



# Child Pornography Offenses

U.S. Sentencing Commission

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# Resources



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# Commission's Website

- Sex Offense Primers
  - *Commercial Sex Acts & Sexual Exploitation of Minors*
  - *Sexual Abuse & Failure to Register Offenses*
  - Also see: *Departure & Variance Primer*
- Statistical information



## Commission's Website (cont.)

- U.S. Sentencing Commission's October 2009 *The History of the Child Pornography Guidelines*
- U.S. Sentencing Commission's February 15, 2012 Child Pornography Hearing transcript and written testimony



## Commission's Website (cont.)

- U.S. Sentencing Commission's February 27, 2013 Report to Congress: *Federal Child Pornography Offenses*
- "USSC Update: Recent Congressional Reports," May 1, 2013 - the second half of this recorded webcast has an in-depth discussion of the Commission's child pornography Report to Congress





# Overview: Selected §2G Guidelines



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# Main 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
§2G1.3	18 U.S.C. §§ 2422 & 2423	“Travel” Offenses
§2G2.1	18 U.S.C. § 2251	CP: Production
§2G2.2	18 U.S.C. §§ 2252 & 2252A	CP: Traffic, Receipt, Possession





# Statutory Penalty Scheme for Child Porn Offenses

## Mandatory Minimums and Statutory Maximums

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

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





# Application Issues

## §2G2.2: Trafficking/Receipt/Possession



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## §2G2.2: Trafficking/Receipt/Possession

- Base offense level depends on offense of conviction:
  - 18 for possession offenses
  - 22 for receipt or trafficking offenses
- Note: 5-year mandatory minimum for receipt & trafficking offenses (18 U.S.C. §§ 2252 & 2252A)



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

12

- 2-level decrease (§2G2.2(b)(1)) for receipt if no intent to traffic or distribute material
- Cannot have offense-related conduct beyond receipt; defendant's burden to prove this
  - *U.S. v. Goluba*, 672 F.3d 304 (5<sup>th</sup> Cir. 2012)
  - *U.S. v. Fore*, 507 F.3d 412 (6<sup>th</sup> Cir. 2007)
  - *U.S. v. Burgess*, 576 F.3d 1078 (10<sup>th</sup> Cir. 2009)



## §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
- 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.*, P2P file-sharing programs like Frostwire)



## §2G2.2(b)(3): Distribution SOC

- No knowledge Requirement
  - *U.S. v. Baker*, 742 F.3d 618 (5<sup>th</sup> Cir. 2014)
  - *U.S. v. Ray*, 704 F.3d 1307 (10<sup>th</sup> Cir. 2013)
  - *U.S. v. Creel*, 783 F.3d 1357 (11<sup>th</sup> Cir. 2015)
- Knowledge requirement
  - *U.S. v. Baldwin*, 743 F.3d 357 (2d Cir. 2014)
  - *U.S. v. McManus*, 734 F.3d 315 (4<sup>th</sup> Cir. 2014)
  - *U.S. v. Robinson*, 714 F.3d 466 (7<sup>th</sup> Cir. 2013)





# File Sharing as Basis for Distribution SOC

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



## File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Nielson*, 455 F. App'x 526 (5<sup>th</sup> Cir. 2011) (+2)
- *U.S. v. Onken*, 440 F. App'x 304 (5<sup>th</sup> Cir. 2011) (+5)
  
- *U.S. v. Mauck*, 469 F. App'x 424 (6<sup>th</sup> Cir. 2012) (+5)
- *U.S. v. Bolton*, 669 F.3d 780 (6<sup>th</sup> Cir. 2012) (+2)
- *U.S. v. Battaglia*, 624 F.3d 348 (6<sup>th</sup> Cir. 2010) (+5)
- *U.S. v. Darway*, 255 F. App'x 68 (6<sup>th</sup> Cir. 2007) (+2)
- *U.S. v. Carani*, 492 F.3d 867 (7<sup>th</sup> Cir. 2007) (+2)



