



# Sex Offenses

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# Main Sex Offense Guidelines & Statutes

§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
§2A3.5	18 U.S.C. § 2250	Failure to Register
§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 <sup>st</sup> Time Offender	Recidivist (Prior Sex Conviction)	1 <sup>st</sup> Time Offender	Recidivist (Prior Sex Conviction)	1 <sup>st</sup> Time Offender	Recidivist (Prior Sex Conviction)
No MM/ 10Y Max.;	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.
20Y Max. if > age 12					



# Use Categorical Approach to Determine Prior Sex Offense Convictions

- *U.S. v. Mills*, 850 F.3d 693 (4th Cir. 2017)
  - North Carolina's Indecent Liberties With a Child is a prior sex conviction 18 U.S.C. § 2251(e)
- *U.S. v. Wikkerink*, 841 F.3d 327 (5th Cir. 2016)
  - Louisiana conviction for aggravated incest qualified as an offense relating to sexual abuse for purposes of the enhanced penalties at 18 U.S.C. § 2252A(b)

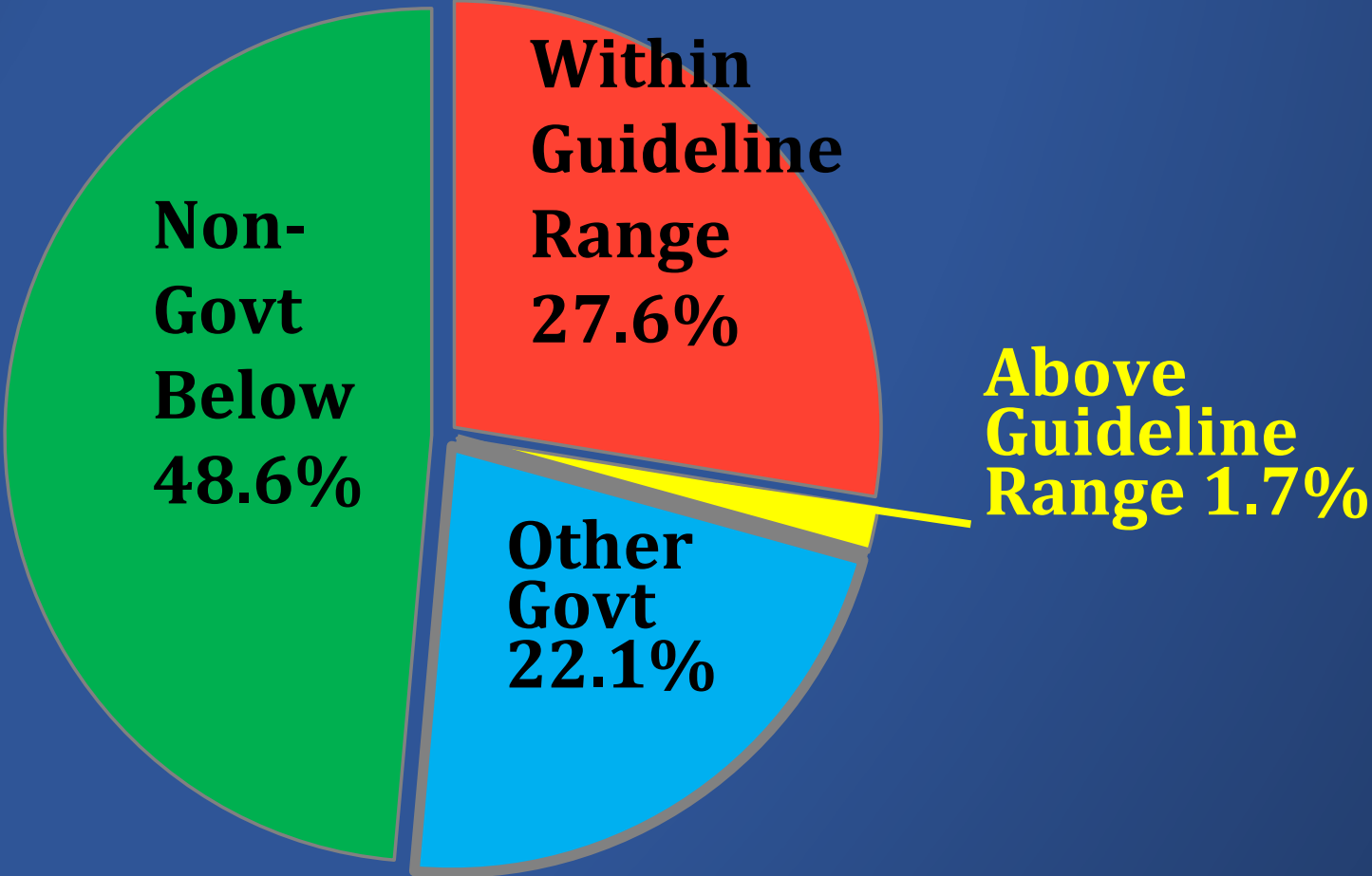


# Prior Sex Offense Convictions

- *U.S. v. Miller*, 819 F.3d 1314 (11th Cir. 2016)
  - FL sexual battery is a prior sex offense conviction under § 2251(e)
- *U.S. v. Mayokok*, 854 F.3d 987 (8<sup>th</sup> Cir. 2017)
  - MN possession of pornographic work is a prior sex conviction
- *U.S. v. Gauld*, -F.3d-, 2017 WL 3254374 (8<sup>th</sup> Cir. 2017)
  - Juvenile delinquency adjudication is not a prior sex conviction



# §2G2.2 Position of Sentences in Relation to Guideline Range National - FY 2015-16 (3,107 cases)



## §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 Commonly Applied SOC's

- Prepubescent minor (b)(2) (96%)
- S/M enhancement (b)(4) (85.2%)
- Use of a computer (b)(6) (94.8%)
- Number of images (b)(7) (97.4%)





## §2G2.2(b)(7): Images SOC

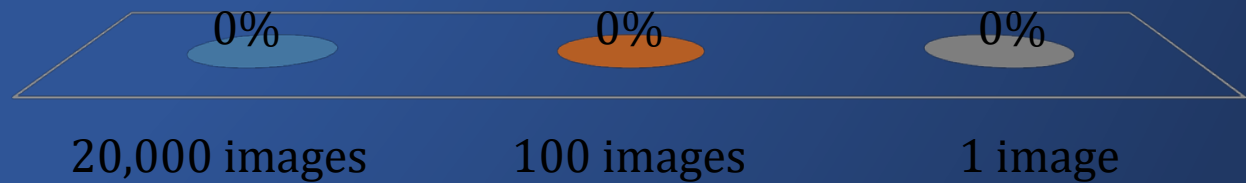
### Number of Images:

- 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



# How many images under §2G2.2(b)(7) is the defendant accountable for?

- A. 20,000 images
- B. 100 images
- C. 1 image



## §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))



## §2G2.2(b)(1): 2-level decrease

- Convicted of receipt and no intent to traffic/distribute
- Def. has burden to prove no conduct beyond receipt
  - *U.S. v. Goluba*, 672 F.3d 304 (5<sup>th</sup> Cir. 2012)
  - *U.S. v. Hodge*, 805 F.3d 675 (6<sup>th</sup> Cir. 2016)
  - *U.S. v. Burgess*, 576 F.3d 1078 (10<sup>th</sup> Cir. 2009)
  - *U.S. v. Shepard*, 661 F. App'x 348 (6<sup>th</sup> Cir. 2016) (“A defendant who knowingly uses file-sharing software such that another user could obtain the prohibited material has distributed child pornography, is disqualified from receiving the §2G2.2(b)(1) reduction.”)



