


Consequences of CP Conviction
(Other than Incarceration)

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Conditions Imposed Upon Defendant

- Certain adjudications:
 - Supervised release
 - Probation
 - Parole
 - Suspended sentence
- Convicted crim. D not incarcerated
- Subject to court's authority

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Purpose of Supervised Release & Similar Adjudications:

- Reintegration of D. into community
- Deter D. from repeating illegal conduct
- Protect public from similar conduct

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**Conditions *Often* Imposed in CP Cases
Relate to Following Broad Categories:**

- Submission to warrantless search
(Person, home, vehicle, computer, etc.)
- Computer and Internet use
- Access to pornography
- Contact with minors
- Polygraph examinations
- Sex-offender treatment programs
- Restitution

NOTE:

When crafting SCSR, inquiry must take place on an individualized basis; court may not impose a SCSR on *all* those found guilty of a particular offense.

Court must consider:

- Nature and circumstance of the offense, and
- History and characteristics of D.

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Types of Conditions

- **Mandatory (fed) include:**
 - D may not commit another crime
 - May not possess controlled substances
 - Sex offenders must keep authorities apprised of whereabouts
- **Discretionary**

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Discretionary Conditions must be rsbly related to:

- Nature & circumstances of offense —history / characteristics of D.,
- Need to afford deterrence to criminal conduct,
- Need to protect public from further crimes of D.
- Need to provide D. w/ needed treatment in most effective manner; *and*

Involve no greater deprivation of liberty than is rsbly necessary

I. WARRANTLESS SEARCHES

- Special Needs

Griffin v. Wisconsin, 483 U.S. 868 (1987)

- Reasonableness

U.S. v. Knights, 534 U.S. 112 (2001)

- Waiver

U.S. v. Barnett – 415 F.3d 690 (7th Cir. 2005)

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1. Special Needs

Condition of Griffin’s probation permitted warrantless search of his home by any probation officer as long as there were rsble grounds to believe there was contraband or an item he was not permitted to possess under probation conditions

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Special Needs (cont...)

- Probationers & parolees do not enjoy absolute liberty, only ... conditional liberty dependent on observance of special [probation] restrictions.”
- Supervision of probationer is a special need of the state permitting degree of infringement upon privacy that would not be constitutional if applied to public at large
- “special needs” of Wisconsin’s probation system make the warrant requirement impracticable and justify replacement of the PC standard with the regulation’s “reasonable grounds” standard.

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Special Needs & Computer Monitoring

- D. Convicted of receiving CP
- Admitted to downloading and transmitting CP
- Probation conditioned upon D’s consent to:
 - installation of software to monitor and filter computer use, and
 - unannounced examination of any computer equipment

U.S. v. Lifshitz, 369 F.3d 173 (2nd Cir. 2004)

- Special needs of probation system were sufficient to justify conditioning D’s probation upon consent to the monitoring of his computer usage, but
- Scope of computer monitoring condition could not be overbroad.

Case remanded to evaluate privacy implications of proposed monitoring techniques, and whether they were sufficiently effective to justify their implementation.

2. Reasonableness

Terms of probation: condition that D. would submit his person, property, residence, vehicle, personal effects to search at anytime with or w/out search warrant or rsble cause.

D had REP in home .
EP diminished when D told of search condition.

Court balanced degree to which condition infringed on the privacy of D (a probationer) *and* degree to which condition needed for legitimate governmental concerns.

U.S. v. Knights, 534 U.S. 112 (2001)

3. Waiver

- D. Sentenced to 1 year of Intensive Probation Supervision as part of plea bargain
- Condition of IPS required D to submit to searches of residence, person, papers, automobile and/or effects whenever requested by probation officer.

7th Circuit:

- Plea bargain is a form of a Contract
- One can waive Constitutional rights
- D's waiver justified the search

U.S. v. Barnett, 415 F.3d 690 (7th Cir. 2005)

II. COMPUTER & INTERNET USAGE:

Types of Restrictions:

- Total ban on computers & Internet
- Total ban unless approved by probation officer

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Total Ban on Computers & Internet:

3rd Circuit:

Restrictions on computer and Internet use must be **narrowly tailored** according to context of **particular offense**

These tools are essential in modern life for legitimate purposes of communication, commerce, and information gathering

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U.S. v. Voelker, (3rd Cir. 2007).

