



# Advanced Guideline Issues

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9:00 am – 11:00 am



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# Scenarios



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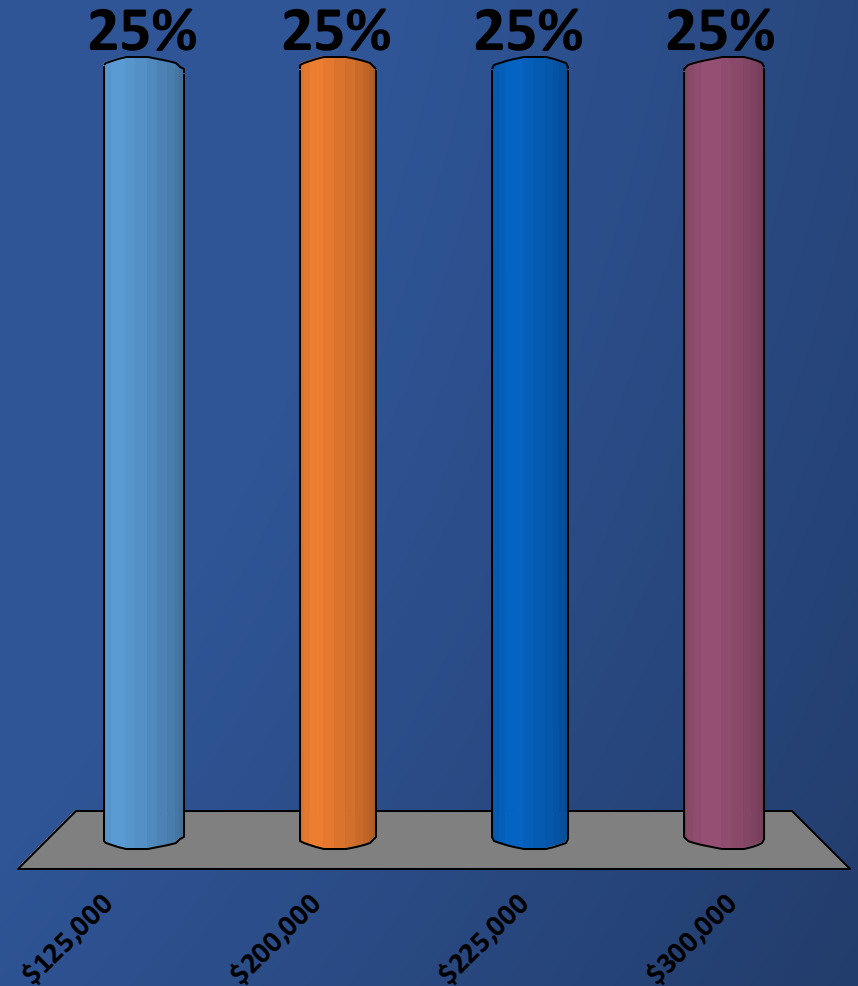
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# Scenario 1: What is the loss amount under §2B1.1?

- A. \$125,000
- B. \$200,000
- C. \$225,000
- D. \$300,000



# §2B1.1 Relevant Conduct

## §1B1.3(a)(2)

- Acts of the defendant that are in the same course of conduct or common scheme or plan as the offense of conviction are included



# Special Rules in the Determination of Loss

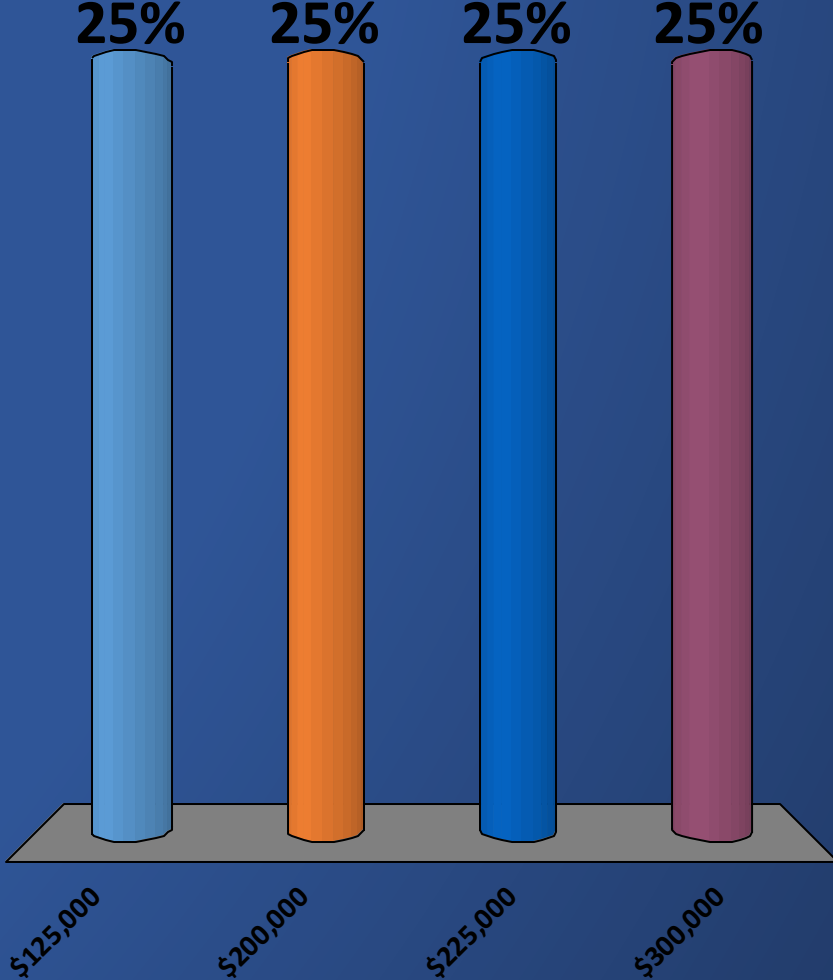
## Application Note 3(F)(viii)

- Federal Health Care Offenses Involving Government Health Care Programs:
  - The aggregate amount of fraudulent bills submitted to the government health care program is prima facie evidence of the amount of intended loss, if not rebutted



# Scenario 1: What is the amount of restitution?

- A. \$125,000
- B. \$200,000
- C. \$225,000
- D. \$300,000



## Restitution and Count of Conviction

- Court must not award restitution beyond offense of conviction
  - *U.S. v. Alisuretove*, 788 F.3d 1247 (5<sup>th</sup> Cir. 2015)
  - *U.S. v. Chaika*, 695 F.3d 741 (8<sup>th</sup> Cir. 2012)
  - *U.S. v. Camick*, 796 F.3d 1206 (10<sup>th</sup> Cir. 2015)
  - *U.S. v. Foley*, 783 F.3d 7 (10<sup>th</sup> Cir. 2015)





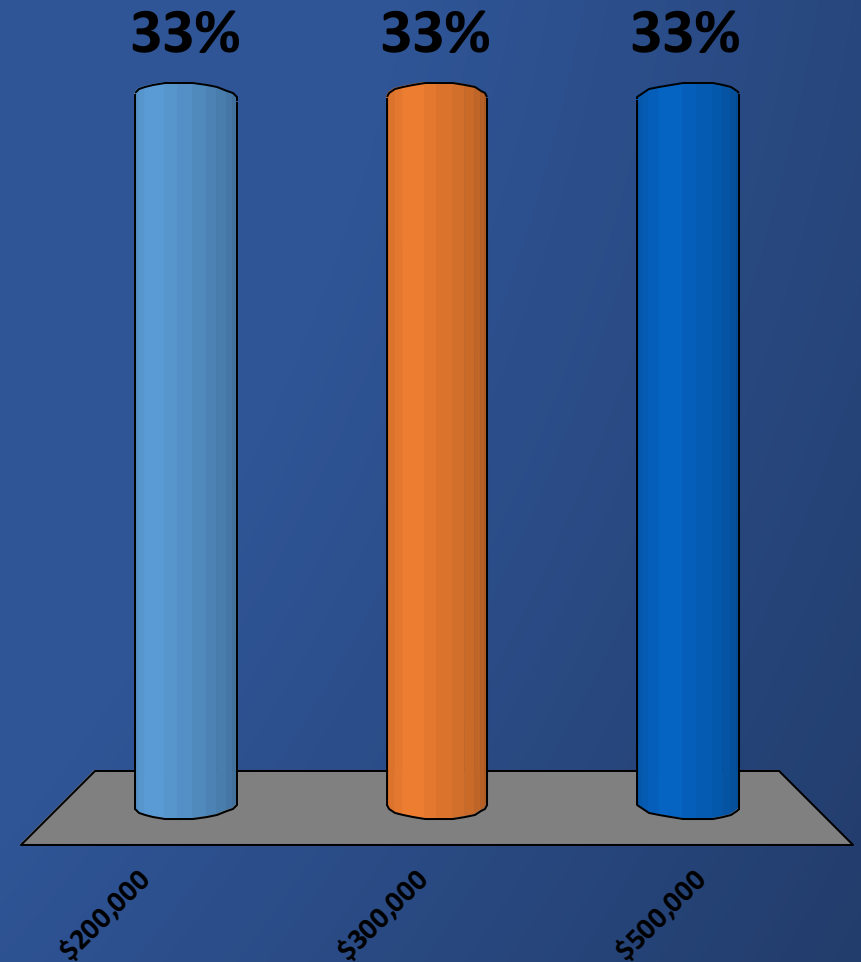
# Offsets and Restitution

- *U.S. v. Mahmood*, 820 F.3d 177 (5th Cir. 2016)
  - Restitution order remanded in health care fraud offense because under Mandatory Victims Restitution Act (MVRA), restitution had to be offset by value of services that defendant's hospitals rendered to patients



