

Advanced Guideline Application Issues

USSC National Seminar

Philadelphia, PA

Wednesday, September 17, 2014

4:15-5:30 p.m.

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Beyond Basics

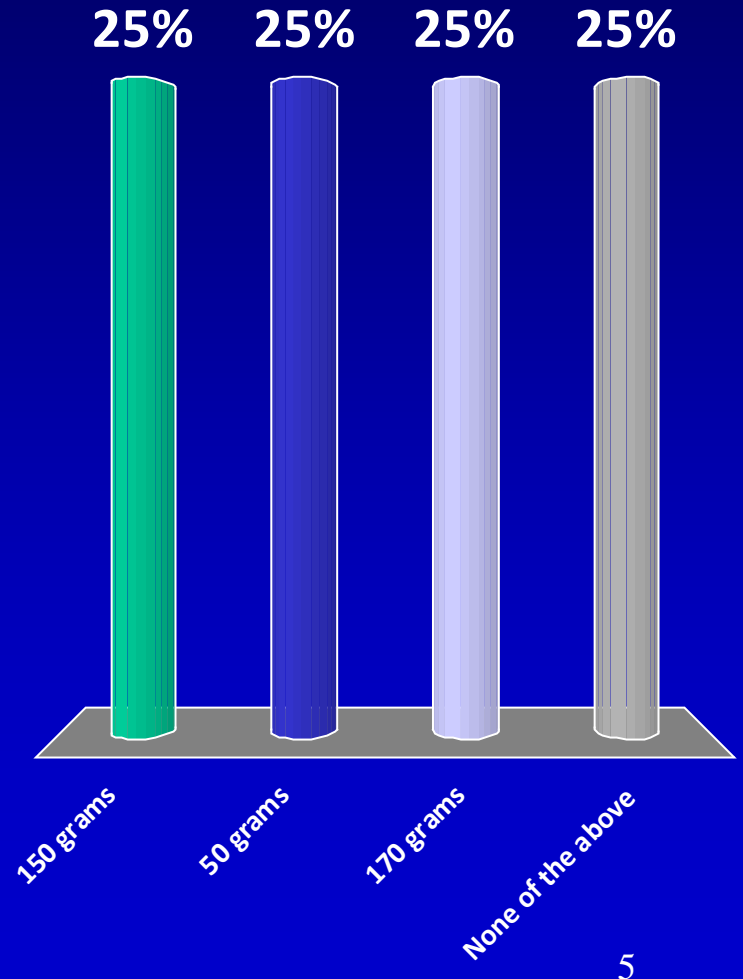
Got It?
or
Gotcha?

#1

- Conviction: Drug conspiracy (12/1/13 – 4/1/14)
- Indictment cites 3 crack deliveries defendant made from Philly to NY
 - December 28, 2014 – 50 grams
 - February 9, 2014 – 50 grams
 - March 2, 2014 – 50 grams
- Defendant delivered 20 grams of crack from Philly to Newark 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. 170 grams
- D. None of the above



§1B1.3(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**

§1B1.3(a)(2)

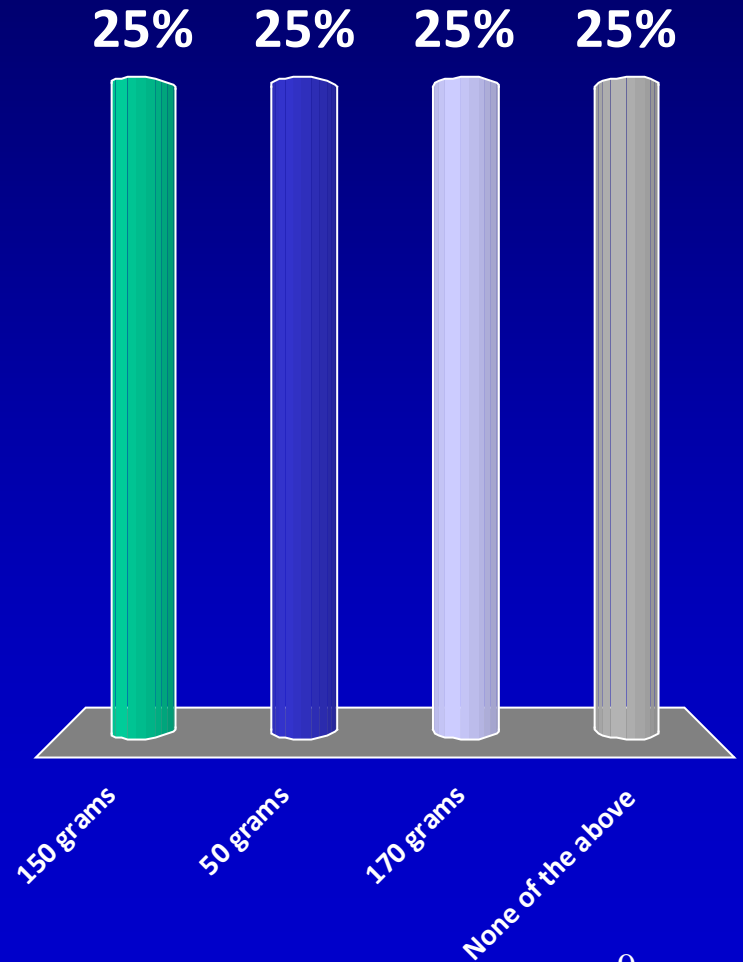
Application Note 8

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, 2014 – 50 grams
 - February 9, 2014 – 50 grams
 - March 2, 2014 – 50 grams
- Indictment also cites crack delivery from Philly to Newark 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. 170 grams
- D. None of the above



Conduct Charged in the Instant Offense of Conviction and Prior Sentences

§1B1.3, App. Note 8

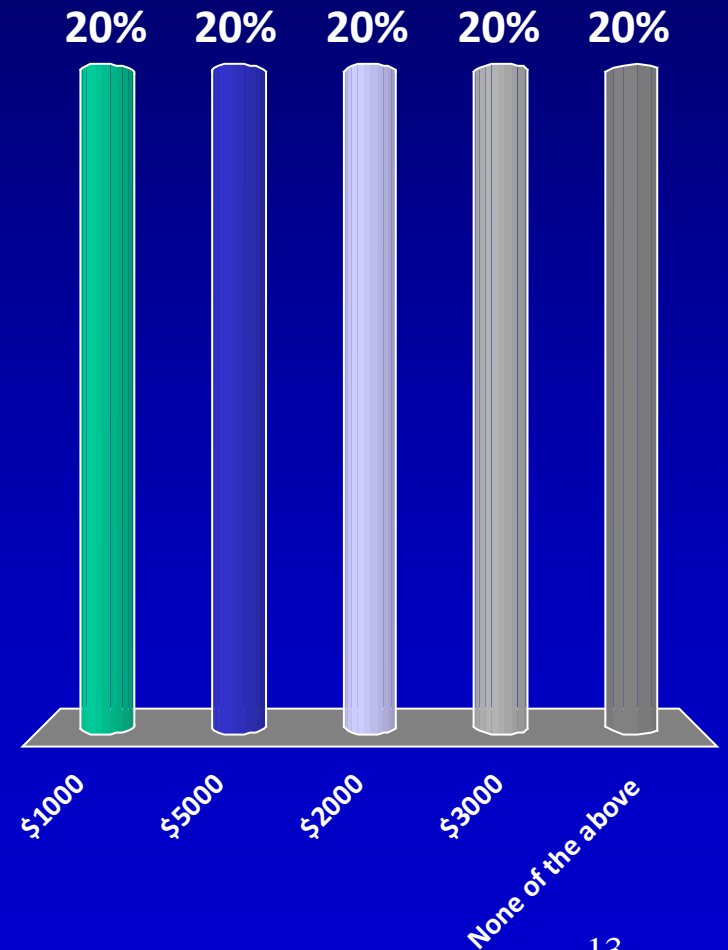
- Conduct associated with a previously imposed sentence expressly charged in the instant offense of conviction will be considered relevant conduct under §1B1.3(a)(1), unless otherwise provided
 - When such conduct is not expressly charged, look to App. Note 8 regarding the §1B1.3(a)(2) determination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

