



# Sex Offenses

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**2023 National Seminar**

**August 30 & 31, 2023**

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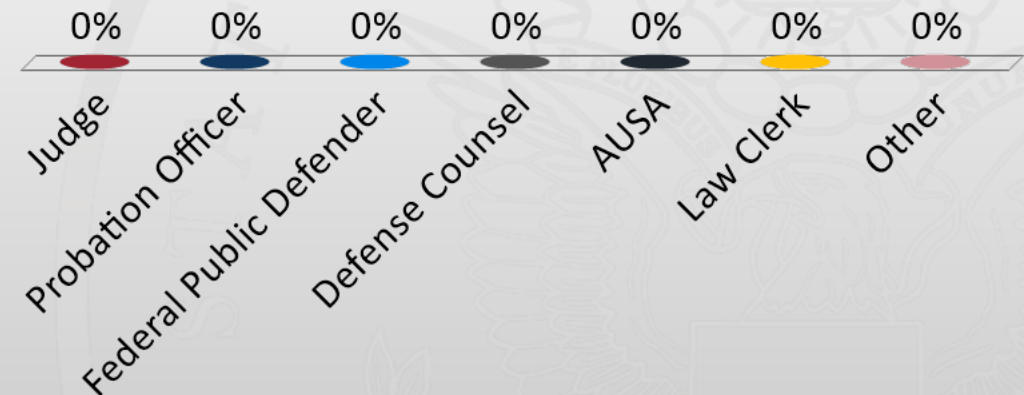
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[Online HelpLine Form](#)



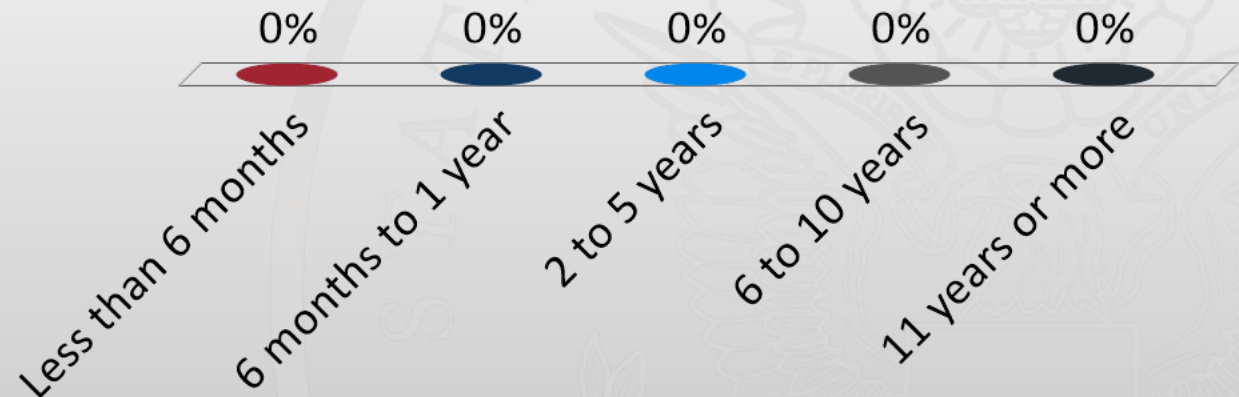
# What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



# How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



# Learning Objectives

By the end of today's session, your active engagement will empower you to:

**Describe** the relevant conduct analysis that applies to child pornography and sex offenses;

**Determine** whether a Cross Reference applies;

**Assess** whether a Special Instruction applies;

**Apply** the multiple count rules to child pornography and sex offense cases; and

**Evaluate** the application of §4B1.5(b).

# **§1B1.3**

## **Relevant Conduct**



# Relevant Conduct Review for Sex Offenses

Defendant

All  
Offenses

(a)(1):

(P)reparation

(D)uring

(A)voiding

Some  
Offenses

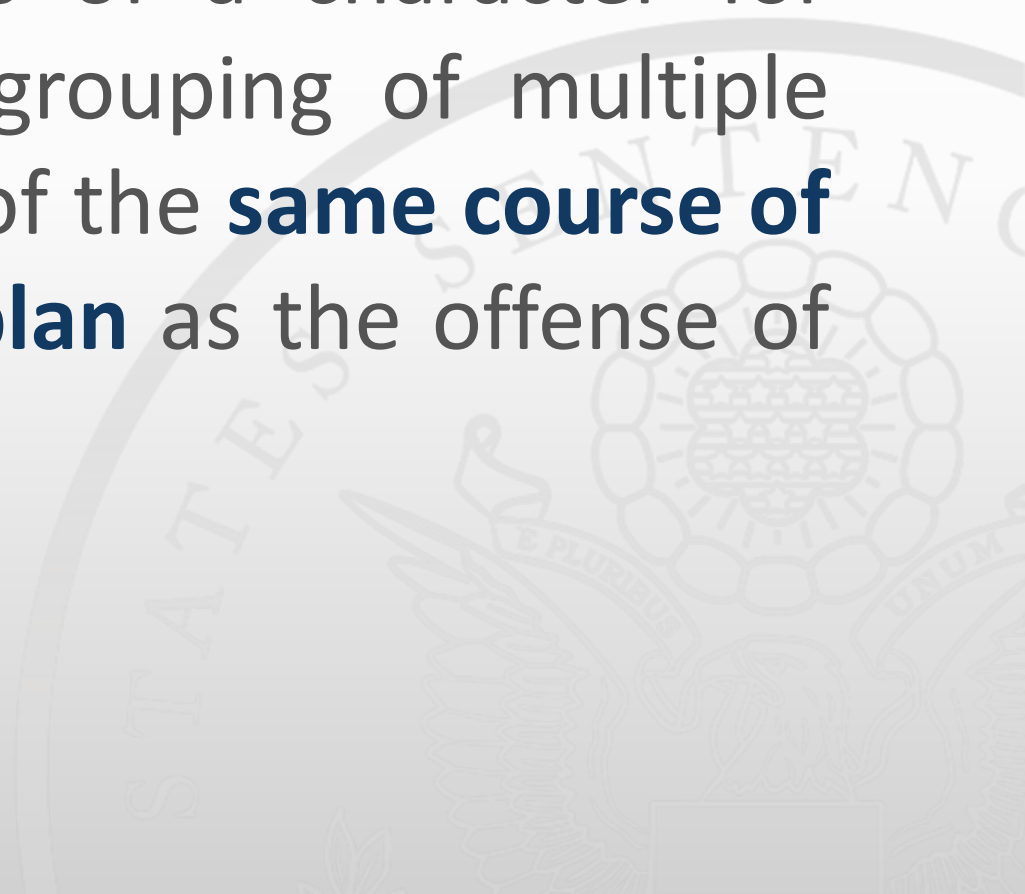
(a)(2):

Same Course of Conduct / Common Scheme or Plan

## §1B1.3(a)(2)

(p. 24)

“**solely with respect** to offenses of a character for which §3D1.2(d) would require grouping of multiple counts . . . all acts that were part of the **same course of conduct or common scheme or plan** as the offense of conviction;”





# §3D1.2(d)

(p. 367)

## “Included List”

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;  
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;  
§§2C1.1, 2C1.2, 2C1.8;  
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;  
§§2E4.1, 2E5.1;  
§§2G2.2, 2G3.1;  
§2K2.1;  
§§2L1.1, 2L2.1;  
§2N3.1;  
§2Q2.1;  
§2R1.1;  
§§2S1.1, 2S1.3;  
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

## “Excluded List”

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);  
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;  
§2C1.5;  
§§2D2.1, 2D2.2, 2D2.3;  
§§2E1.3, 2E1.4, 2E2.1;  
§§2G1.1, 2G2.1;  
§§2H1.1, 2H2.1, 2H4.1;  
§§2L2.2, 2L2.5;  
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;  
§§2P1.1, 2P1.2, 2P1.3;  
§2X6.1.