# Scenario 2: What is the loss amount under §2B1.1?

- A. \$200,000
- B. \$300,000
- C. \$500,000



# Valuation and Timing of Credits

## Application Note 3(E)

- Transferred benefits:
  - The money returned and the *fair market value* of services or property returned before the offense was detected



# Valuation and Timing of Credits

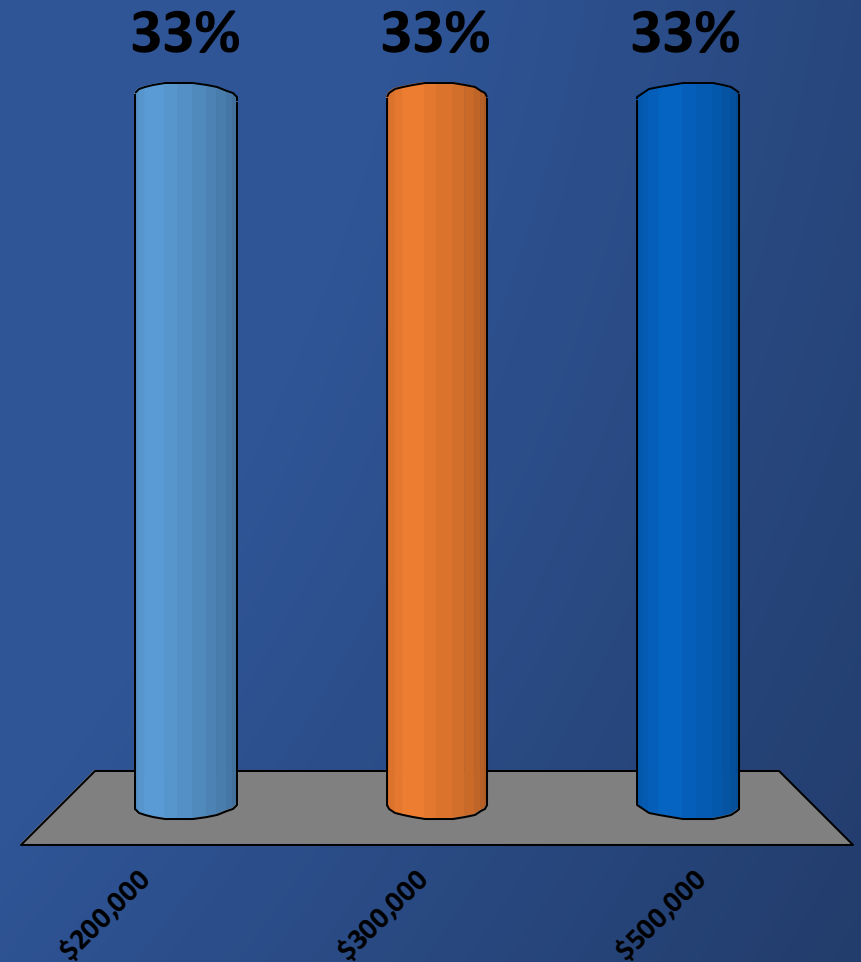
## Application Note 3(E)

- The time of detection of the offense is the earlier of:
  - The time the offense was discovered by a victim or government agency
  - The time the defendant knew or reasonably should have known the offense was detected or about to be detected by a victim or government agency



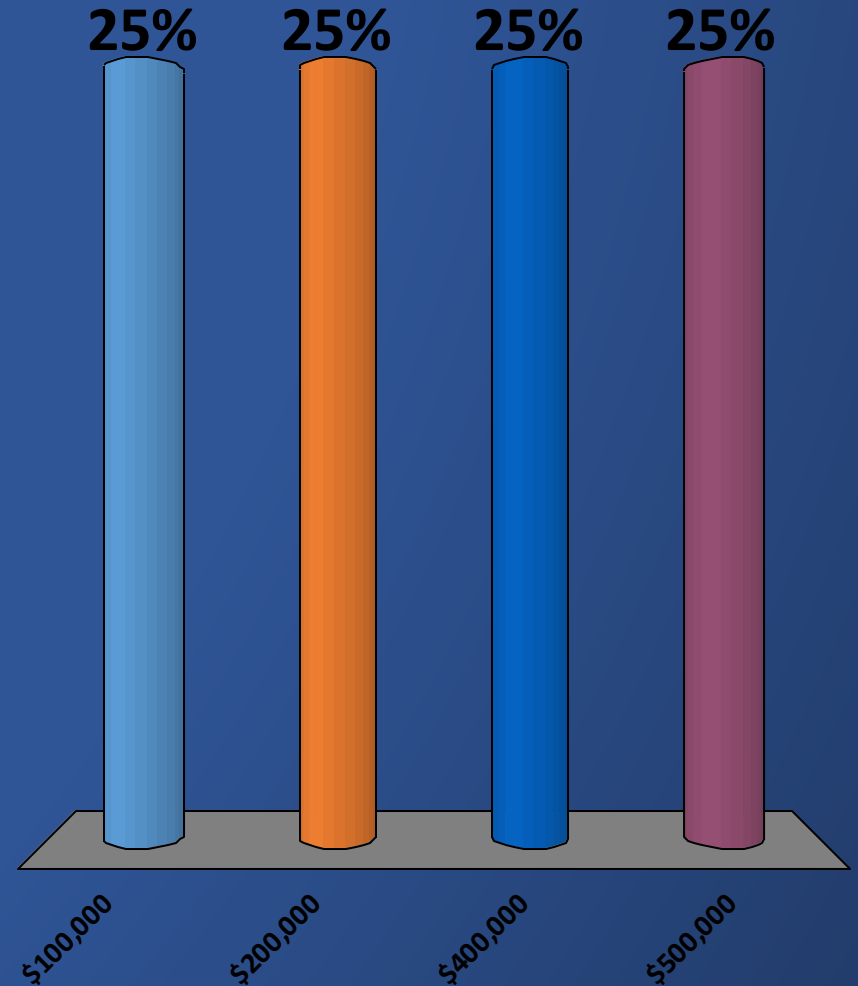
# Scenario 2: What is the amount of restitution?

- A. \$200,000
- B. \$300,000
- C. \$500,000



# Scenario 3: What is the amount of restitution?

- A. \$100,000
- B. \$200,000
- C. \$400,000
- D. \$500,000

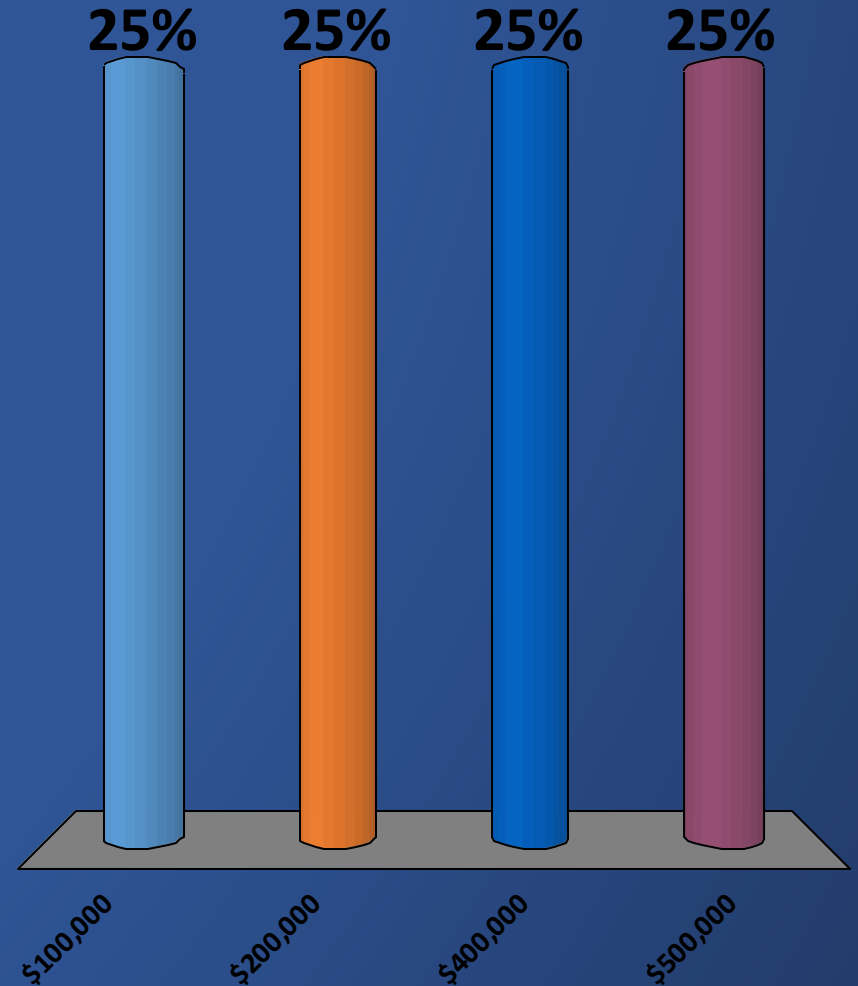


- A successor lender's restitution award should turn on how much it paid to acquire the mortgage
  - *U.S. v. Martin*, 803 F.3d 581 (11th Cir. 2016)
  - *U.S. v. Howard*, 784 F.3d 745 (10th Cir. 2015)
  - *U.S. v. Beacham*, 774 F.3d 267 (5th Cir. 2014)
  - *U.S. v. Chaika*, 695 F.3d 741 (8th Cir. 2012)



