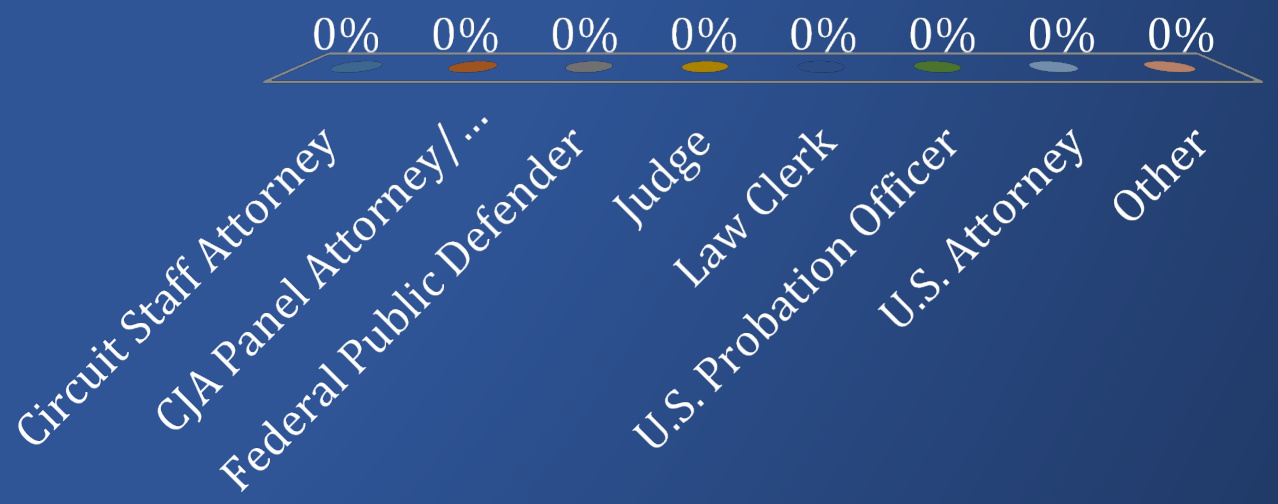
Federal Sex Offenses

San Antonio, Texas

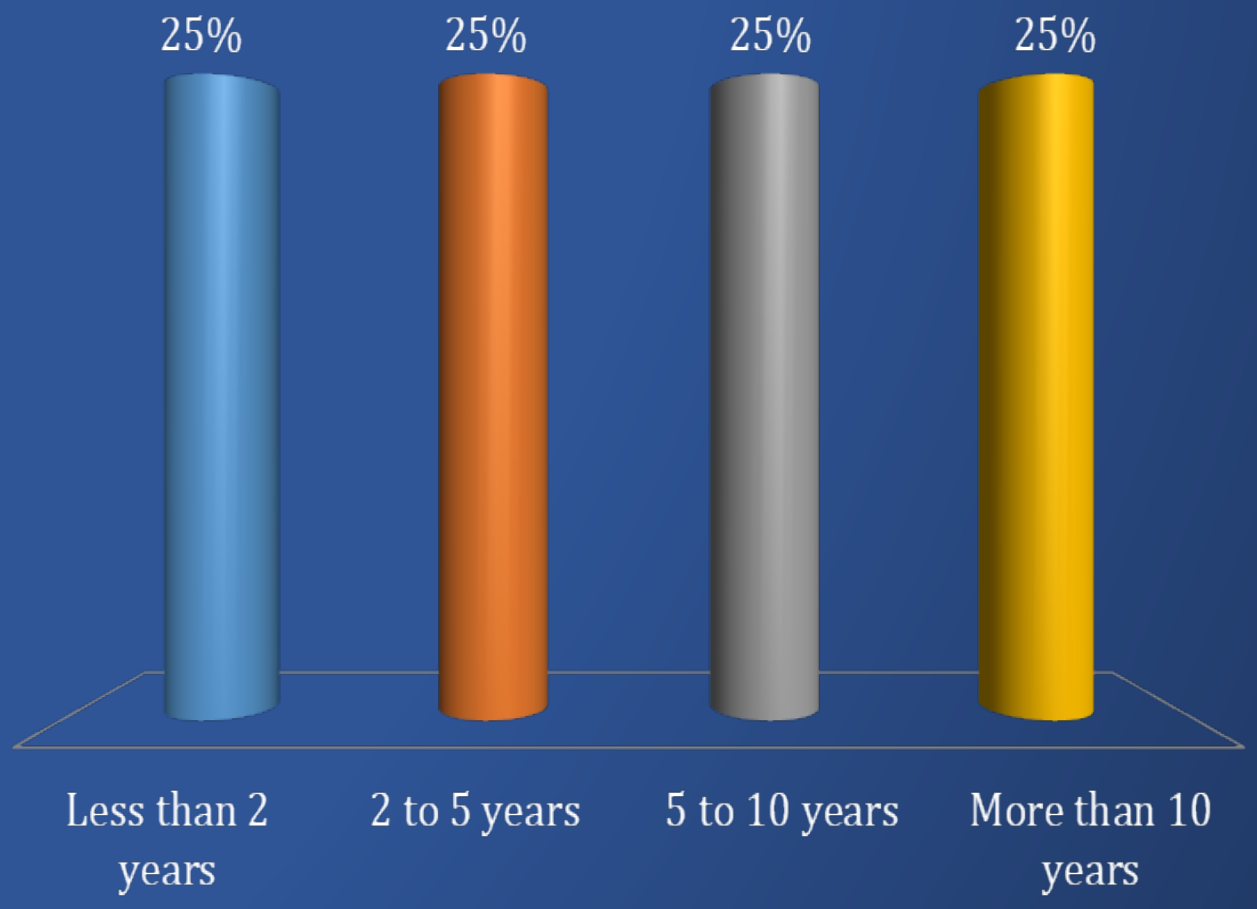
Who's in the audience?

A. Circuit Staff Attorney
B. CJA Panel Attorney/
   Private Defense Attorney
C. Federal Public Defender
D. Judge
E. Law Clerk
F. U.S. Probation Officer
G. U.S. Attorney
H. Other



Years of experience with federal sentencing?

