U.S. SENTENCING COMMISSION'S ANNUAL NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES

June 12, 2009 Breakout session: Child Pornography and Sex Offenses

Hon. John M. Roll,

Chief District Judge, District of Arizona

Partial case list of Ninth Circuit decisions pertaining to sentencing and supervised release condition issues raised in child pornography and sex offense cases

A. Enhancements

1. Sec. 2G2.2(b)(4) - Four level enhancement for child pornography depicting sadistic or masochistic conduct or depictions of violence

United States v. Holt, 510 F.3d 1007, 1011 (9th Cir. 2007)("[A] district court can apply the sadistic conduct enhancement any time images portray the penetration of prepubescent children by adult males because such images are necessarily

pleasureable for the participant and painful for the child)(citing *United States v. Reardon*, 349 F.3d 608, 614-15 (9th Cir. 2003))

2. Sec. 2G2.2(b)(5) - Five level enhancement for engaging in pattern of activity involving sexual abuse or exploitation of minor

United States v. Garner, 490 F.3d 739 (9th Cir. 2007)(molestations of step-children 35 years before solicitation of child pornography depicting parents molesting minor children sufficient to qualify for five level enhancement for engaging in pattern of activiting involving sexual abuse or exploitation)

3. Sec. 2G2.2(c)(1) - Sexually exploiting a minor by production of sexually explicit material applicable

United States v. Speelman, 431 F.3d 1226, 1231-1232 (9th Cir. 2005)(Sec. 2G2.2(c)(1), which applies if conduct involved causing, transporting, permitting or offering or seeking by advertisement a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, applicable here, even though such conduct not be prosecuted under *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003))

4. Sec. 4B1.5 - Repeat and Dangerous Sex Offender

United States v. Schlake, 178 F. App'x 755, 757 (9th Cir. 2006)(because Montana's child endangerment statute proscribes conduct that would not qualify as a basis for enhancement under sec. 4B1.5, enhancement based on defendant being a repeat and dangerous improper; although indictment re historical prior conviction alleged that defendant violated the child endangerment statute by encouraging a child to engage in sexual conduct, the Montana statute has been given a broader application than 18 U.S.C. sec. 2422(b))

B. Departure/Variance

1. Impact of *Booker*

"In *Gall [v. United States*, 128 S.Ct. 586, 591 (2007)], the Court noted that after *Booker* [543 U.S. 220 (2005)], appellate review of sentencing decisions is limited to determining whether they are reasonable." *United States v. Autery*, 555 F.3d 864, 868-869 (9th Cir. 2009).

"In the post-*Booker* era, district courts making sentencing decisions must make the Guidelines "the starting point and the initial benchmark" for their decisions." *Autery*, 555 F.3d at 871-872 (quoting *Gall*, 128 S. Ct.. At 596).

2. Conduct outside heartland

"While district courts are not required to impose a sentence within the Guidelines, *Booker*, 543 U.S. at 249-53), they must 'give serious consideration to the extent of any departure from the Guidelines,' and they must then 'explain [the] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justification.'" *Autery*, 555 F.3d at 871-72 (quoting *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008)).

United States v. Autery, 555 F.3d 864 (9th Cir. 2009)(affirming district court's downward departure to probation from 41-51 month guidelines and plea agreement providing for sentence within that range, based upon district court finding that defendant did not meet pedophile profile, showed he could live responsibly, had support of family, and had no criminal history, among other factors)(dissent by Judge Tashima stated that defendant "showed little indication of being anything other than a run-of-the-mill child pornographer," 555 F.3d at 879)

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002)(departure permissible below sentencing guidelines after district judge determined that the defendant's possession of child pornography was outside the heartland of such cases because the

pornography was "pretty minor" according to an expert witness, it had been automatically downloaded to the defendant's computer, and it had not been indexed)

3. Conduct not outside heartland

United States v. Thompson, 315 F.3d 1071, 1073-74 (9th Cir. 2002)(pointing out that "heartland" refers to "typical" and that cases outside the heartland are cases significantly different from the norm; reversing trial court's downward departure based upon defendant's attempt to conceal child pornography so as to not be easily accessible to others and absence of criminal history; defendant possessed 10,000 images and distributed over 47,000 images) (Judge Berzon concurring that case was not outside heartland, but observing that two additional factors - post-offense rehabilitation and diminished capacity - could justify downward departure)

