



Restitution and Supervised Release



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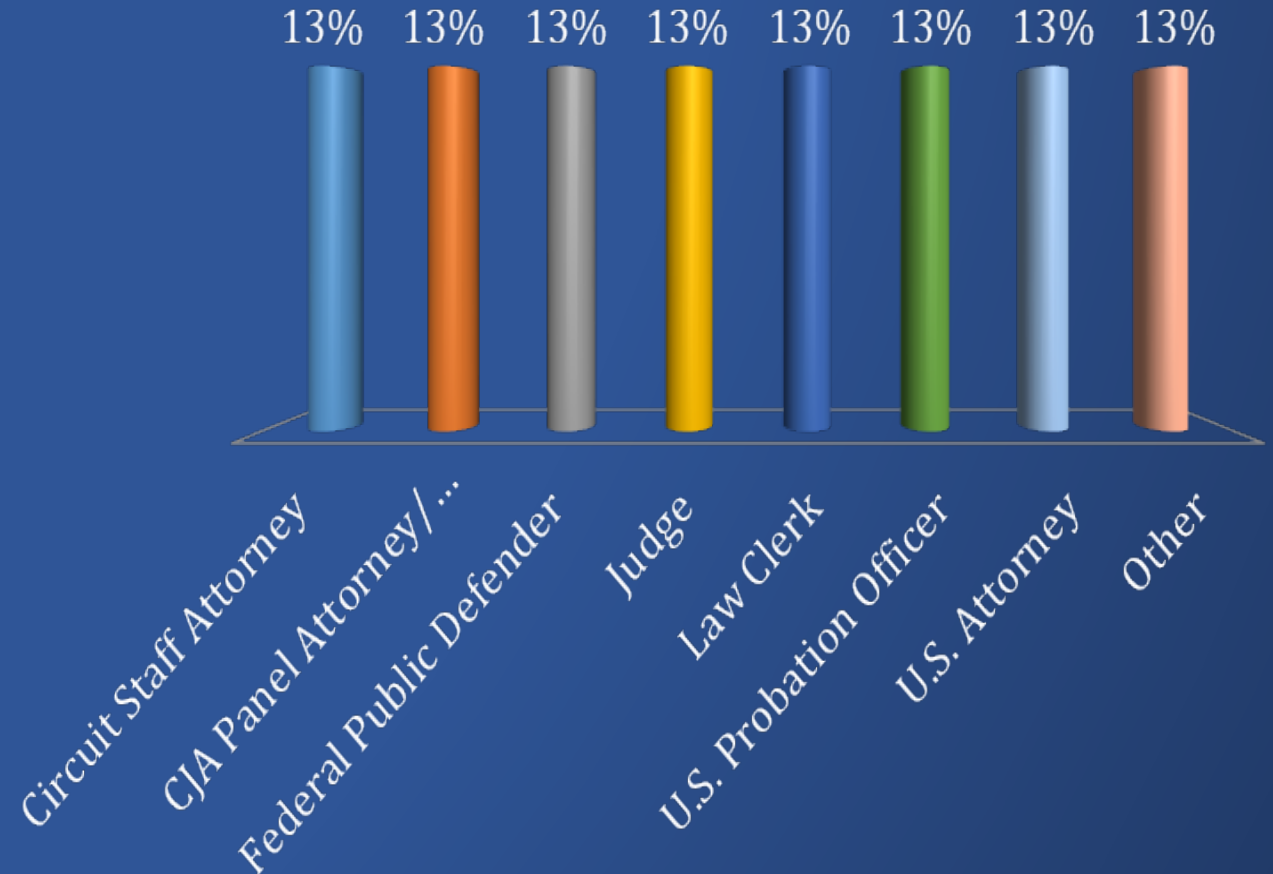
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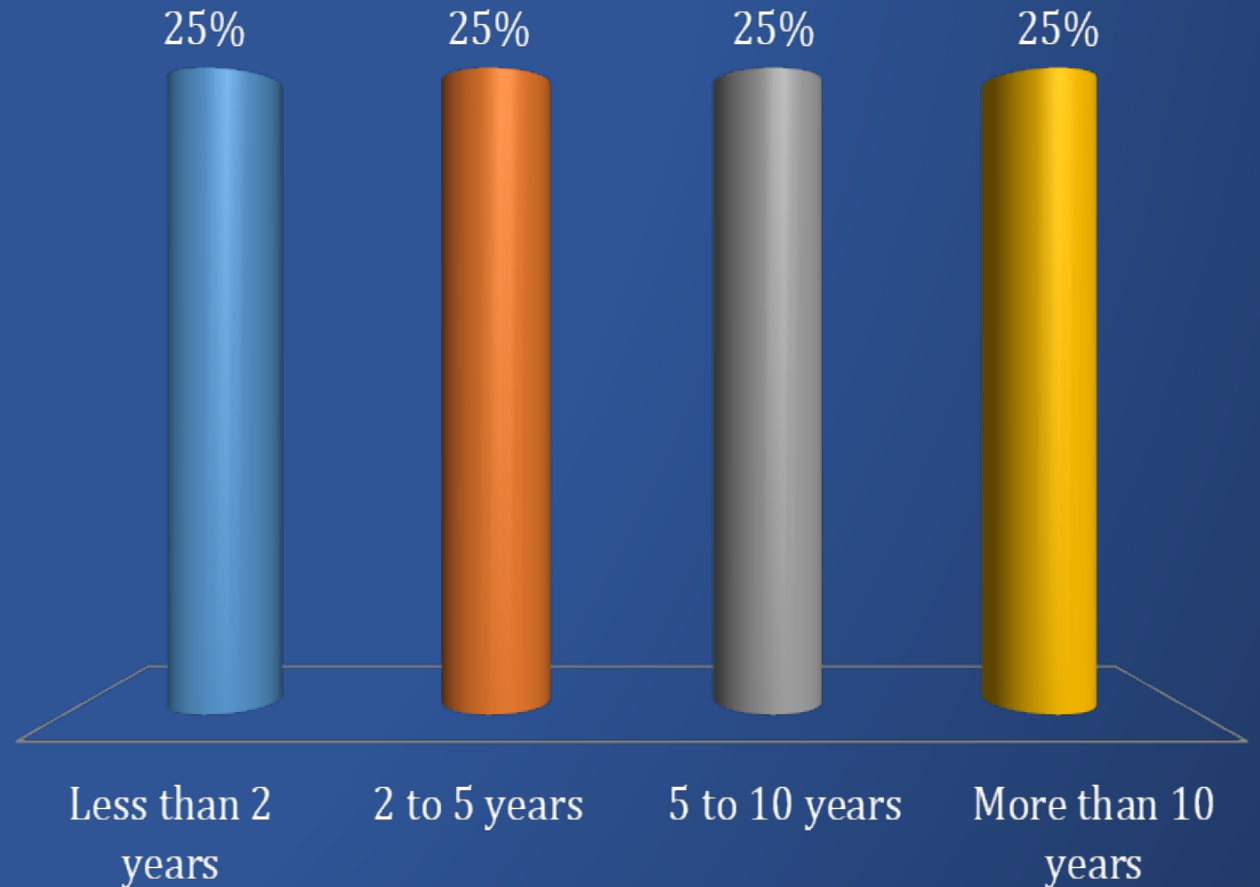
Who's in the audience?

- A. Circuit Staff Attorney
- B. CJA Panel Attorney/
Private Defense Attorney
- C. Federal Public Defender
- D. Judge
- E. Law Clerk
- F. U.S. Probation Officer
- G. U.S. Attorney
- H. Other



Years of experience with federal sentencing?

- A. Less than 2 years
- B. 2 to 5 years
- C. 5 to 10 years
- D. More than 10 years



Restitution Issues

- Determining Restitution in a Conspiracy
- Who is a victim of restitution
- Offsets in Restitution
- Restitution in specific offenses (*e.g.*, sex offenses)



Flexible Approach

- *U.S. v. Howard*, 887 F.3d 1072 (7th Cir. 2018)
 - “Thus, in determining the proper amount of restitution, a district court may, for different types of property, determine that fair market value, replacement cost, foreclosure price, cost to the victim, repair or restoration costs, or another measure of value is most appropriate. For some types of property, one valuation method may be superior to another valuation method.”
 - “This flexible approach allows the district court to determine in each circumstance the best measure of value for the purpose of calculating the actual loss in awarding restitution.”



