



Role in the Offense

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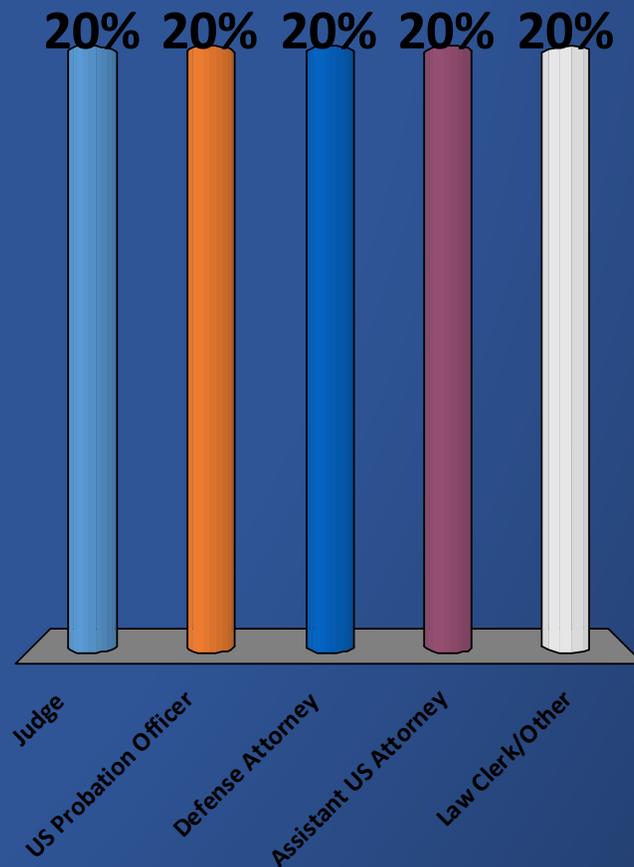
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What position do you hold?

- A. Judge
- B. US Probation Officer
- C. Defense Attorney
- D. Assistant US Attorney
- E. Law Clerk/Other



Role in the Offense Adjustments

Chapter Three, Part B

• §3B1.2 Mitigating Role

- If the defendant was a minimal participant in any criminal activity, **decrease by 4 levels.**
- If the defendant was a minor participant in any criminal activity, **decrease by 2 levels.**
- In cases falling between (a) and (b), **decrease by 3 levels.**



Role in the Offense

National Data

	<u>2014</u>	<u>2015</u>	<u>2016</u>
• Minimal Participant	1.6%	1.4%	1.59%
• Less than Minor Role but not Minimal	0.5%	0.5%	0.51%
• Minor Participant	5.6%	4.9%	5.47%

2016 preliminary data through July 2016



Mitigating Role – Reason for Amendment

7

- Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended.
- Eg. – Mitigating role along the southwest border varied greatly, with a low of 14.3% of couriers and mules receiving the adjustment to a high of 97.2% in another.
- In economic crimes, the adjustment was often applied in a limited fashion.
- Often mitigating role reduction adjustments were not applied in cases where the defendant was “integral” to the successful commission of the offense.





General Principles



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Multiple “participants” required for a role adjustment ⁹

Pursuant to §3B1.2, App. Note 1 – referenced to §3B1.1, App. Note 1
and §3B1.2, App. Note 2

- Participants have to be criminally responsible, but not necessary charged or convicted
- The defendant is a participant; informants may be participants; undercover officers are not
- A role reduction is not applicable unless more than one participant was involved in the offense



Mitigating Role Adjustment

Misperceptions?

- All couriers should receive a mitigating role reduction.
- In a drug case involving multiple defendants, someone has to receive a role reduction.
- In most fraud cases, rarely is there a person who warrants a role reduction.
- If someone plays an integral part in the criminal activity, then they can't receive a role reduction.





Mitigating Role



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Mitigating Role

§3B1.2 Minor Role App. Note 3(A)

Applicability of Adjustment –

Designed for the defendant who is “substantially less culpable than the average participant – **in the criminal activity.**”



Mitigating Role

§3B1.2, App. Note 3(C)

- The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, *is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.*

The determination is fact specific



Mitigating Role

§3B1.2, App. Note 3(A)

- Provides that certain individuals who perform limited functions in the criminal activity “may receive” a role adjustment
 - “A defendant who is accountable under 1B1.3 (Relevant Conduct) only for the conduct in which the defendant was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline.”



Mitigating Role §3B1.2, Reason for Amendment

- The U.S. Sentencing Commission would like to encourage the use of the mitigating role more consistently.
 - Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended.



