase)
 - Images table (2-5 level increase)

§2G2.2(b)(3) Distribution

- 2-7 level increase depending on conduct - most likely:
 - 5 levels for distribution for receipt or expectation of a thing of value, but not for pecuniary gain (*i.e.* trading images) or 2 level for distribution other than distribution described above
- File sharing (Kazaa) can lead to increase
 - *U.S. v. Layton*, 2009 WL 1110814 (4th Cir. 2009) (2 level)
 - *U.S. v. Carani*, 492 F.3d 867 (7th Cir. 2007) (2 level)
 - *U.S. v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (5 level)
 - *U.S. v. Geiner*, 498 F.3d 1104 (10th Cir. 2007) (5 level)
 - *U.S. v. Mathenia*, 409 F.3d 1289 (11th Cir. 2005) (2 level)
 - *See also, U.S. v. Cannel*, 517 F.3d 1172 (9th Cir 2008)

§2G2.2(b)(4) S/M

- If offense involved material that portrays sadistic or masochistic conduct or other depictions of violence increase by 4 levels
- Application Note 2: Applies regardless of whether defendant specifically intended to possess, receive, or distribute such materials
 - *See U.S. v. Frank*, 195 F. App'x 114 (3d Cir. 2008)

§2G2.2(b)(4) S/M

- Courts apply broadly—most circuits have per se rule if image involves something being inserted into young child then enhancement applies.
 - *U.S. v. Hoey*, 508 F.3d 687 (1st Cir. 2008)
 - *U.S. v. Delmarle*, 99 F.3d 80 (2^d Cir. 1996)
 - *U.S. v. Lyckman*, 235 F.3d 234 (5th Cir. 2000)
 - *U.S. v. Groenendal*, 557 F.3d 419 (6th Cir. 2009)
 - *U.S. v. Myers*, 355 F.3d 1040 (7th Cir. 2004)
 - *U.S. v. Belflower*, 390 F.3d 560 (8th Cir. 2004)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2008)
 - *U.S. v. Holt*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Kimler*, 335 F.3d 1132 (10th Cir. 2008)
 - *U.S. v. Hall*, 312 F.3d 1250 (11th Cir. 2002)

§2G2.2(b)(5) Pattern of Activity

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels
- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant whether or not the abuse or exploitation occurred a) during the course of offense, b) involved the same minor, or c) resulted in a conviction for such conduct
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)¹⁰

§2G2.2 Pattern of Activity (cont.)

- No time limit on conduct
 - *U.S. v. Woodward*, 277 F.3d 87 (1st Cir. 2002)(25 yrs ago)
 - *U.S. v. Quinn*, 257 F. App'x 864 (6th Cir. 2007)(30 yrs ago)
 - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007)(35 yrs ago)
- Can potentially apply to attempts and sting cases
 - *U.S. v. Williams*, 183 F. App'x 246 (3d Cir. 2006)(attempt)
 - *U.S. v. Morton*, 144 F. App'x 804 (11th Cir. 2005)(sting)

§2G2.2(b)(7) Images

Number of Images table:

- | | |
|-----------------|------------------|
| • 10-149 images | 2 level increase |
| • 150-299 | 3 level increase |
| • 300-599 | 4 level increase |
| • 600 or more | 5 level increase |

“Images” Instruction

- Application Note 4 contains definition (See 18 U.S.C. § 2256(5) and (8))
- Each photo, picture, computer, image, or any similar depiction shall be considered to be one image. (*But see, U.S. v. Goff*, 501 F.3d 250 (3d Cir. 2007)).
- Each video, video-clip movie, or similar recording shall be considered to have 75 images.

§2G2.2(c)(1) Cross Reference

- If offense involved transporting, permitting or offering, or seeking by notice or advertisement a minor to engage in sexually explicit conduct, for purpose of producing a visual depiction of such conduct, apply §2G2.1 (Production)
- Application Note 5 states that the cross reference is to be construed broadly
 - *U.S. v. Long*, 304 F. App'x 982 (3d Cir. 2008)
 - *U.S. v. Starr*, 533 F.3d 985 (8th Cir. 2008)
 - *U.S. v. Speelman*, 431 F.3d 1226 (9th Cir. 2005)
 - *U.S. v. Huff*, 232 F. App'x 832 (10th Cir. 2007)

§2G2.1 (Production)

