

Child Pornography and Sex Offenses

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10:00 -11:30 and 1:00 - 2:30

Presentation Outline

- U.S. Sentencing Commission Report
- Guideline Issues
- Departures and Variances
- Supervised Release Conditions
- Failure to Register Offenses

U.S.S.C.

HelpLine

202-502-4545

Web Site

www.usssc.gov

Resources

- U.S. Sentencing Commission's February 27, 2013 Report to Congress: *Federal Child Pornography Offenses*
- “*Branded for Life by the Modern Scarlet Letters*” by John Rhodes and Daniel Donovan, *The Champion*, May 2014
- Department of Justice Child Exploitation and Obscenity Section

Resources

- U.S. Sentencing Commission's February 15, 2012 Child Pornography Hearing transcript
- U.S. Sentencing Commission's *The History of the Child Pornography Guidelines*
- Sex Offense Primers
 - *Commercial Sex Acts & Sexual Exploitation of Minors*
 - *Sexual Abuse & Failure to Register Offenses*

Sex Offense Statutes & Guidelines

§2A3.1	18 U.S.C. § 2241	Rape	
§2A3.2	18 U.S.C. § 2243	Stat. Rape	
§2A3.4	18 U.S.C. § 2244	Sex Abuse	
§2G1.1	18 U.S.C. § 1591	Sex Trafficking	
§2G1.3	18 U.S.C. §§ 2422 & 2423	Travel	
§2G2.1	18 U.S.C. § 2251	Production	
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Traffic, Receipt, Possession	6

Statutory Penalty Scheme for Child Porn Offenses

Mandatory Minimums and Statutory Maximums

Possession		Receipt/Distribution/ Transportation		Production	
1 st Time Offender	Recidivist	1 st Time Offender	Recidivist	1 st Time Offender	Recidivist*
No MM/ 10Y Max.; 20Y Max. if > age 12	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.

* Section 2251(e) has additional enhancements for recidivists with multiple priors

**Selected Findings
of the Commission's 2013
Child Pornography Report**

Typical Child Porn Offender

- Offender characteristics have changed little across time
- Typical offender :
 - White male
 - U.S. citizen
 - Educated
 - Employed
 - Early 40s
 - Little/no criminal record

Sentences

Guideline penalty ranges and average sentences have substantially increased, in part because of changes made by the PROTECT Act

Sentences

- Average sentence lengths increased from 54 months in 2004 to 95 months in 2010
- The rate of within-guideline sentences decreased: 83.2% in FY04; 40.2% in FY10 and 32.7% in FY11
- Lowest within-guidelines rate of any major offense type

Dangerous Behavior

A significant percentage of non-production child pornography offenders have known histories of sexually dangerous behavior

Dangerous Behavior

- “Criminal Sexually Dangerous Behavior” (CSDB)
 - “Contact” sex offenses
 - “Non-contact” sex offenses
 - Prior child pornography offenses (separated by an intervening arrest, conviction, or some other official intervention)
- Does not include non-criminal sexually dangerous behavior because it is not recorded consistently in presentence reports (PSR)

Dangerous Behavior

- Of the 1,654 §2G2.2 cases, 520 (31.4%) involved either a prior conviction or a finding of CSDB in the PSR
 - 581 including allegations
- Actual rate of CSDB is higher than known rate because child sex offenses are underreported

Known Recidivism

**General recidivism rate comparable to
recidivism rate of all federal offenders**

Known Recidivism

- Commission's study found that 30% of federal non-production child pornography offenders recidivated, although only 7% of them engaged in sexual recidivism
 - Study of 660 offenders sentenced in FY99-00 followed for an average of 8½ years
 - Most offenders who recidivated did so within the first 36 months

Child Porn Report Takeaways

- The non-production child pornography guideline (§2G2.2, the guideline for possession, receipt, and distribution of child porn) is outdated
 - *i.e.*, it does not account for recent technological changes in offense conduct
- The guideline does not reflect the variations in offenders' culpability and sexual dangerousness

Takeaways (cont.)

- Three primary sentencing factors best account for non-production offenders' culpability and dangerousness:
 - Content of offender's child pornography collection and the nature of an offender's collecting behavior

Takeaways (cont.)

- Degree of an offender’s involvement with other offenders – in particular, in an Internet child pornography “community”
- Offender’s history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense

Takeaways (cont.)

- Some recent studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders. Emerging research on the effectiveness of psycho-sexual treatment administered as part of the “containment model” is especially promising and warrants further study.

