



Sex Offenses



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Main Sex Offense Statutes & Guidelines

§2A3.1	18 U.S.C. § 2241	Rape
§2A3.2	18 U.S.C. § 2243	Stat. Rape
§2A3.4	18 U.S.C. § 2244	Sex Abuse
§2G1.3	18 U.S.C. §§ 1591, 2422, 2423	Trafficking/Travel
§2G2.1	18 U.S.C. § 2251	Production
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Traffic, Receipt, Possession



Statutory Penalty Scheme for Child Porn Offenses

Mandatory Minimums and Statutory Maximums

Possession		Receipt/Distribution/ Transportation		Production	
1 st Time Offender	Recidivist	1 st Time Offender	Recidivist	1 st Time Offender	Recidivist
No MM/ 10Y Max.;	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.
> age 12					



§2G2.2: Trafficking/Receipt/Possession

- Base offense level depends on offense of conviction:
 - 18 for possession offenses
 - 22 for receipt or trafficking offenses
- Note: 5-year mandatory minimum for receipt & trafficking offenses (18 U.S.C. §§ 2252 & 2252A)



§2G2.2: Trafficking/Receipt/Possession (cont.)

5

- 2-level decrease (§2G2.2(b)(1)) for receipt if no intent to traffic or distribute material
- Cannot have conduct beyond receipt; Defendant's burden to prove this
 - *U.S. v. Goluba*, 672 F.3d 304 (5th Cir. 2012)
 - *U.S. v. Fore*, 507 F.3d 412 (6th Cir. 2007)
 - *U.S. v. Burgess*, 576 F.3d 1078 (10th Cir. 2009)



§2G2.2(b)(3): Distribution SOC

- Most common increase either 2 or 5 levels
- 5 levels for distribution for receipt/expectation of thing of value, even if not pecuniary gain (*e.g.*, trading images)
- File sharing enhancement normally either 2 or 5 levels (*e.g.*, Limewire or Frostwire)



§2G2.2(b)(3): Distribution SOC

- No knowledge Requirement
 - *U.S. v. Baker*, 742 F.3d 618 (5th Cir. 2014)
 - *U.S. v. Ray*, 704 F.3d 1307 (10th Cir. 2013)
- Knowledge requirement
 - *U.S. v. Baldwin*, 743 F.3d 357 (2d Cir. 2014)
 - *U.S. v. McManus*, 734 F.3d 315 (4th Cir. 2014)
 - *U.S. v. Robinson*, 714 F.3d 466 (7th Cir. 2013)



November 1, 2016 Amendment

2-Level Specific Offense Characteristic for Distribution at §§2G2.1 (Production), 2G2.2 (Trafficking) & 2G3.1 (Obscenity)

- The 2-level specific offense characteristic applies “if the *defendant knowingly* engaged in distribution.”
 - “Defendant” specific
 - Mens rea requirement: *knowingly*



November 1, 2016 Amendment

5-Level Specific Offense Characteristic for Distribution at §§2G2.2 (Trafficking) & 2G3.1 (Obscenity)

- The 5-level specific offense characteristic applies “if the *defendant* distributed in exchange for any valuable consideration . . .”



Child Pornography Circuit Conflict

5-Level SOC for Distribution (cont.)

- “[This] means that the *defendant agreed* to an exchange with another person under which the *defendant knowingly distributed* to that other person *for the specific purpose of obtaining something of valuable consideration* from that other person, such as”
 - other child pornographic material
 - preferential access to child pornographic material, or
 - access to a child.



§2G2.2(b)(4): Sadistic/Masochistic/Violence SOC

- If offense involved material that portrays sadistic or masochistic conduct or other depictions of violence increase by 4 levels
- Application Note 2: SOC applies regardless of whether defendant specifically intended to possess, receive, or distribute such materials
 - *U.S. v. Maurer*, 639 F.3d 72 (3d Cir. 2011)
 - *U.S. v. Meschino*, 643 F.3d 1025 (7th Cir. 2011)



**§2G2.2(b)(4):
Sadistic/Masochistic/Violence SOC (cont.)**

- Courts apply broadly; circuits have per se rule: if image involves something being inserted into young child, the SOC applies
 - *U.S. v. Hoey*, 508 F.3d 687 (1st Cir. 2007)
 - *U.S. v. Freeman*, 578 F.3d 142 (2^d Cir. 2009)
 - *U.S. v. Maurer*, 639 F.3d 72 (3^d Cir. 2011)
 - *U.S. v. Burgess*, 684 F.3d 445 (4th Cir. 2012)
 - *U.S. v. Lyckman*, 235 F.3d 234 (5th Cir. 2000)
 - *U.S. v. Groenendal*, 557 F.3d 419 (6th Cir. 2009)
 - *U.S. v. Myers*, 355 F.3d 1040 (7th Cir. 2004)



§2G2.2(b)(4):
Sadistic/Masochistic/Violence SOC (cont.)

