RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

1. Defendant pled guilty to two counts of Coercion and Enticement (§2G1.3). The counts involve separate victims. The first count involving victim 1 was committed on February 16, 2016. The second count involving victim 2 was committed on March 28, 2016.

Further investigation revealed that the defendant victimized seven additional minors from January 2016 through April 2016, but not on the same dates as the counts of conviction.

At §2G1.3, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

How many additional calculations of §2G1.3 should be completed?

No additional calculations of §2G1.3 should be completed. The special instruction at §2G1.3(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G1.3(d), the additional minors must be part of the relevant conduct for the offense of conviction.

In this scenario, the first offense of conviction involving victim 1 occurred on February 16, 2016. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction that occurred on February 16, 2016. The second count of conviction involving victim 2 occurred on March 28, 2016. The relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction that occurred on March 28, 2016.

Although the defendant victimized seven additional minors from January 2016 through March 2016, none of those acts occurred during, in preparation, or to avoid detection or responsibility for the offenses that occurred on February 16 or March 28 of 2016. Therefore, the seven

additional minors are not relevant conduct to the offenses of conviction. Because they are outside the relevant conduct, the special instruction cannot be applied.

Section 2G1.3 is neither included nor excluded from grouping at §3D1.2(d), which means that the court must make an individual determination of whether §2G1.3 is a guideline that has an "offense level … determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." The composition of §2G1.3 is very similar to §2G1.1, which is an offense specifically excluded from grouping under §3D1.2(d). Arguably, this also excludes §2G1.3 from grouping under §3D1.2(d), which precludes the court from applying §1B1.3(a)(2); meaning that the court cannot look at the same course of conduct or common scheme or plan as the offense of conviction. Therefore, the special instruction cannot be applied under this principle.

2. Defendant is convicted of one count of sexual exploitation of a minor (§2G2.1) involving a 14-year-old girl, and one count of receipt of child pornography (§2G2.2). The defendant used social media to contact minor female victims to solicit sexually explicit images of them. The defendant received pornographic images from the 14-year-old victim of the sexual exploitation offense in addition to images from five other minor victims.

When applying §2G2.2, the cross reference to §2G2.1 applies because the defendant caused minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct.

At §2G2.1, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

How many additional calculations of §2G2.1 should be completed?

No additional calculations of §2G2.1 should be completed. The special instruction at §2G2.1(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G2.1, the additional minors must be part of the relevant conduct for the offense of conviction.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

In this scenario, the offense of conviction for sexual exploitation of a minor involved a 14-year-old girl. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction involving the 14-year-old victim. None of the other images meet the criteria for relevant conduct.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the defendant used the same modus operandi to coerce the additional minor victims to send him sexually explicit images, the court cannot apply §1B1.3(a)(2) to consider acts of the defendant that are the same course of conduct or common scheme or plan as the offense of conviction for sexual exploitation of a minor. This also precludes application of the special instruction at §2G2.1(d).

The second count of conviction is for possession of child pornography. This guideline is included for grouping under §3D1.2(d) which means that when applying §2G2.2, the court can look to acts that are the same course of conduct or common scheme or plan as the offense of conviction. This is why the images from all the minor victims are included in the application of §2G2.2.

The court, however, in this scenario, applies the cross reference to §2G2.1 because the defendant caused minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. When applying the cross reference to §2G2.1, the court will determine which image results in the greatest offense level under §2G2.1 and will apply §2G2.1 based upon that offense. In this application of §2G2.1, the special instruction also does not apply for the same reasons discussed above. The additional images are not relevant conduct to this specific exploitation – the other images were not created during, in preparation or to avoid detection or responsibility for the offense. Sometimes, guideline users get confused and think that because the offense of conviction is possession of child pornography and that offense is a guideline that is subject to "expanded" relevant conduct (same course of conduct/common scheme or plan), when cross referencing from that count to §2G2.1, the "expanded" relevant conduct carries over. This is incorrect. Whether "expanded" relevant conduct is applicable depends upon the guideline that is applied. Once the cross reference applies to §2G2.1, application of §1B1.2(a)(2) ("expanded" relevant conduct) is prohibited.

3. The defendant and his co-conspirators robbed Chevy Chase Bank on November 18th, 2018. The defendant has pled to one count of robbery and one count of attempted robbery.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

During the investigation of the Chevy Chase bank robbery, the authorities learned that the defendant and his co-conspirators were planning on robbing M&T Bank on December 15th, 2018. As a result, law enforcement officers set up a sting operation at M&T Bank the morning of December 15th, 2018.