Report and Sentencing

- “The Commission's 2013 report does not render the non-production child pornography guidelines in § 2G2.2 invalid or illegitimate. Rather, the Commission recommends that Congress enact legislation providing the Commission with express authority to amend [§ 2G2.2]” The publication of the 2013 report does not change the statutory sentencing scheme, the applicable sentencing guidelines, or the binding precedent about § 2G2.2 in this Circuit.”
 - *U.S. v. Cubero*, 754 F.3d 888 (11th Cir. 2014)

§2G2.2: Trafficking/Receipt/Possession

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

- 2-level decrease (§2G2.2(b)(1)) for receipt if no intent to traffic or distribute material
- Cannot have conduct beyond receipt;
Defendant's burden to prove this
 - *U.S. v. Goluba*, 672 F.3d 304 (5th Cir. 2012)
 - *U.S. v. Fore*, 507 F.3d 412 (6th Cir. 2007)
 - *U.S. v. Burgess*, 576 F.3d 1078 (10th Cir. 2009)
 - *U.S. v. Cubero*, 754 F.3d 8888 (11th Cir. 2014)
(file sharing prevents reduction)

§2G2.2

Specific Offense Characteristics

- (b)(2) Pre-pubescent minor/minor under 12 (+2)
- (b)(3)(A)-(F) Distribution
 - To minor or distribution for pecuniary/other gain (+5)
 - Other distribution (+2)
- (b)(4) Sadism/masochism/other depictions of violence (+4)

§2G2.2

Specific Offense Characteristics (Cont.)

- (b)(5) Pattern of activity (+5)
- (b)(6) Use of computer (+2)
- (b)(7)(A)-(D) Number of images
 - 10-149 (+2)
 - 150-299 (+3)
 - 300-599 (+4)
 - 600+ (+5)

§2G2.2(b)(3): Distribution SOC

- Most common increase either 2 or 5- levels
- 6-level increase for distribution to minor
 - *U.S. v. Roybal*, 737 F.3d 621 (9th Cir. 2013)
- 5 levels for distribution for receipt/expectation of thing of value, even if not pecuniary gain (*e.g.*, trading images)
- File sharing enhancement normally either 2 or 5 levels (*e.g.*, Limewire or Frostwire)

§2G2.2(b)(3): Distribution SOC and File Sharing

- No knowledge requirement
 - *U.S. v. Baker*, 742 F.3d 618 (5th Cir. 2014)
 - *U.S. v. Ray*, 704 F.3d 1307 (10th Cir. 2013)
- Knowledge requirement
 - *U.S. v. Baldwin*, 743 F.3d 357 (2d Cir. 2014)
 - *U.S. v. McManus*, 734 F.3d 315 (4th Cir. 2014)
 - *U.S. v. Robinson*, 714 F.3d 466 (7th Cir. 2013)

§2G2.2(b)(3): Distribution SOC

- “Sharing child pornography on a file-sharing program alone does not trigger the trading enhancement. *United States v. Binney*, 562 F. App'x 376, (6th Cir.2014) (citing *United States v. McManus*, 734 F.3d 315, (4th Cir.2013); *United States v. Vadnais*, 667 F.3d 1206, (11th Cir.2012))”
- “Instead, we examine whether there is evidence, ‘direct or circumstantial,’ that the defendant ‘reasonably believed he would receive something of value by making his child pornography files available for distribution through a peer-to-peer network.’
– *U.S. v. Mabee*, 2014 WL 4337448 (6th Cir. 2014)³⁸

§2G2.2(b)(3): Distribution SOC

- “The facts in the record indicate that, at the very least, Vanlaar had the expectation that in distributing his child pornography files through GigaTribe that other users would return the favor and supply him with access to their files as well. In light of this and in consideration of *McManus*, we conclude that the district court did not clearly err in finding that Vanlaar possessed the requisite expectation necessary for applying the enhancement.”
 - *U.S. v. Vanlaar*, 2014 WL 3805680 (4th Cir. 2014)

File Sharing as Basis for Distribution SOC

- *U.S. v. Chiaradio*, 684 F.3d 265 (1st Cir. 2012) (+2)
- *U.S. v. Corbett*, 453 F. App'x 226 (3d Cir. 2011) (+5)
- *U.S. v. McManus*, 734 F.3d 315 (4th Cir. 2014) (remand)
- *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012) (+5)
- *U.S. v. Brunner*, 393 F. App'x 76 (4th Cir. 2010) (+2)
- *U.S. v. Layton*, 564 F.3d 330 (4th Cir. 2009) (+2)

File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Nielson*, 455 F. App'x 526 (5th Cir. 2011) (+2)
- *U.S. v. Onken*, 440 F. App'x 304 (5th Cir. 2011) (+5)

- *U.S. v. Mauck*, 469 F. App'x 424 (6th Cir. 2012) (+5)
- *U.S. v. Bolton*, 669 F.3d 780 (6th Cir. 2012) (+2)
- *U.S. v. Battaglia*, 624 F.3d 348 (6th Cir. 2010) (+5)
- *U.S. v. Darway*, 255 F. App'x 68 (6th Cir. 2007) (+2)

- *U.S. v. Carani*, 492 F.3d 867 (7th Cir. 2007) (+2)

File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Lynch*, 757 F.3d 780 (8th Cir. 2014) (+5)
- *U.S. v. Durham*, 618 F.3d 921 (8th Cir. 2010) (none)
- *U.S. v. Ultsch*, 578 F.3d 827 (8th Cir. 2009) (+5)
- *U.S. v. Griffin*, 482 F.3d 1008 (8th Cir. 2007) (+5)