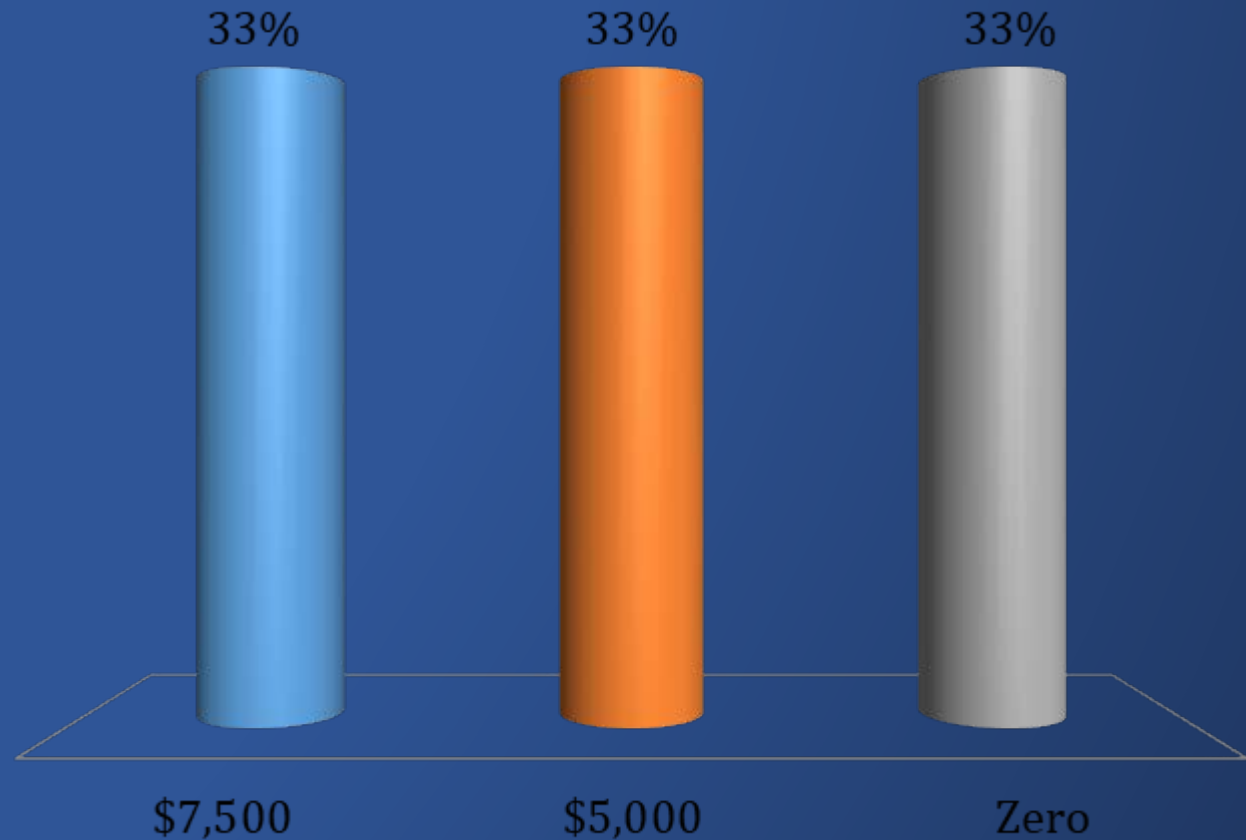
Scenario

- The defendant opened 10 fraudulent credit cards. The defendant used 5 of the cards, charging \$1,000 on each card.
- The court determined loss as \$7,500 based on \$5,000 for the five cards used and another \$2,500 based on the \$500 per card rule at §2B1.1.
- Assuming none of the stores where the cards were used were reimbursed at time of sentencing, what is the amount of restitution?



What is the amount of restitution?

- A. \$7,500
- B. \$5,000
- C. Zero



Restitution and Actual Loss

- *U.S. v. Lundstrom*, 880 F.3d 423 (8th Cir. 2018)
 - “In a fraud case, [restitution] is limited to the actual loss ‘directly caused by the defendant's criminal conduct in the course of the scheme alleged in the indictment.’ ” *Id.* (citation and emphasis omitted).
- The calculation of loss for sentencing purposes does not control the calculation of loss for restitution purposes



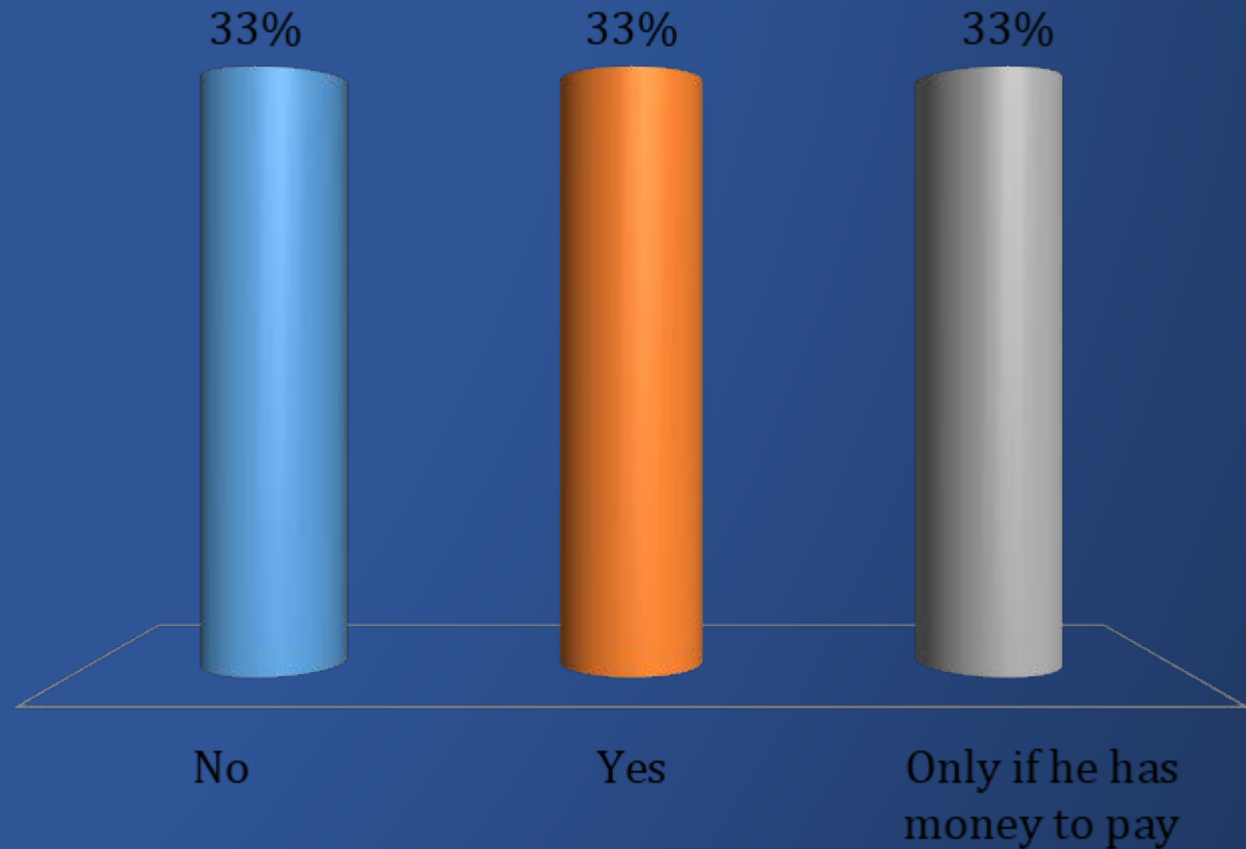
Actual Loss vs. Restitution

- *U.S. v. Villalobos*, 879 F.3d 169 (5th Cir. 2018)
 - The district court erred when it imposed an order of restitution of \$10,000 in a case where there was nothing in the record to support that restitution amount. The district court found that the victims' losses totaled \$0.00 but imposed \$10,000 in restitution.



Scenario 1: Can the defendant be held liable for the entire amount of restitution?

- A. No
- B. Yes
- C. Only if he has money to pay



Restitution and Conspiracy

- *U.S. v. Fowler*, 819 F.3d 298 (6th Cir. 2016)
 - “Thus, the evidence also indicates that Fowler was held responsible for prescriptions written before he became involved in the conspiracy ... we conclude that the district court's restitution order was based on clearly erroneous findings...so we conclude that the district court abused its discretion.”
- *U.S. v. Lozano*, 791 F.3d 535 (5th Cir. 2015)
- *U.S. v. Mason*, 722 F.3d 691 (5th Cir. 2013)
- *U.S. v. Kroma*, 2018 WL 1612241 (2d Cir. 2018)



Restitution Remand

- *U.S. v. White*, 883 F.3d 983 (7th Cir. 2018)
 - “The evidence actually contradicts the restitution award. The restitution amount includes about \$25,000 in losses that predate the “fall of 2009.” The government argues that the loose language in the plea agreement (i.e., “no later than in or around” the fall of 2009) “does not necessarily exclude” pre-2009 losses. That argument stretches too far—especially because the prosecutor expressly stated at sentencing that the government did not charge White with any conduct before his release from prison in August 2009.”





