U.S. SENTENCING COMMISSION'S ANNUAL NATIONAL SEMINAR ON THE FEDERAL SENTENCING GUIDELINES

June 18, 2010 Breakout sessions: Child Pornography and Sex Offenses

Hon. John M. Roll
Chief District Judge
District of Arizona

The following is a partial list of Ninth Circuit decisions pertaining to child pornography and sex offense cases, including cases discussing common sentencing and supervised release condition issues.

A. Recent cases addressing proof issues

Possession a lesser-included of receipt. Possession of child pornography is lesser-included offense of receipt of child pornography, but when different misdeeds are used to prove both, the defendant may be convicted of both and sentenced for both. *United States v. Overton*, 573 F.3d 679, 695-96 (9th Cir. 2009).

Intent to distribute not an element of possession. Possession of child pornography does not require an intent to distribute. *United States v. Olander*, 572 F.3d 764, 765 (9th Cir. 2009).

Viewing supports convictions for receipt or possession. Viewing child pornography is sufficient to establish receipt or possession of child pornography. *Olander*, 764 F.3d at 766-67.

When sexual exploitation is based on two different grounds, defendant may be convicted of two counts. Because sexual exploitation arose in this case from both a supervisory relationship and from coercion, because both existed during the same

exploitation, the defendant could be convicted of two counts of sexual exploitation. *Overton*, 573 F.3d at 692-95.

Definition of lascivious in crime of sexual exploitation. The Ninth Circuit has adopted a six-part non-exhaustive, non-conclusive test to be used by the trier of fact in determining whether an exhibition is lascivious for purposes of "sexually explicit conduct," 18 U.S.C. sec. 2256(2)(A):

"1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; [and]

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

Overton, 573 F.33d at 686-87 (factors discussed in affirming of sexual exploitation convictions) (citations omitted).

B. Enhancements

1. Sec. 2G2.2(b)(4) - Four level enhancement for child pornography depicting sadistic or masochistic conduct or depictions of violence

Penetration of prepubescent children. "[A] district court can apply the sadistic conduct enhancement any time images portray the penetration of prepubescent children by adult males because such images are necessarily pleasurable for the participant and painful for the child." *United States v. Holt*, 510 F.3d 1007, 1011 (9th

Cir. 2007) (citing *United States v. Rearden*, 349 F.3d 608, 614-15 (9th Cir. 2003)**).**

2. Sec. 2G2.2(b)(5) - Five level enhancement for engaging in pattern of activity involving sexual abuse or exploitation of minor

Pattern of activity. Molestations of step-children 35 years before solicitation of child pornography depicting parents molesting minor children qualified for a five level enhancement for engaging in a pattern of activity involving sexual abuse or exploitation. *United States v. Garner*, 490 F.3d 739, 743-44 (9th Cir. 2007)**.**

3. Sec. 2G2.2(c)(1) - Sexually exploiting a minor by production of sexually explicit material applicable

Sec. 2G2.2(c)(1), which applies if conduct involved causing, transporting, permitting or offering or seeking by advertisement a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, was applicable even though such conduct was not prosecutable under *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003). *United States v. Speelman*, 431 F.3d 1226, 1231-32 (9th Cir. 2005).

C. Sentencing calculations, including departures and variances

1. Impact of *Booker*

Reasonableness. "In *Gall [v. United States*, 128 S.Ct. 586, 591 (2007)], the Court noted that after *Booker* [543 U.S. 220 (2005)], appellate review of sentencing decisions is limited to determining whether they are reasonable." *United States v. Autery*, 555 F.3d 864, 868-69 (9th Cir. 2009).

"In the post-*Booker* era, district courts making sentencing decisions must make the Guidelines 'the starting point and the initial benchmark' for their decisions." *Autery*, 555 F.3d at 871-72 (quoting *Gall*, 128 S. Ct. at 596).

A guideline sentence does not necessarily require a lengthy explanation. *United States v. Overton*, 573 F.3d 679, 699-700 (9th Cir. 2009)(high end of

Guidelines sentence, 235 months, not error based on depravity of action with step-daughter, admitted addiction, grooming proclivities, and "substantially underwhelming" case for mitigation).

