



Advanced Relevant Conduct Issues

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Minneapolis, MN



Presenter

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Commission Resources



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Advanced Relevant Conduct Issues - Objectives

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- The court's analysis of what is/is not relevant conduct not only impacts the calculation of the offense level under Chapters 2 and 3 of the guidelines, it also impacts other areas of guideline application, including:
 - Determination of a single offense level for multiple counts of conviction (Chapter 3, Part D);
 - Calculation of criminal history points (Chapter 4); and
 - Adjustments for undischarged terms of imprisonment (§5G1.3)





Quick Overview of Relevant Conduct Principles

§1B1.3



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Dec. 9, 2015

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
common scheme or plan



3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. What was the **scope** of the defendant's *jointly undertaken criminal activity*?
2. Were the acts of others "**in furtherance of**" the defendant's *jointly undertaken criminal activity*?

AND

3. Were the acts of others "**reasonably foreseeable**" in connection with the defendant's *jointly undertaken criminal activity*?



Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

“Expanded” Relevant Conduct at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses



Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

“Expanded” Relevant Conduct at §1B1.3(a)(2)
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses



Relevant Conduct

§1B1.3(a)

(a)(1) & (a)(2): Analysis to establish relevant acts

(a)(3): Harms resulting from, or that were the object of the acts established in (a)(1) & (a)(2)

-*E.g.*, “loss” and “injury” are harms

(a)(4): Information specified for application in a particular guideline





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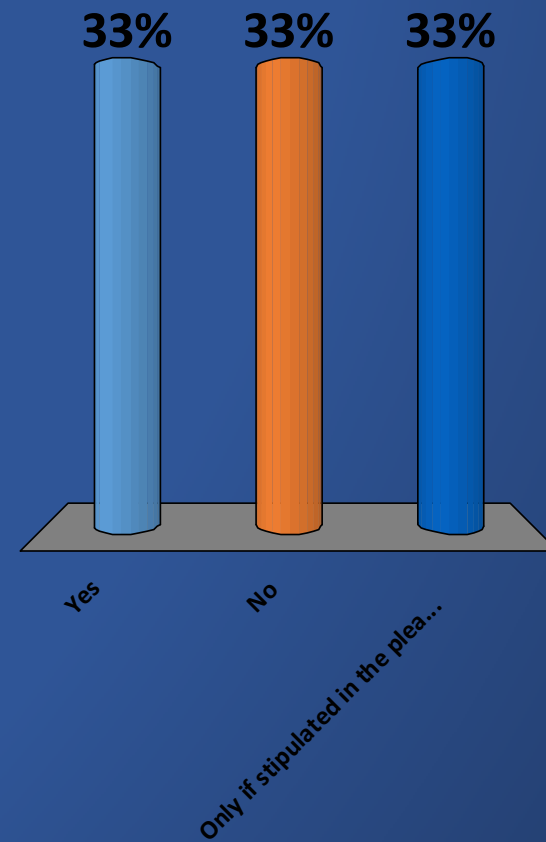
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Can the loss outside of the statute of limitations be included as relevant conduct

- A. Yes
- B. No
- C. Only if stipulated in the plea agreement





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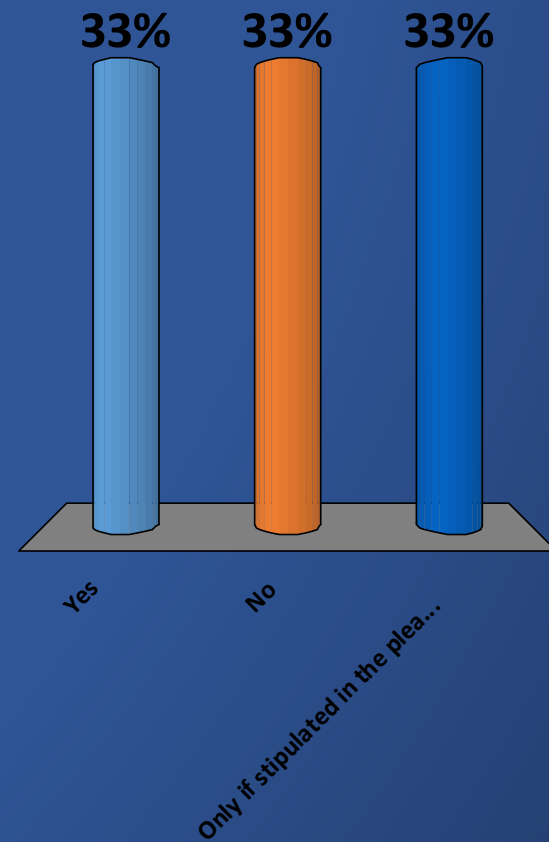
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Can the firearms purchased while the defendant was a juvenile be included as relevant conduct