Mitigating Role

Less Serious Offense §3B1.2 App. Note 3(B)

- A reduction for mitigating role is not ordinarily warranted if the defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct



Factors for the Court to Consider

§3B1.2, App. Note 3(C) – non-exhaustive list

- i. The degree to which the defendant understood the scope and structure of the criminal activity
- ii. The degree to which the defendant participated in the planning/organization of the activity
- iii. The degree to which the defendant exercised decision-making authority
- iv. The nature and extent of the defendant's participation in the commission of the criminal activity
- v. The degree to which the defendant stood to benefit from the criminal activity



Examples

§3B1.2, App. Note 3(C)

- Provides example that a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment.
- Provides that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative

Little case law on this since the November 1, 2015 change in the Guidelines



Mitigating Role

§3B1.2 Minimal Participant App. Note 4

- *Minimal Participant.* Subsection (a) applies to a defendant described in Application Note 3 (A) who plays a minimal role **in the criminal** activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant



Mitigating Role

Minimal Participant

- “To qualify as a minimal participant, a defendant must prove that he is among the least culpable of those involved in the criminal activity...a defendant must be a plainly *peripheral player* to justify his classification as a minimal participant.”
 - *US v. Santos*, 357 F.3d 136 (1st Cir. 2004)
 - *US v. Teeter*, 257 F.3d 14 (1st Cir. 2001)



Couriers and Mules

§3B1.2, App. Note 3(A)

- A defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored **may receive** an adjustment under this guideline.



Questions for Scenarios

- Would you give the defendant an mitigating role reduction?
- Why or why not?
- What factors are you looking for?



Questions for Scenarios

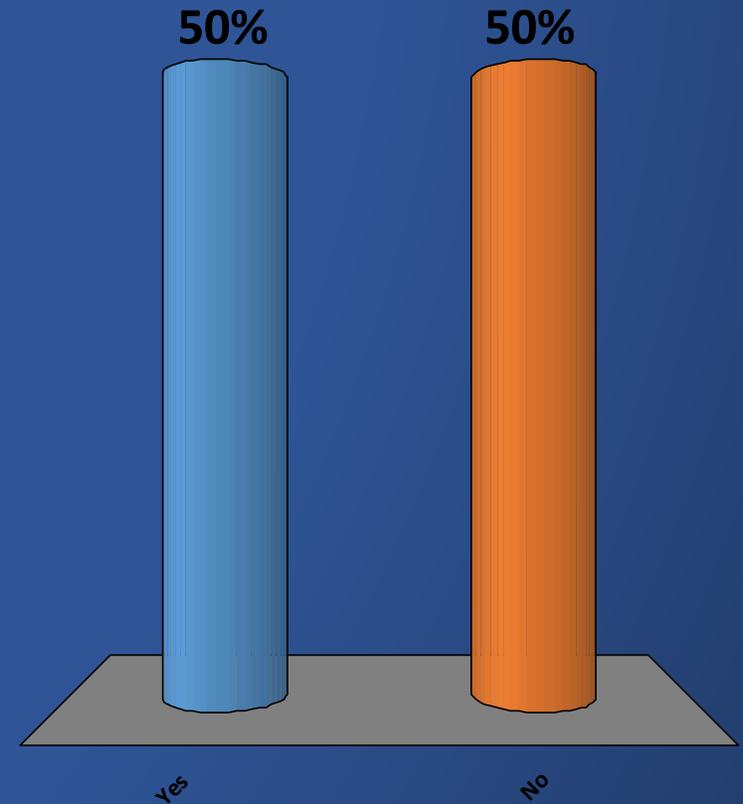
- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- What if there were 3 other co-defendants who were doing the exact same thing as the defendant?
- They must be substantially less culpable than the average participant **in the criminal activity.**



Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside.