#2

- Defendant is bank teller convicted of one count of embezzlement
- On 5 occasions, defendant stole \$1000 from the deposits he received
- Defendant's employer approached him and inquired why the deposits were not balanced
- Defendant then returned \$3000 of the deposits he unlawfully took

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

- A. \$1000
- B. \$5000
- C. \$2000
- D. \$3000
- E. None of the above



Loss Table

§2B1.1(b)(1)

(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14

“Loss”

Application Note 3(A)

Use greater of:

“actual” or “intended” loss

“Actual Loss”

Application Note 3(A)(i)

Reasonably foreseeable pecuniary harm
that resulted from the offense

Causation standard:

“but for” and “reasonably foreseeable”

“Intended Loss”

Application Note 3(A)(ii)

- The pecuniary harm that was intended to result from the offense
- Includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, government sting)

Exclusions from “Loss”

Application Note 3(D)

Loss does not include:

- emotional stress
- harm to reputation
- other non-economic harms
- costs to government or victims for investigation or prosecution
- interest

Credits Against Loss

Application Note 3(E)

Loss may be reduced by:

- certain benefits transferred
- collateral pledged

to the victim prior to the detection of the offense

Valuation and Timing of Credits

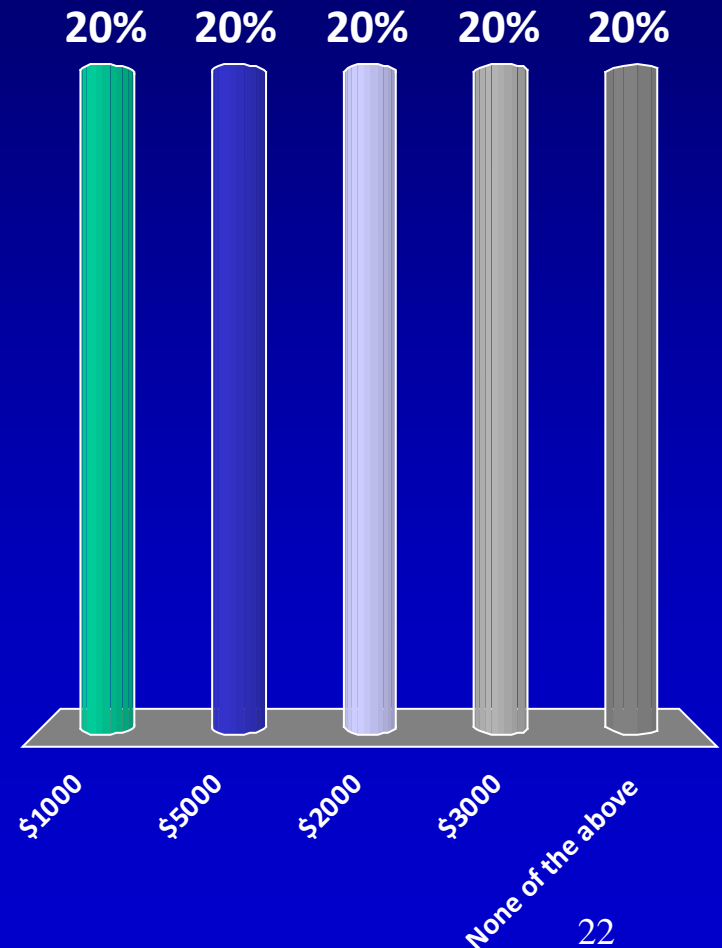
Application Note 3(E)

- Transferred benefits:
 - *Fair market value* of services or property returned as of date of detection of offense
- Pledged collateral:
 - *Amount recovered* upon disposition;
 - If not disposed, *fair market value* as of date of sentencing

- Defendant is bank teller convicted of one count of embezzlement
- On 5 occasions, defendant stole \$1000 from the deposits he received
- Defendant's employer approached him and inquired why the deposits were not balanced
- Defendant then returned \$3000 of the deposits he unlawfully took

What is the amount of restitution for which you would hold the defendant accountable?

- A. \$1000
- B. \$5000
- C. \$2000
- D. \$3000
- E. None of the above



#3

- Conviction: Distribution of Meth within 1000 feet of a school
- Defendant distributed 15 grams of meth on 10 occasions (total: 150 grams)
- On one occasion, the defendant carried a firearm during the distribution

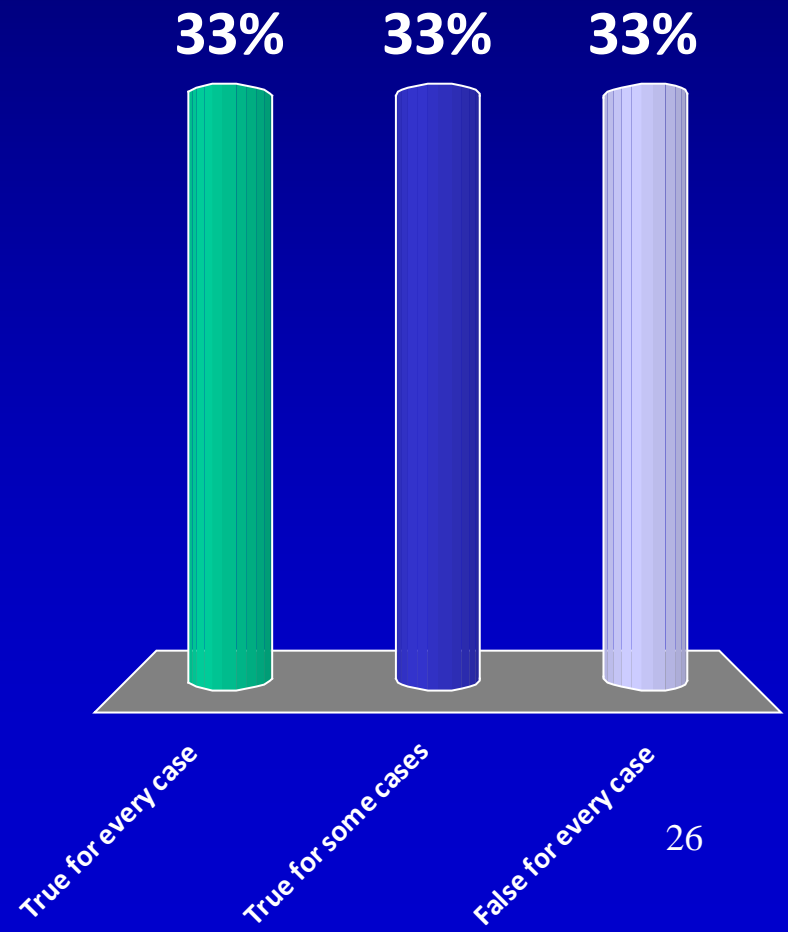
§2D1.2

(a) Base Offense Level (Apply the greatest):

- 1) 2 plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
- 2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
- 3) 26, if the offense involved a person less than eighteen years of age; or
- 4) 13, otherwise.

