

2017  
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Seminar

## Sex Offenses: Selected Cases

Selected Case Law Related to Analyzing Supervised Release Conditions and Restitution in sex offenses cases. This document also discusses cases related to sex offense recidivist statutes.

### Statutes & Guidelines Implicated

**18 U.S.C. § 3583(d)**  
**18 U.S.C. § 3583(k)**  
**§§5D1.1 – 5D1.3**

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### Common Pitfalls in Supervised Release Conditions for Sex Offense Cases

Court needs to provide notice and explanation regarding imposition of special conditions of supervised release.

Court should examine length of time between instant offense and any prior sexual misconduct.

Conditions that involve fundamental liberties (e.g., association with own children, residency restrictions) need more detailed explanation than other conditions.

If a defendant is convicted of failure to register as a sex offender, court should determine if the prior sex offense conviction involved a computer.

### Contact with Minors

*U.S. v. Fey*, 834 F.3d 1 (1st Cir. 2016). Condition restricting the defendant's contact with children only upon approval of the probation officer was vague and overly broad as the defendant was convicted of failure to register as a sex offender based on a rape conviction 17 years prior, where the victim was 16 years old. The condition applied to contact with all minor children yet there was no evidence the defendant was a danger to young children.

*U.S. v. Sainz*, 827 F.3d 602 (7th Cir. 2016). Condition prohibiting any contact with children was too vague as it would have prevented the defendant from buying a hamburger at a restaurant that employs 16 and 17 year old minors.

*U.S. v. Warren*, 843 F.3d 275 (7th Cir. 2016). Condition barring defendant from associating or communicating with a minor without express permission of minor's parent or guardian affirmed because his conviction for distributing child pornography included conduct involving posing on an internet forum, soliciting new child pornography images, and encouraging others to post images on the internet.

*U.S. v. Shultz*, 845 F.3d 879 (8th Cir. 2017). Condition restricting defendant's contact with minor children without written approval from probation officer was reasonable because he was originally convicted of having a sexual relationship with a 14-year old girl when he was 23 years of age, and he had other convictions for violating no-contact orders with other minor females.

*U.S. v. Woodall*, 782 F.3d 383 (8th Cir. 2015). Condition prohibiting contact with minors without probation officer approval affirmed based on past sex offenses (including abusing his 15 year old stepsister) and never having completed a sex-offender treatment program.

*U.S. v. LeCompte*, 800 F.3d 1209 (10th Cir. 2015). Restriction on minor prohibition remanded because court did not explain how

applying the minor prohibition condition to the conduct here would achieve the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation.

*U.S. v. Bear*, 769 F.3d 1221 (10th Cir. 2014). Restriction of contact with his children violated defendant's constitutional liberty interest in relationship with his children.

*U.S. v. Burns*, 775 F.3d 1221 (10th Cir. 2014). Supervised release condition requiring approval to contact own daughter remanded because court did not make particularized finding.

### Viewing Pornography

*U.S. v. Gall*, 829 F.3d 64 (1st Cir. 2016). Condition prohibiting defendant from possessing adult pornography and from entering any location where such pornography is available was remanded because court did not explain why this condition was imposed, whether it was reasonably related to the need for treatment, or whether it was necessary.

*U.S. v. Medina*, 779 F.3d 55 (1st Cir. 2015). "Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here... fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. There may well be a reason to impose a pornography ban in this case. But if so, the District Court has not yet provided it."

*U.S. v. Huor*, 852 F.3d 392 (5th Cir. 2017). Court incorrectly imposed condition limiting the defendant's right to possess and view sexually stimulating materials. Defendant's prior rape of a four-year old took place 20 years ago and the court did not rely on any of the defendant's parole violations (which the court could examine on remand).

*U.S. v. Sainz*, 827 F.3d 602 (7th Cir. 2016). Condition barring access to sexually explicit material was too vague.



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*U.S. v. Sherwood*, 850 F.3d 931 (8th Cir. 2017). Supervised release condition related to allowing probation officer access to any requested financial information and from incurring new credit charges without approval of probation officer was financial information was abuse of discretion when defendant was convicted of sex offense.

*U.S. v. Martinez-Torres*, 795 F.3d 1233 (10th Cir. 2015). “We conclude that on this record the district court abused its discretion in imposing the special condition prohibiting Defendant from viewing or possessing materials depicting or describing sexually explicit conduct.”