2. Departures and variances

"In sentencing a defendant, the district court should first determine the appropriate guideline range, then evaluate whether a traditional departure is warranted, and finally decide whether or not to impose a guideline sentence after considering all the sec. 3553(a) [variance] sentencing factors." *United States v. Ruvalcava-Perez*, 561 F.3d 883, 886 (8th cir. 2009). *See also Rita v. United States*, 551 U.S. 338, 351 (2007)("The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. 18 U.S.C. § 3552(a); Fed. Rule Crim. Proc. 32. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. See Rule 32(f).")

Variance does not require notice before sentencing outside Guidelines but departure does. *United States v. Vanderwerfhorst*, 576 F.3d 929, 934-35 (9th Cir. 2009)(Rule 32(h), Fed. R. Crim. P. inapplicable).

3. Conduct outside heartland

Explanation of unusually harsh or lenient sentence. "While district courts are not required to impose a sentence within the Guidelines, *Booker*, 543 U.S. at 249-53, they must 'give serious consideration to the extent of any departure from the Guidelines,' and they must then 'explain [the] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justification.'" *Autery*, 555 F.3d 864, 871-72 (9th Cir. 2009) (quoting *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008))(affirming district court's downward departure to probation from 41-51 month guidelines and plea agreement providing for sentence within that range, based upon district court finding that defendant did not meet pedophile profile, showed he could live responsibly, had support of family, and had no criminal history, among other factors)(dissent by Judge Tashima, stating that

defendant "showed little indication of being anything other than a run-of-the-mill child pornographer," 555 F.3d at 879).

Circumstances warranting lenity. Departure below the sentencing Guidelines was permissible after the district judge determined that the defendant's possession of child pornography was outside the heartland of such cases because the pornography was "pretty minor" according to an expert witness, it had been automatically downloaded to the defendant's computer, and it had not been indexed. *United States v. Parish*, 308 F.3d 1025, 1030-31 (9th Cir. 2002).

Circumstances warranting sentence above Guidelines. An above-Guidelines sentence was permissible based on variance under 18 U.S.C. sec. 3553A, arising from prior sex offense with minor, "remarkably poor performance on supervised release," and the likelihood defendant would reoffend. *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir. 2009)

4. Conduct not outside heartland

If case typical, not outside heartland. "Heartland" refers to "typical" and cases outside the heartland are cases significantly different from the norm. *United States v. Thompson*, 315 F.3d 1071, 1073-74 (9th Cir. 2002)(reversing trial court's downward departure based upon defendant's attempt to conceal child pornography so as to not be easily accessible to others and absence of criminal history; defendant possessed 10,000 images and distributed over 47,000 images) (Judge Berzon concurred, stating that the case was not outside heartland, but observing that two additional factors - post-offense rehabilitation and diminished capacity - could justify downward departure).

5. Lack of awareness re automatic downloading.

A defendant's lack of familiarity with computers and fact that automatic downloading of child pornography into cache had occurred was a mitigating factor. *United States v. Kuchinski,* 469 F.3d 853, 862-63 (9th Cir. 2006).

6. Departure based on susceptibility to prison abuse.

Departure was permissible because defendant, despite being 5'11" and 190 pounds, would be susceptible to abuse in prison. *United States v. Parish*, 308 F.3d

1025, 1031 (9th Cir. 2002)(Judge Graber, in dissent, pointed out that there was nothing in the record "to support a departure based on Defendant's physical, mental, or emotional state.")

D. Special Conditions of Supervised Release

Imposition of conditions. "[C]onditions of supervised release 'are permissible only if they are reasonably related to the goal of deterrence, protection of the public, or rehabilitation of the offender.'" *United States v. Weber*, 451 F.3d 552, 558 (9th Cir. 2006)(quoting *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003)).

Imposition of sex offender conditions when sentence was imposed for a crime that is not a sex offense. When the crime for which the defendant is being sentenced, or for which new supervised release conditions are being set, is not a sex offense, sex offender conditions may, *United States v. Prochner*, 417 F.3d 54, 64-65 (1st Cir. 2005)(evaluation for sex offender treatment and no contact with minors valid despite sentencing for credit card fraud), or may not, *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003)(sex offender conditions imposed during supervised release revocation hearing impermissible; defendant had been sentenced for conspiracy to distribute and possess marijuana), be permissible.