When applying §2D1.2, only the drug quantity table is only used to determine the BOL (a)(1) &(a)(2).

- A. True for every case
- B. True for some cases
- C. False for every case



References to Other Offense Guidelines

§1B1.5(b)(1) & App. Note 1

An instruction to use the offense level from another Chapter Two guideline means the offense level from the *entire* offense guideline

- Base offense level
- Specific offense characteristics
- Cross references
- Special instructions

Unless there is a direction to use only a specific subsection, *e.g.*, use of a table

§2D1.2

(a) Base Offense Level (Apply the greatest):

- 1) 2 plus the offense level from §2D1.1 applicable to the quantity of controlled substances directly involving a protected location or an underage or pregnant individual; or
- 2) 1 plus the offense level from §2D1.1 applicable to the total quantity of controlled substances involved in the offense; or
- 3) 26, if the offense involved a person less than eighteen years of age; or
- 4) 13, otherwise.

#4

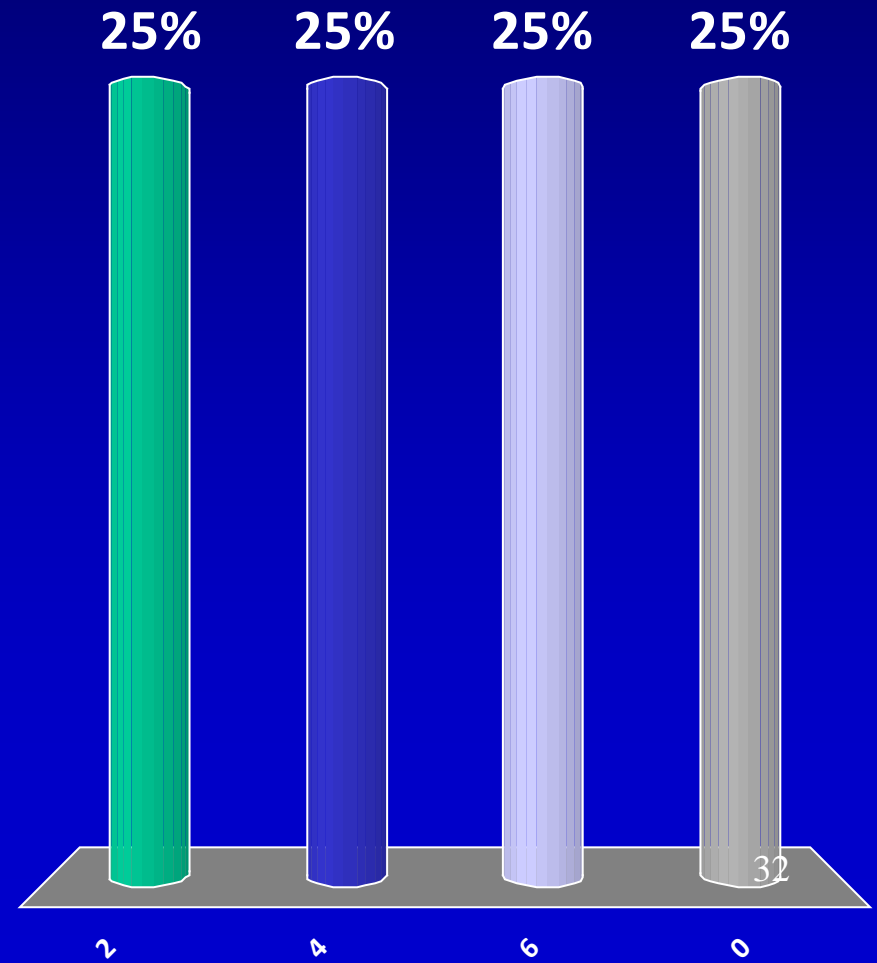
- Defendant is convicted of being a felon in possession
- Defendant was pulled over for DUI. Upon search of the vehicle, police discovered a stolen firearm with an obliterated serial number

§2K2.1

(b)(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

At §2K2.1, how many offense levels will be added to account for the stolen gun and obliterated serial number?

- A. 2
- B. 4
- C. 6
- D. 0

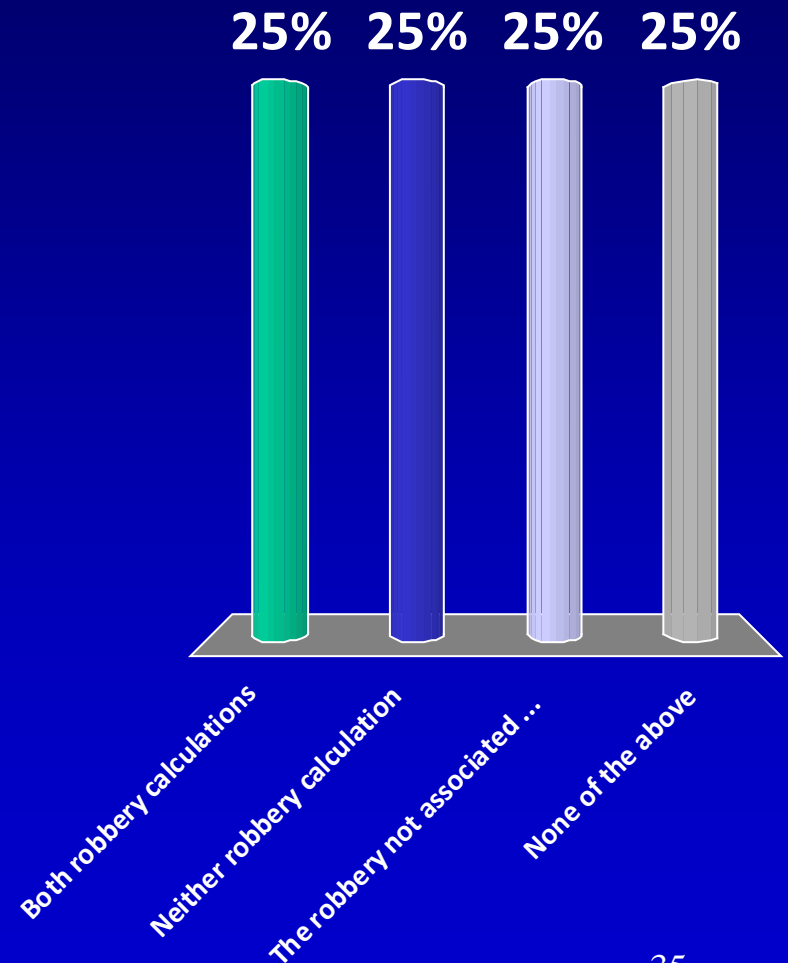


#5

- Defendant is convicted two counts of bank robbery and one count of 18 U.S.C. § 924(c)
- The gun in the 924(c) count was used in the robbery of Bank A.
- Defendant was also in possession of a firearm during the robbery of Bank B.

The SOC for possession of a firearm at §2B3.1 (Robbery) will apply in...