A. Less than 2 years
B. 2 to 5 years
C. 5 to 10 years
D. More than 10 years



Main Sex Offense Guidelines & Statutes

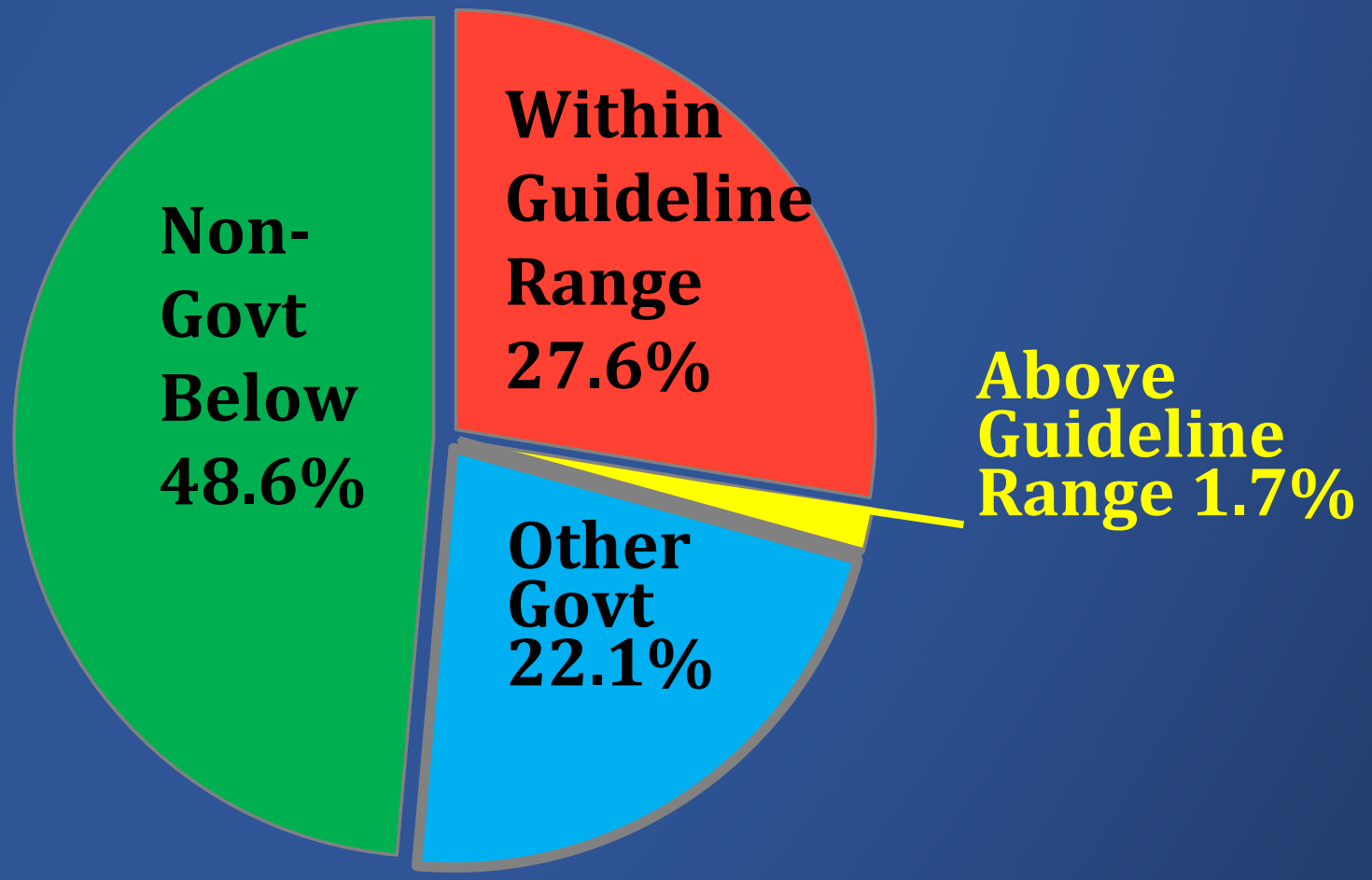
§2A3.1	18 U.S.C. § 2241	Rape
§2A3.2	18 U.S.C. § 2243	Stat. Rape
§2A3.4	18 U.S.C. § 2244	Sex Abuse
§2A3.5	18 U.S.C. § 2250	Failure to Register
§2G1.3	18 U.S.C. §§ 1591, 2422, 2423	Trafficking/Travel of Minors
§2G2.1	18 U.S.C. § 2251	Production
§2G2.2	18 U.S.C. §§ 2252 & 2252A	Traffic, Receipt, Possession

Statutory Penalty Scheme for Child Porn Offenses

Mandatory Minimums and Statutory Maximums

Possession		Receipt/Distribution/ Transportation of Child Porn		Production	
1st Time Offender	Recidivist (Prior Sex Conviction)	1st Time Offender	Recidivist (Prior Sex Conviction)	1st Time Offender	Recidivist (Prior Sex Conviction)
No MM/ 10Y Max.; 20Y Max. if > age 12	10Y MM/ 20Y Max.	5Y MM/ 20Y Max.	15Y MM/ 40Y Max.	15Y MM/ 30Y Max.	25Y MM/ 50Y Max.

§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) (94.1%)
- S/M enhancement (b)(4) (81.2%)
- Use of a computer (b)(6) (95.7%)
- Number of images (b)(7) (95.3%)

§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)
- Applies most often to file sharing cases

§2G2.2(b)(3)(F): Distribution SOC

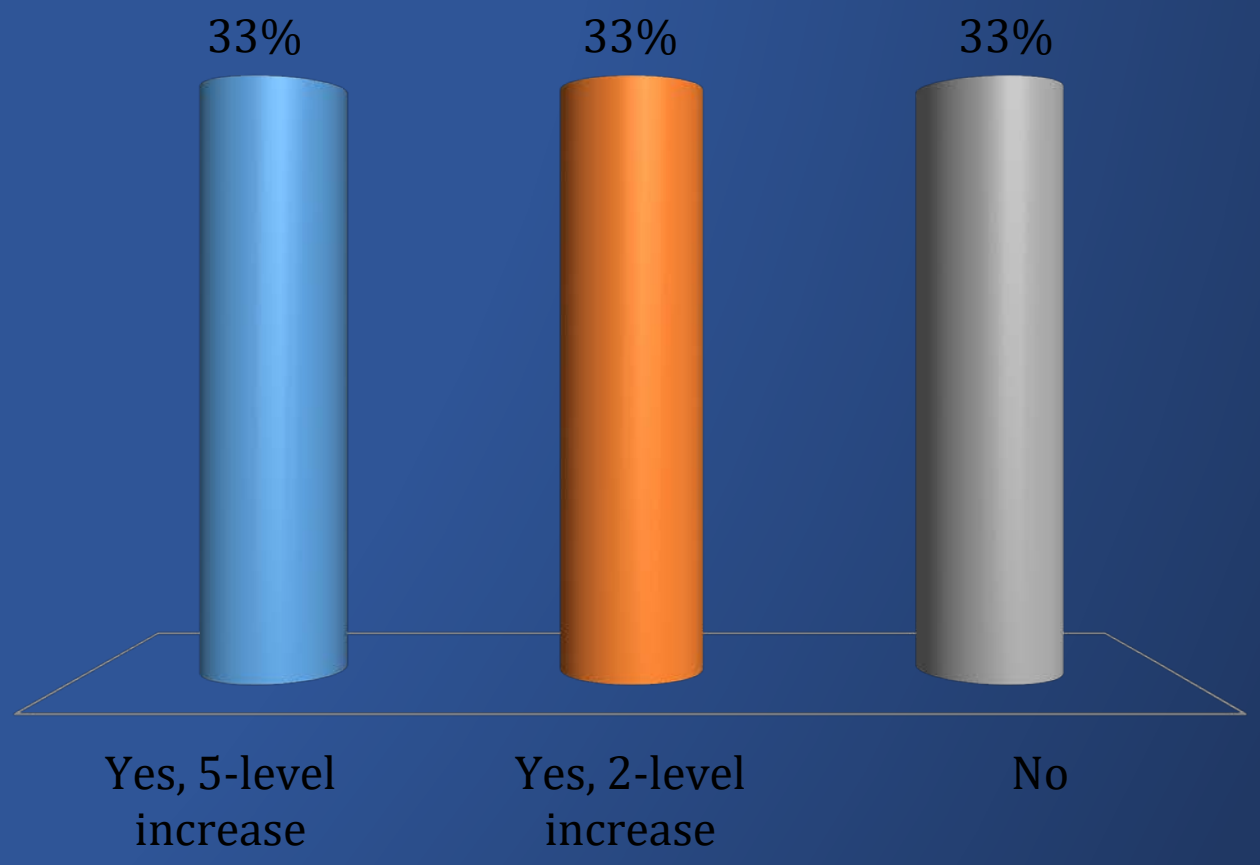
- The 2-level specific offense characteristic applies "if the *defendant knowingly* engaged in distribution."
  - "Defendant" specific
  - Mens rea requirement: *knowingly*