# Offenses *Included* at §3D1.2(d)

Fraud | §2B1.1

Money Laundering | §2S1.1

Tax Violations | §2T1.1

Counterfeiting | §2B5.1

Bribery | §2C1.1

Drugs | §2D1.1

Firearms | §2K2.1

Alien Smuggling | §2L1.1

Possession, Receipt,  
Distribution of Child  
Pornography | §2G2.2

# Offenses *Excluded* at §3D1.2(d)

Robbery | §2B3.1

Assault | §2A2.3

Murder | §2A1.1

Kidnapping | §2A4.1

Criminal Sex Abuse | §2A3.1

Promoting a Commercial Sex  
Act | §2G1.1

Blackmail | §2B3.3

Extortion | §2B3.2

Production of Child  
Pornography | §2G2.1

# Promulgated Amendment

## §2G1.3

### Sex Trafficking of a Minor

§2G1.3 will be added to list that are specifically excluded from the grouping rules at §3D1.2(d).

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);

§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;

§2C1.5;

§§2D2.1, 2D2.2, 2D2.3;

§§2E1.3, 2E1.4, 2E2.1;

§§2G1.1, 2G2.1;

← **§2G1.3**

§§2H1.1, 2H2.1, 2H4.1;

§§2L2.2, 2L2.5;

§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;

§§2P1.1, 2P1.2, 2P1.3;

§2X6.1.

# Relevant Conduct is Limited to the Offense of Conviction

Defendant

All  
Offenses

(a)(1):

(P)reparation

(D)uring

(A)voiding

Some  
Offenses

(a)(2):

Same Course of Cond

Common Scheme or Plan



**Mr. Smith**

**&**

**Mr. Jones**



Distribution,  
Receipt, Possession

Production



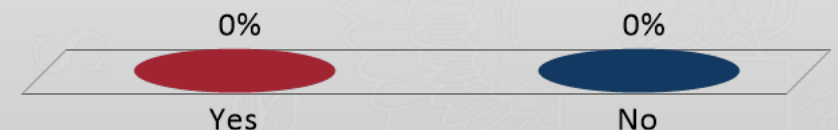
# Mr. Smith | Scenario 1



Mr. Smith pled guilty to one count of receipt of child pornography (§2G2.2). The indictment identified over 5,000 images which were located on the defendant's computer. Forensic examination of the defendant's cell phone revealed evidence that he also possessed and distributed child pornography images by text message during the same time period.

**Should an increase for distribution at §2G2.2(b)(3) be applied?**

- ✓ A. Yes
- B. No



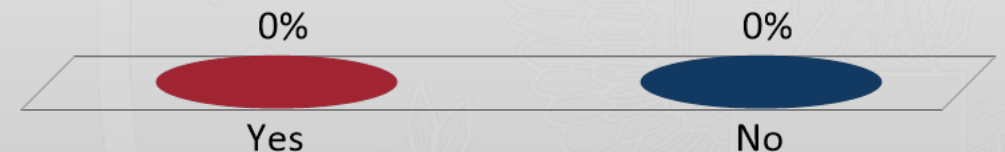
# Mr. Jones | Scenario 1



Mr. Jones pled guilty to one count of production of child pornography (§2G2.1). The indictment identified a single image of a 14-year-old girl. One week after the crime charged in the indictment, the defendant produced an additional image of child pornography—this time involving a 6-year-old victim.

**Should the Specific Offense Characteristic at §2G2.1(b)(1)(A) for an offense involving a minor less than 12 be applied?**

- A. Yes
- ✓ B. No





# Relevant Conduct Differences



## §2G2.2

Distribution / Receipt / Possession  
of Child Pornography

- Cell phone images are considered – **SAME COURSE OF CONDUCT**



Victim A  
14 years old



Victim B  
6 years old



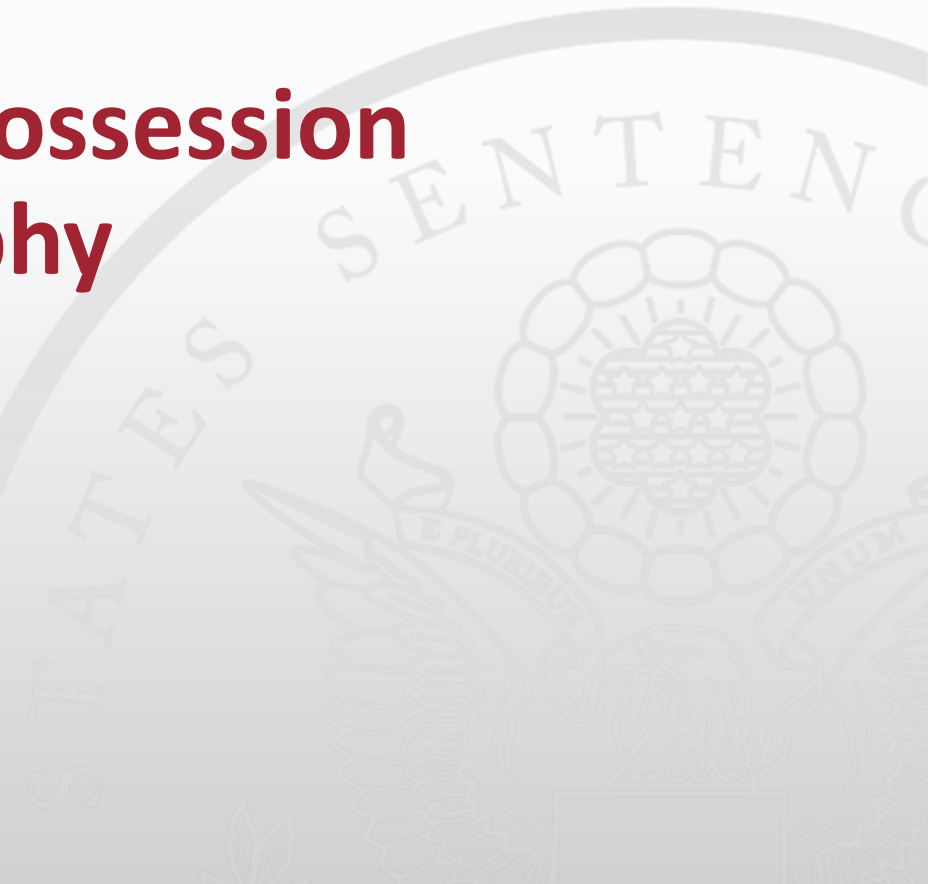
## §2G2.1

Production of Child Pornography

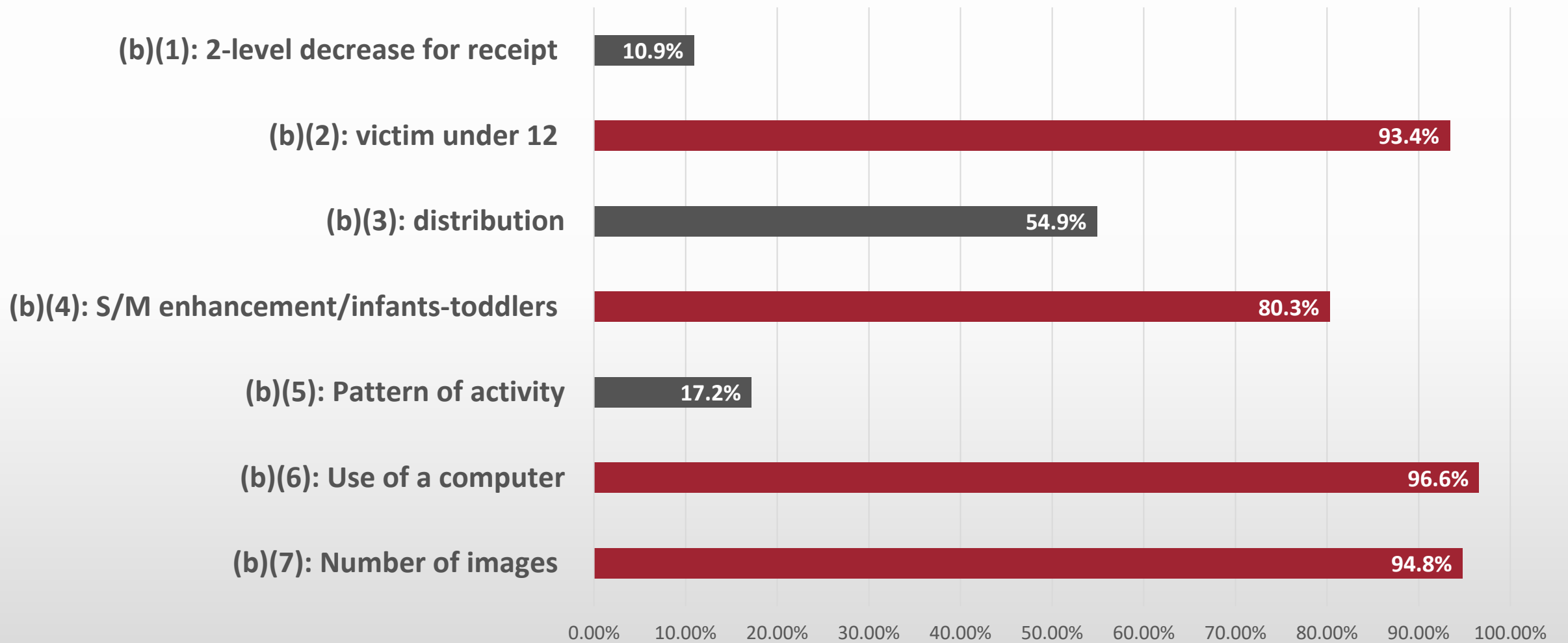
- Limited to the **OFFENSE OF CONVICTION**
- Cannot include conduct involving **Victim B**