Who is A Victim for Restitution ?



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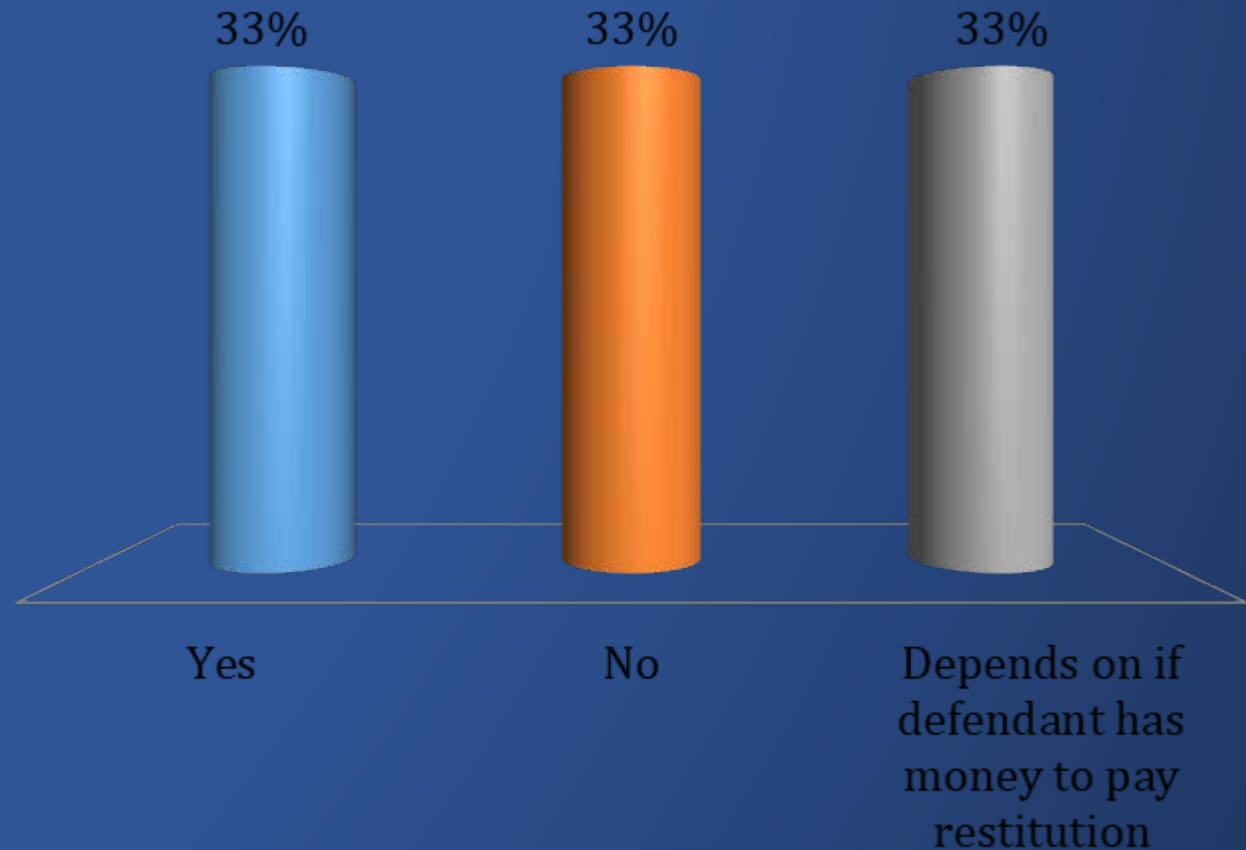
Scenario

- The defendant is charged with federal carjacking. He pistol whipped a woman as she was entering her car and then stole the car. The woman was taken to the hospital with a concussion and a broken nose and jaw. The government introduced into evidence her medical bills showing her medical expenses were \$75,000.
- The defendant pled guilty to felon in possession under 18 U.S.C. § 922.
- The court ordered \$75,000 in restitution?



Is this order of restitution correct?

- A. Yes
- B. No
- C. Depends on if defendant has money to pay restitution



Restitution Remand

- General Rule:
 - Victim determination is based on offense of conviction
 - Mandatory Victim Restitution only for certain offenses
- Exceptions:
 - If offense involves a scheme, conspiracy or pattern
 - “Related expenses”
 - Plea agreement can expand “who is a victim”



Restitution Scheme

- *U.S. v. Sanjar*, 876 F.3d 725 (5th Cir. 2017)
 - When the offense of conviction involves a “scheme,” the restitution statute broadens the definition of victim to include “any person directly harmed by the defendant's criminal conduct in the course of the scheme. In such a situation, restitution may include losses suffered by victims not named in the indictment so long as they are victims of the scheme described therein.
- Conspiracy to commit health care fraud requires a scheme.



Restitution “Related”

- *U.S. v. Johnson*, 875 F.3d 422 (9th Cir. 2017)
 - “Accordingly, we vacate the district court's restitution order and remand for the court to make factual findings to determine whether Johnson's activities beyond the BBBS event are sufficiently related to be included for restitution purposes in Johnson's overall scheme to defraud.”



Restitution: Categorical Approach?

- *U.S. v. Ritchie*, 858 F.3d 201 (4th Cir. 2017)
 - Court could circumstance-specific approach rather than categorical approach in determining whether defendant's conviction was an offense against property within meaning of MVRA
- False statement on the HUD-1 form is an “offense against property” under the MVRA.



Restitution: Categorical Approach

- *U.S. v. Collins*, 854 F.3d 1324 (11th Cir. 2017)
 - Court could circumstance-specific approach rather than categorical approach in determining whether defendant's conviction was an offense against property within meaning of MVRA
 - Bank employee who was convicted of conspiring to corruptly accept illegal gratuities, for assisting third party in cashing stolen United States Treasury checks and thereby depriving bank of its property when it was required to reimburse the intended payees for their losses, was convicted of “offense against property”





Restitution Remands: Lack of Evidence



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Restitution Remand

- *U.S. v. Villalobos*, 879 F.3d 169 (5th Cir. 2018)
 - District court erred when it imposed an order of restitution of \$10,000 in a case where there was nothing in the record to support that restitution amount.
- *U.S. v. Davis*, 863 F.3d 894 (D.C. Cir. 2017)
 - Restitution remanded because the court did not resolve the factual disputes over the amount of money with anything other than conclusions.



Restitution Remands

- Remands

- *U.S. v. Finazzo*, 850 F.3d 94 (2d Cir. 2017)
- *U.S. v. Henricks*, 866 F.3d 618 (7th Cir. 2018)
- *U.S. v. Anderson*, 866 F.3d 761 (7th Cir. 2017)
- *U.S. v. Stein*, 846 F.3d 1135 (11th Cir. 2017)
- *U.S. v. Shabudin*, 701 F. App'x 599 (9th Cir. 2017)



What is Compensable?

- Medical expenses
- Lost wages
- Value of Property
- Victim's lawyer expenses?
 - *Lagos v. U.S.*, 864 F.3d 320 (5th Cir. 2017)
cert. granted, 138 S. Ct. 55 (2018)



Medical Expenses

- *U.S. v. Cowden*, 882 F.3d 464 (4th Cir. 2018)
 - “Based on the overwhelming evidence presented regarding the injuries Hamrick sustained as a result of Cowden's actions, we hold that the district court acted within its discretion in requiring Cowden to pay the full amount of Hamrick's medical expenses.”