- *U.S. v. Vallejos*, 742 F.3d 902 (9th Cir. 2014) (+2)

- *U.S. v. Geiner*, 498 F.3d 1104 (10th Cir. 2007) (+5)

File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Vadnais*, 667 F.3d 1206 (11th Cir. 2012) (+2)
(reversing +5)
- *U.S. v. Spriggs*, 666 F.3d 1284 (11th Cir. 2012) (+2)
(reversing +5)
- *U.S. v. DuFran*, 430 F. App'x 855 (11th Cir. 2011) (+2)
- *U.S. v. Gaughran*, 429 F. App'x 877 (11th Cir. 2011) (+5)

§2G2.2(b)(4): Sadistic/Masochistic/Violence SOC

- If offense involved material that portrays sadistic or masochistic conduct or other depictions of violence increase by 4 levels
- Application Note 2: SOC applies regardless of whether defendant specifically intended to possess, receive, or distribute such materials
 - *U.S. v. Maurer*, 639 F.3d 72 (3d Cir. 2011)
 - *U.S. v. Meschino*, 643 F.3d 1025 (7th Cir. 2011)

**§2G2.2(b)(4):
Sadistic/Masochistic/Violence SOC (cont.)**

- Courts apply broadly; most circuits have per se rule: if image involves something being inserted into young child, the SOC applies
 - *U.S. v. Hoey*, 508 F.3d 687 (1st Cir. 2007)
 - *U.S. v. Freeman*, 578 F.3d 142 (2^d Cir. 2009)
 - *U.S. v. Maurer*, 639 F.3d 72 (3^d Cir. 2011)
 - *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)

§2G2.2(b)(4):

Sadistic/Masochistic/Violence SOC (cont.)

- Courts apply broadly; most circuits have per se rule: if image involves something being inserted into young child, the SOC applies (cont.)
 - *U.S. v. Koch*, 625 F.3d 470 (8th Cir. 2010)
 - *U.S. v. Belflower*, 390 F.3d 560 (8th Cir. 2004)
 - *U.S. v. Holt*, 510 F.3d 1007 (9th Cir. 2007)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Kimler*, 335 F.3d 1132 (10th Cir. 2003)
 - *U.S. v. Hall*, 312 F.3d 1250 (11th Cir. 2002)
 - *See also, U.S. v. Burgess*, 684 F.3d 445 (4th Cir. 2012)

§2G2.2(b)(5): Pattern of Activity SOC

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels

§2G2.2(b)(5): Pattern of Activity (cont.)

- 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
 - during the course of offense
 - involved the same minor, or
 - resulted in a conviction for such conduct
 - can be unidentified, generalized individual (attempts)
 - *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012)
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)

§2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct
 - *U.S. v. Clark*, 685 F.3d 72 (1st Cir. 2012) (24 yrs)
 - *U.S. v. Woodward*, 277 F.3d 87 (1st Cir. 2002) (27 yrs)
 - *U.S. v. Olfano*, 503 F.3d 240 (3^d Cir. 2007) (16 yrs)
 - *U.S. v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (30 yrs)
 - *U.S. v. Quinn*, 257 F. App'x 864 (6th Cir. 2007) (30 yrs)
 - *U.S. v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
 - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007) (35 yrs)
 - *U.S. v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (35 yrs)
 - *U.S. v. Turner*, 626 F.3d 566 (11th Cir. 2010) (20 yrs)³⁹

§2G2.2(b)(5): Pattern of Activity (cont.)

- Recent circuit cases applying the enhancement
 - *U.S. v. Walpole*, 543 F. App'x 224 (3d Cir. 2013)
 - *U.S. v. Davis*, 751 F.3d 769 (6th Cir. 2014)
 - *U.S. v. Houston*, 2014 WL 863 (7th Cir. 2014)
 - *U.S. v. Poe*, 2014 WL 4116800 (8th Cir. 2014)
 - *U.S. v. Britt*, 2014 WL 3954010 (11th Cir. 2014)
 - *U.S. v. Worthey*, 716 F.3d 1107 (8th Cir. 2014)

§2G2.2(b)(5): Pattern of Activity (cont.)

- Can include attempts
 - *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012)
- Can include conduct when defendant was a minor
 - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013)

§2G2.2(b)(6): Use of a Computer

- Congressional Directive
- Not double counting
 - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013)
 - *U.S. v. Lewis*, 605 F.3d 395 (6th Cir. 2010)
 - *U.S. v. Tenuto*, 593 F.3d 695 (7th Cir. 2010)
 - *U.S. v. Kiefer*, 2014 WL 3635008 (9th Cir. 2014)

§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)

§2G2.2(c)(1) Cross Reference (cont.)

