SEX OFFENSES SCENARIOS

Scenario 1

Defendant was convicted of one count of possession of child pornography on June 1, 2016. The indictment stated that the defendant possessed 100 images of child pornography on his computer. The government submitted documents showing that on multiple occasions from Aug. 1, 2015 until June 1, 2016, the defendant used a file sharing program to download images of child pornography. The defendant was aware that other people could access his files from the file sharing program. The defendant had over 20,000 images of child pornography on his computer when he was arrested, but the indictment only listed 100 images.

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

Answer:

20,000 images. Section 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)). Thus, the 20,000 images would be considered the same course of conduct to the 100 images listed in the indictment and the court would be able to count them to apply the 5-level enhancement for more than 600 images.

Scenario 2

Same facts as above.

The probation officer applied a 5-level increase for distribution of pornography under §2G2.2(b)(3) based on the defendant's knowledge that other individuals in the file sharing program could access his files. The defendant objected to this increase.

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

Answer:

Yes, but the court should apply a two-level enhancement at §2G2.2(b)(3), not the five-level enhancement recommended by the probation officer. To apply the 5-level distribution specific offense characteristic, the defendant must distribute child pornography in exchange for valuable consideration. Section 2G2.2, Application Note 1 provides that the defendant must agree 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. Here, there is no evidence that the defendant agreed to exchange child pornography with a specific person, so the five-level enhancement should not apply. However, as the defendant knew that others could access his files when he joined the file sharing program, the court should apply the two-level enhancement for distribution at §2G2.2(b)(3)(F).

Scenario 3

The defendant is convicted of possession of child pornography under 18 U.S.C. § 2252. The defendant's step-daughter testified at the sentencing hearing that the defendant sexually abused her on numerous

occasions 30 years' ago when she was 14. The government argues that the 5-level pattern of activity enhancement at §2G2.2(b)(5) should apply, but the defendant objects because while he admits the conduct took place, it occurred 30 years ago and there was no conviction for the conduct.

Should the enhancement for pattern of activity apply?

Answer:

Yes. Section 2G2.2, Application Note 1 defines pattern of activity as any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by a defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense, (B) involved the same minor; or (C) resulted in a conviction for such conduct. Here, while the defendant abused his step-daughter 30 years before the instant offense and there was no conviction for that conduct, the court can consider this conduct in determining whether to apply the pattern of activity enhancement. Almost every circuit has permitted a court to consider sexual exploitation that occurred over 15 years prior to the instant offense of conviction. *See, e.g., U.S. v. Alberts*, 859 F.3d 979 (11th Cir. 2017) (conduct occurred 30 years prior to instant offense).

Scenario 4

Defendant is convicted of Failure to Register as a Sex Offender. The PSR states that because the defendant was convicted of a sex offense, §5D1.2(b)(2) recommends the statutory maximum term of supervised release be imposed.

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

Answer:

No. While the defendant will qualify for a five-year term of supervised release under 18 U.S.C. § 3583(k), §5D1.2(b) will not apply because "Failure to Register offenses", are not considered "sex offenses". Section §5D1.2(b)(2) applies to offenses that are "sex offenses" and Application Note 1 specifically excludes 18 U.S.C. § 2250 (Failure to register) from the definition of sex offense.

Scenario 5

The defendant is convicted of production of child pornography for producing a video of himself engaging in sexual activity with one of his 13-year old students on July 5, 2016. The defendant admitted that he had sex with another student one time in 2013. The probation officer has applied §4B1.5(b). The defendant objected, arguing that he only has one prior prohibited sexual conduct and that the enhancement should not apply because the it requires two prior instances of sexual abuse.

Should the enhancement at §4B1.5(b) apply?

Answer:

Yes. Section 4B1.5(b), Application Note 4 provides that if a defendant engages in a pattern of activity involving prohibited sexual conduct on at least two separate occasions, the defendant engaged in

prohibited sexual conduct with a minor, a five-level enhancement applies. An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of instant offense or (II) resulted in a conviction for the conduct. Here, while the defendant had only one prior sexual conduct with a minor, the guidelines provide that the instant offense can be considered as part of the pattern of activity.

Scenario 6

The defendant is convicted of sexual abuse of a minor under 18 U.S.C. § 2241 for engaging in sexual conduct with an 11-year old. In 2009, the defendant was convicted of sexual assault of an adult under 18 U.S.C. § 2241. The probation officer applies §4B1.5(a) based on the prior conviction of the assault of the adult.