Offsets to Restitution



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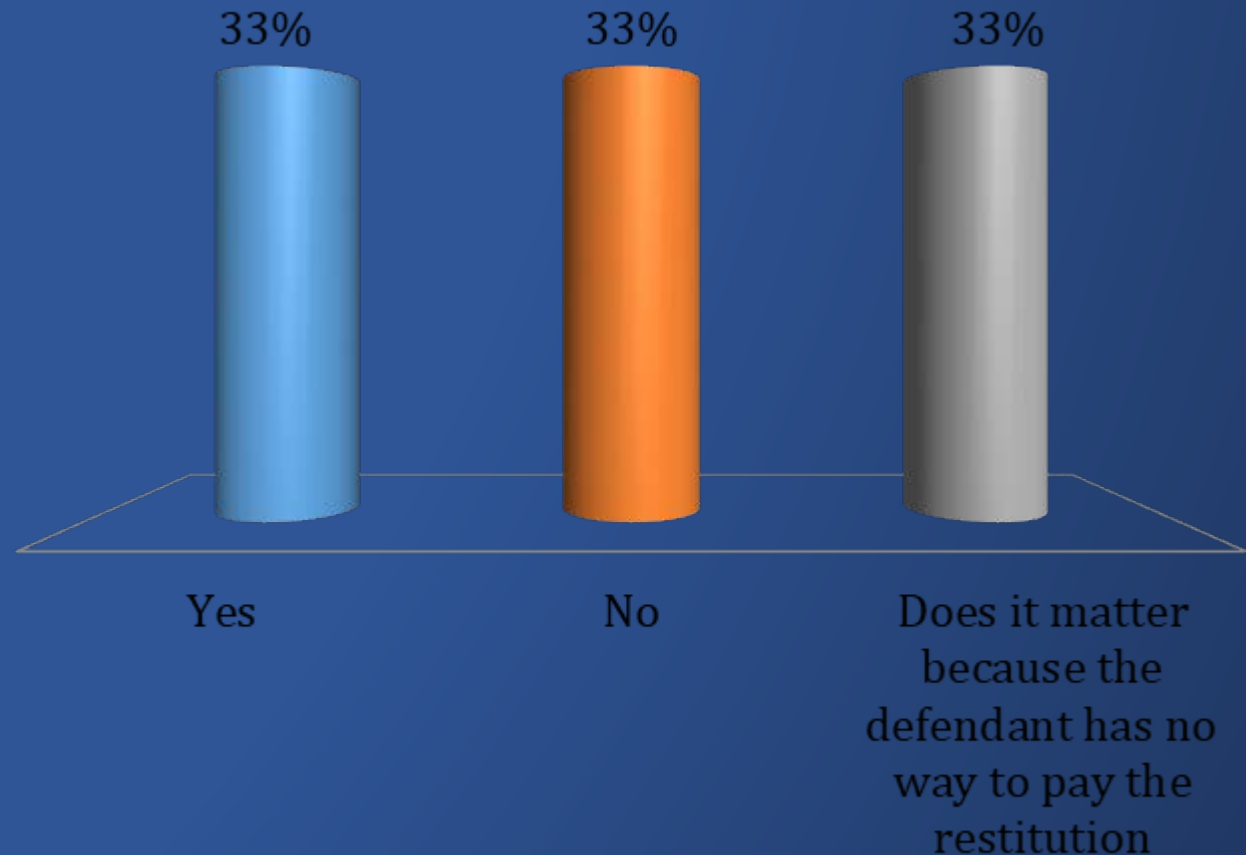
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Scenario 2: Will the court's restitution likely be affirmed on appeal?

- A. Yes
- B. No
- C. Does not matter because the defendant has no way to pay the restitution



Restitution and Offset

- *U.S. v. Smathers*, 879 F.3d 453 (2d Cir. 2018)
 - A defendant seeking a reduction of his restitution obligation has the burden of showing that the victim has been made whole and therefore no further restitution is necessary.
- Defendant did not prove that AOL was compensated



Restitution Offset

- *U.S. v. Foster*, 878 F.3d 1297 (11th Cir. 2017)
 - The defendant bears the burden to prove the value of any goods or services he provided that he claims should not be included in the restitution amount. Here, the defendant was unable to show that he provided value to investors as would reduce restitution.
- *But see, U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016) (court should have offset restitution because defendant proved offset)



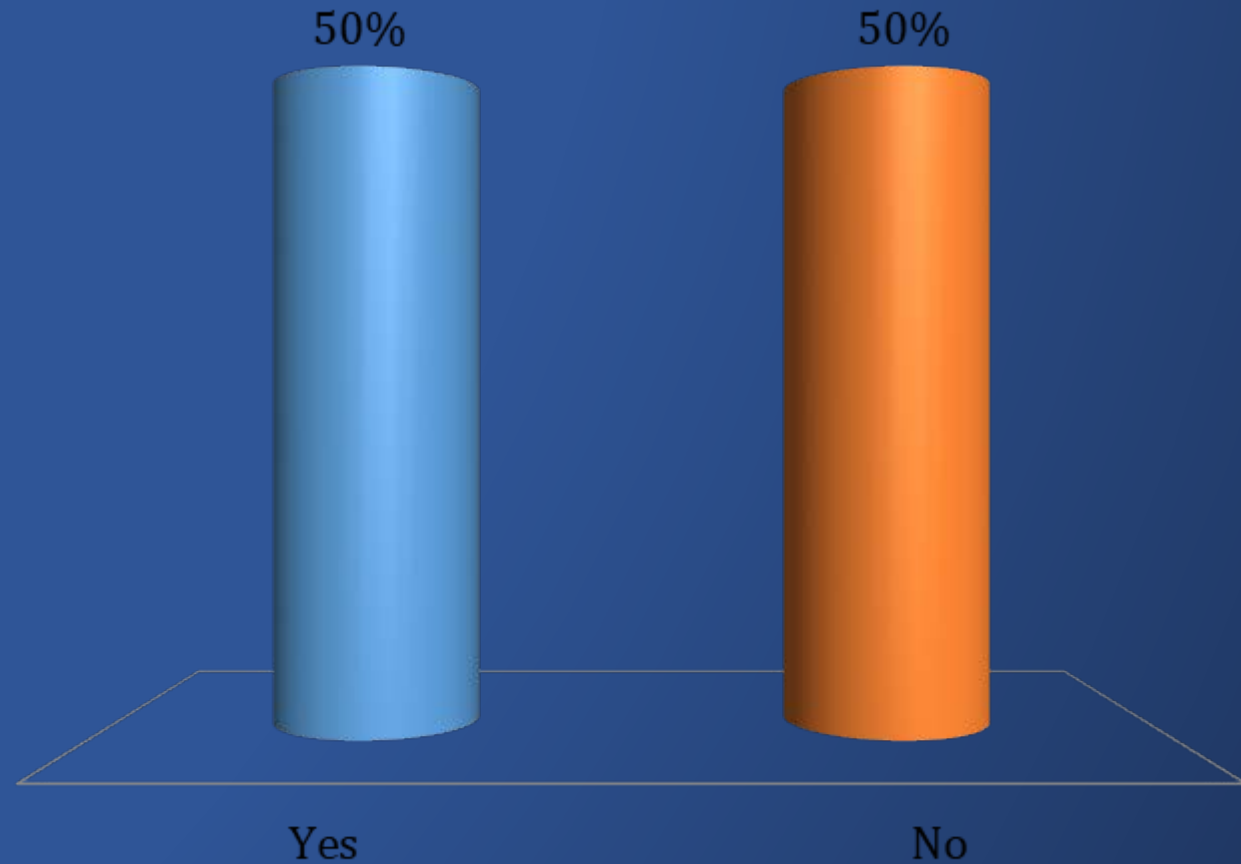
Burden To Reduce

- *U.S. v. Bryant*, 655 F.3d 232 (3d Cir. 2011)
- *U.S. v. Sheinbum*, 136 F.3d 443 (5th Cir. 1998)
- *U.S. v. Elson*, 577 F.3d 713 (6th Cir. 2009)
- *U.S. v. Malone*, 747 F.3d 481 (7th Cir. 2014)
- *U.S. v. Bane*, 720 F.3d 818 (11th Cir. 2013)



Scenario 3: Can the court reduce the restitution amount by the forfeiture amount?

- A. Yes
- B. No



Restitution and Forfeiture

- *U.S. v. Sanjar*, 876 F.3d 725 (5th Cir. 2017)
 - Forfeiture funds cannot be used to offset restitution.
 - “Restitution and forfeiture serve distinct purposes. Restitution is remedial in nature; its goal is to make the victim whole. Forfeiture is punitive; it seeks to disgorge any profits or property an offender obtains from illicit activity.”
- *See U.S. v. Arnold*, 878 F.3d 940 (8th Cir. 2017)