A. Yes

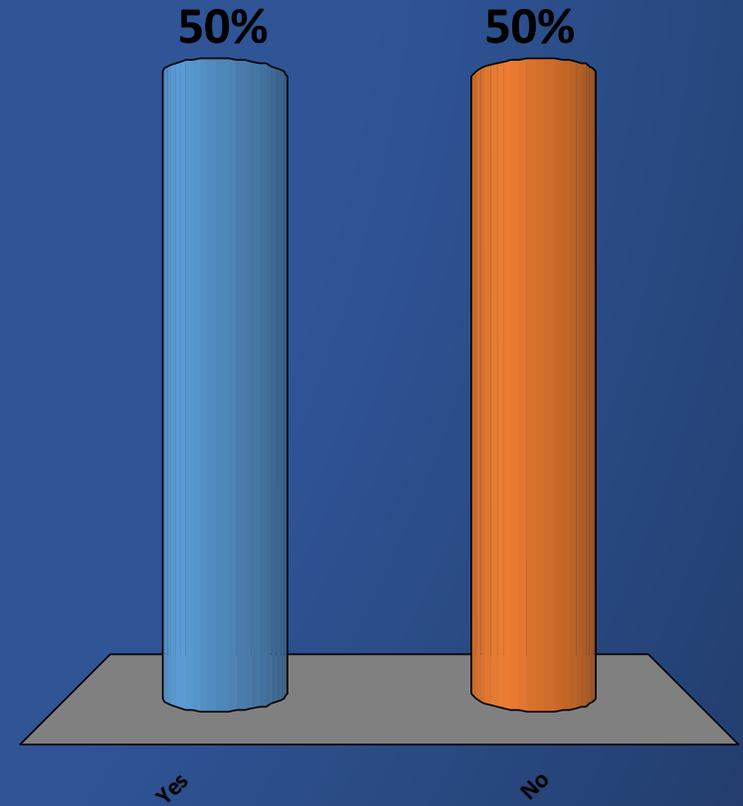
B. No



Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside. One of those defendants outside of prison helps by mailing completed tax forms and receiving refunds on debit cards.

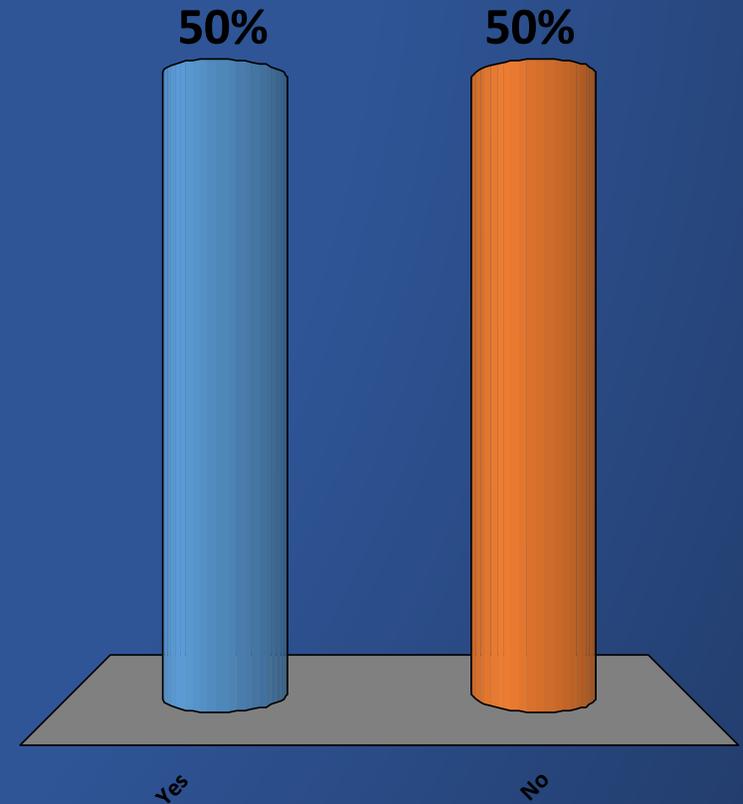
A. Yes

B. No



Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside. One of those defendants outside of prison helps by mailing completed tax forms and receiving refunds on debit cards, which are then provided to the incarcerated defendants.