## §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



## §2G2.2(b)(3)(F): Distribution SOC

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



## §2G2.2: Distribution

- “Although Dunning has not admitted that he knew how peer-to-peer file-sharing software works, neither has he presented any evidence that he did not know that file-sharing software shares—and thus distributes—files. Not only could the fact-finder have reasonably inferred that Dunning knew that his use of a file-sharing program distributed files, Dunning's argument that he removed the files from the software so that others would no longer have access to them undermines his argument that he did not know that the file-sharing software shares files.”
- *U.S. v. Dunning*, 857 F.3d 342 (6<sup>th</sup> Cir. 2017)



## §2G2.2: Distribution

- “The district court made two findings to support its determination that Monetti “knowingly engaged in distribution”: (1) Monetti changed the default sharing settings in the Ares program, which showed he understood that files in the shared folder could be downloaded by other users; and (2) Monetti kept the Ares program running on his computer, which allowed other users to download child pornography from his shared folder.”
- *U.S. v. Monetti*, -F.App’x-, 2017 WL 3614429 (11<sup>th</sup> Cir. 2017)





## §2G2.2: Distribution

- “Monetti also does not dispute that he had child pornography in his shared folder. For example, it is not disputed that Agent Devine downloaded child pornography on four or five occasions from the folder. This evidence shows Monetti used Ares even though he knew the child pornography in his shared folder could be distributed through the program. The district court therefore did not err in finding Monetti knowingly distributed child pornography.”
- *U.S. v. Monetti*, -F.App'x-, 2017 WL 3614429 (11<sup>th</sup> Cir. 2017)



## §2G2.2(b)(3)(B): Distribution SOC

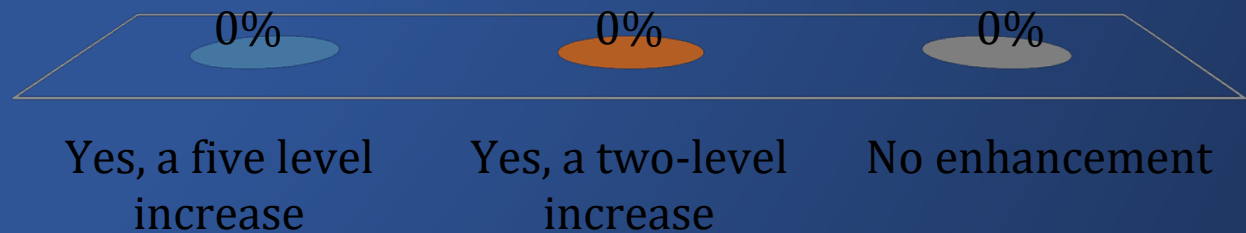
### 5-Level Specific Offense Characteristic for Distribution

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



# Should the defendant receive an enhancement under §2G2.2(b)(3)?

- A. Yes, a five level increase
- B. Yes, a two-level increase
- C. No enhancement



## §2G2.2(b)(3)(B): 5-level

- “[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)(3)(B): 5-level Distribution

- “The district court did not clearly err in finding that this email exchange showed by a preponderance of the evidence that Little sent Hall the pornography with the expectation that Hall would send him different child pornography in return. It is apparent from those emails that both Little and Hall wanted to exchange child pornography, and when Little sent Hall child pornography he expected Hall to respond in kind. The district court did not err in applying the five-level enhancement under § 2G2.2(b)(3)(B).”
- *U.S. v. Little*, 864 F.3d 1283(11<sup>th</sup> Cir. 2017)



## §2G2.2(b)(3)(B): 5-level Distribution

- “Bennett repeatedly engaged in “pass-for-pass” exchanges, in which he provided his password to another user with the expectation of receiving the other user's password. Indeed, in one exchange (relied upon by the District Court) Bennett and another user expressly discussed their pornography preferences before agreeing to provide each other access to their child-pornography files.... thus, 5-level enhancement applied.”
- *U.S. v. Bennett*, 839 F.3d 153 (2d Cir. 2016)



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

- If offense involved material that portrays sadistic or masochistic conduct or other depictions of violence or sexual abuse or exploitation of an infant or toddler, increase by 4 levels
- Application Note 2: SOC applies regardless of whether defendant specifically intended to possess, receive, or distribute such materials



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

- 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 (1<sup>st</sup> Cir. 2007)
  - *U.S. v. Freeman*, 578 F.3d 142 (2<sup>d</sup> Cir. 2009)
  - *U.S. v. Maurer*, 639 F.3d 72 (3<sup>d</sup> Cir. 2011)
  - *U.S. v. Burgess*, 684 F.3d 445 (4<sup>th</sup> Cir. 2012)
  - *U.S. v. Lyckman*, 235 F.3d 234 (5<sup>th</sup> Cir. 2000)
  - *U.S. v. Groenendal*, 557 F.3d 419 (6<sup>th</sup> Cir. 2009)
  - *U.S. v. Myers*, 355 F.3d 1040 (7<sup>th</sup> Cir. 2004)





## §2G2.2(b)(4)

- Courts apply broadly; 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 (8<sup>th</sup> Cir. 2010)
  - *U.S. v. Holt*, 510 F.3d 1007 (9<sup>th</sup> Cir. 2007)
  - *U.S. v. Rearden*, 349 F.3d 608 (9<sup>th</sup> Cir. 2003)
  - *U.S. v. Kimler*, 335 F.3d 1132 (10<sup>th</sup> Cir. 2003)
  - *U.S. v. Hall*, 312 F.3d 1250 (11<sup>th</sup> Cir. 2002)



# Child Pornography Scenario

- Defendant took a picture of his penis on a 14-year old lips while she slept.
- The victim stated that she felt humiliated and degraded when she learned of the picture.
- Should the enhancement for sadistic and masochistic images at §2G2.1(b)(4) apply?



# Should the S/M enhancement apply at §2G2.1(b)(4)?

A. Yes, because victim felt degraded

B. No



## §2G2.1 (Production of Child Porn)

- *U.S. v. Nesmith*, -F.3d-, 2017 WL 3393055 (5<sup>th</sup> Cir. 2017)
  - “[W]e hold that an image portrays sadistic conduct [§2G2.1(b)(4)] where it depicts conduct that an objective observer would perceive as causing the victim in the image physical or emotional pain contemporaneously with the image's creation. Because the victim in this case was asleep when the image was taken, no objective observer would conclude that the image portrayed sadistic conduct—namely, the defendant obtaining sexual release through the infliction of physical or emotional pain on another.”