Specific Types of Cases



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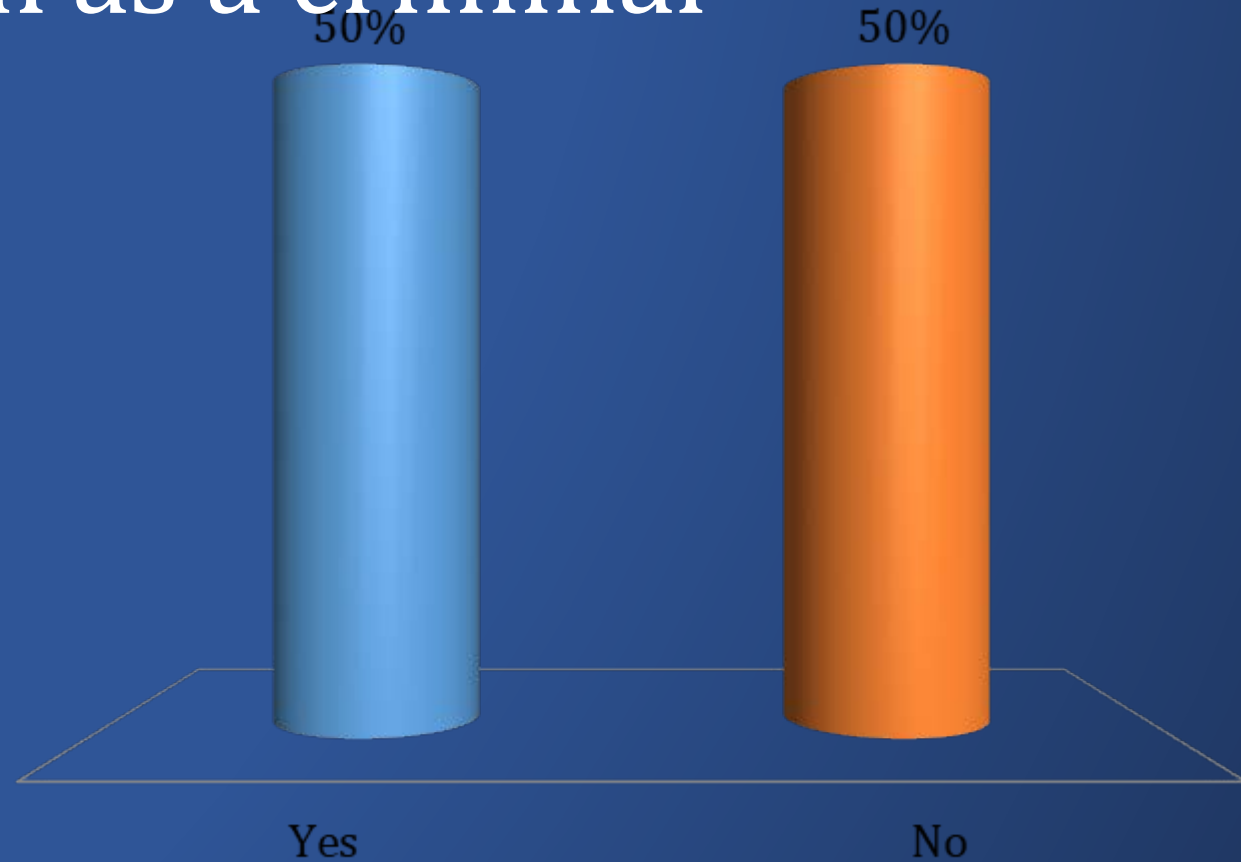
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Scenario: Defendant convicted of tax evasion under 26 U.S.C. § 7201. Can the court order restitution as a criminal monetary payment?

- A. Yes
- B. No



Tax Offense

- *U.S. v. Jansen*, 884 F.3d 649 (7th Cir. 2018)
 - Restitution is not permitted for offenses under Title 26 offenses unless they impose restitution as a condition of supervised release.
 - Here, the judgment ordered the defendant to pay restitution as a criminal monetary penalty which is prohibited. Case remanded to allow the district court to clarify that the court did not impose restitution as a criminal penalty but rather as a condition of supervised release.
 - *See U.S. v. Westbrook*, 858 F.3d 317 (5th Cir. 2017)



Restitution in Mortgage Fraud

- *Robbers v. U.S.*, 134 S. Ct. (2014)
- *U.S. v. Stone*, 866 F.3d 219 (4th Cir. 2017)
- *U.S. v. Burnett*, 805 F.3d 787 (7th Cir. 2015)
- *U.S. v. Howard*, 784 F.3d 745 (10th Cir. 2015)





Restitution in Sex Offense Cases



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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 Pornography Cases

- *U.S. v. Funke*, 846 F.3d 998 (2d Cir. 2017)
 - “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.”



Restitution in Child Pornography Cases

- *U.S. v. Galan*, 804 F.3d 1287 (9th Cir. 2015)
 - In calculating the amount of restitution to be imposed upon a defendant who was convicted of distribution or possession of child pornography, the losses, including ongoing losses, caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible. The district court erred when it declined to limit the restitution imposed upon Galan in that manner.



Restitution in Distributing Child Pornography Cases

- *U.S. v. Hoskins*, 876 F.3d 942 (8th Cir. 2017)
 - \$7,500 restitution order affirmed against the defendant who filmed a victim being raped and then distributed the images. The court determined that the defendant should pay part of the victim's approximately \$50,000 damages based upon her role in the criminal activity.



18 U.S.C. § 2259 (Mandatory Restitution)

- Costs include:
 - Medical services related to physical, psychiatric, or psychological care
 - Physical or occupational therapy or rehabilitation
 - Necessary transportation, temporary housing and child care expenses
 - Lost income
 - Attorney's fees, as well as other costs incurred
 - Any other losses suffered by victim as a proximate result of the offense



Restitution for Future Therapy

- *U.S. v. Osman*, 853 F.3d 1184 (11th Cir. 2017)
 - 18 U.S.C. § 2259 may include restitution for future therapy expenses as long as the award reflects a reasonable estimate of those costs and is based on record evidence.
 - \$16,250 amount included four courses of therapy for child molested by her father and the pictures were shared online.
- *U.S. v. Rogers*, 758 F.3d 37 (1st Cir. 2014)
- *U.S. v. Johnson*, 680 F. App'x 194 (4th Cir. 2017) (\$78K)
- *U.S. v. Danser*, 270 F.3d 451 (7th Cir. 2001)
- *U.S. v. Julian*, 242 F.3d 1245 (10th Cir. 2001)



Justice for Victims of Trafficking Act

- In addition to the assessment imposed under § 3014, the court shall assess an amount of \$5,000 on any non-indigent person convicted of an offense under:
 - Chapter 77 (peonage, slavery, trafficking in persons);
 - Chapter 109A (sexual abuse);
 - Chapter 110 (sexual exploitation/abuse of children);
 - Chapter 117 (transportation for illegal sexual activity);
 - Section 274 of INA (8 U.S.C. § 1324) unless person was alien's spouse, parent, son, or daughter
- *See U.S. v. Kelley*, 861 F.3d 790 (8th Cir. 2017)





Supervised Release Conditions



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Common Pitfalls in Supervised Release Conditions

- Court did not make an INDIVIDUALIZED assessment of the condition
- Court did not make necessary findings for the condition
- Condition was imposed for too long a time period
- Prior sex offense conduct was too far removed from the “non-sex offense” instant offense



Considerations for Sex Offense Conditions

- Things to consider in imposing conditions:
 - What is the offense of conviction?
 - If instant offense is Failure to Register, what was the underlying offense that required registration?
 - Did the defendant sexually abuse someone?
 - Does the defendant have children of his own?
 - How long ago were the prior sex offenses?
 - Can the defendant watch adult pornography?
 - What is length of supervised release?



Supervised Release Terms

- *U.S. v. Brooks*, -F.3d-, 2018 WL 2027236 (2d Cir. 2018)
 - Lifetime term of supervised release unreasonable on defendant whose first revocation involved failed drug tests and failure to report for scheduled drug testing
 - “Nevertheless, on this record, Brooks's conduct is not distinguishable from that of many other recidivist defendants in his position struggling with drug addiction. Brooks's violations of supervised release center on a drug habit that he has been unable, thus far, to kick..”