§2G2.2: Knowledge

- "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 file-sharing software shares files."
  - *U.S. v. Dunning*, 857 F.3d 342 (6th Cir. 2017)

Scenario 1: Should the defendant receive an enhancement under §2G2.2(b)(3)?

A. Yes, 5-level increase
B. Yes, 2-level increase
C. No



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

- Applies "if the *defendant* distributed in exchange for any valuable consideration . . ."
- Application Note 1: "[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 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 court did not err in applying the five-level enhancement under 2G2.2(b)(3)(B)."
  - *U.S. v. Little*, 864 F.3d 1283(11th 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)(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

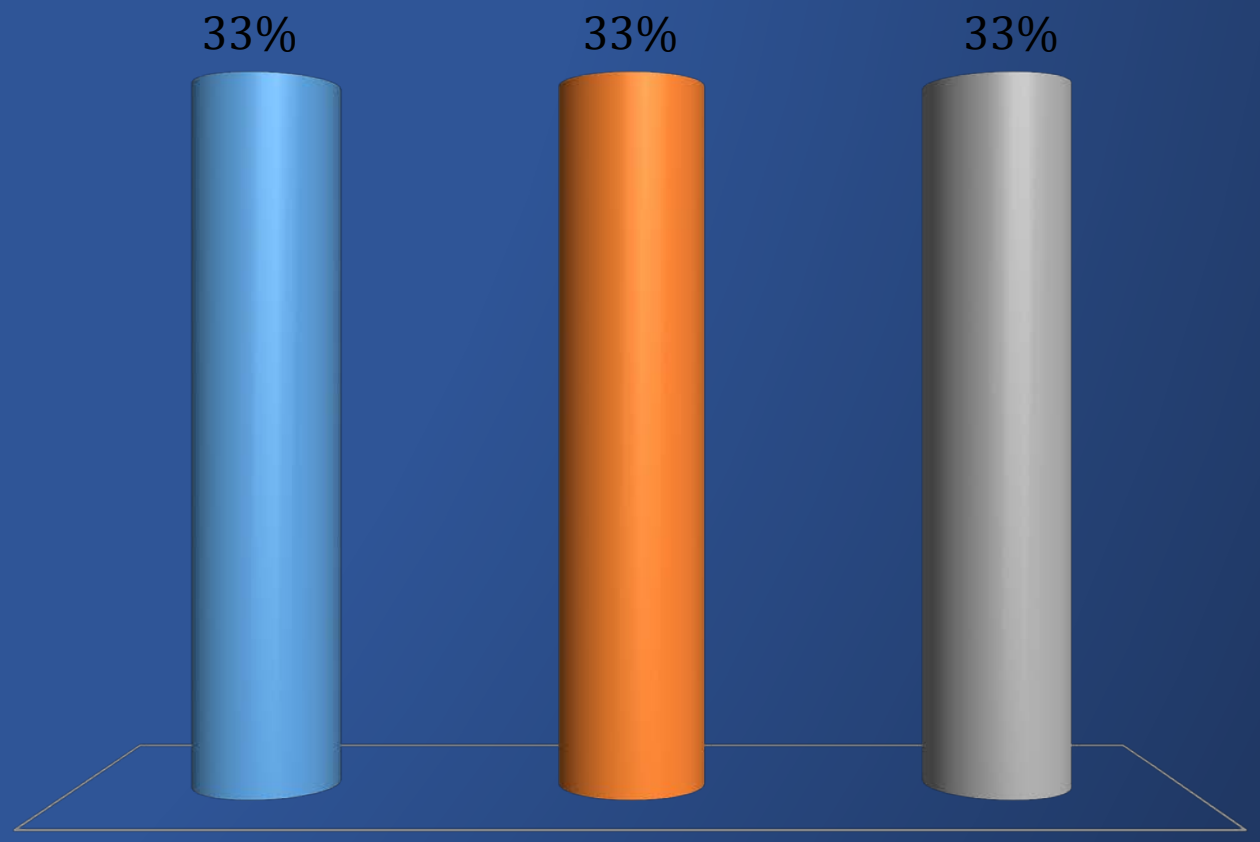
- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant

Scenario 2: Should the defendant receive the "pattern of activity enhancement under §2G2.2(b)(5)?

A. No, because conduct was 30 years ago

B. No, because you need a conviction to apply enhancement

C. Yes



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

- These instances can include conduct:
  - during the course of instant 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 (11th Cir. 2017))

§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. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (26 yrs)
  - *U.S. v. Woodard*, 694 F.3d 950 (8thCir. 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. Alberts*, 859 F.3d 979 (11th Cir. 2017) (30 yrs)

§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 (4th Cir. 2014)
- *U.S. v. Nicoson*, 793 F.3d 761 (7th Cir. 2015)
- *U.S. v. Steffen*, 818 F.3d 770 (8th Cir. 2016)
- *U.S. v. Burch*, 809 F.3d 1041 (8th Cir. 2016)
- *U.S. v. Zayas*, 758 F.3d 986 (8th Cir. 2014)
- *U.S. v. Zagorski*, 807 F.3d 291 (D.C. Cir. 2015)