1. Sex offender treatment.

Sex offender treatment, with the type and extent of such treatment determined by the probation officer, has been upheld. *United States v. Rearden*, 349 F.3d 609, 619 (9th Cir. 2003)(sex offender treatment program as ordered by probation officer upheld as supervised release condition). *See also United States v. Underwood*, 334 Fed. App'x 825, 826-27 (9th Cir. 2009)(ordering disclosure of PSR to treatment provider upheld).

2. Drug treatment and testing.

Because "a condition of supervised release need not relate to the offense as long as the condition satisfies the goal of deterrence, protection of the public, or rehabilitation, "in light of defendant's recreational use of marijuana and

methamphetamine, "[i]t is not obvious that undergoing drug treatment would not be 'beneficial both to [Rearden] and to society...'" *Rearden*, 349 F.3d at 619 (citations omitted).

3. Condition designed to prohibit possession of pornography.

Earlier Ninth Circuit case law held that a prohibition on possession of "any materials that depict or describe 'sexually explicit conduct' as defined in 18 U.S.C. sec. 2256(2)" was a permissible supervised release condition. *United States v. Weber*, 186 Fed. App'x 751,753 (9th Cir. 2006)(citing *United States v. Rearden*, 349 F.3d 608, 619-20 (9th Cir. 2003). *See also Rearden*, 349 F.3d at 619-20 (upholding ban on possession of "any materials depicting sexually explicit conduct as defined in 18 U.S.C. sec.2256(2)"; condition of supervised release furthered the goals of rehabilitation and protecting public); *United States v. Bee*, 162 F.3d 1232, 1234-35 (9th Cir. 1998)(district court did not err in ordering as a condition of supervised release that defendant possess no sexually stimulating material; First Amendment does not prohibit this condition for a sex offender when condition furthers goals of rehabilitation of defendant and protection of public)*; United States v. Riley*, 342 Fed. App'x 315 (9th Cir. 2009).

More recent case law, however, concludes that a condition that prohibits possessing materials that depict or describe child pornography may be overbroad. *See United States v. Cope,* 527 F.3d 944, 957-58 (9th Cir. 2008)(condition prohibiting defendant from possessing "any materials...depicting and/or describing child pornography" overbroad because "describing" could encompass descriptions appearing in "statutes, case law and Cope's own writing as part of his sex offender treatment"). *See also, United States v. Stolte,* 2009 WL 4884622 (9th Cir. 2009). Also, a prohibition against possession of pornography may be fatally vague. *United States v. Antelope*, 395 F.3d 1128, 1141-42 (9th Cir. 2005)("pornography" prohibition too vague; district court should look to language approved in *Rearden)*; *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002)(a blanket prohibition on possession of "any pornography" violates due process because it is too vague to clearly inform a probationer as to what conduct is prohibited).

4. Loitering near places primarily used by children under the age of 18.

The Court may order that a defendant not loiter near places primarily used by

children. *United States v. Rearden*, 349 F.3d 608, 620 (9th Cir. 2003)(defendant was sentenced for shipping child pornography over the internet; based on evidence that defendant posed a risk to children, the court permissibly ordered as a condition of supervised release that the defendant not loiter near places primarily used by children under the age of 18; although defendant claimed his interest in children was strictly fantasy, the district court was not required to accept this explanation; defendant collected articles re rape and murder of children and wrote graphic descriptions of child murders and sexual abuse) . *See also United States v. Riley*, 342 Fed. App'x 315 (9th Cir. 2009).

However, a condition that a defendant "not reside in close proximity" to children may be too vague. *United States v. Guagliardo*, 278 F.3d 868, 872-73 (9th Cir. 2002)(condition of supervised release that defendant "not reside in 'close proximity' to places frequented by children" is too vague because it leaves "close proximity" undefined).

5. No contact with children.

A condition requiring no contact with children is permissible. *United States v. Bee*, 162 F.3d 1232, 1235 (9th Cir.1998)(district court acted within broad discretion in ordering that defendant sentenced for abusive sexual contact, as a condition of supervised release, have no contact with children). Also, a defendant may be required to report any contact with children. *United States v. Underwood ,* 334 Fed. App'x 825 (9th Cir. 2009).