- **Note:** 15 year mandatory minimum for 18 U.S.C. § 2251 (Production)
- High frequency SOC's:
 - age of victim (84.3%)
 - sex act or contact (52.8%)
 - custody/care (52%)

§2G1.3 (Travel Cases and Child Sex Trafficking)

- Note: mandatory minimum increased from 5 to 10 years for 18 U.S.C. §§ 2422(b) & 2423(a) offenses by the Adam Walsh Act
- New base offense levels effective Nov 1, 2007 based on Adam Walsh Act
- Base Offense Levels
 - 34 (§1591(b)(1) – victim under 14)
 - 30 (§1591(b)(2) – victim between 14-18)
 - 28 (§§ 2422(b) or 2423(a) – enticement or transport of minor)
 - 24 otherwise

§2G1.3 Pointers

- SOC's
 - Use of a computer (+2)
 - Sex act, sexual contact, or commercial sex act (+2)
 - Misrepresentation of identity/undue influence (+2)
 - *See U.S. v. Castellon*, 213 F. App'x 732 (10th Cir. 2008)
 - Effective, Nov 1, 2009 new amendment prohibits undue influence if “minor was an undercover officer”
 - Age of victim (might be subject to cross-reference) (+8) (does not apply to §1591 cases)
 - Care, custody, control (+2)

§2G1.3 Cross References

- §2G1.3(c)(1) to §2G2.1 (Production)
 - *U.S. v. Veazey*, 491 F.3d 700 (7th Cir. 2007)
 - *U.S. v. Mai*, 2008 WL 4139383 (10th Cir. 2008)
 - *U.S. v. Bohannon*, 476 F.3d 1246 (11th Cir.)
- §2G1.3(c)(3) to §2A3.1 (Rape)
 - Offense involved conduct described in 18 U.S.C. §§ 2241 or 2242
- Cross references can apply to sting cases

“Minor” Definition

Minor means:

- 1) Individual under 18
- 2) Individual, whether fictitious or not, who a law enforcement officer represented to a participant had not attained 18 and could be provided for purposes of sex conduct
- 3) Undercover law enforcement who is posing as a minor

§2G1.1 (Promoting Commercial Sex Act)

- Guideline for prostitution involving adults
- Base Offense Levels
 - 34 if convicted under §1591(b)(1)
 - 14 otherwise
- Special Instruction
 - If the offense involved more than one victim, apply the guidelines for each victim as if contained in a separate count of conviction

§2A3.1 through §2A3.4

- §2A3.1 (Aggravated Sexual Abuse)
 - *U.S. v. Chee*, 514 F.3d 1106 (10th Cir. 2007)
 - *U.S. v. Fish*, 2008 WL 4435941 (10th Cir. 2008)
 - *U.S. v. Martin*, 528 F.3d 746 (10th Cir. 2008)
- Can apply §2A3.1 SOC's in sting cases
 - *U.S. v. DeCarlo*, 434 F.3d 447 (6th Cir. 2006)
- Potential cross references at §2A3.2 and §2A3.4
 - *U.S. v. Tyndall*, 521 F.3d 877 (8th Cir. 2008)

§4B1.5 (Repeat and Dangerous Sex Offender)

- §4B1.5(a) for prior convictions
 - Similar to career offender guideline (potential BOL and CHC increases)
- §4B1.5(b) for prior conduct (no conviction necessary)
 - 5-level increase

§4B1.5 (Repeat and Dangerous Sex Offender Against Minor)

§4B1.5(a)

- Instant offense is a covered sex crime
 - Does not include distribution, receipt, or possession of child pornography
- Has at least one prior sex offense conviction
 - *U.S. v. Leach*, 491 F.3d 858 (8th Cir. 2007)
 - *U.S. v. Pierson*, 544 F.3d 933 (8th Cir. 2008)
 - *U.S. v. Schlake*, 178 F. App'x 755 (9th Cir. 2006)
- Offense level is determined under Chpts Two and Three or from the table and Criminal History will be at least Category V

§4B1.5(b)

- Instant offense is a sex crime
- Neither §4B1.1 nor §4B1.5(a) apply
- Defendant engaged in a pattern of activity involving prohibited sexual conduct
- 5-Level increase in the offense level determined under Chapters Two and Three

§4B1.5(b)