- Courts apply broadly; most circuits have per se rule: if image involves something being inserted into young child, the SOC applies (cont.)
 - *U.S. v. Koch*, 625 F.3d 470 (8th Cir. 2010)
 - *U.S. v. Holt*, 510 F.3d 1007 (9th Cir. 2007)
 - *U.S. v. Rearden*, 349 F.3d 608 (9th Cir. 2003)
 - *U.S. v. Kimler*, 335 F.3d 1132 (10th Cir. 2003)
 - *U.S. v. Hall*, 312 F.3d 1250 (11th Cir. 2002)



November 1, 2016 Amendment

Infants & Toddlers at §§2G2.1 & 2G2.2

- Expands current 4-level specific offense characteristic for material that portrays S/M or other depictions of violence, to also include an infant/ toddler
- If this SOC applies, do not apply §3A1.1(b) for Vulnerable Victim
 - *but see U.S. v. Wright*, 373 F.3d 935 943 (9th Cir 2004) and *U.S. v. Jenkins*, 712 F.3d 209 (5th Cir. 2013)



§2G2.2(b)(5): Pattern of Activity SOC

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels
- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred



§2G2.2(b)(5): Pattern of Activity (cont.)

- These instances can include conduct:
 - during the course of offense
 - involved the same minor, or
 - resulted in a conviction for such conduct
 - can include conduct when defendant was a minor
(*U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013))
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)



§2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct
 - *U.S. v. Clark*, 685 F.3d 72 (1st Cir. 2012) (24 yrs)
 - *U.S. v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (16 yrs)
 - *U.S. v. Bacon*, 646 F.3d 218 (5th Cir. 2011) (30 yrs)
 - *U.S. v. Quinn*, 257 F. App'x 864 (6th Cir. 2007) (30 yrs)
 - *U.S. v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
 - *U.S. v. Woodard*, 694 F.3d 950 (8th Cir. 2012) (19 yrs)
 - *U.S. v. Garner*, 490 F.3d 739 (9th Cir. 2007) (35 yrs)
 - *U.S. v. Lucero*, 747 F.3d 1242 (10th Cir. 2014) (35 yrs)
 - *U.S. v. Turner*, 626 F.3d 566 (11th Cir. 2010) (20 yrs)



§2G2.2(b)(7): Images SOC

Number of Images:

- 10-149 images 2-level increase
 - 150-299 3-level increase
 - 300-599 4-level increase
 - 600 or more 5-level increase
-
- Video clips/videos = 75 images





Commission Report to Congress: Federal Child Pornography Offenses



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Child Pornography Report Highlights

- A significant percentage of non-production child pornography offenders (31.4%) have known histories of sexually dangerous behavior
- Known sexual recidivism was 7.4%
- §2G2.2 is outdated and the guideline does not reflect the variations in offenders' culpability and sexual dangerous



Report Takeaways

- Three broad factors should be primary considerations in sentencing child pornography offenders:
 - 1) content of collection
 - 2) involvement in offender communities,
 - 3) contact
- The guidelines should be amended to address these factors, and Congress should authorize the Commission to amend guideline provisions that were promulgated pursuant to specific congressional directives or legislation



Factors Argued for Departures/Variations

- Psychosexual evaluations
- Risk of touching
- Length of time looking at child pornography
- Material in images (*e.g.*, babies in image)
- Age of victims and the age of the defendant



Factors Argued for Departures/Variations

- Military Service
- Computer sophistication
- Experts
- Rehabilitation
- Physical condition of defendant



“Policy Disagreement” or “Lack of Empirical Evidence” Argument in Child Porn Cases

- Compare

- *U.S. v Dorvee*, 616 F.3d 174 (2d Cir. 2010)
- *U.S. v Grober*, 624 F.3d 592 (3d Cir. 2010)
- *U.S. v Henderson*, 649 F.3d 955 (9th Cir. 2011)

- With

- *U.S. v Miller*, 665 F.3d 114 (5th Cir. 2011)
- *U.S. v Bistline I*, 665 F.3d 758 (6th Cir. 2012)
- *U.S. v Pugh*, 515 F.3d 1179 (11th Cir. 2008)





Selected Issues for §2G Child Sex Offense Guidelines

Relevant Conduct, Multiple Counts, and Special Instructions



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Scenario 1: §2G2.2 (Traffic/Receipt/Possess)

- Defendant is convicted one count of possession of child porn on June 1, 2016; Guideline §2G2.2
- The offense of conviction involved the defendant's possession of 100 images of child porn on his computer
- On multiple occasions from Aug. 1, 2015 until June 1, 2016, the defendant also distributed child porn in order to get child porn; this involved a total of 2,000 images beyond those in count of conviction



Scenario 1: §2G2.2 (Traffic/Receipt/Possess) (cont.)