- A. Yes
- B. No
- C. Only if stipulated in the plea agreement





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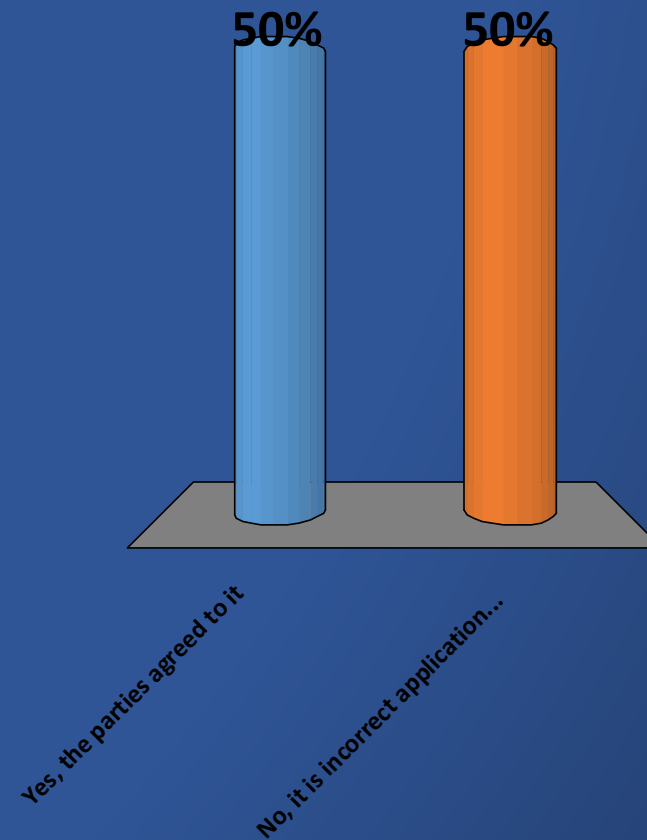
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Should two separate calculations of §2B1.1 be done?

- A. Yes, the parties agreed to it
- B. No, it is incorrect application of the guidelines



Relevant Conduct Analysis: §1B1.3(a)(2)

WHO: (a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(2):

Same course of conduct/
Common scheme or plan



Offenses for Which “Expanded Relevant Conduct”¹⁸ Applies

§§1B1.3(a)(2) & 3D1.2(d) (“Rule (d)”)

- The applicable Chapter Two guideline must be one included in a list at §3D1.2(d) (or be of that type), which is the list used for “grouping” multiple counts of conviction of a certain type
- NOTE: Multiple counts of conviction are not necessary to have “expanded” relevant conduct



Offenses **Included** at §3D1.2(d):

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;
§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.



“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 5(B)(i)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*



“Same Course of Conduct”

§1B1.3(a)(2); App. Note 5(B)(ii);
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity



Chapter Two Guidelines on the “Included” List and Multiple Counts of Conviction

§3D1.2(d)

- For multiple counts of conviction using the *same* Chapter Two guideline listed at §3D1.2(d), there will be a single application, based on the aggregate and the offense conduct “taken as a whole”
 - Because this list also “expands” relevant conduct, acts in the same course of conduct or common scheme or plans as the offenses of conviction will also be considered in application



Grouping Under “Rule (d)”

Fraud 1
(§2B1.1)

Fraud 2
(§2B1.1)

One application, with the offense level
for the group based on the offense
conduct “taken as a whole”