# §2G2.2

## Distribution / Receipt / Possession of Child Pornography



# §2G2.2 SOCs (2022)



# Pattern of Activity

§2G2.2(b)(5) (p. 215)

If defendant engaged in **pattern of activity** involving the **sexual abuse or exploitation** of a minor, increase by 5-levels.

**pattern of activity**

**sexual abuse or exploitation**

# Pattern of Activity

§2G2.2, App. Note 1 (p. 217)

Part of Instant  
Offense



Different Minors



Conviction

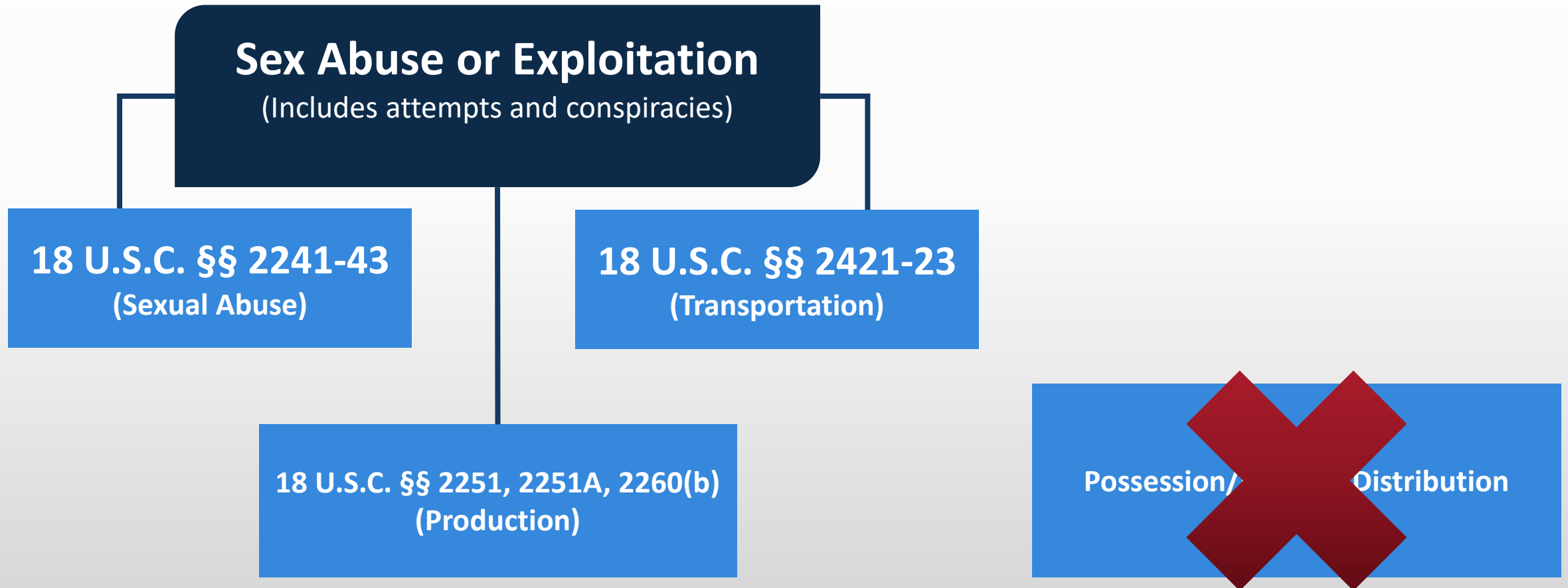


Time Frame



# Sexual Abuse or Exploitation

§2G2.2, App. Note 1 (p. 217)



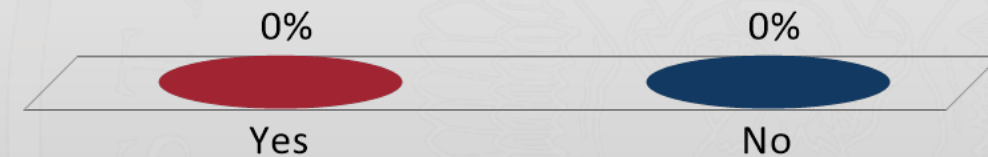
# Mr. Smith | Scenario 2



Mr. Smith is convicted of one count of possession of child pornography. Twenty years before the offense took place, the defendant sexually abused two different minors on two different occasions. The abuse was verified.

**Will the 5-level “pattern of activity” enhancement at §2G2.2(b)(5) apply?**

- ✓ A. Yes
- B. No



# §2G2.2(c)(1)

## Cross Reference





# Production Cross Reference

§2G2.2(c)(1), (p. 216)



If the offense involves **production**...

apply §2G2.1 if the resulting offense level is greater.

# Production Cross Reference

§2G2.2, App. Note 7(A) (p. 218)

**Cross reference**  
to be *construed*  
*broadly*

- employing
- using
- persuading
- inducing
- enticing
- coercing
- transporting
- permitting
- or offering or seeking by notice or advertisement

a minor to engage in sexually explicit conduct for the purpose of **production**.

# Mr. Smith | Scenario 3

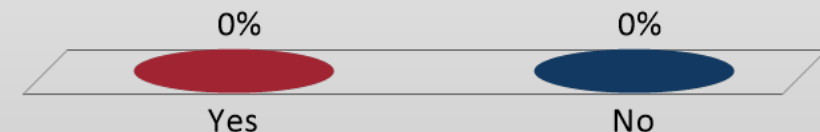


Recall the prior scenario: “Mr. Smith pled guilty to one count of receipt of child pornography. The indictment identified over 5,000 images which were located on the defendant’s computer. Forensic examination of the defendant’s cell phone revealed evidence that he also possessed and distributed child pornography images by text message during the same time period.”

**Further investigation into the images on Mr. Smith’s cell phone determined that he persuaded a 14-year-old minor to create and send a sexually explicit image of herself to him.**

**Does the Cross Reference at §2G2.2(c)(1) apply?**

- ✓ A. Yes
- B. No



When cross-referencing from §2G2.2 to §2G2.1, do we still apply “expanded” relevant conduct?

