



Relevant Conduct

2023 National Seminar

August 29, 2023

This document is produced and disseminated at U.S. taxpayer expense.

Lori Baker

Sentencing Specialist

lbaker@ussc.gov

Ross Thomas

Senior Attorney

rthomas@ussc.gov

Office of Education and Sentencing Practice

HelpLine: (202) 502-4545

[Online HelpLine Form](#)

What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



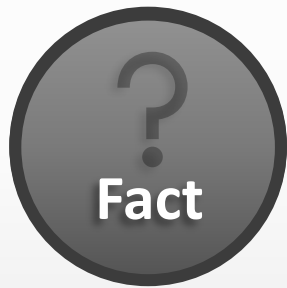
On a scale from 1 to 5, what's your comfort level with relevant conduct, with 1 being the least comfortable and 5 being most comfortable?

- A. 1
- B. 2
- C. 3
- D. 4
- E. 5



Relevant Conduct

What Facts Matter in Chapters 2 and Chapter 3?



No



Base Offense Level

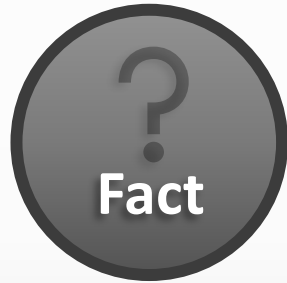
SOC

Cross References

Adjustments

Learning Objectives

Your active engagement in this session will enable you to:



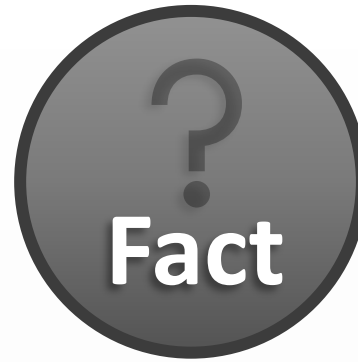
Determine whether something is a fact to which the relevant conduct rules apply; and



Apply the relevant conduct rules to those facts, focusing on:

- Jointly Undertaken Criminal Activity;
- “Expanded” Relevant Conduct; and
- Advanced Relevant Conduct Principles.

What's a



Standard of Proof

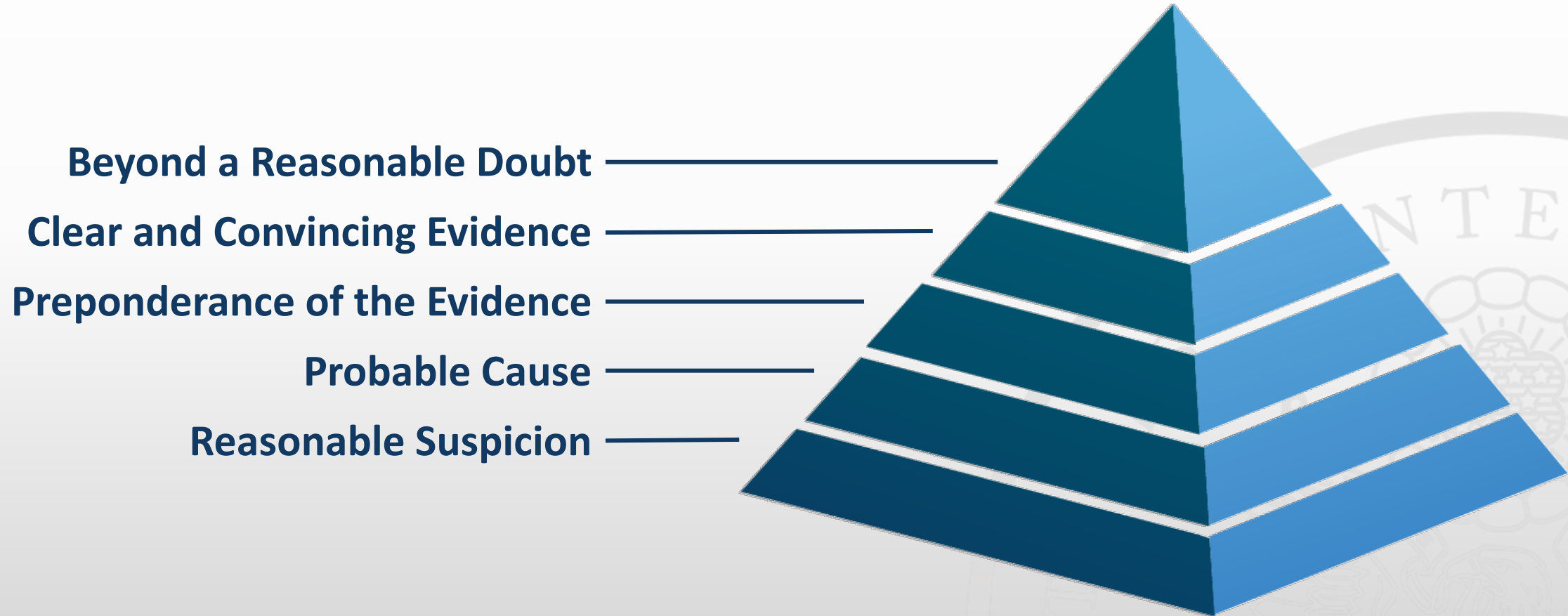
Burden of Persuasion

State, Local, and Foreign Criminal Conduct

Uncharged, Dismissed, and Acquitted Conduct

Standard of Proof

How Much Proof Do I Need at Sentencing?



Dylan Birdie is convicted of one count of migrant smuggling. Mr. Birdie has three prior arrests for the same conduct, but the charges on those arrests were dismissed. You have no other information about those prior charges.

Are those prior instances of migrant smuggling facts to which the relevant conduct rules apply?