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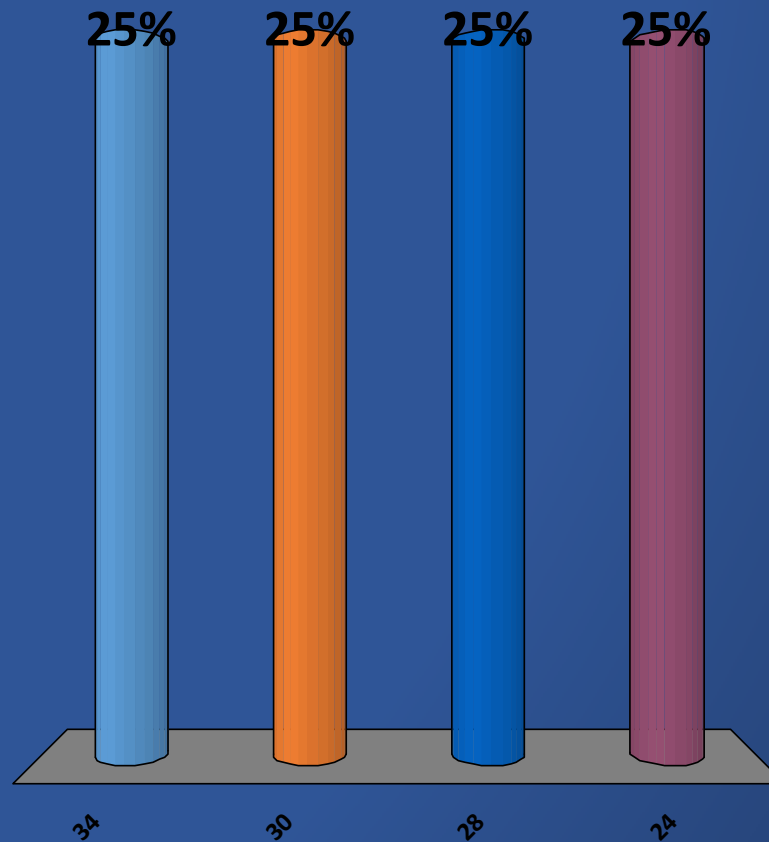
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What is the applicable base offense level for this defendant?

- A. 34
- B. 30
- C. 28
- D. 24



Factors Requiring Conviction Under a Specific Statute

§1B1.3 Application Note 7

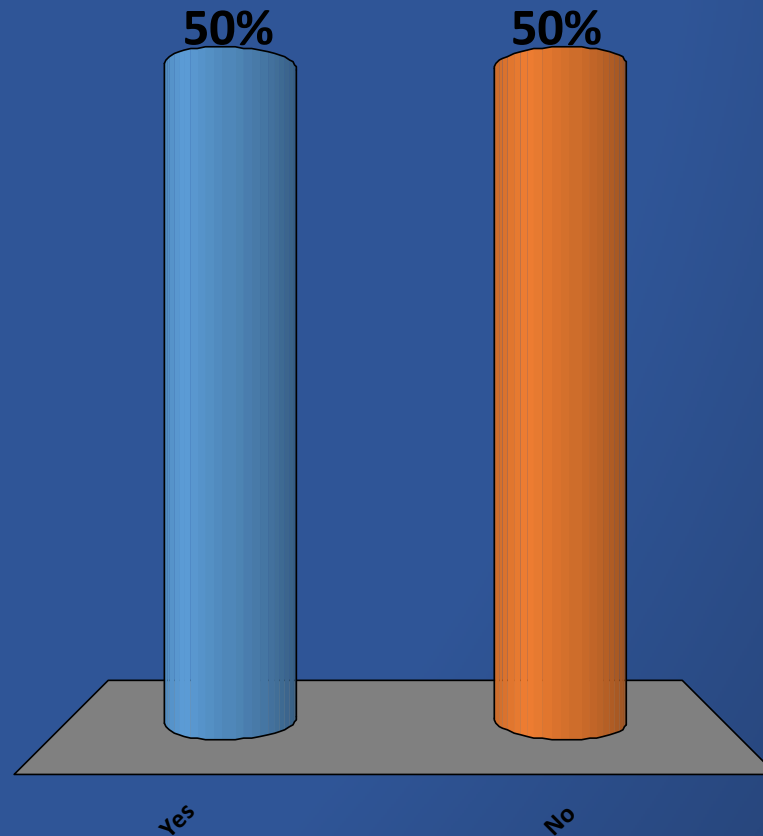
- An express direction to apply a particular factor only if the defendant was convicted of a particular statute **includes** the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute.



Is the special instruction applicable?