# Scenario 3: What is the loss amount under §2B1.1?

- A. \$100,000
- B. \$200,000
- C. \$400,000
- D. \$500,000





# Valuation and Timing of Credits

## Application Note 3(E)

- Pledged collateral:
  - *Amount recovered* upon disposition;
  - If not disposed, *fair market value* as of date of sentencing



# Mortgage Fraud

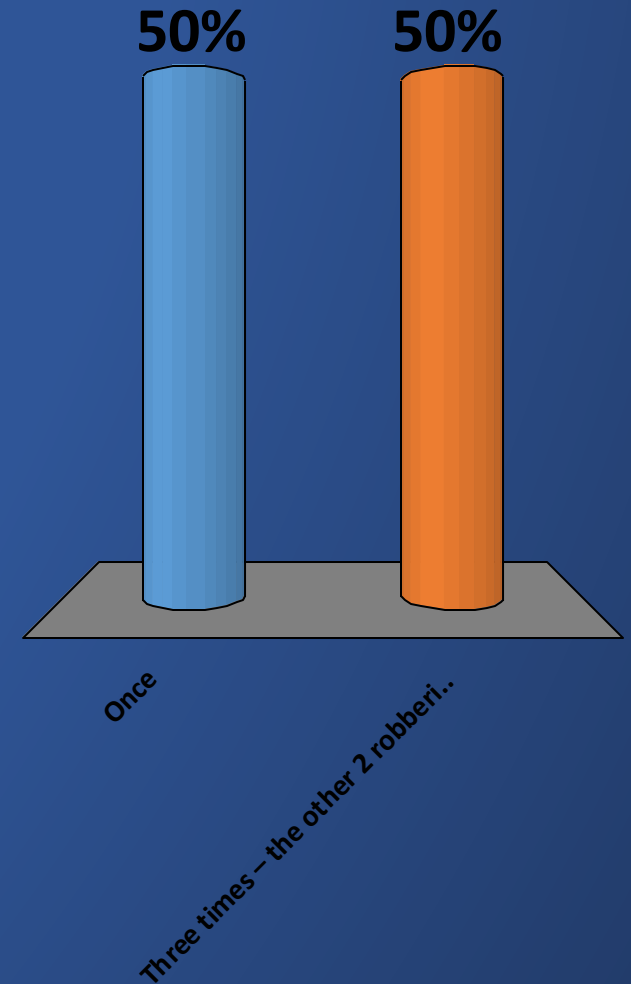
## §2B1.1, App. Note 3(E)(iii)

- Provides a rebuttable presumption that, if the property is not disposed of by the time of sentencing, the most recent tax assessment at the time of plea is the fair market value



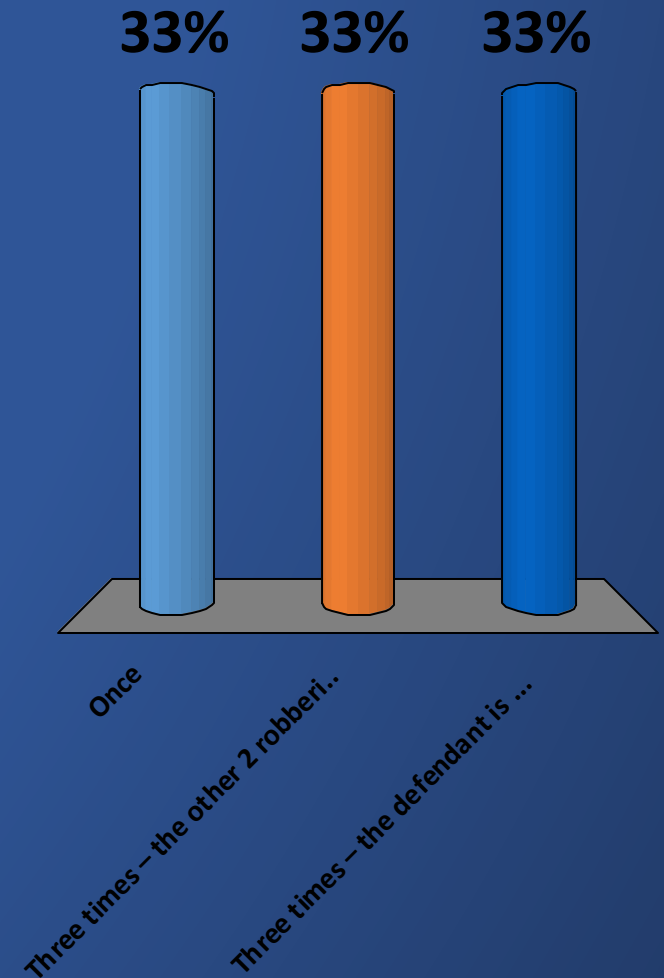
# Scenario 4: How many times should the robbery guideline be applied?

- A. Once
- B. Three times – the other 2 robberies are relevant conduct



# Scenario 5: How many times should the robbery guideline be applied?

- A. Once
- B. Three times – the other 2 robberies are relevant conduct
- C. Three times – the defendant is charged with conspiring to commit 3 robberies



# Conspiracy to Commit More than One Offense

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## §1B1.2(d)

- A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.



# Stipulations in Plea Agreements

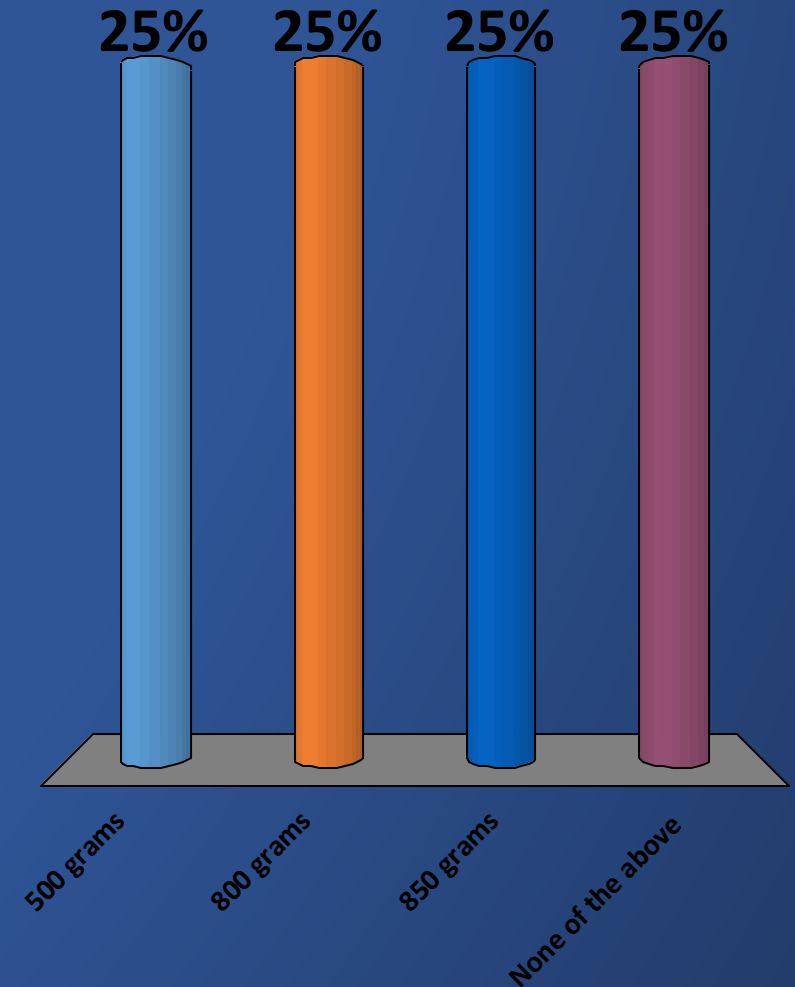
## §1B1.2(c), Application Note 1

- A plea agreement containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- A factual statement or a stipulation contained in a plea agreement is a stipulation . . . only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes.