18 U.S.C. § 3583(d)

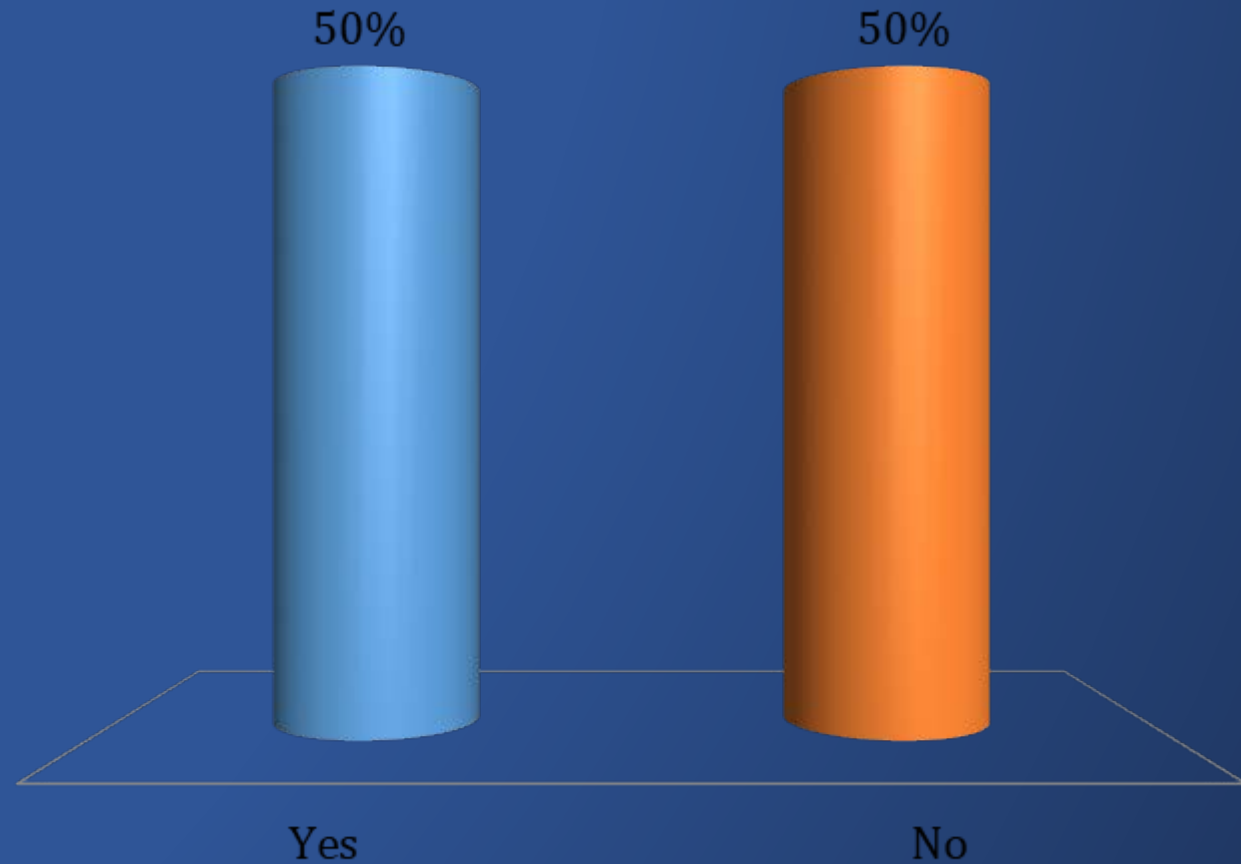
Conditions of Supervised Release

- 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)



Scenario 4: Is this an appropriate condition of supervised release?

- A. Yes
- B. No



Software Installation

- *U.S. v. Ferndandez*, 776 F.3d 344 (5th Cir. 2016)
 - 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



Computer Restrictions

- *U.S. v. Dallman*, 886 F.3d 1277 (8th Cir. 2018)
 - This is not a case involving mere possession of child pornography. Although only one video containing child pornography was found on Dallman's computer, his use of computers and the internet was justifiably concerning to the district court. Dallman used the internet to steal another person's identity so that he could avoid his responsibility to register as a sex offender.



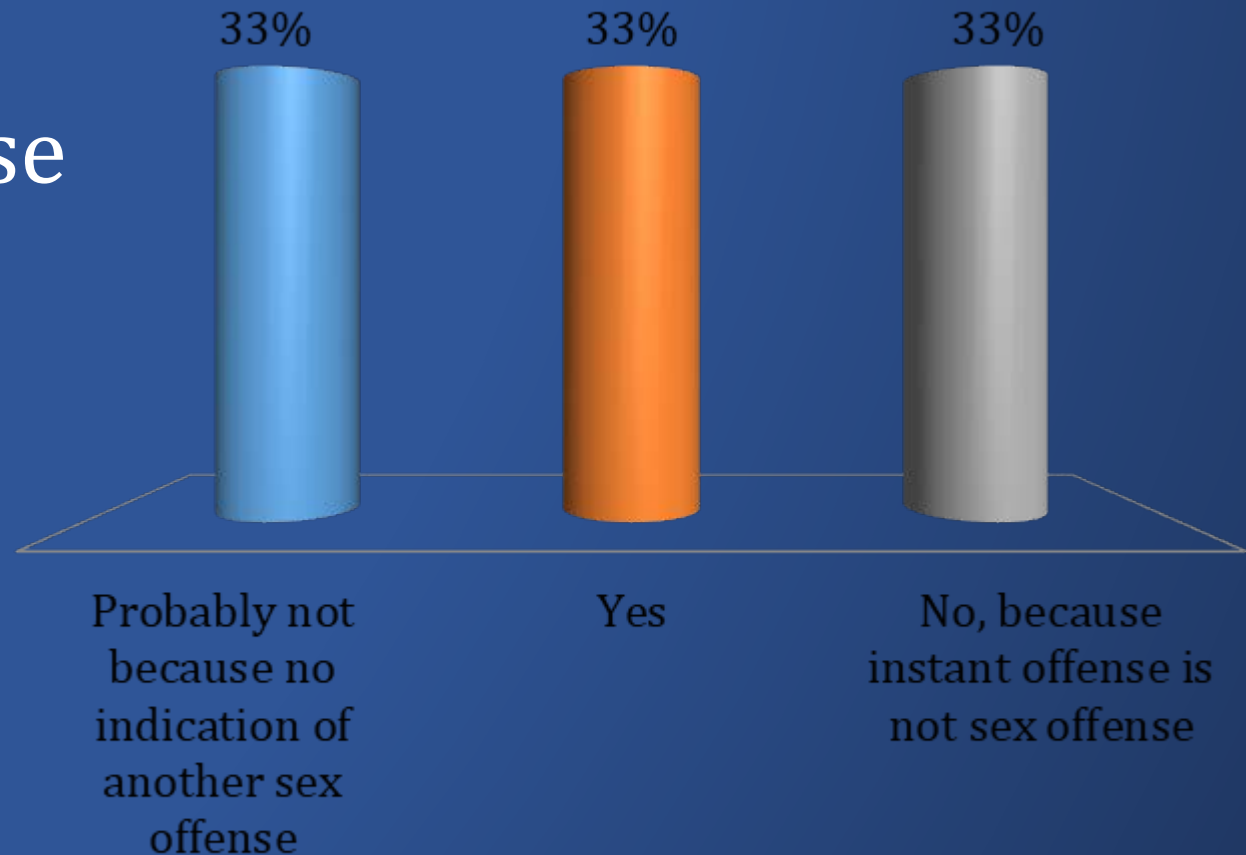
Computer Restrictions

- *U.S. v. Dallman*, 886 F.3d 1277 (8th Cir. 2018)
 - “Through such efforts, Dallman successfully evaded the registration requirement for years. The district court questioned “why he's trying so hard to avoid his responsibility to register.” The presence of the child pornography, the unusually complex organization of Dallman's computer (clearly designed to render search more difficult), and Dallman's computer sophistication all demonstrate that he poses a significant monitoring challenge to his supervising probation officer.”



Scenario 5: Is this an appropriate condition of supervised release?

- A. Probably not because no indication of another sex offense
- B. Yes
- C. No, because instant offense is not sex offense