A. Yes

B. No





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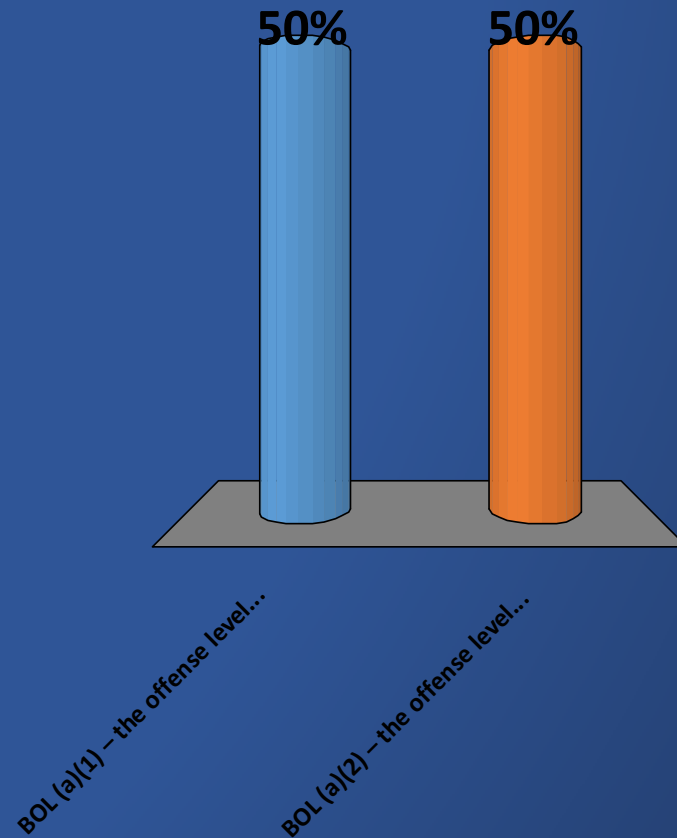
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Which base offense level at §2S1.1 applies?

- A. BOL (a)(1) – the offense level for the underlying drug offense
- B. BOL (a)(2) – the offense level corresponding to the amount of laundered funds



Impact of Terms

“Offense”
and
“Defendant”

Upon the Relevant Conduct
Used in Application



“Otherwise Specified”

§1B1.3(a)

- The general analysis of relevant conduct will be applied “(u)nless otherwise specified”
- One of the most common specifications otherwise is the use of the term “*defendant*” (as opposed to “*offense*”) to limit relevant conduct in some considerations to the acts for which the defendant is directly responsible (as opposed to acts a co-participant may have done)



Definition of “Offense”

§1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) ... unless a different meaning is specified or is otherwise clear from the context
 - Note that use of the passive voice infers “offense,” *e.g.*, “If a dangerous weapon (including a firearm) *was possessed ...*” at §2D1.1(b)(2)



Use of Term “Defendant”

§1B1.3

- The use of the term “defendant” prohibits including relevant conduct based on the acts of others under §1B1.3(a)(1)(B)
- NOTE: Defendant *is still accountable* for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused at §1B1.3(a)(1)(A)





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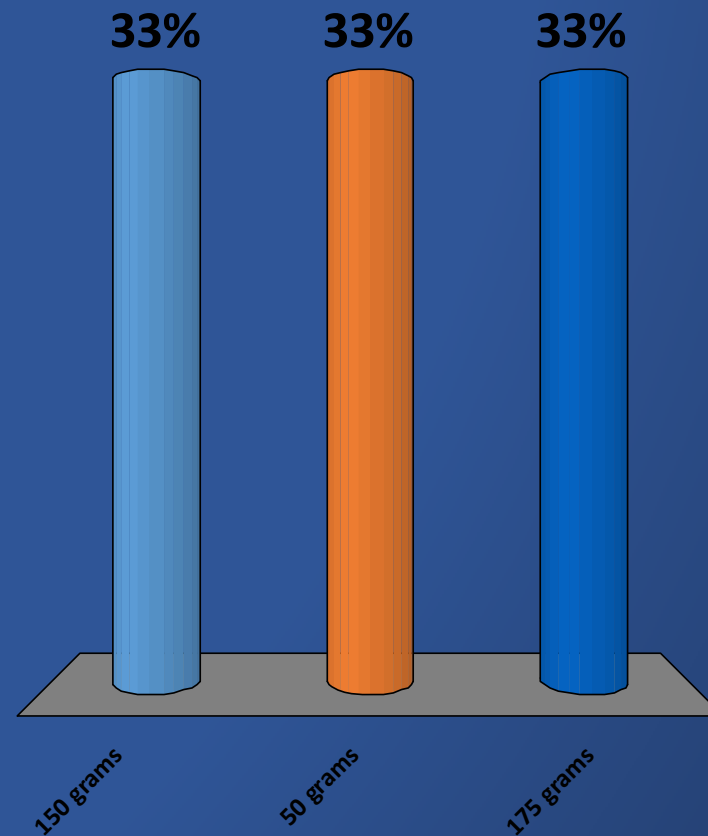
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For what amount of drugs would you hold the defendant accountable?