# Scenario 6: For what amount of drugs will the defendant be held accountable?

- A. 500 grams
- B. 800 grams
- C. 850 grams
- D. None of the above



## §1B1.3(a)(2)

### Application Note 5(c)

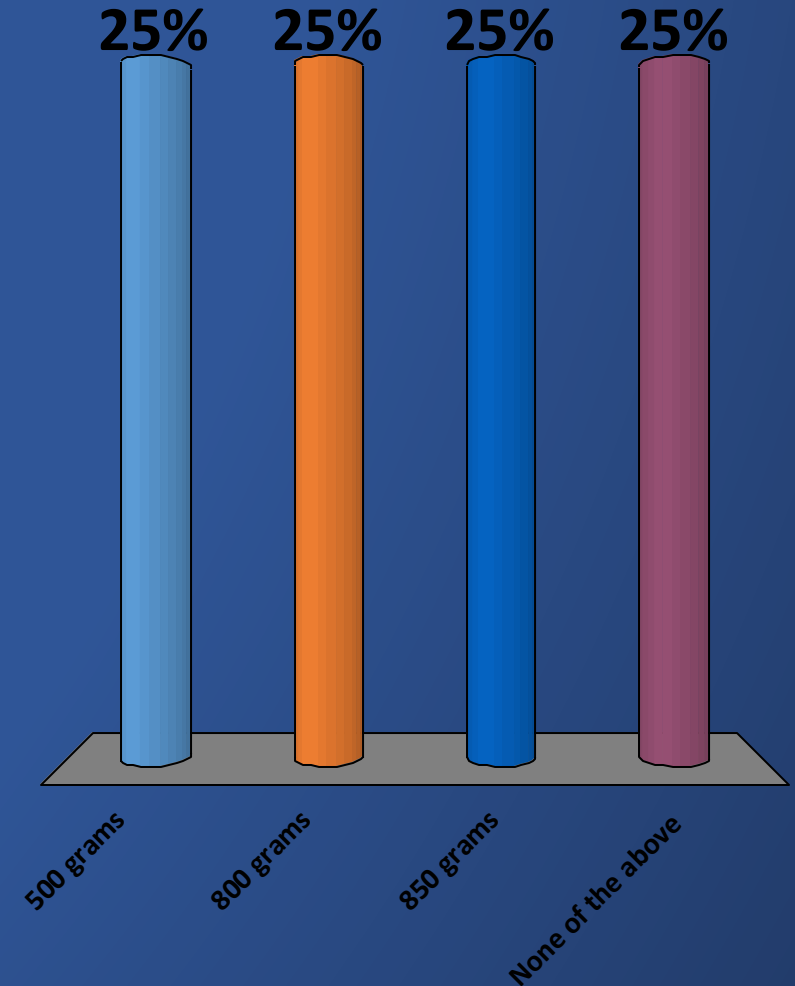
- In determination of “expanded” relevant conduct, the course of conduct or common scheme or plan **DOES NOT INCLUDE** conduct “associated” with a sentence imposed prior to the commission of the instant offense of conviction





# Scenario 7: For what amount of drugs will the defendant be held accountable?

- A. 500 grams
- B. 800 grams
- C. 850 grams
- D. None of the above



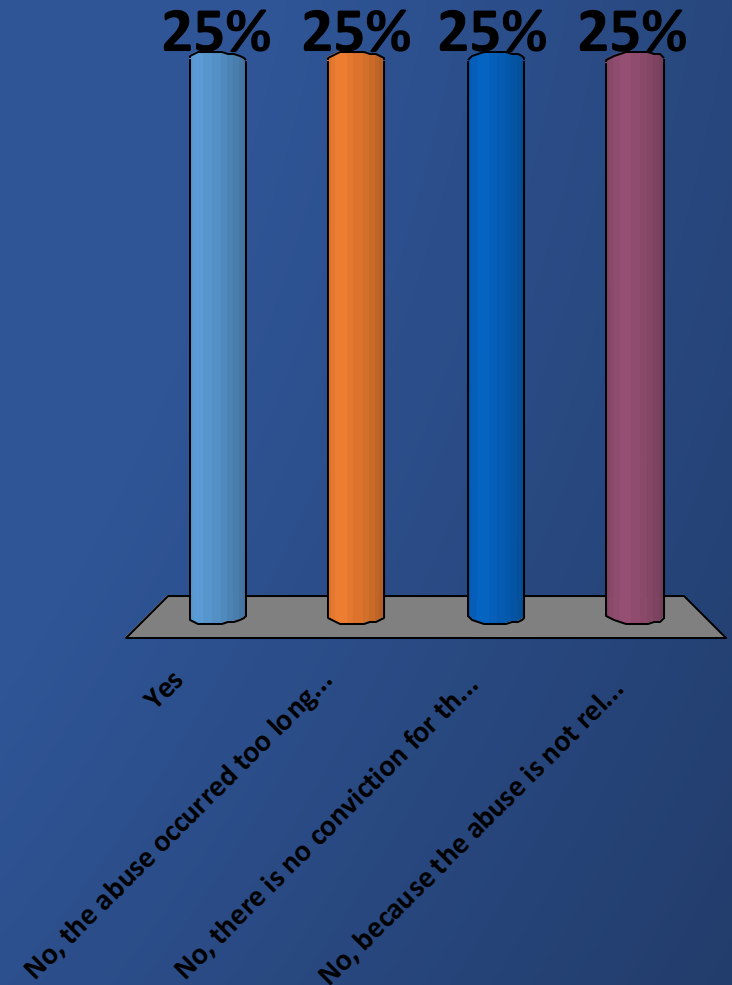
## §2G2.2(b)(5): Pattern of Activity SOC

- If defendant engaged in pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels



# Scenario 8: Will the increase for “pattern of activity” apply?

- A. Yes
- B. No, the abuse occurred too long ago
- C. No, there is no conviction for the prior abuse
- D. No, because the abuse is not related to the possession offense



## §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
- *See also* §4B1.5 (Repeat/Dangerous Sex Offender)



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

- No time limit on conduct
  - *U.S. v. Clark*, 685 F.3d 72 (1<sup>st</sup> Cir. 2012) (24 yrs)
  - *U.S. v. Woodward*, 277 F.3d 87 (1<sup>st</sup> Cir. 2002) (27 yrs)
  - *U.S. v. Olfano*, 503 F.3d 240 (3d Cir. 2007) (16 yrs)
  - *U.S. v. Bacon*, 646 F.3d 218 (5<sup>th</sup> Cir. 2011) (30 yrs)
  - *U.S. v. Quinn*, 257 F. App'x 864 (6<sup>th</sup> Cir. 2007) (30 yrs)



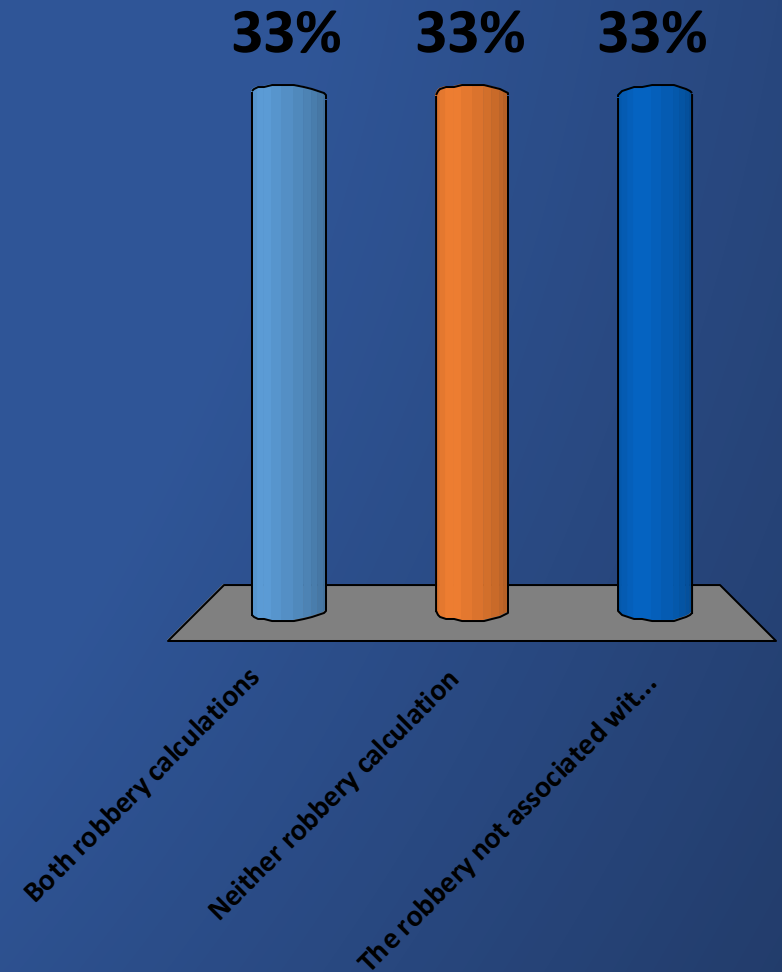
## §2G2.2(b)(5): Pattern of Activity (cont.)

