



Case Law Update: Restitution and Supervised Release Conditions

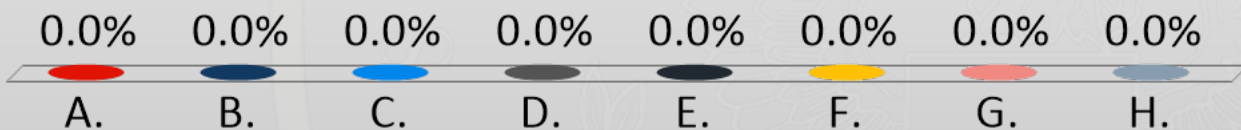
Thursday, September 5, 2019

3:30 p.m. – 5:00 p.m.

Alan Dorhoffer

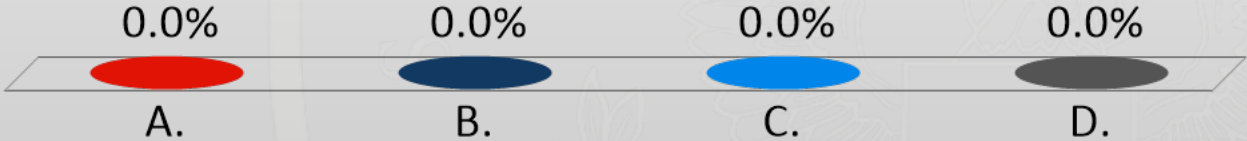
Who is in the Audience?

- 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)



Determining Restitution

- General Rule:
 - Victim determination is based on offense of conviction
 - Mandatory Victim Restitution only for certain offenses
 - Special Rules for Certain Offense (*e.g.*, 18 U.S.C. § 2259)
- Exceptions:
 - If offense involves a scheme, conspiracy or pattern
 - “Related expenses”
 - Plea agreement can expand “who is a victim”



Flexible Approach

- *U.S. v. Howard*, 887 F.3d 1072 (7th Cir. 2018)
 - “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.”



Offense of Conviction

- *U.S. v. Thomas*, -F.3d-, 2019 WL 3558975 (8th Cir. Aug 5, 2019)
 - “[T]he record here shows that the restitution order sought to compensate solely for losses occurring before the offense of conviction. Thus, the restitution order in this case is an illegal order.”

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)



Including Losses Outside The Offense Of Conviction

- Key point: Offense of conviction determines dates of restitution unless offense involves a conspiracy, pattern, or scheme then can broaden amount and who is victim.
U.S. v. Sanjar, 876 F.3d 725 (5th Cir. 2017)

- Example of scheme: Health care fraud (18 U.S.C. § 1347)
U.S. v. Aieze-Smith, 923 F.3d 565 (9th Cir. 2019)



Who is a Victim

- *U.S. v. Mathew*, 916 F.3d 510 (5th Cir. 2019)
 - “Mathew’s offense does not involve a scheme, conspiracy, or pattern. The indictment charged him with violating 18 U.S.C. § 1028(a)(3), (b)(2)(B), and (c)(1), which make it a crime ‘knowingly [to] possess[] with intent to use unlawfully or transfer unlawfully five or more ... authentication features ... issued by or under the authority of the United States.’”

Who Can Receive Restitution

- *U.S. v. Mathew*, 916 F.3d 510 (5th Cir. 2019)
 - When the offense involves a scheme, conspiracy, or pattern of criminal activity, restitution may be awarded to any person who is directly harmed by the defendant's course of criminal conduct

Restitution and Statute of Limitations

- *U.S. v. Anieze-Smith*, 923 F.3d 565 (9th Cir. 2019)
 - A district court may order restitution for all losses resulting from a fraudulent scheme, even those caused by conduct occurring outside the statute of limitations
See also, U.S. v. Dickerson, 370 F.3d 1330 (11th Cir. 2004)

Who Can Be a Victim

- Identifiable victims
- Banks
- Federal and State government agencies
- Corporation
- Bankruptcy Trustee
- Third-parties

What is the amount of restitution?

- A. \$7,500
- B. \$1,000
- C. \$5,000
- D. \$500

0.0%

0.0%

0.0%

0.0%

A.

B.

C.

D.

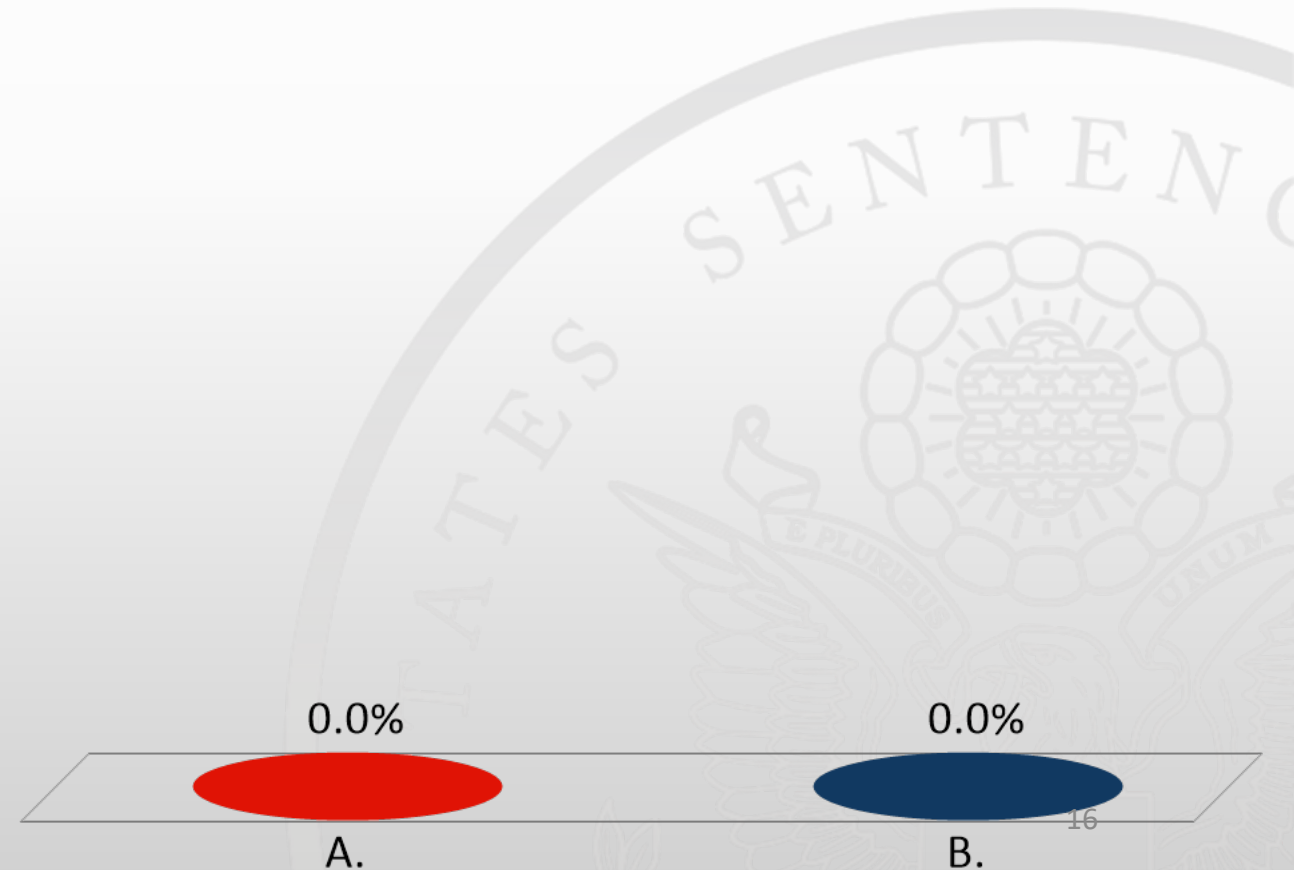
Using Loss Amount Determined Under §2B1.1 As Restitution

- Key point: Calculate restitution independently of §2B1.1
 - *U.S. v. Lundstrom*, 880 F.3d 423 (8th Cir. 2018)
(calculation of loss for sentencing purposes does not control the calculation of loss for restitution purposes)
- Key Point: Do not use any intended loss for restitution



Is the order likely to be affirmed on appeal?