- A. 150 grams
- B. 50 grams
- C. 175 grams



When Something is NOT the “Same Course of Conduct/Common Scheme or Plan”

Application Note 5(C)

- In determination of “expanded” relevant conduct, the course of conduct or common scheme or plan does not include conduct “associated” with a sentence imposed prior to the commission of the instant offense of conviction

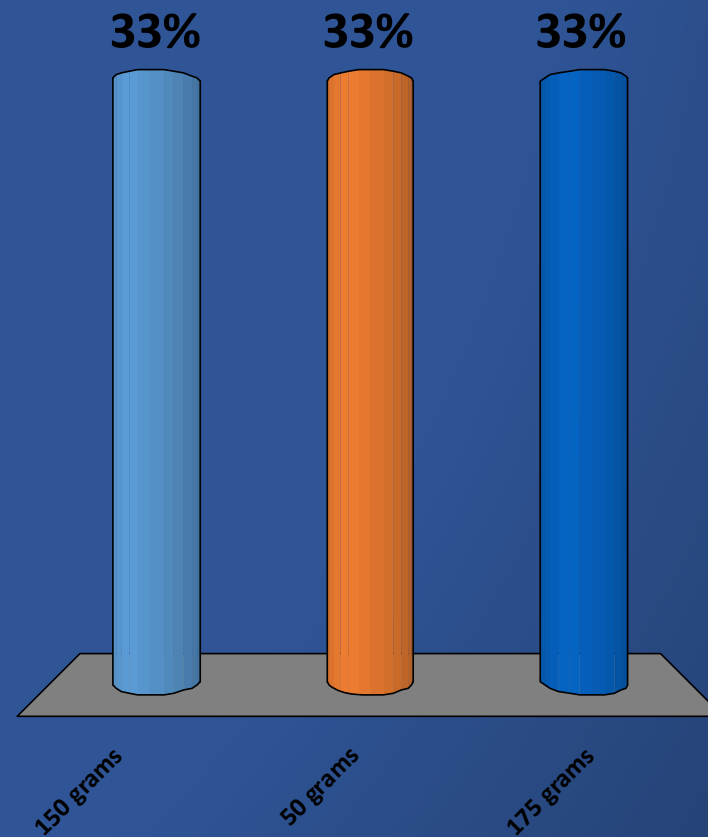


- Conviction: Drug conspiracy (10/1/13 – 4/1/14)
- Indictment cites 3 crack deliveries defendant made from Philly to NY
 - December 28, 2013 – 50 grams
 - February 9, 2014 – 50 grams
 - March 2, 2014 – 50 grams
- Indictment also cites 20 grams crack delivery from Philly to Camden on October 10, 2013
 - Defendant sentenced in NJ state court to 1 month jail on November 17, 2013



For what amount of drugs would you hold the defendant accountable?

- A. 150 grams
- B. 50 grams
- C. 175 grams



Conduct Charged in the Instant Offense of Conviction and Prior Sentences

§1B1.3, App. Note 5(C)

- Conduct associated with a previously imposed sentence expressly charged in the instant offense of conviction will be considered relevant conduct under §1B1.3(a)(1), unless otherwise provided
- When such conduct is not expressly charged, look to App. Note 8 regarding the §1B1.3(a)(2) determination of same course of conduct or common scheme or plan