- *U.S. v. Castro-Valenzuela*, 304 F. App'x 986 (3d Cir. 2008)
- *U.S. v. Long*, 304 F. App'x 982 (3d Cir. 2008)
- *U.S. v. Cox*, 744 F.3d 305 (4th Cir. 2014)
- *U.S. v. Caudill*, 427 F. App'x 301 (5th Cir. 2011)
- *U.S. v. Zayas*, 2014 WL 3377797 (8th Cir. 2014)
- *U.S. v. Bauer*, 626 F.3d 1004 (8th Cir. 2010)
- *U.S. v. Shuler*, 598 F.3d 444 (8th Cir. 2010)
- *U.S. v. Starr*, 533 F.3d 985 (8th Cir. 2008)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)

Restitution

18 U.S.C. § 2259

Restitution in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710
(2014)

- “Restitution is proper under §2259 only to the extent the defendant’s offense proximately caused a victim’s losses. Applying the statute’s causation requirements in this case, victims should be compensated and defendants should be held to account for the their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others.”

Restitution in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710
(2014)

- “There are a variety of factors, district courts might consider in determining a proper amount of restitution, and it is neither necessary nor appropriate to prescribe a precise algorithm for determining restitution. But district courts might, as a starting point, determine the amount of the victim’s images, then set an award of restitution in consideration of factors that bear on the relative causal significance of the defendant conduct in producing those losses.”

Restitution Factors in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710
(2014)

- 1) the number of past criminal defendants found to have contributed to the victim's general losses;
- 2) reasonable predictions of the number of future offenders likely to be caught and convicted for crimes contributing to the victim's general losses;
- 3) any available and reasonably reliable estimate of the broader number of offenders involved;

Restitution in Child Porn Offenses

Paroline v. U.S., 134 S Ct. 1710
(2014)

- 4) whether the defendant reproduced or distributed images of the victim,
- 5) whether the defendant had any connection to the initial production of the images;
- 6) how many images of the victim the defendant possessed and other facts relevant to the defendant's relative causal role.”

Cases Discussing *Paroline* Factors

- *U.S. v. Rogers*, 2014 WL 2959282 (1st Cir. 2014)
 - Affirming \$3,150 restitution order for “Vicky”
- *U.S. v. Reynolds*, 2014 WL 4187936 (E.D. MI 2014)
 - District court ordered \$11,000 “Cindy” and \$15,500 to “Vicky”
- *U.S. v. Watkins*, 2014 WL 3966381 (E.D. CA 2014)
 - District court ordered \$2,191.74 to “Vicky”

Cases Discussing *Paroline* Factors

- *U.S. v. Galan*, 2014 WL 3474901 (D. OR 2014)
 - District court ordered \$3,433 in restitution to “Cindy”
- *U.S. v. Hernandez*, 2014 WL 2987655 (E.D. CA 2014)
 - District court ordered \$2,282.86 to “Vicky”
- *U.S. v. Crisostomi*, 2014 WL 3510215 (D. RI 2014)
 - District court ordered \$713.68 to “Vicky” & \$638.41 to “Cindy”

Departures and Variances

Factors Argued for Departures/Variations

- Psychosexual evaluations
- Risk of touching
- Military Service
- Length of time looking at child pornography
- Material in images (*e.g.*, babies in image)
- Age of victims and the age of the defendant

Factors Argued for Departures/Variations

- Computer sophistication
- Experts
- Rehabilitation
- Physical condition of defendant

“Policy Disagreement” or “Lack of Empirical Evidence” Argument in Child Porn Cases

- Compare
 - *U.S. v Dorvee*, 616 F.3d 174 (2d Cir. 2010)
 - *U.S. v. Grober*, 624 F.3d 592 (3d Cir. 2010)
 - *U.S. v. Henderson*, 649 F.3d 955 (9th Cir. 2011)
- With
 - *U.S. v. Miller*, 665 F.3d 114 (5th Cir. 2011)
 - *U.S. v Bistline I*, 665 F.3d 758 (6th Cir. 2012)
 - *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008)

Below Guideline Sentences Affirmed in Child Porn Cases

- *U.S. v. Grober*, 624 F.3d 592 (3d Cir. 2010)
 - Receipt of child porn
- *U.S. v. Rowan*, 530 F.3d 379 (5th Cir. 2008)
 - Possession of child porn
- *U.S. v. Duhon*, 541 F.3d 391 (5th Cir. 2008)
 - Possession of child porn

Below Guideline Sentences Affirmed in Child Porn Cases (cont.)

- *U.S. v. Richards*, 659 F.3d 527 (6th Cir. 2011)
 - Production and possession
- *U.S. v. Stall*, 581 F.3d 276 (6th Cir. 2009)
 - Possession of child porn
- *U.S. v. Beach*, 275 F. App'x 529 (6th Cir. 2008)
 - Transporting child porn
- *U.S. v. Grossman*, 513 F.3d 592 (6th Cir. 2008)
 - Possession of child porn

Below Guideline Sentences
Affirmed in Child Porn Cases (cont.)