- Must have engaged in prohibited sex conduct on at least two separate occasions with a minor (similar analysis to §2G2.2(b)(5)'s pattern of activity SOC)
 - No double counting because §4B1.5(b) does not apply to §2G2.2 offenses (but can apply to §2G2.1 offenses—*see U.S. v. Riccardi*, 2008 WL 4183921 (10th Cir. 2008))
- Victim of instant offense counts for pattern
- No prior conviction necessary
 - *U.S. v. Rojas*, 520 F.3d 876 (8th Cir. 2008)
 - *U.S. v. Fadl*, 498 F.3d 862 (8th Cir. 2007)
- No time limitation on prior conduct

Departures and Variances

Congressional Acts Related to Sentencing

- Crime Control Act of 1990 (Pub L. 101-647)
- Treasury, Postal Service and General Government Appropriation Act -- 1991 (Pub. L. 102-141)
- Sex Crimes Against Children Prevention Act -- 1995 (Pub. L. 104-71)
- Protection of Children from Sexual Predators Act-- 1998 (Pub. L. 105-314)
- PROTECT Act -- 2003 (Pub. L. 108-21)
- Adam Walsh Act -- 2006 (Pub. L. 109-248)

Examples of Below Guideline Sentences Affirmed in Child Pornography Cases

- *U.S. v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009)
- *U.S. v. Pauley*, 511 F.3d 468 (4th Cir. 2007)
- *U.S. v. Smith*, 275 F. App'x 184 (4th Cir. 2008)
- *U.S. v. Rowan*, 530 F.3d 379 (5th Cir. 2008)
- *U.S. v. Nazerzadeh*, 280 F. App'x 432 (5th Cir. 2008)
- *U.S. v. Duhon*, 541 F.3d 391 (5th Cir. 2008)
- *U.S. v. Grossman*, 513 F.3d 592 (6th Cir. 2008)
- *U.S. v. Autery*, 555 F.3d 864 (9th Cir. 2009)
- *U.S. v. Huckins*, 529 F.3d 1312 (10th Cir. 2008)
- *U.S. v. Smart*, 518 F.3d 800 (10th Cir. 2008)
- *U.S. v. Irely*, 2009 WL 806860 (11th Cir. 2009)
- *U.S. v. McBride*, 511 F.3d 1293 (11th Cir. 2007)

Examples of Below Guideline Sentences Reversed

- *U.S. v. Kane*, 2009 WL 80228 (8th Cir. 2009)
- *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008)
- *U.S. v. Johnson*, 242 F. App'x 7 (4th Cir 2007)
- *U.S. v. Borho*, 485 F.3d 904 (6th Cir. 2007)
- *U.S. v. Goldberg*, 491 F.3d 668 (7th Cir. 2007)

Examples of Above Guideline Sentences in Child Pornography Cases

- *U.S. v. Martinucci*, 561 F.3d 533 (2d Cir. 2009)
- *U.S. v. Whorley*, 550 F.3d 326 (4th Cir. 2008)
- *U.S. v. McGehee*, 261 F. App'x 771 (5th Cir. 2008)
- *U.S. v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008)
- *U.S. v. Puente*, 267 F. App'x 863 (11th Cir. 2008)
- *U.S. v. Garnette*, 474 F.3d 1057 (8th Cir. 2007)
- *U.S. v. Gnavi*, 474 F.3d 532 (8th Cir. 2007)

Child Sex Crimes and Supervised Release

Supervised Release Statutes and Guidelines

- 18 U.S.C. § 3583(k): The authorized term for most sex offenses is any term of years or life
- §§5D1.1 – 5D1.3 – Supervised Release Terms and Conditions
- §5D1.2(b): If instant offense of conviction is sex offense, statutory maximum term of supervised release is recommended

Supervised Release Statutes and Guidelines

- Supervised release term can be imposed for life
 - *U.S. v. Proctor*, 281 F. App'x 72 (3d Cir. 2008)
 - *U.S. v. Hayes*, 445 F.3d 536 (2d Cir. 2006)
 - *U.S. v. Gonzalez*, 445 F.3d 815 (5th Cir. 2006)
 - *U.S. v. Cope*, 506 F.3d 908 (9th Cir. 2007)
 - *U.S. v. Daniels*, 541 F.3d 915 (9th Cir. 2008)
 - *U.S. v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005)

18 U.S.C. § 3583(d)

Conditions of Supervised Release

- Must be reasonably related to 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)
- Cannot involve greater deprivation of liberty than is reasonably necessary to achieve the goals of (a)(2)(B), (a)(2)(C), and (a)(2)(D)
- Specifically states that if an offender is required to register under SORNA, the court shall order compliance with SORNA requirements