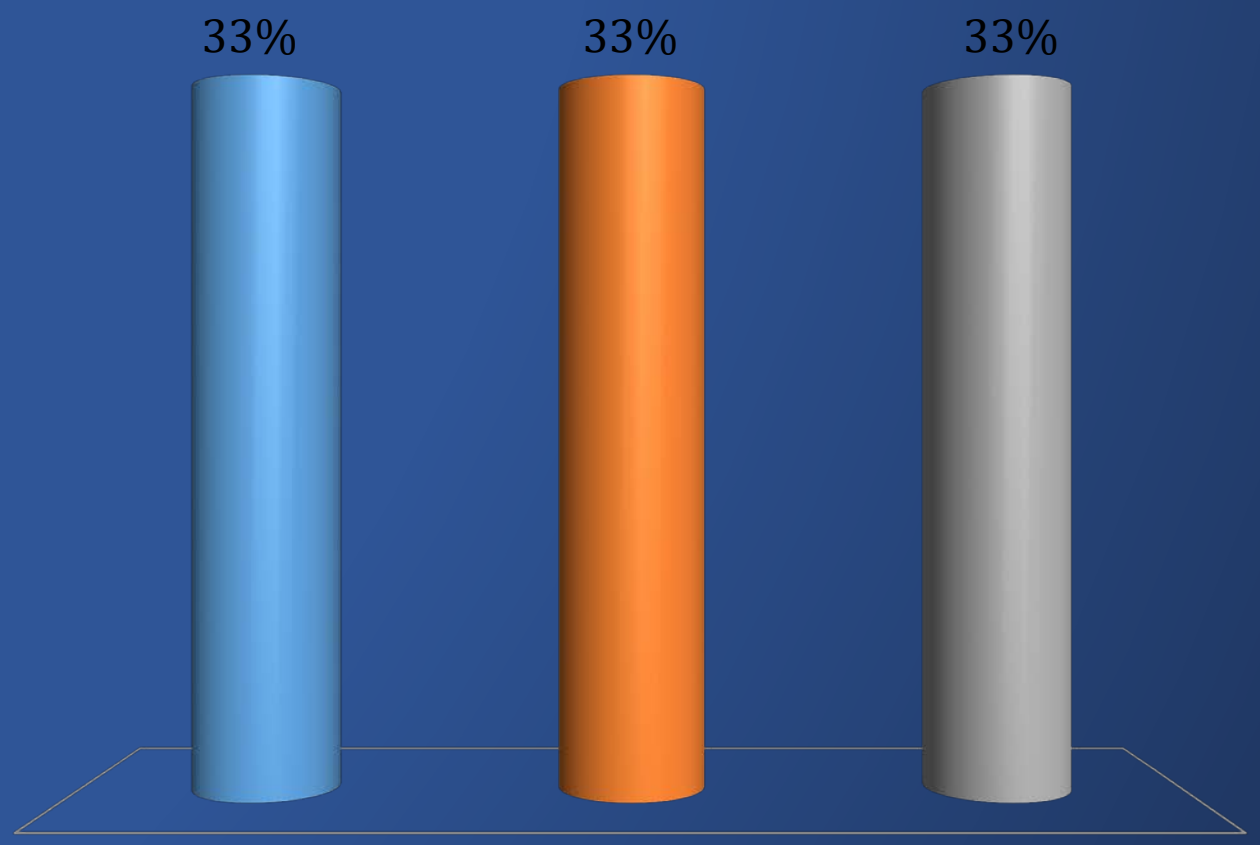
§2G2.1: Production

- 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)

Scenario 3: Should the enhancement at §2G2.1(b)(1) apply?

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



§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

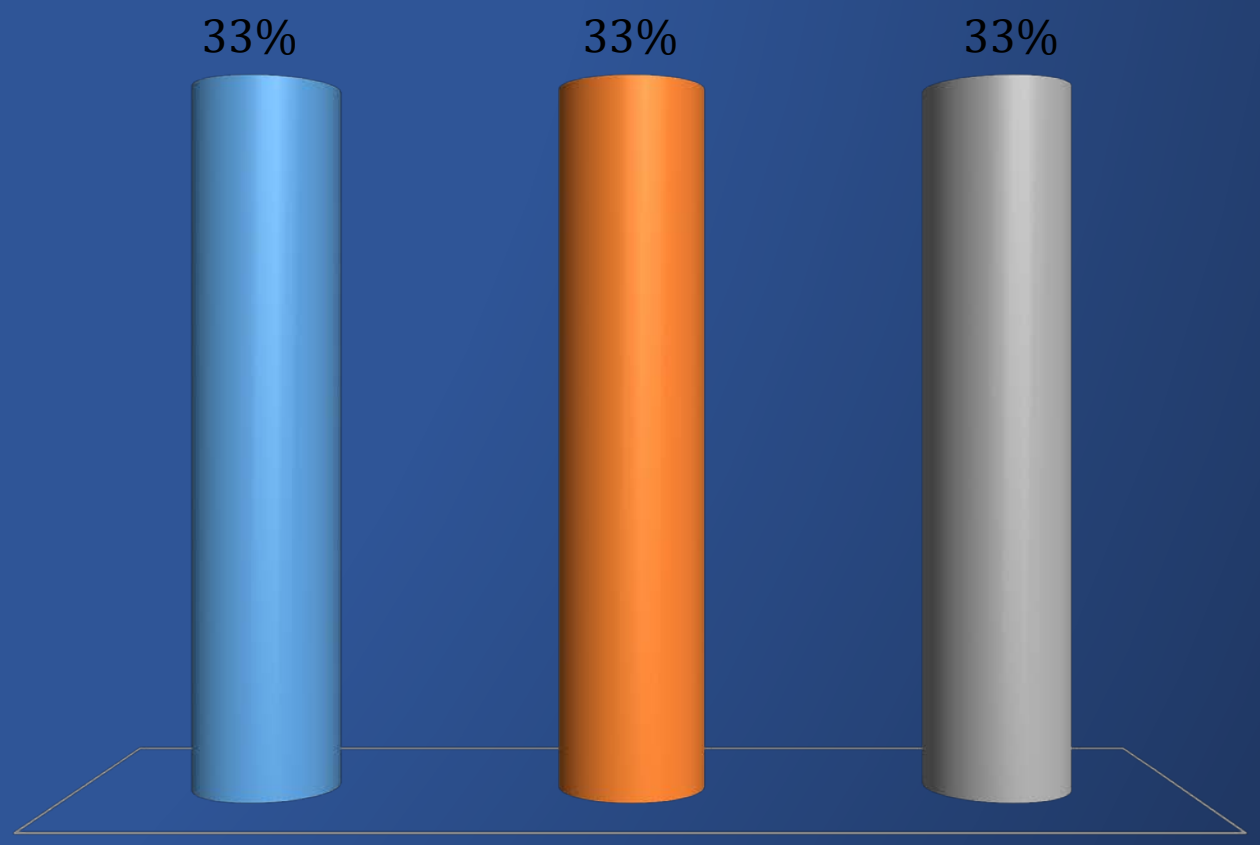
WHEN: Offense of Conviction

(a)(1): In preparation | During | Avoiding detection

(a)(2): ~~Same course of conduct/ Common scheme or plan~~

Scenario 4: Should the special instruction at §2G2.1(d)(1) apply?

A. No
B. Yes



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

Special Instruction

§2G2.1(d)(1) & App. Note 5

Production – Child 1 (§2G2.1)	Production – Child 2 (§2G2.1)
Ch. Two TOTAL 40	Ch. Two TOTAL 38

§2G2.1(d)(1) Applied

- *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."

§2G2.1(d)(1) Did Not Apply

- *U.S. v. Schock,* 862 F.3d 563 (6th Cir. 2017)
  - "Because Schock's exploitation of Victim 1 in August 2014 did not occur until almost a year after the commission of the offense of conviction—photographing Victim 2 in September 2013—the government has not established that Schock's conduct with respect to Victim 1 occurred during the commission of the offense of conviction under § 1B1.3(a)(1)."