6. Prohibition of possession of computer access to any online service.

A Court may prohibit possession or use of a computer with access to any online service without prior approval of the probation department. *United States v. Rearden*, 349 F.3d 608, 620-21 (9th Cir. 2003) (condition was appropriate in light of fact that defendant was involved in e-mail transmissions of graphic child pornography and this condition furthered the goals of rehabilitation of defendant and protection of the public); *see also United States v. Antelope*, 395 F.3d 1128, 1142 (9th Cir. 2005); *United States v. Riley*, 342 Fed. App'x 315 (9th Cir. 2009)(unpublished portion).

However, a condition that prohibits a defendant from accessing any computer material related to minors may be overbroad. *United States v. Riley*, 576 F.3d 1046, 1048-49 (9th Cir. 2009)(published portion)(prohibition against defendant accessing

"via computer any material that relates to minors" is overbroad; defendant could violate condition as written by watching a movie that had children in it).

7. Search and seizure of computer, computer related devices and peripheral equipment.

A condition that authorizes the search of defendant's computer devices and the installation of monitoring software may be appropriate. *United States v. Rearden*, 349 F.3d 608, 621 (9th Cir. 2003)(upholding condition that "[all computers, computer related devices, and the peripheral equipment used by defendant shall [be] subject to search and seizure and the installation of search and/or monitoring software and/or hardware, including unannounced seizure for the purpose of search," as serving the purpose of monitoring defendant's progress under supervision).

8. Restitution to child pornography victim.

Restitution, if reasonable, may be ordered for victim of child pornography production. *United States v. Doe*, 488 F.3d 1154, 1160-61 (9th Cir. 2007)(restitution to victim of production of child pornography and engaging in sexual conduct with minor permissible if reasonable); *but see United States v. Follet*, 269 F.3d 996, 1001-02 (9th Cir. 2001)(although restitution could be ordered for victim's counseling services, because the counseling agency was not the victim, restitution to the agency could not be ordered, even if the agency provided the counseling free of charge to the victim).

9. Occupational restrictions.

Employment restrictions designed to prevent regular contact with minors may be appropriate. *United States v. Riley*, 342 Fed. App'x 315, 319 (9th Cir. 2009)(unpublished portion)(conditions restricting defendant's employment in occupations that cause him to regularly contact minors was not an abuse of discretion; these "conditions do not prohibit Riley from returning to his previous work").

10. Lifetime supervised release.

A condition of lifetime supervised release may be permissible. *United States v. Cope*, 527 F.3d 944, 952 (9th Cir. 2008)(in sentencing defendant for possession of child pornography, "the lifetime term is not greater than necessary, 18 U.S.C.

§3553(a), and is reasonable in light of the nature of Cope's offense, *id.* § 3553(a)(1), his history of having a sexual interest in children . . . and the need to protect the public . . . ."

E. Special conditions of supervised release requiring notice and findings.

"Where a condition is not on the list of mandatory or discretionary conditions in the sentencing guidelines notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness." *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004). Such conditions include plethysmograph testing, polygraph testing, Abel assessment, and forced medication. *United States v. Cope*, 527 F.3d 944, 953 (9th Cir. 2008).

"If [] the condition implicates a particularly significant liberty interest of the defendant, then the district court must support its decision on the record with record evidence that the condition of supervised release sought to be imposed is 'necessary to accomplish one or more of the factors listed in sec. 3583(d)(1)' and 'involves no greater deprivation of liberty than is reasonably necessary.'" *United States v. Weber*, 451 F.3d 552, 561 (9th Cir. 2006)(quoting *United States v. Williams*, 356 F.3d 1045, 1057 (9th Cir. 2004)).

Case law implies that "[t]he requirement of special findings applies to any imposed treatment or medication that implicates a particularly significant liberty interest." *United States v. Cope,* 527 F.3d 944, 955 (9th Cir. 2009).

1. Forced medication.

Because forced medication involves a particularly significant liberty interest, "a district court is required, before ordering such a condition, to 'make on-the-record, medically-grounded findings that court-ordered medication is necessary to accomplish one or more of the factors listed in 18 U.S.C. sec.3583(d)(1).'" *United States v. Weber*, 451 F.3d 552, 559-60 (9th Cir. 2006)(quoting *United States v. Williams*, 356 F.3d 1045 (9th Cir. 2004) and citing *Sell v. United States*, 539 U.S. 166 (2003)).