A. Yes

✓ B. No



# Offenses *Excluded* at §3D1.2(d)

Robbery | §2B3.1

Assault | §2A2.3

Murder | §2A1.1

Kidnapping | §2A4.1

Criminal Sex Abuse | §2A3.1

Promoting a Commercial Sex  
Act | §2G1.1

Blackmail | §2B3.3

Extortion | §2B3.2

Production of Child  
Pornography | §2G2.1

# Relevant Conduct is Limited to the Offense of Conviction

Defendant  
(a)(1)(A)

+

Jointly Undertaken  
(a)(1)(B)

All  
Offenses

(a)(1):

(P)reparation

(D)uring

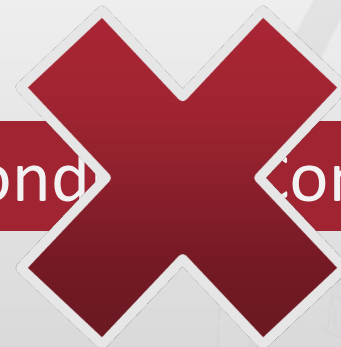
(A)voiding

Some  
Offenses

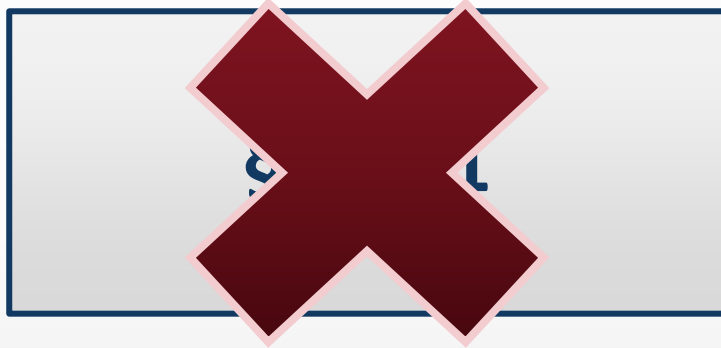
(a)(2):

Same Course of Cond

Common Scheme or Plan



# Remember “Expanded” Relevant Conduct?



§2G2.2

§2G2.2

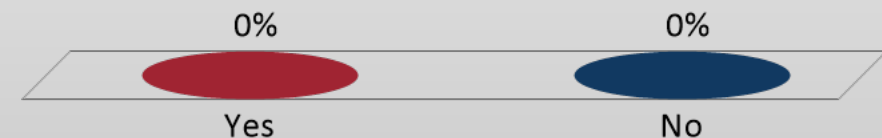
# Mr. Smith | Scenario 4



Recall Mr. Smith who is convicted of receipt of child pornography. He possessed over 5,000 images, *including depictions of infants and toddlers*. The Cross Reference to §2G2.1 (production) applies because the images located on Mr. Smith's cell phone include an image of a 14-year-old minor engaged in sexually explicit conduct that he persuaded her to create and send to him.

**Will the increase at §2G2.1(b)(4)(B) – infants and toddlers apply?**

- A. Yes
- ✓ B. No





# Cross Reference



**§2G2.2**

5,000 images including infants and toddlers



**Victim A**  
14 years old

**§2G2.1**

One image produced

# Mr. Smith | Scenario 5



What if there are *two images* on Mr. Smith's cell phone of a 14-year-old minor engaged in sexually explicit conduct that he persuaded her to create and send to him. The Cross Reference to §2G2.1 (production) applies.

**What offense conduct will be used to calculate the guideline at §2G2.1?**

- A. The conduct depicted in both images
- ✓ B. The conduct from the single image which results in the highest guideline calculation



# Cross References

## §1B1.5, App. Note 3 (p. 34)

Where there is more than one such other offense, **the most serious such offense** . . . is to be used.



# Production Cross Reference

§2G2.2(c)(1), (p. 216)



If the offense involves **production**...

apply §2G2.1. . .

**if the resulting offense level is greater.**

# §2G2.2 Cross Reference Example

**Count 1**  
Receipt of child pornography

Guideline: **§2G2.2**  
BOL: 22  
(b)(3) (Distribution) +2  
(b)(6) (Use of Computer) +2  
(b)(7) (Number of Images) +5  
**Total Offense Level of 31**

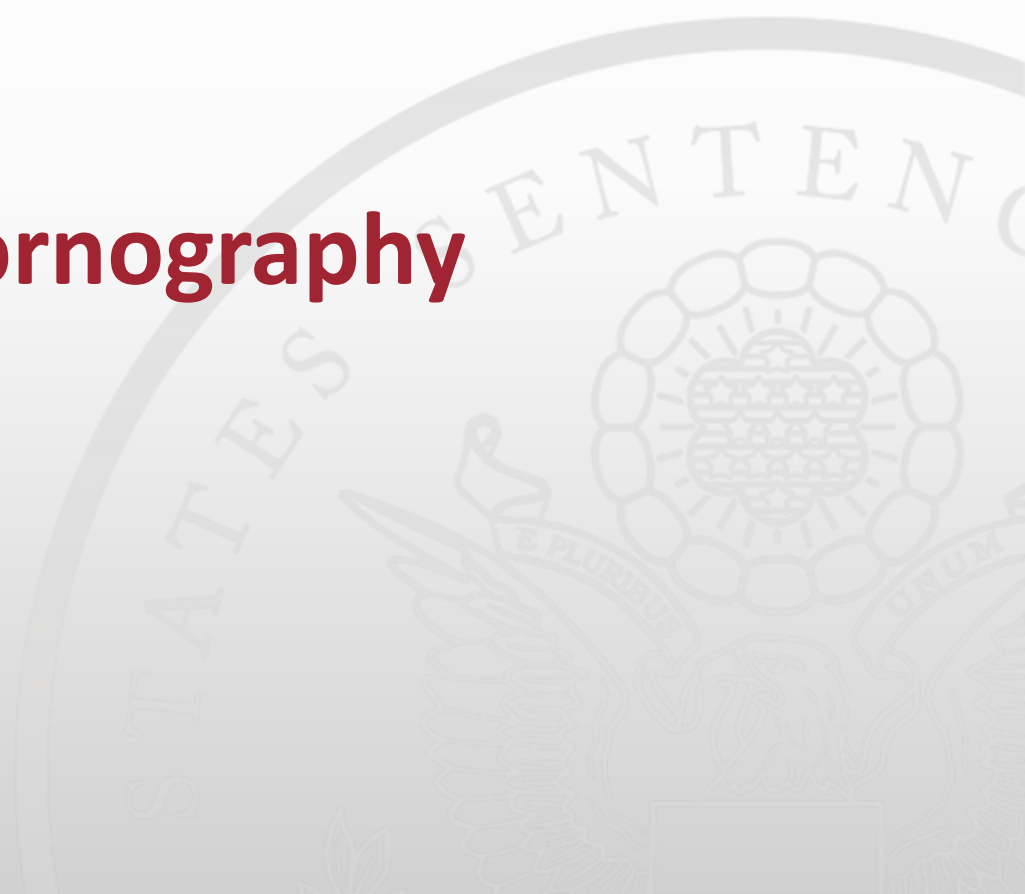
**Count 1 Cross Reference**  
Production of child pornography

**§2G2.2** → **§2G2.1**

Guideline: **§2G2.1**  
BOL: 32  
(b)(1)(B) (Minor under 16) +2  
(b)(2)(A) (Sexual Act) +2  
(b)(6) (Use of Computer) +2  
**Total Offense Level of 38**

# **§2G2.1**

## **Production of Child Pornography**



# Production Offenses

## §2G2.1

Relevant conduct analysis is **limited to** . . .

In preparation

During

Avoiding Detection



# Mr. Jones | Scenario 1



Mr. Jones is charged with two counts of production of child pornography. Count 1 cites a specific video of Victim A produced on June 1, 2021. Count 2 cites a specific video of Victim A produced on July 1, 2021. The defendant pled guilty to Count 1. Count 2 will be dismissed.

**What offense conduct will be used to calculate the guideline at §2G2.1?**

- ✓ A. The conduct from Count 1 only
- B. The conduct from both Count 1 and Count 2





# Mr. Jones | Scenario 2



Mr. Jones pled guilty to one count of production of child pornography citing *three images* of Victim A which were produced on three separate dates.

**What offense conduct will be used to calculate the guideline at §2G2.1?**

- A. The conduct depicted in all three images
- ✓ B. The conduct from the single image which results in the highest guideline calculation



# Mr. Jones | Scenario 3



Mr. Jones pled guilty to one count of production of child pornography. The count of conviction cites a one-year period from June 1, 2021, to June 1, 2022, when Victim A was 12 years of age. Multiple videos were produced during this one-year period.