- How many images is the defendant accountable for?
- Will the defendant receive the SOC for distribution?



§3D1.2(d) and Relevant Conduct

- **§2G2.2 (Trafficking)** is on the “*included list*” at §3D1.2(d), therefore relevant conduct will include acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2))



Scenario 2: §2G2.1 (Production)

- The defendant is convicted one count of production of child porn, citing one minor, age 14, exploited during the production on July 15, 2016; Guideline §2G2.1
- On July 2, 2016, the defendant also produced child porn exploiting a different child, age 10



Scenario 2: §2G2.1 (Production) (cont.)

- Will the defendant be accountable for the second production exploiting the second child, and can the SOC for minor under age 12 apply?



§3D1.2(d) and Relevant Conduct

- **§2G2.1 (Production)** is on the “*excluded* list” at §3D1.2(d), therefore relevant conduct **will not include** acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2))



Scenario 3: §2G1.3 (Travel/Transportation)

- The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution; Guideline §2G1.3
- On another occasion that week the defendant transported the minor to a different location for purposes of prostitution and filmed the sexual activity
- Will the defendant be accountable for the second transportation of the child?



§3D1.2(d) and Relevant Conduct

- **§2G1.3 (Travel/Transportation)** is not on either list at §3D1.2(d), but should be treated like other similar offenses on the “*excluded* list,” meaning relevant conduct **will not include** acts in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2))



Special Instruction

§2G1.3(d)(1) & App. Note 6 (Travel/Transportation)

- If the relevant conduct of the offense of conviction involved more than one minor victim, *whether specifically cited in the count of conviction or not*, each such minor shall be treated as if contained in a separate count of conviction
- Multiple counts involving more than one minor are not to be grouped together



Scenario 4: §2G1.3 (Travel/Transportation)

- Same facts as Scenario 3, except on the occasion of the offense of conviction, in addition to the 15-year-old minor cited, there was also an 11-year-old being transported for prostitution
- Will the Special Instruction be applied?
- Will there be a single application looking at the conduct related to both minors, or will there be a separate application for each?



Special Instruction

§2G1.3(d)(1) & App. Note 6 (Travel/Transportation)

Transportation – Child 1
(§2G1.3)

Ch. Two TOTAL 30

Transportation – Child 2
(§2G1.3)

Ch. Two TOTAL 38



Special Instruction

§2G2.1(d)(1) & App. Note 5 (Production)

- If the relevant conduct of the offense of conviction includes more than one minor being exploited, *whether specifically cited in the count of conviction or not*, each such minor shall be treated as if contained in a separate count of conviction
- Multiple counts involving more than one minor are not to be grouped together



Scenario 5: §2G2.1 (Production)

- The defendant is convicted of one count of production of child porn, citing one minor, age 10, exploited during the production on a May 10, 2016; Applicable guideline §2G2.1
- In that same production, a second minor, age 9, was also exploited in the same fashion in the same video



Scenario 5: §2G2.1 (Production)

- Will the Special Instruction be applied?
- Will there be a single application looking at the conduct related to both minors, or will there be a separate application for each?



Special Instruction

§2G2.1(d)(1) & App. Note 5

Production – Child 1
(§2G2.1)

Ch. Two TOTAL 40

Production – Child 2
(§2G2.1)

Ch. Two TOTAL 38



Scenario 6: Multiple Counts

- Count 1 – Trafficking child porn on April 15, 2016;
Applicable guideline §2G2.2; OL 40
- Count 2 – Production of child porn, citing one minor exploited during the production on April 15, 2016;
Applicable guideline §2G2.1; OL 38
 - Among the SOCs applied is §2G2.1(b)(3) for the offense involving distribution of child porn



Scenario 6: Multiple Counts (cont.)

- The distribution cited in the trafficking count is the same child porn cited in the production count
- The relevant conduct of the trafficking offense includes not only the child porn cited in the count but also additional distributions by the defendant over a period of six months
- Will the counts group? If so, under which grouping rule?