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

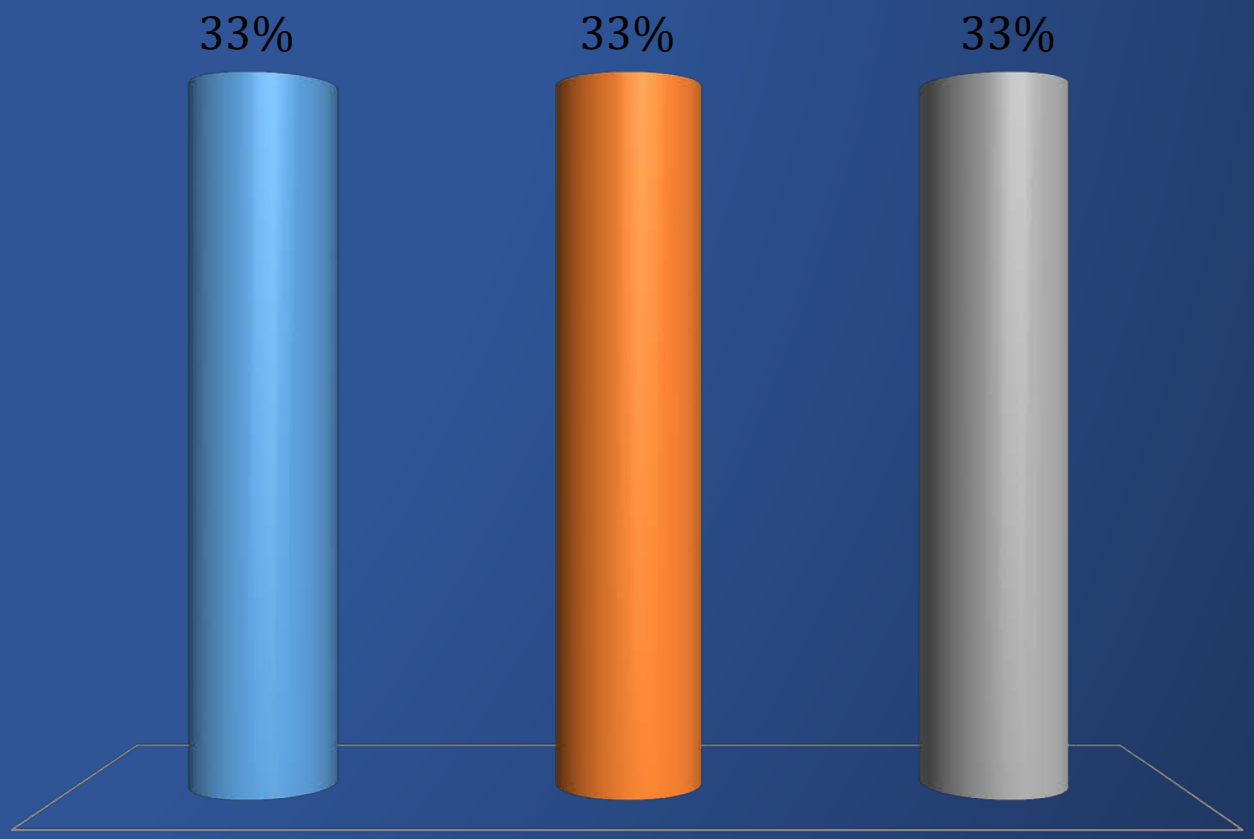
§2G1.3: Travel Cases and Child Sex Trafficking

- 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

Scenario 5: What is the base offense level?

A. 34
B. 24
C. 32



§1B1.3, Application Note 7

- "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, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute."

- *But see U.S. v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016)

§2G1.3 Specific Offense Characteristics

- Use of a computer (+2)
- Sex act, sexual contact, or commercial sex act (+2)
- Undue influence (+2)
- Age of victim (+8)
- Care, custody, control (+2)

Examples of Undue Influence §2G1.3(b)(2)

- *U.S. v. Houston*, 857 F.3d 427 (1st Cir. 2017)
- *U.S. v. Pringler*, 765 F.3d 445 (5th Cir. 2014)
- *U.S. v. Reid*, 751 F.3d 763 (6th Cir. 2014)
- *U.S. v. McMillian*, 777 F.3d 444 (7th Cir. 2015)
- *U.S. v. Brooks*, 610 F.3d 1186 (8th Cir. 2010)
- *U.S. v. Hornbuckle*, 784 F.3d 549 (9th Cir. 2015)
- *U.S. v. Blake*, 868 F.3d 960 (11th 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 (1st Cir. 2017)
  - *U.S. v. Cramer*, 777 F.3d 597 (2d Cir. 2015)
  - *U.S. v. Pringler*, 765 F.3d 445 (5th Cir. 2014)
  - *U.S. v. McMillian*, 777 F.3d 444 (7th Cir. 2015)
  - *U.S. v Gibson*, 840 F.3d 512 (8th Cir. 2016)
  - *U.S. v. Hill*, 783 F.3d 842 (11th Cir. 2015)

- New amendment, Effective Nov, 1, 2018
  - Can apply the SOC for prostitution cases

§2G1.3 Cross-References

- Cross reference to Production (§2G2.1)
  - *U.S. v. Veazy*, 491 F.3d 700 (7th Cir. 2007)
  - *U.S. v. Bohannon*, 476 F.3d 1246 (11th Cir. 2007)

- Cross reference to Rape (§2A3.1)
  - *U.S. v. Ray*, 831 F.3d 431 (7th Cir. 2016)
  - *U.S. v. Reynolds*, 720 F.3d 685 (8th Cir. 2013)
  - *U.S. v. Flanders*, 752 F.3d 1317 (11th Cir. 2014)