## File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Lynch*, 2014 WL 3033333 (8<sup>th</sup> Cir. 2014) **(+5)**
- *U.S. v. Durham*, 618 F.3d 921 (8<sup>th</sup> Cir. 2010) **(none)**
- *U.S. v. Ultsch*, 578 F.3d 827 (8<sup>th</sup> Cir. 2009) **(+5)**
- *U.S. v. Griffin*, 482 F.3d 1008 (8<sup>th</sup> Cir. 2007) **(+5)**
  
- *U.S. v. Vallejos*, 742 F.3d 902 (9<sup>th</sup> Cir. 2014) **(+2)**
  
- *U.S. v. Geiner*, 498 F.3d 1104 (10<sup>th</sup> Cir. 2007) **(+5)**



## File Sharing as Basis for Distribution SOC (cont.)

- *U.S. v. Vadnais*, 667 F.3d 1206 (11<sup>th</sup> Cir. 2012) **(+2)** (reversing **+5**)
- *U.S. v. Spriggs*, 666 F.3d 1284 (11<sup>th</sup> Cir. 2012) **(+2)** (reversing **+5**)
- *U.S. v. DuFran*, 430 F. App'x 855 (11<sup>th</sup> Cir. 2011) **(+2)**
- *U.S. v. Gaughran*, 429 F. App'x 877 (11<sup>th</sup> 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 (7<sup>th</sup> Cir. 2011)



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

- Courts apply broadly – virtually all circuits have per se rule: if image involves something being inserted into young child, the SOC applies
  - *U.S. v. Koch*, 625 F.3d 470 (8<sup>th</sup> Cir. 2010)
  - *U.S. v. Belflower*, 390 F.3d 560 (8<sup>th</sup> Cir. 2004)



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

- *U.S. v. Hoey*, 508 F.3d 687 (1<sup>st</sup> Cir. 2007)
- *U.S. v. Freeman*, 578 F.3d 142 (2<sup>d</sup> Cir. 2009)
- *U.S. v. Maurer*, 639 F.3d 72 (3<sup>d</sup> Cir. 2011)
- *U.S. v. Lyckman*, 235 F.3d 234 (5<sup>th</sup> Cir. 2000)
- *U.S. v. Groenendal*, 557 F.3d 419 (6<sup>th</sup> Cir. 2009)
- *U.S. v. Myers*, 355 F.3d 1040 (7<sup>th</sup> Cir. 2004)



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

- *U.S. v. Koch*, 625 F.3d 470 (8<sup>th</sup> Cir. 2010)
- *U.S. v. Belflower*, 390 F.3d 560 (8<sup>th</sup> Cir. 2004)
- *U.S. v. Holt*, 510 F.3d 1007 (9<sup>th</sup> Cir. 2007)
- *U.S. v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003)
- *U.S. v. Kimler*, 335 F.3d 1132 (10<sup>th</sup> Cir. 2003)
- *U.S. v. Hall*, 312 F.3d 1250 (11<sup>th</sup> Cir. 2002)
- *See also U.S. v. Burgess*, 684 F.3d 445 (4<sup>th</sup> 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 (4<sup>th</sup> 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 (1<sup>st</sup> Cir. 2012) (24 yrs)
  - *U.S. v. Woodward*, 277 F.3d 87 (1<sup>st</sup> Cir. 2002) (27 yrs)
  - *U.S. v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (16 yrs)
  - *U.S. v. Bacon*, 646 F.3d 218 (5<sup>th</sup> Cir. 2011) (30 yrs)
  - *U.S. v. Quinn*, 257 F. App'x 864 (6<sup>th</sup> Cir. 2007) (30 yrs)