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

- Objective Standard

- *U.S. v. Freeman*, 578 F.3d 142 (2d Cir. 2009)
- *U.S. v. Maurer*, 639 F.3d 72 (3d Cir. 2011)
- *U.S. v. Johnson*, 680 F. App'x 194 (4<sup>th</sup> Cir. 2017)
- *U.S. v. Nesmith*, -F.3d-, 2017 WL 3393055 (5<sup>th</sup> Cir. 2017)
- *U.S. v. Corp*, 668 F.3d 379 (6<sup>th</sup> Cir. 2012)
- *U.S. v. Johnson*, 784 F.3d 1070 (7<sup>th</sup> Cir. 2015)
- *U.S. v. Raplinger*, 555 F.3d 687 (8<sup>th</sup> Cir. 2009)



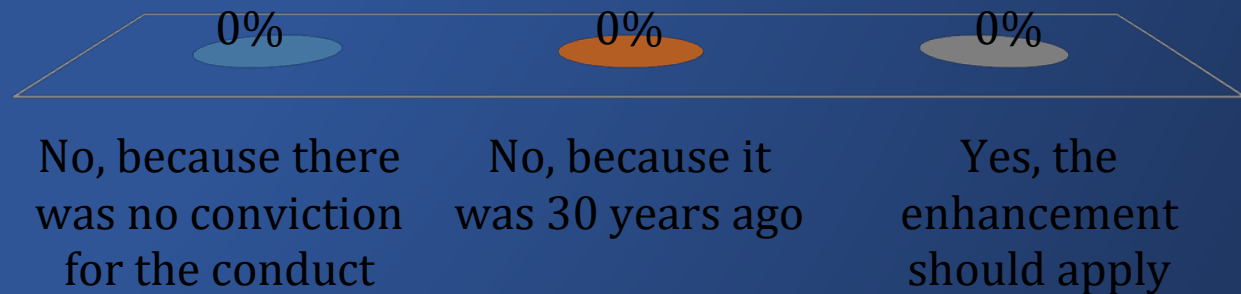
## §2G2.2(b)(5): Pattern of Activity SOC

- 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



# Should the defendant receive the enhancement for pattern of activity?

- A. No, because there was no conviction for the conduct
- B. No, because it was 30 years ago
- C. Yes, the enhancement should apply



## §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 and *U.S. v. Alberts*, 859 F.3d 979 (11<sup>th</sup> Cir. 2017))
- *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 (1<sup>st</sup> Cir. 2012) (24 yrs)
  - *U.S. v. Olfano*, 503 F.3d 240 (3<sup>d</sup> Cir. 2007) (16 yrs)
  - *U.S. v. Bacon*, 646 F.3d 218 (5<sup>th</sup> Cir. 2011) (30 yrs)
  - *U.S. v. Quinn*, 257 F. App'x 864 (6<sup>th</sup> Cir. 2007) (30 yrs)
  - *U.S. v. Lovaas*, 241 F.3d 900 (7<sup>th</sup> Cir. 2001) (26 yrs)
  - *U.S. v. Woodard*, 694 F.3d 950 (8<sup>th</sup> Cir. 2012) (19 yrs)
  - *U.S. v. Garner*, 490 F.3d 739 (9<sup>th</sup> Cir. 2007) (35 yrs)
  - *U.S. v. Lucero*, 747 F.3d 1242 (10<sup>th</sup> Cir. 2014) (35 yrs)
  - *U.S. v. Alberts*, 859 F.3d 979 (11<sup>th</sup> Cir. 2017) (30 yrs)



## §2G2.2(b)(6): Use of Computer

- Not double counting with other SOCs
  - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2012)
  - *U.S. v. Richardson*, 713 F.3d 232 (5<sup>th</sup> Cir. 2013)
  - *U.S. v. Lewis*, 605 F.3d 395 (6<sup>th</sup> Cir. 2010)
  - *U.S. v. Tenuto*, 593 F.3d 695 (7<sup>th</sup> Cir. 2010)
  - *U.S. v. Kiefer*, 490 F.3d 739 (9<sup>th</sup> Cir. 2007)
  - *U.S. v. Little*, 864 F.3d 1283 (11<sup>th</sup> Cir. 2017)



## §2G2.2(c)(1) Cross Reference

- If offense involved transporting, permitting or offering, or seeking by notice or advertisement a minor to engage in sexually explicit conduct, for purpose of producing a visual depiction of such conduct, apply §2G2.1 (Production)



## §2G2.2(c)(1) Cross Reference to §2G2.1 (Production)

- *U.S. v. Cox*, 744 F.3d 305 (4<sup>th</sup> Cir. 2014)
- *U.S. v. Callier*, 608 F. App'x 294 (5<sup>th</sup> Cir. 2015)
- *U.S. v. Nicoson*, 793 F.3d 761 (7<sup>th</sup> Cir. 2015)
- *U.S. v. Steffen*, 818 F.3d 770 (8<sup>th</sup> Cir. 2016)
- *U.S. v. Burch*, 809 F.3d 1041 (8<sup>th</sup> Cir. 2016)
- *U.S. v. Zayas*, 758 F.3d 986 (8<sup>th</sup> Cir. 2014)
- *U.S. v. Zagorski*, 807 F.3d 291 (D.C. Cir. 2015)





# 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 (9<sup>th</sup> Cir. 2011)

- With

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





# §2G1.3: Travel Cases & Child Sex Trafficking



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## §2G1.3: Travel Cases and Child Sex Trafficking

- Note: mandatory minimum 10 years for 18 U.S.C. §§ 2422(b) & 2423(a) offenses
- Base Offense Levels
  - 34 (§1591(b)(1) – victim under 14)
  - 30 (§1591(b)(2) – victim between 14-18)
  - 28 (§§ 2422(b) or 2423(a) – enticement or transport of minor)
  - 24 otherwise



## §2G1.3 Specific Offense Characteristics

- Use of a computer (+2)
- Sex act, sexual contact, or commercial sex act (+2)
- Misrepresentation of identity/undue influence (+2)
  - Undue influence does not apply if sting case only
- Age of victim (+8)
- Care, custody, control (+2)



## §2G1.3(b)(2): Undue Influence

- *U.S. v. Houston*, 857 F.3d 427 (1<sup>st</sup> Cir. 2017)
- *U.S. v. Pringler*, 765 F.3d 445 (5<sup>th</sup> Cir. 2014)
- *U.S. v. Reid*, 751 F.3d 763 (6<sup>th</sup> Cir. 2014)
- *U.S. v. McMillian*, 777 F.3d 444 (7<sup>th</sup> Cir. 2015)
- *U.S. v. Brooks*, 610 F.3d 1186 (8<sup>th</sup> Cir. 2010)
- *U.S. v. Hornbuckle*, 784 F.3d 549 (9<sup>th</sup> Cir. 2015)
- *U.S. v. Blake*, -F.3d-, 2017 WL 3586887 (11<sup>th</sup> Cir. 2017)



## §2G1.3(b)(3): Use of Computer & App. Note 4

- §2G1.3, Application Note 4 is inconsistent with §2G1.3(b)(3)(B)
  - *U.S. v. Houston*, 857 F.3d 427 (1<sup>st</sup> Cir. 2017)
  - *U.S. v. Cramer*, 777 F.3d 597 (2<sup>d</sup> Cir. 2015)
  - *U.S. v. Winbush*, 524 F. App'x 914 (4<sup>th</sup> Cir. 2013)
  - *U.S. v. Pringler*, 765 F.3d 445 (5<sup>th</sup> Cir. 2014)
  - *U.S. v. McMillian*, 777 F.3d 444 (7<sup>th</sup> Cir. 2015)
  - *U.S. v. Gibson*, 840 F.3d 512 (8<sup>th</sup> Cir. 2016)
  - *U.S. v. Hill*, 783 F.3d 842 (11<sup>th</sup> Cir. 2015)