4. Lack of awareness re automatic downloading

United States v. Kuchinski, 469 F.3d 853 (9th Cir. 2006)(defendant's lack of familiarity with computers and fact that automatic downloading of child pornography into cache had occurred was a mitigating factor)

5. Departure based on susceptibility to prison abuse

United States v. Parish, 308 F.3d 1025 (9th Cir. 2002)(departure was permissible because defendant, despite being 5'11" and 190 pounds, would be susceptible to abuse in prison)(Judge Graber, in dissent, pointed out that there was nothing in the record "to support a departure based on Defendant's physical, mnetal, or emotional state.")

C. Supervised Release Conditions

"[C]onditions of supervised release 'are permissible only if they are reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender.'" *United States v. Weber*, 451 F.3d 552, 558 (9th Cir. 2006)(quoting *United States v. T.M.*, 330 F.3d 1230, 1240 (9th Cir. 2003).

1. Sex offender treatment

United States v. Reardon, 349 F.3d 609, 619 (9th Cir. 2003)(sex offender treatment program as ordered by probation officer upheld as supervised release condition)

2. **Prohibition on possession of pornography**

United States v. Weber, 186 Fed. Appx. 751,753 (9th Cir. 2006)(prohibition on possession of "any materials that depict or describe 'sexually explicit conduct' as defined in 18 U.S.C. sec. 2256(2)" was a permissible supervised release condition)(citing *United States v. Reardon*, 349 F.3d 608, 619-620 (9th Cir. 2003)

United States v. Reardon, 349 F.3d 608,619-620 (9th Cir. 2003)(upholding ban on possession of "any materials depicting sexually explicit conduct as defined in 18 U.S.C. sec.2256(2)"; condition of supervised release furthered the goals of rehabilitation and protecting public).

United States v. Bee, 162 F.3d 1232, 1234-1235 (9th Cir. 1998)(district court did not err in ordering as a condition of supervised release that defendant possess no sexually stimulating material; First Amendment does not prohibit this condition for a sex offender when condition furthers goals of rehabilitation of defendant and protection of public).

Compare United States v. Antelope, 395 F.3d 1128, 1141-42 (9th Cir. 2005)("pornography" prohibition too vague, but encouraging district court to look

to language approved in *Reardon*); *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002)(a blanket prohibition on possession of "any pornography" violates due process because it is too vague to clearly inform a probationer as to what conduct is prohibited)

3. Loitering near places primarily used by children under the age of 18

United States v. Reardon, 349 F.3d 608, 620 (9th Cir. 2003)(defendant was sentenced for shipping child pornography over the internet; based on evidence that defendant posed a risk to children, the court permissibly ordered as a condition of supervised release that the defendant not loiter near places primarily used by children under the age of 18; although defendant claimed his interest in children was strictly fantasy, the district court was not required to accept this explanation; defendant collected articles re rape and murder of children and wrote graphic descriptions of child murders and sexual abuse)

Compare United States v. Guagliardo, 278 F.3d 868, 872-873 (9th Cir. 2002)(condition of supervised release that defendant "not reside in 'close proximity' to places frequented by children" is too vague because it leaves "close proximity" undefined)

4. No contact with children

United States v. Bee, 162 3rd 1232, 1235 (9th Cir.1998)(district court acted within broad discretion in ordering that defendant sentenced for abusive sexual contact, as a condition of supervised released, have no contact with children; also upheld was condition that defendant not loiter in places primarily used by children)

5. Prohibition of possession of computer access to any online service

United States v. Reardon, 349 F.3d 608, 620-621 (9th Cir. 2003)(court could prohibit possession or use of a computer with access to any online service without prior approval of probation; this condition was appropriate in light of fact that defendant was involved in e-mail transmissions of graphic child pornography and this condition furthered the goals of rehabilitation of defendant and protection of the public); *see also United States v. Antelope*, 395 F.3d 1128, 1142 (9th Cir. 2005)

