Sentencing in Child Pornography Possession Cases

Presented by the United States Attorney's Office and Federal Public Defender's Office for the District of New Hampshire

Sentencing Generally

- Generally governed by U.S.S.G. § 2G2.2
- No mandatory minimum for possession of child pornography
- Statutory maximum for possession is 10 years. Increases to 20 years if (1) D possessed at least one prepubescent image; and (2) that fact is alleged in the charging instrument
- Maximum fine of $250,000
- JVTA $5,000 special assessment (if crime occurs after May 29, 2015)
- Supervised release of at least 5 years, up to life
- Sex offender registration
- Restitution

Application of the Guidelines

- Base offense level is always 18 for possession
  - Consider prospect of receipt/distribution (BOL 22, 5 year man-min)
- Other possible enhancements:
  - Possessing at least one CP image of prepubescent minor
  - Distributing images of child pornography
  - Possessing sadistic/masochistic material
  - Engaging in pattern of activity involving sexual abuse or exploitation of a minor
  - Using a computer to commit the offense
  - Number of CP images (size of the collection)

Application of the Guidelines

- § 2G2.2(a)(b)(3): Various levels of enhancement for different degrees of distribution
  - +5 for distributing for pecuniary gain
  - +5 for distributing in exchange for "a thing of value"
  - +5 for distribution to a minor
  - +6 for distribution to a minor that was intended to persuade, induce, entice or coerce minor to engage in illegal activity
  - +7 for distribution to a minor that was intended to persuade, induce, entice, coerce or facilitate travel of minor to engage in prohibited sexual conduct
  - +2 for all other distribution
- <u>Things to note</u>:
  - "A thing of value" includes *other child pornography*
  - "General" distribution: there is a *mens rea* requirement. Must be evidence to establish by a preponderance that defendant knowingly distributed
    - Most common scenario: sharing through peer-to-peer network. Must show more than the fact that default settings were set to share. At very least, must show that D knew default settings set to share.
    - New Application Note: "applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly"
  - If charged with the crime of distributing child pornography, the distribution enhancement will still be applied when calculating the advisory guideline range

Application of the Guidelines

- § 2G2.2(b)(4): +4 levels for possessing sadistic/masochistic
  - No *mens rea* requirement
    - Application Note 2 (applies "regardless of whether defendant specifically intended to possess, access with intent to view, receive, or distribute such materials")
  - "Sadistic/Masochistic" includes:
    - Children being physically harmed (i.e., tortured; beaten; strangled; in pain from penetration)
    - Children being humiliated (e.g., being urinated on; bound/gagged)
    - All infants/toddlers (previously infants/toddlers being penetrated; expanded in new guidelines)

Application of the Guidelines

- § 2G2.2(b)(6): +2 levels for using a computer to commit the offense
- Position of the U.S. Attorney's Office:
  - The enhancement technically applies, and should be assessed by the Probation Office in calculating the defendant's advisory guideline range
  - The Court should then apply a two-level downward variance to discount the application of the enhancement
    - Possible exceptions: Use of dark web (TOR); particularly sophisticated computer use (encryption)

Application of the Guidelines

- § 2G2.2(b)(7): Various enhancements depending on # of images
  - 10–149 images = +2 levels
  - 150–299 images = +3 levels
  - 300–599 images = +4 levels
  - 600+ images = +5 levels
- *Every video counts as 75 images, regardless of video's length
  - Eight videos triggers maximum image enhancement
- Possible upward departure where videos significantly exceed 5 minutes in length (see Application Note 4).

Application of the Guidelines

- Be aware of potential cross-reference to manufacturing
- Hypothetical: Defendant possesses large collection of child pornography. He produced one of 10,000 still images himself with a neighborhood minor.
  - If he pleads to possession rather than manufacturing, he no longer faces a 15-year statutory minimum sentence
  - However, if the government can establish by preponderance that he produced the one image, the guideline for manufacturing is cross-referenced, and guideline exposure substantially increases (BOL 32)

Commonly Litigated Technical Guideline Issues at Sentencing

- (1) Do images depict sadistic/masochistic conduct?
  - Is bondage alone sadistic/masochistic? (Yes)
- (2) Did the defendant *intend* to distribute?
  - What were default settings on P2P client software?
  - Were settings changed?
  - Any forensics suggesting defendant knew P2P settings?
- (3) Did the defendant distribute for the receipt, or expectation of receipt, of a thing of value?
  - Is sending to/receiving from same person enough?

