



Basic Relevant Conduct

§1B1.3



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Relevant Conduct

- Sets the limits of information to be used in guidelines application
 - Note however that at sentencing generally ALL information can be used
 - 18 U.S.C. § 3661
 - §1B1.4
 - *Witte, Watts, etc.*
- Sentencing accountability is not always the same as criminal liability



Key Points to Remember about Relevant Conduct

- Defendant is always responsible for acts that he/she commits
- Defendant is sometimes responsible for acts of others as part of a jointly undertaken criminal activity
- For certain offenses, defendant will be responsible for acts that are part of the same course of conduct, common scheme or plan



Relevant Conduct

§1B1.3

- (a): Establishes what is relevant for Chapters Two and Three
- Base offense levels (BOL's)
 - Specific offense characteristics (SOC's)
 - Cross references
 - Chapter Three Adjustments



Subsections (a)(1) and (a)(2)

§1B1.3(a)

- Responsible for most application issues
- Requires an analysis
 - Keyed to the offense of conviction
 - Requires determinations of “WHO” & “WHEN”



(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



Holding a Defendant Accountable for His/Her Acts Under Relevant Conduct



(a)(1)(A) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(A): Acts of the defendant:
Acts committed, aided, abetted,
counseled, commanded,
induced, procured, or willfully
caused by the defendant

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection



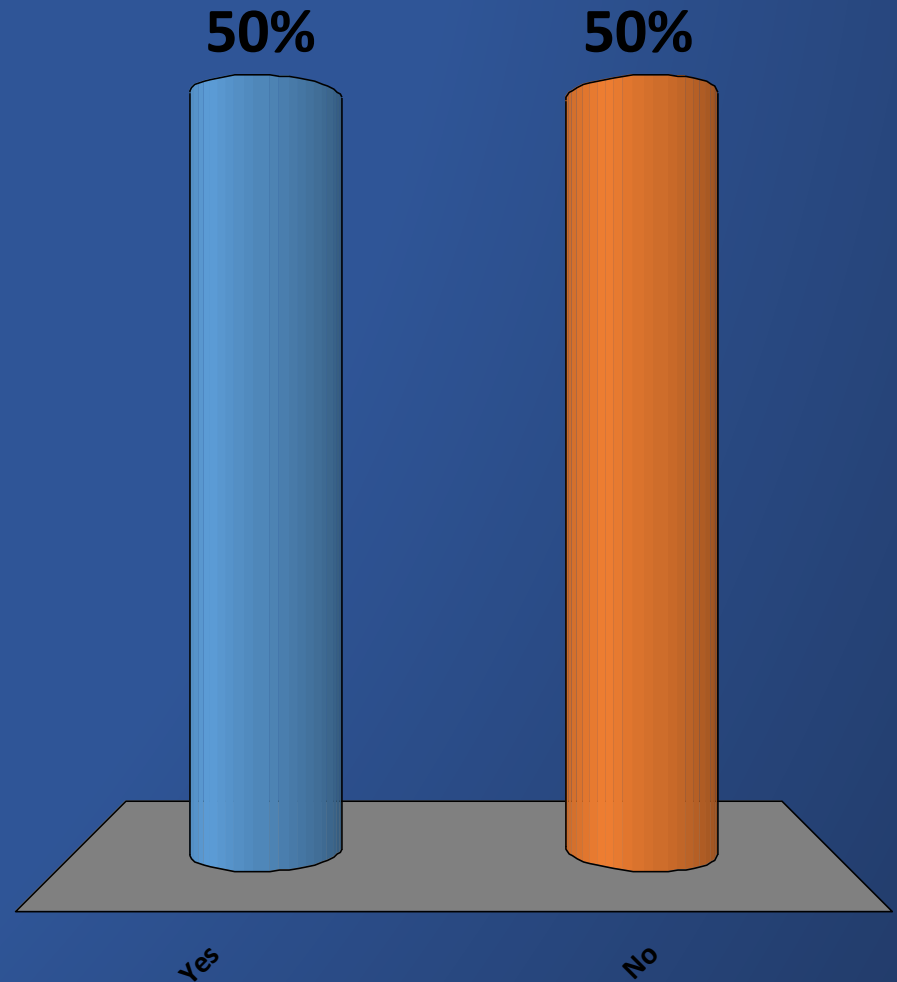
Exercise #1

- Def. convicted of one count of Bank Robbery, citing a specific date in which the defendant stole \$1,700.
- Applicable guideline is §2B3.1 (Robbery)
- If it is determined that the defendant also possessed and brandished a gun during the robbery. Should the defendant also be subject to the gun enhancement?



Should the gun enhancement be applied?