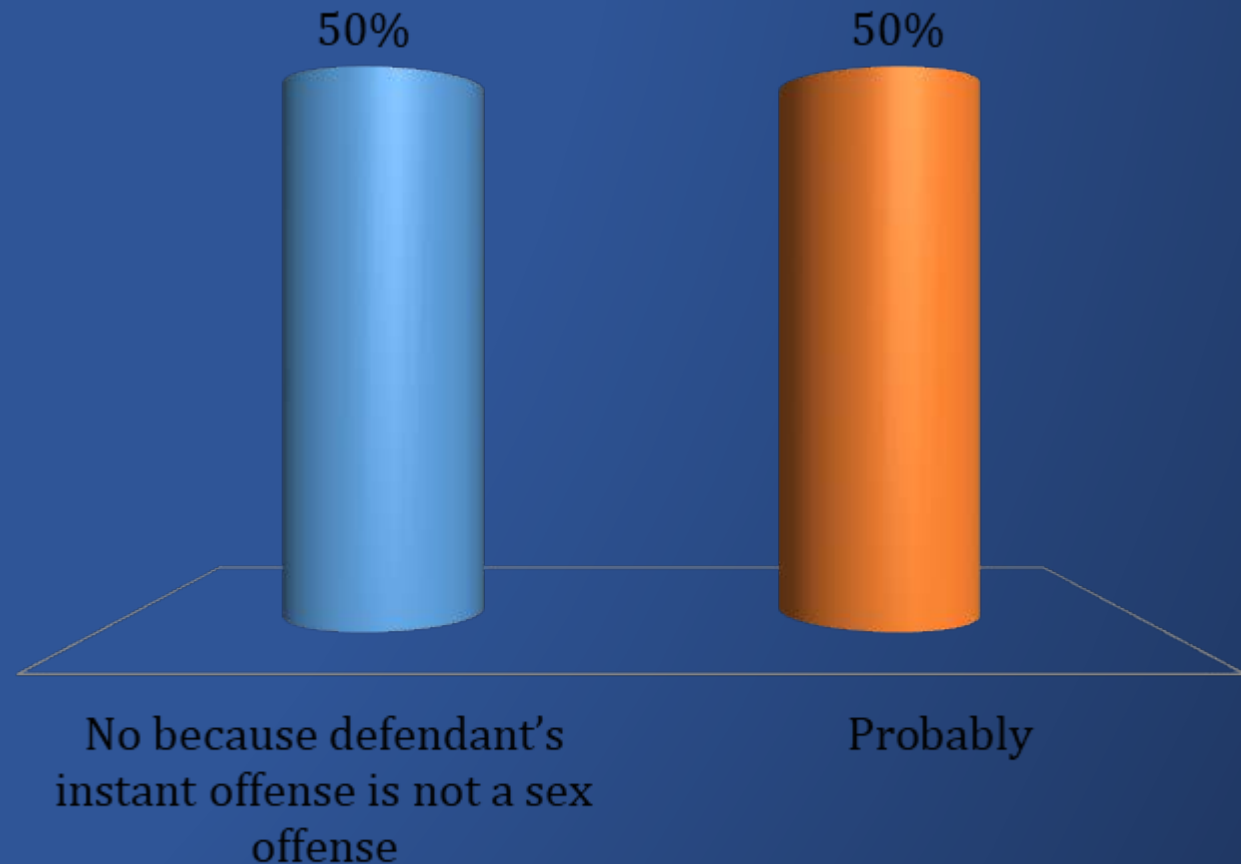
Not convicted of Sex Offense

- *U.S. v. Del Valle-Cruz*, 785 F.3d 48 (1st Cir. 2015)
 - The defendant has a single eighteen-year-old sex offense on his record. For the prior twelve years, he had “stayed out of trouble,” and had no criminal convictions other than failure to register as a sex offender



Scenario 6: Is this an appropriate condition of supervised release?

- A. No because defendant's instant offense is not a sex offense
- B. Probably



Not convicted of Sex Offense

- *U.S. v. Garcia*, 872 F.3d 52 (1st Cir. 2017)
 - Conditions requiring sex offender treatment and those restricting contact with minors may be appropriate despite the conviction not being a sex offense ... “where the intervening time between a distant sex offense and the present conviction is marked by substantial criminal activity.”
 - “This is because “subsequent criminal conduct, whether or not of a sexual nature, indicates an enhanced risk of recidivism.”



Not convicted of Sex Offense

- *U.S. v. Ford*, 882 F.3d 1279 (10th Cir. 2018)
 - Defendant must undergo sex-offender risk assessment even though the defendant was not convicted of a sex crime (felon in possession).
 - And although there is no evidence that Ford has committed another sex crime, Ford has been incarcerated almost continuously since his first sex offense—leaving him few chances to relapse. The lack of newer sex offenses, though having “some merit,” is not as “probative of his proclivities” as a “similarly blemish-free period of time while at liberty.”



Non-Sex Offense

- *U.S. v. Ford*, 882 F.3d 1279 (10th Cir. 2018)
 - “Though Ford's prior sex-offense conviction was nineteen years old, the prior offense involved a minor, there was no record that Ford had received treatment, and Ford spent the nineteen years between the prior sex offense and the sentencing hearing behind bars—severely curtailing the probative value of his subsequently “clean record.”



Non-Sex Offense

- *U.S. v. Thompson*, 888 F.3d 347 (8th Cir. 2018)
 - Defendant convicted of drug trafficking
 - “Thompson's record also includes prior convictions for indecent or lewd acts with a child under 16 years of age in 1995 and failure to register as a sex offender in 2006. Given Thompson's prior sexual misconduct, Condition 2's requirement that Thompson be evaluated for sex-offense treatment and participate in treatment as needed is reasonably related to his history and characteristics, and to the statutory purposes of deterrence, protection of the public, and correctional treatment.”



Non-Sex Offense Convictions

- *U.S. v. Childress*, 874 F.3d 523 (6th Cir. 2017)
 - Even though defendant was not convicted of a sex offense (felon-in-possession), the court could impose a supervised release condition of a psychosexual evaluation because the defendant had been convicted of aggravated assault in state court that involved the defendant having incestuous relations with his minor half sister.



Sex Offender Treatment

- *U.S. v. Lincoln*, 876 F.3d 1137 (8th Cir. 2017)
 - Supervised release condition requiring a defendant to participate in a mental health evaluation and treatment that may include participation in a sex offender treatment program was reasonable. Although the defendant's sexual misconduct occurred when he was 15, over 20 years ago, the defendant never completed a sex-offender treatment and the probation officer noted he "displayed some moderate risk dynamic factors for sexual offense recidivism."



Treatment Condition

- *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.



Not convicted of a Sex Offense

- *U.S. v. Carter*, 463 F.3d 526 (6th Cir. 2006) (17 years too old)
- *U.S. v. Kent*, 209 F.3d 1073 (8th Cir. 2000) (13 years too old)
- *U.S. v. Moran*, 573 F.3d 1132 (11th Cir. 2009) (10 years ok)





Specific Supervised Release Conditions



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Supervised Release Conditions Remands

- Treatment or Therapy
- Associations with Others
- Access to Sexually Stimulating Materials
- Geography Locations
- Computer Restrictions
- Alcohol or Drug Treatment or Restrictions
- Lifestyle Restrictions



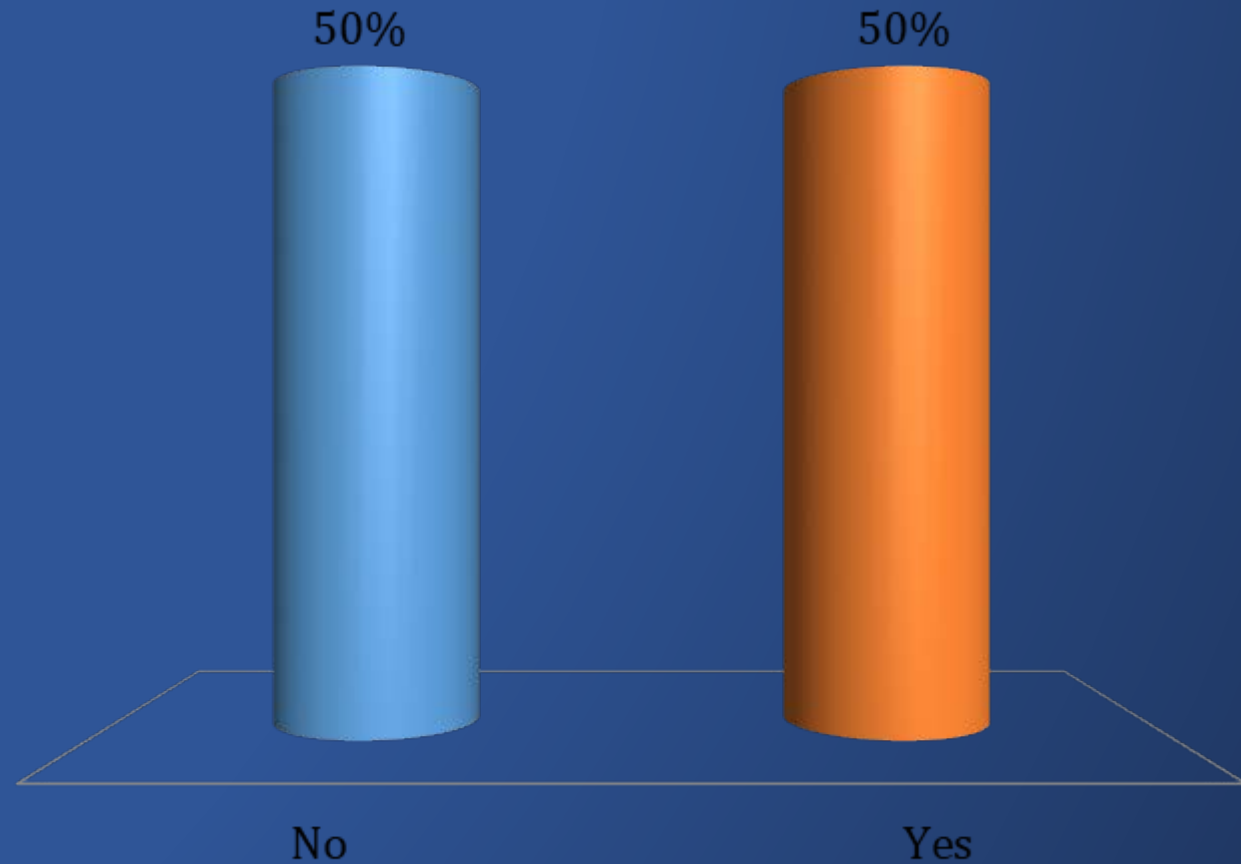
Evidence For Condition

- *U.S. v. Hill*, -F.3d-, 2018 WL 2186613 (8th Cir. 2018)
 - The dismissed domestic assault allegation failed to establish the factual or evidentiary basis necessary to impose domestic violence counseling.
- “To be sure, [the “Amended Petition”] does contain allegations that, if proven true, would support the district court's decision.” But the allegations, and the corresponding state charge, were dismissed—meaning the evidence of domestic assault “consists of only bare and unproven accusations of misconduct from other cases.”