- No time limit on conduct (cont.)
  - *U.S. v. Lovaas*, 241 F.3d 900 (7<sup>th</sup> Cir. 2001) (26 yrs)
  - *U.S. v. Woodard*, 694 F.3d 950 (8<sup>th</sup> Cir. 2012) (19 yrs)
  - *U.S. v. Garner*, 490 F.3d 739 (9<sup>th</sup> Cir. 2007) (35 yrs)
  - *U.S. v. Lucero*, 747 F.3d 1242 (10<sup>th</sup> Cir. 2014) (35 yrs)
  - *U.S. v. Turner*, 626 F.3d 566 (11<sup>th</sup> Cir. 2010) (20 yrs)



# Scenario 9: The SOC for possession of a firearm at §2B3.1 will apply to ...

- A. Both robbery calculations
- B. Neither robbery calculation
- C. The robbery not associated with the 924(c)



## §2K2.4, Application Note 4

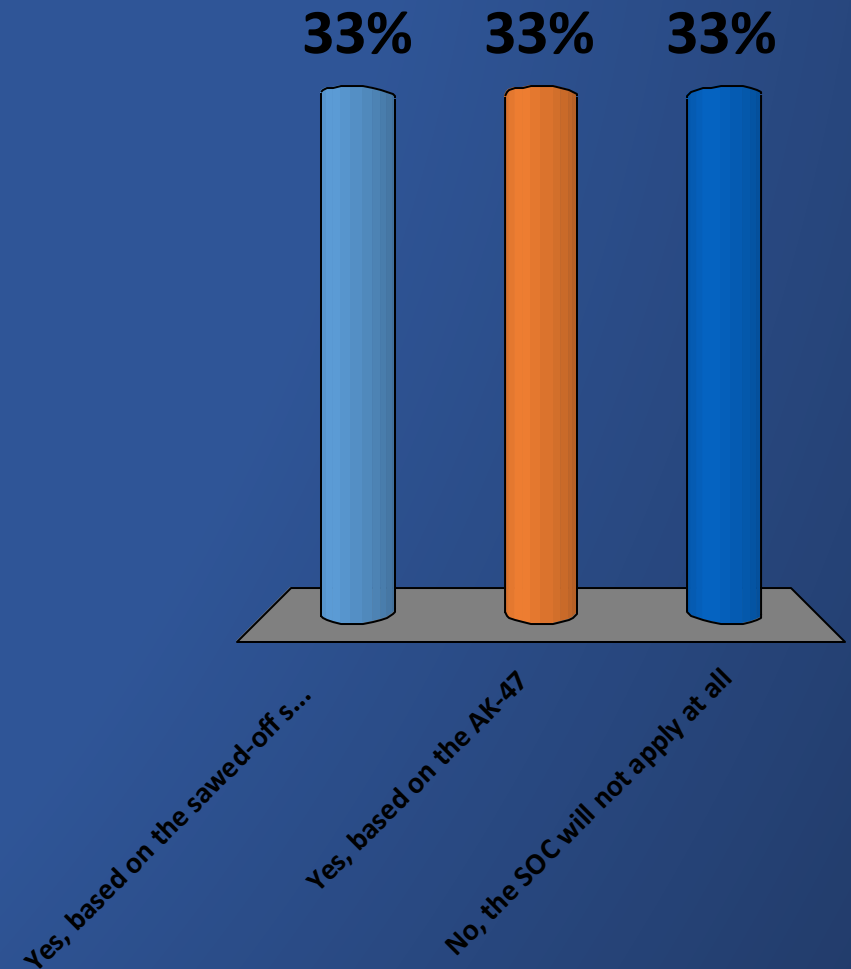
If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.





# Scenario 10: Will the SOC for possession of a firearm at §2D1.1 apply?

- A. Yes, based on the sawed-off shotgun
- B. Yes, based on the AK-47
- C. No, the SOC will not apply at all



## §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).



# Criminal History Points

## Prior Offense Committed at 18 or Older

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

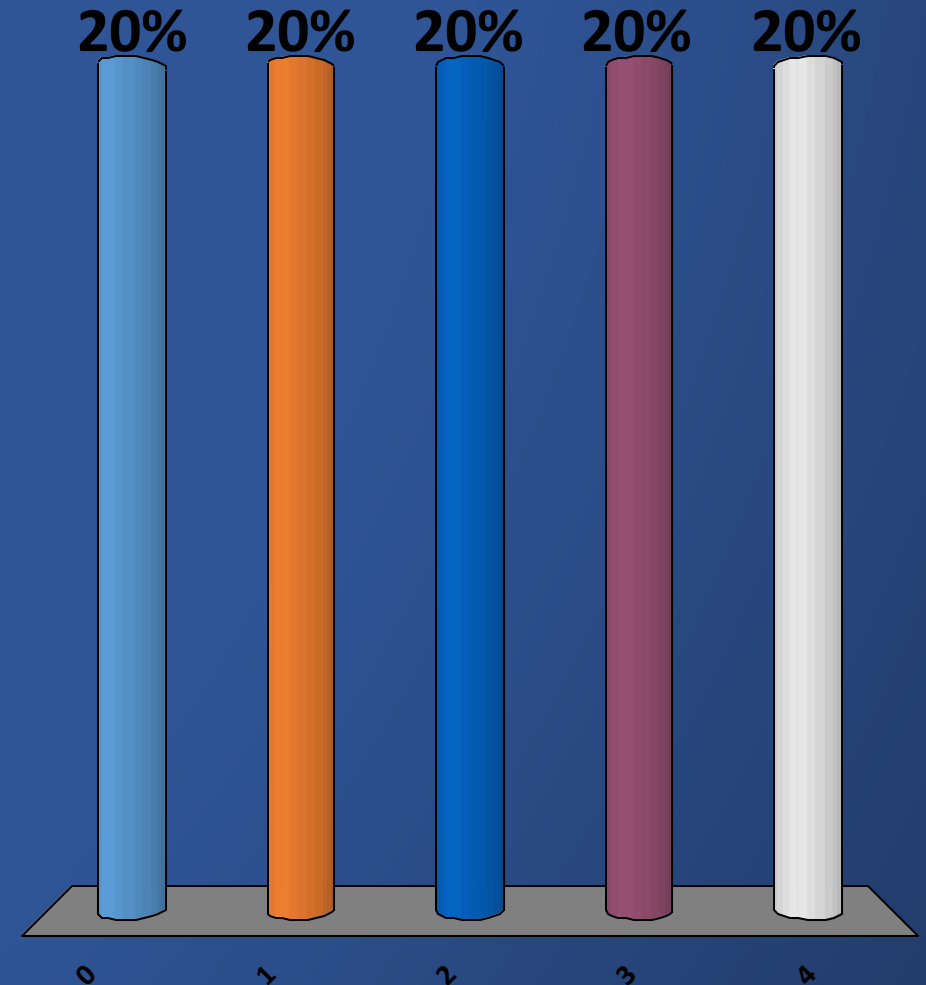
\* If otherwise countable

\*\* Exceptions may apply



# Scenario 11: How many criminal history points will be assigned to this conviction?

- A. 0
- B. 1
- C. 2
- D. 3
- E. 4



# General Approach in Handling Revocations: Add time imposed at original sentencing with time imposed upon revocation

- Original sentence 3 yrs. imprisonment, suspended upon service of 1 yr. w/ 5 yrs. probation to follow
- Probation revoked; 6 mos. imposed
  - 1 yr. original sentence
  - + 6 mos. revocation sentence
  - 1 yr. 6 mos. = **3 points**



# Revocation May Affect Time Frame

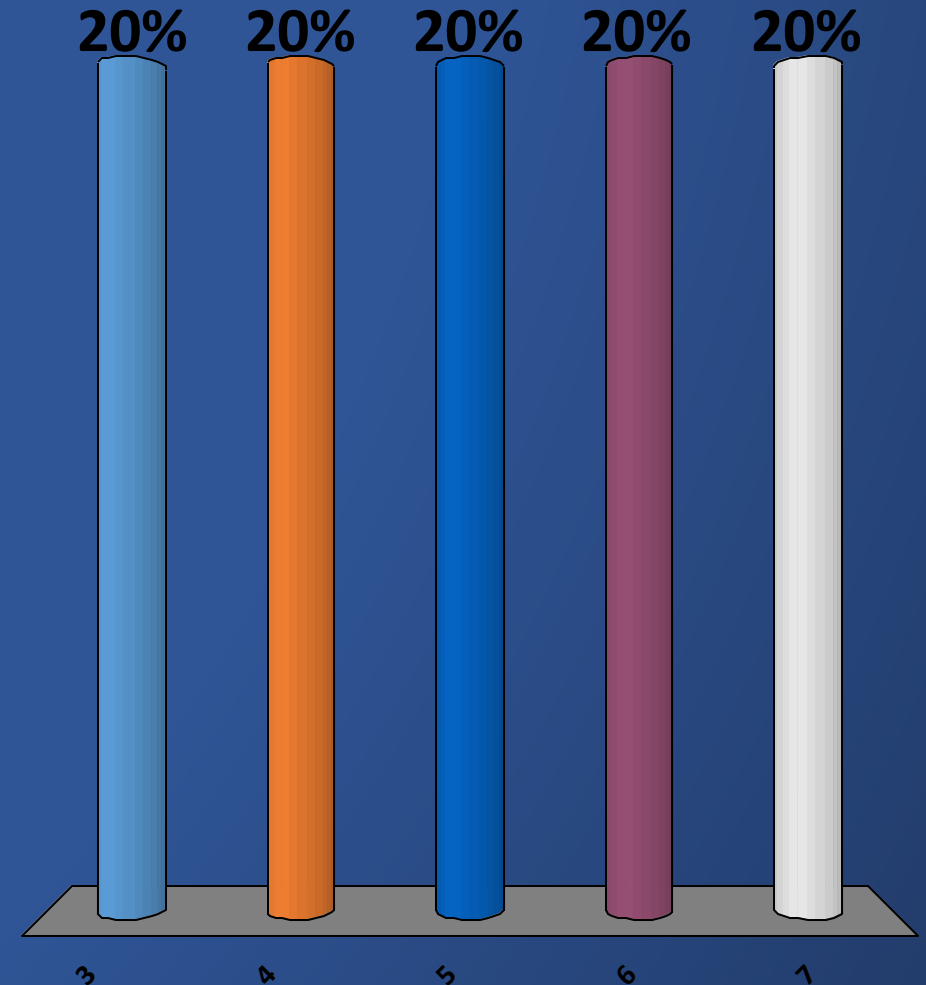
## §4A1.2(k)(2)

- For the purposes of determining the applicable time period, use the following:
  - A. An ADULT TERM of imprisonment totaling MORE THAN 13 MONTHS – the date of last release from incarceration
  - B. A CONFINEMENT SENTENCE for an offense COMMITTED PRIOR TO THE DEFENDANT'S 18<sup>TH</sup> BIRTHDAY – the date of last release from confinement
  - C. IN ANY OTHER CASE – the date of the original sentence



# Scenario 12: How many criminal history points will be assigned to these conviction?

- A. 3
- B. 4
- C. 5
- D. 6
- E. 7



## §4A1.2, Application Note 11

Where a revocation applies to multiple sentences, and such sentences are counted separately, add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points.