As expected, the defendant and his co-conspirators arrived at M&T Bank just after noon on December 15th. SWAT officers quickly descended on the defendant and his co-conspirators in order to stop the bank robbery. While attempting to subdue the co-conspirators, a SWAT officer shot and killed one of the defendant's co-conspirators.

Will the cross reference at §2B3.1 apply? Why or why not?

No, the cross reference at §2B3.1 does not apply. Section 2B3.1(c)(1) applies "if a victim was killed under circumstances that would constitute murder" and is applied if the homicide is relevant conduct to the robbery offense. The killing of one of the co-conspirators is not relevant conduct.

The slaying of the co-conspirator is not an act that the defendant "committed, aided, abetted, counseled, commanded, induced, procured or willfully caused" during, in preparation, or to avoid detection for the robbery offense as required under §1B1.3(a)(1)(A).

The only way to hold the defendant accountable for the act of another person is to conduct a relevant conduct analysis under §1B1.3(a)(1)(B). This is a three-part analysis that requires a determination of: 1) the scope of the defendant's jointly undertaken activity with the other person; 2) whether the act of the other person was in furtherance of the defendant's joint undertaking; and 3) whether the act of the other person was reasonably foreseeable to the defendant.

The defendant in this scenario does not have a jointly undertaken agreement with the SWAT officer. Therefore, the defendant cannot be held accountable for the act of killing his co-conspirator. The cross reference will not apply.

4. The defendant has been convicted of one count of kidnapping. The indictment alleges three victims were kidnapped as a result of the offense.

Will "pseudo counts" be calculated for this case? Why or why not?

No, "pseudo counts" will not be calculated for this case. There are only three ways under the guidelines where "pseudo counts" can be applied. The first circumstance is where the parties

stipulate to the commission of additional offenses in a plea agreement and agree that the stipulation will be for the purpose of calculating additional "pseudo counts." See §1B1.2(c). The second circumstance is where the defendant is convicted of a conspiracy to commit multiple offenses. When this occurs, guideline application requires that the court apply the guidelines as if the defendant had been convicted on a separate count of conspiracy for each offense the defendant conspired to commit. The third and final circumstance is where the Chapter Two guideline itself contains a special instruction that permits application of "pseudo counts" when the relevant conduct of the offense includes multiple victims, such as the ones found in §2G1.3 and §2G2.1.

In this scenario, none of the three ways in which "pseudo counts" can be applied are present. There will be one calculation of the kidnapping guideline, §2A4.1, based upon one victim – the victim where the application of §2A4.1 will result in the highest offense level.

5. The defendant has been charged with one count of interstate transportation of an individual other than a minor for the purpose of prostitution. The indictment alleges that beginning on or about January 20, 2018 and continuing through July 17, 2018, the defendant transported victim A on several occasions for the purpose of prostitution.

Further investigation reveals that the defendant also transported four additional women for the purpose of prostitution.

At §2G1.1, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

How many additional calculations of §2G1.1 should be completed?

More information is needed. More facts are needed to determine if, on a specific occasion while transporting victim A for the purpose of prostitution, additional victims were transported for the same purpose.

The special instruction at §2G1.1(d) applies "if the offense involved more than one victim." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G1.1(d), the additional victims must be part of the relevant conduct for the offense of conviction.

Without knowing whether the transportation of victim A also included additional victims, additional calculations of §2G1.1 can be completed.

6. The defendant was originally charged with two counts: Assault on a Federal Officer involving victim A, and Attempting to Kill a Federal Officer involving victim B.

The defendant was found guilty at trial for the Assault on a Federal Officer involving victim A. The defendant was found not guilty at trial for Attempting to Kill a Federal Officer involving victim B.

Can the more serious injuries related to victim B be used when calculating §2A2.2? Why or why not?

No. The more serious injuries related to victim B cannot be used when calculating §2A2.2. Specific offense characteristic (b)(3) at §2A2.2 provides increases of three, five, or seven levels based upon the degree of bodily injury the victim sustained as a result of the assault. In order for this enhancement to apply, the injury must have resulted from an act the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction. See §1B1.3(a)(1)(A). The aggravated assault guideline is not a guideline that allows the court to look to "expanded" relevant conduct – acts that are the same course of conduct or common scheme or plan as the offense of conviction. As a result, the more serious injury that resulted from the attempt to kill count cannot be included in the calculation of §2A2.2. It is not part of the relevant conduct.