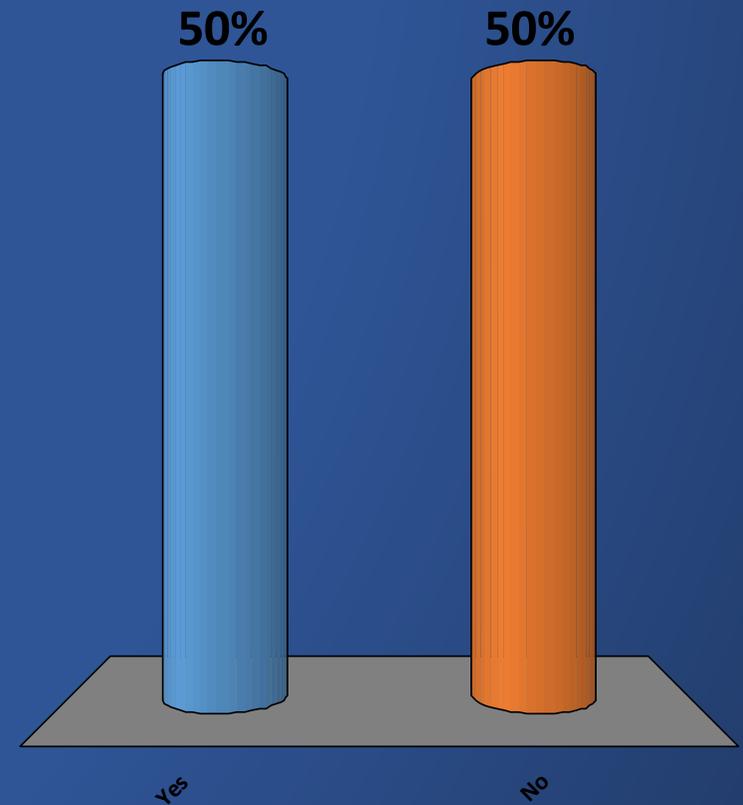
- A. Yes
- B. No



Multiple defendants operate a tax fraud scheme from inside a correctional institution. They garner the assistance of others on the outside. One of those defendants outside of prison helps by mailing completed tax forms and receiving refunds on debit cards, which are then provided to the incarcerated defendants.

The outside help receive a nominal amount of money for their assistance on relatively few occasions - \$100 per tax return

- A. Yes
- B. No



Questions for Scenarios

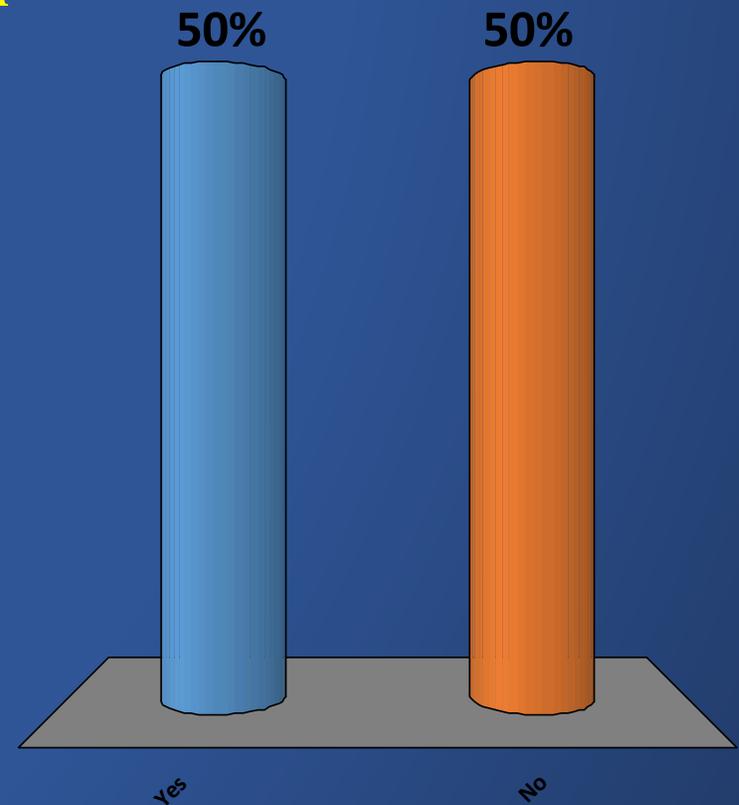
- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- Does it matter than she has done this 3 or 4 times before?
- They must be substantially less culpable than the average participant in the criminal activity.



The defendant's wife picks up the defendant who then instructs her to drive to a remote location to deliver drugs. However, upon their arrival, they are both arrested.