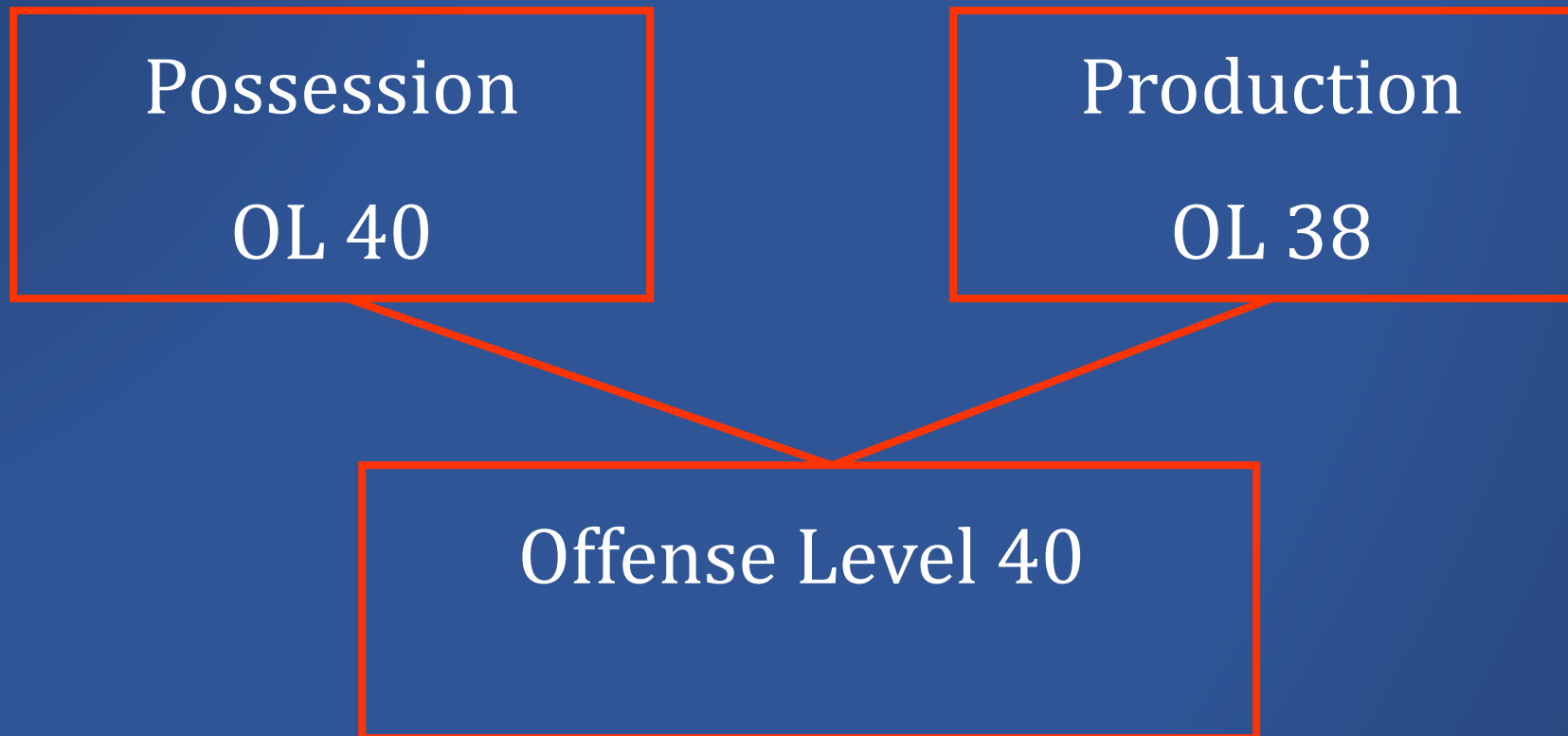


“Rule (c)”

“When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.”



Impact of Counts Grouping under Rule (c)



Scenario 7: Multiple Counts

- Count 1 – Transportation of 14-year-old for purposes of illegal sexual activity, child porn production, on March 20, 2016, Guideline §2G1.3; OL 32
 - There was only the one minor in the transportation
- Count 2 – Production of child porn, citing the same 14-year-old in the production on March 20, 2016, Applicable guideline §2G2.1; OL 38
 - There was only the one minor exploited in the production



Scenario 7: Multiple Counts (cont.)

- Will the cross reference at §2G1.3(c)(1) for production of child porn apply? If so, what is the resulting offense level?
- Will the counts group? If so, under which grouping rule?



Impact of Counts Grouping under Rule (a)