- A. No, because court should have awarded credit to the defendant
- B. Yes, no credit should have been awarded



Defendant Has Burden To Prove Credit Against Restitution

Key point: Defendant must prove he provided value to victim.

U.S. v. Foster, 878 F.3d 1297 (11th Cir. 2017)

Example: In health care fraud, a defendant must establish

(1) services provided to Medicare beneficiaries were legitimate and

(2) Medicare would have paid for those services.

U.S. v. Ricard, 922 F.3d 639 (5th Cir. 2019)

U.S. v. Mathew, 916 F.3d 510 (5th Cir. 2019)

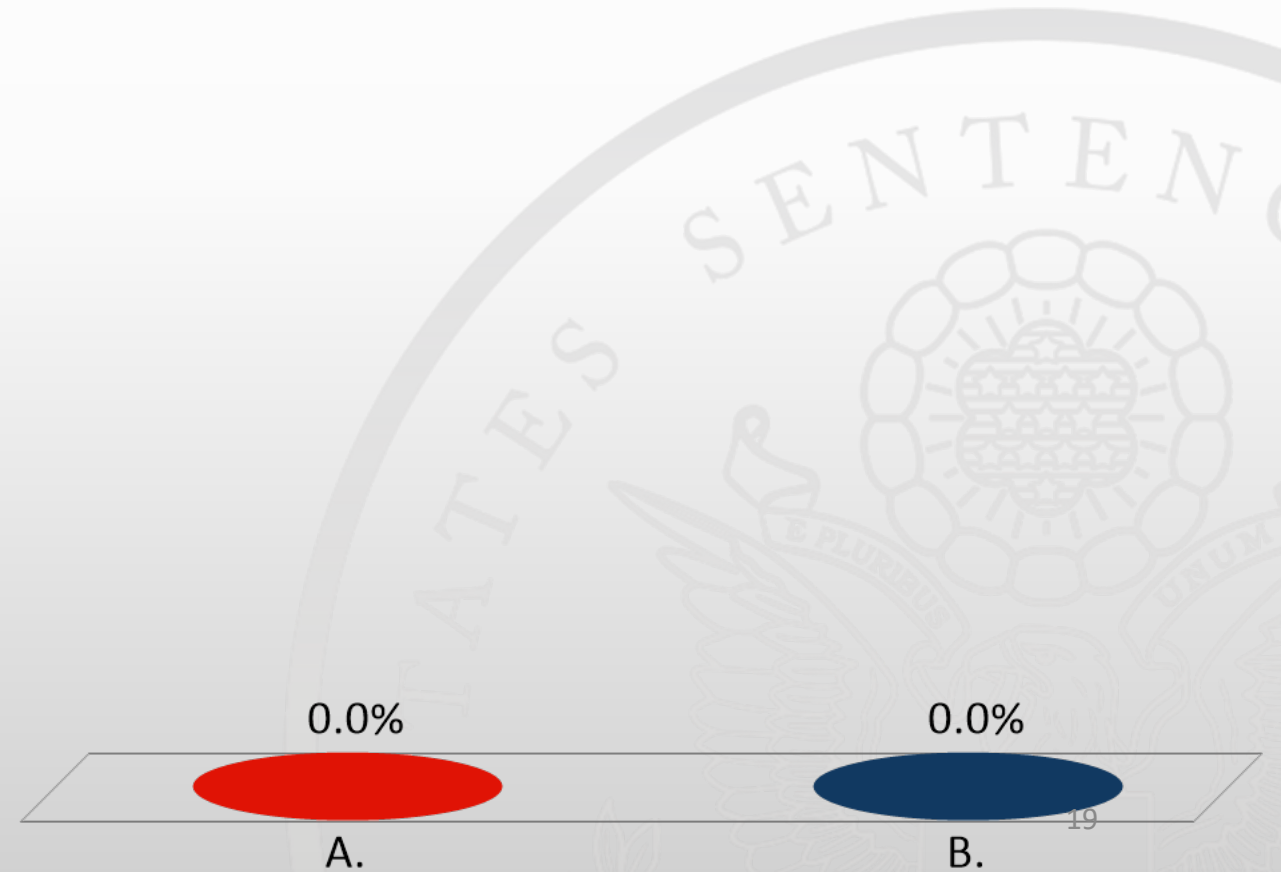
Medicare Restitution

- *U.S. v. Bikundi*, 926 F.3d 761 (D.C. Cir. 2019)
 - Because the defendants did not carry their burden of production as to any legitimate services, the district court properly concluded that the \$80.6 million in payments from D.C. Medicaid constituted loss under the MVRA

Scenario 3: Is the court's order correct?

A. No

B. Yes



Lagos v. U.S., 138 S. Ct. 1684 (2018)

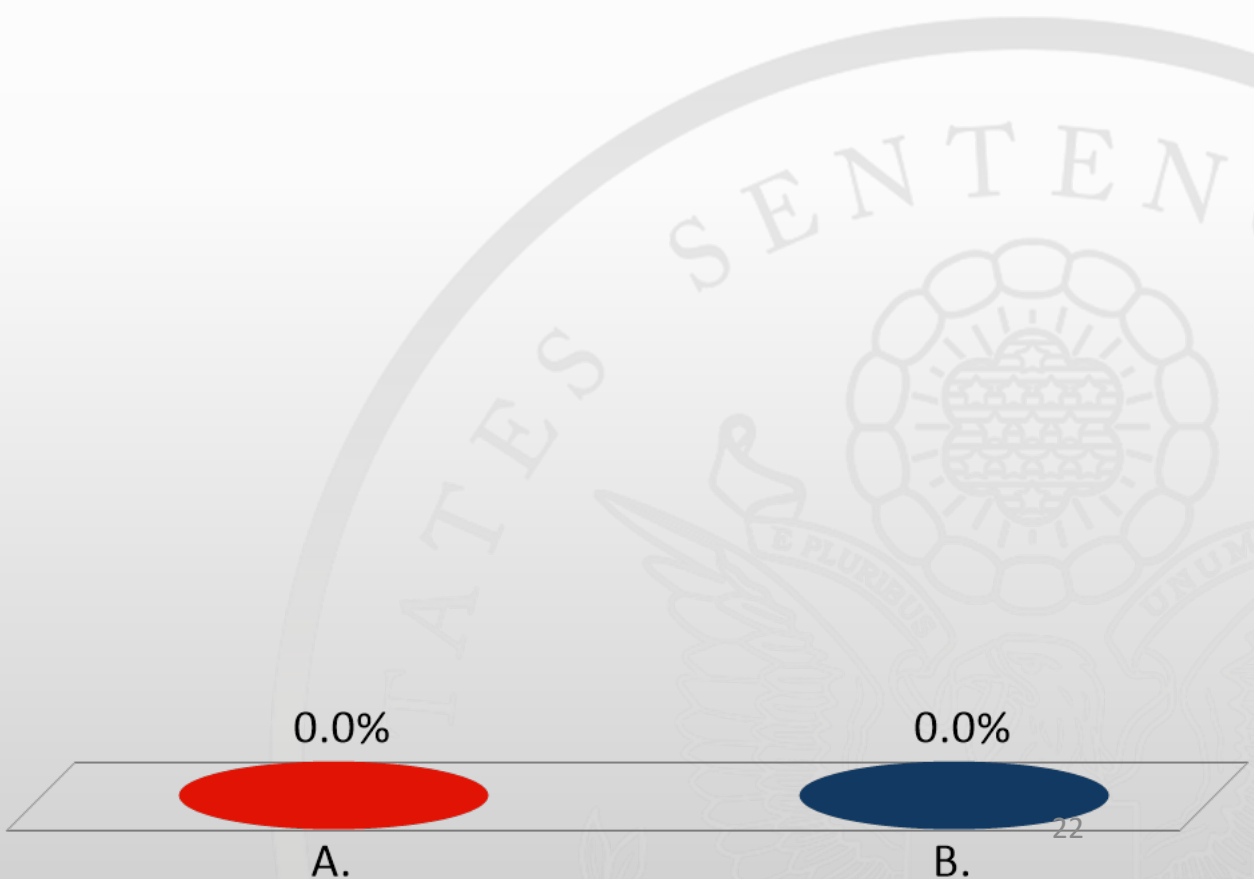
- Restitution for investigative costs under MVRA (18 U.S.C. § 3663A(b)(4)) is limited to government investigations and criminal proceedings, and does not include costs associated with private investigations and civil or bankruptcy litigation.