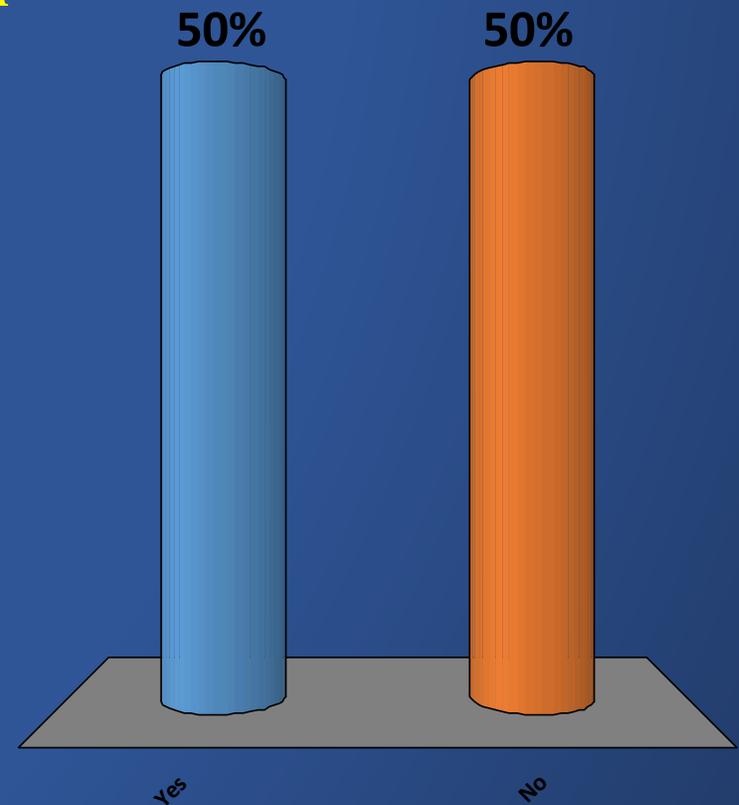
A. Yes

B. No



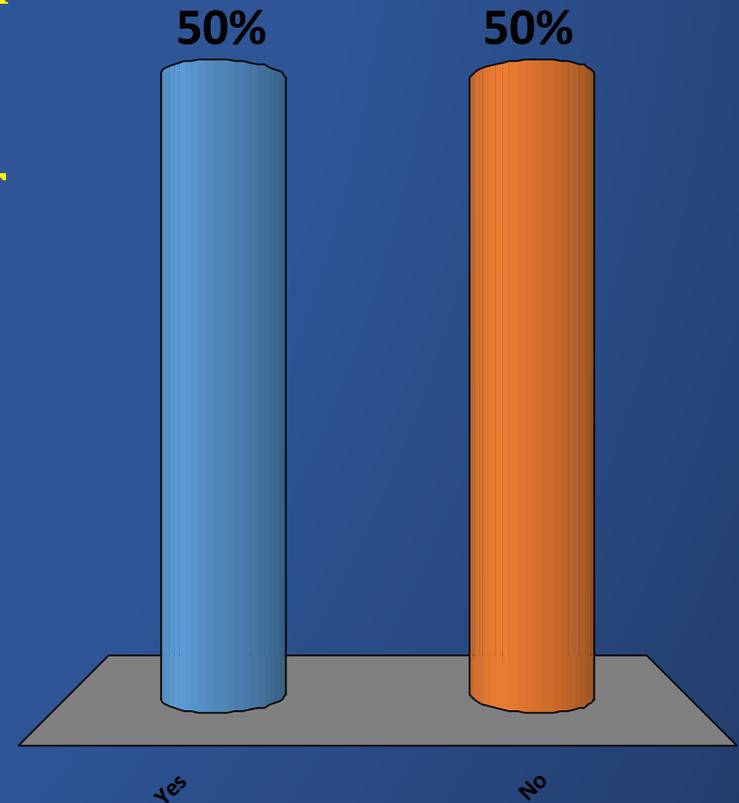
The defendant's wife picks up the defendant who then instructs her to drive to a remote location to deliver drugs. However, upon their arrival, they are both arrested. The defendant's wife has done this 3 or 4 times before.

- A. Yes
- B. No



The defendant's wife picks up the defendant who then instructs her to drive to a remote location to deliver drugs. However, upon their arrival, they are both arrested. The defendant's wife has done this 3 or 4 times before. She never knew what type of drugs or what quantity of drugs was being delivered.