# Relevant Conduct and “Status”

## §4A1.1(d) & App. Note 4

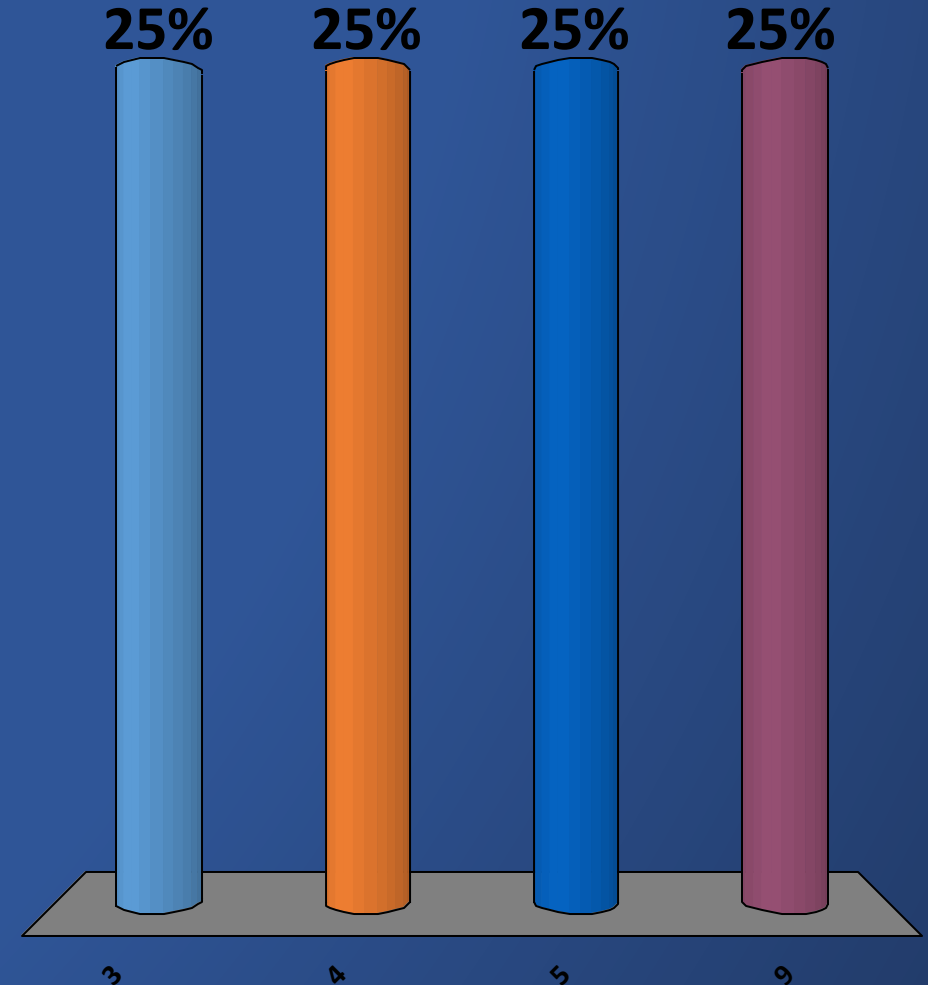
- “Status” if under criminal justice sentence during any relevant conduct

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



# Scenario 13: How many criminal history points apply for the three robberies?

- A. 3
- B. 4
- C. 5
- D. 9



# Threshold Determination: Intervening Arrest

§4A1.2(a)(2)

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



# 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



# A “Single Sentence” That Includes Crimes of Violence

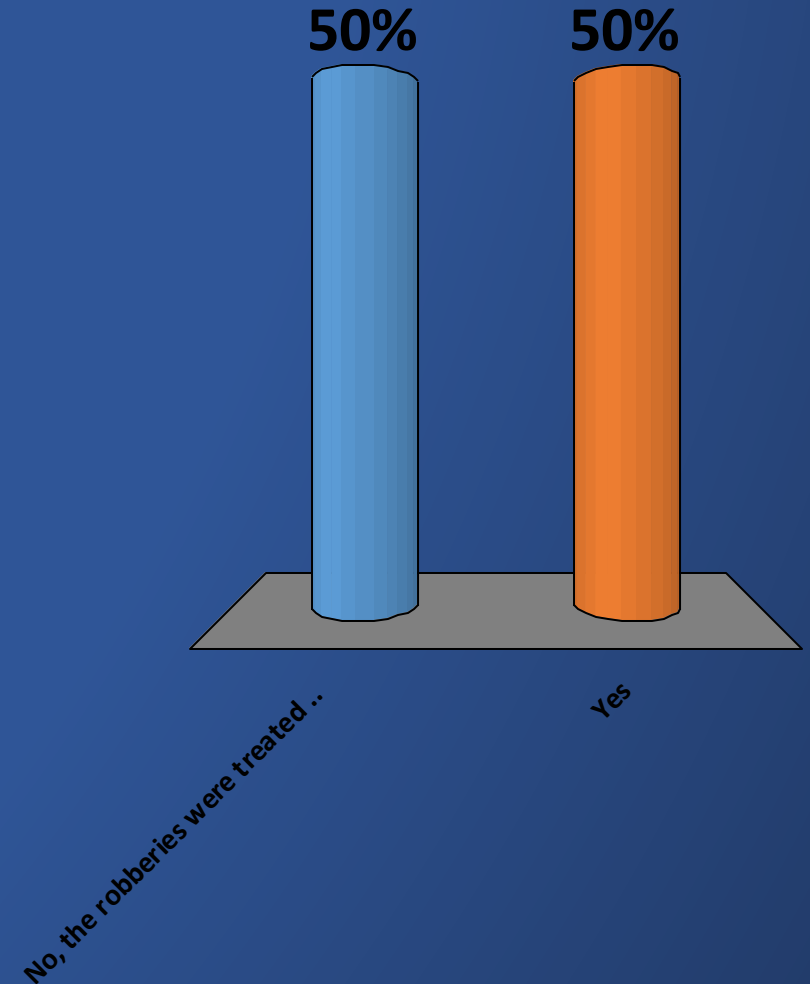
## §4A1.1(e)

- When multiple prior sentences are treated as a “single sentence,” §4A1.1(e) adds 1 point for each crime of violence that did not result in additional points under §4A1.1(a), (b), or (c)