- *U.S. v. Autery*, 555 F.3d 864 (9th Cir. 2009)
 - Possession of child porn

- *U.S. v. Huckins*, 529 F.3d 1312 (10th Cir. 2008)
 - Possession of child porn

Below Guideline Sentences Remanded in Child Porn Cases

- *U.S. v. DeSilva*, 613 F.3d 352 (2d Cir. 2010)
 - Receipt of child porn
- *U.S. v. Lychock*, 578 F.3d 214 (3d Cir. 2009)
 - Possession of child porn
- *U.S. v. Goff*, 501 F.3d 250 (3d Cir. 2007)
 - Possession of child porn
- *U.S. v. Morace*, 594 F.3d 340 (4th Cir. 2010)
 - Possession of child porn

Below Guideline Sentences Remanded in Child Porn Cases (cont.)

- *U.S. v. Bistline II*, 720 F.3d 631 (6th Cir. 2012)
 - Possession of child porn
- *U.S. v. Robinson*, 669 F.3d 767 (6th Cir. 2012)
 - Possession of child porn
- *U.S. v. Bistline I*, 665 F.3d 758 (6th Cir. 2012)
 - Possession of child porn
- *U.S. v. Christman*, 607 F.3d 1110 (6th Cir. 2010)
 - Possession of child porn
- *U.S. v. Camiscione*, 591 F.3d 823 (6th Cir. 2010)
 - Possession of child porn
- *U.S. v. Harris*, 339 F. App'x 533 (6th Cir. 2009)
 - Possession/distribution of child porn

Below Guideline Sentences Remanded in Child Porn Cases (cont.)

- *U.S. v. Kane*, 639 F.3d 1121 (8th Cir. 2011)
 - Aggravated sexual abuse
- *U.S. v. Irely*, 612 F.3d 1160 (11th Cir. 2010)
 - Production of child porn below range remanded
- *U.S. v. Pugh*, 515 F.3d 1179 (11th Cir. 2008)
 - Possession of child porn below range remanded
- ****U.S. v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009)***
 - Possession of child porn below range ***remanded upon defendant's appeal***

Above Guideline Sentences Affirmed in Child Porn Cases

- *U.S. v. Gilmore*, 599 F.3d 160 (2d Cir. 2010)
- *U.S. v. Martinucci*, 561 F.3d 533 (2d Cir. 2009)
- *U.S. v. McGowan*, 315 F. App'x 338 (2d Cir. 2009)

- *U.S. v. Larkin*, 629 F.3d 177 (3d Cir. 2010)
- *U.S. v. King*, 604 F.3d 125 (3d Cir. 2010)

- *U.S. v. Whorley*, 550 F.3d 326 (4th Cir. 2008)

- *U.S. v. McGehee*, 261 F. App'x 771 (5th Cir. 2008) ₆₂

Above Guideline Sentences Remanded in Child Porn Case

- *U.S. v. Chandler*, 732 F.3d 434 (5th Cir. 2013)
 - Production of child porn
- *U.S. v. Aleo*, 681 F.3d 290 (6th Cir. 2012)
 - Production of child porn

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 5 years to 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

Proposed 2014 Amendments

- Supervised Release
 - Failure to Register as a Sex Offender (18 U.S.C. § 2250) is *not* a “sex offense” for purposes of §5D1.2(b) (which recommends the maximum term of supervised release for a “sex offense”)

Term of Supervised Release

- Supervised release term can be imposed for life
 - *U.S. v. Oswald*, 2014 WL 4087199 (2d Cir. 2014)
 - *U.S. v. Hayes*, 445 F.3d 536 (2d Cir. 2006)
 - *U.S. v. Underwood*, 507 F. App'x 223 (3d Cir. 2012)
 - *U.S. v. Hayes*, 404 F. App'x 753 (4th Cir. 2010)

Term of Supervised Release (cont.)

- Supervised release term can be imposed for life
 - *U.S. v. Ellis*, 720 F.3d 220 (5th Cir. 2013)
 - *U.S. v. Rogers*, 531 F. App'x 597 (6th Cir. 2013)
 - *U.S. v. McGlothlin*, 391 F. App'x 542 (7th Cir. 2010)
 - *U.S. v. Demers*, 634 F.3d 892 (8th Cir. 2011)
 - *U.S. v. Apodaca*, 641 F.3d 1077 (9th Cir. 2011)
 - *U.S. v. Crowder*, 738 F.3d 1103 (9th Cir. 2013)
 - *U.S. v. Young*, 502 F. App'x 726 (10^h Cir. 2012)

Term of Supervised Release (cont.)

- Supervised release term can be imposed for life
 - *U.S. v. Everhart*, 562 F. App'x 937 (11th Cir. 2014)
 - *U.S. v. Moriarty*, 429 F.3d 1012 (11th Cir. 2005)

Term of Supervised Release (cont.)