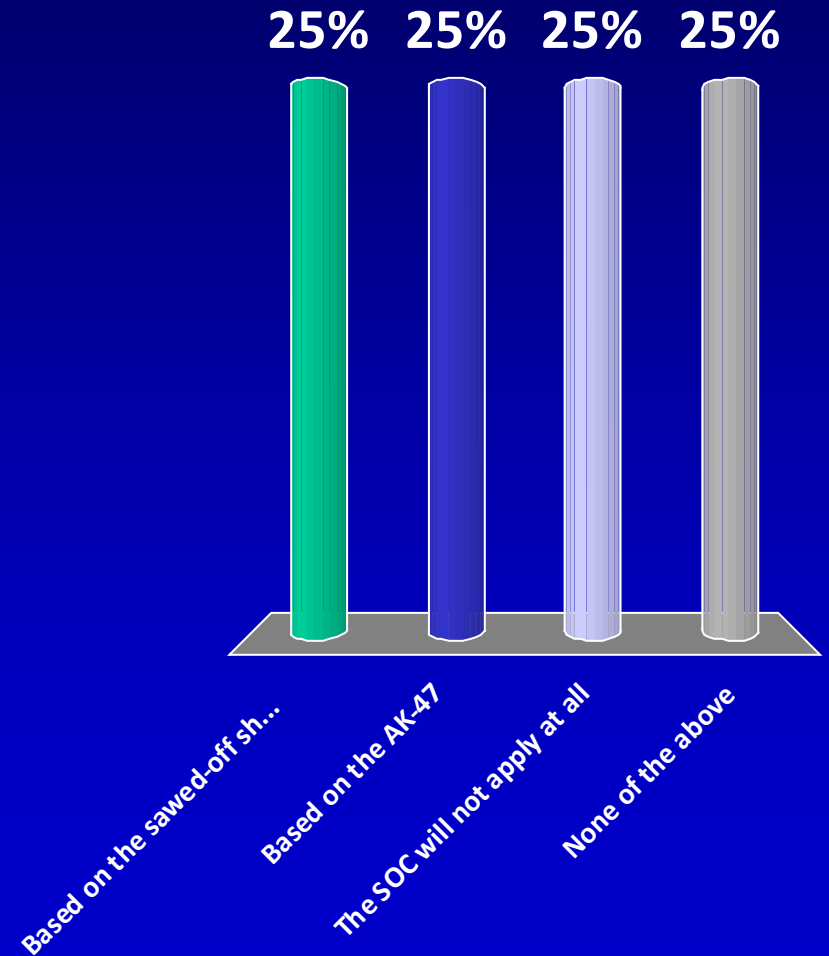
- A. Both robbery calculations
- B. Neither robbery calculation
- C. The robbery not associated with the 924(c)
- D. None of the above



- Defendant is convicted one count of PWID cocaine and one count of 18 U.S.C. § 924(c)
- The gun in the 924(c) count is a sawed-off shotgun
- Defendant also possessed an AK-47 in connection with the drug trafficking offense

The SOC for possession of a firearm at §2D1.1 (Drugs) will apply...

- A. Based on the sawed-off shotgun
- B. Based on the AK-47
- C. The SOC will not apply at all
- D. None of the above



§2K2.4, Application Note 4

If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.

§2K2.4, Application Note 4

A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

#6

- Defendant pled guilty to one count of money laundering (18 U.S.C. § 1956 – statutory maximum penalty 20 years)
- Defendant laundered \$100,000 – the funds derived from his mortgage fraud scheme
- §2S1.1(Money Laundering) directs application of the guideline for the underlying offense from which the funds were derived

Alternative Base Offense Levels

§2B1.1(a)

BOL 7, if

- Stat. max. of 20 years or more

AND

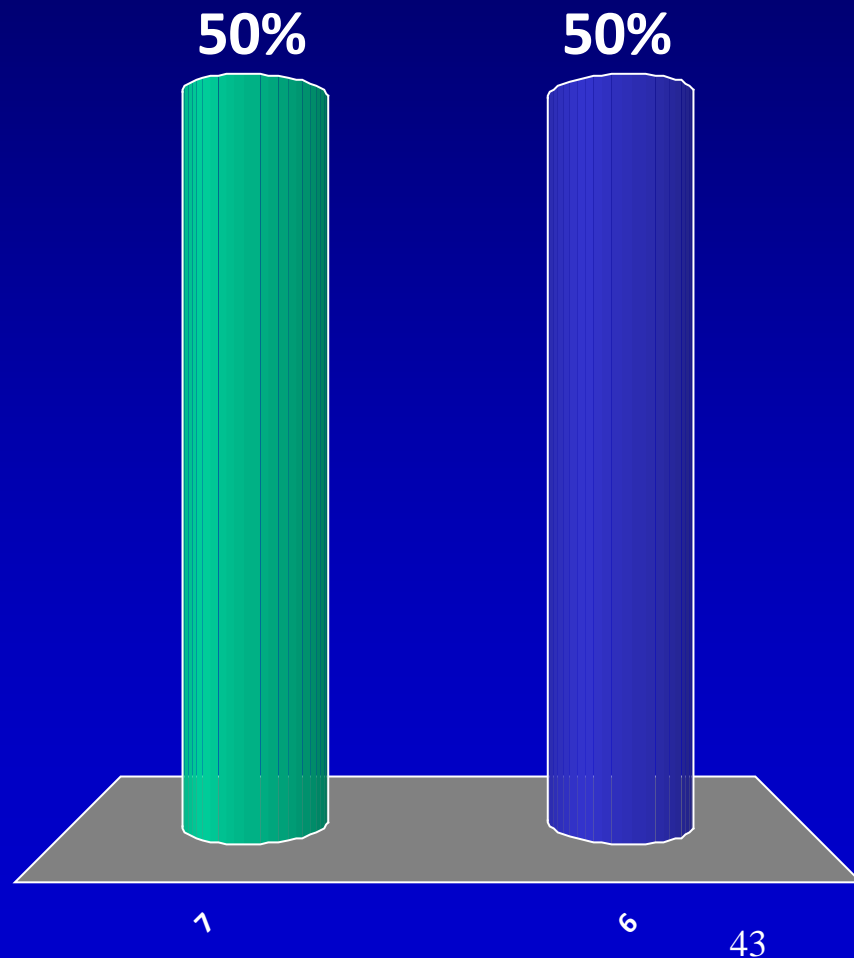
- Referenced by Appendix A or §2X1.1

BOL 6, otherwise

The BOL at §2B1.1 for this defendant is:

A. 7

B. 6

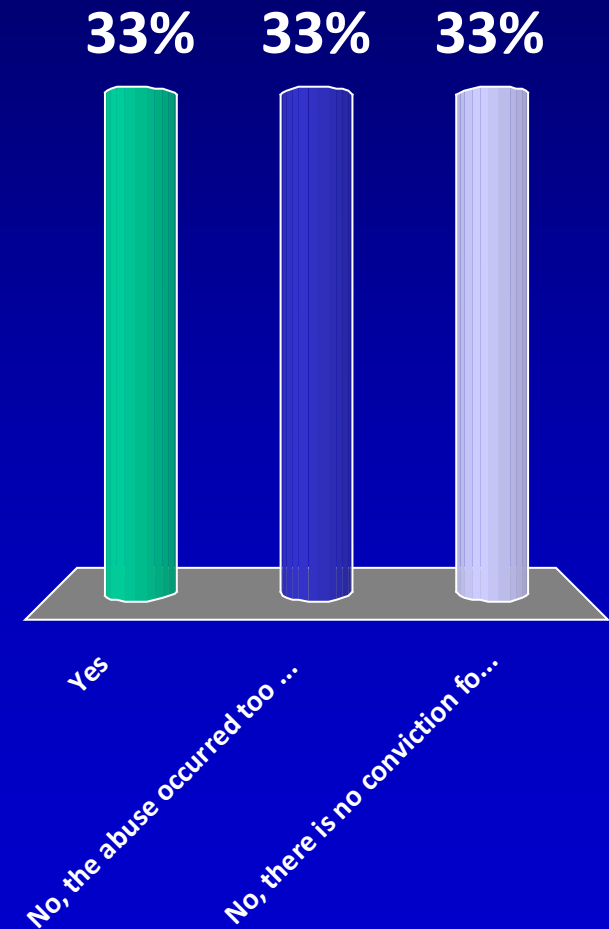


#7

- Defendant pled guilty to one count of possession of child pornography
- During the course of the presentence investigation, the defendant's 30 year old daughter came forward and revealed that she was first sexually abused by her father (the defendant) 20 years ago.