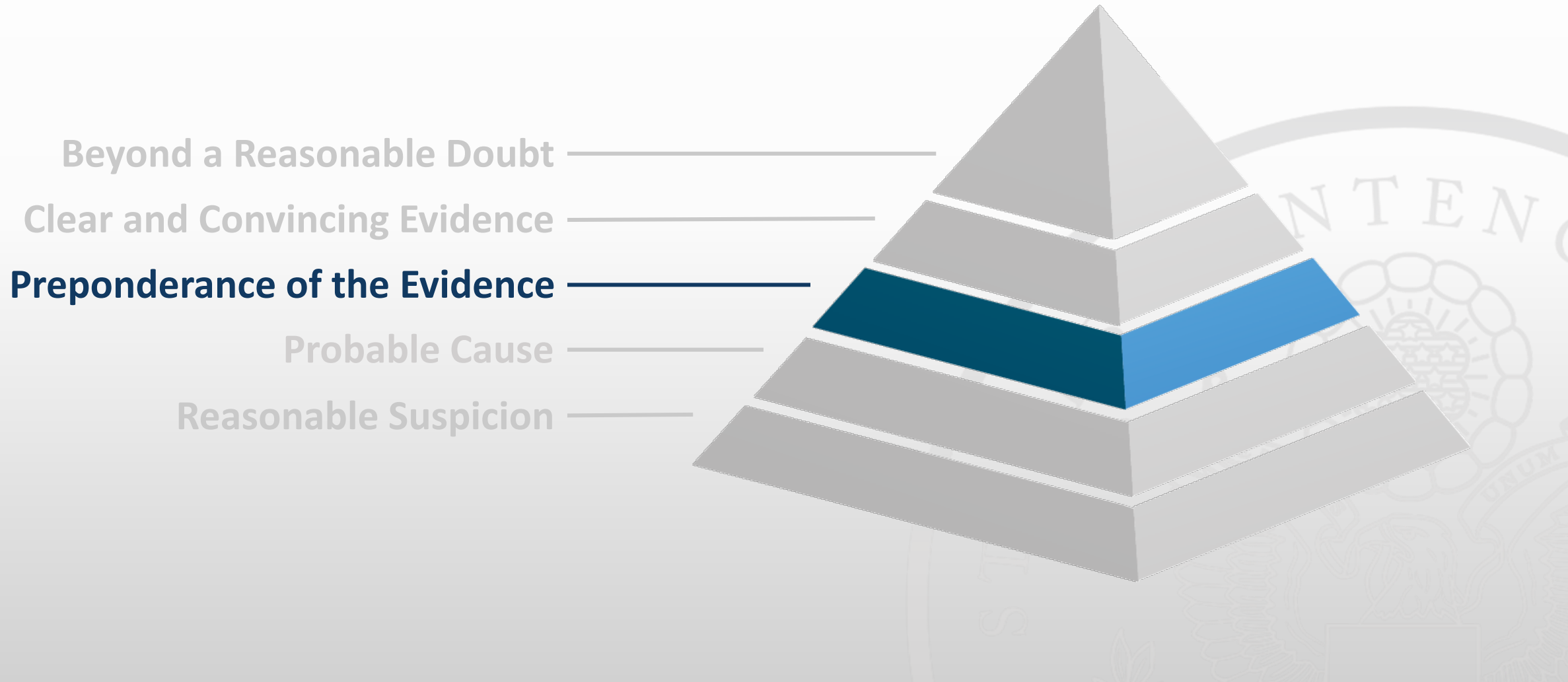
A. Yes

B. No



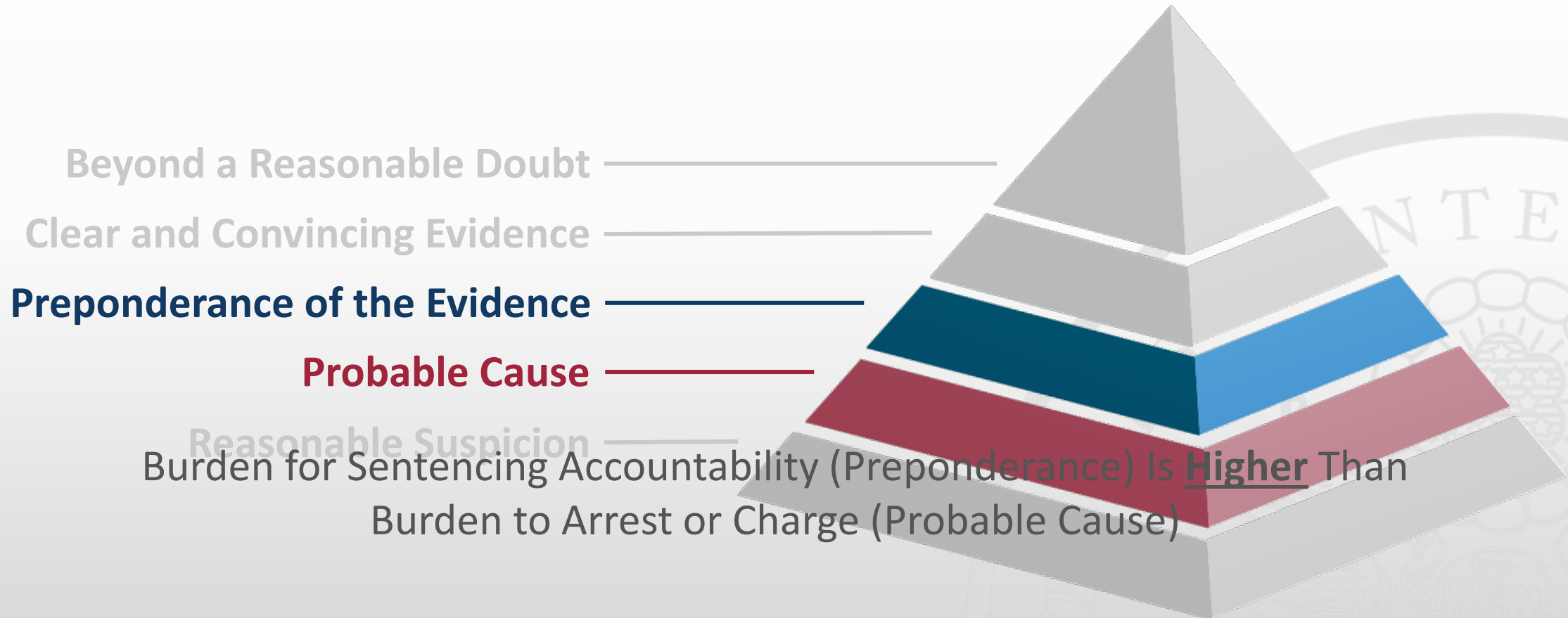
Standard of Proof

How Much Proof Do I Need at Sentencing?



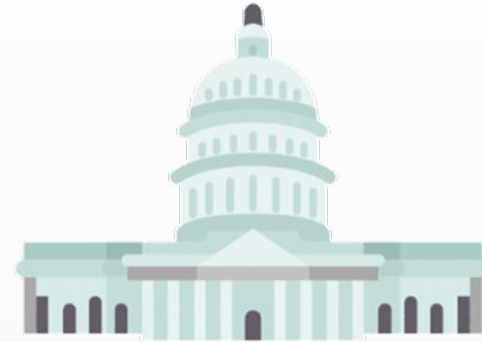
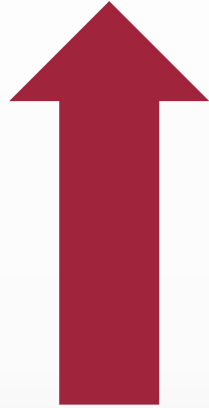
Standard of Proof

How Much Proof Do I Need at Sentencing?



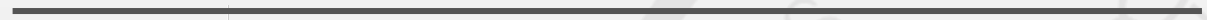
Burden of Persuasion

Who Must Prove a Fact?

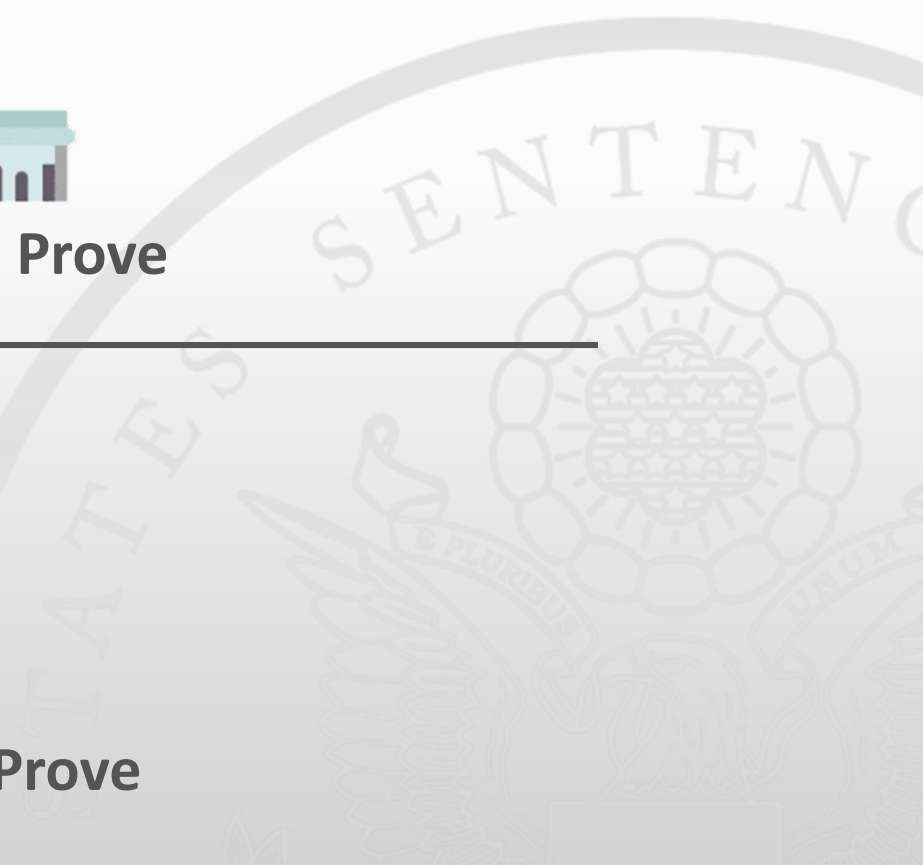


Government Must Prove

Guidelines Range



Defendant Must Prove



State, Local, and Foreign Criminal Conduct

Relevant Conduct Must Be Criminal Conduct



State and Local
Criminal Conduct



Foreign
Criminal Conduct

Eileen Celia is convicted of one count of unlawful possession of a machine gun. Ms. Celia legally owns 100 other firearms.

Are these 100 additional firearms facts to which the relevant conduct rules apply?

A. Yes

B. No



Uncharged, Dismissed, and Acquitted Conduct

If proven by a preponderance, relevant conduct includes:



Uncharged
Criminal Conduct



Dismissed
Criminal Conduct



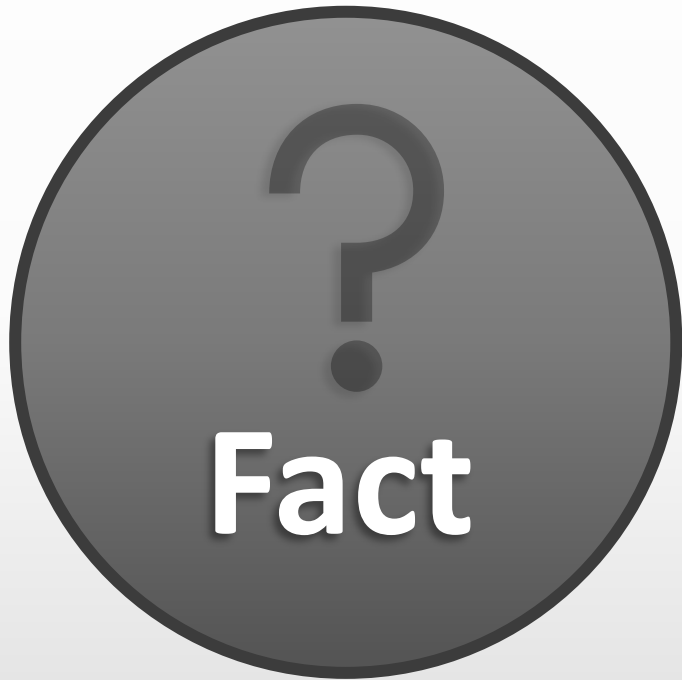
Acquitted
Criminal Conduct

Brett Herb is charged with one count of drug trafficking and one count of murder in aid of racketeering. He is convicted of drug trafficking but acquitted of the murder at trial.