- Convicted of receipt of CP.
- Condition imposed lifetime ban on accessing computers & Internet.
- Ct. focused on the “ubiquitous presence of the Internet,” - “extent to which computers have become part of daily life and commerce.”
- Ct: hard to imagine how Voelker could function in modern society given the lifetime ban.

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Voelker

HELD — *Lifetime ban was:*

- “antithesis of a narrowly tailored sanction.”
- A greater deprivation of liberty than rsbly necessary, and
- Not rsbly related to factors set forth in § 3583

While D.’s conduct was reprehensible, he did not use computer to seek out minors or set up meetings.

489 F.3d 139 (3rd Cir. 2007)

3rd Circuit 2010 – *U.S. v. Heckman*
Court struck down total Ban on Internet access. Factors:

- Length of proposed ban,
- Coverage of proposed ban,
- Defendant’s underlying conduct

Ct distinguished straight possession or distribution of CP from cases where D. used Internet to lure a child or to entice another to exploit a child.

592 F.3d 400

Total Ban: cont.

U.S. v. Paul, (5th Cir. 2001) 274 F.3d 155

COURT UPHELD:

Condition prohibiting D. from having, possessing, or having access to “computers, the Internet, photographic equipment, audio/visual equipment, or any item capable of producing a visual image.”

- Rationally related to offense
- Appropriate public protection measure
- D’s computer had over 1,200 CP images
- D used Internet to access cp chat rooms, BBs, newsgroups
- Used e-mail to advise others to scout single, dysfunctional parents to gain access to kids
- Used e-mail to solicit others to take trips to Mexico to “visit” children

Total Ban: cont.

U.S. v. Locke, 5th Cir. 2007

D. Pled guilty to 1 count possession of CP
Condition of probation: Ban on accessing Internet

5th Circuit:

- Internet prohibition served dual purpose of protecting public and discouraging recidivism.
- The fact that D. did not use Internet to encourage others to exploit children “in no way lessens the harm caused by child pornography.”

482 F.3d 764.

Total Ban Unless Approved by Probation Officer

U.S. v. Crume (8th Cir. 2005) 422 F.3d 728

No evidence that D. used computer for anything beyond "simply possessing" CP.

Greater deprivation of Defendant's 1st Amendment rights than rsbly necessary

Ct could impose more narrowly-tailored restriction via

- prohibition on accessing certain categories of websites / content
- Ensure compliance through random searches and filtering software.

Condition Invalid:

U.S. v. Sofsky, (2d Cir. 2002)

D. received over 1000 CP images & movies on computer via Internet; used computer & Internet to exchange images.

HELD:

- Condition **was** reasonably related to purposes of D's sentencing, but
- Inflicted greater deprivation on D's liberty than was reasonably necessary.

Sofsky (cont.)

Court reasoned although a D. might use telephone to commit fraud, this wouldn't justify condition prohibiting use of telephones.

A more focused restriction — ltd. to porn. sites & images could be enforced by:

- Unannounced inspections of D's premises,
- Examination of materials on hard drive or removable disks.
- Gvt could also check on D's Internet use via a sting operation w/ gvt placed ads for pornography.

**Total Ban unless Approved by P.O:
Possession (+) something more...**

8th Circuit upheld similar bans when D. used computer & Internet to do more than **“merely possess”** CP.

- Used computer and Internet to operate CP website

U.S. v. Fields, 324 F.3d 1025 (2003)

- Used Internet to exchange CP (+) tried to arrange sexual relation w/ underage girls via computer and Internet.

U.S. v. Ristine, 335 F.3d 692 (2003)

III. POSSESSION OF SEX. EXPLICIT MATERIAL

When ban restricts material protected by 1/A (ex. legal adult pornography) court must balance goals of supervised release against serious 1/A concerns.

CONDITION REJECTED:

D. pled guilty to receipt of CP ---

Condition prohibited him from possessing *“all forms of pornography, including legal pornography.”*

Court held:

- Provision overbroad & violated 1/A; “might apply to wide swath of work ranging from serious art to ubiquitous advertising.”
- Unconstitutionally vague: breadth was unclear.

Noted a more tightly defined restriction on adult, legal porn, one that . . . Language from cp statute, would be constitutional.