Amount of Restitution

- *U.S. v. Gammell*, -F.3d-, 2019 WL 3719799 (8th Cir. Aug. 8, 2019)
 - Restitution order could include costs associated with fixing websites after attacks because “[t]hese costs effectively equate to repair or cleanup costs because they involve mitigating the damage caused by Gammell’s DDoS attacks and restoring a website or web application to its normal functionality, without necessarily replacing the website or web application.”

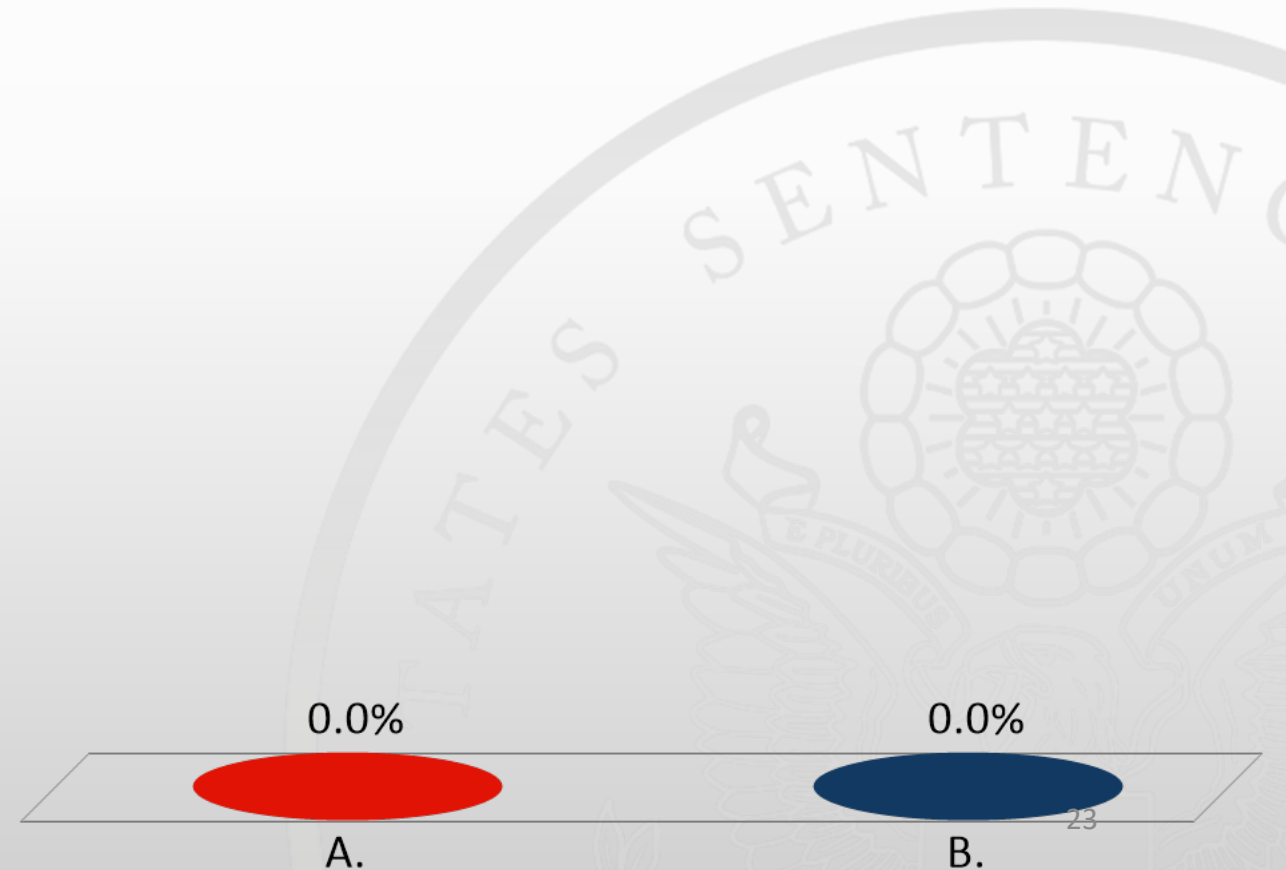
Scenario 4: Is the restitution order correct?

- A. Yes
- B. No



Scenario 5: Can the court order restitution as a criminal monetary payment?

- A. Yes
- B. No



Tax Offenses

- *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
- *U.S. v. Rankin*, 929 F.3d 399 (6th Cir. 2019)
 - “We modify the judgment to clarify that Rankin must begin to make restitution payments only upon the start of his term of supervised release because it is a Title 26 offense.”

Restitution in Child Pornography Offenses

- No need to disaggregate losses

U.S. v. Halverson, 897 F.3d 645 (5th Cir. 2019)

U.S. v. Sainz, 923 F.3d 1309 (7th Cir. 2019)

U.S. v. Bordman, 895 F.3d 1048 (8th Cir. 2019)

U.S. v. Rothenberg, 923 F.3d 1309 (11th Cir. 2019)

U.S. v. Monzel, 930 F.3d 470 (D.C. Cir. 2019)

- Disaggregate losses

U.S. v. Galan, 804 F.3d 1287 (9th Cir. 2019)

Amy, Vicky, and Andy

Child Pornography Assistance Act of 2018

- Provides guidance to courts to determine restitution in cases of possession, trafficking, and production of child pornography
- Court must impose a minimum of \$3,000 in restitution for each victim
- Special assessments may be imposed on defendants

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

- Costs include:
 - Medical services related to physical, psychiatric, or psychological care
 - Physical or occupational therapy or rehabilitation
 - 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. Here, \$16,250 amount included four “courses of therapy” for the victim
- *U.S. v. Rogers*, 758 F.3d 37 (1st Cir. 2014)
- *U.S. v. Danser*, 270 F.3d 451 (7th Cir. 2001)
- *U.S. v. Julian*, 242 F.3d 1245 (10th Cir. 2001)

Special Assessment in Sex Offenses

- *U.S. v. Shepard*, 922 F.3d 753 (6th Cir. 2019)

A court can consider the defendant's earning potential along with his present finances when determining whether to impose the \$5,000 special assessment under the Justice for Victims of Trafficking Act.