# Scenario 13: Will the defendant qualify as an Armed Career Criminal?

- A. No, the robberies were treated as a single sentence
- B. Yes



# ACCA Different Occasions

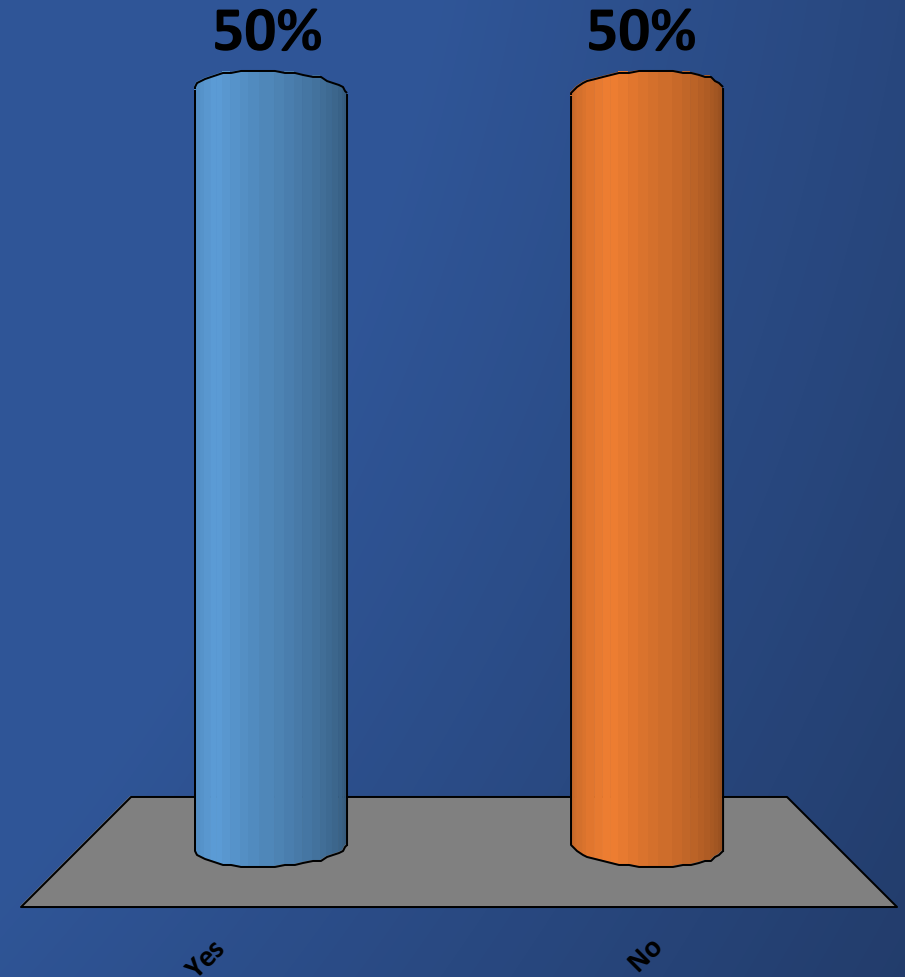
- The case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another:
  - *See, U.S. v. McCloud*, 818 F.3d 591 (11<sup>th</sup> Cir. 2016) (distinctions in the timing and location of the events in question are central to the determination that they are “separate and distinct criminal episodes”)



# Scenario 14: Is this defendant a career offender?

A. Yes

B. No





## §4B1.1 Career Offender Criteria

- Defendant at least 18 at time of instant offense
- Instant offense of conviction is a felony for a “crime of violence” or a “controlled substance offense”
- At least two prior felony convictions for a “crime of violence” or “controlled substance offense,” counted *separately* under §4A1.1(a), (b), or (c)
- Instant offense committed *after* sustaining the two prior felony convictions



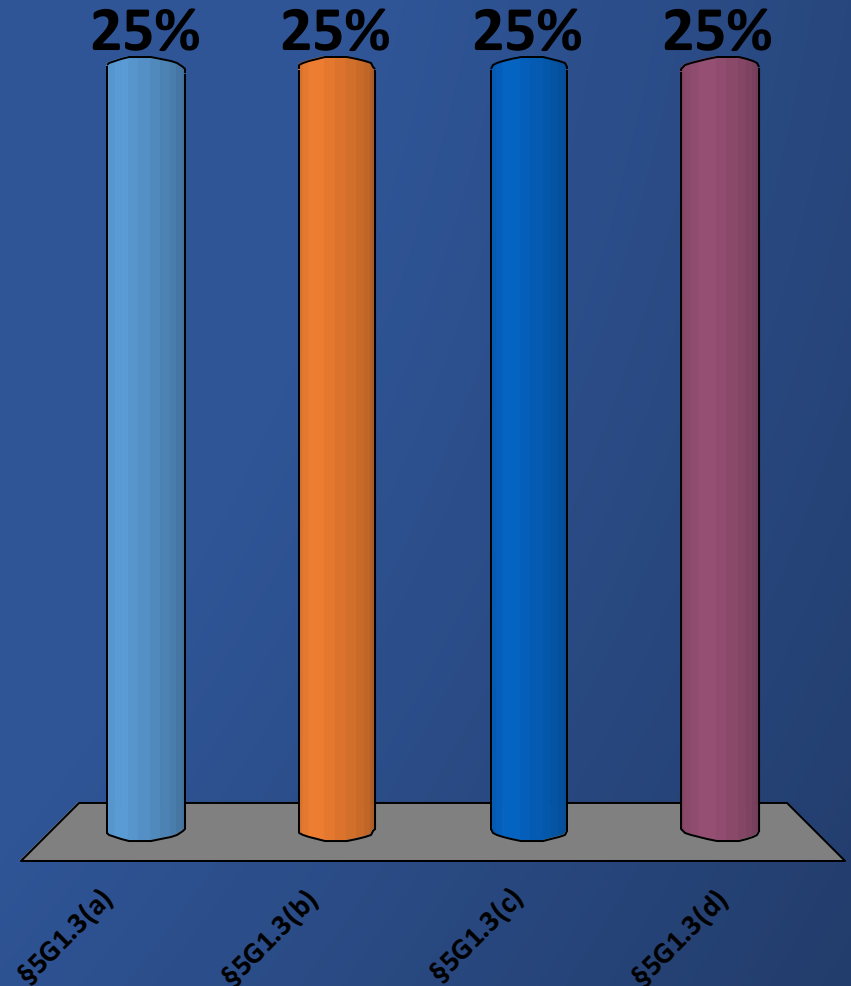
# §5G1.3 Undischarged Terms of Imprisonment

- a) Instant federal offense committed while serving a term of imprisonment. Sentences imposed consecutively.
- b) Undischarged term resulted from another offense that is relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3). Sentences run concurrently, credit for time served on undischarged term
- c) Anticipated state term of imprisonment that is relevant conduct to the instant offense under §1B1.3(a)(1), (a)(2), or (a)(3). Sentences run concurrently.
- d) In any other case, sentence for the instant offense can run concurrently, partially concurrently, or consecutively.



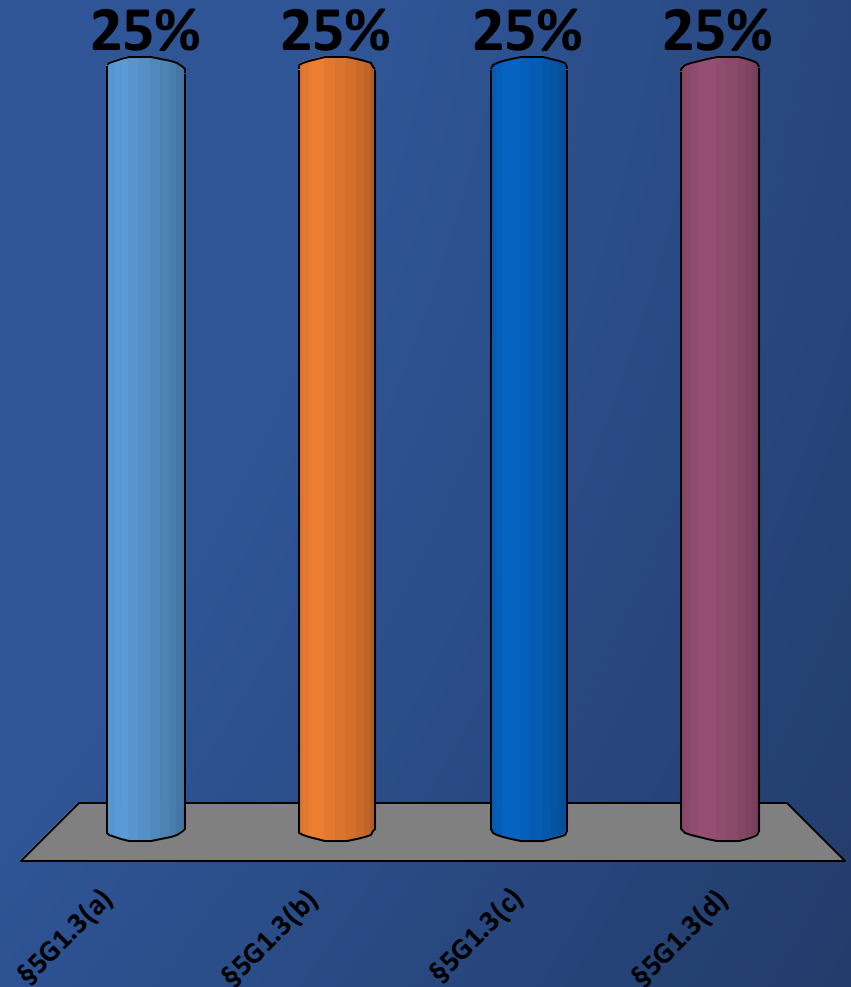
# Scenario 15: Which section of §5G1.3 applies?