## §2G1.3 Cross-References

- Cross reference to Production (§2G2.1)
  - *U.S. v. Kamal*, 488 F. App'x 871 (5<sup>th</sup> Cir. 2012)
  - *U.S. v. Veazy*, 491 F.3d 700 (7<sup>th</sup> Cir. 2007)
  - *U.S. v. Mai*, 291 F. App'x 910 (10<sup>th</sup> Cir. 2008)
  - *U.S. v. Korfhage*, 683 F. App'x 888 (11<sup>th</sup> Cir. 2017)
  - *U.S. v. Bohannon*, 476 F.3d 1246 (11<sup>th</sup> Cir. 2007)
- Cross reference to Rape (§2A3.1)
  - *U.S. v. Robinson*, 436 F. App'x 82 (3d Cir. 2011)
  - *U.S. v. Liebert*, 554 F. App'x 173 (4th Cir. 2014)
  - *U.S. v. Ray*, 831 F.3d 431 (7th Cir. 2016)
  - *U.S. v. Flanders*, 752 F.3d 1317 (11th Cir. 2014)





## 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



## §2G1.3(d)(1)

- *U.S. v. Billups*, 850 F.3d 762 (5<sup>th</sup> Cir. 2016)
  - Pseudo count adjustment applies to fictitious victims
- *U.S. v. Cade*, 452 F. App'x 47 (2d Cir. 2011)
  - Court correctly concluded that offense involved two victims and therefore special rule applied
- *U.S. v. Garcia-Gonzalez*, 714 F.3d 306 (5<sup>th</sup> Cir. 2013)
  - Can rely on uncharged conduct in applying §2G1.3(d)



## §2G2.1: Production

- Common specific offense characteristics
  - age of victim
  - sex act or contact
  - custody/care
  - Distribution
  - S/M enhancement
- Note: 15 year mandatory minimum for 18 U.S.C. § 2251 (Production)



## 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



## §2G2.1(d)(1)

- *U.S. v. Ahders*, 622 F.3d 115 (2d Cir. 2010)
  - “The conduct involving BB and VB occurred “during the commission of the offense of conviction,” as it occurred during the period that Ahders was producing pornographic images and film of EM. Ahders exploited and abused all three children, including abusing EM and BB together, during Mother's Day weekend in 2007 when VB and BB were staying with EM for a sleepover. During this weekend, Ahders produced pornographic images of all three children. Clearly, then, the abuse of VB and BB was “relevant conduct,” and it was properly considered by the district court.”





# Failure to Register Offenses: 18 U.S.C. § 2250 and §2A3.5



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## **BOL: Determined by Tier (42 U.S.C. § 16911(5))**

- Tier III: aggravated sex abuse, abusive sex contact against minor under 13, kidnapping not by parent (BOL 16)
- Tier II: sex trafficking, coercion and enticement, transportation for sex activity, abusive sexual contact, solicitation of minor for prostitution, distribution or production of child pornography (BOL 14)
- Tier I: other than Tier II or Tier III offender (BOL 12)



# Tiers

- Must use categorical approach except for age question
  - *U.S. v. Berry*, 814 F.3d 192 (4<sup>th</sup> Cir. 2016)
  - *U.S. v. White*, 782 F.3d 1118 (10<sup>th</sup> Cir. 2015)
- GA Rape was a Tier III offense
  - *U.S. v. Cammorto*, 859 F.3d 311 (4<sup>th</sup> Cir. 2017)
- MN criminal sex conduct in 2nd degree was Tier III
  - *U.S. v. Coleman*, 681 F. App'x 413 (5<sup>th</sup> Cir. 2017)





# Tiers

- FL sex battery was Tier II
  - *U.S. v. Ramirez*, 677 F. App'x 575 (11<sup>th</sup> Cir. 2017)
- NJ child endangerment was not Tier III
  - *U.S. v. Berry*, 814 F.3d 192 (4<sup>th</sup> Cir. 2016)
- NY attempted sex abuse in first degree was Tier III
  - *U.S. v. Neel*, 641 F. App'x 782 (10<sup>th</sup> Cir. 2016)
- CA inducing sex conduct by misrepr. creating fear is Tier III
  - *U.S. v. Alexander*, 802 F.3d 1134 (10<sup>th</sup> Cir. 2015)



# Tiers

- RI first degree child molestation was not Tier III
  - *U.S. v. Morales*, 801 F.3d 1 (1<sup>st</sup> Cir. 2015)
- NC taking indecent liberties with a child should have been Tier I
  - *U.S. v. White*, 782 F.3d 1118 (10<sup>th</sup> Cir. 2015)
- OR attempted rape in 1<sup>st</sup> degree was Tier III
  - *U.S. v. Parent*, 585 F. App'x 668 (9<sup>th</sup> Cir. 2014)



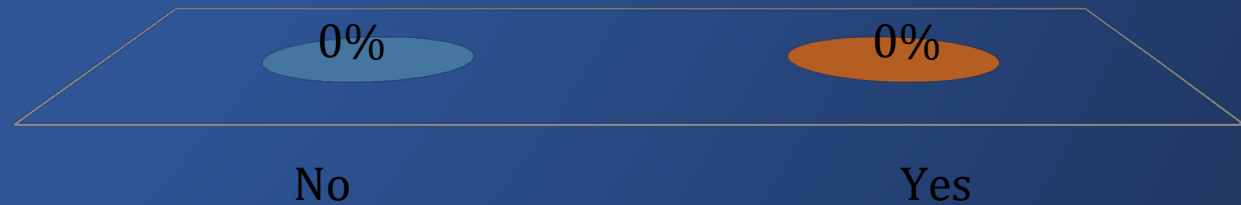
## §2A3.5

- (b)(1): offense committed while in failure to register status
  - 8-level increase for sex offense against a minor victim
  - 6-level increase for sex offense against non-minor victim, or any other felony offense against a minor
- (b)(2): defendant voluntarily (A) corrected the failure to register or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels



Does §5D1.2(b)(2) policy statement regarding maximum terms of supervised release apply to this case

- A. No
- B. Yes



## §4B1.5: Repeat and Dangerous Sex Offender

- a) Defendant's instant offense of conviction is a covered sex crime...and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:



## §4B1.5: Repeat and Dangerous Sex Offender

- Instant offense of conviction includes an offense against a minor under Chapter 109(A), Chapter 110 (not including trafficking, receipt, or possession of child pornography), Chapter 117
- These offenses include: production of child pornography, travel cases, and sex trafficking



## §4B1.5(a)

- Criminal History Category is V
- Offense level determined by a table based on statutory maximum
  - Unless the offense level from Chapters Two and Three is greater