- A. Yes
- B. No



Exercise #2

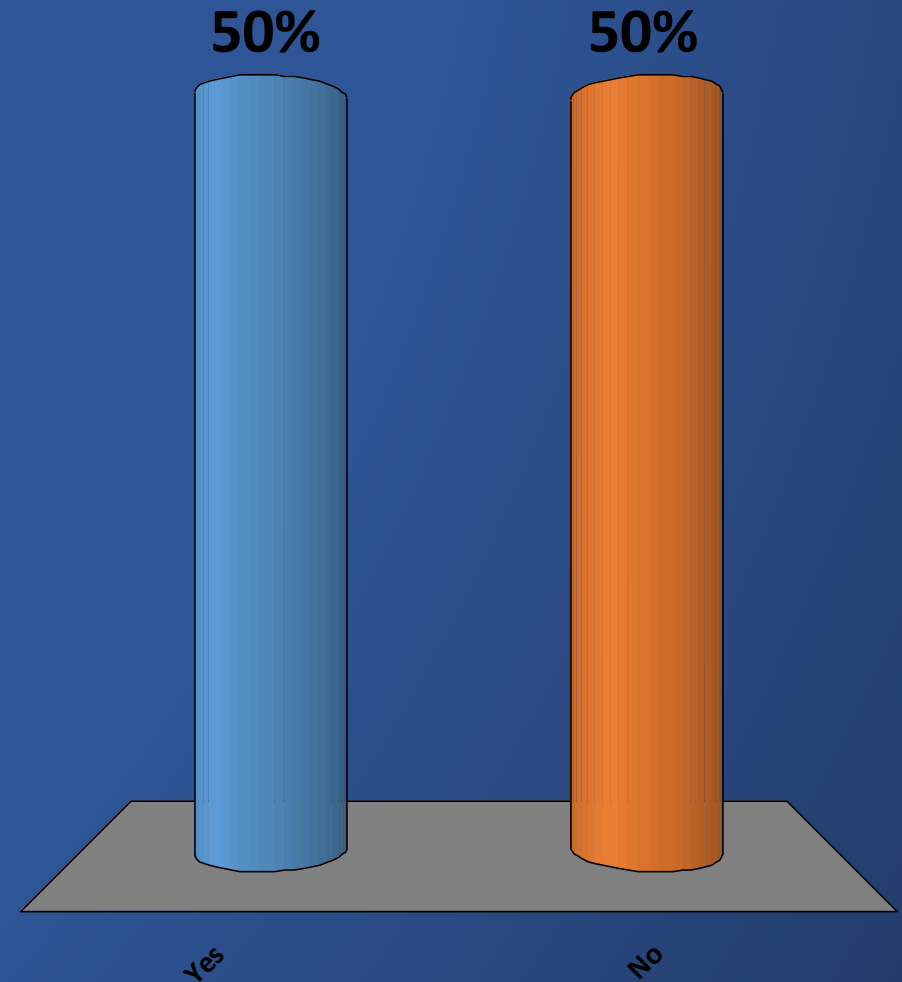
- Def. convicted of one count of Bank Robbery, citing a specific date in which the defendant stole \$1,700.
- Applicable guideline is §2B3.1 (Robbery)
- If it were determined that Def. did not possess a gun in the bank, but after the bank robbery used a gun to carjack a vehicle in order to aid the getaway, would the §2B3.1 firearm SOC apply?



Should the gun enhancement be applied?

A. Yes

B. No



Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct



(a)(1)(B) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(B): Certain acts of others:

3-part analysis:

- scope of undertaking
- acts of others in furtherance
- and reasonably foreseeable

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection



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

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking



Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others



Standard for “Reasonable Foreseeability”

§1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
 - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?



Determining Scope in a Conspiracy

§1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy



Determining Scope in a Conspiracy (cont.)

“Bright Line Rule” of
§1B1.3, App. Note 2

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.



“Reasonably Foreseeable”

§1B1.3, App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Reasonable foreseeability applies only to the conduct of others ((a)(1)(B)); it does not apply to the defendant’s own conduct ((a)(1)(A))