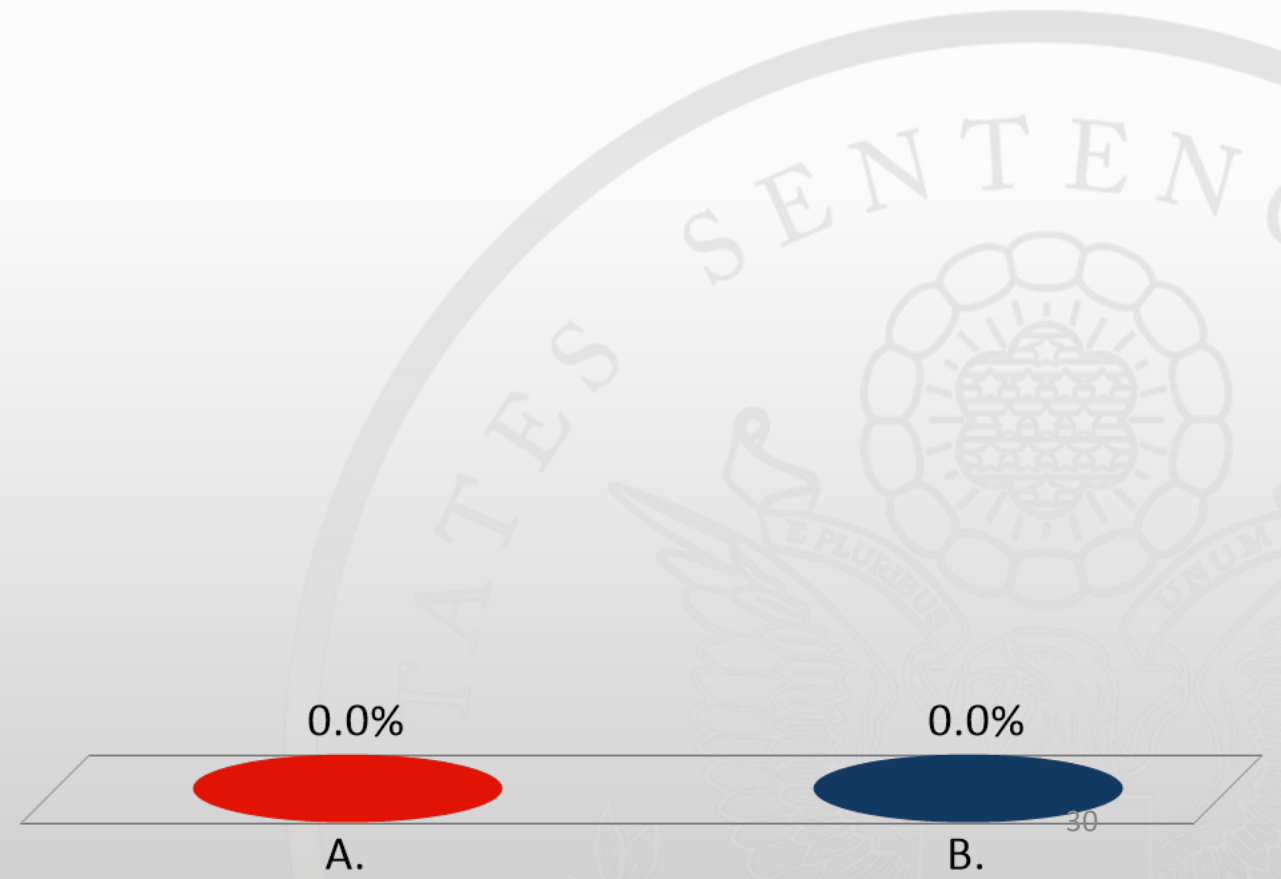
U.S. v. Graves, 908 F.3d 137 (5th Cir. 2018)

U.S. v. Wandahsega, 924 F.3d 868 (6th Cir. 2019)

U.S. v. Kelley, 861 F.3d 790 (8th Cir. 2017)

Scenario 6: Can the court waive the restitution amount?

- A. Yes
- B. No



Determining Restitution

- *U.S. v. Brazier*, -F.3d-, 2019 WL 3774126 (7th Cir. Aug. 12, 2019)
 - Section 3664(f)(1)(A) now orders courts imposing restitution to order restitution for “the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.”

Supervised Release Conditions

U.S. v. Haymond, 139 S. Ct 2369 (2019)

The sex offender revocation statute (18 U.S.C. 3583(k)) which mandates revocation and five years' imprisonment if the defendant committed certain offenses is unconstitutional

18 U.S.C. § 3583(d)

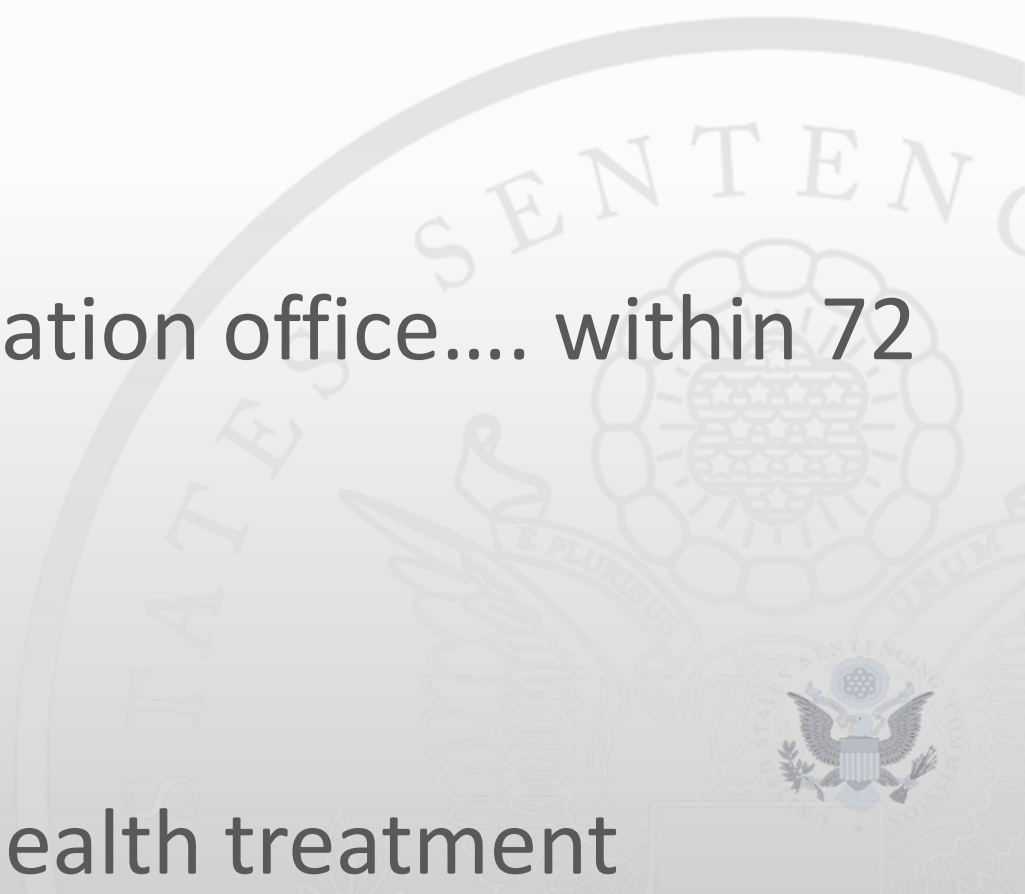
Conditions of Supervised Release

- 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)



Types of Supervised Release Conditions

- Mandatory
 - Defendant shall not commit another federal, local offense
- Standard
 - Defendant shall report to the probation office.... within 72 hours
- Special
 - Defendant must undergo mental health treatment