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

- No time limit on conduct (cont.)
  - *U.S. v. Lovaas*, 241 F.3d 900 (7<sup>th</sup> Cir. 2001) (26 yrs)
  - *U.S. v. Woodard*, 694 F.3d 950 (8<sup>th</sup> Cir. 2012) (19 yrs)
  - *U.S. v. Garner*, 490 F.3d 739 (9<sup>th</sup> Cir. 2007) (35 yrs)
  - *U.S. v. Lucero*, 747 F.3d 1242 (10<sup>th</sup> Cir. 2014) (35 yrs)
  - *U.S. v. Turner*, 626 F.3d 566 (11<sup>th</sup> Cir. 2010) (20 yrs)



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

- Can include attempts
  - *U.S. v. Strieper*, 666 F.3d 288 (4<sup>th</sup> 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” even in era when overwhelming majority offenders use computers
  - *U.S. v. Kiefer*, 2014 WL 3635008 (9<sup>th</sup> Cir. 2014)
  - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013)



## §2G2.2(b)(7): Images SOC

### Number of Images:

- |                 |                  |
|-----------------|------------------|
| • 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 one image
  - *U.S. v. McNerney*, 636 F.3d 772 (6<sup>th</sup> Cir. 2011) (duplicate digital images should be counted separately)
  - *U.S. v. Sampson*, 606 F.3d 505 (8<sup>th</sup> Cir. 2010)





## “Images” Instruction (cont.)

- Each video, video-clip movie, or similar recording shall be considered to have 75 images
- Thumbnail images created by video editing process when videos reviewed and edited could be considered to determine images
  - *U.S. v. Nissen*, 666 F.3d 486 (8<sup>th</sup> Cir. 2012)



# VULNERNABLE VICTIM ENHANCEMENT (when images involve babies or toddlers)

- Circuit split over where USSG § 3A1.1(b):
  - *U.S. v. Dowell*, 771 F.3d 162 (4<sup>th</sup> Cir. 2014) (vulnerable victim enhancement improper double-counting where defendant received enhancement for child under 12 years old under USSG §2G2.2(b)(2))
  - *U.S. v. Jenkins*, 712 F.3d 209 (5<sup>th</sup> Cir.2013) & *U.S. v. Holt*, 510 F.3d 1007 (9<sup>th</sup> Cir. 2007) (not considered improper double-counting)





# Departures and Variances



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# Factors Argued for Departures/Variations (Upward and Downward)

- Psychosexual evaluations
- Risk of engaging in conduct sex offenses (low or high risk)
- Length of time looking at child pornography and collecting behaviors (*e.g.*, cataloguing images)
- Material in images (*e.g.*, babies in image)
- Age of victims and the age of the defendant



# Factors Argued for Departures/Variations

- Military Service
- Computer sophistication (or lack thereof)
- Findings of Forensic Experts
- Rehabilitation (*e.g.*, successful sex offender treatment)
- 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 (9<sup>th</sup> Cir. 2011)

- With

- *U.S. v Miller*, 665 F.3d 114 (5<sup>th</sup> Cir. 2011)
- *U.S. v Bistline I*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)
- *U.S. v Pugh*, 515 F.3d 1179 (11<sup>th</sup> 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 (5<sup>th</sup> Cir. 2008)
  - Possession of child porn
- *U.S. v. Duhon*, 541 F.3d 391 (5<sup>th</sup> Cir. 2008)
  - Possession of child porn



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

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





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

- *U.S. v. Autery*, 555 F.3d 864 (9<sup>th</sup> Cir. 2009)
  - Possession of child porn
- *U.S. v. Huckins*, 529 F.3d 1312 (10<sup>th</sup> 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 (4<sup>th</sup> Cir. 2010)
  - Possession of child porn