U.S. v. Loy,

Voelker, (3d Cir. 2007)

Lifelong term of supervised release w/ cond. prohibiting him from possessing “any materials ... depicting and/or describing sexually explicit conduct as defined at Title 18 USC, § 2256(2).”

COURT HELD:

- No nexus btwn. restriction & goals of sup. release,
- Nothing on record suggested sex. explicit mat. involving only adults contributed to D’s offense,
- No reason to believe viewing materials would cause D. to reoffend.

D. Convicted for possession of CP — condition prohibited him from possessing any pornography.

8th Circuit remanded for court to impose condition w/ greater specificity.

Probationer does not have unqualified 1st Amend. right to “sexually stimulating or sexually oriented materials.”

A probationer does have a separate due process right to conditions of supervised release that are sufficiently clear to inform him of what conduct will result in his being returned to prison.

U.S. v. Guagliardo, 278 F.3d 868 (9th Cir. 2002)

Thielemann: (3d Cir. 2009)

Pled guilty to 1 count receiving cp

Condition prevented D. from possessing or viewing any materials including pictures, photos, books, writings, drawings, or video games depicting and/or describing “sexually explicit conduct” (as defined by statute.)

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UPHELD:

- Restriction would protect children from Thielemann’s predatory nature,
- Could contribute to his rehabilitation.
- D. used CP to seduce heterosexual men
- D’s arose from adult men who were sexually excited by children.

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Condition banning D. from possessing sexually stimulating materials was vacated:

- Court’s findings not particularized to D.
- “I think a sex offender doesn’t have any business looking at *Playboy* magazine.”

U.S. v. Bender (8th Cir. 2009) 566 F.3d 748
(*Traveler Case*)

IV. CONTACT WITH MINORS

U.S. v. Stoterau, 9th Cir. 2008

CT UPHELD PROVISIONS:

- Parent must be present during any an all allowed communications with minor,
- D. must notify parent / legal guardian of his conviction
- D. can not be employed or volunteer in any capacity w/ any business that causes him contact with minors.

Conditions reasonably related to the goals of deterrence, rehabilitation, and protection of public.

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U.S. v. Stults, 8th Cir. 2009

Special condition of supervised release prohibited D. from coming w/in 500' of schools, parks, or other places used primarily by children *unless* approved in advance by PO.

HELD: Not impermissible deprivation of D's liberty:

- D possessed CP depicting sadistic & violent abuse of pre-teens
- D had history of sexually abusing minors
- Not blanket prohibition; D could seek written advance permission from PO.

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UPHELD:

D. (convicted of receiving & possessing CP) prohibited from having unsupervised contact with minors.

Not impermissibly vague: associational conditions don't apply to casual or chance meetings.

U.S. v. Loy, 237 F.3d 251 (3d. Cir. 2001)

D. Convicted of possessing CP required to avoid places, establishments, areas frequented by minors.

Sufficient common understanding of what constitutes these locations to satisfy constitutional requirement of rsble certainty.

U.S. v. Paul, 274 F.3d (5th Cir. 2001)

D. convicted of receiving CP; downloaded hundreds of images from Internet.

9th CIRCUIT UPHELD:

Condition prohibiting D. *for life* from frequenting or loitering w/in 100 feet of school yards, parks, public swimming pools, playgrounds, youth centers, video arcades, or other places primarily used by persons under 18, *or living within direct view of these places.*

"Sheer volume" of CP suggested sexual interest in kids; Condition rsbly related to offense; goals of rehabilitating D. & protecting public from potential sexual interest in children.

U.S. v. Daniels, 541 F.3d 915 (2008)

UPHELD:

Condition providing that during the 5 year period of supervised release, "D. shall not go to or loiter near school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18"

U.S. v. Blinkinsop, 606 F.3d 1110 (9th Cir. 2010)

But....

U.S. v. Miller, 594 F.3d 172 (3rd Cir 2010)

Special condition requiring D. not to associate w/ children under age of 18 except in presence of an adult approved by probation office was overbroad.

Modification warranted to allowed for contact w/ family members under 18 and for brief, unanticipated and incidental contacts w/ minors.

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OVERTURNED:

Condition that D. convicted of possessing CP not reside in "close proximity" to places frequented by children.