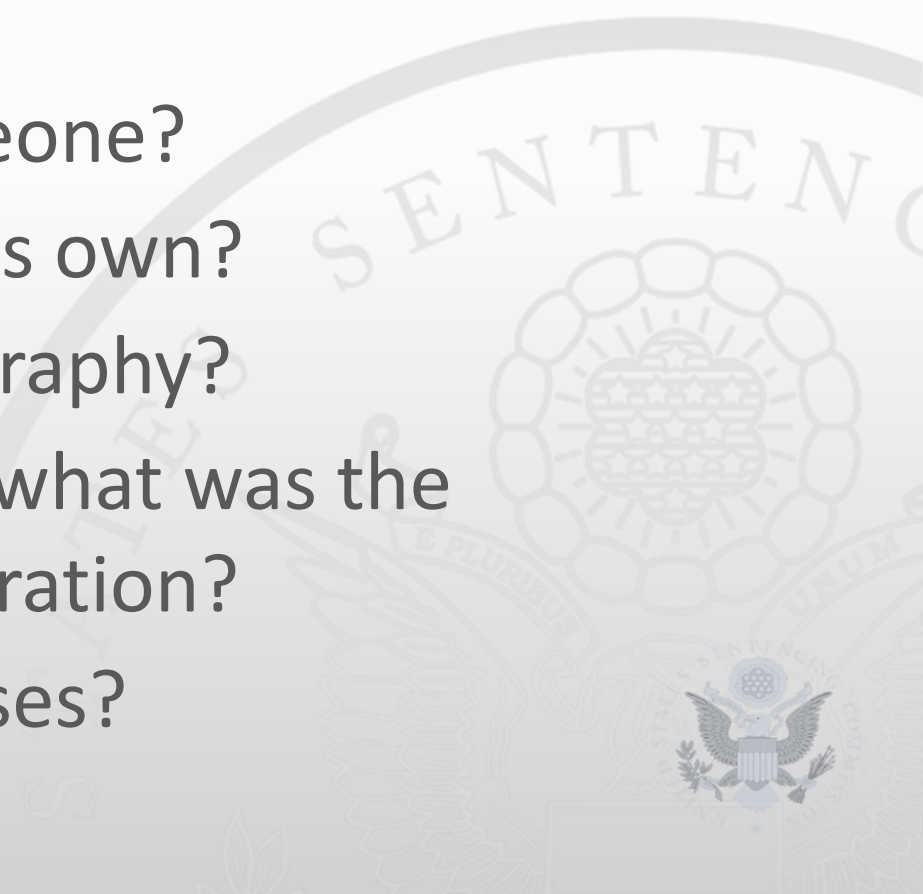
Common Pitfalls in Supervised Release Conditions

- Court did not make an **INDIVIDUALIZED** assessment
- Court did not make necessary findings
- Length of Condition



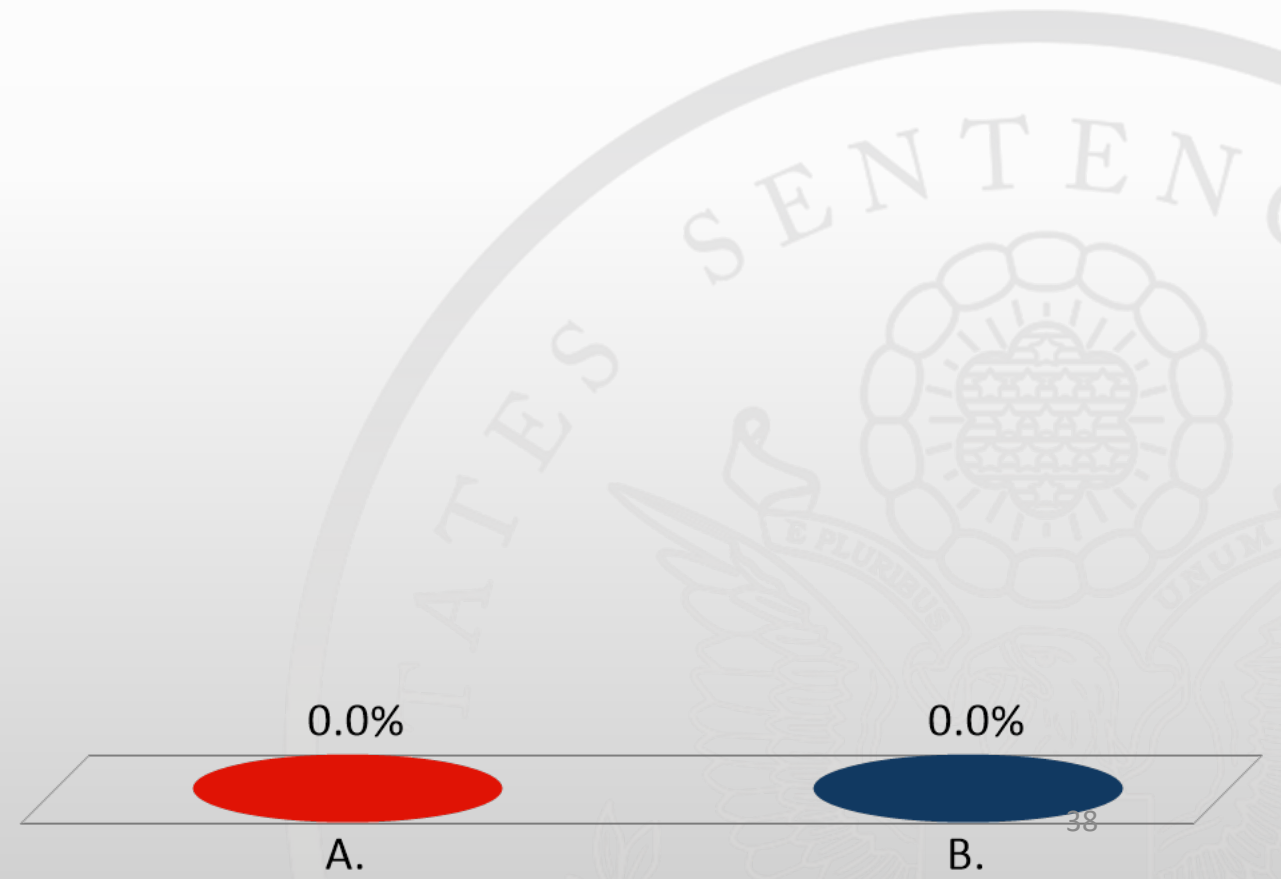
Considerations for Sex Offense Conditions

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



Scenario 7: Is this a proper condition?

- A. Yes
- B. Probably not



Individualized Inquiry

- *U.S. v. Bell*, 915 F.3d 574 (8th Cir. 2019)
 - The court abused its discretion in imposing condition prohibiting the defendant from any consumption of alcohol and from frequenting establishments where it is the primary item for sale because the court did not conduct an individualized inquiry into the circumstances of defendant's alcohol use and drug dependence.

U.S v. Carson, 924 F.3d 467 (8th Cir. 2019)

- Court plainly erred by failing to make any effort to support the challenged conditions with individualized findings.

Common Pitfalls in Supervised Release Conditions

- District court must orally enumerate each special condition
U.S. v. Rivas-Estrada, 906 F.3d 346 (5th Cir. 2018)
- Court did not make necessary findings for the condition, especially if the condition involved “fundamental liberties”
U.S. v. Eaglin, 913 F.3d 88 (2d Cir. 2019)



Lack of Justification

- *U.S. v. Bleau*, 930 F.3d 35 (2d Cir. 2019)
 - The court plainly erred by failing to adequately justify its imposition of a special condition of supervised release that prohibited the defendant from having direct contact with minors without pre-approval from the Probation Office