Is the murder a fact to which the relevant conduct rules apply?

- A. Yes
- ✓ B. It Depends
- C. No





Standard of Proof



Burden of Persuasion



Criminal Conduct



Uncharged, Dismissed, and Acquitted Conduct

What's in the



General Overview

Essential Concepts



Relevant Conduct Rules

Section 1B1.3 (pp. 23–24)

Relevant Conduct
Instruction Manual



Unless Otherwise Specified...

§1B1.3(a)(1)(A)

Defendant's Conduct

§1B1.3(a)(1)(B)

Jointly Undertaken Criminal Activity

§1B1.3(a)(2)

“Expanded” Relevant Conduct

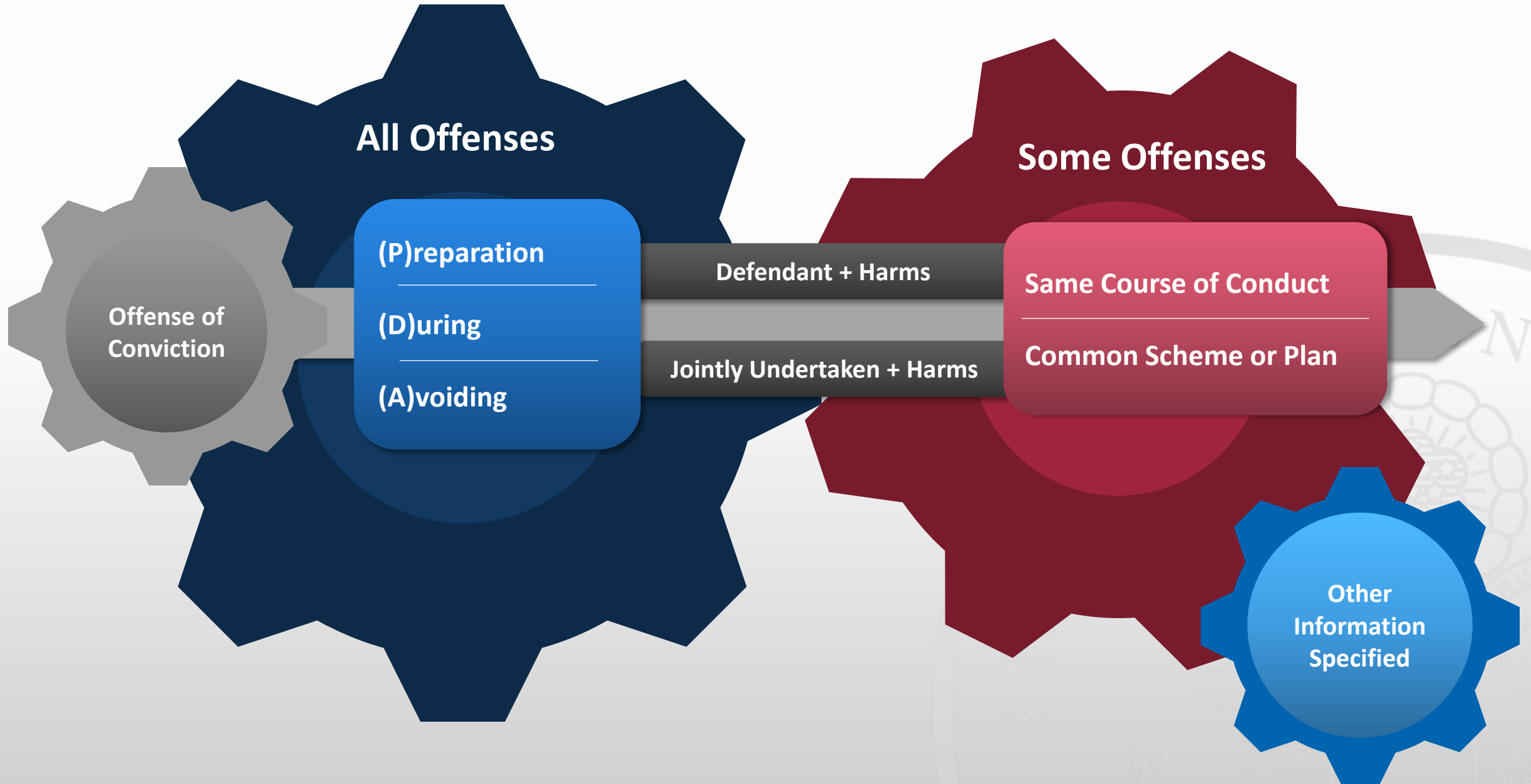
§1B1.3(a)(3)

Harms

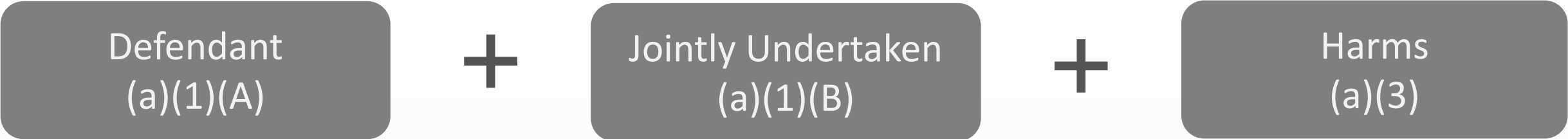
§1B1.3(a)(4)

Any Other Information

Relevant Conduct



Section 1B1.3 Overview



Essential Concepts for Relevant Conduct

PDA (Preparation, During, Avoiding)

Jointly Undertaken Criminal Activity

When Relevant Conduct “Expands”

Same Course of Conduct

Common Scheme or Plan



Connecting Acts to the Offense of Conviction for All Offense Types

All
Offenses

(a)(1):

(P)reparation

(D)uring

(A)voiding

STATES

E PLURIBUS

UNUM

Sharyn Walton is convicted of one count of bank robbery. While fleeing from the robbery, Ms. Walton uses a gun to steal an occupied vehicle.

Is the carjacking relevant conduct under §1B1.3(a)(1)(A)?

- ✓ A. Yes
- B. No



In addition to the first bank robbery, Sharyn Walton committed a second, uncharged bank robbery. During the second robbery, Ms. Walton punched one of the customers, causing the customer bodily injury. No one suffered bodily injury during the first bank robbery, which resulted in a conviction.

Is the customer's bodily injury relevant conduct under §1B1.3(a)(1)(A) ?

A. Yes

B. No



The defendant pleaded guilty to one count of production of child pornography. The indictment identified a single image of a 17-year-old victim. One week after the crime charged in the indictment, the defendant produced an additional image of child pornography—this time with a 6-year-old victim.

Is the image of the 6-year-old victim, which the defendant produced, relevant conduct under §1B1.3(a)(1)(A)?

A. Yes

B. No



Jointly Undertaken Criminal Activity

Jointly Undertaken
(a)(1)(B)

+

Harms
(a)(3)

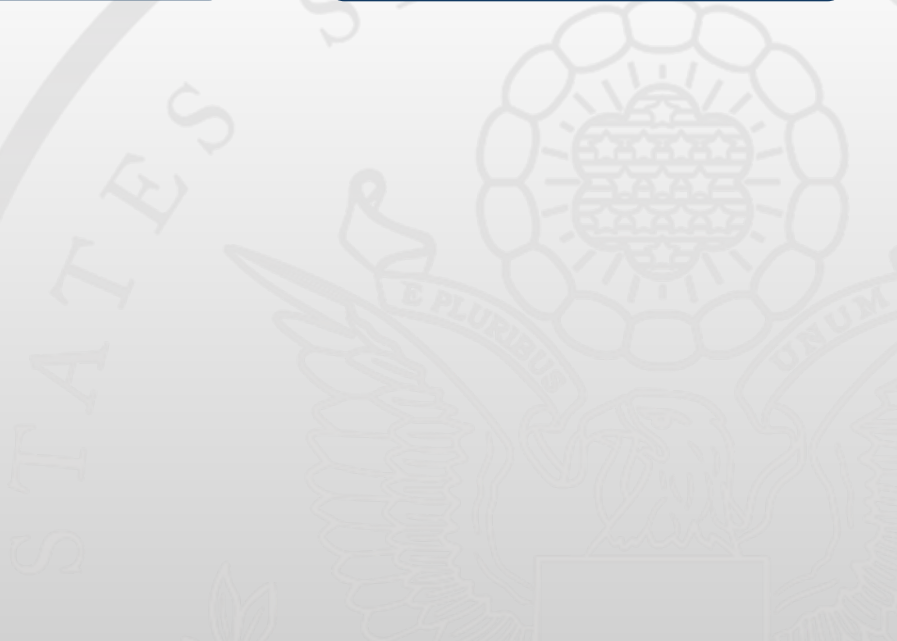
All
Offenses

(a)(1):