- Supervised release term for life unreasonable
 - *U.S. v. Finch*, 482 F. App'x 840 (4th Cir. 2012) (court did not explain reasons for life)
 - *U.S. v. Fraga*, 704 F.3d 432(5th Cir. 2013) (court did not explain reasons)
 - *U.S. v. Inman*, 666 F.3d 1001 (6th Cir. 2012) (court did not explain why it imposed a life term of supervised release)

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) (“deterrence”), (a)(2)(C) (“protect public”), and (a)(2)(D) (“rehabilitation”)
- 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)

Individualized Conditions

- *U.S. v. Ramos*, 2014 WL 3938590 (1st Cir. 2014)
 - Where a defendant's offense did not involve the use of the internet or a computer, and he did not have a history of impermissible internet or computer use, a computer restriction here not appropriate

Considerations in Individualized Conditions

- Things to consider in imposing conditions
 - Did the crime involve a computer?
 - Did the offense involve using the computer to chat with a victim or other offenders?
 - Was the victim a child or an adult?
 - Does the defendant have children of his own?
 - What are his past offenses or allegations?
 - How long ago were the prior sex offenses?
 - Does the defendant really need substance abuse treatment?

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. Morales-Cruz*, 712 F.3d 71 (1st Cir. 2013)
 - *U.S. v. Sebastian*, 612 F.3d 47 (1st Cir. 2010)
 - *U.S. v. Zielinski*, 511 F. App’x 112 (2d Cir. 2013)
 - *U.S. v. Dupes*, 513 F.3d 338 (2d Cir. 2008)
 - *U.S. v. Perkins*, 207 F. App’x 559 (6th Cir. 2006)

Not Convicted of a “Sex Offense” (cont.)

- Courts have upheld the imposition of “sex offense” conditions even if the instant offense of conviction is not a sex offense (cont.)
 - *U.S. v. Ross*, 475 F.3d 871 (7th Cir. 2007)
 - *U.S. v. Kelly*, 677 F.3d 373 (8th Cir. 2012)
 - *U.S. v. Smart*, 472 F.3d 556 (8th Cir. 2006)
 - *U.S. v. Miles*, 411 F. App’x 126 (10th Cir. 2010)
 - *U.S. v. Vinson*, 147 F. App’x 763 (10th Cir. 2005)

Not Convicted of a “Sex Offense” (cont.)

- Courts **have remanded** the imposition of “sex offense” conditions if the instant offense of conviction is not a sex offense
 - *U.S. v. Dougan*, 684 F.3d 1030 (10th Cir. 2012) (17 year old conviction for sexual battery too old)
 - *U.S. v. Sharp*, 469 F. App’x 523 (9th Cir. 2013) (more than a decade old)
 - *U.S. v. Carter*, 463 F.3d 526 (6th Cir. 2006) (17 years old too remote)

Not Convicted of a “Sex Offense” (cont.)

- Courts have remanded the imposition of “sex offense” conditions if the instant offense of conviction is not a sex offense (cont.)
 - *U.S. v. Johnson*, 756 F.3d 532 (7th Cir. 2014) (15 years ago)
 - *U.S. v. Scott*, 270 F.3d 632 (8th Cir. 2001)
 - *U.S. v. Rogers*, 468 F. App’x 359 (4th Cir. 2012) (23 year old)

Explain Conditions

- “We have consistently required that district courts explain and justify conditions of supervised release. That is a district must state the reasons in open court for imposing a particular special condition so that the appellate court is not left to speculate about the reasons.”
– *U.S. v. Miller*, 594 F.3d 172 (3d Cir. 2010)

Recent Supervised Release Cases Remanded

- *U.S. v. Shannon*, 743 F.3d 496 (7th Cir. 2014)
 - Remand because court failed to explain why lifetime ban on possession of child porn
- *U.S. v. Poulin*, 745 F.3d 796 (7th Cir. 2014)
 - Remand on supervised conditions because the judge did not explain why the conditions should be imposed

Specific Conditions of Supervised Release for Sex Offenders

Restriction on Computer and Internet Use

Total Ban Upheld

- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001)
- *U.S. v. Mark*, 425 F.3d 505 (8th Cir. 2005)

Restriction on Computer and Internet Use (cont.)

Restrict Use With USPO Approval

- *U.S. v. Johnson*, 446 F.3d 272 (2d Cir. 2006)
- *U.S. v. Crandon*, 173 F.3d 122 (3d Cir. 1999)
- *U.S. v. Phillips*, 370 F. App'x 610 (6th Cir. 2010)

Restriction on Computer and Internet Use (cont.)

Restrict Use With USPO Approval (cont.)

- *U.S. v. Morais*, 670 F.3d 889 (8th Cir. 2012)
- *U.S. v. Demers*, 634 F.3d 982 (8th Cir. 2011)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
(vacating condition)
- *U.S. v. Crume*, 422 F.3d 728 (8th Cir. 2005)
(vacating condition only possession and receipt)

Restriction on Computer and Internet Use (cont.)

Restrict Use With USPO Approval (cont.)