Special Instruction

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

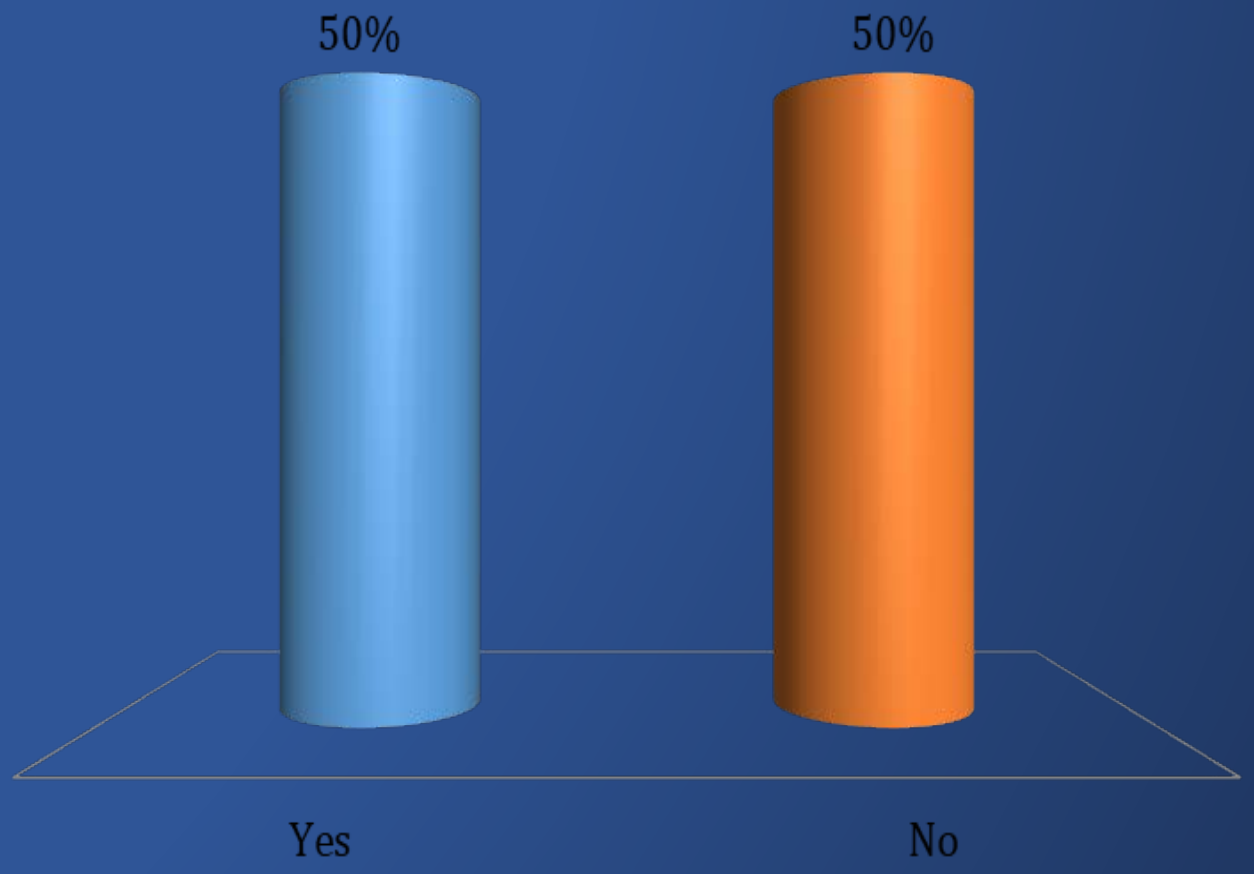
- If the relevant conduct of the offense of conviction involved more than one minor victim, *whether specifically cited in the count of conviction or not*, each such minor shall be treated *as if* contained in a separate count of conviction

- Multiple counts involving more than one minor are not to be grouped together

Scenario 6: Should the special instruction at §2G1.3(b)(1) apply?

A. Yes

B. No



Application of the Special Instruction When It Applies

§2G1.3(d)(1) & App. Note 6

Trafficking – Child 1 (§2G1.3)	Trafficking – Child 2 (§2G1.3)
Ch. Two TOTAL 38	Ch. Two TOTAL 36

§2G1.3(d)(1)

- *U.S. v. Billups,* 850 F.3d 762 (5th Cir. 2016)
  - Pseudo count adjustment applies to fictitious victims
- *U.S. v. Garcia-Gonzalez,* 714 F.3d 306 (5th Cir. 2013)
  - Can rely on uncharged conduct in applying §2G1.3(d)
- *U.S. v. Davis,* 453 F. App'x 452 (5th Cir. 2013)
  - Court should not have used special instruction because conduct with the other minor was not relevant conduct to the first victim because it was before date of the indictment

§4B1.5: Repeat and Dangerous Sex Offender

- a) Defendant's instant offense is a covered sex crime…and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction increase offense level by a table and CHC V

- b) Instant offense is a covered sex crime, subsection (a) of this guideline does not apply, and, the defendant engaged in a pattern of activity involving prohibited sexual conduct: increase offense level by 5

§4B1.5(a)

- 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(a)

- Prior sex offense conviction must be against a minor
  - *U.S. v. Viren*, 828 F.3d 535 (7th 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 (5th Cir. 2016)

- No time limit on prior sex offense conviction
  - *U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)

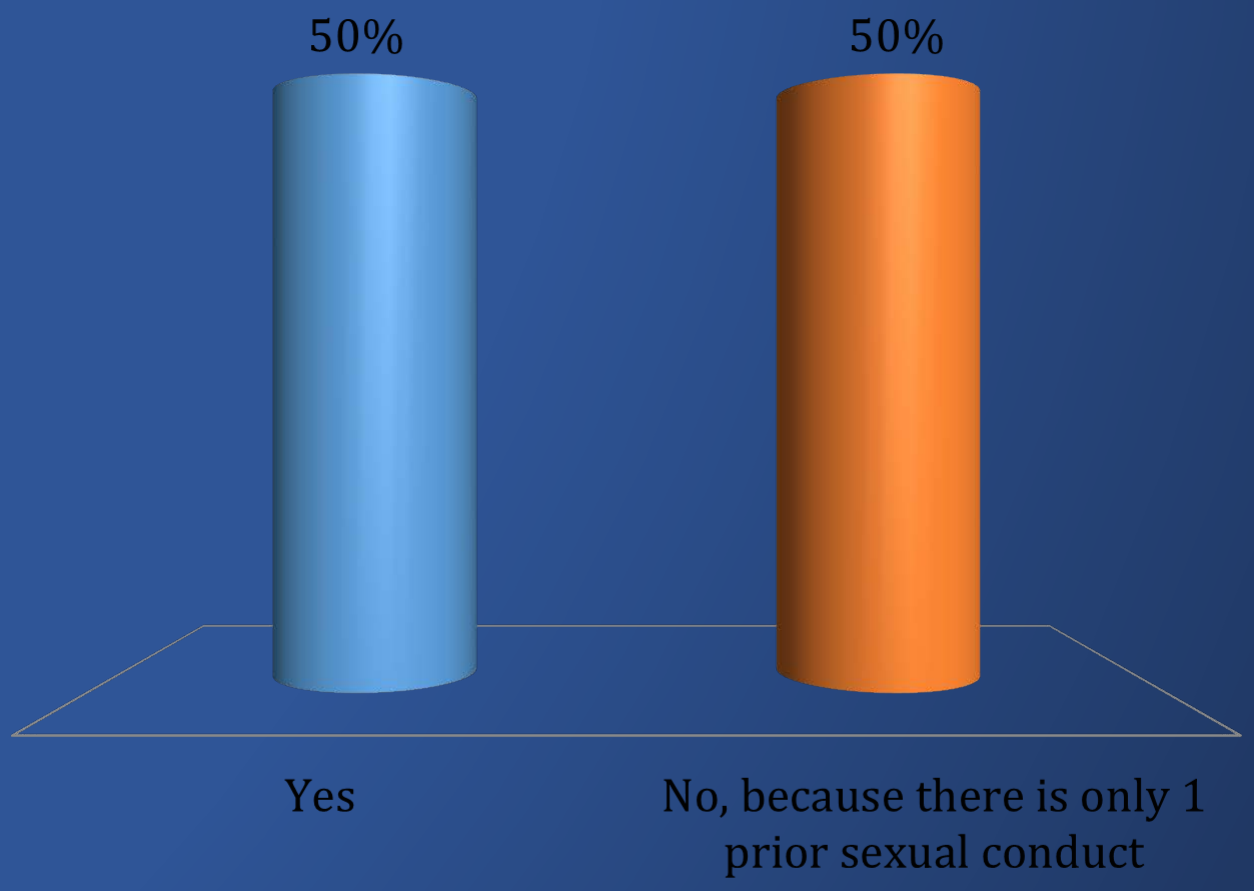
§4B1.5(b):

- Instant offense of conviction is a covered sex crime, subsection (a) of this guideline does not apply, and, the defendant engaged in a pattern of activity involving prohibited sexual conduct: the offense level is 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

Scenario 7: Should §4B1.5(b) apply?