**Statutory  
Maximum**

**Offense  
Level \***

Life

37

25 years +

34

20 years +

32

15 years +

29

10 years +

24

5 years +

17

More than 1 year

12



**Decrease by number of levels (0 or -2 or -3) at §3E1.1 (Acceptance of Responsibility)**





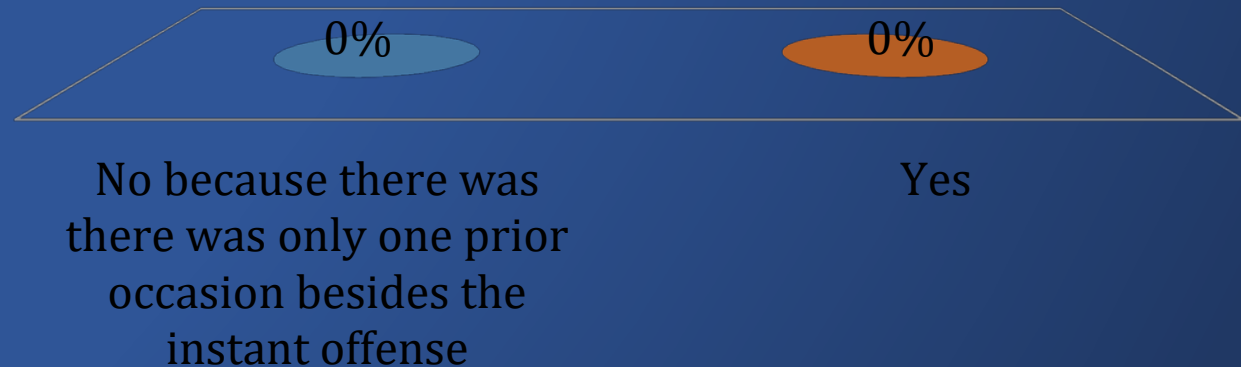
## §4B1.5: Repeat and Dangerous Sex Offender

- b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and, the defendant engaged in a pattern of activity involving prohibited sexual conduct: the offense level shall be 5 plus the offense level determined under Chapters Two and Three.
- Pattern means: any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant



# Should §4B1.5(b) apply?

- A. No because there was there was only one prior occasion besides the instant offense
- B. Yes



## §4B1.5(b)

- Can include conduct involved in instant offense
  - *U.S. v. Ray*, 840 F.3d 512 (8<sup>th</sup> Cir. 2008)
  - *U.S. v. Sibley*, 681 F. App'x 457 (6<sup>th</sup> Cir. 2017)
- No conviction necessary
  - *U.S. v. Bevins*, 848 F.3d 835 (8<sup>th</sup> Cir. 2017)
- Can include attempts and fictitious minors
  - *U.S. v. Morgan*, 842 F.3d 1070 (8<sup>th</sup> Cir. 2016)
  - *U.S. v. Syed*, 616 F. App'x 973 (11<sup>th</sup> Cir. 2015)



## §4B1.5(b)

- Court could rely on police reports
  - “The district court found that it was reasonable to rely on the experience of the detective who prepared the police reports. It also found that certain details reported by Minor # 1 made the reports “almost self-authenticating”: for example, Minor # 1 knew that Hinkley preferred to be called Ethan rather than Derek, described Hinkley befriending him in much the same way that Hinkley befriended Victims # 1 and # 2, and accurately recounted details of the apartment.”
    - *U.S. v. Hinkley*, 803 F.3d 85 (1<sup>st</sup> Cir. 2015)



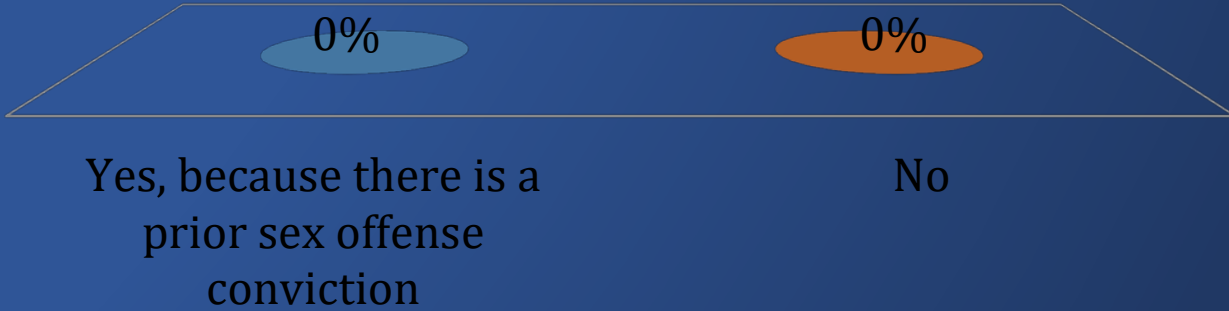
## §4B1.5(b)

- Can apply both §2G2.2(b)(5) and §4B1.5(a) if multiple convictions
  - *U.S. v. McRee*, 625 F. App'x 430 (11<sup>th</sup> Cir. 2015)
  - *U.S. v. Rothenberg*, 610 F.3d 621 (11<sup>th</sup> Cir. 2010)
  - *U.S. v. Dowell*, 771 F.3d 162 (4<sup>th</sup> Cir. 2014)
- Can apply both §2G2.1(d)(1) and §4B1.5(a) to same case
  - *U.S. v. Fadi*, 498 F.3d 862 (8<sup>th</sup> Cir. 2007)
  - *U.S. v. Peck*, 496 F.3d 885 (8<sup>th</sup> Cir. 2007)



# Should §4B1.5(a) apply?

- A. Yes, because there is a prior sex offense conviction
- B. No



# §4B1.5(a)

- Prior sex offense conviction must be against a minor
  - *U.S. v. Viren*, 828 F.3d 535 (7<sup>th</sup> Cir. 2016)
- Must use the categorical approach
  - *U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)
  - *U.S. v. Wikkerink*, 841 F.3d 327 (5<sup>th</sup> Cir. 2016)
- No time limit on prior sex offense conviction
  - *U.S. v. Babcock*, 753 F.3d 857 (6<sup>th</sup> Cir. 2014)
- DE 1<sup>st</sup> and 3<sup>rd</sup> degree unlawful sexual contact are not priors
  - *U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)





# Selected Issues for §2G Child Sex Offense Guidelines

## Relevant Conduct, Multiple Counts, and Special Instructions



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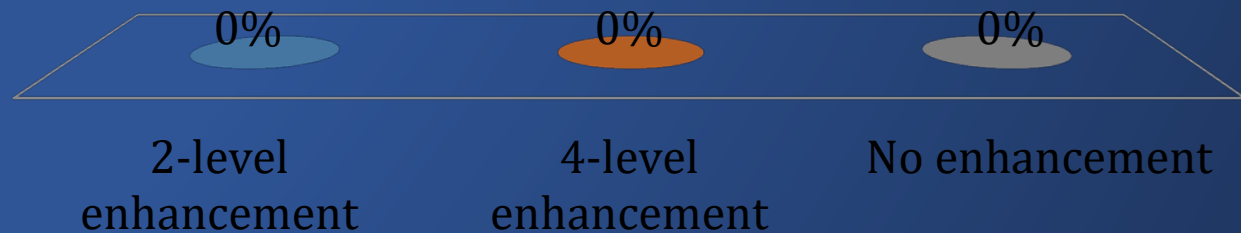


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# Should the enhancement at §2G2.1(b)(1) apply?