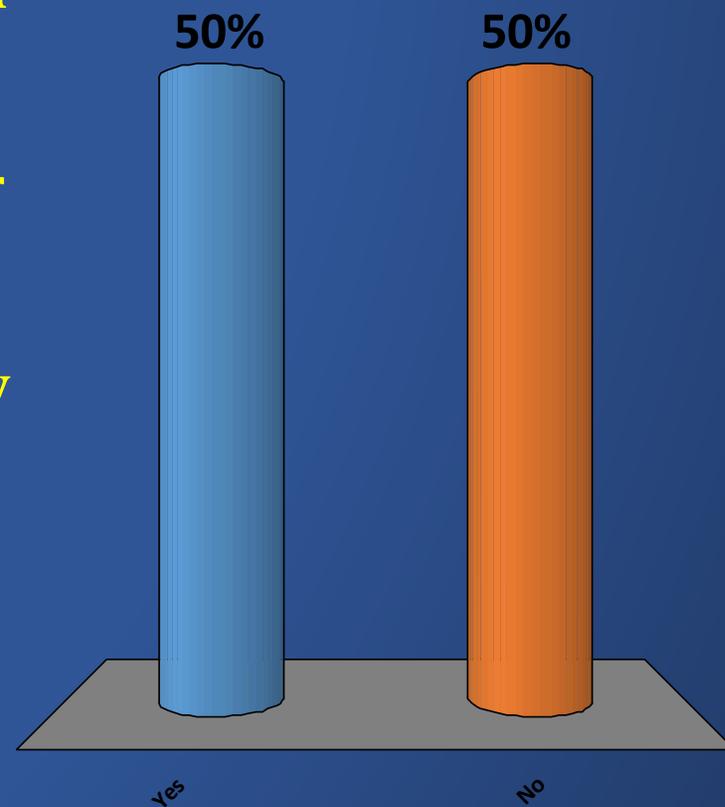
- A. Yes
- B. No



The defendant's wife picks up the defendant who then instructs her to drive to a remote location to deliver drugs. However, upon their arrival, they are both arrested. The defendant's wife has done this 3 or 4 times before. She never knew what type of drugs or what quantity of drugs was being delivered. She was also unaware how much money her husband was making. However, she often saw her husband with large quantities of cash, which she used to buy clothes and jewelry.

A. Yes

B. No



Questions for Scenarios

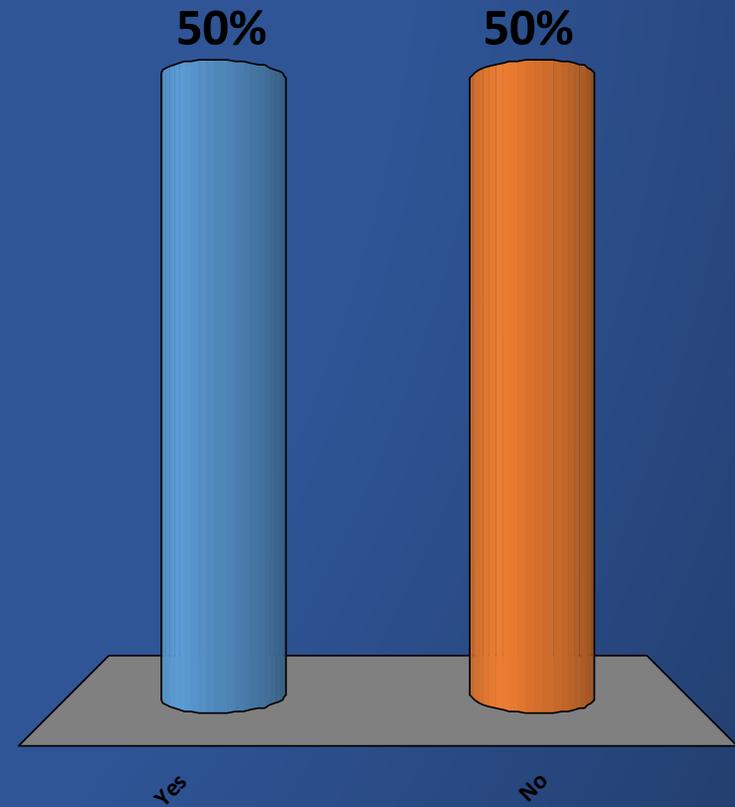
- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- Does it matter than he has done this 6 times before?
- They must be substantially less culpable than the average participant in the criminal activity.



Defendant is stopped at the border with 100 kilograms of marijuana in his vehicle.

A. Yes

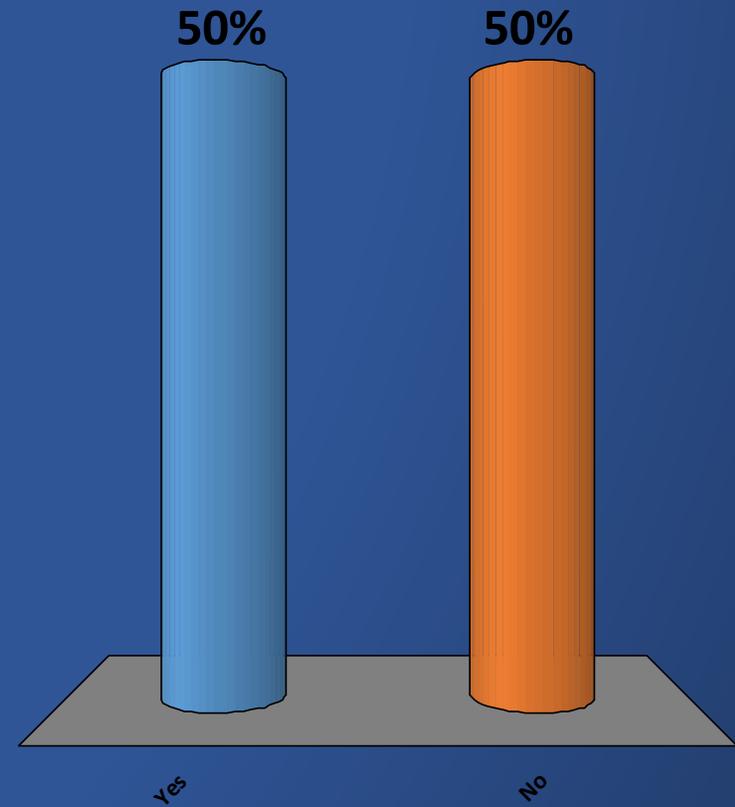
B. No



Defendant is stopped at the border with 100 kilograms of marijuana in his vehicle, along with a firearm.