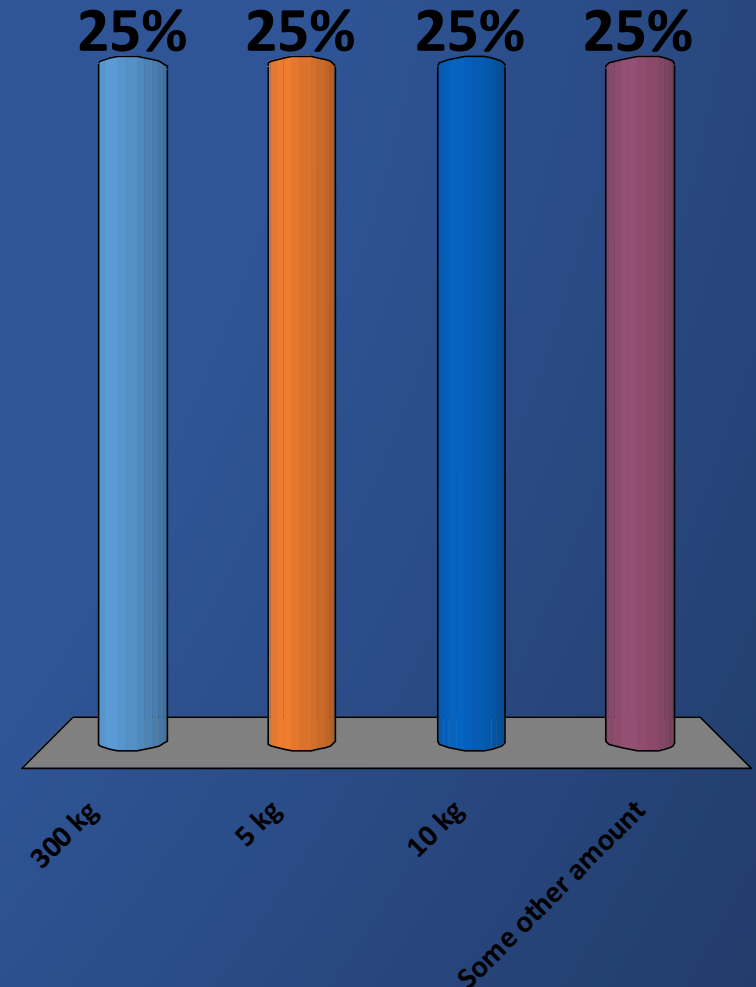
Exercise #3

- Def. is convicted of a drug conspiracy involving at least 300kg of cocaine
- Applicable guideline is §2D1.1 (Drugs)
- Conspiracy involved multiple importations; however, Def. was only involved in two importations of 5kg each
- It is determined that the defendant's undertaking only includes the two importations of 5kg each



What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

- A. 300 kg
- B. 5 kg
- C. 10 kg
- D. Some other amount



Exercise #4

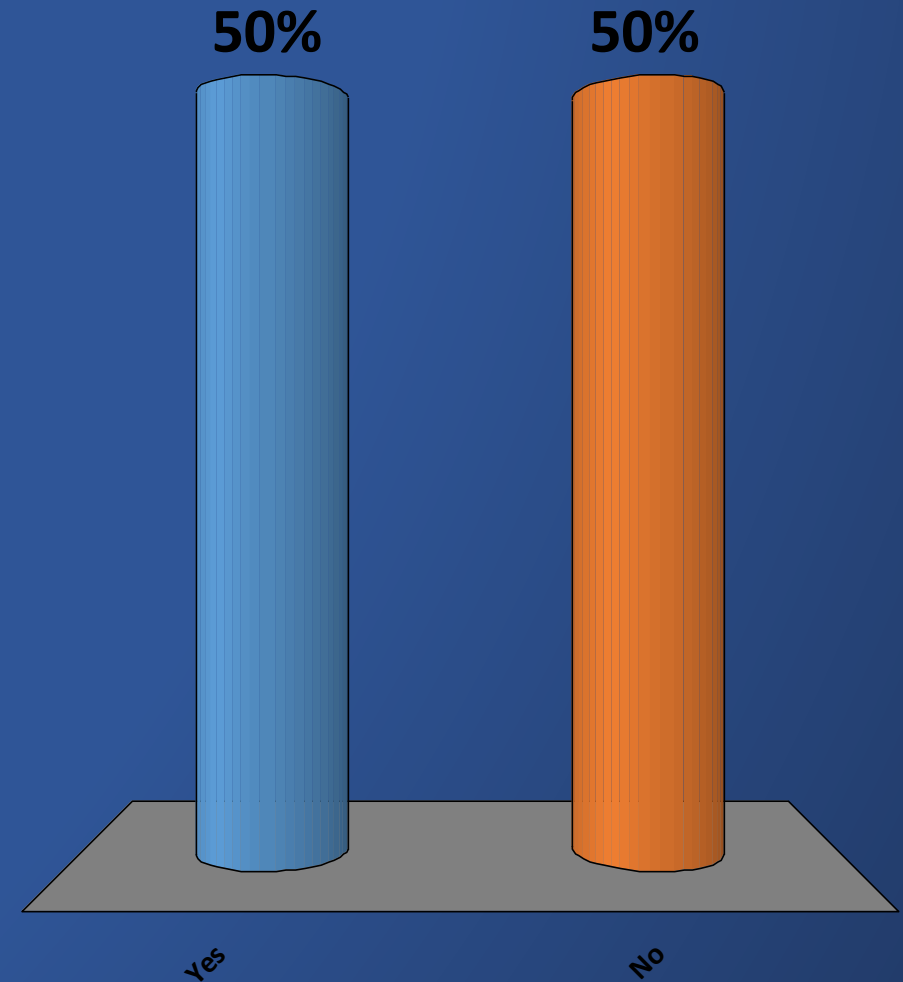
- Def. convicted of bank robbery
- Applicable guideline is §2B3.1
- Co-participant carried a gun in the robbery, a fact unknown to Def. until the commission of the robbery
- Will the §2B3.1 SOC for “if a firearm was brandished or possessed” apply?