- A. §5G1.3(a)
- B. §5G1.3(b)
- C. §5G1.3(c)
- D. §5G1.3(d)



# Scenario 16: Which section of §5G1.3 applies?

- A. §5G1.3(a)
- B. §5G1.3(b)
- C. §5G1.3(c)
- D. §5G1.3(d)



# Relevant Conduct

## §1B1.3

- (a)(1) Acts of the defendant during/in preparation/to avoid detection/responsibility for the offense of conviction
- (a)(2): Acts of others in a jointly undertaken criminal activity during/in preparation/to avoid detection/responsibility for the offense of conviction
- (a)(3): Harms from the acts established in (a)(1) & (a)(2)
- (a)(4): Any other information specified in the applicable



# Alternative Base Offense Levels

## §2B1.1(a)

BOL 7, if

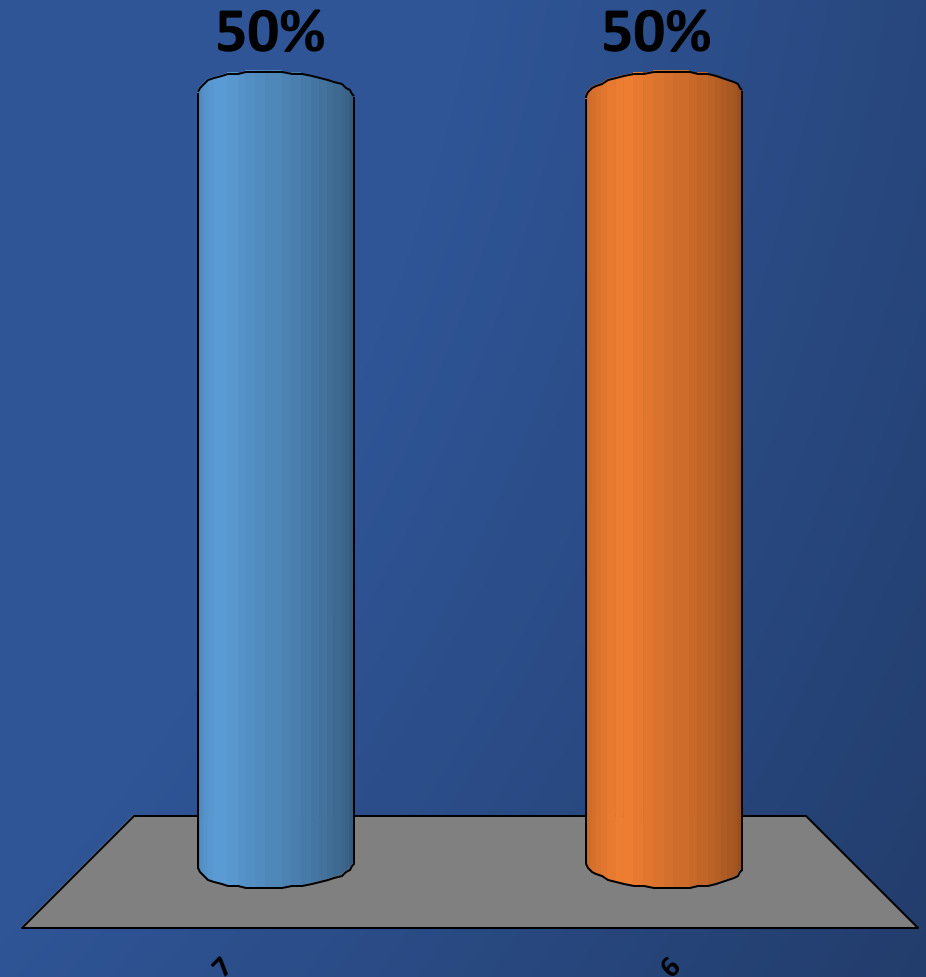
- Stat. max. of 20 years or more
- AND**
- Referenced by Appendix A or §2X1.1

BOL 6, otherwise



# Scenario 17: What is the applicable BOL at §2B1.1 for the underlying fraud offense?

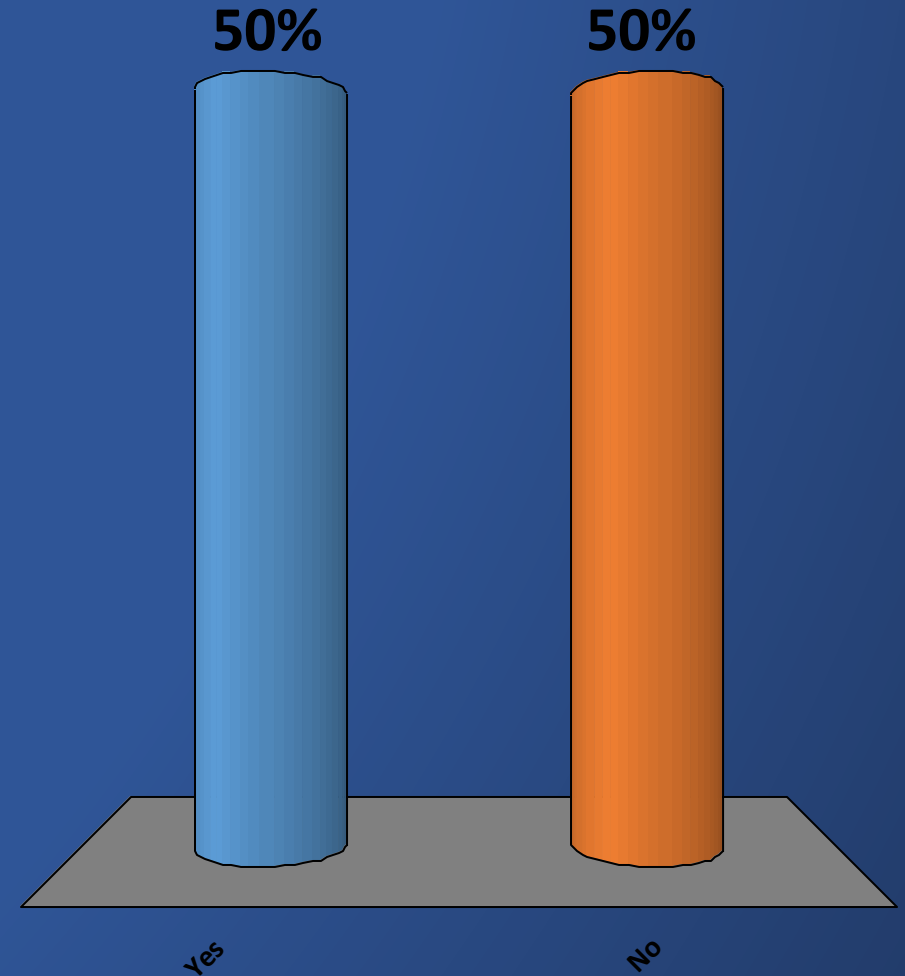
- A. 7
- B. 6



# Scenario 17: Will the defendant receive an increase for aggravating role (§3B1.1)?

A. Yes

B. No





# Chapter Three Adjustments and §2S1.1

## Application Note 2(C)

- In cases in which BOL (a)(1) applies, application of any Chapter Three Adjustment shall be determined based on the offense covered by this guideline (*i.e.*, the laundering of the criminally derived funds) and **NOT** on the underlying offense from which the laundered funds are derived



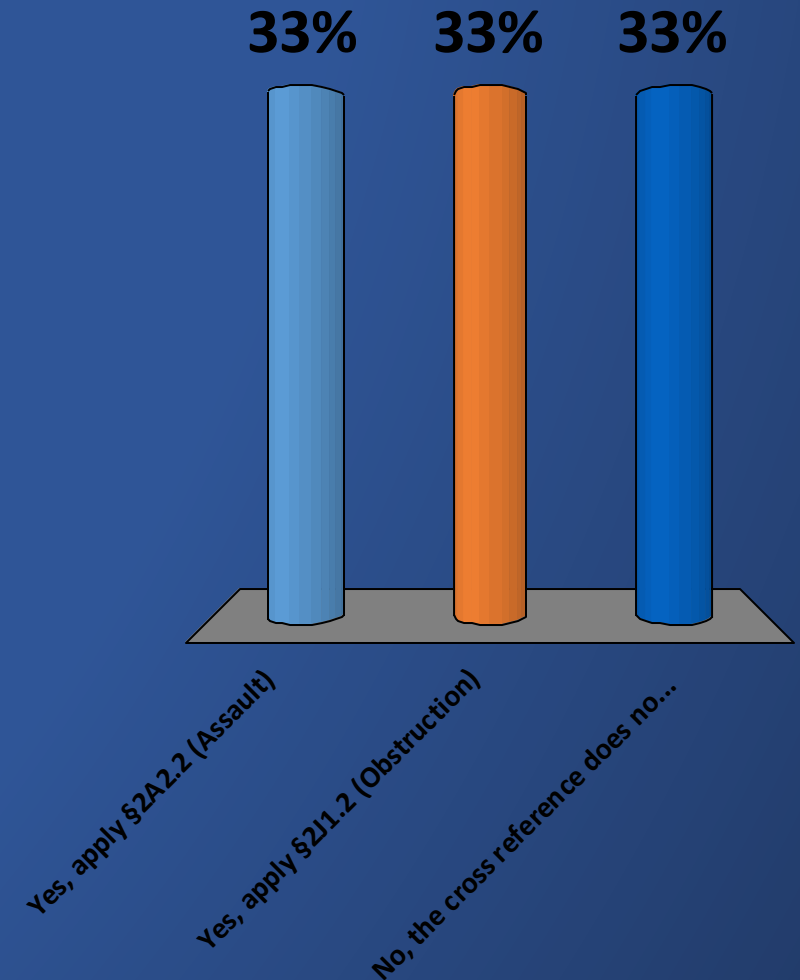
## Cross Reference at §2B1.1(c)(3)

- If the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and
- The conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.



# Scenario 18: Does the cross reference at §2B1.1(c)(3) apply?

- A. Yes, apply §2A2.2 (Assault)
- B. Yes, apply §2J1.2 (Obstruction)
- C. No, the cross reference does not apply



# Scenario 19: Does the BOL of 20 apply in this case?

- A. Yes
- B. No
- C. Maybe