In particular, two types of medications - antipsychotic medication and so-called "chemical castration" medication, both of which interfere with mental processes and alter behavior, implicate particularly significant liberty interests. *Cope*, 527 F.3d at 955 and n.5 ("at least two examples of medication that would implicate particularly significant liberty interests [requiring *Williams* and *Weber* findings]" are antipsychotic medication and "'so-called 'chemical castration,' the taking of hormonal drugs to reduce his sex drive and cause temporary impotence." Both medications "interfere[] with mental processes and alter[] behavior." Also, the panel stated that other medications not yet in existence will implicate particularly significant liberty interests, citing the novel by Anthony Burgess, *A Clockwork Orange*. *Cope*, 527 F.3d at 955.

A condition that requires the taking of "any" or "all" prescribed medication is overbroad. *Cope*, 527 F.3d at 955-56 ("[W]here, as here, a district court orders a defendant to take 'any' or 'all' medications prescribed by medical or other treatment personnel during his term of supervised release without making heightened *Williams* findings, this all-encompassing medication condition must necessarily be understood as limited to those medications that do not implicate a particularly significant liberty interest of the defendant;" the panel also stated that the condition was so broad as to pose the possibility of the defendant being revoked for failing to take prescription cold medication).

2. Polygraph testing as part of sex offender treatment.

Polygraph testing can be ordered if notice is given and a full opportunity for determining appropriateness is afforded the defendant. *United States v. Cope*, 527 F.3d 944, 953 (9th Cir. 2008)*; see also United States v. Antelope,* 395 F.3d 1128, 1333-39 (9th Cir. 2005)(polygraph testing can be ordered as part of sex offender treatment if the defendant retains the right to invoke the Fifth Amendment in order to avoid compulsory self-incrimination).

3. Plethysmograph testing.

Because plethysmograph testing is exceptionally intrusive in nature and duration, "[o]nly a finding that plethysmograph testing is likely given the defendant's characteristics and criminal background to reap its intended benefits can justify the intrusion into a defendant's significant liberty interest in his own bodily integrity." *United States v. Weber*, 451 F.3d 552, 561-67 (9th Cir. 2006)(Judge Noonan concurred, but would hold "the Orwellian procedure at issue to be always a violation

of the personal dignity of which prisoners are not deprived," 451 F.3d at 570); *see also United States v. Cope*, 527 F.3d 944, 953-54 (9th Cir. 2008)(plethysmograph testing implicates significant liberty interest).

"[P]enile plethysmograph is a test designed to measure a man's sexual response to various visual and auditory stimuli. More precisely, the male 'places on his penis a device that measures its circumference and thus the level of the subject's arousal as he is shown sexually explicit slides or listens to sexually explicit audio 'scenes.'" *United States v. Weber*, 451 F.3d 552, 561-62 (9th Cir. 2006). "Today, plethysmograph testing has become rather routine in adult sexual offender treatment programs, with one survey noting that approximately one-quarter of adult sex offender programs employ the procedure." *Id.* 451 F.3d at 562. "The American Psychiatric Association has expressed reservations about the procedure," questioning its reliability, validity and susceptibility to manipulation. *Id.*, 451 F.3d at 564.

4. Abel Assessment.

Notice is required before Abel Assessment may be ordered. *United States v. Cope*, 527 F.3d 944, 953 (9th Cir. 2008).

"[Abel testing is] another non-physiological test which [] appears to enjoy routine use in sexual offender programs... Abel testing [] involves exhibiting photographs to an individual and measuring the length of time he looks at each picture." *United States v. Weber*, 451 F.3d 552, 567-68 (9th Cir. 2006).

F. Butner Study.

The so-called Butner study, reported as Michael L. Bourke and Andres E. Hernandez, "The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders," *J. Fam. Viol.*, vol. 24, no. 3 (2009) has prompted considerable discussion. *See, e.g.*, Tori DeAngelis, *Porn use and Child Abuse*, Monitor on Psychology, Dec. 2009, Vol. 40, No. 11 at 56 (American Psychological Association) (*available at*: http://www.apa.org/monitor/2009/12/child-abuse.aspx).