(P)reparation

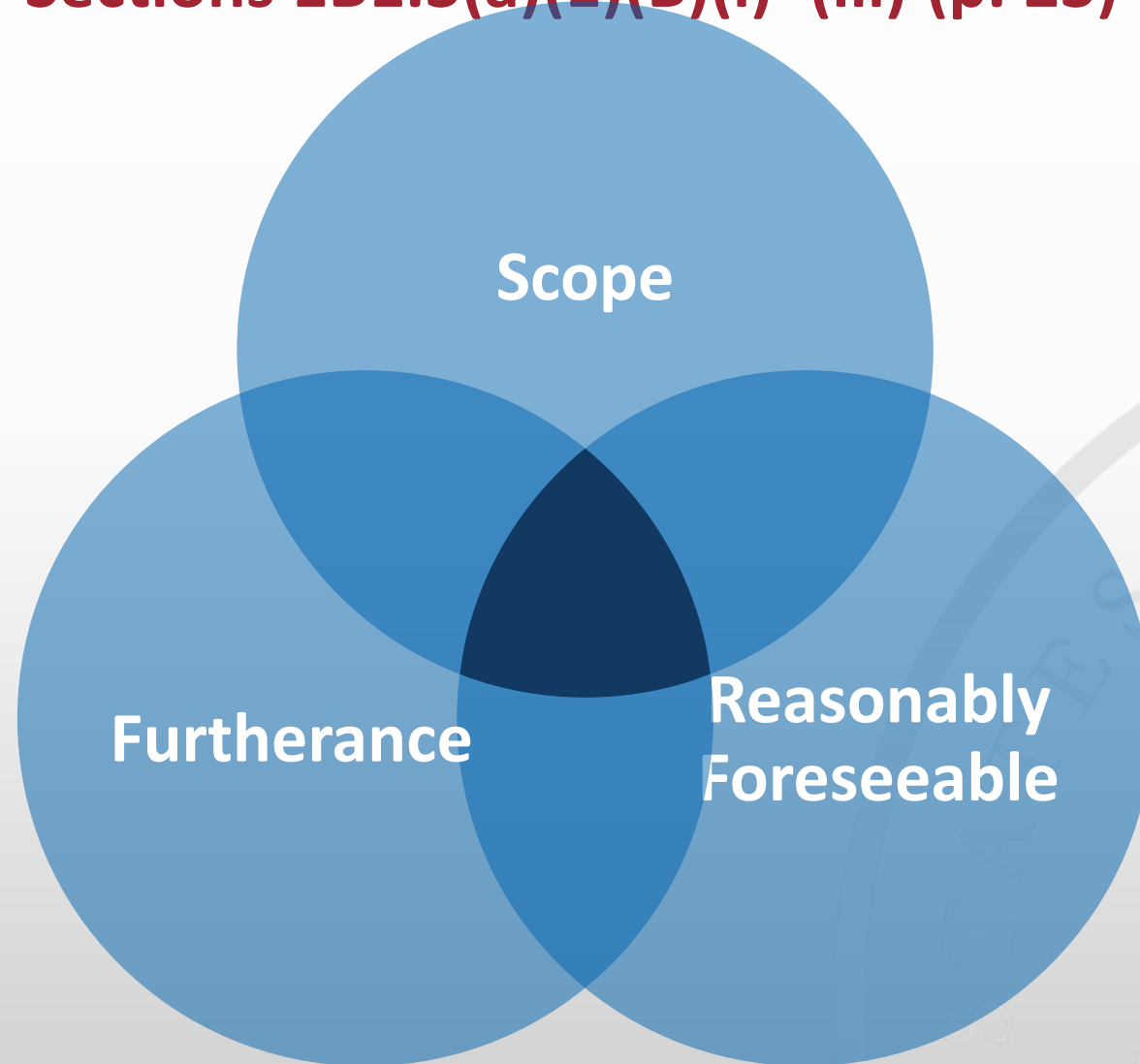
(D)uring

(A)voiding



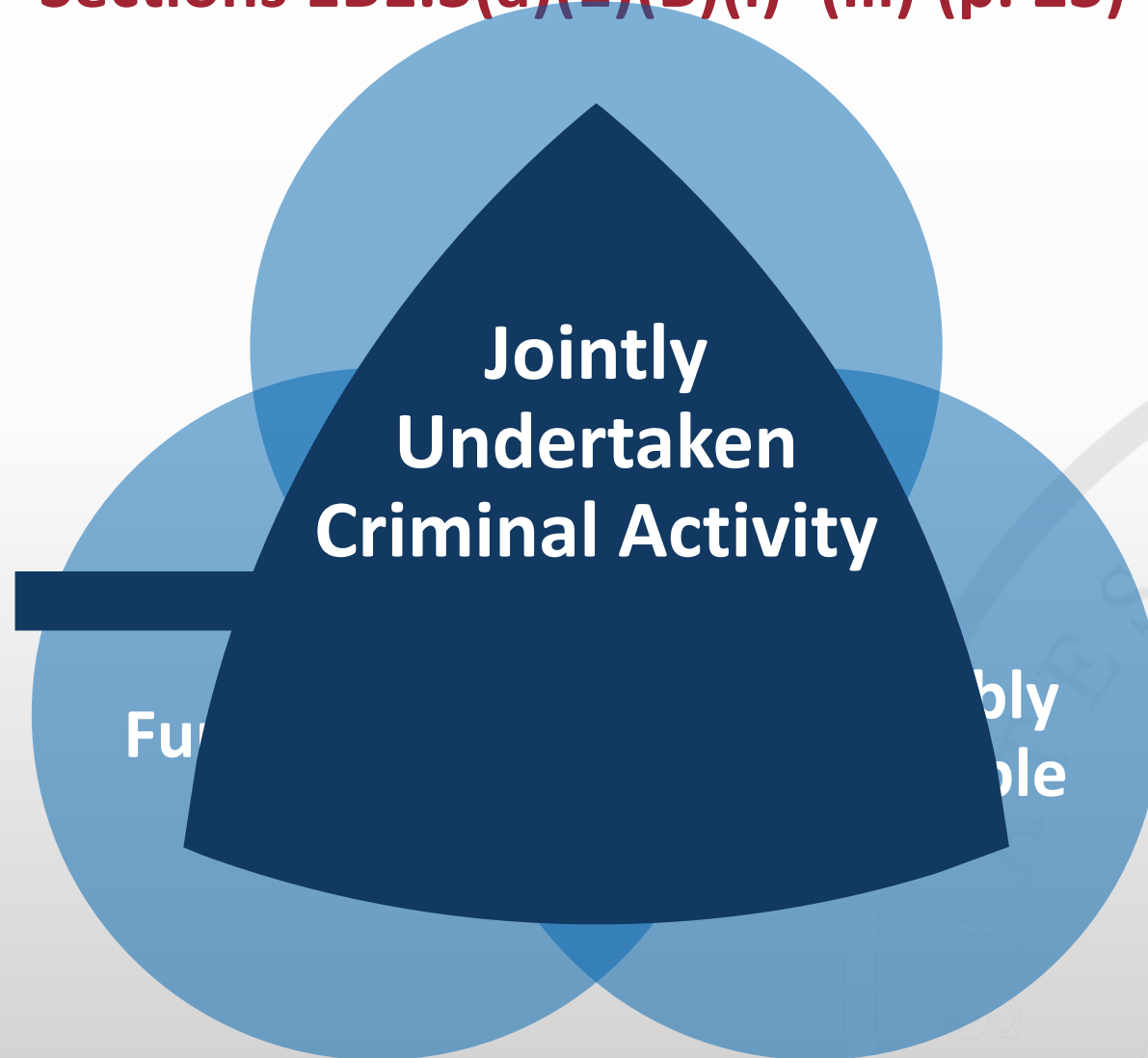
Jointly Undertaken Criminal Activity

Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



Jointly Undertaken Criminal Activity

Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



Kendall, Siobhan, and Roman Roy were each convicted of conspiracy to commit wire fraud. At sentencing, the court applied the same §2B1.1 loss amount to all three Roy siblings, reasoning only that “once you’re a part of the conspiracy, then you can be held liable for the acts of the other co-conspirators throughout the duration of the conspiracy.”

Did the district court apply the correct analysis?

- A. Yes
- B. No



Imagine that Siobhan Roy is aware of Kendall and Roman Roy's conspiracy from the start, but Siobhan does not actively participate in the conspiracy until her brothers ask her to call up an old "friend." She agrees to help them defraud the "friend" but says she won't help them defraud anyone else.