Notice Requirement

- *U.S. vs. Wise*, 391 F.3d 1027 (9th Cir. 2004) (where a condition of supervised release is not on the list of mandatory or discretionary conditions in guidelines, notice is required before it is imposed)
- *U.S. v. Cope*, 506 F.3d 908 (9th Cir. 2007) (court has discretion as to form or timing of notice, but court cannot announce the sentence and conditions and only afterward provide defendant an opportunity to object—here, remand was necessary because court failed to provide notice)
- *See also*, *U.S. v. Angle*, 234 F.3d 326 (7th Cir. 2002) and *U.S. v. Coenen*, 135 F.3d 938 (5th Cir.) *but see* *U.S. v. Mangan*, 306 F. App'x 758 (3d Cir. 2009)

“Not convicted of a sex offense”

- Courts have upheld the imposition of “sex offense” conditions even if the instant offense of conviction is not a sex offense.
 - *U.S. v. Vinson*, 147 F. App’x 763 (10th Cir. 2005)
 - *But see U.S. v. Carter*, 463 F.3d 526 (6th Cir. 2006) (condition not reasonably related to defendant’s criminal history).

Specific Conditions of Supervised Release for Sex Offenders

No Contact with Minors

- *U.S. v. Roy*, 438 F.3d 140 (1st Cir. 2006)
- *U.S. v. Johnson*, 446 F.3d 272 (2d Cir. 2006)
- *U.S. v. Proctor*, 281 F.3d 72 (3d Cir. 2008)
- *U.S. v. Loy*, 237 F.3d 251 (3d Cir. 2001) (upholding condition that def. have no unsupervised contact with minors)
- *U.S. v. Voelker*, 489 F.3d 139 (3d Cir. 2007)(lacked clarity—remand)
- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001) (affirmed prohibition on contact with minors)
- *U.S. v. Levering*, 441 F.3d 566 (8th Cir. 2006) (affirmed cond.)
- *U.S. v. Mark*, 425 F.3d 505 (8th Cir. 2005) (only with P.O. approval)
- *U.S. v. Davis*, 452 F.3d 991 (8th Cir. 2006) (no evidence that defendant had sexually abused a child so condition restricting access to daughter not reasonably related)
- *U.S. v. Bee*, 162 F.3d 1232 (9th Cir. 1998) (def. cannot have contact with children under 18 unless approved by P.O.)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)
- *See also, U.S. v. Morgan*, 44 F. App'x 881 (10th Cir. 2008)(defendant must report unauthorized contact with minors)

Cannot Frequent Places Frequented by Children

- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001) (def. must avoid places, areas, and establishments frequented by minors)
- *U.S. v. Kerr*, 472 F.3d 517 (8th Cir. 2006) (has to get permission of probation officer)
- *U.S. v. Ristine*, 335 F.3d 692 (8th Cir. 2003) (same)
- *U.S. v. Rearden*, 349 F.3d 608 (9th Cir.) 2003 (def. cannot loiter w/in 100 feet area frequented by children)
- *U.S. v. Lindblad*, 254 F. App'x 647 (9th Cir. 2007)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (same)
- *U.S. v. Macmillen*, 07-3377, (2d Cir. Sep. 23, 2008)

Cannot Reside Near Places Frequented by Children

- *U.S. v. Peterson*, 248 F.3d 79 (2d. Cir. 2001)
(condition barring def. from school, park, etc.
where children likely to congregate too vague *see*
also, U.S. v. Raftopoulos, 254 F. App'x 829)
- *U.S. v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002)
(condition that def. not reside in close proximity to
places frequented by children too vague;
remanded to specify precise distance limitation)

Restriction on Computer and Internet Use

- Complete ban upheld
 - *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001)
 - *U.S. v. Mark*, 425 F.3d 505 (8th Cir. 2005)
- Restrict use with P.O. approval
 - *U.S. v. Johnson*, 446 F.3d 272 (2^d Cir. 2006)
 - *U.S. v. Crandon*, 173 F.3d 122 (3rd Cir. 1999)
 - *U.S. v. Boston*, 494 F.3d 660 (8th Cir. 2007)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Walser*, 275 F.3d 981 (10th Cir. 2001)
 - *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)

Restriction on Computer and Internet Use (cont.)

