

Defending Federal Child Pornography Cases: The Basics

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I. Applicable Statutes:

Child Pornography Possession

- 18 U.S.C. § 2252(a)(4)(B)
- *Without* a prior qualifying offense: 10-year statutory maximum. 18 U.S.C. § 2252(b)(2).
- *With* a prior qualifying offense: 10-year mandatory minimum; 20-year statutory maximum. 18 U.S.C. § 2252(b)(2).
 - Convictions that qualify as a prior:
 - prior conviction under
 - chapter 110 (sexual exploitation and other abuse of children),
 - chapter 71 (obscenity),
 - chapter 109A (sexual abuse),
 - chapter 117 (transportation for illegal sexual activity and related crimes),
 - section 920 of title 10 (article 120 of the Uniform Code of Military Justice, which covers rape, sexual assault, and other sexual misconduct),
 - the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward,
 - or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.

18 U.S.C. § 2252(b)(2).

Child Pornography Receipt and Distribution

- 18 U.S.C. § 2252A(a)(2) or 18 U.S.C. § 2252(a)(2)
- *Without* a prior qualifying offense: 5-year mandatory minimum and 20-year statutory maximum. 18 U.S.C. § 2252A(b)(1); 18 U.S.C. § 2252(b)(1).

- *With a prior qualifying offense:* 15-year mandatory minimum and 40-year statutory maximum. 18 U.S.C. § 2252A(b)(1); 18 U.S.C. § 2252(b)(1).

II. **Applicable sentencing guideline for possession, receipt and distribution cases: U.S.S.G. § 2G2.2**

Base Offense Level

Possession: 18

Distribution/Receipt: 22

Common Specific Offense Characteristics

Age of depicted child/children

- If the material involved a **prepubescent minor or a minor who had not attained the age of 12 years**, increase by 2 levels. U.S.S.G. § 2G2.2(b)(2).

Distribution – only the greatest level applies

- Distribution **for the receipt, or expectation of receipt, of a thing of value**, but not for pecuniary gain, **increase by 5 levels**. U.S.S.G. § 2G2.2(b)(3)(B).
- Other distribution, **increase by 2 levels**. U.S.S.G. § 2G2.2(b)(3)(F).

NOTE: While distribution enhancements often apply in cases involving peer-to-peer file sharing services, some courts have ruled that mere use of a file sharing program is not sufficient to warrant a distribution enhancement. *See United States v. Durham*, 618 F.3d 921 (8th Cir. 2010).

Sadistic or masochistic conduct

- If the offense involved material that portrays **sadistic or masochistic conduct** or **other depictions of violence**, **increase by 4 levels**. U.S.S.G. § 2G2.2(b)(4).

Use of a computer

- If the offense involved the **use of a computer or an interactive computer service** for the possession, transmission, receipt, or distribution of the

material, or for accessing with intent to view the material, **increase by 2 levels**. U.S.S.G. § 2G2.2(b)(6).

Number of images

- at least 10 images, but fewer than 150, increase by 2 levels;
- at least 150 images, but fewer than 300, increase by 3 levels;
- at least 300 images, but fewer than 600, increase by 4 levels; and
- 600 or more images, increase by 5 levels.

U.S.S.G. § 2G2.2(b)(7).

III. Pretrial Detention/Release issues specific to child pornography cases

If pretrial release is granted, electronic monitoring required for child pornography charges, and many other offenses involving allegations of sexual conduct with minors. 18 U.S.C. § 3142(c)(1)(B). There is a rebuttable presumption of detention for “any felony that is not otherwise a crime of violence that involves a minor victim.” 18 U.S.C. § 3142(f)(1)(E).

IV. Pretrial Motions

Motions to File:

1. Motion for Disclosure of Results and Reports of Computer Forensic Testing
 - a. Request: “disclosure of the results of any forensic testing performed on any computer or removable media, including flash drives and optical media.”
 - b. Request: “disclosure of any report produced by any software

program used by law enforcement to perform forensic testing, including reports produced by FTK or EnCase software.”

2. Motion for Discovery and Inspection of Products and Records of Electronic Surveillance

- a. Request: “records of monitoring of communications via the internet or other use of a computer for communications”

V. Discovery and Defenses

Always review the evidence seized from your client’s computer.

Unfortunately, 18 U.S.C. § 3509(m) prohibits reproduction of child pornography, which typically means that you must review contraband images and videos on a government computer. The statute requires that “any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.”

18 U.S.C. § 3509(m)(1). The government must make contraband discovery “reasonably available to the defendant.” 18 U.S.C. § 3509(m)(2)(A).

Hire an expert to forensically examine the hard drive. Such an examination reveals sentencing issues and may yield potential defenses:

- Was there file sharing? (possible enhancement)
- Is there proof of *who* downloaded the child pornography files?
- Where were the files stored; were they accessible or in unallocated space?
- When were the images last accessed, transmitted or imported?
- How were the files stored - separate, all together?
- Are there computer viruses, trojans or malware?
- Is there adult pornography?

VI. Sentencing

Deconstruct the sentencing guideline recommendation. Refer to Assistant Federal Defender Troy Stabenow's excellent article *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, available at www.fd.org. This article should be the starting point for any sentencing arguments.

Many courts have adopted arguments challenging the validity of the recommendations contained in U.S.S.G. § 2G2.2. Some helpful cases:

- *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010)
- *United States v. Dorvee*, 616 F.3d 174, 184-86 (2d Cir.2010)
- *United States v. Grober*, 595 F.Supp.2d 382 (D.N.J. 2008)
- *United States v. Johnson*, 588 F.Supp.2d 997 (S.D.Iowa 2008)
- *United States v. Baird*, 580 F.Supp.2d 889 (D.Neb.2008)
- *United States v. Hanson*, 561 F.Supp.2d 1004 (E.D.Wis.2008)
- *United States v. Shipley*, 560 F.Supp.2d 739 (S.D.Iowa 2008)

VII. Restitution

Mandatory restitution is ordered by 18 U.S.C. § 2259 for offenses under Chapter 110, which covers the child pornography statutes. Courts vary widely on how § 2259 has been applied in cases where the defendant is not accused of producing child pornography. Plaintiffs' attorneys for children depicted in known child pornography images and videos have been filing restitution requests for large sums, often several million dollars per defendant. See *Child Pornography, and an Issue of Restitution*, John Schwartz, New York Times,

February, 2, 2010, available at <http://www.nytimes.com/2010/02/03/us/03offender.html?hp>. In particular, the “Vicky” and “Amy” series have been subject to significant restitution litigation. While some courts have ordered defendants to pay in excess of \$ 3 million in restitution, see *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at *3-4 (S.D.Fla. Sept. 2, 2009), other courts have ruled that mere receivers or possessors of child pornography cannot be ordered to pay restitution because there is no proximate causation. *United States v. Woods*, 689 F.Supp.2d 1102 (N.D.Iowa 2010). Indigent defendants have frequently settled such restitution claims for a few thousand dollars or less.

VIII. Civil Commitment

The federal government is now in the business of subjecting those considered to be sexually dangerous to indefinite civil commitment. The operative statute, 18 U.S.C. § 4248, has withstood a constitutional challenge in the United States Supreme Court. *United States v. Comstock*, ___U.S. ___, ___, 130 S.Ct. 1949 (2010). Defense counsel should be aware of the potential that clients may be subjected to civil commitment screening while serving a BOP sentence.