- *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)
- *U.S. v. Love*, 593 F.3d 1 (D.C. Cir. 2010)

Ban on Computers

- *U.S. v. Malenya*, 736 F.3d 554 (D.C. Cir. 2013)
 - “But the record contains no evidence either that Malenya indulged in adult or child pornography, or that viewing adult pornography would increase the likelihood that he would again indulge in sex with non-adults—which, after all, he did not seek out in this case. With no evidence of a need for the restriction, it appears to be a more significant deprivation of liberty than is reasonably necessary.”

Restriction on Computer and Internet Use (cont.)

Total Ban Prohibited

- *U.S. v. Perazza-Mercado*, 553 F.3d 65 (1st Cir. 2009) (Internet not used to commit offense)
- *U.S. v. Sofsky*, 287 F.3d 122 (2d Cir. 2002)
- *U.S. v. Voekler*, 489 F.3d 139 (3d Cir. 2007)
- *U.S. v. Lantz*, 443 F. App'x 135 (6th Cir. 2011)

Restriction on Computer and Internet Use (cont.)

Total Ban Prohibited (cont.)

- *U.S. v. Holm*, 326 F.3d 872 (7th Cir. 2003)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
- *U.S. v. Sales*, 476 F.3d 732 (9th Cir. 2007)
- *U.S. v. White*, 244 F.3d 1199 (10th Cir. 2001)
- *U.S. v. Russell*, 600 F.3d 631 (D.C. Cir. 2010) ⁸⁷

No Contact with Minors

- *U.S. v Wolf Child*, 699 F.3d 1082 (9th Cir. 2012)
 - Because the fundamental right to familial association is a particularly significant liberty interest, the district court was required to follow enhanced procedural requirements before imposing conditions barring the defendant from residing in a house with someone under 18 and from associating with anyone who has children under 18. Here the court did not make the enhanced findings.

No Contact with Minors

- *U.S. v. Baker*, 2014 WL 2736016 (7th Cir. 2014)
 - Ban on no unsupervised contact with children vacated because no evidence he abused his own kids

Restrictions on Residing Near and/or Frequenting Locations Frequented by Children

- *U.S. v. Macmillen*, 544 F.3d 71 (2d Cir. 2008)
- *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 U.S. v. Raftopoulos, 254 F. App'x 829 (2d Cir.
2007)

Restrictions on Residing Near and/or Frequenting Locations Frequented by Children (cont.)

- *U.S. v. Paul*, 274 F.3d 155 (5th Cir. 2001)
(def. must avoid places, areas, and establishments frequented by minors)
- *U.S. v. Schaefer*, 675 F.3d 1122 (8th Cir. 2012)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
- *U.S. v. Ristine*, 335 F.3d 692 (8th Cir. 2003)

Restrictions on Residing Near and/or Frequenting Locations Frequented by Children (cont.)

- *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
(def. cannot loiter within 100 feet of area frequented by children)
- *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)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)
(same)

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. 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. Teeple*, 447 F. App'x 712 (6th Cir. 2012)
- *U.S. v Sines*, 303 F.3d 793 (7th Cir. 2002)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)
- *U.S. v. Begay*, 631 F.3d 1168 (10th Cir. 2011)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)

Participate in Mental Health or Sex Treatment Program

- *U.S. v. Prochner*, 417 F.3d 54 (1st Cir. 2005)
- *U.S. v. Miller*, 594 F.3d 172 (3d Cir. 2010)
- *U.S. v. Teeple*, 447 F. App'x 712 (6th Cir. 2012)
- *U.S. v. Baker*, 2014 WL 2736016 (7th Cir. 2014)
- *U.S. v. Wiedower*, 634 F.3d 490 (8th Cir. 2011)
- *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008)
- *U.S. v. Lopez*, 258 F.3d 1053 (9th Cir. 2001)
- *U.S. v. Morgan*, 44 F. App'x 881 (10th Cir. 2002)
- *U.S. v. Zinn*, 321 F.3d 1084 (11th Cir. 2003)

Ban on Possession of Sexually Explicit Materials

- *U.S. v. Magner*, 455 F. App'x 131 (2d Cir. 2012)
 - Our cases hold that in the context of child pornography convictions, the term “pornography” in a condition of supervised release should be interpreted in light of the definition of pornography in 18 U.S.C. § 2256, which is sufficiently clear to defeat the vagueness argument

Ban on Possession of Sexually Explicit Materials

- *U.S. v. Lantz*, 443 F. App'x 135 (6th Cir. 2011)
 - ban on material that “depicts or alludes to sexual activity” is overly broad.
 - ban on any material depicts minors under 18 too broad because not limited to child porn
- *U.S. v. Deatherage*, 682 F.3d 755 (8th Cir. 2012) (ban acceptable because likely abuse of children)
- *U.S. v. Olsen*, 667 F.3d 958 (8th Cir. 2012)
- *U.S. v. Bender*, 566 F.3d 748 (8th Cir. 2009)

Other Conditions

- Penile plethysmograph
 - *U.S. v. McLaurin*, 731 F.3d 258 (2d Cir. 2013)
(violates due process)
 - *U.S. v. Dotson*, 324 F.3d 256 (4th Cir. 2003)
(acceptable condition)
 - *U.S. v. Weber*, 451 F.3d 552 (9th Cir. 2006)
(court must make individualized finding before ordering as a condition)

Other Conditions (cont.)