- Total ban prohibited
 - *U.S. v. Sofsky*, 287 F.3d 122 (2d Cir. 2002)
 - *U.S. v. Freeman*, 316 F.3d 386 (3rd Cir. 2003)
 - *U.S. v. Voekler*, 489 F.3d 139 (3d Cir. 2007)
 - *U.S. v. Holm*, 326 F.3d 872 (7th Cir. 2003)
 - *U.S. v. Crume*, 422 F.3d 728 (8th Cir. 2005)
 - *U.S. v. Esparza*, 2009 WL 129468 (9th Cir. 2009)
 - *U.S. v. White*, 244 F.3d 1199 (10th Cir. 2001)

Polygraph Condition Allowed

- *U.S. v. Roy*, 438 F.3d 140 (1st Cir. 2006)
- *U.S. v. Johnson*, 446 F.3d 272 (2^d Cir. 2006)
- *U.S. v. Kosteniuk*, 251 F. App'x 97 (3^d Cir. 2007)
- *U.S. v. Lee*, 315 F.3d 206 (3^d Cir. 2003)
- *U.S. v. Dotson*, 324 F.3d 256 (4th Cir. 2003)
- *U.S. v. Locke*, 482 F.3d 764 (5th Cir. 2007)
- *U.S. v Sines*, 303 F.3d 793 (7th Cir. 2002)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)

Supervised Release Conditions for Sex Offenses (cont.)

- *U.S. v. Antelope*, 395 F.3d 1128 (9th Cir. 2005): *Kastigar* use immunity and derivative use immunity if treatment requires self-incrimination
- *United States v. York*, 357 F.3d 14 (1st Cir. 2004)

Other conditions

- **Penile Plethysmograph**

- *U.S. v. Dotson*, 324 F.3d 256 (4th Cir. 2003) (acceptable condition)
- *U.S. v. Morgan*, 44 F. App'x 881 (10th Cir. 2002)(possibly)
- *U.S. v. Weber*, 451 F.3d 552 (9th Cir. 2006) (court must make individualized finding before ordering as a condition)

- **Abel Test**

- *U.S. v. Stoterau*, 524F.3d 988 (9th Cir. 2008))

- **Prescribed Medication**

- *U.S. v. Cope*, 506 F.3d 908 (9th Cir. 2008) (court must make individualized finding)

Participate in Mental Health or Sex Treatment Program

- *U.S. v. Prochner*, 417 F.3d 54 (1st Cir. 2005)
- *U.S. v. Lopez*, 258 F.3d 1053 (9th Cir. 2001)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)
- *U.S. v. Morgan*, 44 F. App'x 881 (10th Cir. 2008)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)

Registration Requirements

- **Adam Walsh Act / Sex Offender Registration and Notification Act**
- *Smith v. Doe*, 123 S. Ct. 1140 (2003)
- 18 U.S.C. § 3583(d) and §§5B1.3(a)(1) and (a)(9) and 5D1.3(a)(1) and (a)(7)
- *U.S. v. Jorge-Salgado*, 520 F.3d 840 (8th Cir. 2008)
- *U.S. v. Talbert*, 501 F.3d 449 (5th Cir 2007)

Occupational Restrictions

§5F1.5

- Court can impose supervised release condition prohibiting defendant from engaging in specified occupation, business or profession under certain conditions
 - *U.S. v. Weber*, 186 F. App'x 751 (9th Cir. 2006)
 - *U.S. v. Gill*, 523 F.3d 107 (2^d Cir. 2008)

Ban on Possession of Sexually Explicit Materials

- *U.S. v. Voelker*, 489 F.3d 139 (3rd Cir. 2007) (too broad without any explanation for prohibiting any materials depicting and/or describing “sexually explicit conduct”)
- *U.S. v. Boston*, 494 F.3d 660 (8th Cir. 2007) (acceptable conditions)
- *U.S. v. Weber*, 186 F. App’x 751 (9th Cir. 2006)
- *U.S. v. Guagliardo*, 278 F.3d 868 (9th Cir. 2002) (blanket prohibition of pornography overbroad)
- 18 U.S.C. § 2256(2)(A)(i)-(v)

Restitution Issues in Sex Offenses

- Restitution to victims can include anticipated future costs of psychological treatment
 - *U.S. v. Danser*, 270 F.3d 451 (7th Cir. 2001)
 - *U.S. v. Laney*, 189 F.3d 954 (9th Cir. 1999)
 - *U.S. Doe*, 488 F.3d 1154 (9th Cir. 2007)
 - *U.S. v. Julian*, 242 F.3d 1245 (10th Cir. 2001)
 - *U.S. v. Johnson*, 400 F.3d 187 (4th Cir. 2005) (restitution to treatment center), *but see U.S. v. Follett*, 269 F.3d 996 (9th Cir. 2001).