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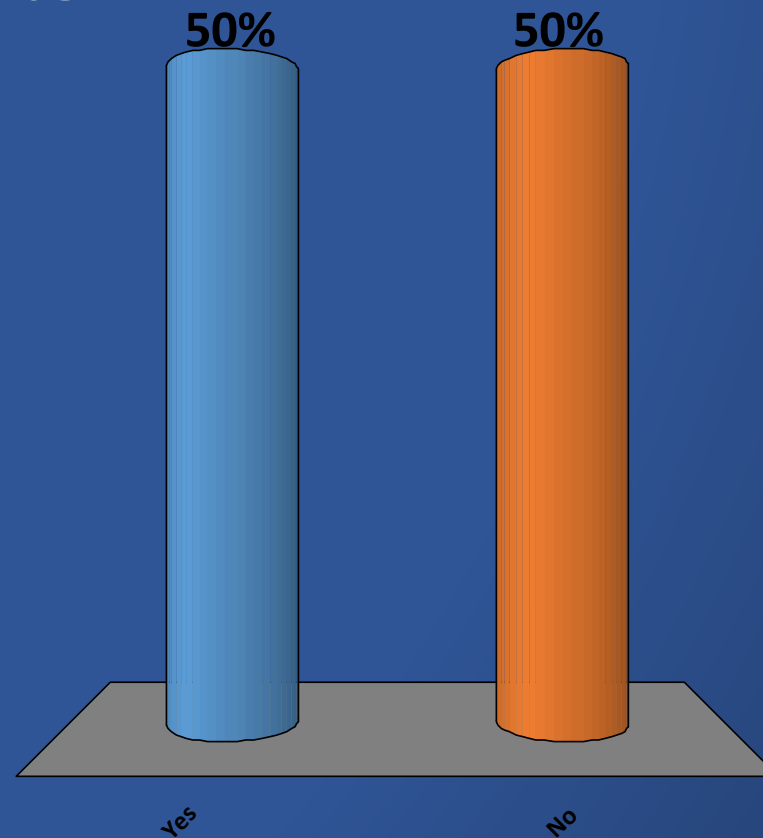


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Should the prior conviction receive criminal history points?

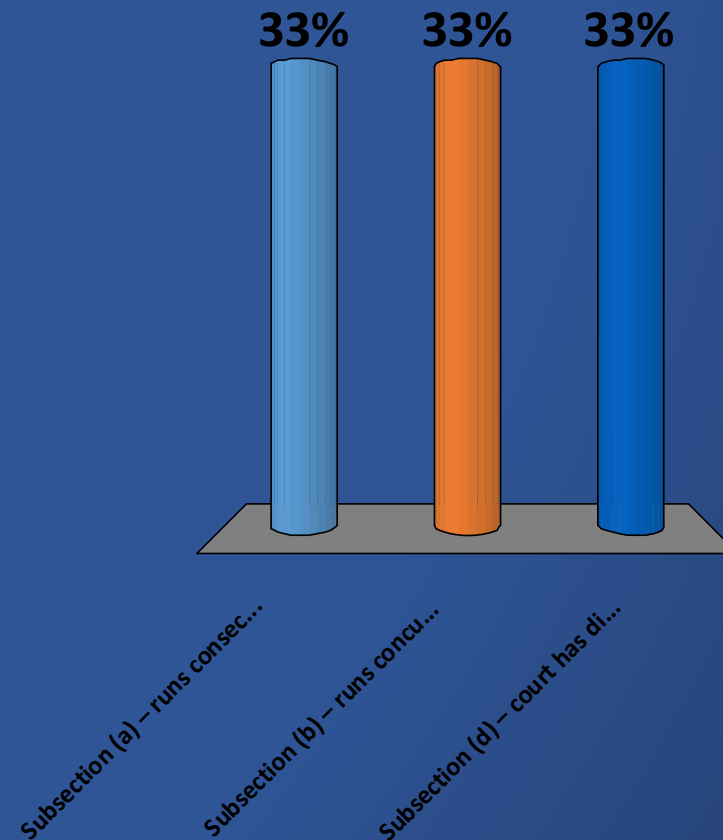
A. Yes

B. No



Which provision of §5G1.3 applies?

- A. Subsection (a) – runs consecutively
- B. Subsection (b) – runs concurrently
- C. Subsection (d) – court has discretion



(a)(1) & (a)(2): Analysis

WHO: (a)(1)(A): Acts of the defendant
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(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
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(a)(2):