Should the gun enhancement be applied?

A. Yes

B. No



Exercise #5

- Three defendants convicted of a Drug Conspiracy involving 10,000 kg of Marijuana- §2D1.1.
- Defendant 1 lives in Minnesota, but owns a grow operation in CA. Defendant 2 lives in CA at the grow operation and is responsible for taking care of the plants, watering them, harvesting, etc. Defendant 3 lives in CO and has access to an airplane. He flew to CA on several occasions to pick-up the marijuana (total of 5, 000kg) and took it back to CO to distribute to his people.
- What amounts are attributable to each defendant?



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

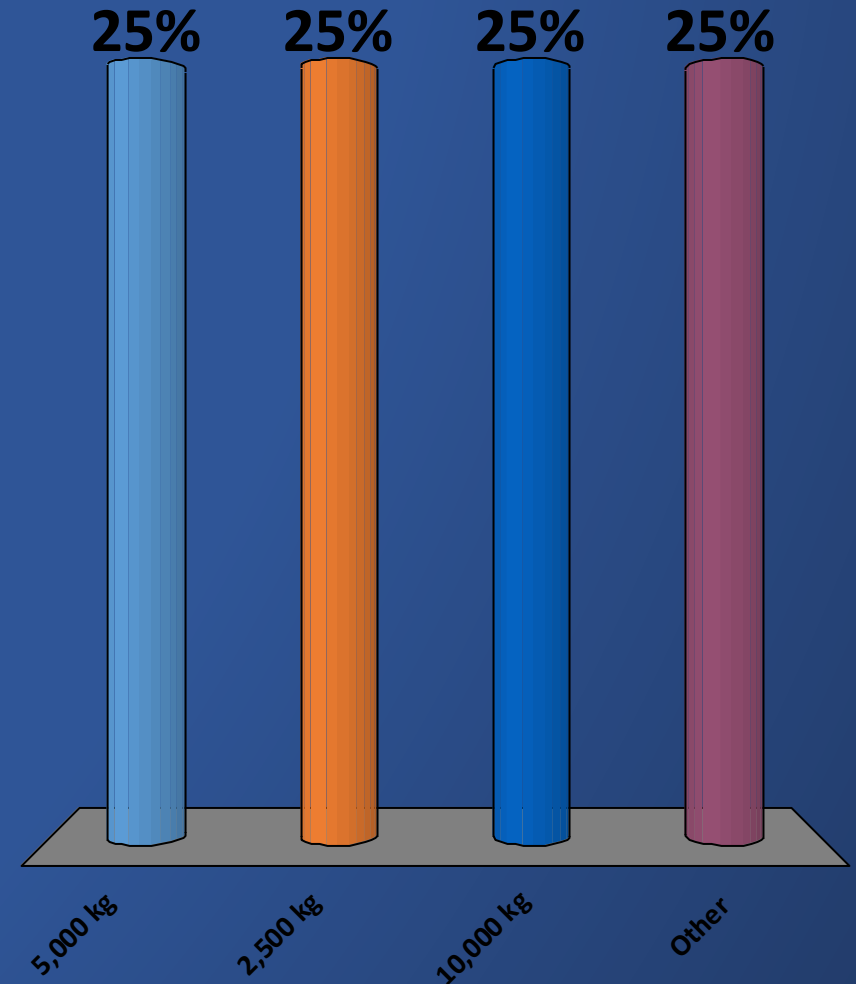
Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking



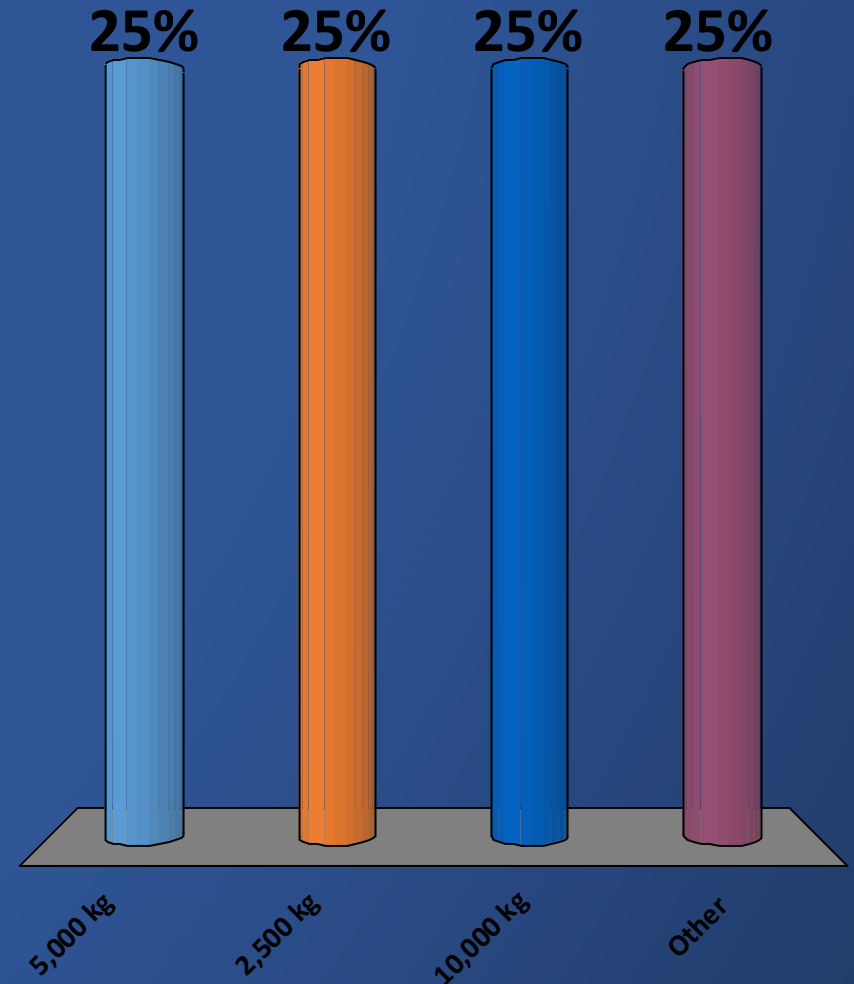
What quantity of marijuana is Defendant 1 accountable for?

- A. 5,000 kg
- B. 2,500 kg
- C. 10,000 kg
- D. Other



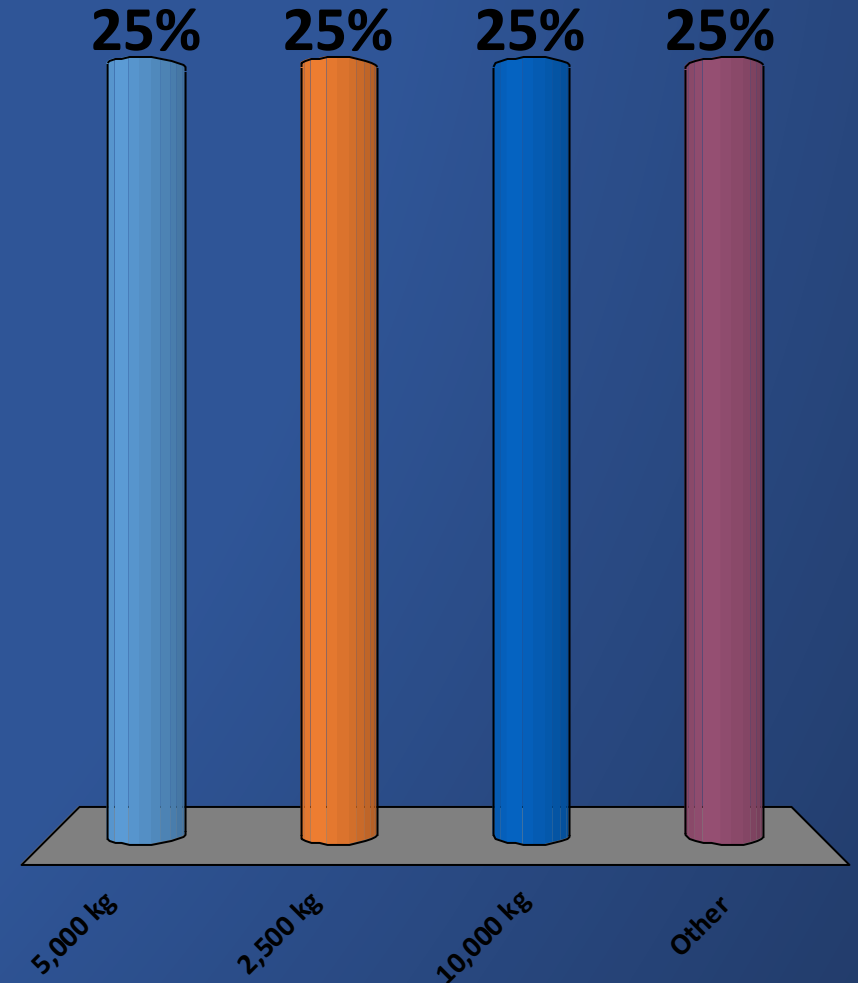
What quantity of marijuana is Defendant 2 accountable for?