**What offense conduct will be used to calculate the guideline at §2G2.1?**

- A. The conduct from the entire one-year period
- B. The conduct from the single video from that one-year period which results in the highest guideline calculation



**§2G2.1(d)(1)**  
**Special Instruction**



# Special Instruction

## **§2G2.1(d)(1) (p. 212)**

If the offense involved the exploitation of more than one minor, Chapter 3, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.



# Special Instruction

## §2G2.1(d)(1) (p. 212)

If the **offense** involved the exploitation of more than one minor . . .

In preparation

During

Avoiding Detection



# Mr. Jones | Scenario 4

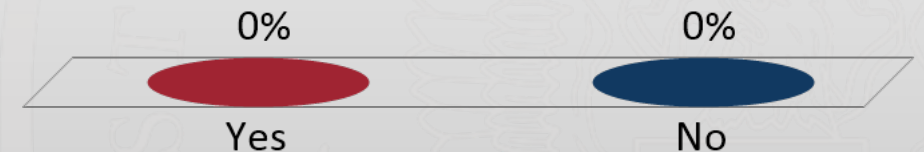


Mr. Jones pled guilty to one count of production of child pornography. The count of conviction cites a specific image of Victim A, age 14. Three days later, the defendant also produced an image of Victim B, age 9.

**Does the Special Instruction at §2G2.1(d) apply?**

A. Yes

✓ B. No



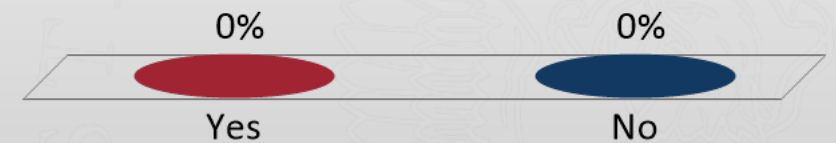
# Mr. Jones | Scenario 5



Mr. Jones pled guilty to one count of production of child pornography. The count of conviction cites one video produced by the defendant depicting Victim A, age 12, and Victim B, age 10, engaged in sexually explicit conduct.

**Does the Special Instruction at §2G2.1(d) apply?**

- ✓ A. Yes
- B. No



# Mr. Jones | Scenario 6

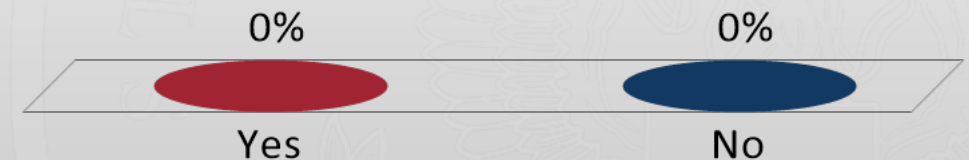


Mr. Jones pled guilty to one count of production of child pornography. The count of conviction cites one video produced by the defendant involving the sexual exploitation of his 5-year-old.

A review of the video reveals that all three of the defendant's children (ages 5, 7, and 9) appear in this video, engaged in sexually explicit conduct.

**Does the Special Instruction at §2G2.1(d) apply?**

- ✓ A. Yes
- B. No





# Special Instruction

## §2G2.1, App. Note 7 (p. 214)

If Special Instruction applies:

- Each victim is treated as a separate offense.
- These offenses cannot be grouped.
- **Units must be assigned.**

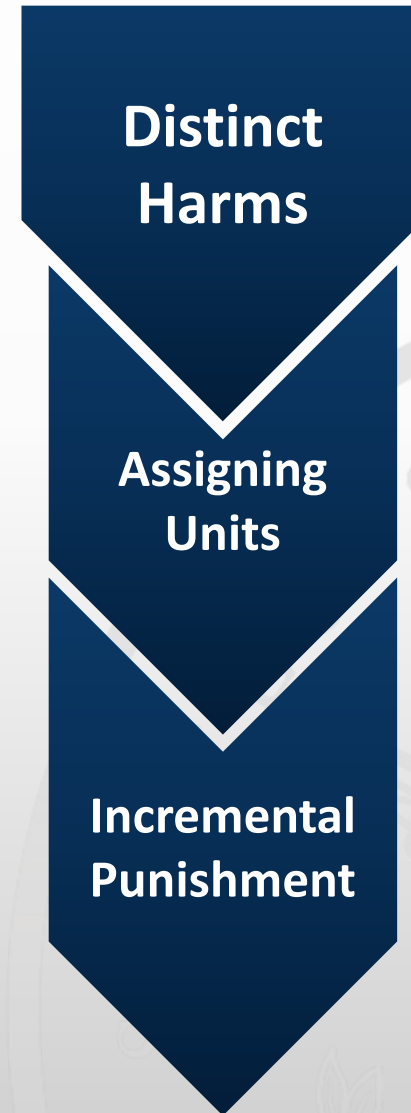


# Multiple Counts

## Chapter 3, Part D



# Rationale



# Two Sets of Rules

## 1. “Grouping” (§3D1.2)

- **Closely related counts** are treated as a single, composite harm.
- One offense level represents all counts.



# Two Sets of Rules

## 1. “Grouping” (§3D1.2)

- Closely related counts are treated as a single, composite harm.
- One offense level represents all counts.

## 2. “Assigning Units” (§3D1.4)

- Provides incremental punishment for multiple counts involving separate, distinct harms.
- Adds offense levels for **significant** additional criminal conduct.

# Assignment of Units

## If more than one group:

- Assign 1 unit to the group with the highest offense level;
- Assign 1,  $\frac{1}{2}$ , or 0 units to the remaining groups; and
- Increase the offense level of the highest group according to the unit chart.

# Assignment of Units (§3D1.4)

Comparison of Offense Levels	Number of Units to Assign
Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

# Special Instruction and Pseudo Counts

Recall Mr. Jones who pled guilty to one count of production of child pornography.

The count of conviction cites one video produced by the defendant depicting Victim A, age 12, and Victim B, age 10, engaged in sexually explicit conduct.





# Assignment of Units (§3D1.4)



**Victim A**

§2G2.1

Offense Level

**36**

**1 unit**



**Victim B**

§2G2.1

Offense Level

**34**

**1 unit**

**Total Units**

**2**

# Assignment of Units (§3D1.4)

Total Units

2



Two Additional  
Offense Levels

Number of Units	Increase in Offense Level
1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
more than 5	Add 5 levels

# Additional Offense Levels (§3D1.4)

Total of **2** units = 2 additional offense levels

Highest  
Offense Level

Production 1

§2G2.1

Offense Level

**36**

+2 additional  
offense levels

**38**

combined  
offense level

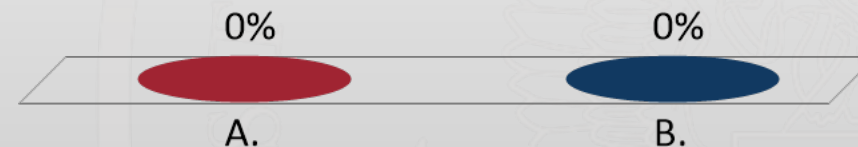
# Mr. Jones | Scenario 7



What if Mr. Jones is convicted of two counts of production of child pornography. Count 1 cites the sexual exploitation of Victim A, age 12. Count 2 cites the sexual exploitation of Victim B, age 10.