Is Siobhan's loss amount limited to the losses suffered by the "friend" or all losses suffered by all victims of the wire fraud conspiracy?

- A. All Losses
- ✓ B. Losses Suffered by "Friend"



Bonnie and Clyde agree to commit a bank robbery. During the robbery, Bonnie assaults and injures a customer. Clyde, who played the role of getaway driver, was unaware of the victim's injury and even told Bonnie not to lose her temper and hurt any innocent bystanders.

Is Clyde responsible for the victim's injury?

- ✓ A. Yes
- B. No



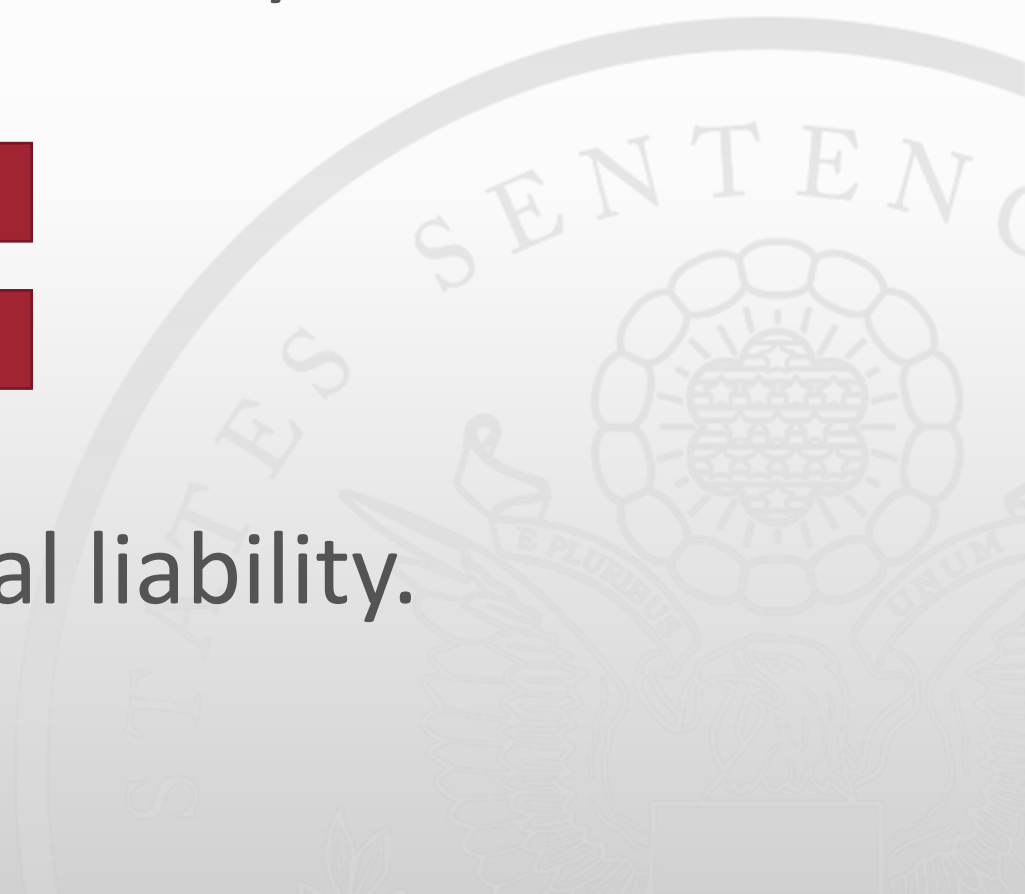
Relevant Conduct

Section 1B1.3, App. Note 1 (p. 24)

Sentencing accountability is



the same as criminal liability.



Relevant Conduct & Conspiracy Law

“The advisory guidelines instruct—and this Court has **repeatedly held**—that the scope of relevant conduct with regard to the drug amounts involved in a conspiracy under § 1B1.3(a)(1)(B) is **‘significantly narrower’** than the conduct needed to obtain a conspiracy conviction.”

United States v. McReynolds, 964 F.3d 555 (6th Cir. 2020)

“[T]he scope of conduct for which a defendant can be held accountable under the sentencing guidelines is **significantly narrower** than the conduct embraced by the law of conspiracy.”

United States v. Perrone, 936 F.2d 1403 (2d Cir. 1991)

Tilda Silvia is convicted of conspiracy to distribute 1 kilogram of heroin. The conspiracy distributed 5 kilograms of heroin. Ms. Silvia knew about the entire scope of the conspiracy, but she only agreed to **distribute** 250 grams of heroin on three separate occasions.

What quantity of drugs will Ms. Silvia be held responsible for at §2D1.1(a)(5)?

- A. 250 grams
- ✓ B. 750 grams
- C. 1 kilogram
- D. 5 kilograms



Bright Line Rule

Section 1B1.3, App. Note 3(B) (p. 25)

Relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct.



Dr. McDreamy pleads guilty to a conspiracy involving the submission of false claims to Medicare. The conspiracy operated for three years. During Year 1, McDreamy was unaware of its existence. During Year 2, McDreamy learned about the conspiracy's illegal activity. During Year 3, McDreamy began participating in the conspiracy.

Dr. McDreamy's loss calculation begins during which year?

- A. Year 1
- B. Year 2
- C. Year 3



“Expanded” Relevant Conduct

Defendant
(a)(1)(A)

+

Jointly Undertaken
(a)(1)(B)

+

Harms
(a)(3)

Some
Offenses (a)(2):

Same Course of Conduct / Common Scheme or Plan

When Does Relevant Conduct Expand?



Aggregate Harm Cases



Physical Harm Cases



Kurt Frankie pleaded guilty to one count of assault on Officer 1 for his activities related to January 6. The assault for that conviction is not an aggravated assault. Mr. Frankie, however, assaulted Officer 2 by strangling him, which meets the guidelines definition of aggravated assault.

There is a cross reference in the assault guideline to aggravated assault. Can you apply this cross reference based on the aggravated assault to Officer 2?

A. Yes

B. No



Offenses Excluded at §3D1.2(d)

Section 3D1.2(d) (p. 367)

Robbery | §2B3.1

Extortion | §2B3.2

Murder | §2A1.1

Kidnapping | §2A4.1

Assault | §2A2.3

Aggravated Assault | §2A2.2

Blackmail | §2B3.3

Criminal Sex Abuse | §2A3.1

Burglary | §2B2.1

Recall this earlier scenario: “The defendant pleaded guilty to one count of production of child pornography. The indictment identified a single image of a 17-year-old victim. One week after the crime charged in the indictment, the defendant produced an additional image of child pornography—this time with a 6-year-old victim.”

Is the image of the 6-year-old victim, which the defendant produced, “expanded” relevant conduct under §1B1.3(a)(2)?

A. Yes

B. No



Darby Christen is convicted of one count of possession of a stolen firearm. The investigation revealed that Mr. Christen also possessed a machine gun.

Can you use the expanded relevant conduct rules to determine whether the machine gun is relevant conduct?

- ✓ A. Yes
- B. No



Offenses Included at §3D1.2(d)

Section 3D1.2(d) (p. 367)