- A. 2-level enhancement
- B. 4-level enhancement
- C. No enhancement



## §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))



# §1B1.3(a)(1) & (a)(2): Analysis

**WHEN:**

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

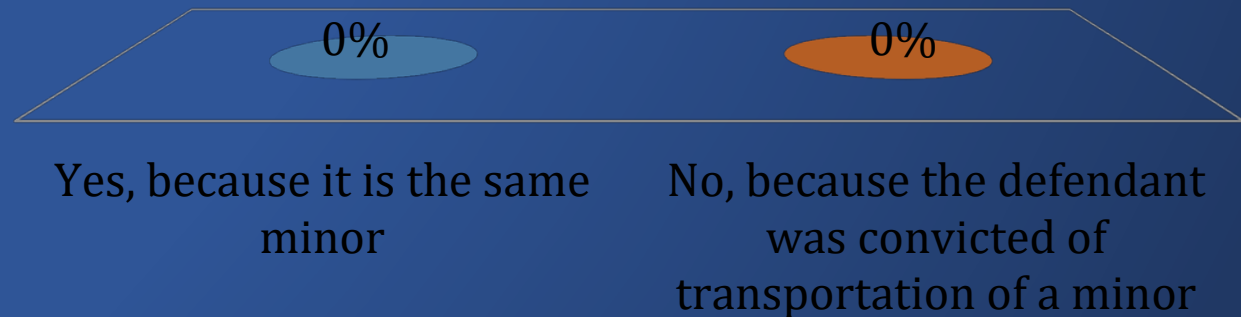
(a)(2):

~~Same course of conduct/  
Common scheme or plan~~



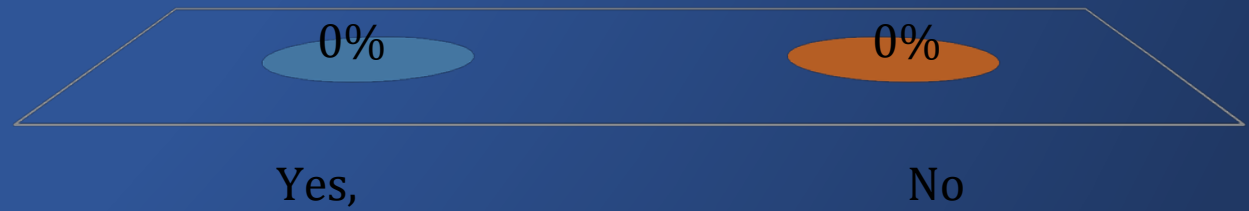
# Should the cross-reference at §2G2.1(c)(1) apply?

- A. Yes, because it is the same minor
- B. No, because the defendant was convicted of transportation of a minor



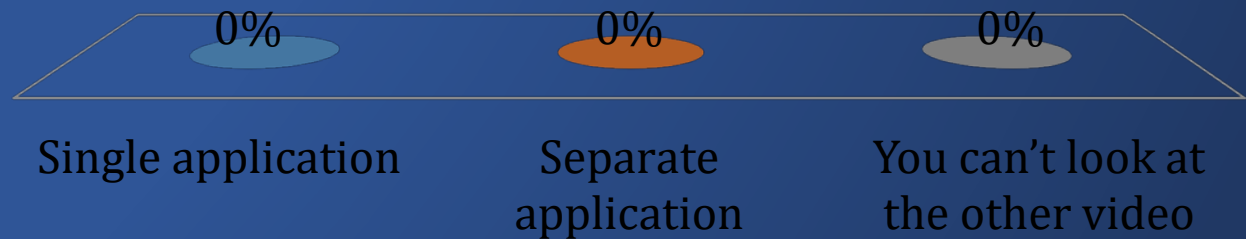
# Should the special instruction apply

- A. Yes,
- B. No



# Is there a single application or separate application

- A. Single application
- B. Separate application
- C. You can't look at the other video



## 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



# §1B1.3(a)(1) & (a)(2): Analysis

**WHEN:**

Offense of Conviction

(a)(1):

In preparation

During

Avoiding  
detection

(a)(2):

~~Same course of conduct/  
Common scheme or plan~~





## §2G1.3(d)(1)

- *U.S. v. Schock*, 862 F.3d 563 (6<sup>th</sup> Cir. 2017)
  - “The district court erred by finding, on this record, that Schock's exploitation of Victim 1 constituted relevant conduct under § 1B1.3(a)(1). Therefore, the district court necessarily erred in applying the § 2G2.1 enhancement, in creating a pseudo-count for the exploitation of Victim 1, and in calculating Schock's sentencing range under the Guidelines.”



## §2G1.3(d)(1)

- *U.S. v. Weiner*, 518 F. App'x 358 (6<sup>th</sup> Cir. 2013)
  - Court incorrectly applied special instruction because conduct against other victims occurred before the relevant conduct of the offense of conviction of victim 1
- *U.S. v. Davis*, 453 F. App'x 452 (5<sup>th</sup> Cir. 2013)
  - Court should not have used special instruction because the conduct with the other minor was not relevant conduct to the first victim because it was before the date of the indictment



# Special Instruction

## §2G2.1(d)(1) & App. Note 5

Production – Child 1  
(§2G2.1)

Ch. Two TOTAL 40

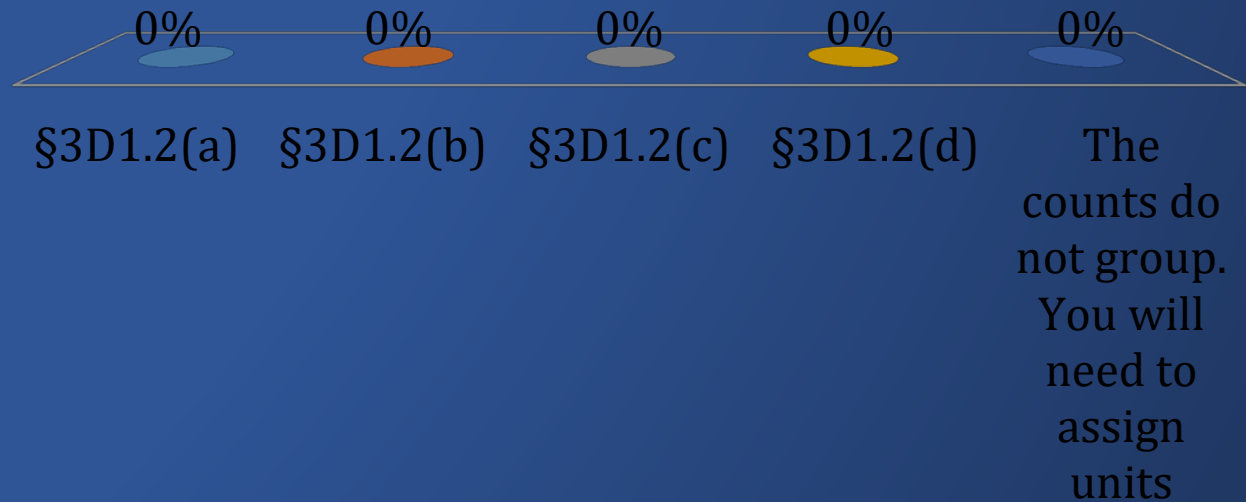
Production – Child 2  
(§2G2.1)