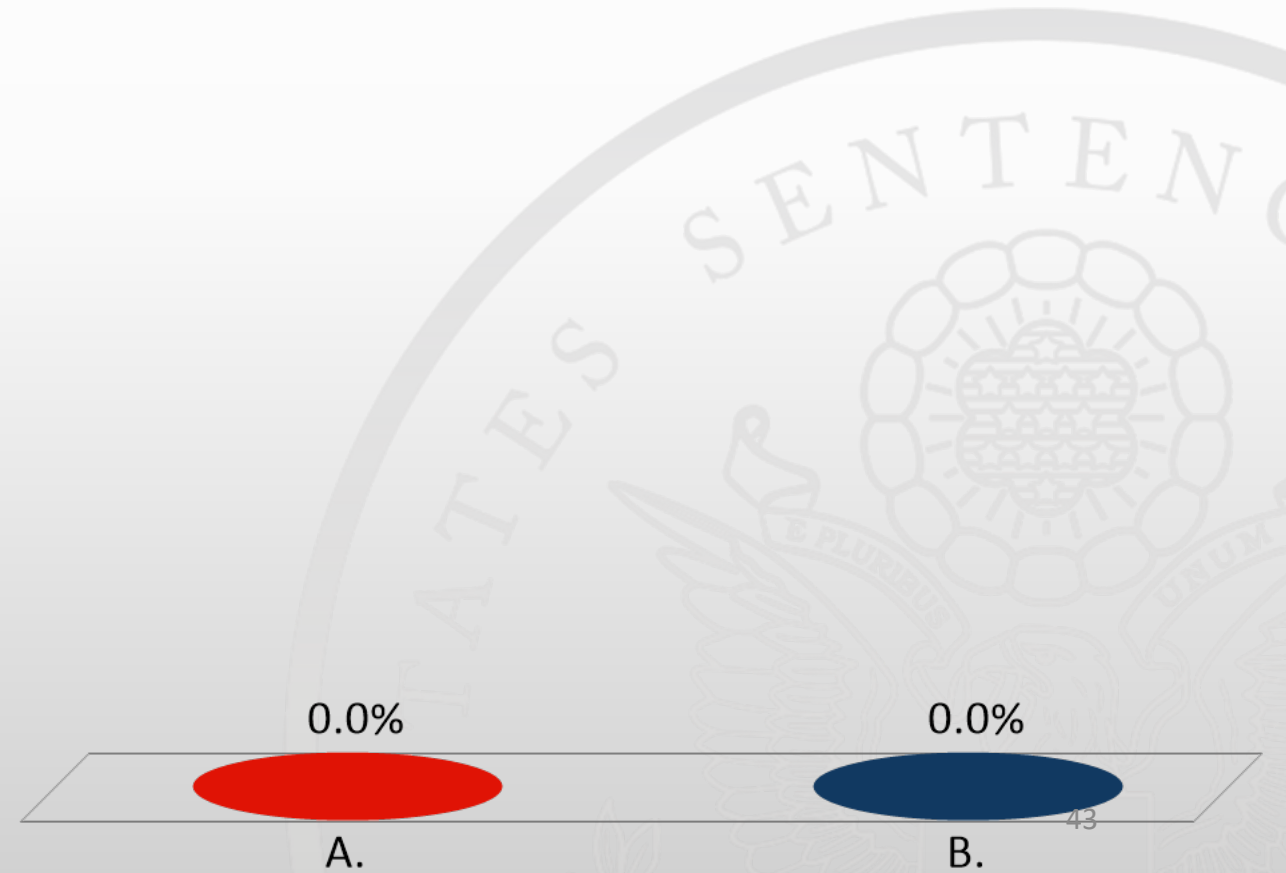
Supervised Release Condition Remands

- Treatment or Therapy
- Associations with Others
- Geography Locations
- Computer Restrictions
- Alcohol or Drug Treatment or Restrictions
- Improper Delegation to Probation Officer



Scenario 8: Is this a proper condition?

- A. Yes
- B. Probably not



Relation to Adult Pornography

- *U.S. v. Eaglin*, 913 F.3d 88 (2d Cir. 2019)
 - “In sum, on this record, we can discern no reasonable relation between Eaglin’s underlying offense of failure to register, his criminal history (including his fifteen-year old statutory rape crimes), his likelihood of recidivism, or need for rehabilitative service, on the one hand, and the District Court’s wholesale restriction of his possession of legal adult pornography, on the other.”

Improper Delegation

- *U.S. v. Cabral*, 926 F.3d 687 (10th Cir. 2019)
 - Supervised release condition requiring defendant to notify third parties if the probation officer determines the defendant poses a risk to them was an improper delegation to a probation officer because it could infringe on a number of liberty interests.

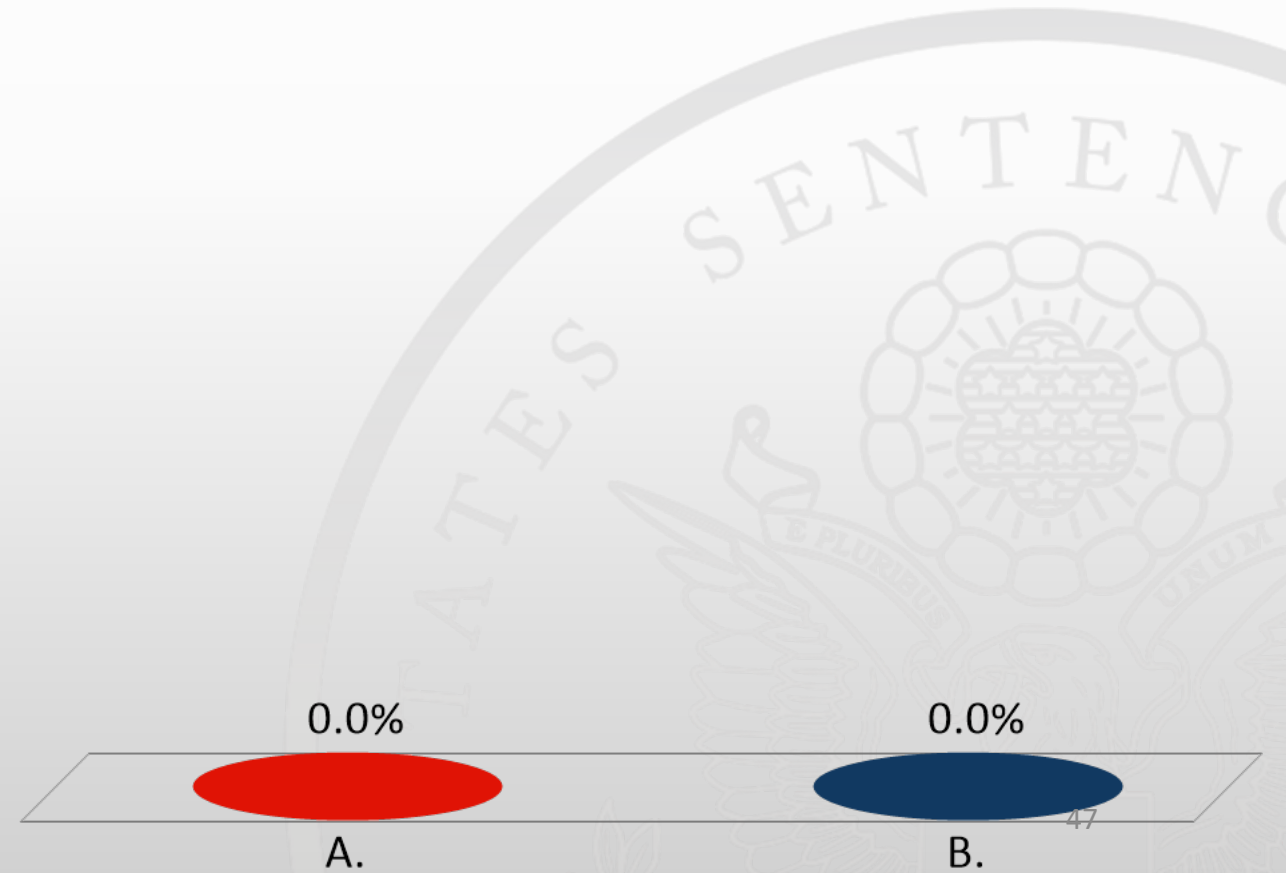
See also, U.S. v. Boles, 914 F.3d 95 (2d Cir. 2019) and *U.S. v. Shiraz*, 2019 WL 3801478 (4th Cir. 2019)

Delegation

- *U.S. v. Young*, 910 F.3d 665 (2d Cir. 2019)
 - Supervised release condition delegating authority to probation officer to decide drug treatment cannot include inpatient treatment
 - Mental health treatment condition is reasonable because it just leaves the details of the conditions to the probation officer not the decision of treatment

Scenario 9: Is this a proper condition?

