US Sentencing Commission's Annual National Seminar
on the Federal Sentencing Guidelines

2018

National Seminar

Sex Offenses
Answers

SEX OFFENSES SCENARIOS – 2018 WORKBOOK ANSWERS

Scenario 1

Defendant is convicted of one count of possession of child pornography on June 1, 2017. The defendant used a file sharing program to download images of child pornography.

The government believes that the 5-level increase for distribution of pornography under §2G2.2(b)(3) applies based on the defendant's knowledge that other individuals in the file sharing program could access his files.

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

Answer:

Yes, the 2-level distribution enhancement at §2G2.2(b)(3)(F), not the 5-level enhancement at §2G2.2(b)(3)(B). To apply the 5-level distribution enhancement, 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 5-level enhancement does not apply. However, as the defendant knew that others could access his files when he joined the file sharing program, the 2-level enhancement for distribution at §2G2.2(b)(3)(F) does apply.

Scenario 2

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 over 30 years prior to instant offense).

Scenario 3

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2017. On July 7, 2017, the defendant also produced child pornography exploiting a different child, age 9.

The probation officer applied a 2-level increase for the offense involving a minor between 12-16 under §2G2.1(b)(1)(B). The government has objected, arguing that the court should impose a 4-level increase for a minor under 12 under §2G2.1(b)(1)(A).

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

Answer:

Yes – the 2-level enhancement at §2G2.1(b)(1)(B) (minor at least age 12 but less than age 16) applies; not the 4-level enhancement at §2G2.1(b)(1)(A) (minor less than age 12).

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 relevant conduct only includes those acts in the production occurring on July 15, 2016 – In this case the production only included the 14-year-old child cited in the indictment. The video of the nine-year-old child produced on July 7 is not relevant conduct, so the enhancement for a "minor under 12" does not apply.

Scenario 4

The defendant is convicted of one count of production of child pornography, citing one minor, age 10, exploited during the production on December 2, 2017; applicable guideline §2G2.1. In the video, there is another child who is also filmed engaging in sexual activity. Does the special instruction at §2G2.1(d)(1) apply?

Answer:

Yes, the special instruction at §2G2.1(d)(1) applies. Section 2G2.1, App. Note 7 provides that the special instruction "directs that if the relevant conduct of an 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."

In this case, while only the 10-year-old minor was cited in the count of conviction, the production also included the additional child in the same video, so the special instruction under §2G2.1(d) will apply to the second child.

Scenario 5

The defendant is convicted 18 U.S.C. § 1594 (Conspiracy to violate 18 U.S.C. § 1591(a), Sex Trafficking of Children). The probation officer applied a base offense level 34, pursuant to §2G1.3(a)(1). The defendant objects, and believes the base offense should be 24, pursuant to §2G1.3(a)(4).

What is the correct base offense level?

Answer:

§2G1.3 has four base offense levels ((a)(1)-(a)(4)), including
(a)(1) - BOL 34, if convicted under § 1591(b)(1), and
(a)(4) – BOL 24 otherwise

Base offense level 34 applies even though the defendant was not convicted under § 1591(b)(1) because the defendant was convicted of a conspiracy offense that establishes that the substantive offense was by force, fraud, or coercion or the child was less than age 14 (pursuant to § 1591(b)(1)). Title 18, Section 1594(c) is Conspiracy to violate 18 U.S.C. § 1591 (Sex trafficking of children by force, fraud, or coercion). Section1B1.3, App. Note 7 provides instructions on determining base offense levels when a factor requires a conviction under a particular statute:

> Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy . . . in respect to that particular statute.

Because § 1594's underlying offense is offense under § 1591(b)(1), base offense level 34 should apply.

But see U.S. v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) (holding that the base offense level for a conviction under § 1594(c) Conspiracy to violate § 1591 is 24).

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Scenario 6

The defendant is convicted of one count of transportation of a minor, age 15, for purposes of prostitution on February 5, 2018. The government alleges the defendant also transported a second minor age 16 on February 1 for purposes of prostitution.

Does the special instruction at §2G1.3(d)(1) apply?

Answer:

No. The minor transported on February 1st is not within the relevant conduct of the offense of conviction (the transportation of the minor on February 5th), so the special instruction at §2G1.3(d)(1) will not apply regarding the prostitution of that minor.

The applicable guideline for the offense of conviction, §2G1.3 (Commercial Sex Acts with Minor; Transportation; Travel) is not on the" included" or "excluded" list at §3D1.2(d). However, because this offense is similar to the offenses covered by §2G1.1 (Commercial Sex Acts with Adults), which is on the "excluded list" at §3D1.2(d)), §2G1.3 should be treated similarly. For offenses on the excluded list, the court may not use "expanded relevant conduct" at §1B1.3(a)(2), so acts in the same course of conduct or common or plan as the offense of conviction will not be used in application. Because the offense of conviction is for the transportation of a minor for prostitution on February 5th, the transportation of the minor on February 1st did not occur "during" the instant offense of conviction conduct, and is not relevant conduct.

Scenario 7

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 enhancement requires two prior instances of sexual abuse.

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

Answer:

Yes. §4B1.5(b)(2) applies when the offense of conviction is a "covered sex crime," as defined in Application Note 2 [which includes the defendant's instant offense of production of child porn], and the defendant engaged in a "pattern of activity" involving "prohibited sexual conduct."

Pattern of activity is defined at App. Note 4(B) as at least two separate occasions of the defendant engaging in prohibited sexual conduct with a minor. Prohibited sexual conduct is defined at App. Note 4(A), and includes both the production of child pornography, and the commission of a sex act with a minor, which are the acts in which this defendant engaged on

two separate occasions. Although one of the acts occurred during the offense of conviction, that can count as one of the two occasions required under §4B1.5. *See U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2017).

Scenario 8

Count 1 – Trafficking child pornography on April 15, 2017; Applicable guideline §2G2.2; Offense Level 40

Count 2 – Production of child pornography, citing one minor exploited during the production on April 15, 2017; 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?

Answer: Yes.

If so, under which grouping rule?

Answer:

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 group pursuant to §3D1.2(c).