Drugs | §2D1.1

Possession or Distribution of
Child Pornography | §2G2.2

Fraud | §2B1.1

Alien Smuggling | §2L1.1

Firearms | §2K2.1

Money Laundering | §2S1.1

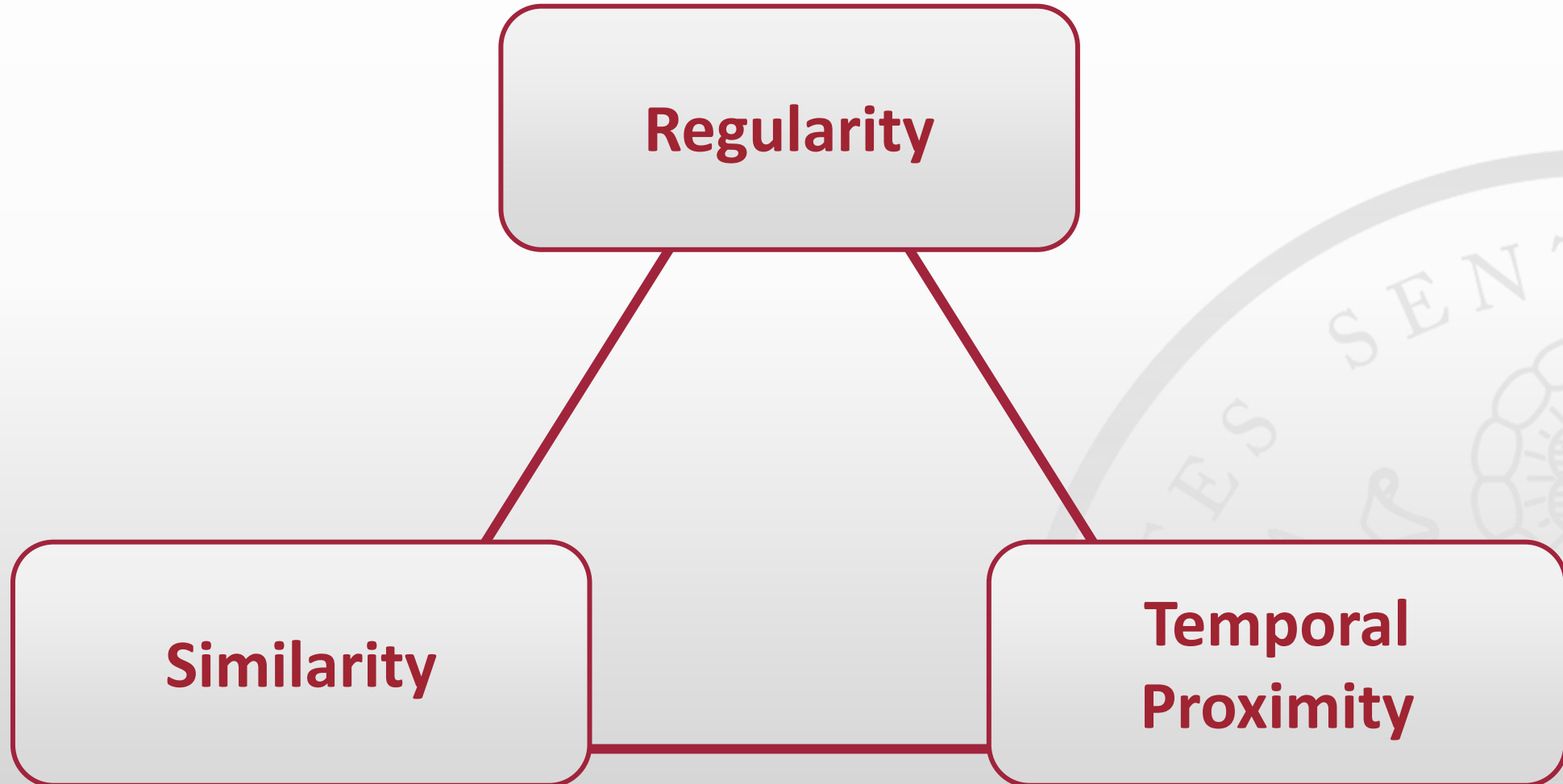
Bribery | §2C1.1

Tax Offenses | §2T1.1

Counterfeiting | §2B5.3

Same Course of Conduct

Section 1B1.3(a)(2), App. Note 5(B)(ii) (p. 30)



Recall the prior scenario: “Darby Christen is convicted of one count of possession of a stolen firearm. The investigation revealed that Mr. Christen also possessed a machine gun.”

If Mr. Christen possessed that single machine gun 18 months before the instant offense, is the machine gun expanded relevant conduct?

A. Yes

B. No



Keenan Rollerson was convicted of unlawful possession with intent to distribute heroin. The heroin was discovered during a consent search of Rollerson's stash house. Law enforcement also discovered fentanyl, cocaine, and tramadol at the stash house. Further, in the weeks leading up to the offense of conviction, law enforcement conducted four controlled purchases, two involving heroin and two involving fentanyl, all of which were conducted at the stash house.

Which of the following facts are relevant conduct to the offense of conviction?

- A. Stash House Drugs
- B. Controlled Purchases
- ✓ C. Both
- D. Neither



Pablo Escobar was convicted of conspiracy to traffic large quantities of cocaine. The charged cocaine conspiracy took place between 2018 and 2020. Pablo also was a low-level heroin courier, in a different conspiracy, involving different coconspirators, that began and ended in 2016. No charges were ever brought as to the 2016 heroin conspiracy.

Does Pablo's relevant conduct include 2016 heroin conspiracy?

- A. Yes
- B. No



Common Scheme or Plan

Section 1B1.3(a)(2), App. Note 5(B)(i) (p. 29)

Other Offense



Conviction

Victims

Accomplices

Purpose

Modus Operandi

Moira Rose was convicted of conspiracy to commit wire fraud. Mrs. Rose was the leader of the conspiracy, which took place between 2018 and 2020 and involved selling counterfeit wigs on the internet. In 2015, Mrs. Rose embezzled money from the Rosebud Motel where she worked the front desk. No charges were ever brought as to her embezzlement.

Does Mrs. Rose's relevant conduct include her embezzlement?

- A. Yes
- B. No



Don Siegelman, a former Alabama Governor, was charged with two counts of honest services fraud (§2C1.1). Count 1 involved a pay-for-play agreement wherein Individual 1 paid Siegelman money to be appointed to a state healthcare board. Count 2 also involved a pay-for-play agreement where Individual 2 gave Siegelman money for government actions that benefited Individual 2's businesses. Siegelman was convicted of Count 1 but acquitted of Count 2. Siegelman was assisted by Nick Bailey, his assistant in both schemes, which deprived Alabama citizens of honest services and was intended to enrich and empowered Siegelman.

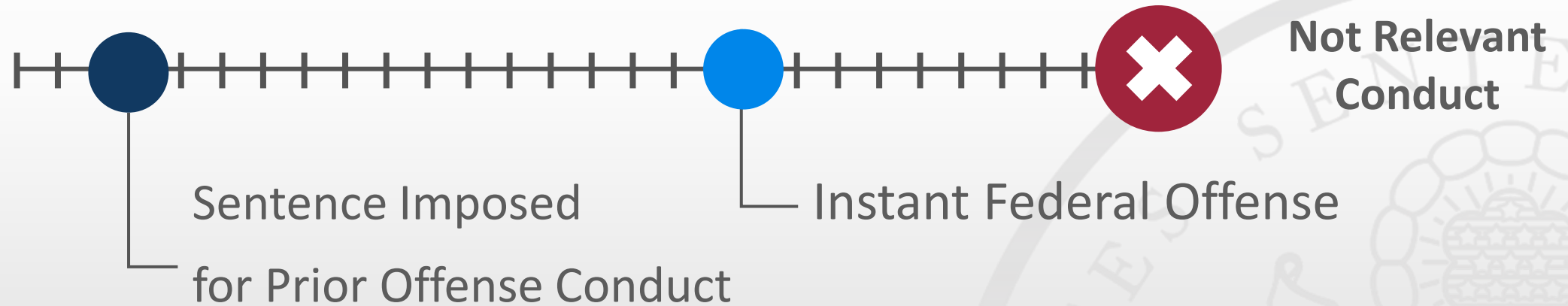
Does Siegelman's relevant conduct include Count 2 if proven by a preponderance?

- ✓ A. Yes
- B. No



Conduct Associated with a Prior Sentence

Section 1B1.3, App. Note 5(C) (p. 30)



Lily Connie is convicted of one count of conspiracy to distribute fentanyl from January 2021 to December 2021, during which she regularly distributed fentanyl. Ms. Connie has a prior state conviction for selling fentanyl. The conduct underlying that state conviction took place in December 2020, and she was sentenced in March 2021.

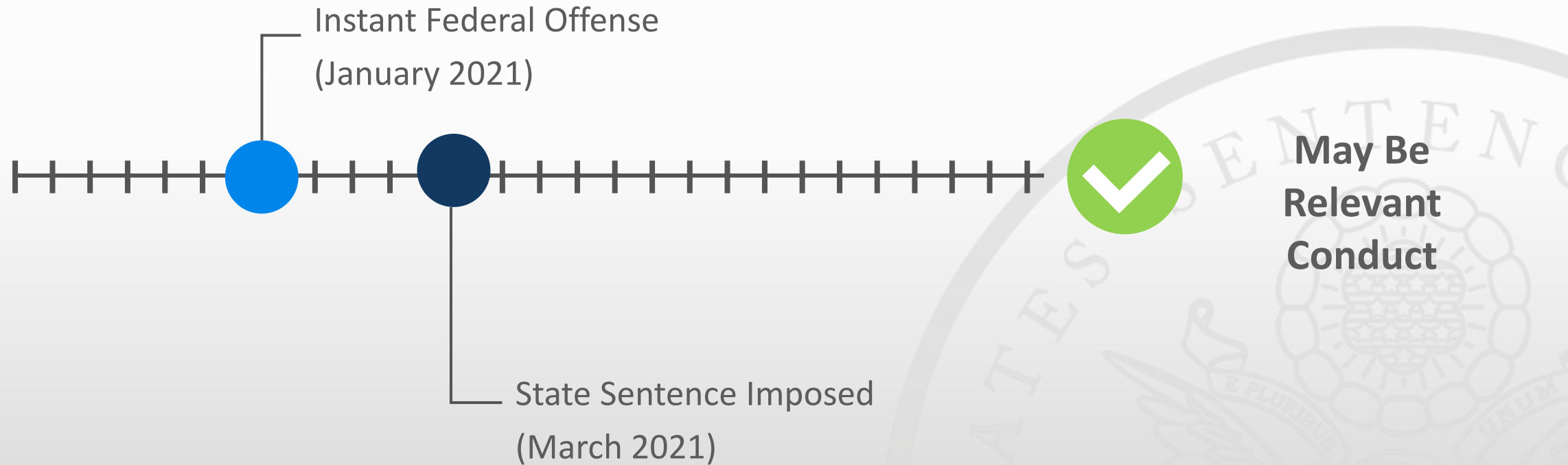
Is the prior state conviction relevant conduct or criminal history?