- A. Yes
- B. Probably not



Mental Health Condition

- *U.S. v. Bree*, 927 F.3d 856 (5th Cir. 2019)
 - Mental health treatment condition remanded because no evidence to show that defendant had mental issues
 - Defendant's drug addiction does not mean he needs mental health treatment

Drug Treatment Condition

- Key issue: Explain why the condition is necessary?
- “Considering Romig’s personal use of methamphetamine, which began at age 16, and his criminal history of drug abuse convictions, it was not an abuse of discretion for the court to keep the condition in place to prevent further drug abuse and to provide for correctional treatment and rehabilitation.”
 - *U.S. v. Romig*, -F.3d-, 2019 WL 3783126 (8th Cir. Aug. 13, 2019)

Psychoactive Substances

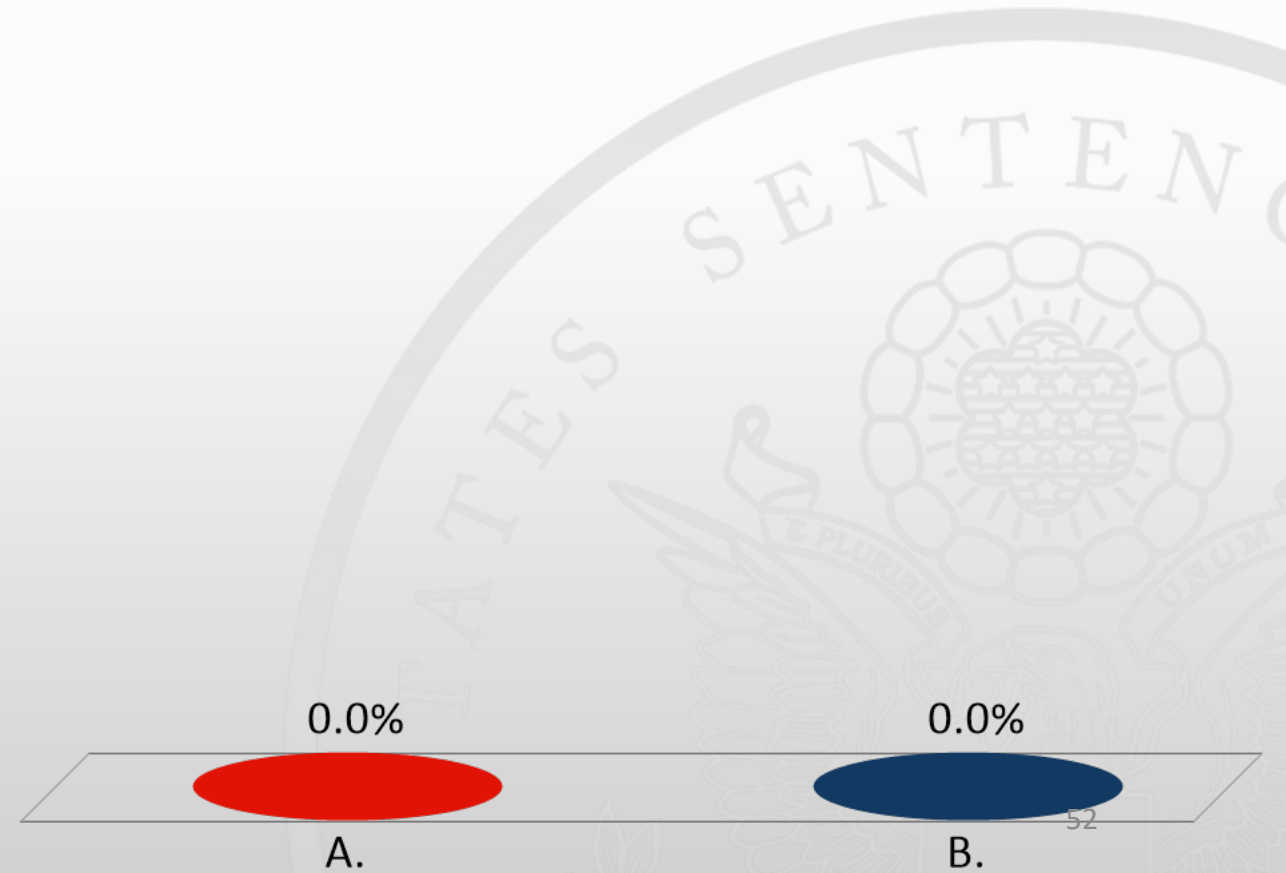
- *U.S. v. Daniel*, -F.3d-, 2019 WL 3420127 (5th Cir. July 30, 2019)
 - Condition's barring using psychoactive substances reasonable because it provided specific examples of substances the court meant, including synthetic marijuana and bath salts. The court further narrowed the special condition to only those psychoactive substances 'that impair a person's physical or mental functioning,' thereby implicitly excluding mere mood-altering substances like coffee or chocolate

Non-sex offense

- *U.S. v. Barcus*, 892 F.3d 228 (6th Cir. 2018)
 - The district court correctly imposed psychosexual evaluation and mental health treatment after being convicted of failure to register. The defendant's prior offense was statutory rape with a 12-year old girl.
 - "While this act occurred six years ago, this is not so far in the past as to make the special sex offender conditions unreasonable. Besides, during four of those six years Barcus was incarcerated for committing that sexual act."
 - *But see U.S. v. Carter*, 463 F.3d 526 (6th Cir. 2006)

Scenario 10: Is this a proper condition?

- A. Yes
- B. Probably not



Modification

- *U.S. v. Washington*, 904 F.3d 204 (2d Cir. 2018)
 - “We conclude here that the written judgment’s additional language requiring ‘submission to polygraph testing’ is an impermissible modification of the spoken sentence.”

Differences in Conditions

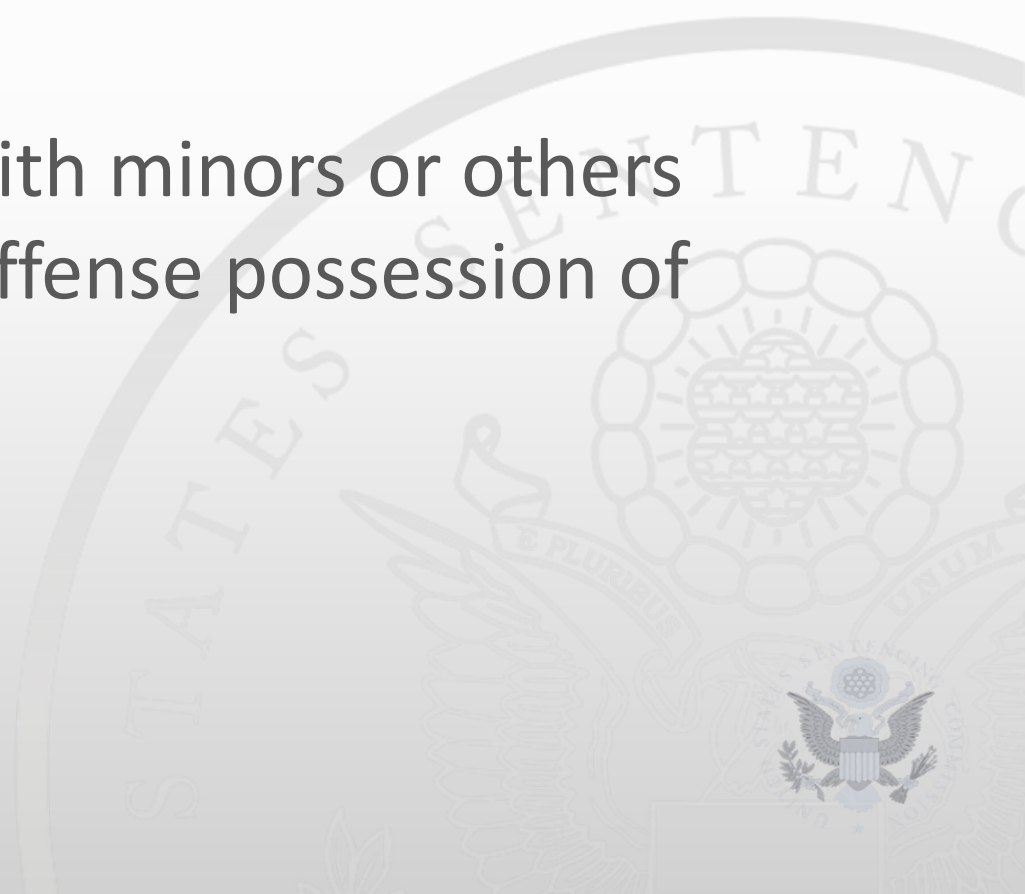
- *U.S. v. Anstice*, 930 F.3d 907 (7th Cir. 2019)
 - Court does not need to announce mandatory conditions at sentencing but needed to orally announce discretionary conditions.
- *See also, U.S. v. Vasquez-Puente*, 922 F.3d 700 (5th Cir. 2019)