- A. 5,000 kg
- B. 2,500 kg
- C. 10,000 kg
- D. Other



What quantity of marijuana is Defendant 3 accountable for?

- A. 5,000 kg
- B. 2,500 kg
- C. 10,000 kg
- D. Other



Exercise #6

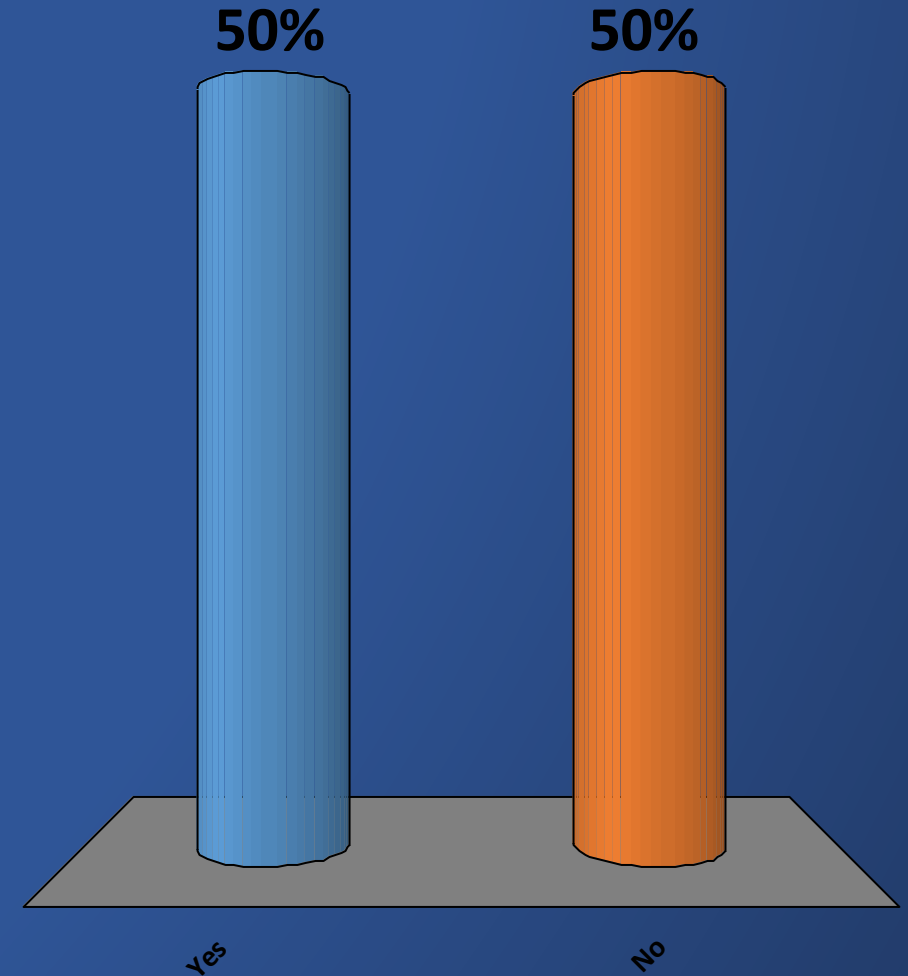
- Defendants were convicted of Filing False Tax Returns - §2T1.1. Defendant 1 steals personal identifying information from a local business. Defendant 2 files the vast majority of the false tax returns. Defendant 1 only files a handful of returns, but they share the return money which exceeds \$100,000.



Is each defendant accountable for the total loss amount?

A. Yes

B. No





“Expanded Relevant Conduct”

(a)(2) of §1B1.3



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Analysis of §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 Applies

§1B1.3(a)(2) & “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



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



“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 9(A)

- 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 9(B);
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity



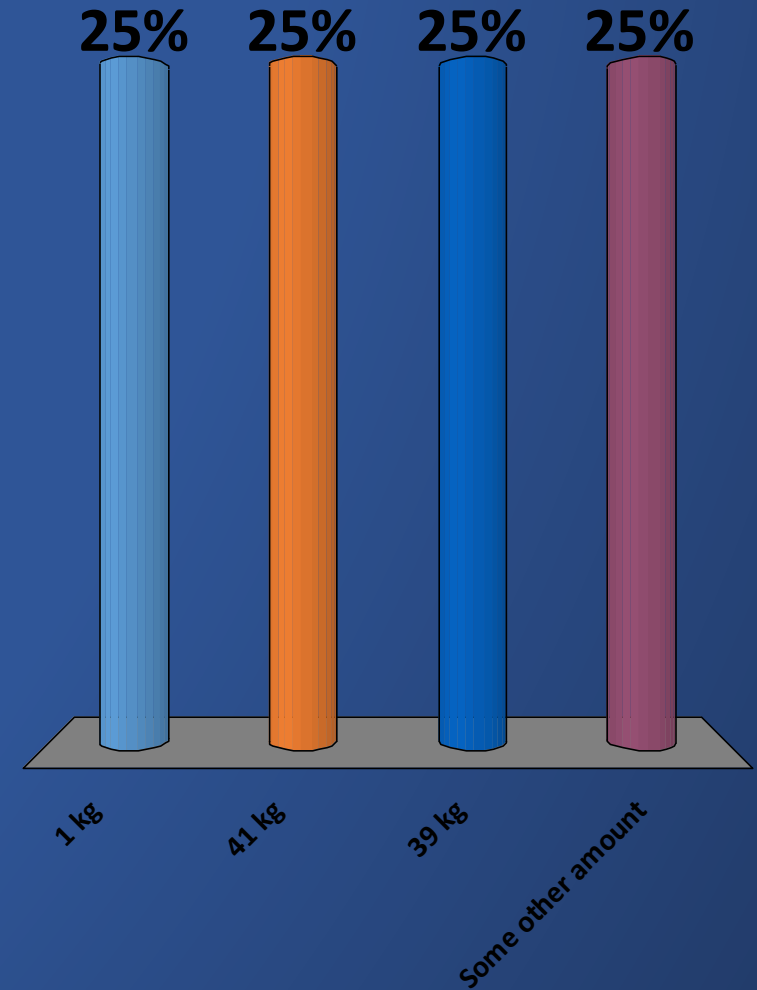
Exercise #7

- Def. convicted of sale of 1kg of cocaine on a single occasion
- Applicable guideline is §2D1.1
- It is determined that Def. additionally sold 1kg of cocaine to the same gang member each week for 40 weeks



What quantity of drugs will be used to determine the defendant's base offense level at §2D1.1?