- Condition impermissibly vague: "close proximity?"
- Remanded for ct. to specify precise distance.

U.S. v. Guagliardo, 278 F.3d 868 (9th Cir. 2002)

Condition of supervised release need not relate to crime of conviction as long as it relates to one of the statutory sentencing factors.

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V. SUBMISSION TO POLYGRAPH TESTS

Generally upheld –

Submission to testing to ensure compliance w/ probationary terms reasonably related to D's CP offense and personal history.

U.S. v. Zinn, 321 F.3d 1084 (11th Cir. 2003)

Rsbly related to protection of public and D's rehabilitation. D. required to report to P.O. and provide truthful answers...polygraphing did not place significantly greater demand on him.

U.S. v. Lee, 315 F.3d 206 (3rd Cir. 2003)

Polygraph Tests

Does not violate D's right against self-incrimination. Questions were to ascertain only if D. violated terms of probation; answers could not serve as basis for future criminal prosecutions.

U.S. v. Locke, 482 F.3d 764 (5th Cir. 2007)

SUBMISSION TO POLYGRAPHS GENERALLY UPHELD:

Conditions requiring D. to submit to polygraph tests. If Q's called for answers that would incriminate him, he may exercise his 5th Amend. Right and remain silent.

U.S. v. Yoder, 201 Fed. Appx.383 (9th Cir. 2006)
U.S. v. Antelope, 395 F.3d 1128 (9th Cir. 2005)

**Participation —
Sex Offender Treatment Programs:
Generally Upheld**

D. Possessed 11 images of CP; condition mandated participation in sex offender treatment program.

History and characteristics of D. did not support need for S.O. treatment, *but* treatment was related in tangible way to crime of conviction:

- possession of CP is a sex offense
- contributes to victimization of children
- Creates market for child abuse

Treatment rsbly related to deterrent & preventative goals.

U.S. v. Miller, 594 F.3d 172 (3rd Cir. 2010)

VI. RESTITUTION TO VICTIMS:

D. Convicted of producing, transporting, receiving and possessing CP.

Ordered to pay restitution to child victims pursuant to 18 U.S.C. § 2259 in amt of \$974,902

2nd Circuit held:

Restitution order pursuant to § 2259 may include amount for future medical expenses – need for lifetime counseling due to underage sexual involvement induced by D.

Remanded re: calculation of amount.

U.S. v. Pearson, 570 F.3d 480 (2009)

Restitution in Possession Cases:

Many cases arising from Request for Restitution by "Amy," a victim in the "Misty" CP series.

- Awarded \$3,263,758 *U.S. v. Freeman*, (N.D. Fla. 2009)
- Awarded \$3,680,153 did not address causation *U.S. v. Staples*, (S.D. Fla. 2009)
- Some courts seem to adopt set amount of restitution per defendant
 - \$5000 to victim *U.S. v. Brown* (C.D. Cal. 2009)
 - \$3000 to victim *U.S. v. Ferenci* (E.D. Cal. 2009)
- Government and D. stipulated to amount *U.S. v. Granato*, (D. Nev. 2009)

U.S. v. Hardy, 707 F. Supp. 2d (W.D. Pa. 2010)

Should court award restitution under 2259 to victim who was depicted in CP, from a criminal D who received, possessed and distributed pornographic images but was not involved with victim's original abuse or creation of images?

HELD:

Yes. Defendant proximately caused victim's injuries by disseminating images.

DECLINED TO ORDER RESTITUTION:

Noted restitution in end-user possession case must be based on identification of specific injury to victim caused by specific conduct of D.

U.S. v. Simon (N.D. Cal. 2009)

Govt failed to present sufficient evidence of particular loss proximately caused by offense of conviction.

U.S. v. Berk (D. Me. 2009)

Individuals in images possessed by D. were victims under § 2259, but govt failed to show D's conduct in possessing CP proximately caused victims losses.

U.S. v. Chow, (S.D.N.Y. 2010)

Conditions Often Imposed in CP Cases...*recap*

- Submission to warrantless search
(Person, home, vehicle, computer, etc.)
- Computer and Internet use
- Access to pornography
- Contact with minors
- Polygraph examinations
- Sex-offender treatment programs
- Restitution

Thank You

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