Ch. Two TOTAL 38



# How do the counts group

- A. §3D1.2(a)
- B. §3D1.2(b)
- C. §3D1.2(c)
- D. §3D1.2(d)
- E. The counts do not group. You will need to assign units



## “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)



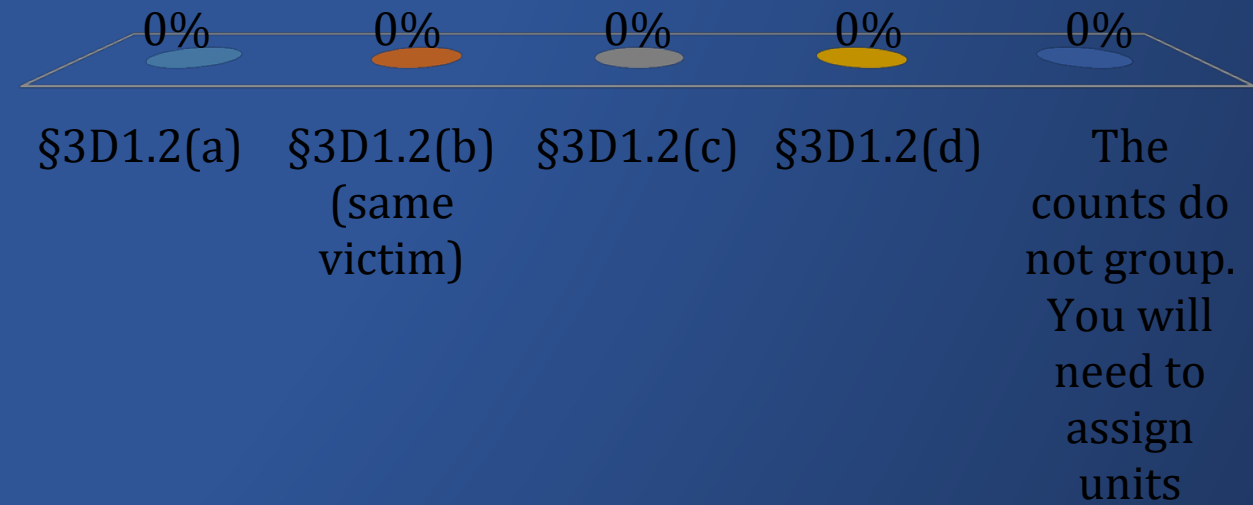
## Scenario

- Defendant pleaded guilty to three counts of enticement of a minor to engage in sexual activity under 18 U.S.C. § 2422(b)
- The defendant had sex with a 14 year old boy on three separate occasions (on 1/1/2016, 2/1/2016, and 3/1/2016)



# How do the counts group

- A. §3D1.2(a)
- B. §3D1.2(b)
- C. §3D1.2(c)
- D. §3D1.2(d)
- E. The counts do not group. You will need to assign units





## Grouping

- §3D1.2, application note 4 says that if the defendant is convicted of two counts of raping the same person on different days, the counts are not to be grouped under §3D1.2(b)
  - *See U.S. v. Nagel*, 835 F.3d 1371 (11<sup>th</sup> Cir. 2016) (do not apply §3D1.2(b) even if “consensual sex”)





# Supervised Release Conditions



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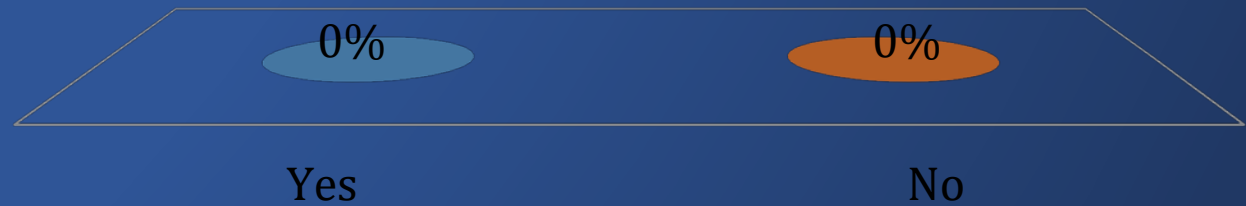


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# Is this a appropriate condition?

A. Yes

B. No



## Software Installation

- *U.S. v. Ferndandez*, 776 F.3d 344 (5<sup>th</sup> Cir. 2015)
  - Supervised release condition requiring software installation improper because it was not related to defendant's Failure to Register conviction when his only prior sex offense conviction was for sexual assault of 14 year old which did not involve a computer



# Common Pitfalls in Supervised Release Conditions in Sex Offense Cases

- Court did not make an INDIVIDUALIZED assessment of the condition
- Court did not make necessary findings for the condition
- Condition was imposed for too long a time period
- Prior sex offense conduct was too far removed from the instant offense (arises often in Failure to Register Offenses)



## 18 U.S.C. § 3583(d)

### Conditions of Supervised Release

- Must be reasonably related to 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)
- Cannot involve greater deprivation of liberty than is reasonably necessary to achieve the goals of (a)(2)(B), (a)(2)(C), and (a)(2)(D)





# Notice Issues



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# Supervised Release Conditions

- *U.S. v. Martinez-Torres*, 795 F.3d 1233 (10<sup>th</sup> Cir. 2015)
  - “Court did not make an individualized assessment of whether it was appropriate for supervised release sex offender conditions and did not provide proper notice.”
  - “When, however, neither the Sentencing Commission nor Congress has required or recommended a condition, we expect the sentencing court to provide a reasoned basis for applying the condition to the specific defendant before the court.”







# Sex Offense Conditions



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## Not Convicted of a “Sex Offense”

- Courts have upheld the imposition of “sex offense” conditions even if the instant offense of conviction is not a sex offense
  - *U.S. v. Sebastian*, 612 F.3d 47 (1<sup>st</sup> Cir. 2010)



# Considerations for Sex Offense Conditions

- Things to consider in imposing conditions:
  - What is the offense of conviction?
  - If instant offense is Failure to Register, what was the underlying offense that required registration?
  - Did the defendant sexually abuse someone?
  - Does the defendant have children of his own?
  - How long ago were the prior sex offenses?
  - Can the defendant watch adult pornography?





# Specific Sex Offense Conditions



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# Minor Prohibition

- *U.S. v. LeCompte*, 800 F.3d 1209 (10<sup>th</sup> Cir. 2015)
  - Restriction on minor prohibition remanded because court did not explain how applying the minor prohibition condition to the conduct here would achieve the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation
- *See also, U.S. v. Sainz*, 827 F.3d 602 (7<sup>th</sup> Cir. 2016)



# Approval to Contact Own Children

- *U.S. v. Bear*, 769 F.3d 1221 (10<sup>th</sup> Cir. 2014)
  - Restriction of contact with his children violated his constitutional liberty interest in relationship with his children
- *U.S. v. Burns*, 775 F.3d 1221 (10<sup>th</sup> Cir. 2014)
  - Supervised release condition requiring approval to contact own daughter remanded because court did not make particularized findings



## Contact with Children

- *U.S. v. Fey*, 834 F.3d 1 (1st Cir. 2016)
  - Supervised release condition restricting the defendant's contact with children only upon approval of the probation office. The defendant was convicted of failure to register as a sex offender based on a rape conviction 17 years prior, where the victim was 16 years old. The rape conviction was too broad as it applied to contact with all minor children. There was no evidence the defendant was a danger to young children.