Does the 5-level increase for “pattern of activity” apply to this defendant?

- A. Yes
- B. No, the abuse occurred too long ago
- C. No, there is no conviction for the prior abuse



§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

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

- Pattern means any combination of **two or more** separate instances of sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation occurred
 - during the course of offense
 - involved the same minor, or
 - resulted in a conviction for such conduct
 - can be unidentified, generalized individual (attempts)
 - *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012)
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)

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

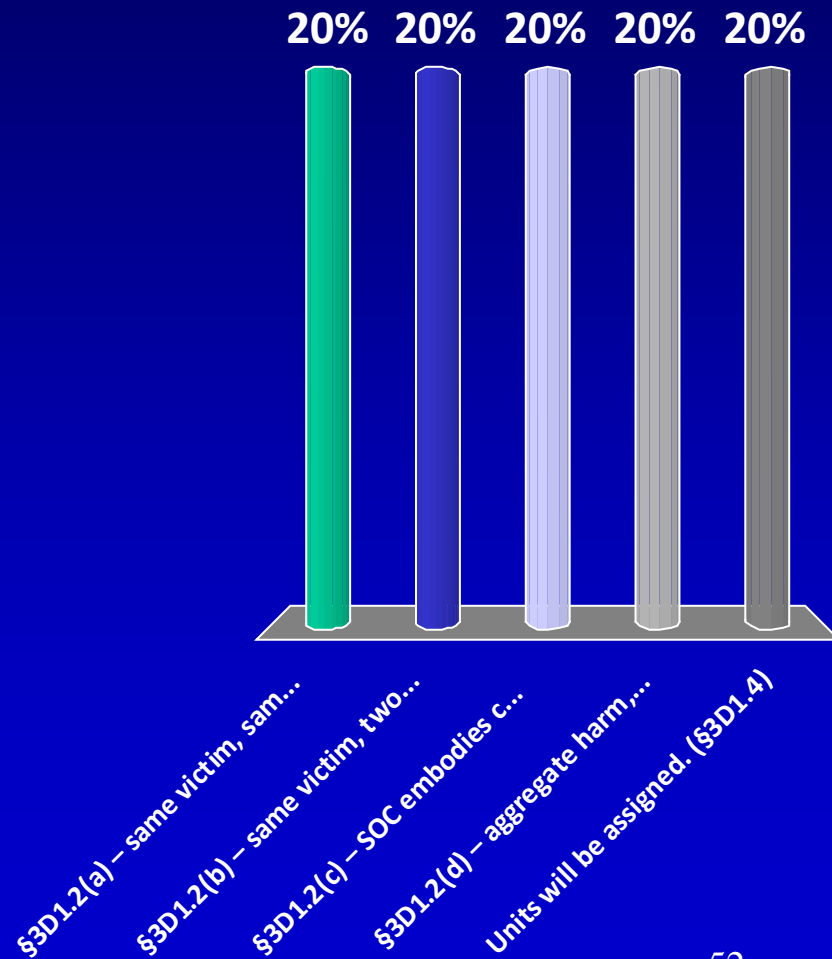
- No time limits on conduct
 - *U.S. v. McGarity*, 669 F.3d 1218 (11th Cir. 2012) (over 30 years before instant offense)
- Can include attempts
 - *U.S. v. Strieper*, 666 F.3d 288 (4th Cir. 2012)
- Can include conduct when defendant was a minor
 - *U.S. v. Reingold*, 731 F.3d 204 (2d Cir. 2013)

#8

- Defendant, an illegal alien, was apprehended crossing the southwest border from Mexico to the U.S.
- At the time the defendant was apprehended, he was in possession of a firearm
- Defendant is convicted of two counts: illegal reentry (§2L1.2) and alien in possession of a firearm (§2K2.1)

Which multiple count rule will apply in this case?

- A. §3D1.2(a) – same victim, same act
- B. §3D1.2(b) – same victim, two acts
- C. §3D1.2(c) – SOC embodies conduct of other count
- D. §3D1.2(d) – aggregate harm, continuous offense
- E. Units will be assigned. (§3D1.4)



#9

Defendant's prior convictions are:

1/10	felony dist. drugs	30 days jail	? pt.
2/09	poss. stolen prop.	\$500 fine	? pt.
3/08	DUI	10 days jail	? pt.
4/07	theft	\$200 fine	? pt.
5/06	fraud	30 days jail	? pt.
6/05	auto theft	6 mos. prob.	? pt.
7/04	felony dom. asslt. with bodily injury	45 days jail	? pt.

Criminal History Points

Prior Offense Committed at 18 or Older

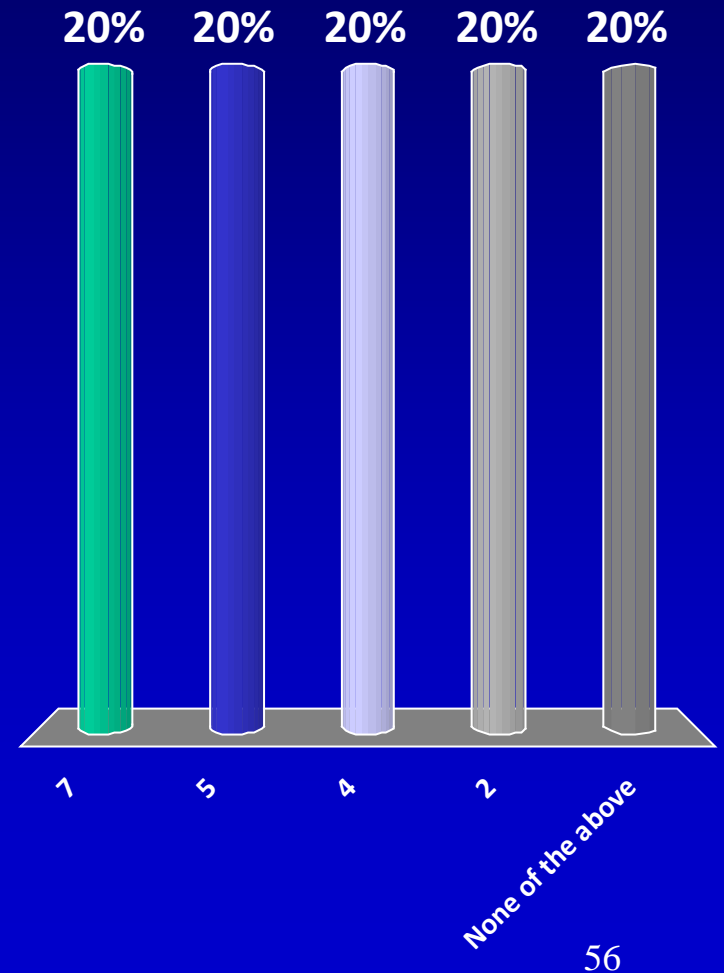
Points*	Sentence	Time Frame (Earliest Date of Relevant Conduct)
3	>13 months	Within 15 yrs. of prior sentence imposition or release
2	≥60 days	Within 10 yrs. of prior sentence imposition
1 (max of 4)	All others**	Within 10 yrs. of prior sentence imposition

* If otherwise countable

** Exceptions may apply

How many criminal history points?

