

DEFENDING CHILD SEXUAL
ASSAULT MATERIAL (CSAM) /
CHILD PORNOGRAPHY CASES
IN NEW JERSEY SUPERIOR
COURT

WHO IS THIS GUY????

- Practicing attorney for 20 years
 - Partner at Rosenberg | Perry & Associates
 - Seven (7) lawyers including three (3) former Assistant County Prosecutors, former municipal court prosecutor and former public defender
 - Criminal Defense Practice serving entire State
 - Also represent clients in administrative hearings (Title IX and Public Employment)
 - Former Assistant County Prosecutor 10+ Years in Burlington & Camden County
 - Co-Chair of the Criminal Practice Committee – Burlington County Bar Association
 - Certified Criminal Trial Attorney – New Jersey Supreme Court
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OVERVIEW OF CLASS

- Basics of New Jersey Criminal Procedure
 - Common Fact Patterns of CSAM cases
 - Special Issues in Attorney Client Relationship
 - CSAM Criminal Statutes
 - Case Law Review
 - Defense Strategies
 - Mitigation Strategies
 - Sentencing Issues
 - Hot Topics
 - Questions???
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INTRODUCTION

- CSAM cases are incredibly difficult to defend
 - Proof of the crime is usually very strong
 - No Jury Sympathy
 - No Prosecutor Sympathy
 - Sentencing Laws are very harsh
 - Prison
 - Megan's Law
 - PSL
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HOW CAN YOU DEFEND THESE PEOPLE????

- Safeguard against Government overreach
 - Most defendants are mischaracterized
 - Law treats complex criminal activity as though it is motivated solely by deviance
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PATH OF A CRIMINAL CASE

- Arrest / Charge
 - Detention Hearing
 - Pre-Indictment Conference (“PIC”)
 - Indictment or Remand
 - Arraignment
 - “Conferences” / Motions
 - Pre-Trial Conference (“Plea Cut Off”)
 - Trial
 - Sentencing
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COMMON CSAM FACT PATTERNS

- **MOST COMMON**

- ISP alerted to illicit content on network
 - Referral to NCMEC
 - NCMEC investigation
 - NCMEC referral to Law Enforcement
 - Law Enforcement investigation
 - Search Warrant
 - “Interview”
 - Charge
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OTHER FACT PATTERNS

- Citizen Referral
 - Unintended Discovery
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SPECIAL ISSUES IN ATTORNEY-CLIENT RELATIONSHIP

- Expectations
 - Privilege
 - Collateral Consequences
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CSAM STATUTES

• Definitions:

- “Child” means any person under 18 years of age.
 - DISTINGUISHABLE FROM “HANDS ON” CONDUCT (AGE OF CONSENT IS 16)
- “Distribute” means to sell, or to manufacture, give, provide lend, trade, mail, deliver, publish, circulate, disseminate, present, exhibit, display, share, advertise, offer, or make available via the internet or by any other means, whether for pecuniary gain or not. The term also includes an agreement or attempt to distribute.
- “File-sharing program” means a computer program, application, software or operating system that allows the user of a computer on which such program, application, software or operating system is installed to designate files as available for searching by and copying to one or more other computers. The term “file-sharing program” includes but is not limited to a computer program, application or software that enables a computer user to participate in a peer-to-peer network.
 - THIS IS VERY COMMON

CSAM STATUTES

• Definitions (continued):

- “Item depicting the sexual exploitation or abuse of a child” means a photograph, film, video, an electronic, electromagnetic or digital recording, an image stored or maintained in a computer program or file or in a portion of a file, or any other reproduction or reconstruction which:
 - Depicts a child engaging in a prohibited sexual act or in the simulation of such an act; or
 - Portrays a child in a sexually suggestive manner.
 - “Peer to peer network” means a connection of computer systems through which files are shared directly between the systems on a network without the need of a central server.
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CSAM STATUTES

- **Definitions (continued):**

- “Portray a child in a sexually suggestive manner” means
 - To depict a child’s less than completely and opaquely covered intimate parts ... in a manner that, by means of the posing, composition, format, or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
 - To depict any form of contact with a child’s intimate parts ... in a manner that, by means of the posing, composition, format or animated sensual details, emits sensuality with sufficient impact to concentrate prurient interest on the child; or
 - To otherwise depict a child for the purpose of sexual stimulation or gratification of any person who may view the depiction where the depiction does not have serious literary, artistic, political, or scientific value.
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CSAM STATUTES

• Definitions (continued):

- “Prohibited sexual act” means
 - Sexual intercourse; or
 - Anal intercourse; or
 - Masturbation; or
 - Bestiality; or
 - Sadism; or
 - Masochism; or
 - Fellatio; or
 - Cunnilingus; or
 - Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction; or
 - Any act of sexual penetration
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CSAM STATUTES

- Image Count is important because it can dictate
 - The degree of the charge, and
 - The sentence
 - 1 Picture = 1 image
 - 1 Video = 10 images
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CSAM STATUTES

- Age
 - N.J.S.A. 2C:24-4b(6)
 - “[A] person who is depicted as or presents the appearance of being under the age of 18 in any photograph, film, videotape, computer program or file, video game, or any other reproduction or reconstruction shall be rebuttably presumed to be under the age of 18.
 - “If the child who is depicted as engaging in, or who is caused to engage in, a prohibited sexual act or simulation of a prohibited sexual act or portrayed in a sexually suggestive manner is under the age of 18, the actor shall be strictly liable and it shall not be a defense that the actor did not know that the child was under the age of 18, nor shall it be a defense that the actor believed that the child was 18 years of age or older, even if such mistaken belief was reasonable.”