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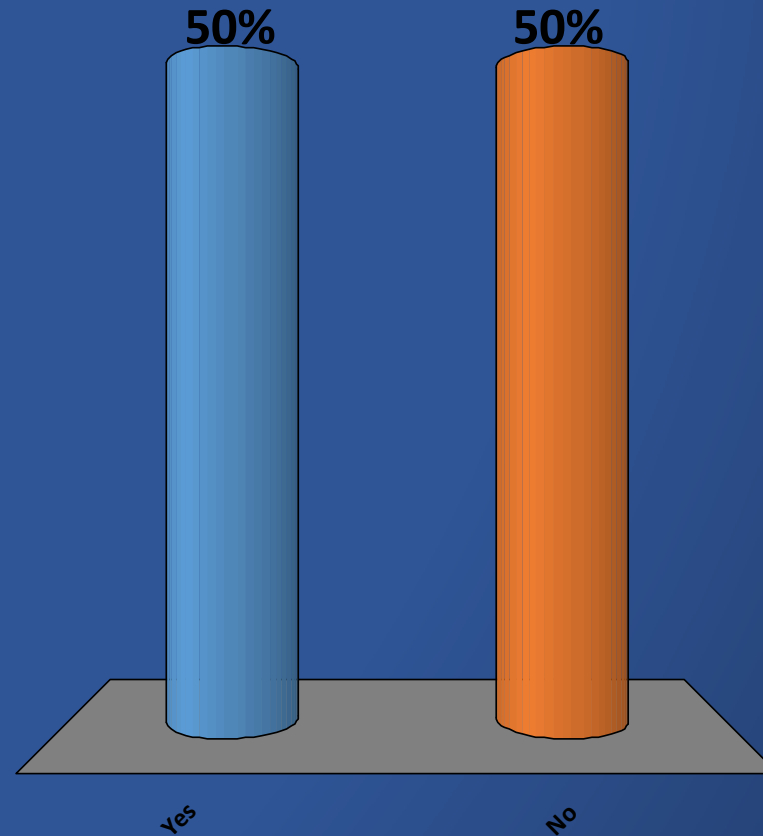
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Will the special instruction at §2G1.3 apply

- A. Yes
- B. No





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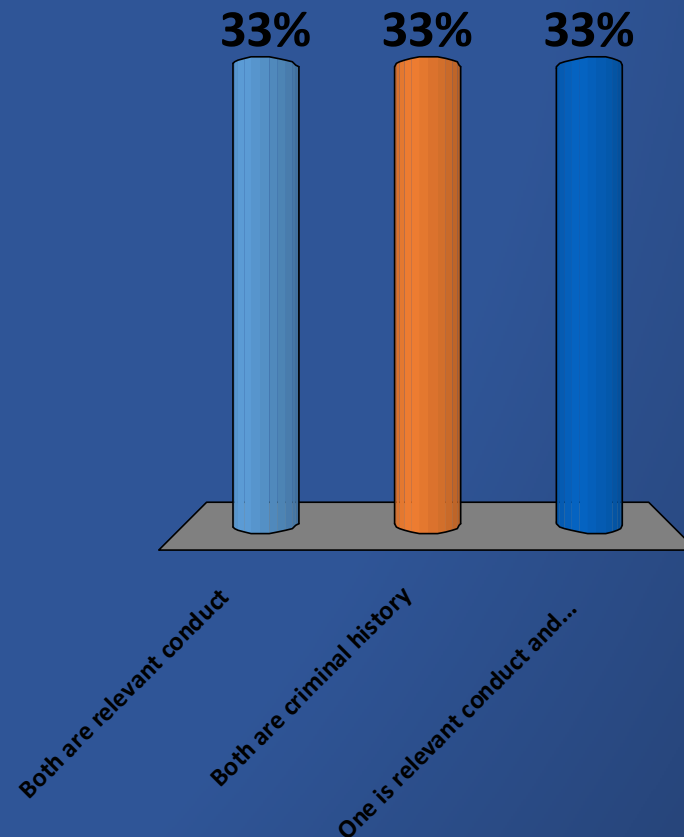
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Are the Prior Convictions Relevant Conduct or Criminal History?

- A. Both are relevant conduct
- B. Both are criminal history
- C. One is relevant conduct and one is criminal history



“Prior Sentence”

§4A1.2(a)(1) & App. Note 1

**Conduct that is part of the
relevant conduct of the instant offense
will not be a “prior sentence”
for criminal history**