**These counts . . .**

- A. Group together because they both use §2G2.1
- ✓ B. Do not group – units are assigned



# Grouping Closely Related Counts at §3D1.2

Multiple counts involve *substantially the same* harm when:

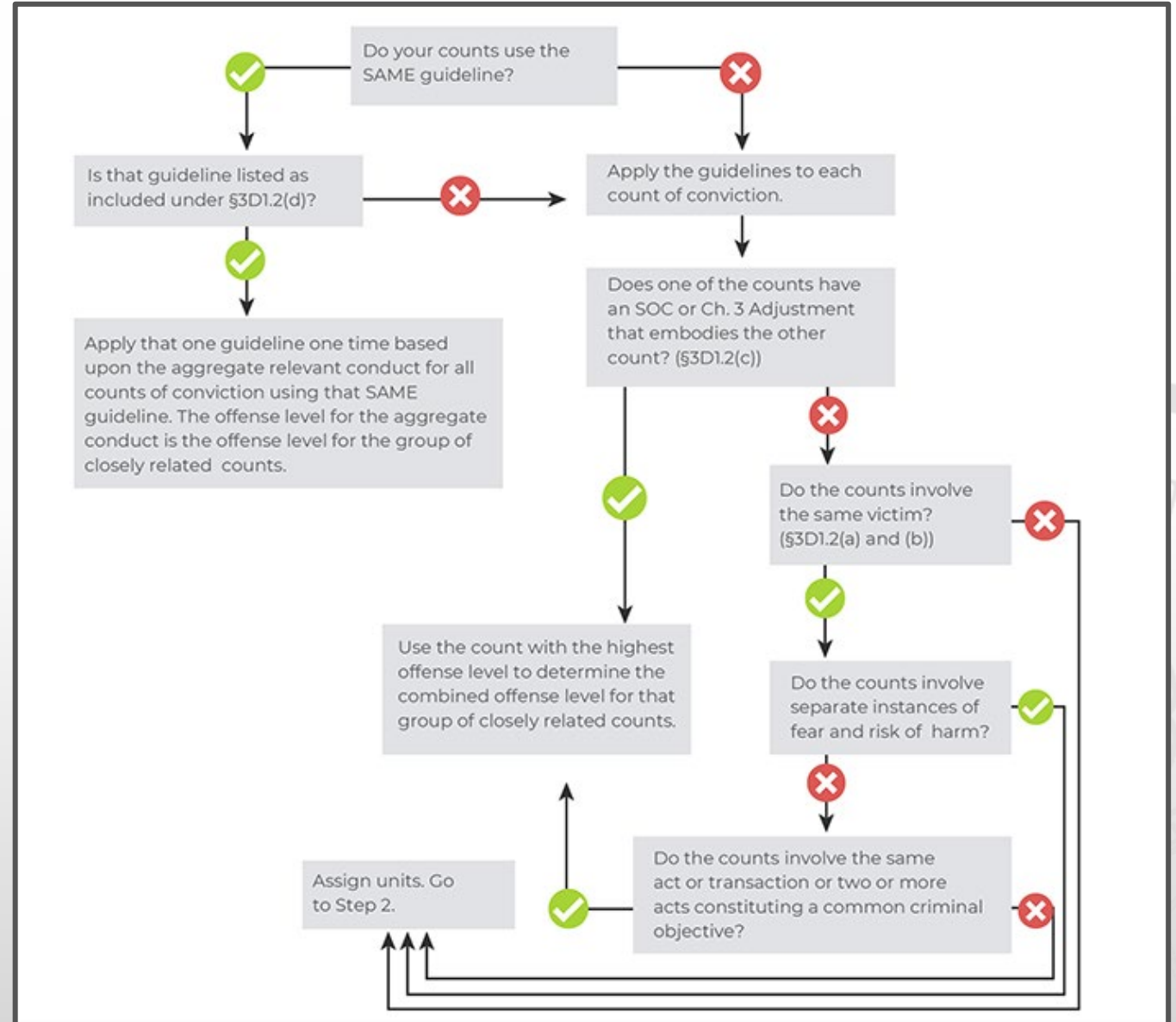
**RULE** **a** Same Victim, Same Act

**RULE** **b** Same Victim, Related Acts

**RULE** **c** Conduct Accounted for by SOC/Adjustment

**RULE** **d** Aggregated Harm Guidelines

# Decision Tree: Grouping Multiple Counts of Conviction



Do your counts use the  
**SAME** guideline?

Is that guideline listed as  
included under §3D1.2(d)?



# The Defendant | Scenario 2

The defendant pled guilty to:

Count 1: Possession of Child Pornography

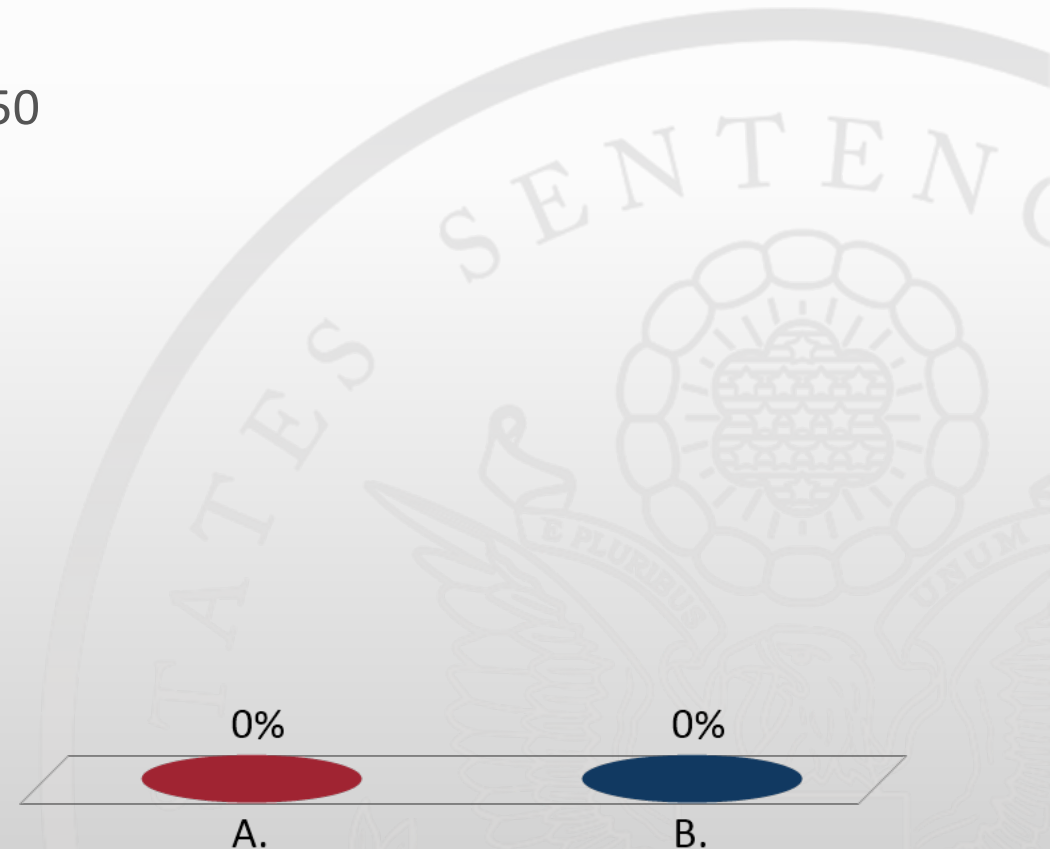
Count 2: Distribution of Child Pornography

The defendant possessed a total of 500 images. He distributed 50 of the images he possessed.

The applicable guideline for both counts is §2G2.2.

These counts . . .

- ✓ A. Group under Rule (d)
- B. Do not group because the counts involve different conduct





Do your counts use the  
**SAME** guideline?

Is that guideline listed as  
included under §3D1.2(d)?

Apply that one guideline one time based upon the  
aggregate relevant conduct for all counts of  
conviction using that SAME guideline.

RULE

d

GROUPING

# The Defendant | Scenario 2

The defendant pled guilty to:

Count 1: Possession of Child Pornography involving images of **Victim A**

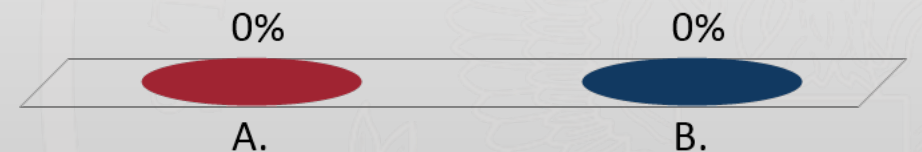
Count 2: Receipt of Child Pornography involving images of **Victim B**

Count 3: Distribution of Child Pornography involving images of **Victim C**

The applicable guideline for all three counts is **§2G2.2**.

These counts . . .