6. Search and seizure of computer, computer related devices and peripheral equipment

United States v. Reardon, 349 F.3d 609, 621 (9th Cir. 2003)(upholding condition that "[all computers, computer related devices, and the peripheral equipment used by defendant shall [be] subject to search and seizure and the installation of search and/or

monitoring software and/or hardware, including unannounced seizure for the purpose of search," as serving the purpose of monitoring defendant's progress under supervision)

7. **Restitution to victim**

United States v. Doe, 488 F.3d 1154 (9th Cir. 2007)(restitution to victim of production of child pornography and engaging in sexual conduct with minor permissible if reasonable); *but see United States v. Follet*, 269 F.3d 996 (9th Cir. 2001)(although restitution could be ordered for victim's counseling services, because the counseling agency was not the victim, restitution to the agency could not be ordered, even if the agency provided the counseling free of charge to the victim)

8. **Lifetime supervised release**

United States v. Cope, 527 F.3d 944, 952 (9th Cir. 2008)(in sentencing defendant for possession of child pornography, "the lifetime term is not greater than necessary, 18 U.S.C. §3553(a), and is reasonable in light of the nature of Cope's offense, *id.* § 3553(a)(1), his history of having a sexual interest in children . . . and the need to protect the public . . . ."

D. Notice requirements re certain supervised release conditions

"Where a condition is not on the list of mandatory or discretionary conditions in the sentencing guidelines notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness." *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004). Such conditions include plethysmograph testing, polygraph testing, Abel assessment, and forced medication. *United States v. Cope*, 527 F.3d 944, 953 (9th Cir. 2008).

"If [] the condition implicates a particularly significant liberty interest of the defendant, then the district court must support its decision on the record with record evidence that the condition of supervised release sought to be imposed is 'necessary to accomplish one or more of the factors listed in sec. 3583(d)(1)' and 'involves no greater deprivation of liberty than is reasonably necessary.'" *United States v. Weber*, 451 F.3d 552, 561 (9th Cir. 2006)(quoting *United States v. Williams*, 356 F.3d 1045, 1057 (9th cir. 2004)).

1. Forced medication

United States v. Weber, 451 F.3d 552, 559-560 (9th Cir. 2006)(because a particularly significant liberty interest is at stake with regard to forced medication, "a district court is required, before ordering such a condition, to 'make on-the-record,

medically-grounded findings that court-ordered medication is necessary to accomplish one or more of the factors listed in 18 U.S.C. sec.3583(d)(1).'")(quoting *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004)and citing *Sell v. United States*, 539 U.S. 166 (2003))

2. Polygraph testing as part of sex offender treatment

United States v Antelope, 395 F.3d 1128 (9th Cir. 2005)(polygraph testing can be ordered as part of sex offender treatment if the defendant retains the right to invoke the Fifth Amendment in order to avoid compulsory self-incrimination)

3. Plethysmograph testing

"[P]enile plethysmograph is a test designed to measure a man's sexual response to various visual and auditory stimuli. More precisely, the male 'places on his penis a device that measures its circumference and thus the level of the subject's arousal as he is show sxually explicit slides or listens to sexually explicit audio 'scenes.'" *United States v. Weber*, 451 F.3d 552, 561-562 (9th Cir. 2006). "Today, plethysmograph testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure." *Id.* 451 F.3d at 562. "The American Psychiatric Associaton

has expressed reservations about the procedure," questioning its reliability, validity and susceptability to manipulation. *Id.*, 451 F.3d at 564.

United States v. Weber, 451 F.3d 552, 561-567 (9th Cir. 2006).(because plethysmograph testing is exceptionally intrusive in nature and duration, "[o]nly a finding that plethysmograph testing is likely given the defendant's characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant's significant liberty interest in his own bodily integrity")(Judge Noonan's concurrence would hold "the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived," 451 F.3d at 570)

4. Abel Assessment

"Another non-physiological test which also appears to enjoy routine use in sexual offender programs is Abel testing. Abel testing [] involves exhibiting photographs to an individual and measuring the length of time he looks at each picture." *United States v. Weber*, 451 F.3d 552, 567-568 (9th Cir. 2006).