- A. 7
- B. 5
- C. 4
- D. 2
- E. None of the above



Criminal History Points Under §4A1.1(c)

1/10	felony dist. drugs	30 days jail	1 pt.
2/09	poss. stolen prop.	\$500 fine	1 pt.
3/08	DUI	10 days jail	1 pt.
4/07	theft	\$200 fine	1 pt.
5/06	fraud	30 days jail	0 pt.
6/05	auto theft	6 mos. prob.	0 pt.
7/04	felony dom. asslt. with bodily injury	45 days jail	0 pt.



X

Criminal History Points Under §4A1.1(c)

1/10	felony dist. drugs	30 days jail	1 pt.
2/09	poss. stolen prop.	\$500 fine	1 pt.
3/08	DUI	10 days jail	1 pt.
4/07	theft	\$200 fine	1 pt.
5/06	fraud	30 days jail	1 pt.
6/05	auto theft	6 mos. prob.	1 pt.
7/04	felony dom. asslt. with bodily injury	45 days jail	1 pt.

4 pts.

#10

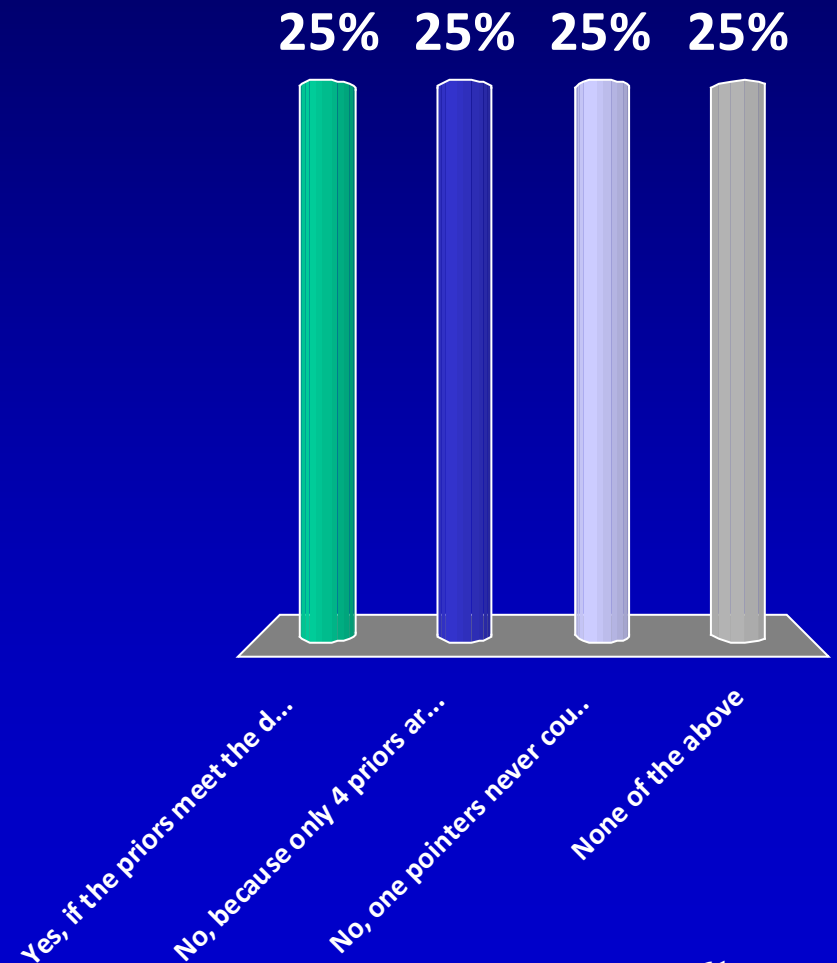
Defendant's instant offense is drug trafficking. His prior convictions are:

1/10	felony dist. drugs	30 days jail	1 pt.
2/09	poss. stolen prop.	\$500 fine	1 pt.
3/08	DUI	10 days jail	1 pt.
4/07	theft	\$200 fine	1 pt.
5/06	fraud	30 days jail	1 pt.
6/05	auto theft	6 mos. prob.	1 pt.
7/04	felony dom. asslt.	45 days jail	1 pt.
	with bodily injury		

4 pts.

Based on the highlighted priors, is the defendant a career offender?

- A. Yes, if the priors meet the definitions at career offender
- B. No, because only 4 priors are counted
- C. No, one pointers never count for career offender
- D. None of the above

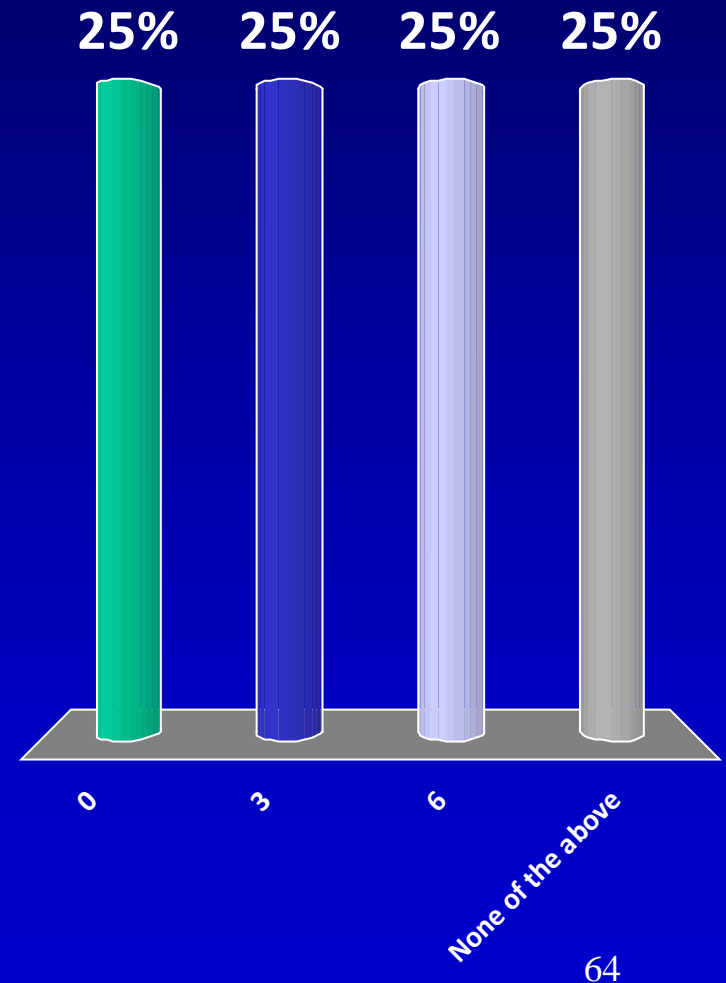


#11

- Conviction: PWID Cocaine (Jan. 2012 – May 2012)
- Prior Record:
 - Robbery 1: June 14, 2008 arrested July 1, 2008 for the offense
 - Robbery 2: July 7, 2008 arrested Sept. 12, 2008 for the offense
 - Separate indictments for the 2 robberies
 - Sentenced on same day January 2, 2009 to:
5 years for Robbery 1 and 5 years consecutive for Robbery 2

How many criminal history points will the defendant receive?