A. Yes
B. No, because there is only 1 prior sexual exploitation



§4B1.5(b)

- Can include conduct involved in instant offense
  - *U.S. v. Ray*, 840 F.3d 512 (8th Cir. 2008)
- No conviction necessary
  - *U.S. v. Bevins*, 848 F.3d 835 (8th Cir. 2017)
- Can include attempts and fictitious minors
  - *U.S. v. Morgan*, 842 F.3d 1070 (8th Cir. 2016)

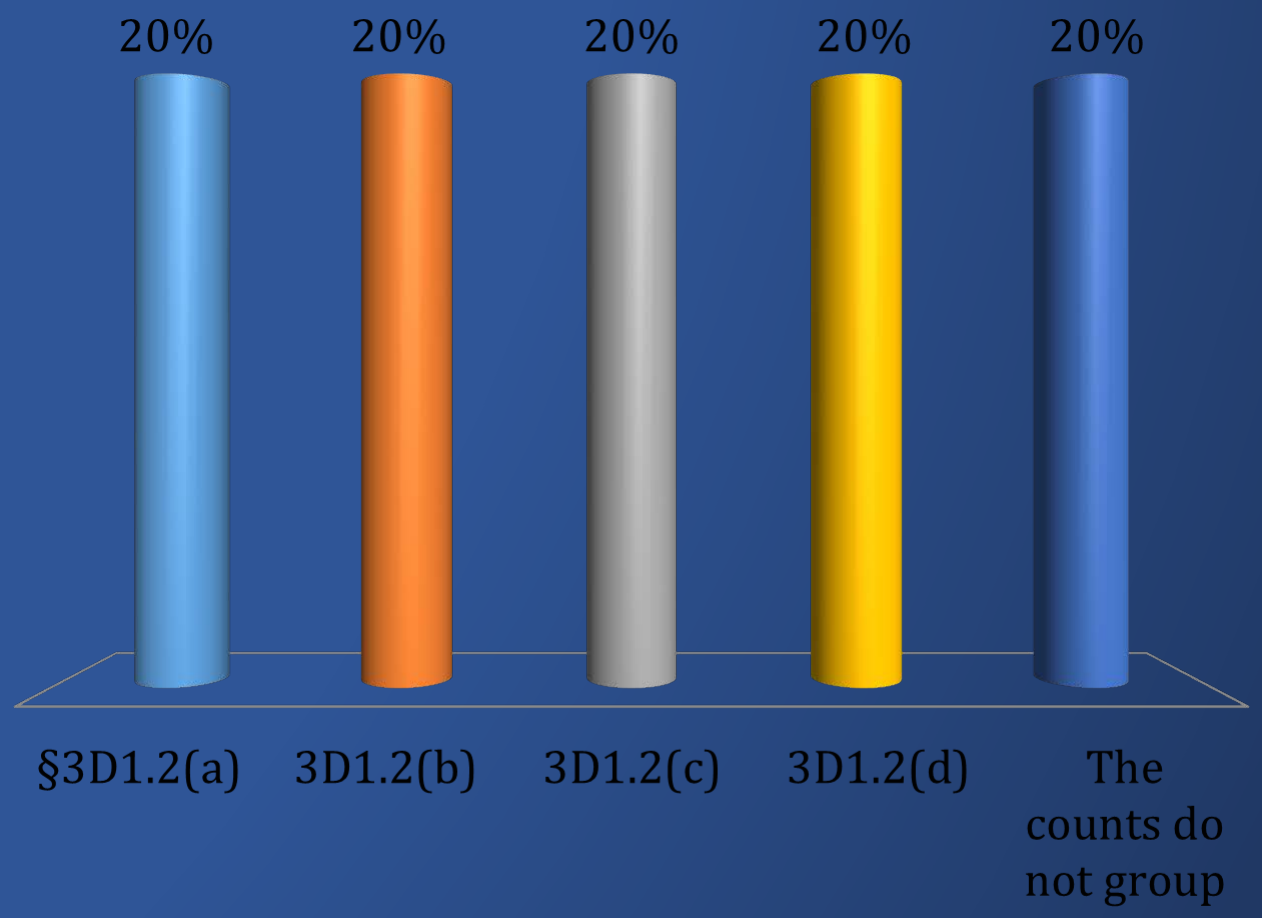
§4B1.5(b)

- Can apply both §2G2.2(b)(5) and §4B1.5(a) if multiple convictions
  - *U.S. v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010)
  - *U.S. v. Dowell*, 771 F.3d 162 (4th Cir. 2014)

- Can apply both §2G2.1(d)(1) and §4B1.5(a) to same case
  - *U.S. v. Fadi,* 498 F.3d 862 (8th Cir. 2007)
  - *U.S. v. Peck*, 496 F.3d 885 (8th Cir. 2007)

Scenario 8: How do the counts group?