# Sex Offender Treatment

- *U.S. v. Von Behren*, 822 F.3d 1139 (10<sup>th</sup> Cir. 2016)
  - Condition of supervised release that required participation in sex offender treatment, which included a mandatory polygraph, violated the defendant's right against self-incrimination because the questions required the defendant to admit to illegal sexual contact with minors and failure to participate in the polygraph would lead to revocation of his supervised release





## Treatment Condition

- *U.S. v. Douglas*, 850 F.3d 660 (4<sup>th</sup> Cir. 2016)
  - Court affirmed condition requiring a “sex offender evaluation” for defendant convicted of SORNA violation despite underlying sex offense being twenty-two years old. The court was concerned about the 14-plus years of evasive actions that the defendant took to avoid apprehension by law enforcement after he failed to register as a sex offender.
  - See also, *U.S. v. Silver*, --F. App'x--, 2017 WL 1407716 (5<sup>th</sup> Cir. 2017)



# Computer Monitoring and Computer Activities

- *U.S. v. Dunn*, 777 F.3d 1171 (10<sup>th</sup> Cir. 2015)
  - Condition requiring a defendant convicted of possessing child pornography to submit to computer monitoring and obtain permission to engage in other computer-related activities was plain error because the district court failed to make necessary findings to impose such a harsh restriction that materially affected the defendant's ability to obtain gainful employment



## Sexually Stimulating Materials

- *U.S. v. Huor*, 852 F.3d 392 (5<sup>th</sup> Cir. 2017)
  - “Nonetheless, a defendant's right to possess and view sexually stimulating materials is not defeated by evidence that the defendant has in fact viewed sexually stimulating materials. While it is worrisome that Huor violated the terms of his parole to view such material, it remains “hard to imagine how preventing [Huor] from accessing sexually stimulating materials would prevent future criminal conduct.” Conditions of supervised release must serve the purposes of § 3553(a) and may not merely represent stumbling blocks.”



## Sexually Stimulating Materials

- *U.S. v. Gall*, 829 F.3d 64 (1st Cir. 2016)
  - Condition prohibiting defendant from possessing adult pornography and from entering any location where such pornography is available was remanded because the court did not provide any explanation for imposing the special condition
- *See also, U.S. v. Martinez-Torres*, 795 F.3d 1233 (10th Cir. 2015) and *U.S. v. Sainz*, 827 F.3d 602 (7th Cir. 2016)



## Viewing Pornography

- *U.S. v. Medina*, 779 F.3d 55 (1<sup>st</sup> Cir. 2015)
  - “Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here... fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. There may well be a reason to impose a pornography ban in this case. But if so, the District Court has not yet provided it.”



## Romantic Relationships

- *U.S. v. Rock*, 863 F.3d 827 (D.C. Cir. 2017)
  - Condition requiring notifying probation officer when he establishes a significant romantic relationship and inform the other party of his prior sex offense too vague because “we think it likely in many cases, the two persons involved might not agree as to whether they had such a relationship.”





# Restitution in Sex Offense Cases



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# Restitution in Child Porn Offenses

*Paroline v. U.S.*, 134 S Ct. 1710 (2014)

“Restitution is proper under § 2259 only to the extent the defendant’s offense proximately caused a victim’s losses. Applying the statute’s causation requirements in this case, victims should be compensated and defendants should be held to account for their conduct on those victims, but defendants should only be made liable for the consequences and gravity of their own conduct, not the conduct of others.”





# Restitution in Child Pornography Cases

- *U.S. v. Funke*, 846 F.3d 998 (2d Cir. 2017)
  - “The district court properly applied the *Paroline* factors, considering Funke's ‘possession of a large number of files involving [Vicky] and his role in distributing files to others over the BitTorrent program.’ The court did not abuse its discretion in awarding \$3,500 in restitution.”



# Restitution in Child Pornography Cases

- *U.S. v. Galan*, 804 F.3d 1287 (9<sup>th</sup> Cir. 2015)
  - In calculating the amount of restitution to be imposed upon a defendant who was convicted of distribution or possession of child pornography, the losses, including ongoing losses, caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible. The district court erred when it declined to limit the restitution imposed upon Galan in that manner.



## 18 U.S.C. § 2259 (Mandatory Restitution)

- Costs include:
  - Medical services related to physical, psychiatric, or psychological care
  - Physical or occupational therapy or rehabilitation
  - Necessary transportation, temporary housing and child care expenses
  - Lost income
  - Attorney's fees, as well as other costs incurred
  - Any other losses suffered by victim as a proximate result of the offense



## Restitution under § 2259

- *U.S. v. Osman*, 853 F.3d 1184 (11<sup>th</sup> Cir. 2017)
  - A restitution order under 18 U.S.C. § 2259 may include restitution for future therapy expenses as long as the award reflects a reasonable estimate of those costs and is based on record evidence
- *See also*, *U.S. v. Rogers*, 758 F.3d 37 (1<sup>st</sup> Cir. 2014), *U.S. v. Pearson*, 570 F.3d 480 (2<sup>d</sup> Cir. 2009), *U.S. v. Johnson*, 680 F. App'x 194(4<sup>th</sup> Cir. 2017), *U.S. v. Danser*, 270 F.3d 451 (7<sup>th</sup> Cir. 2001), *U.S. v. Laney*, 189 F.3d 954 (9<sup>th</sup> Cir. 1999) *U.S. v. Julian*, 242 F.3d 1245 (10<sup>th</sup> Cir. 2001)



## Restitution in Production Cases

- *U.S. v. Johnson*, --F. App'x--, 2017 WL 775856 (4<sup>th</sup> Cir. 2017)
  - “Courts have “recognized that [§ 2259] is ‘phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse,’ ” *United States v. Doe*, 488 F.3d 1154, 1159 (9th Cir. 2007) and future counseling expenses may be included in the restitution award.”
- \$78,000 restitution for future therapy costs affirmed (\$150 per session, one session per week until victim attained 18)



# Restitution in Sex Trafficking Cases

- *U.S. v. Baston*, 818 F.3d 651 (11<sup>th</sup> Cir. 2016)
  - “Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country. Baston must pay restitution to K.L. for her prostitution in Australia. The district court erred when it reduced her restitution award.”



## Justice for Victims of Trafficking Act

- In addition to the assessment imposed under § 3014, the court shall assess an amount of \$5,000 on any non-indigent person convicted of an offense under:
  - Chapter 77 (peonage, slavery, trafficking in persons);
  - Chapter 109A (sexual abuse);
  - Chapter 110 (sexual exploitation/abuse of children);
  - Chapter 117 (transportation for illegal sexual activity);
  - Section 274 of INA (8 U.S.C. § 1324) unless person was alien's spouse, parent, son, or daughter
- *See U.S. v. Kelley*, 861 F.3d 790 (8<sup>th</sup> Cir. 2017)