Should the enhancement apply?

Answer:

No. §4B1.5(a) applies to a defendant whose instant offense is a covered sex crime and the defendant must have a prior sex offense conviction against a minor. Here, the defendant's prior conviction was for sexual assault of an adult. (*See. e.g., U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016))

Scenario 7

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2016. On July 2, 2016, the defendant also produced child pornography exploiting a different child, age 9.

The probation officer applied a two-level increase for the offense involving a minor over 12 under §2G2.1(b)(1). The government has objected, arguing that the court should impose a four-level increase for a minor under 12.

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

Answer:

No. Section 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)). Thus, the court would only be able to apply conduct occurring on July 15, 2016 related to the child listed in the indictment. The video that contained the nine-year ago child is not relevant conduct because it did not occur on July 15, so the court cannot apply the specific offense characteristic for a "minor under 12".

Scenario 8

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution from June 1, 2016 to June 8, 2016. 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 cross-reference at §2G1.3(c)(1) apply?

Yes. Section 2G1.3(c)(1) provides that if the offense involved producing a visual depiction of a minor, §2G2.1 applies. Here, because the indictment states that the victim was transported between June 1, 2016 to June 8, 2016, the court can apply the cross reference based on the filming of the sexual activity because all conduct involving the minor that occurred during the days alleged in the indictment is considered relevant conduct.

Scenario 9

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on May 10, 2016; applicable guideline §2G2.1. The government also found a video the defendant produced involving a 6-year old. In that same video, a second minor, age 9, was also exploited in the same manner.

Will the special instruction be applied?

No. Section §2G2.1(d) provides that if the offense involved the exploitation of more than one minor, Chapter Three, Part D shall apply as if the exploitation of each minor had been contained in a separate count of conviction. While the defendant has produced videos of three children engaged in sexual behavior, the court will only be able to consider the video on May 10, 2016 in calculating the offense level at §2G2.1. Section 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)). Here, the other video is not relevant conduct to the video cited in the indictment on May 10, 2016, so the special instruction cannot apply.

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

Single application. Because the other video is not included as relevant conduct (see answer above), the court will not apply a separate application for the children in the other video.

Scenario 10

Count 1 – Trafficking child pornography on April 15, 2016; Applicable guideline §2G2.2; Offense Level 40

Count 2 – Production of child pornography, citing one minor exploited during the production on April 15, 2016; Applicable guideline §2G2.1; Offense Level 38

The probation officer applied §2G2.1(b)(3) for the offense involving distribution of child pornography.

The distribution cited in the trafficking count is the same child pornography cited in the production count.

Will the counts group?

Yes.

If so, under which grouping rule?

The counts will group pursuant to §3D1.2(c). Section 3D1.2(c) states: "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." Section 2G2.1(b)(3) provides a 2-level increase if the offense involved distribution, and this specific offense characteristic applied in this case. Because the specific offense characteristic embodies conduct from count 1 (distribution conduct), the two counts would group pursuant to §3D1.2(c).

Scenario 11

Defendant was convicted of Failing to Register as a Sex Offender under the Sex Offender Registration Act (SORNA) found at 18 U.S.C. § 2250(a). The defendant was required to register as a sex offender based on his 2004 conviction for Texas sexual assault. In that case, defendant pleaded guilty to sexually assaulting his 9-year old niece when she was left in his care. He received a 12-year sentence for that offense. The defendant has two other prior drug trafficking offenses, but no other prior sex offense convictions.

At sentencing, the probation officer has listed in the sentencing recommendation the following special condition during the defendant's supervised release term:

Defendant must submit to computer filtering software to block sexually oriented websites for any computer the defendant uses or possesses.

Is this an appropriate condition?

Probably not. Special conditions of supervised release must involve no greater deprivation of liberty than is necessary to serve the purposes of § 3553(a)(2)(B) (deterrence), (A)(2)(C) (protection of the public), and (a)(2)(D) (educational or vocational training, medical care) and must be consistent with any pertinent policy statements issued by the Commission. Here, the defendant's prior sexual conviction was for assaulting his niece and did not involve using a computer to commit the offense. Thus, imposing a condition involving computer filtering software does not appear to be related to the purposes listed at § 3553(a), and the condition would likely not be appropriate. (*See, U.S. v. Fernandez*, 776 F.3d 344 (5th Cir. 2015)).