Scenario 7: Is this an appropriate condition of supervised release as written?

- A. No
- B. Yes



Mental Health Therapy

- *U.S. v. Franklin*, 838 F.3d 564 (5th Cir. 2016)
 - “If the district court intends that the therapy be mandatory but leaves a variety of details, including the selection of a therapy provider and schedule to the probation officer, such a condition of probation may be imposed. If, on the other hand, the court intends to leave the issue of the defendant's participation in therapy to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included.”



Delegation Issue

- *U.S. v. Iverson*, 874 F.3d 855 (5th Cir. 2017)
 - A special condition of release that stated “[t]he defendant shall follow all other lifestyle or restrictions or treatment requirements imposed by the therapist . . .” was in inappropriate because it delegated sentencing authority to the treatment provider.
- *See also, U.S. v. Huor*, 852 F.3d 392 (5th Cir. 2017)



Mental Health Treatment

- *U.S. v. Jereb*, 882 F.3d 1325 (10th Cir. 2018)
 - “The transcript of the sentencing hearing shows the district court considered Mr. Jereb’s temperament in court, his upbringing, his proclivity for losing his temper, and his propensity for going “off the rails,” when choosing to make mental health treatment a condition of supervised release.”



Drug Treatment

- *U.S. v. Feterick*, 872 F.3d 822 (7th Cir. 2018)
 - “Despite information in the presentence report about Feterick's history with drugs, the judge's only mention of cocaine was in his misstatement about the timing of Feterick's cocaine use. Even if drug treatment might be warranted by Feterick's history of marijuana use and his short-term abuse of Percocet, we aren't confident that the judge would have imposed the treatment condition if aware that Feterick's cocaine use was quite remote in time (20 years before the bank robberies).”



Alcohol Restriction

- *U.S. v. Betts*, 886 F.3d 198 (2d Cir. 2018)
 - “Neither defendant's underlying crime nor any of the conduct contributing to his violations of supervised release involved the use of alcohol. The District Court was not presented with any evidence suggesting that defendant ever seriously abused alcohol.”
 - “Given the factual record below, the standard condition limiting excessive use of alcohol, which was also included in defendant's judgment, is sufficient to further the objectives of sentencing. We conclude that the special condition banning all alcohol use is not reasonably related to any of the factors outlined in Section 5D1.3(b)”



Employment Restrictions

- *U.S. v. Jenkins*, 854 F.3d 181 (2d Cir. 2017)
 - Employment restriction remanded.
 - “The relationship between the restrictions on Jenkins's employment and Jenkins's offense and circumstances is not readily apparent. As mentioned earlier, the nature of these employment restrictions mean that, as a practical matter, he may never be employable.”



Direct Contact with Minor Under 18

- *U.S. v. Jenkins*, 854 F.3d 181 (2d Cir. 2017)
 - But under this condition, Jenkins is prohibited during the 25-year period from interaction with family members or friends who might have children under the age of 18 unless he goes through a preapproval process with the Probation Office which presumably would entail some sort of investigation and finding by that office. This restriction would apply with full force to all routine family interaction—for example, Thanksgiving dinners or seders or christenings.



Indirect Contact with Minors

- *U.S. v. Jenkins*, 854 F.3d 181 (2d Cir. 2017)
 - “It is difficult to know what the boundaries of this restriction might be. If, for example, members of a little league baseball team were soliciting in front of a supermarket, could Jenkins approach them or later call in and contribute? Common sense would say “yes” but the problem for Jenkins would be that the consequences of an incorrect guess would be sufficiently serious that he would be ill advised to run any risks at all.”
 - “Is he required to stay away from sporting events or natural history museums or street fairs? The reasonable necessity for these restrictions which apply to Jenkins when he is in his 70s and 80s eludes us.”



Notifying Probation Officer of Significant Romantic Relationships

- *U.S. v. Rock*, 863 F.3d 827 (D.C. Cir. 2017)
 - Supervised release condition requiring the defendant to notify the probation officer of any significant romantic relationship was unconstitutionally because people of common intelligence might not agree whether they were in a significant romantic relationship.



Accessing or Possessing Sexually Stimulated Materials

- *U.S. v. Gall*, 829 F.3d 64 (1st Cir. 2016) (possession and can't enter any location where sold overbroad)
- *U.S. v. Huor*, 852 F.3d 392 (5th Cir. 2017) (will not prevent future conduct unreasonable)
- *U.S. v. Sainz*, 827 F.3d 602 (7th Cir. 2016) (too vague)
- *U.S. v. Lacy*, 877 F.3d 790 (5th Cir. 2017) (reasonable)



Adult Pornography Ban

- *U.S. v. Wagner*, 872 F.3d 535 (10th Cir. 2017)
 - “But we have upheld such conditions where the district court provides proper justification, as “an offender on supervised release has no unmitigated First Amendment right to view adult pornography on the internet, particularly when he is permitted to view it through other mediums like television or in magazines.”
 - “Wagner's offense conduct stemmed from his use of the internet to search for, find, and communicate with both Holly and Jen.”



RESTITUTION AND SUPERVISED RELEASE SCENARIOS

1. The defendant was convicted of conspiracy to commit healthcare fraud, conspiracy to distribute controlled substances and conspiracy to receive kickbacks. The defendant, a physician, and his partner physicians, wrote false prescriptions that were filled by pharmacists. The indictment states that the dates of the conspiracy spanned from January 1, 2013 to December 31, 2017. The doctor joined the conspiracy in January 1, 2015.

The court concluded that the total amount of restitution for the entire five-year conspiracy was \$1,500,000 (\$300,000 a year in fraudulent billing). The court ordered the defendant to pay the full amount of restitution. The defendant has appealed the restitution order.

Can the defendant be held liable for the entire amount of restitution?

2. The defendant was convicted of health care fraud (18 U.S.C. § 1347). Medicare paid the defendant \$150,000 based on bills submitted by the defendant. At sentencing, the government asks for \$150,000 in restitution for the fraudulent bills submitted to Medicare by the defendant. The defendant argued that \$50,000 of the amount paid by Medicare was for bills that involved legitimate services he provided to patients. The defendant did not offer any proof that the bills he submitted to Medicare were for necessary procedures because he believes the government has the burden to introduce into evidence that some of the bills submitted were legitimate. The court orders \$150,000 in restitution, concluding that the defendant has the burden to prove that \$50,000 were for legitimate work and because he did not offer any evidence, there is no credit against the \$150,000 order.

Will the court's restitution order likely be affirmed on appeal?

3. The defendant was convicted of wire fraud (18 U.S.C. § 1343) based on a scheme involving vehicle-financing rebates. The court imposed a \$160,000 forfeiture award based on the gains from the scheme. Three months after the forfeiture award, the court plans on imposing restitution in the amount of \$280,000. The defendant believes the restitution amount should be reduced by the \$160,000 forfeiture award.

RESTITUTION AND SUPERVISED RELEASE SCENARIOS

Can the court reduce the restitution amount by the forfeiture order?

4. The defendant was convicted of Failing to Register as a Sex Offender, under 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2009 Texas conviction for sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 12-year old niece when she was left in his care. He received a 7-year sentence for that offense. The defendant has no other prior sex offense convictions.

At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during defendant's supervised release term:

"Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses."

Is this an appropriate supervised release condition in this case?

5. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece and he received a 5-year sentence for that conviction. At sentencing for the drug offense, the government requests the court impose the following supervised release condition:

"Defendant must submit to a psychosexual evaluation upon release from imprisonment."

Is this a reasonable supervised release condition?

6. The defendant was convicted of drug trafficking (21 U.S.C. § 841) on January 7, 2018 for selling cocaine on October 15, 2017. The defendant has one prior conviction from 2003 for molesting his 11 year-year old niece. He received a 15-year sentence for that conviction and was released from prison on August 5, 2017. At sentencing for the drug

RESTITUTION AND SUPERVISED RELEASE SCENARIOS

trafficking offense, the probation officer recommends the following supervised release condition:

“Defendant must submit to a psychosexual evaluation upon release from imprisonment.”

The defendant objects to this condition because his prior sexual conviction was over 15 years ago.

If the judge imposed this condition, will this condition likely be affirmed on appeal?

7. The defendant was convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)). The defendant has a history of mental illness and the court imposed the following condition of supervised release:

“The defendant is required to participate in a mental health program as deemed necessary and approved by the probation officer.”

Is this a reasonable condition?