- Abel Test
 - *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008))
- Prescribed medication
 - *U.S. v. Cope*, 527 F.3d 944 (9th Cir. 2008) (court must make individualized finding)
 - *U.S. v. Mike*, 632 F.3d 686 (10th Cir. 2011) (acceptable)

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. Prochner*, 417 F.3d 54 (1st Cir. 2005)
 - *U.S. v. Gill*, 523 F.3d 107 (2^d Cir. 2008)
 - *U.S. v. Carter*, 652 F.3d 894 (8th Cir. 2011)

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. Mike*, 632 F.3d 686 (10th Cir. 2011)
(need to make specific finding)

Seventh Circuit Best Practices

- *U.S. v. Siegel*, 753 F.3d 705 (7th Cir. 2014)
 - Require probation service to communicate its recommendations for conditions of supervised release to defense at least 2 weeks before sentencing hearing
 - Make an independent judgment regardless of plea agreement
 - Determine appropriateness with reference to the PARTICULAR conduct, character of the defendant rather than on the basis of loose generalizations about the defendant's crime and criminal history

Seventh Circuit Best Practices

- *U.S. v. Siegel*, 753 F.3d 705 (7th Cir. 2014)
 - Make sure that each condition imposed is simply worded because the defendant is not normally a lawyer and when released from prison the defendant will not have a lawyer
 - Defendant should meet with judge on the eve of his release from prison to remind defendant of the conditions

Sexual Deviancy Evaluation

- *U.S. v. Bainbridge*, 746 F.3d 943 (9th Cir. 2014)
 - A court can impose a sexual deviancy evaluation as a condition of supervised release even if the original offense was not a sex offense
 - No change in circumstances since the original supervised release conditions are needed

Failure to Register Offenses: 18 U.S.C. § 2250 and §2A3.5

Failure to Register

§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

- SOC (b)(2) if defendant voluntarily (A) corrected the failure to register or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels

Tiers

- 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

§2A3.5 Tier Cases

- *U.S. v. Backus*, 550 F. App'x 260 (6th Cir. 2014)
 - FL sexual battery upon child under 16 was a Tier II offense
- *U.S. v. Cabrera-Guiterrez*, 756 F.3d 1125 (9th Cir. 2014)
 - OR sexual abuse in 2nd degree is not Tier III offense and court could not use modified approach because statute was not divisible
- *U.S. v. Forster*, 549 F. App'x 757 (10th Cir. 2013)
 - OH gross sexual imposition is a Tier III offense

§2A3.5 Tier Cases

- *U.S. v. Stock*, 685 F.3d 621 (6th Cir. 2012)
 - IN sexual battery not a Tier III offender
 - “It is far from clear whether a categorical approach should be applied in the SORNA context”
- *U.S. v. Bango*, 386 F. App’x 50 (3rd Cir. 2012)
 - FL battery is a Tier III
- *U.S. v. Taylor*, 644 F.3d 573 (7th Cir. 2011)
 - Sodomy is a Tier III under modified approach

§2A3.5(b)(1) Cases

- *U.S. v. Williams*, 2014 WL 4116815 (11th Cir. 2014)
 - 6-level increase for committing sex offense vs. victim while in failure to register status applied
- *U.S. v. Lott*, 750 F.3d 214 (2d Cir. 2014)
 - 8-level increase applied

§2A3.5(b)(1) Cases

- *U.S. v. Johnson*, 743 F.3d 196 (7th Cir. 2014)
 - 6-level increase for committing sex offense against a victim while in failure to register status did not apply because offense did not involve force
- *U.S. v. Bevins*, 430 F. App'x 550 (8th Cir. 2011)
 - 8-level increase for sex offense vs. minor applied

§2A3.5 Reduction Cases

- *U.S. v. Forster*, 549 F. App'x 757 (10th Cir. 2013)
 - §2A3.5(b)(2) reduction did not apply
- *U.S. v. Green*, 505 F. App'x 65 (2d Cir. 2012)
 - 3-level decrease not available to defendant who did not register after a year
- *U.S. v. Diaz*, 313 F. App'x 735 (5th Cir. 2009)
 - Defendant not eligible for 3-level decrease because he did not voluntarily attempt to register

§2A3.5 Cases

- *U.S. v. McGee*, 559 F. App'x 323 (5th Cir. 2014)
 - Above guideline in failure to register affirmed
- *U.S. v. Rosario*, 535 F. App'x 662 (10th Cir. 2011)
 - Above guideline in failure to register affirmed
- *U.S. v. Myers*, 598 F.3d 474 (8th Cir. 2010)
 - Court can use prior conviction at both §2A3.5 & §4A1.1