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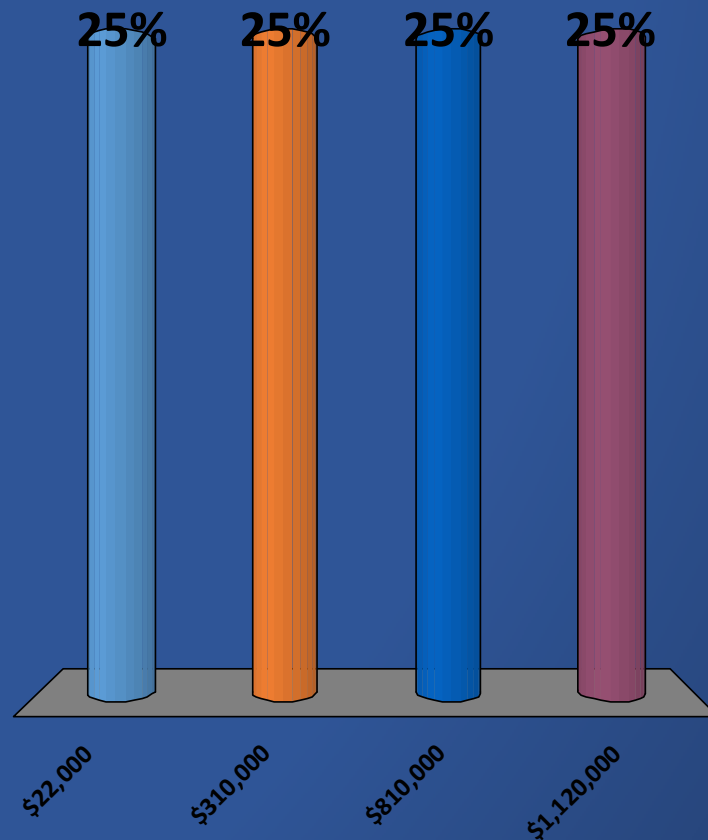
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What Amount of Loss Should Be Attributed to Defendant B?

- A. \$22,000
- B. \$310,000
- C. \$810,000
- D. \$1,120,000



3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. What was the **scope** of the defendant's *jointly undertaken criminal activity*?
2. Were the acts of others “**in furtherance of**” the defendant's *jointly undertaken criminal activity*?

AND

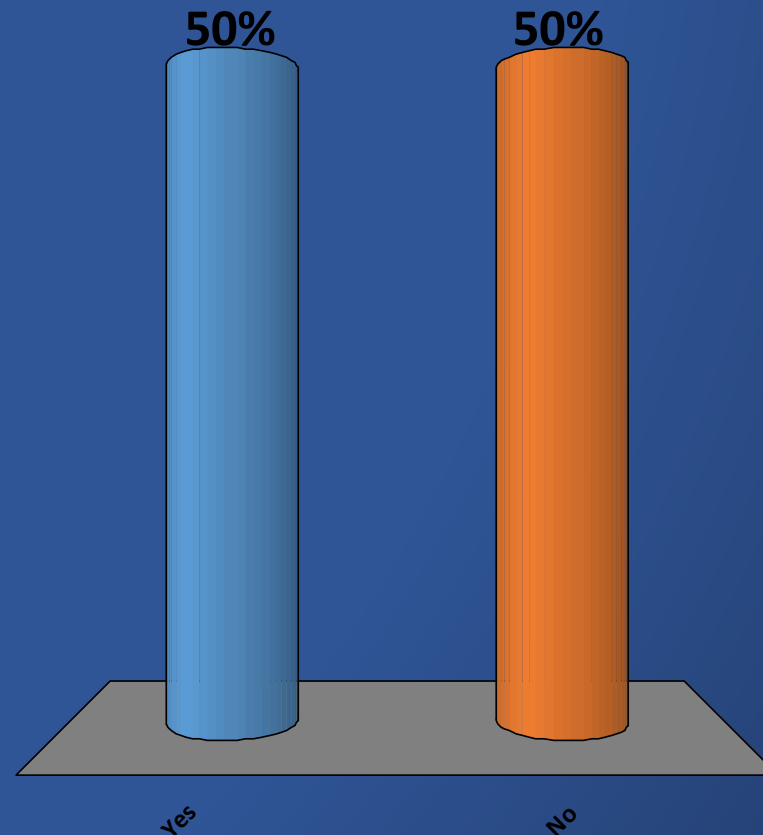
3. Were the acts of others “**reasonably foreseeable**” in connection with the defendant's *jointly undertaken criminal activity*?



Would Defendant B Receive an Increase for the Offense Involving Substantial Financial Hardship

A. Yes

B. No



Definition of “Offense”

§1B1.1, App. Note 1(H)

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 - Note that use of the passive voice infers “offense,” *e.g.*, “If a dangerous weapon (including a firearm) *was possessed ...*” at §2D1.1(b)(2)



Thank You!



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