CSAM STATUTES

• POSSESSION

- Endangering the Welfare of a Child, N.J.S.A. 2C:24-4b(5)(b)(i-iii)
 - “A person commits a crime ... if he knowingly possesses, knowingly views, or knowingly has under his control, through any means, including the Internet ... items depicting the sexual exploitation of a child.”
 - Grading
 - Less than 1,000 = Third Degree
 - BUT if 100 or more images presumption of incarceration
 - At least 1,000 but less than 100,000 = Second Degree
 - 100,000 or more = First Degree
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CSAM STATUTES

• DISTRIBUTION

- “A person commits a crime if, by any means, including but not limited to the internet, he:
 - Knowingly distributes an item depicting the sexual exploitation of a child;
 - Knowingly possesses an item depicting the sexual exploitation of a child with the intent to distribute that item; or
 - Knowingly stores or maintains an item depicting the sexual exploitation or abuse of a child using a file-sharing program which is designated as available for searching by or copying to one or more other computers.”
 - “[T]he State shall not be required to offer proof that an item depicting the sexual exploitation or abuse of a child had actually been searched, copied, transmitted or viewed by another user of the file-sharing program, or by any other person, and it shall be no defense that the defendant did not intend to distribute the item to another user of the file-sharing program or to any other person.”

CSAM STATUTES

- **DISTRIBUTION**

- Grading
 - 1,000 items or more = First Degree
 - Less than 1,000 items = Second Degree
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CSAM STATUTES

- **PRODUCTION**

- “Causing or Permitting”
 - “A person commits a crime of the first degree if he causes or permits a child to engage in a prohibited sexual act or in the simulation of such an act or to be portrayed in a sexually suggestive manner if the person knows, has reason to know or intends that the prohibited act or portrayal may be photographed, filmed, reproduced, or reconstructed in any manner, including the internet, or may be part of an exhibition or performance.”
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CSAM STATUTES

- **PRODUCTION**

- “Photographs or films”
 - “A person commits a crime of the second degree if he photographs or films a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner or who uses any device, including a computer, to reproduce or reconstruct the image of a child in a prohibited sexual act or in the simulation of such an act or for portrayal in a sexually suggestive manner.”
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CASE LAW REVIEW

- Cell Phone Passcode can be compelled. State v. Andrews, 243 N.J. 447 (2020)
 - Images must be of real children; Statute does not apply to virtual child pornography. State v. May, 362 N.J. Super. 572 (App. Div. 2003)
 - Juveniles subject to the Statute. State v. D.M., 238 N.J. 2 (2019)
 - Distinguishes free speech from CSAM (Defendant possessed child erotica) [not CSAM] and wrote graphic descriptions of acts on photographs. Conduct does not fall within Statute. State v. Higgenbotham, (App. Div. 2023)
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DEFENSE STRATEGIES

- Accidental Download
 - Mistaken Content
 - Procedural Mistake
 - Third Party (Hacking)
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MITIGATION STRATEGIES

- Start therapy **immediately**
 - Risk assessment
 - Mental Health Issues
 - Document, document, document
 - Polygraph
 - Presentation Matters
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SENTENCING (BASICS)

- Four degrees of Crime
 - First = 10-20 Years
 - Second = 5-10 Years
 - Third = 3-5 Years
 - Fourth = up to 18 months
 - Presumption of incarceration for 1st and 2nd Degree convictions
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SENTENCING – PAROLE INELIGIBILITY

- Distribution Statute
 - 25 images - 1,000 images = Minimum five (5) years without parole
 - Over 1,000 images = Minimum Ten (10) years without parole
- “Causing or Permitting” manufacturing CSAM Statute falls within No Early Release Act (85% no parole)

SENTENCING – EXTENDED TERM

- For second or subsequent conviction defendant must be sentenced to an extended term
 - Extended Term = sentencing one (1) degree higher than crime convicted
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SENTENCING – MEGAN’S LAW