Oral vs. Written Condition

- *U.S. v. Jackson*, 909 F.3d 199 (7th Cir. 2019)
 - “We have held that when an inconsistency exists between an oral and the later written sentence, the sentence pronounced from the bench controls. Because the notification condition here was not pronounced from the bench, it must be vacated.”
 - See also, *U.S. v. James*, 792 F.3d 962 (8th Cir. 2015)

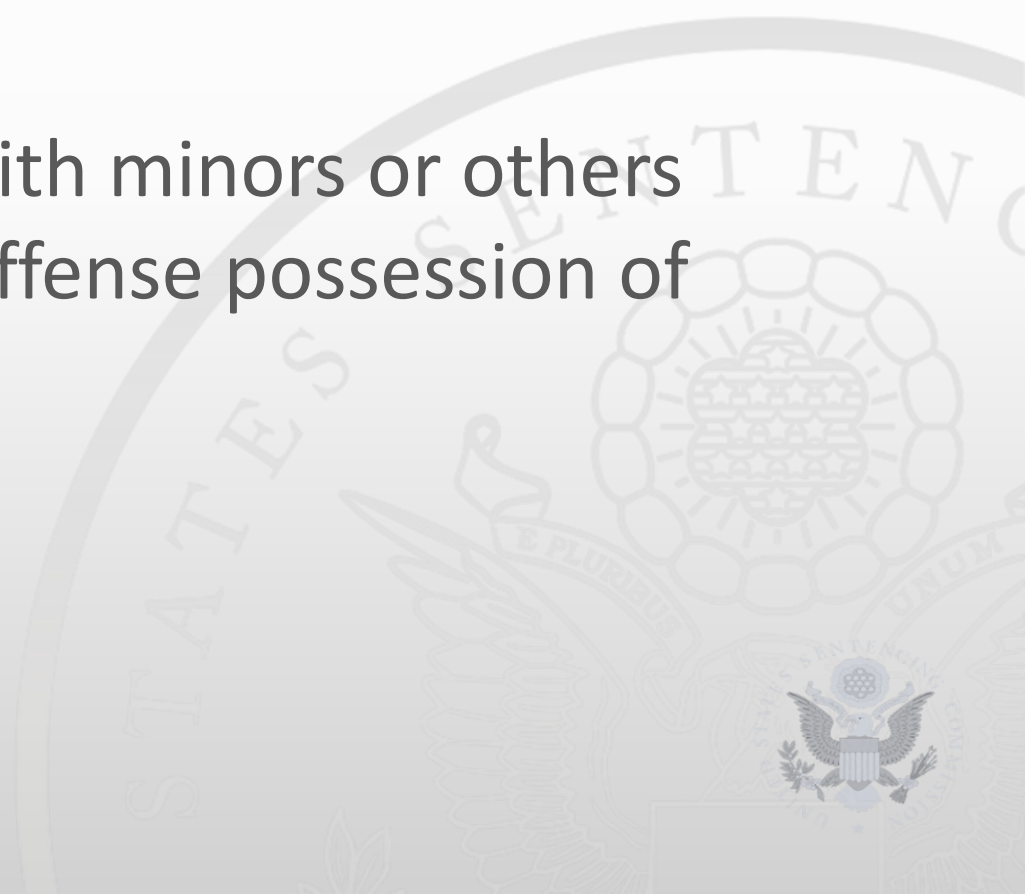
Contact with Minors

- Does defendant have children of his own?
- Was the defendant communicating with minors or others regarding child pornography or was offense possession of child pornography?
- How broad is the restriction?



Contact with Minors

- Did the defendant molest his own child?
- Was the defendant communicating with minors or others regarding child pornography or was offense possession of child pornography?
- How broad is the restriction?



Association

- *U.S. v. Washington*, 893 F.3d 1076 (8th Cir. 2018)
 - Condition barring the defendant from being “in company” with “all gangs” was impermissibly vague
- *U.S. v. Romig*, 916 F.3d 718 (8th Cir. 2019)
 - Condition prohibiting defendant from associating with Hell’s Angels members or prospects was reasonable because defendant was a prospect for the group

Polygraph Condition Allowed

- *U.S. v. Boles*, 914 F.3d 95 (2d Cir. 2019)
 - Court did not abuse its discretion in ordering polygraph examinations as part of the defendant's sex offender treatment

Polygraph Testing

- *U.S. v. Hood*, 920 F.3d 87 (1st Cir. 2019)
 - Periodic polygraph testing condition was proper because it contained limiting language that included that “no violation proceedings will arise solely on the defendant’s failure to pass a polygraph examination or on the defendant’s refusal to answer polygraph questions.”

Total Internet Ban

- *U.S. v. Eaglin*, 913 F.3d 88 (2d Cir. 2019)
 - “On the record before us, the imposition of a total Internet ban for the eleven-year period of Eaglin’s supervised release is substantively unreasonable as it has not been shown to be ‘reasonably related’ to the statutory factors governing sentencing nor to be reasonably necessary to effectuate the sentencing objectives. In short, the Internet ban imposed on Eaglin severely encroached on his First Amendment rights by depriving him of the opportunity to engage with modern society.”⁶¹

Internet Bans

- *U.S. v. Holena*, 906 F.3d 288 (3d Cir. 2018)
 - “Still, internet bans are ‘draconian,’ and we have said as much ‘even in cases where we have upheld them.’”
 - “To gauge whether an internet or computer restriction is more restrictive than necessary, we consider three factors: the restriction’s length, its coverage, and ‘the defendant’s underlying conduct.’ Sometimes we also consider a fourth factor: the proportion of the supervised-release restriction to the total restriction period (including prison).”



Internet Ban With Permission

- *U.S. v. Strubberg*, 929 F.3d 969 (8th Cir. 2019)
 - “The trial record shows Strubberg perused websites in an effort to arrange casual sexual encounters, which was the genesis of his attempt to have sex with a minor here. He exchanged emails and photographs with Kathy, including purported photographs of Abby. And he used search terms indicating he was looking up information about having sex with a minor immediately before leaving to meet with Abby.”

Computer Use

- *U.S. v. Spallak*, -F.3d-, 2019 WL 3884027 (8th Cir. Aug. 19, 2019)
 - Computer restriction without permission of probation officer is reasonable because the defendant got caught using the job center computer to seek child porn and the defendant can seek permission from the probation officer

Computer Use

- *U.S. v. Blair*, -F.3d-, 2019 WL 3793368 (10th Cir. Aug. 13, 2019)
 - “The probation office is limited to imposing only those restrictions that are reasonably calculated to prevent the defendant from using a computer or the Internet to access, store, produce, or send child pornography in any form; to provide necessary restrictions to facilitate a defendant’s correctional treatment so that he may be rehabilitated; and to protect the public from any further crimes of the defendant.”

Community Service

- *U.S. v. Parkins*, -F.3d-, 2019 WL 3884241 (2d Cir. Aug. 19, 2019)
 - “In light of §5F1.3, Application Note 1’s general proscription of more than 400 hours of community service and the district court’s inadequate, individualized justification for a higher amount, the imposition of a total of 695 hours of community service was an abuse of discretion.”
- *See U.S. v. Purham*, 795 F.3d 761 (7th Cir. 2015)

Questions or Comments?



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