- ✓ A. Relevant Conduct
- B. Criminal History



Conduct Associated with a Prior Sentence

Section 1B1.3, App. Note 5(C) (p. 30)



Lily Connie is convicted of one count of conspiracy to distribute fentanyl from January 2021 to December 2021, during which she regularly distributed fentanyl. Ms. Connie has a prior state conviction for selling fentanyl. The conduct underlying that state conviction took place in March 2020, and she was sentenced in December 2020.

Is the prior state conviction relevant conduct or criminal history?

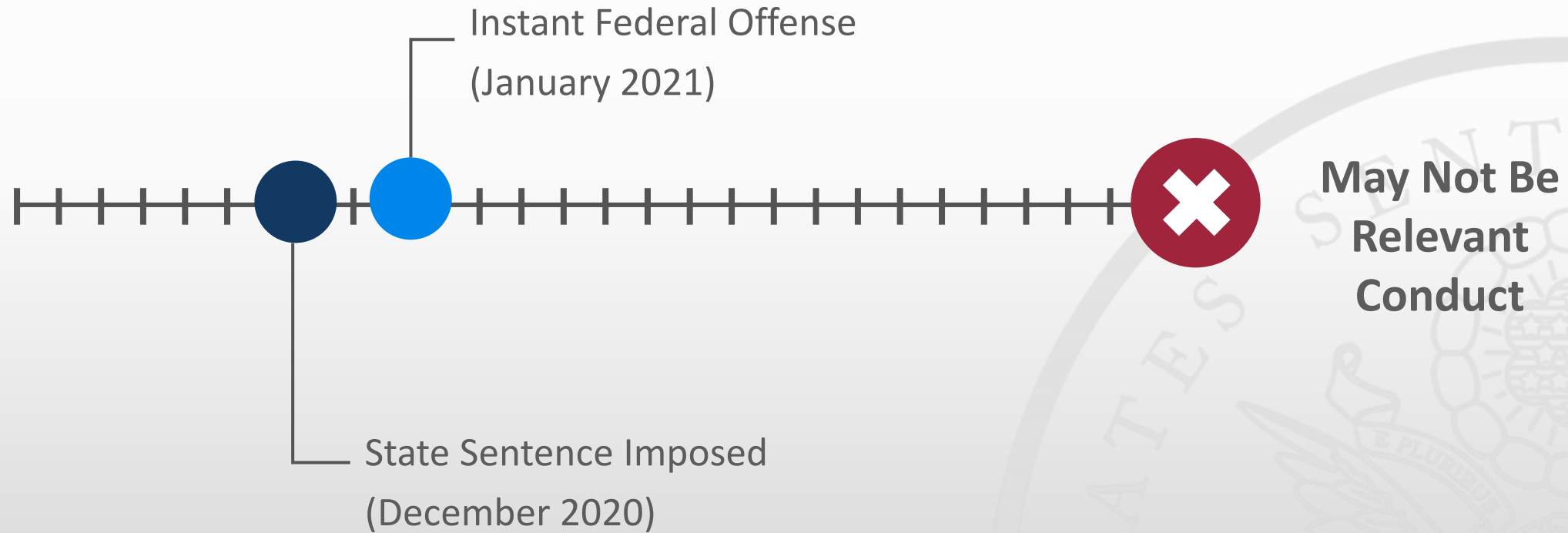
A. Relevant Conduct

✓ B. Criminal History



Conduct Associated with a Prior Sentence

Section 1B1.3, App. Note 5(C) (p. 30)



Essential Concepts for Relevant Conduct



PDA (Preparation, During, Avoiding)



Jointly Undertaken Criminal Activity



When Relevant Conduct “Expands”



Same Course of Conduct



Common Scheme or Plan



Relevant Conduct
Analysis

Advanced Concepts for Relevant Conduct

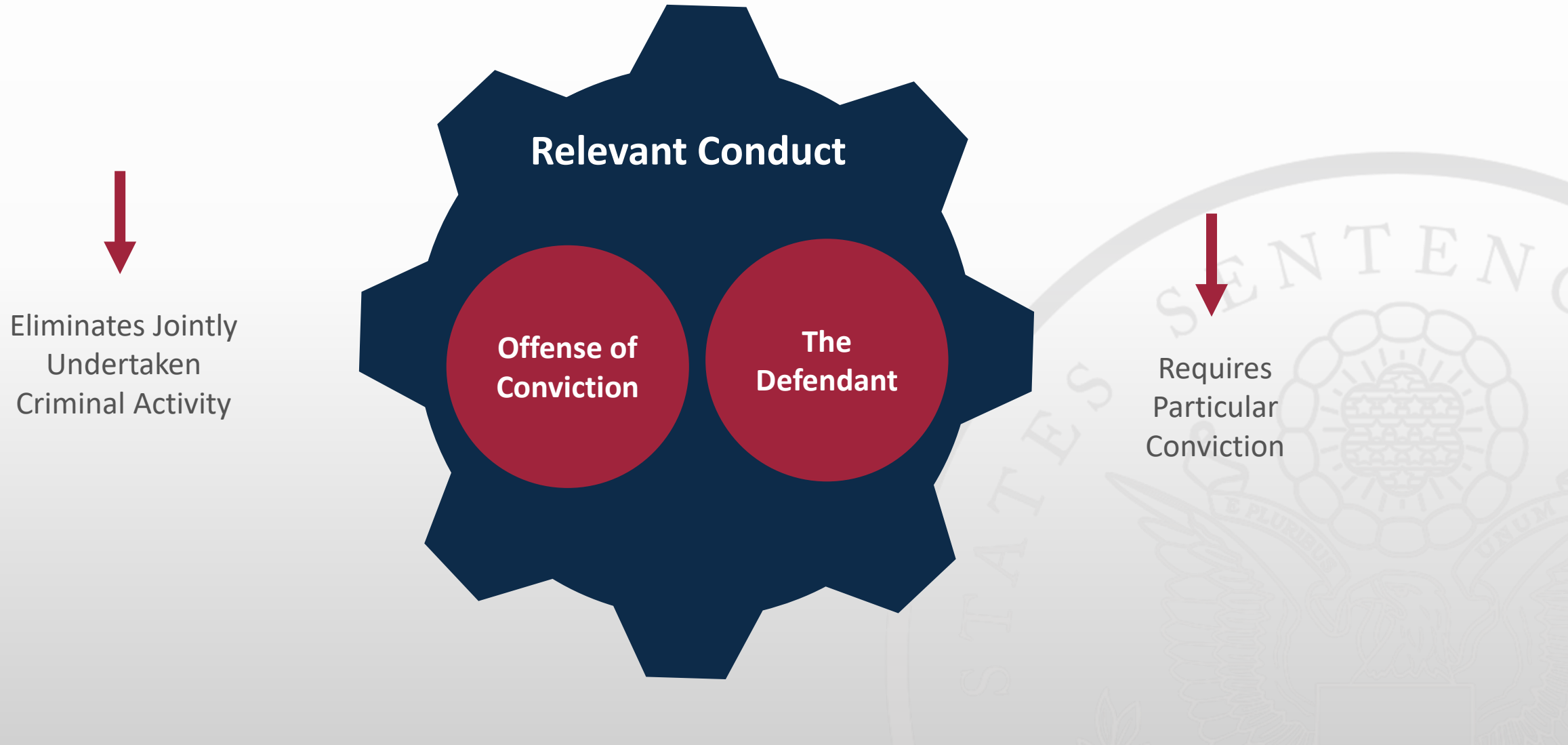
Relevant Conduct Exceptions (Introductory Clause)

Section (a)(4) Relevant Conduct



Relevant Conduct Exceptions

Introductory Clause (p. 23)



Kelly Stueben pleaded guilty to one count of distribution of fentanyl. The offense of conviction does not charge death or serious bodily injury resulting, but the government has proven, by a preponderance of the evidence, that the fentanyl buyer died from a fentanyl overdose after taking the fentanyl sold by Ms. Stueben.

Does the BOL at §2D1.1(a)(2), which requires that “the offense of conviction established that death or serious bodily injury result from the use of the substance” apply?