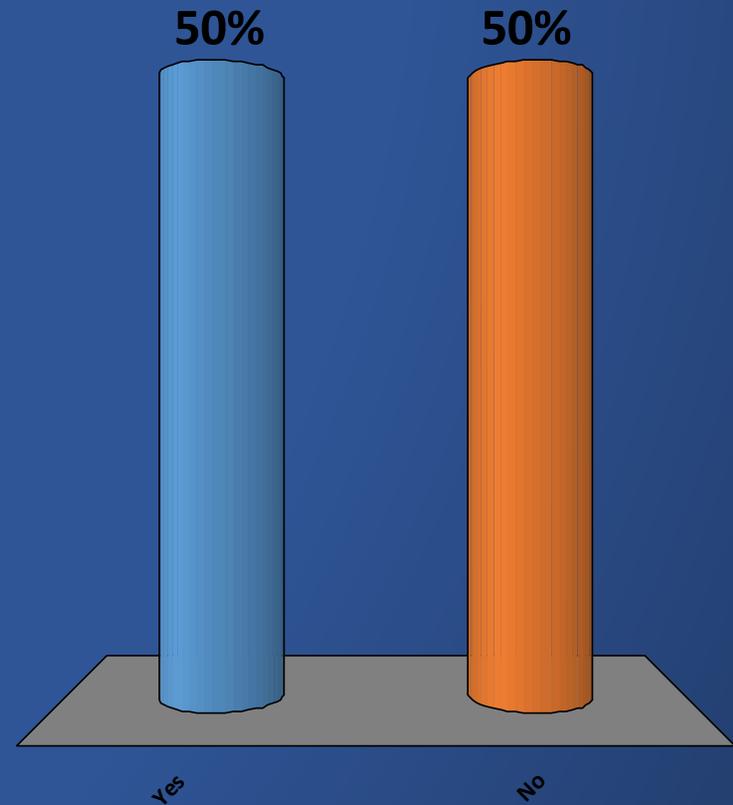
A. Yes

B. No



Defendant is stopped at the border with 100 kilograms of marijuana in his vehicle, along with a firearm. Law enforcement also located \$100,000 in cash.

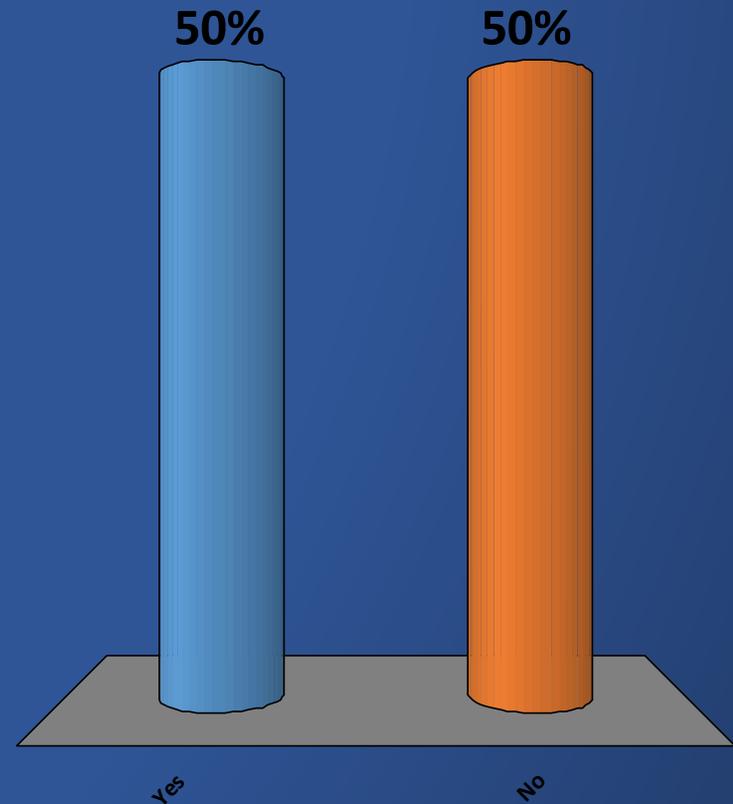
- A. Yes
- B. No



Defendant is stopped at the border with 100 kilograms of marijuana in his vehicle, along with a firearm. Law enforcement also located \$100,000 in cash. Defendant has been previously caught and convicted on 6 other occasions for transporting illegal drugs into the country. He was paid \$600 on each occasion.