Practical Considerations Not Captured in Sentencing Guidelines

- Duration of illegal conduct
- Specificity of collection (Devoted to sadistic? Prepubescent?)
- Group Membership/Contribution to the Market
- Offender sophistication (Encryption? Dark Web?)
- Organization of collection
  - Is the illicit material intermingled with adult pornography? Thrown in a separate folder in no apparent order? Or organized with neat file structures by age and type?
- Possession of child erotica in addition to child pornography
  - Suggestive of sexual interest

Risk of Recidivism

- One of most critical factors for the Court
- Extremely difficult to quantify risk of recidivism in child pornography possession cases
  - Psycho-sexual evaluations
  - Journal articles cutting both ways
  - Statements of defendant: stemming from sexual interest vs. interest in "taboo"?
  - "Addicted"? Can cut both ways
- Alternative considerations:
  - Polygraph as part of proffer
  - Extended term of supervised release
  - Rigorous therapy/counseling throughout investigation and prosecution

Are the guidelines flawed?

- Single most litigated issue at child pornography possession sentencing hearings
- Persuasive arguments for and against
- Argument: fails to distinguish among offenders
  - Hypothetical – all offenders trigger max?
  - USAOs take largest cases, more likely to trigger enhancements
  - Videos far more damaging to victim than still image
  - Although easier to bulk-download, larger collection with more videos suggests greater interest/bigger danger
- Ultimately, despite regular criticism, guidelines have not been substantially revamped (and to extent they have been changed, have arguably been broadened, not constricted)

Good Practice – Defense Perspective

- Develop solid release plan
  - 3rd party custodian; electronic monitoring; treatment; supervised contact with minors
- Does client perceive that he/she has a problem in addition to charges?
  - If so, arrange for appropriate treatment and counseling ASAP
- Educate client about potential penalties, and possible/probable outcomes
  - Be careful about appearing like part of the prosecution team
- Review possible dismissal or suppression issues, and whether to pursue

Good Practice – Defense Perspective

- If potential forensic issues, retain a qualified forensic expert to review all digital evidence
- If appropriate, obtain psycho-sexual evaluation, including assessment of future risk and amenability to treatment
  - Give the evaluator all copies of discovery and prior medical records
- View the images to educate the client and assess applicable guideline enhancements
- Encourage client to continue counseling and comply with all conditions of release (or participate in correctional programs if detained pending trial)
- At sentencing, obtain and present with the sentencing memorandum any pertinent treatment records, psycho-sexual or other evaluations, and any positive family or community involvement
  - Any letters of support should be factual and specific

JVTA Special $5,000 Assessment

- May 29, 2015, Justice for Victims of Trafficking Act was enacted
- One provision – 18 U.S.C. § 3014:
  - If crime committed between May 29, 2014 and September 30, 2019, defendant required to pay $5,000 special assessment unless "indigent"
  - Not much case law yet on what qualifies as "indigence" under 18 U.S.C. § 3014
  - Applies to all child pornography offenses

Restitution: Paroline and Paroline Factors

- United States v. Paroline, 134 S. Ct. 1710 (2014)
  - Applied a foreseeability-based proximate cause standard to determine that victims depicted in child pornography images or videos knowingly viewed, possessed, received, distributed, or produced by a defendant are entitled to receive restitution from that defendant under 18 U.S.C. § 2259
  - "Somewhat atypical causal process" in this "special context"
  - Recognized difficulty in clearly apportioning responsibility for the damage inflicted
- Paroline factors – "no precise mathematical inquiry"
  - (1) Number of past criminal defendants found to have contributed to victim's general losses
  - (2) Reasonable predictions of the number of future defendants
  - (3) Any available and reasonably reliable estimate of the broader number of offenders
  - (4) Whether the defendant distributed the image(s)
  - (5) Whether the defendant contributed to their original production
  - (6) How many images of the victim the defendant possessed
  - (7) "Other facts relevant to the defendant's relative causal role"

Restitution: How it works (practically)

- Defendant pleads guilty to (or is convicted at trial of) child pornography offense
- Images possessed by the defendant have been sent to the National Center for Missing and Exploited Children (NCMEC), which identifies any known child victims
- Victims choose whether to opt into victim notification; those victims are notified
- Only a small number of notified child victims (now between 10 and 20) actively seek restitution
- Those victims who actively seek restitution submit packet of materials in support of restitution request to the USAO
- USAO provides those materials to (1) defense counsel, and (2) U.S. Probation Office
- USAO provides, to defense counsel, charts maintained by DOJ (Child Exploitation/Obscenity Section) which include, to the extent possible, restitution judgments for particular victims nationwide
- Typically, defense counsel then reaches out to victim counsel to attempt to settle without need to resort to litigation

Detention v. Self-Report

- Statutory threshold is high ("exceptional reasons" under 18 U.S.C. § 3145
- Court often allows to self-report if defendant is engaged in meaningful counseling/therapy and has complied with previous conditions of release