Additional Websites

- www.fd.org. – Federal Defender Site
- www.projectsafechildhood.gov – DOJ's Project Safe Childhood site
- www.csom.org - Center for Sex Offender Management
- www.ojp.gov/smart - SMART office webpage for registration information
- www.nsopr.gov - National Sex Offender Public Registry
- www.atsa.com - Association for Treatment of Sexual Abuse (ATSA)

Adam Walsh Act

- Sex Offender Registration and Notification Act (SORNA) part of the Adam Walsh Child Protection and Safety Act of 2006
- Creates a federal public registry website (www.nsopr.gov)
- Gives Attorney General the authority to set guidelines for jurisdictions – proposed guidelines require jurisdictions to maintain sex offender registries and public websites
- Creates the SMART office within DOJ
- Obliges sex offenders to register consistent with new federal standards

Adam Walsh Act, con't

- SORNA seeks to set a baseline federal standard for sex offender registry requirements
- Replaces prior sex offender registry system, known as the Wetterling Act
- Incentive for jurisdictions to comply is possible loss of some federal grants
- SORNA does not establish a federal sex offender registry
- New federal criminal offense for failure to register under SORNA (18 U.S.C. § 2250)

Required to Register

- All offenders convicted of offense that has an element involving sexual act or sex contact
- Convicted of federal offenses:
 - Chapter 109A, 110, 117 of Title 18
 - Sex trafficking offenses
 - Specified Federal offenses in Indian Country
 - Specified Military offenses
- Convicted of certain offenses against minors, including kidnapping/false imprisonment, child pornography possession/production/distribution

Who Is a Sex Offender under SORNA?

See 42 U.S.C. § 16911(1)-(8)

- Offenders classified into three tiers (Tier III the most serious)
- Offenders must register in up to four places:
 - Where they committed the offense (for initial registration if different from residence jurisdiction) (42 U.S.C. §16913)
 - Where they reside
 - Where they are employed
 - Where they go to school

Who is a Sex Offender (cont.)

- Tier III: aggravated sex abuse, abusive sex contact against minor under 13, kidnapping not by parent
- Tier II: sex trafficking, coercion and enticement, transportation for sexual activity, abusive sexual contact, solicitation of minor for prostitution, distribution or production of child pornography
- Tier I: other than Tier II or Tier III offender
- *See U.S. v. Byun*, 539 F.3d 982 (9th Cir. 2008)

Sex Offender Registration

- Must register before completing sentence or no more than three business days after sentencing (and keep current within 3 business days after a change of information)
- Statutory affirmative defense for “uncontrollable circumstances” (18 U.S.C. § 2250(b))

Classification of Sex Offender	Must Register For
Tier I	15 years (could be reduced to 10 years)
Tier II	25 years
Tier III	Life (could be reduced to 25 years)

Failure to Register as a Sex Offender

§2A3.5

- New guideline for 18 U.S.C. § 2250(a) offenses
- Statutory penalties:
 - 10 year statutory maximum
 - 5 year mandatory term of supervised release (see § 3583(k))

Failure to Register as a Sex Offender (cont.)

§2A3.5

- BOL determined by classification of sex offender
 - Tier III: BOL 16
 - Tier II: BOL 14
 - Tier I: BOL 12
- SOC (b)(1) if offense committed while in failure to register status
 - 8-level increase for sex offense against a minor victim
 - 6-level increase for sex offense against non-minor victim, or any other felony offense against a minor

Failure to Register as a Sex Offender (cont.)

§2A3.5

- 3-level decrease ((b)(2)) if defendant voluntarily corrected (or attempted to correct) failure to register status but could not due to uncontrollable circumstance
 - Conduct must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction detected the failure to register
 - *See U.S. v. Diaz*, 2009 WL 614514 (5th Cir. 2009)
 - Does not apply if defendant received increase at (b)(1)

Aggravated Offenses Relating to Registration as a Sex Offender

§2A3.6

- New guideline for new offenses
 - 18 U.S.C. § 2250(c) (committing crime of violence while in failure to register status); 5 year mandatory minimum and stat max 30 years
 - Must be consecutive to any § 2250(a) sentence