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

- *U.S. v. Bistline II*, 2013 WL 3214580 (6<sup>th</sup> Cir. 2012)
  - Possession of child porn
- *U.S. v. Robinson*, 669 F.3d 767 (6<sup>th</sup> Cir. 2012)
  - Possession of child porn
- *U.S. v. Bistline I*, 665 F.3d 758 (6<sup>th</sup> Cir. 2012)
  - Possession of child porn
- *U.S. v. Christman*, 607 F.3d 1110 (6<sup>th</sup> Cir. 2010)
  - Possession of child porn
- *U.S. v. Camiscione*, 591 F.3d 823 (6<sup>th</sup> Cir. 2010)
  - Possession of child porn
- *U.S. v. Harris*, 339 F. App'x 533 (6<sup>th</sup> Cir. 2009)
  - Possession/distribution of child porn



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

- *U.S. v. Kane*, 639 F.3d 1121 (8<sup>th</sup> Cir. 2011)
  - Aggravated sexual abuse
- *U.S. v. Irey*, 612 F.3d 1160 (11<sup>th</sup> Cir. 2010)
  - Production of child porn below range remanded
- *U.S. v. Pugh*, 515 F.3d 1179 (11<sup>th</sup> 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 (4<sup>th</sup> Cir. 2008)
  
- *U.S. v. McGehee*, 261 F. App'x 771 (5<sup>th</sup> Cir. 2008)



## Above Guideline Sentences Remanded in Child Porn Case

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





# Restitution

## 18 U.S.C. § 2259



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# 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 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 (cont.)

*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 in Child Porn Offenses (cont.)

*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 (cont.)

*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;



# Restitution in Child Porn Offenses (cont.)

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

6. How many images of the victim the defendant possessed and other facts relevant to the defendant's relative causal role.”
7. Other facts relevant to defendant's causal role



# Appellate Cases Discussing *Paroline* Factors

- *U.S. v. Rogers*, 758 F.3d 37 (1<sup>st</sup> Cir. 2014)
  - Affirming \$3,150 restitution order for “Vicky”
- *U.S. v. Hagerman*, 586 F. App’x 64 (2d Cir. 2014)
  - \$3,281 award affirmed



# Appellate Cases Discussing *Paroline* Factors

- *U.S. v. Beckmann*, 786 F.3d 672 (8<sup>th</sup> Cir. 2015)
  - Court did not err in ordering restitution of \$9,000 (\$3,000 per victim)
- *U.S. v. Dunn*, 777 F.3d 1171 (10<sup>th</sup> Cir. 2015)
  - Remanding \$583,9555 award to “Vicky”



# District Cases Discussing *Paroline* Factors

- *U.S. v. Monge*, 2015 WL 787099 (C.D. CA 2015)
  - District court ordered \$21,000 to 7 victims (\$3,000 each)
- *U.S. v. Randjelovich*, 2015 WL 4095655 (E.D. CA 20154)
  - Court ordered \$4,000 to “Angela” & \$1,000 to “Andy” and \$6,000 to “Sarah”
- *U.S. v. Hite*, 2015 WL 3941513 (D. DC 2015)
  - District court ordered \$16,750 to 5 victims



# District Cases Discussing *Paroline* Factors

- *U.S. v. Crisostomi*, 31 F. Supp.3d 361 (D. RI 2014)
  - Court ordered \$713.68 to “Vicky” & \$638.41 to “Cindy”
- *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 2987665 (E.D. CA 2014)
  - District court ordered \$2,282.86 to “Vicky”





# District Cases Discussing *Paroline* Factors

- *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. Miner*, 2014 WL 4816230 (N.D.N.Y 2014)
  - Court ordered \$2000 to “Jblonde” & \$3,065 to “Andy”
- *U.S. v. Watkins*, 2014 WL 3966381 (E.D. CA 2014)
  - District court ordered \$2,191.74 to “Vicky”



# DISPUTED CONDITIONS OF SUPERVISION IN SEX OFFENDER CASES

- Computer usage restrictions
- No pornography or even materials depicting nudity or sexually explicit literature
- Certain sex offender treatment modalities (*e.g.*, penile plethysmograph)
- Polygraph requirement
- Warrantless, suspicionless search condition