Aggravated Sexual Assault	ALL
Sexual Assault	ALL
Aggravated Criminal Sexual Contact	ALL
Kidnapping	N.J.S.A. 2C:13-1c(2)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4a (Engaging in Sexual Conduct that would Impair or Debauch the Morals of a Child)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(3) (Causes or Permits Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(4) (Photographs or Films Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(5)(a) (Distribution / Possession with Intent to Distribute Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(5)(b)(i)-(ii) (Possession of Child Pornography – Child Sexual Abuse Material – 1000 images or more)
Luring	<u>N.J.S.A.</u> 2C:13-6
Criminal Sexual Contact – Victim is Minor	<u>N.J.S.A.</u> 2C:14-3b
Kidnapping – victim is a minor; defendant is not a parent	<u>N.J.S.A.</u> 2C:13-1
Criminal Restraint – victim is a minor; defendant is not a parent	<u>N.J.S.A.</u> 2C:13-2
False Imprisonment – victim is a minor; defendant is not a parent	<u>N.J.S.A.</u> 2C:1-3
Promoting Prostitution of a Child	<u>N.J.S.A.</u> 2C:34-1b(3)-(4)
Leader of a Child Pornography Network	<u>N.J.S.A.</u> 2C:24-2.1

SENTENCING – MEGAN'S LAW

- Conviction for out of state crime that is “similar” will also require registration. N.J.S.A. 2C:7-2b(3)
 - Juvenile “Sexting” escape clause. N.J.S.A. 2C:7-2b(4)
 - Image must be limited to nudity or sexually suggestive manner;
 - Both creator and subject must be juveniles; and
 - Subject must have consented to creation of photograph
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SENTENCING – MEGAN'S LAW

- Megan's Law encompasses two (2) aspects:
 - Registration
 - Notification
 - Both aspects subject to Registrant's Tier
 - Tier One = Low Risk
 - Tier Two = Moderate Risk
 - Tier Three = High Risk
 - Registrant's can challenge tier
 - Judge is not obligated to blindly follow RRAS
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PAROLE SUPERVISION FOR LIFE

Aggravated Sexual Assault	ALL
Sexual Assault	ALL
Aggravated Criminal Sexual Contact	ALL
Kidnapping	<u>N.J.S.A.</u> 2C:13-1c(2)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4a (Engaging in Sexual Conduct that would Impair or Debauch the Morals of a Child)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(3) (Causes or Permits Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A.</u> 2C:24-4b(5)(b)(i)-(ii) (Possession of Child Pornography – Child Sexual Abuse Material – 1000 images or more)
Luring	<u>N.J.S.A.</u> 2C:13-6
Violation of Community Supervision for Life	<u>N.J.S.A.</u> 2C:43-6.4d

PAROLE SUPERVISION FOR LIFE

- A conviction for the below or conviction for an attempt of the below includes PSL upon motion by the prosecutor unless the court finds on the record that the special sentence is not needed to protect the community or deter the defendant from future criminal activity. N.J.S.A. 2C:43-6.4a

Endangering the Welfare of a Child	<u>N.J.S.A. 2C:24-4b(4)</u> (Photographs or Films Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A. 2C:24-4b(5)(a)</u> (Distribution / Possession with Intent to Distribute Child Pornography – Child Sexual Abuse Material)
Endangering the Welfare of a Child	<u>N.J.S.A. 2C:24-4b(5)(b)(iii)</u> (Possession of Child Pornography – Child Sexual Abuse Material)
Leader of a Child Pornography Network	<u>N.J.S.A. 2C:24-2.1</u>

PAROLE SUPERVISION FOR LIFE

- Requirements are numerous. N.J.A.C. 10A:71-6.12:
 - Obey all laws and ordinances;
 - Report to the assigned parole officer as instructed;
 - Notify the assigned parole officer no later than the next business day after any arrest, after being served with or receiving a complaint or summons, and after accepting any pre-trial release including bail;
 - Reside at a residence approved by the Parole Officer and obtain approval prior to moving to a different residence;
 - Obtain approval prior to leaving the State for more than twenty-four (24) hours;
 - Refrain from possessing any firearms;
 - Cooperate with any medical or psychological evaluation;
 - Submit to a polygraph examination; and
 - Adhere to any Internet restrictions.
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PAROLE SUPERVISION FOR LIFE

- Parolees are not entitled to same due process rights as defendant.
- No Judge – Only a hearing officer. N.J.S.A. 30:4-123.63
- Burden of Proof is Clear and Convincing Evidence. N.J.S.A. 30:4-123.63
- No Constitutional Right to Counsel. Puchalski v. New Jersey State Parole Board, 104 N.J. Super. 294 (App. Div.), aff'd 55 N.J. 113 (1969).
- Upon violation additional term of incarceration imposed. N.J.A.C. 10A71-6.12(p):
 - Eighteen (18) months if the underlying conviction was a crime of the First Degree
 - Sixteen (16) months if the underlying conviction was a crime of the Second Degree
 - Fourteen (14) months if the underlying conviction was a crime of the Third Degree
 - Twelve (12) months if the underlying conviction was a crime of the Fourth Degree

REMOVAL FROM ML OR PSL

- For most convictions,
 - 15 years offense free conduct, and
 - Judicial finding that registrant/parolee is not danger to the community
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HOT TOPICS

- There is a desperate need for risk instruments that address on-line conduct
 - J.G. case rejected use of CPORT
 - Special Needs Offenders
 - ASD, etc.
 - Release from ML after 15 years no offense (H.D. case)
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