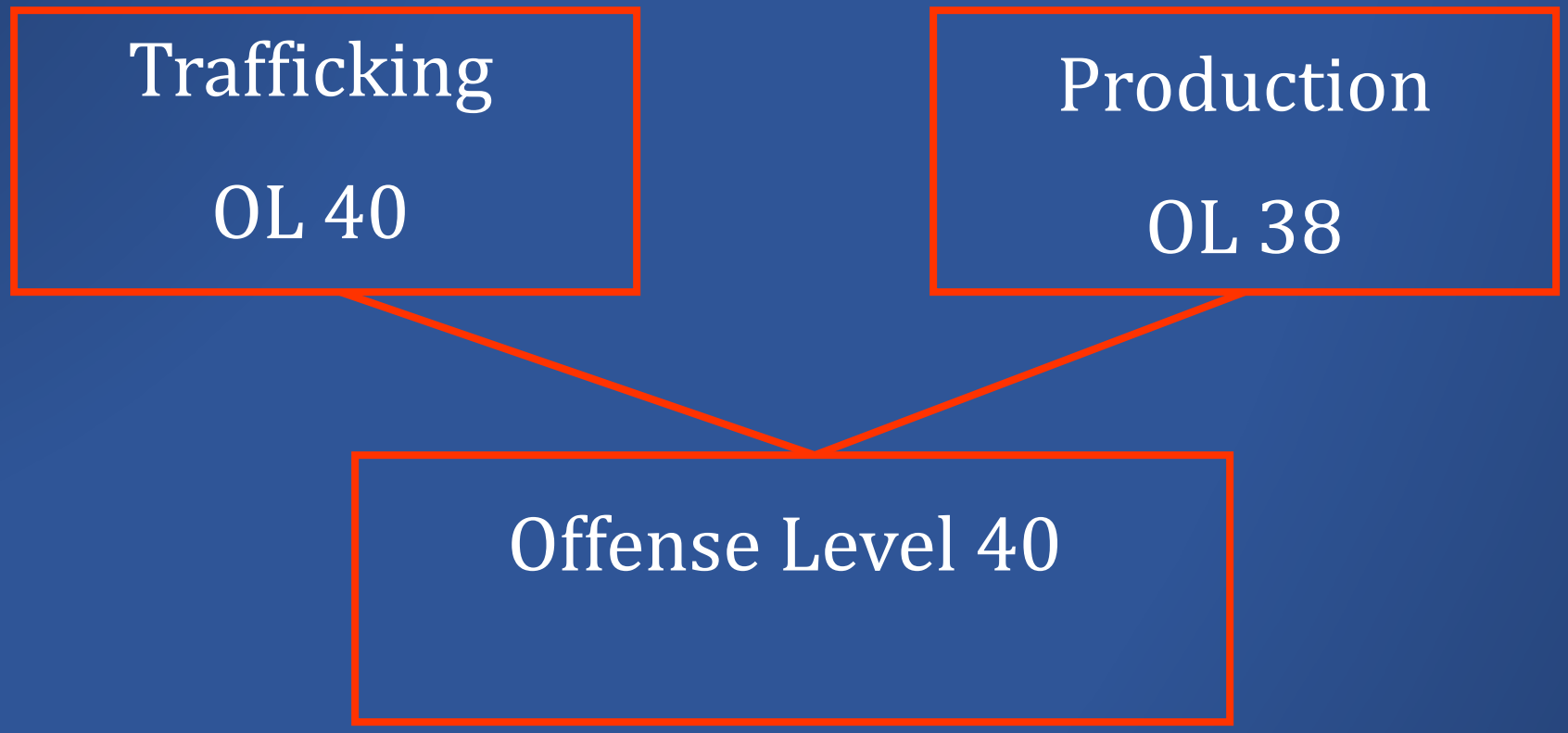
A. §3D1.2(a)
B. 3D1.2(b)
C. 3D1.2(c)
D. 3D1.2(d)
E. The counts do not group



"§3D1.2 (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)



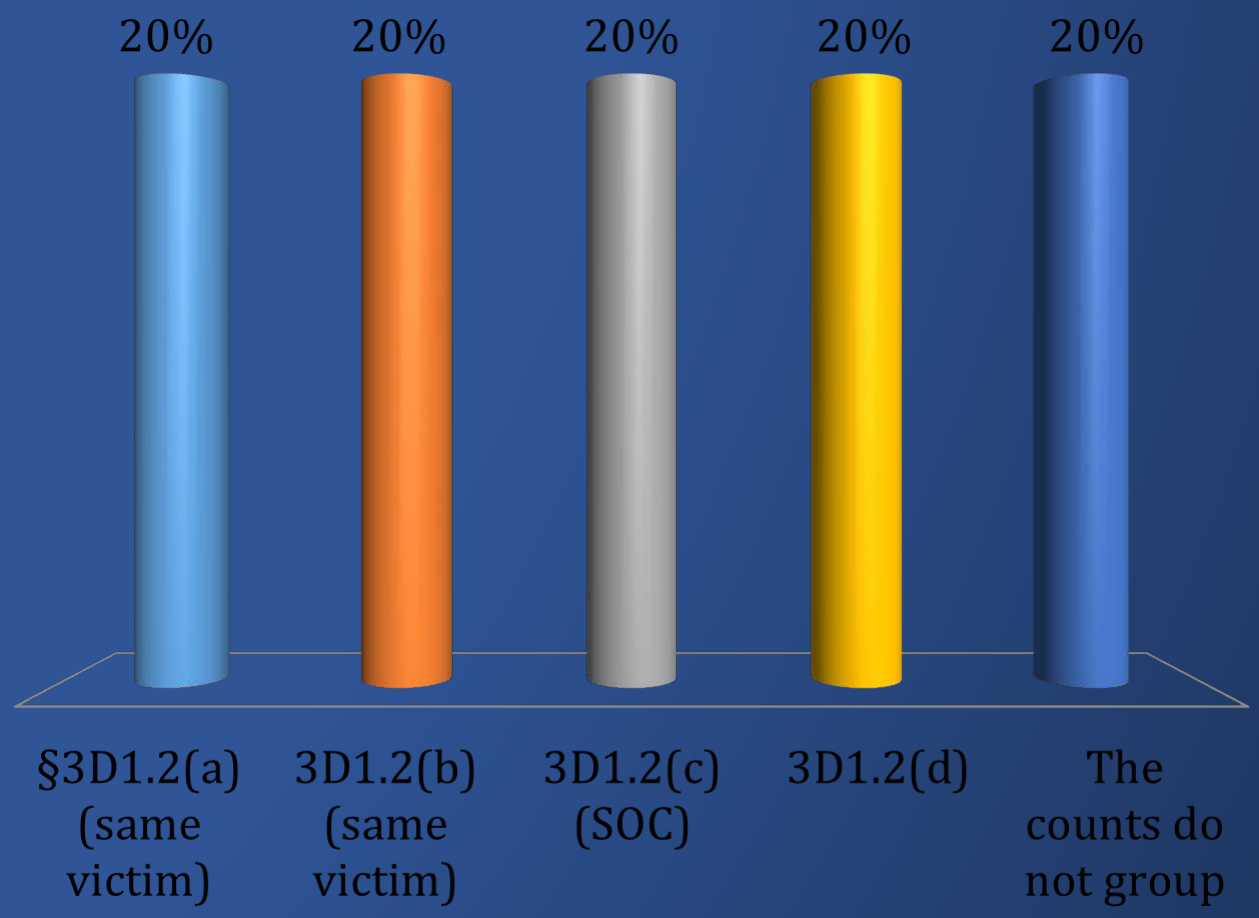
Scenario

- 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)

Scenario: How do the counts group?

A. §3D1.2(a) (same victim)
B. 3D1.2(b) (same victim)
C. 3D1.2(c) (SOC)
D. 3D1.2(d)
E. The counts do not group



Section 3D1.2(b), Application Note 4:

"The defendant is convicted of two counts of rape for raping the person on different days. The counts are not to be grouped together."

See U.S. v. Nagel, 835 F.3d 1371 (11th Cir. 2017) (do not apply §3D1.2(b) even if "consensual sex"

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

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 (4th Cir. 2016)
  - *U.S. v. White*, 782 F.3d 1118 (10th Cir. 2015)

- NJ child endangerment was not Tier III
  - *U.S. v. Berry*, 814 F.3d 192 (4th Cir. 2016)

- GA rape was a Tier III offense
  - *U.S. v. Cammorto*, 859 F.3d 311 (4th Cir. 2017)

Tiers

- RI first degree child molestation was not Tier III
  - *U.S. v. Morales*, 801 F.3d 1 (1st Cir. 2015)

- CA inducing sex conduct by misrepr. creating fear is Tier III
  - *U.S. v. Alexander*, 802 F.3d 1134 (10th Cir. 2015)

- NC taking indecent liberties with a child should have been Tier I
  - *U.S. v. White*, 782 F.3d 1118 (10th Cir. 2015)

§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