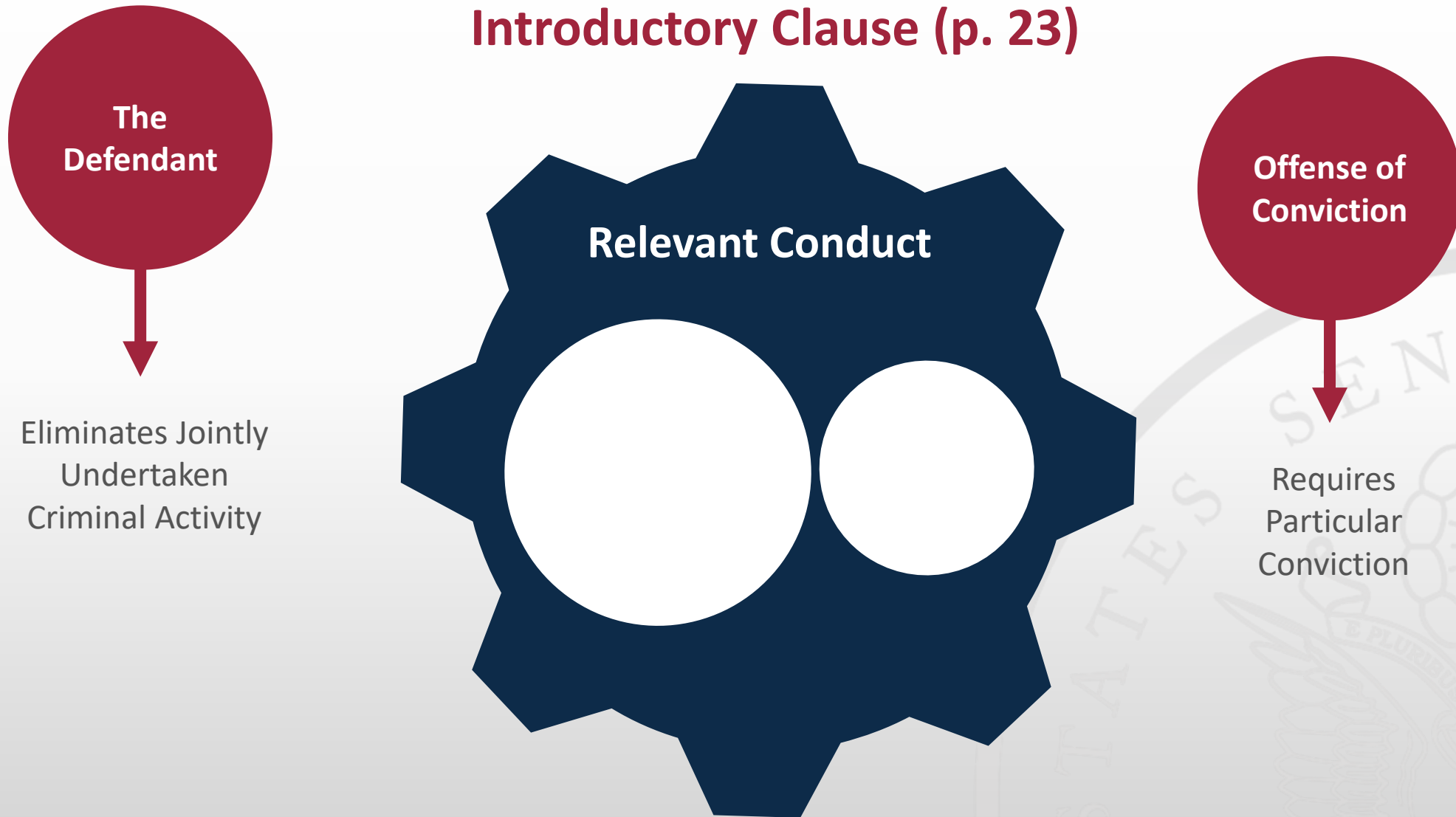
A. Yes

B. No



Relevant Conduct Exceptions

Introductory Clause (p. 23)



**The
Defendant**

Eliminates Jointly
Undertaken
Criminal Activity

Relevant Conduct

**Offense of
Conviction**

Requires
Particular
Conviction

Factors Requiring Conviction Under a Specific Statute

Section 1B1.3, App. Note 7 (p. 31)

**Offense of
Conviction**

Includes:

Conspiracy

Attempt

Solicitation

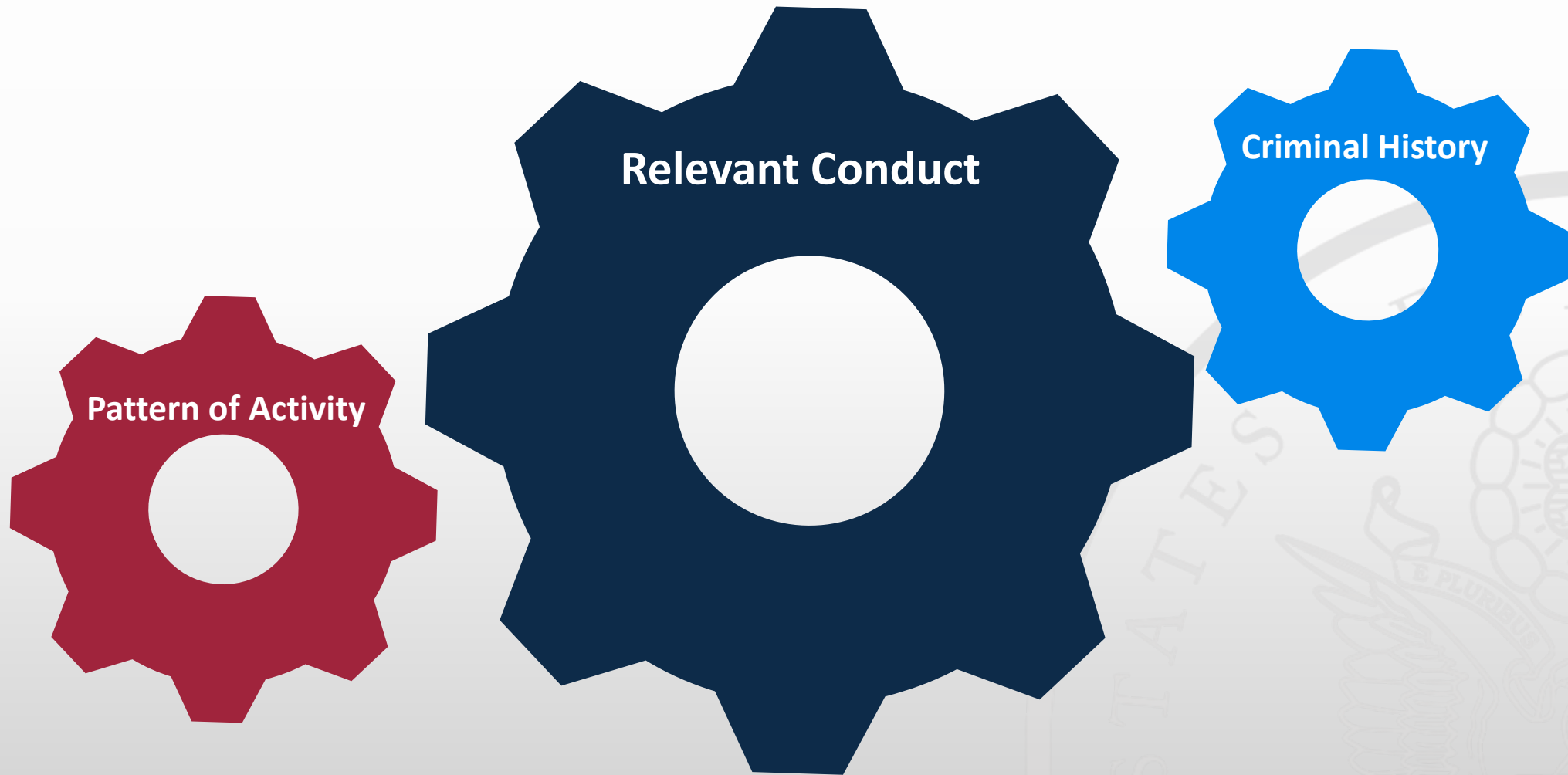
Aiding and Abetting

Accessory after the Fact

Misprision

Other Information Specified

Section 1B1.3(a)(4) (p. 24)



The defendant is convicted of one count of possession of child pornography. Twenty years before the offense took place, the defendant sexually abused two different minors on two different occasions.

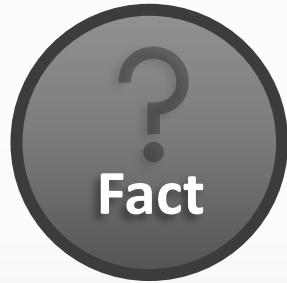
Does the pattern-of-activity enhancement apply even though the sexual abuse is neither same course of conduct nor common scheme or plan?

- ✓ A. Yes
- B. No



Learning Outcomes

You should now be able to:



Determine whether something is a fact to which the relevant conduct rules apply; and



Apply the relevant conduct rules to those facts, focusing on:

- Jointly Undertaken Criminal Activity;
- “Expanded” Relevant Conduct; and
- Advanced Relevant Conduct Principles.

Questions?



www.ussc.gov



[@theusscgov](https://twitter.com/theusscgov)



HelpLine | (202) 502-4545



training@ussc.gov