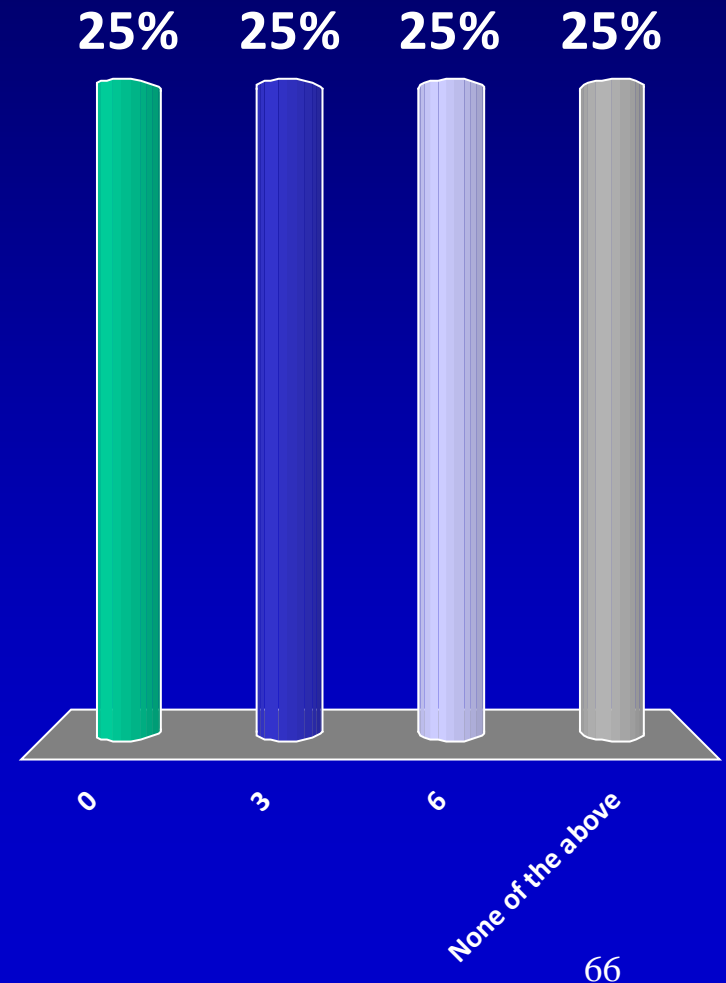
- A. 0
- B. 3
- C. 6
- D. None of the above



- Conviction: PWID Cocaine (Jan. 2012 – May 2012)
- Prior Record:
 - Robbery 1: June 14, 2008 arrested August 3, 2008 for the offense
 - DUI: arrested July 1, 2008 for the offense, ultimately dismissed
 - Robbery 2: July 7, 2008 arrested Sept. 12, 2008 for the offense
 - Separate indictments for the 2 robberies
 - Sentenced for both robberies on January 2, 2009 to:
5 years for Robbery 1 and 5 years consecutive for Robbery 2

How many criminal history points will the defendant receive?

- A. 0
- B. 3
- C. 6
- D. None of the above



Treatment of Multiple Prior Sentences

§4A1.2(a)(2)

Multiple Prior Sentences

§4A1.2(a)(2)

- Requires a determination of whether multiple prior sentences are counted “separately” or as a “single sentence”

Threshold Determination: Intervening Arrest

§4A1.2(a)(2)

Multiple prior sentences for offenses
separated by an intervening arrest
are counted separately

“Intervening Arrest”

§4A1.2(a)(2)

“i.e., the defendant is arrested for the first offense prior to committing the second offense”

Examples: Separated by Intervening Arrest

offense
arrested
offense
arrested

**Intervening
Arrest**

offense
offense
offense
arrested

**Not an
Intervening
Arrest**

offense
offense
offense
arrested
arrested
arrested

**Not an
Intervening
Arrest** 71

Single Sentence Criteria

§4A1.2(a)(2)

Multiple prior sentences will be treated as a “single sentence” *if*

1. Prior sentences are for offenses **NOT** separated by an intervening arrest

AND

2. The offenses *either*

- Were named in the same charging document, *or*
- Resulted in sentences imposed on the same day

Impact of a “Single Sentence”

§4A1.2(a)(2)

Rather than add points for each prior sentence:

- If concurrent sentences
 - Use the longest sentence
- If consecutive sentences
 - Use the aggregate length of the sentences

Example:

Point Assignments and “Single” Sentences

<u>Length</u>	<u>Point Assignments</u>	
	<u>“Single Sentence”</u>	<u>Counted Separately</u>
5 yrs. <u>2 yrs. consec.</u> }		3 pts. <u>3 pts.</u>
7 yrs.	3 pts.	6 pts.

Example:

Point Assignments and “Single” Sentences

Length

Point Assignments

“Single
Sentence”

Counted
Separately

5 yrs.

2 yrs. concur.

}

3 pts.

3 pts.

5 yrs.

3 pts.

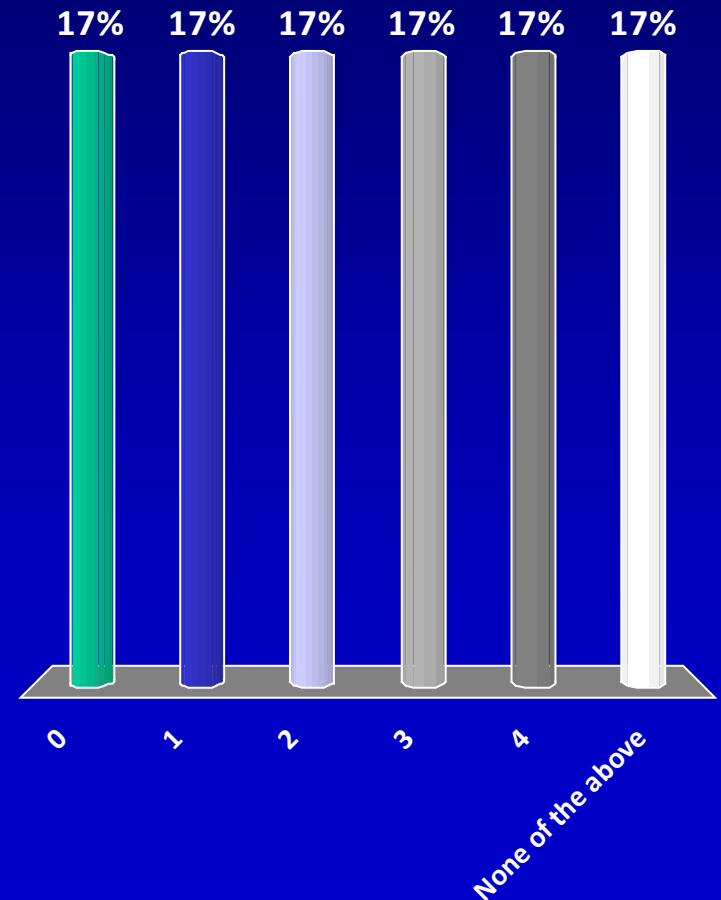
6 pts.