- ✓ A. Group under Rule (d)
- B. Do not group because the counts involve different victims



Apply the guidelines to each count of conviction.

Does one of the counts have an SOC or Ch. 3 Adjustment that embodies the other count?



# The Defendant | Scenario 3

## The defendant pled guilty to:

Count 1: production of child pornography Victim A (§2G2.1)

Count 2: production of child pornography Victim B (§2G2.1)

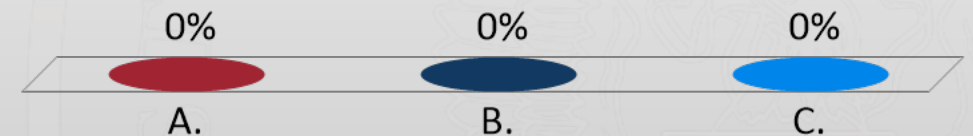
Count 3: receipt of child pornography (§2G2.2)

Count 4: possession of child pornography (§2G2.2)

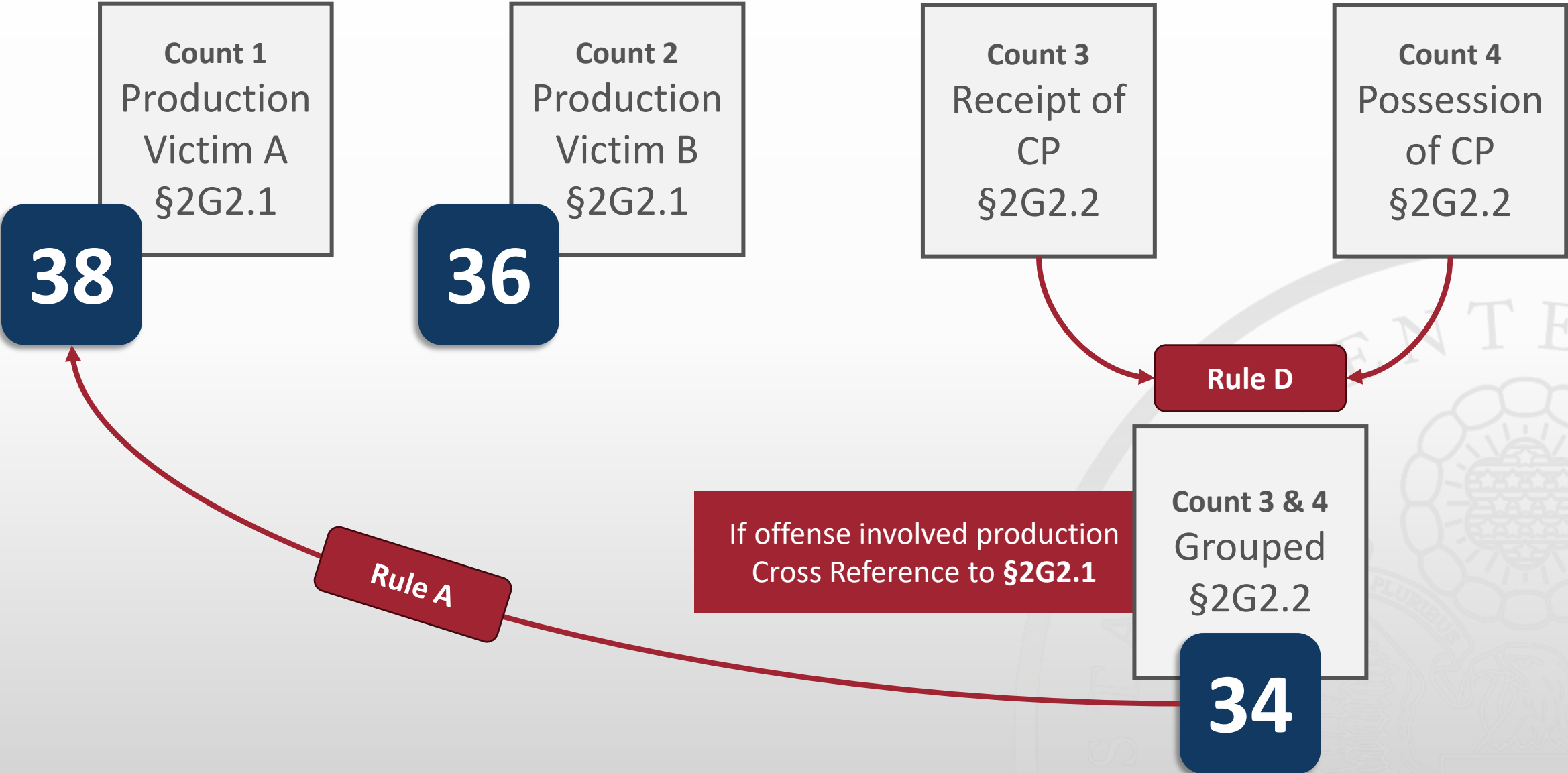
The produced images of Victims A and B are included in the possessed images in Count 4.

## These counts . . .

- A. Group together
- B. Don't group – units are assigned
- ✓ C. Group together and units are assigned



# Multiple Counts Scenario



# Multiple Counts Scenario

Counts 1, 3 & 4  
Grouped  
§2G2.1

38

1  
Unit

Count 2  
Production  
Victim B  
§2G2.1

36

1  
Unit



40

Final Offense Level

Units must be assigned

## Assignment of Units

Highest Offense Level (or Equal)	1
1-4 Levels Less Serious	1
5-8 Levels Less Serious	½
9 or More Levels Less Serious	0

## Total Units

## Additional Levels

1	None
1½	Add 1 level
2	Add 2 levels
2½ - 3	Add 3 levels
3½ - 5	Add 4 levels
5+	Add 5 levels

# Commercial Sex Acts and Trafficking

## §§2G1.1 & 2G1.3

<b>Relevant Conduct</b>	Limited to Preparation, During, Avoiding
<b>§2G1.3(c)(1)</b>	Cross Reference to §2G2.1 - Production
<b>Special Instructions</b>	Only apply to multiple victims within one instance
<b>Multiple Counts</b>	Distinct Harms = Assign Units

# **§4B1.5(b)**

**Repeat and Dangerous Sex Offender  
Against Minors**





# Repeat and Dangerous Sex Offenders

## §4B1.5(b) (p. 403)

If the defendant's instant offense of conviction is a covered sex crime . . . and the defendant engaged in a pattern of activity involving prohibited sexual conduct:



increase by 5 levels

**covered sex crime**

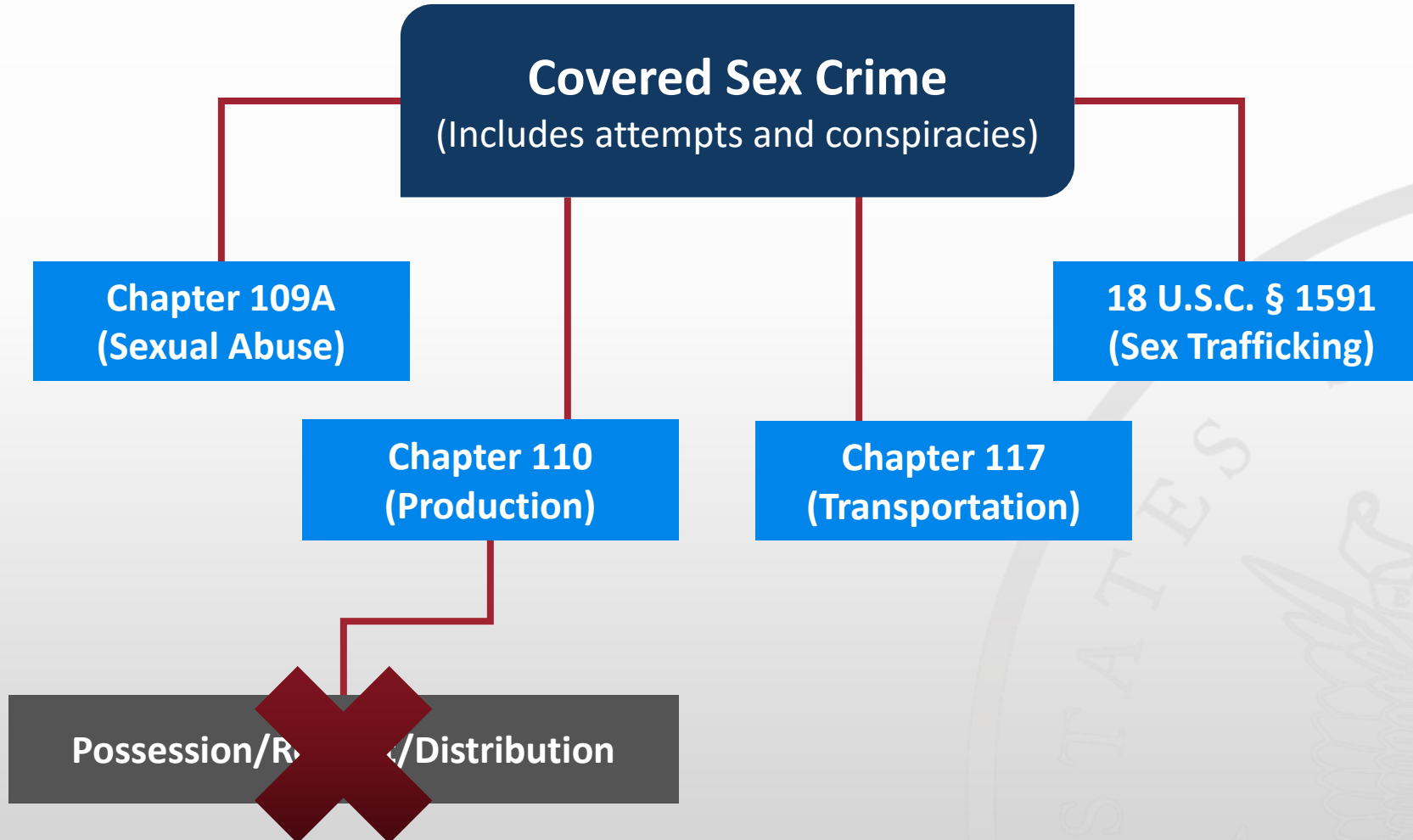
**pattern**

**prohibited sexual conduct**



# Covered Sex Crime

§4B1.5, App. Note 2 (pp. 403-04)



# Determination of Pattern of Activity

§4B1.5, App. Note 4(B) (p. 404)

Part of Instant  
Offense



Different Minors



Conviction

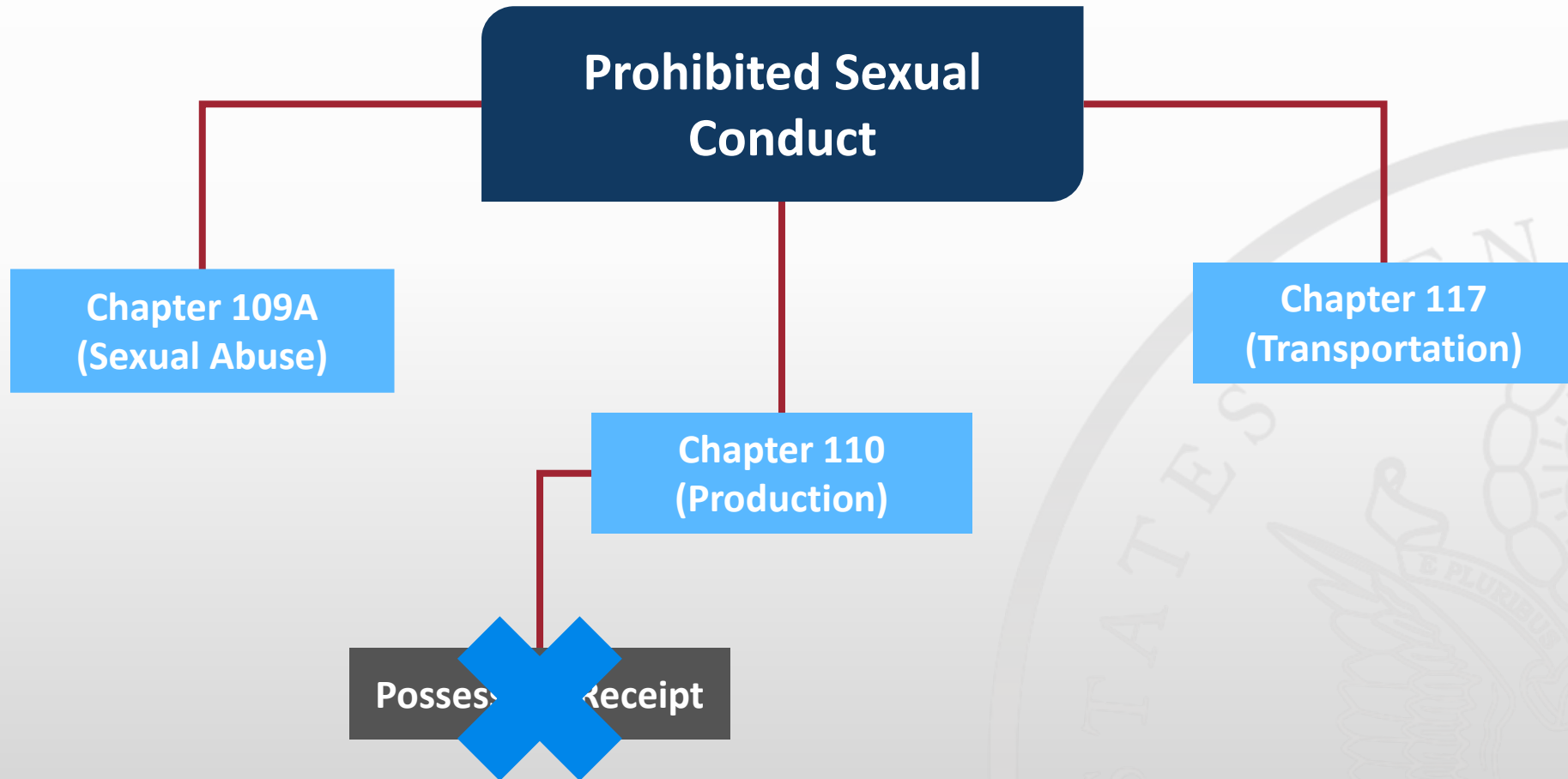


Time Frame



# Prohibited Sexual Conduct

§4B1.5, App. Note 4(A) (p. 404)



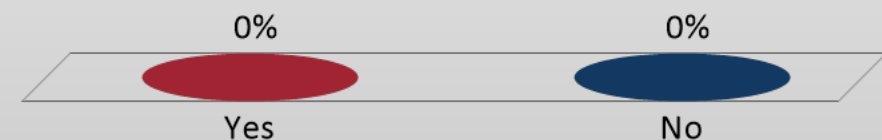
# Mr. Jones | Scenario 11



Recall the following scenario: “Mr. Jones is charged with two counts of production of child pornography (§2G2.1). Count 1 cites a specific video of Victim A on June 1, 2021. Count 2 cites a specific video of Victim A on July 1, 2021. The defendant pled guilty to Count 1. Count 2 will be dismissed. Only the conduct from Count 1 is used to calculate the guideline at §2G2.1.”

**Will Repeat and Dangerous Sex Offender at §4B1.5(b) apply?**

- ✓ A. Yes
- B. No



# Sex Offense Pointers

<b>Relevant Conduct</b>	Does the guideline use “expanded” relevant conduct?
<b>Special Instructions</b>	Only apply to multiple victims within one instance
<b>Multiple Counts</b>	May group <i>and</i> assign units
<b>§4B1.5</b>	Remember to evaluate!
<b>Call the HelpLine!</b>	202-502-4545

# Learning Outcomes

You should now be able to:

**Describe** the relevant conduct analysis that applies to child pornography and sex offenses;

**Determine** whether a Cross Reference applies;

**Assess** whether a Special Instruction applies;

**Apply** the multiple count rules to child pornography and sex offense cases; and

**Evaluate** the application of §4B1.5(b).



# Questions or Comments



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