- A. 1 kg
- B. 41 kg
- C. 39 kg
- D. Some other amount



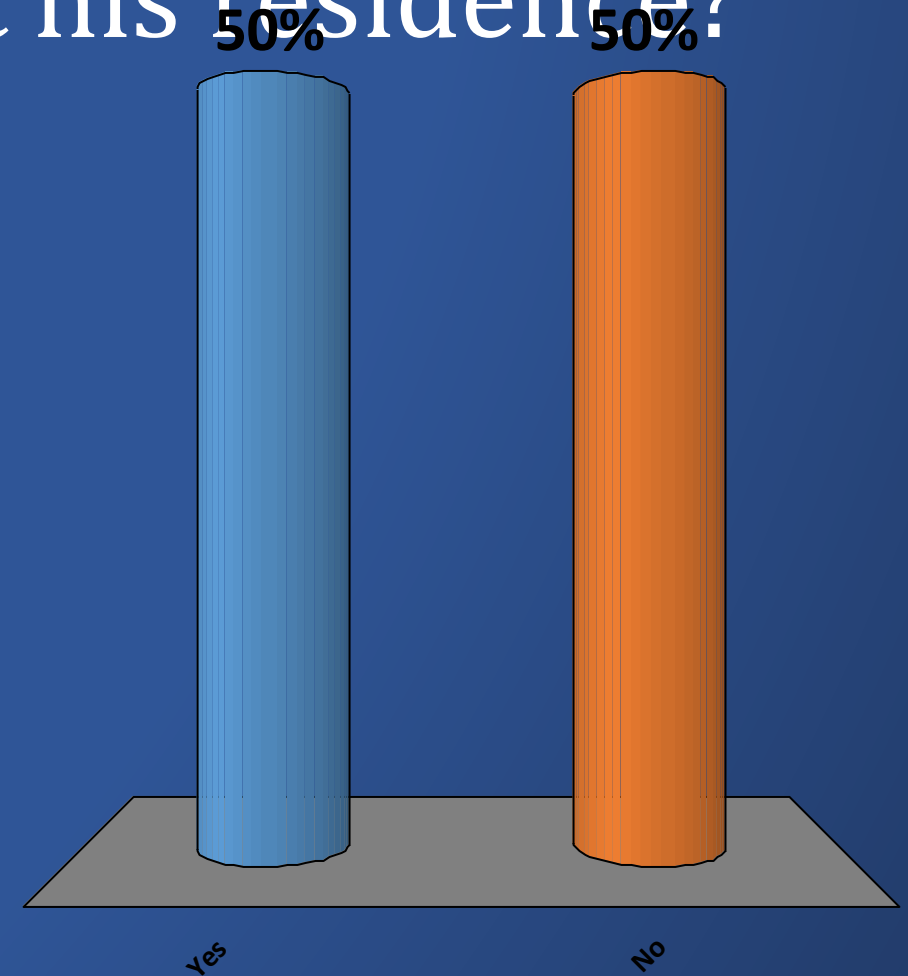
Exercise #8

- Defendant convicted of Felon in Possession of a Firearm - §2K2.1.
- Several months after the offense cited in the Indictment, during the execution of the search warrant, officers located seven additional firearms, including two that were stolen and four that had the serial numbers scratched off.



Is the defendant accountable for the firearm in the count of conviction as well as the 7 firearms located at his residence?

- A. Yes
- B. No



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



§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~~



Exercise #9

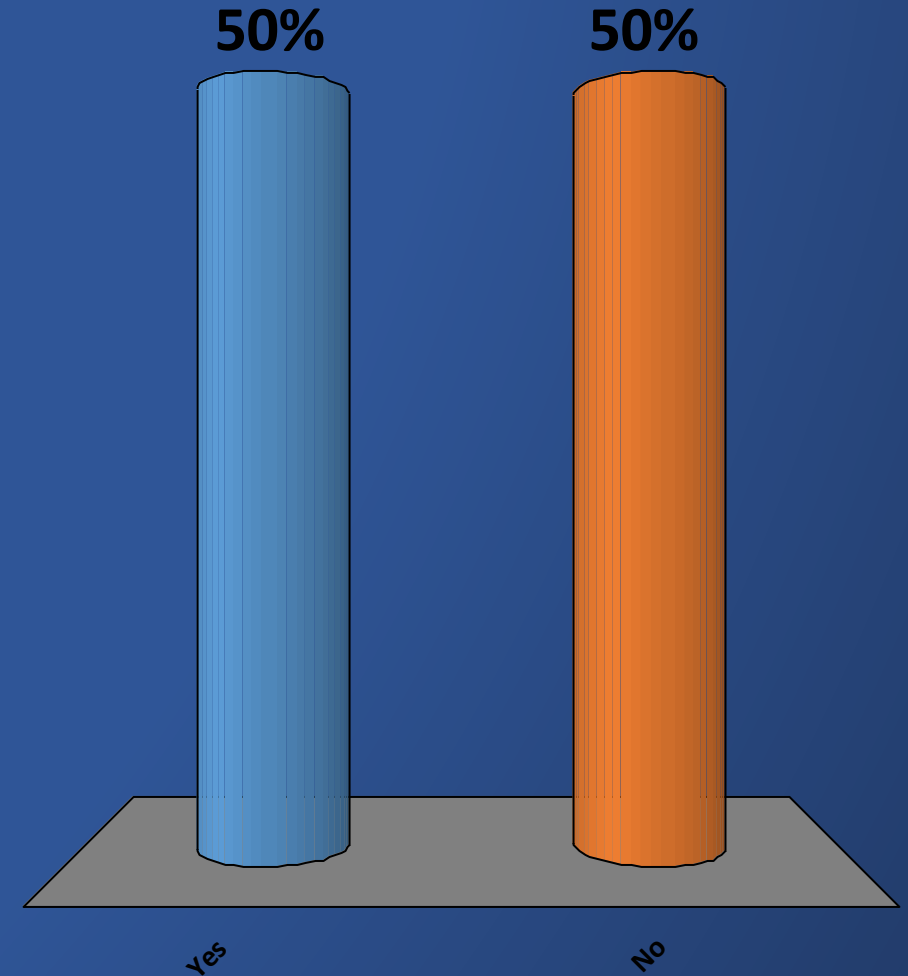
- Defendant was indicted for 21 bank robberies.
- Defendant pleads guilty to 5 of them.

- Can you include the additional 16 of them for relevant conduct purposes?



Will the additional robberies be included as relevant conduct?

- A. Yes
- B. No



Helpful Approach to Relevant Conduct in the Application of Chapter Two

- Determine the applicable Chapter Two guideline
 - Using §1B1.2 and Appendix A
- Determine if the guideline has “expanded” relevant conduct of (a)(2)
 - Look to §3D1.2(d)



Helpful Approach (cont.)

- Review the Chapter Two guideline
 - Determine what (a)(1) and (a)(2) acts will be addressed
 - Determine if any additional information is specified
- Determine if a cross reference will result in use of a different Chapter Two guideline
 - Make similar assessments as made above