#12

- Conviction: PWID Cocaine (Jan. 2012 – May 2012)
- Prior Record:
 - Driving while license suspended – 1 year probation
 - Driving while license suspended – 2 years probation
 - DUI – \$500 fine
 - DUI – 15 days jail

How many criminal history points will the defendant receive?

- A. 0
- B. 1
- C. 2
- D. 3
- E. 4
- F. None of the above



Excluded Offenses

§4A1.2(c)(1) & (c)(2)

Excluded Offenses

§4A1.2(c)(1) & (c)(2) & (o)

- §4A1.2(c)(1) - List of misdemeanors and petty offenses that are only counted when:
 - The sentence was probation of more than one year
 - The sentence was imprisonment of at least thirty days
 - The prior offense was similar to an instant offense
 - *E.g.*, driving without license or with suspended license

Excluded Offenses (cont.)

§4A1.2(c)(1) & (c)(2) & (o)

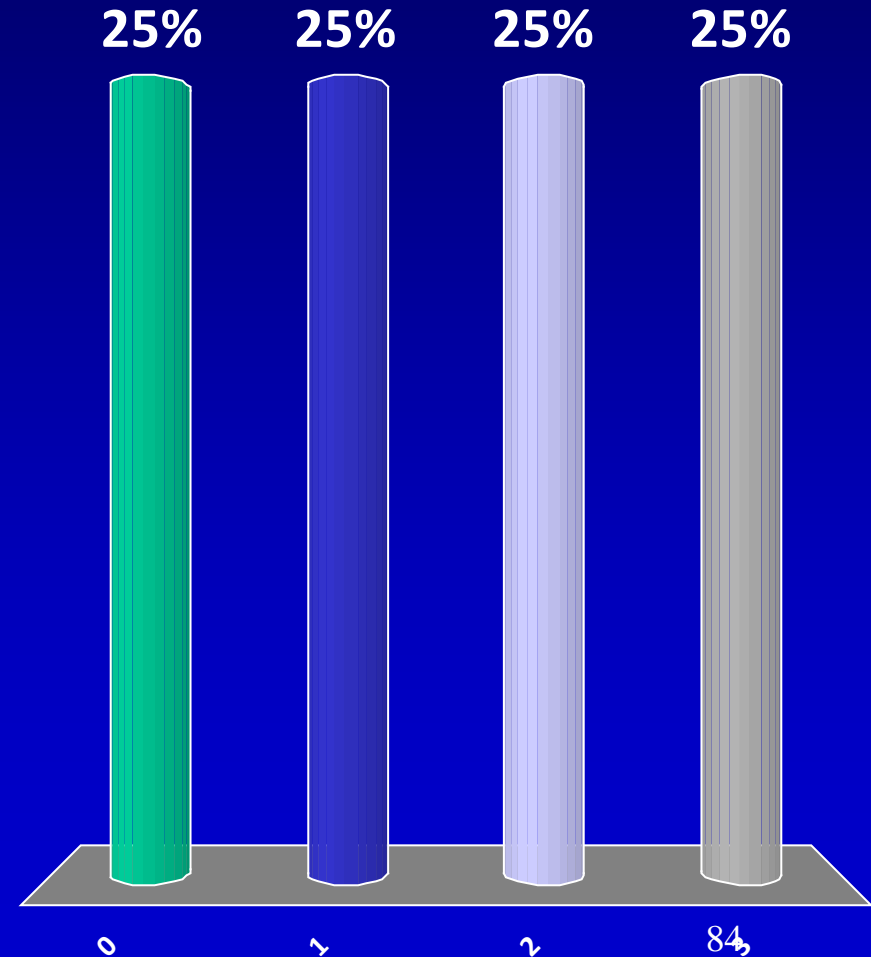
- §4A1.2(c)(2) - List of misdemeanor and petty offenses that are never counted
 - *E.g.*, hitchhiking
- “Misdemeanor” means having a maximum statutory penalty of one year or less
 - Note: All such offenses are counted if a “felony offense” (*i.e.*, maximum of over 1 yr.)

#13

- Defendant, an illegal alien, was found to be unlawfully in the United States while in state custody for driving without a license
- For the misdemeanor driving without a license offense, the defendant was sentenced to 10 days in jail

How many criminal history points will the defendant receive for driving without a license?

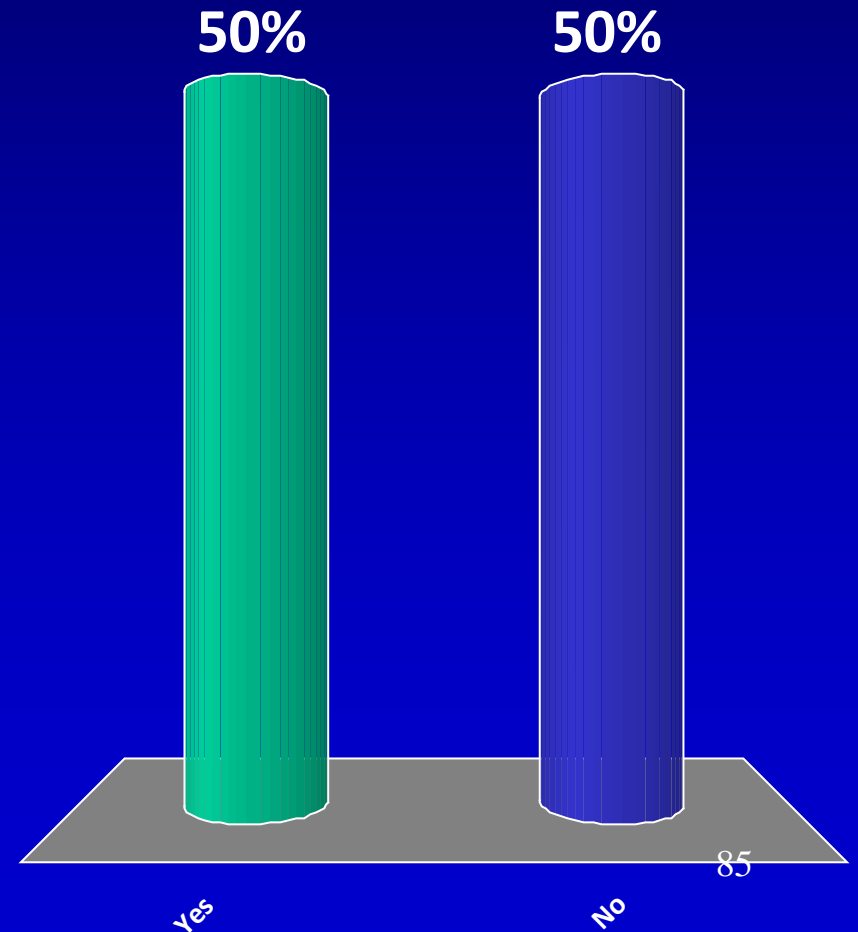
- A. 0
- B. 1
- C. 2
- D. 3



Will the defendant also receive points at §4A1.1(d) (“status”) for committing the instant offense while serving a sentence?

A. Yes

B. No



Relevant Conduct and “Status”

§4A1.1(d) & App. Note 4

- “Status” if under criminal justice sentence during any relevant conduct

Note: “status” can only count if the sentence from which it resulted has been counted

END