*U.S. v. Poignant*, --F. App'x--, 2017 WL 191923 (11th Cir. 2017). (unpublished) Condition prohibiting defendant from viewing, possessing, or producing visual depictions of adults engaged in sexually explicit conduct was affirmed as court found his experiences with adult pornography were linked to his sexual interest in children.

### Computer Restrictions

*U.S. v. Hinkel*, 837 F.3d 111 (1st Cir. 2016). Condition prohibiting defendant from possessing or using a computer or having access to any online service without prior approval was too broad. Condition barring defendant from entering a chat room or sending instant messages without approval was also too broad.

*U.S. v. Duke*, 788 F.3d 392 (5th Cir. 2015). Condition prohibiting defendant from accessing computer for rest of his life was unreasonable. Lifetime ban on association with minors for life was overbroad.

*U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015). Supervised release condition requiring software installation improper because it was not related to defendant's failure to register conviction when his only prior sex offense conviction was for sexual assault of 14 year old, which did not involve a computer.

*U.S. v. Dunn*, 777 F.3d 1171 (10th Cir. 2015). Condition requiring a defendant convicted of possessing child pornography to submit to computer monitoring and obtain permission to engage in other computer-related activities was plain error because the district court failed to make necessary findings to impose such a harsh restriction that materially affected the defendant's ability to obtain gainful employment.

### Sex Offender Treatment

*U.S. v. Mercado*, 777 F.3d 532 (1st Cir. 2015). “In light of the defendant's prior conviction for a sex offense against a minor and his prodigious criminal history, we think it apparent that a sex-offender treatment condition is reasonably related to rehabilitation and protecting the public.”

*U.S. v. Douglas*, 850 F.3d 660 (4th Cir. 2017). Court affirmed condition requiring a “sex offender evaluation” for defendant convicted of SORNA violation despite underlying sex offense being twenty-two years old. The court was concerned about the 14-plus years of evasive actions that the defendant

took to avoid apprehension by law enforcement after he failed to register as a sex offender. *See also, U.S. v. Silver*, --F. App'x--, 2017 WL 1407716 (5th Cir. 2017) (unpublished).

*U.S. v. Huor*, 852 F.3d 392 (5th Cir. 2017). Condition requiring defendant to undergo sex offender treatment was reasonably related to the nature and circumstances of defendant's history. Defendant had previously raped a small child, and had deceived two mothers by using a false name and failing to inform them of his past, earning a place in their homes and placing himself under the same roof as small children.

*U.S. v. Von Behren*, 822 F.3d 1139 WL 2641270 (10th Cir. 2016). Condition of supervised release that required participation in sex offender treatment, which included a mandatory polygraph, violated the defendant's right against self-incrimination because the questions required the defendant to admit to illegal sexual contact with minors and failure to participate in the polygraph would lead to revocation of his supervised release.

### Restitution

*U.S. v. Funke*, 846 F.3d 998 (8th Cir. 2017). The Eighth Circuit, joining five other circuits, held that future losses could be included in restitution orders for victims of child pornography. The district court properly applied the Paroline factors, considering Funke's “possession of a large number of files involving [Vicky] and his role in distributing files to others over the BitTorrent program.” The court did not abuse its discretion in awarding \$3,500 in restitution.

*U.S. v. Osman*, --F.3d--, 2017 WL 1337208 (11th Cir. 2017). Restitution for future expenses, including therapeutic costs for a victim of sexual abuse is appropriate under § 2259 (Mandatory Restitution for Sexual Exploitation of Children) as long as the award is based on a reasonable estimate of those costs (joining 5 circuits which held the same—1st, 2nd, 7th, 9th and 10th).

*U.S. v. Baston*, 818 F.3d 651 (11th Cir. 2016). Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country. The defendant must pay restitution to the victim for her prostitution in Australia. The district court erred when it reduced her restitution award.

### Prior Sex Offense Convictions

*U.S. v. Mills*, 850 F.3d 693 (4th Cir. 2017). North Carolina's Indecent Liberties with a Child is categorically a crime involving sexual exploitation of a child under 18 U.S.C. § 2251(e).

*U.S. v. Wikkerink*, 841 F.3d 327 (5th Cir. 2016). Louisiana conviction for aggravated incest qualified as an offense relating to sexual abuse for purposes of the enhanced penalties at 18 U.S.C. § 2252A(b).

*U.S. v. Miller*, 819 F.3d 1314 (11th Cir. 2016). Florida sexual battery is a prior sex offense conviction under § 2251(e).

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.