7. The defendant is convicted of one count of coercing a minor to engage in production of child pornography. During a three-month period, the defendant contacted hundreds of minors via a live app and enticed/coerced them to send him explicit sexual videos using the app.

The defendant received numerous videos, but law enforcement can only locate two of them as the videos disappear from the app after a short time.

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

At §2G2.1, there is the following special instruction:

> (d) Special Instruction
>
> (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

How many additional calculations of §2G2.1 should be completed?

No additional calculations of §2G2.1 should be completed. The special instruction at §2G2.1(d) applies "if the offense involved more than one minor." "Offense" is defined in Application Note 1(I) at §1B1.1. "Offense" is defined as "the offense of conviction and all relevant conduct under §1B1.3." In order to apply the special instruction at §2G2.1, the additional minors must be part of the relevant conduct for the offense of conviction.

In this scenario, the offense of conviction involved coercing a minor to engage in production of child pornography. Pursuant to §1B1.3(a)(1), the relevant conduct for this offense includes any acts the defendant committed during the offense of conviction, in preparation for the offense of conviction, or to avoid detection or responsibility for the offense of conviction. None of the other images (whether located or not) meet the criteria for relevant conduct.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the defendant coerced a significant number of minors to engage in production of child pornography, the court cannot apply "expanded" relevant conduct at §1B1.3(a)(2) to consider acts of the defendant that are the same course of conduct or common scheme or plan as the offense of conviction for sexual exploitation of a minor. This also precludes application of the special instruction at §2G2.1(d).

8. The defendant has pled guilty to a single count of production of child pornography involving a 12-year-old victim.

The defendant's plea agreement contains the following statement: "the defendant agrees that the Statement of Facts constitutes a stipulation of facts for purposes of Section 1B1.2(c)."

RELEVANT CONDUCT-SEX OFFENSES AND CRIMES AGAINST THE PERSON

The Statement of Facts discusses the defendant's production of child pornography (involving the 12-year-old girl) and outlines the defendant's receipt of child pornography.

Should an additional calculation of §2G2.2 be completed?

Yes. An additional calculation of §2G2.2 should be completed. Section 1B1.2(c) states that when a plea agreement contains a stipulation that specifically establishes the commission of additional offense(s), the court shall apply the guidelines as if the defendant had been convicted of additional count(s) charging those offense(s).

In this scenario, the plea agreement specifies that, for the purpose of guideline application, the parties agree that an additional guideline calculation under §2G2.2 shall be completed in addition to the calculation under §2G2.1 for the production count to which the defendant pleaded guilty.

9. The defendant has pled guilty to one count of production of child pornography that occurred on August 15, 2017. The production involves a single image of his grandson.

The defendant molested both his grandson and granddaughter over a significant length of time. The state prosecuted the defendant for the molestation cases. Neither state conviction encompasses the date of the instant offense.

Defense counsel is arguing that the prior state convictions for the molestation conduct are the same course of conduct as the instant offense of conviction and as such, should not be given criminal history points.

Are the prior convictions the same course of conduct as the instant offense? Should they be given criminal history points?

The prior convictions are not the same course of conduct as the instant offense. Therefore, they will be given criminal history points. The instant offense involves production of a single image of the minor male victim on August 15, 2017. The prior molestation case against the minor female victim is not relevant conduct to the instant offense. The molestation of the minor female victim is completely outside of the acts the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction – the production of the image of the minor male victim.

The prior conviction for the molestation of the minor male victim also is not relevant conduct. The molestation of the young boy occurs at a different time than the offense of conviction. The

molestation, therefore, is not an act that the defendant committed during, in preparation, or to avoid detection or responsibility for the offense of conviction – the production of the image of the minor male victim.

Additionally, §2G2.1 is excluded from grouping under §3D1.2(d), which means that the court cannot consider acts that are the same course of conduct or common scheme or plan as the offense of conviction as described in §1B1.3(a)(2). So, even though the molestation and the production of images is similar abusive conduct, the court is not permitted to look at "expanded" relevant conduct – acts that are the same course of conduct, common scheme or plan as the offense of conviction.

Therefore, because the conduct associated with the prior sentences are not part of the instant offense, criminal history points will be assigned.