A. Yes

B. No



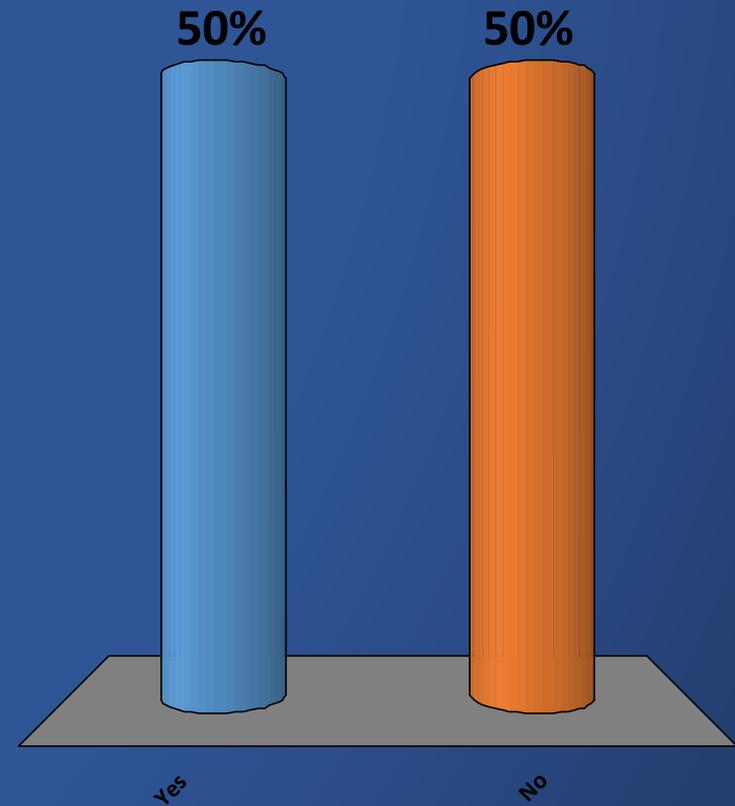
Questions for Scenarios

- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- Does it matter than she had small children with her?
- Would it make a difference if the substance was cocaine or heroin?
- They must be substantially less culpable than the average participant in the criminal activity.



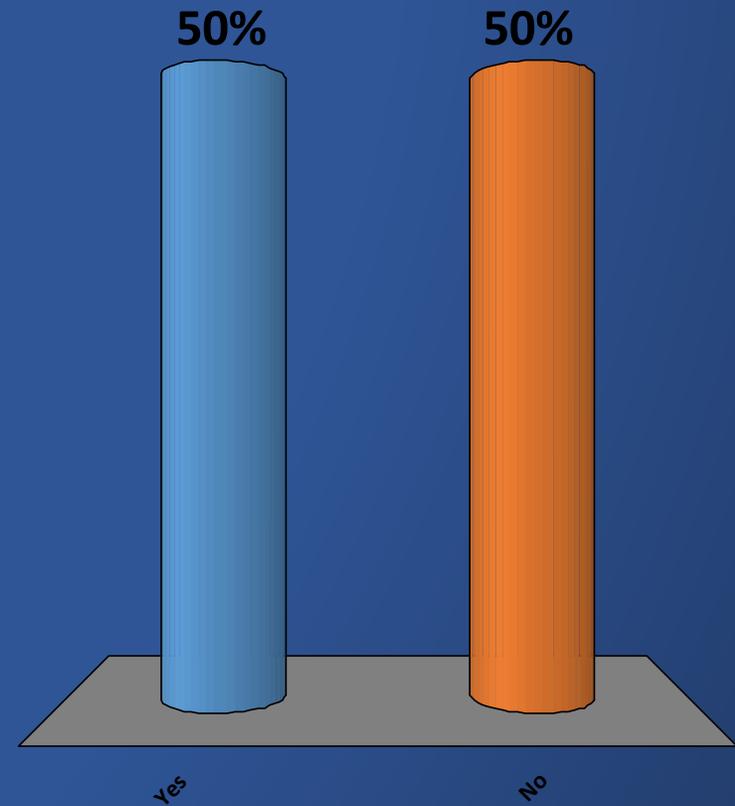
Defendant admitted to transporting 55 kilograms of marijuana concealed in her vehicle as she attempted to cross the border.

- A. Yes
- B. No



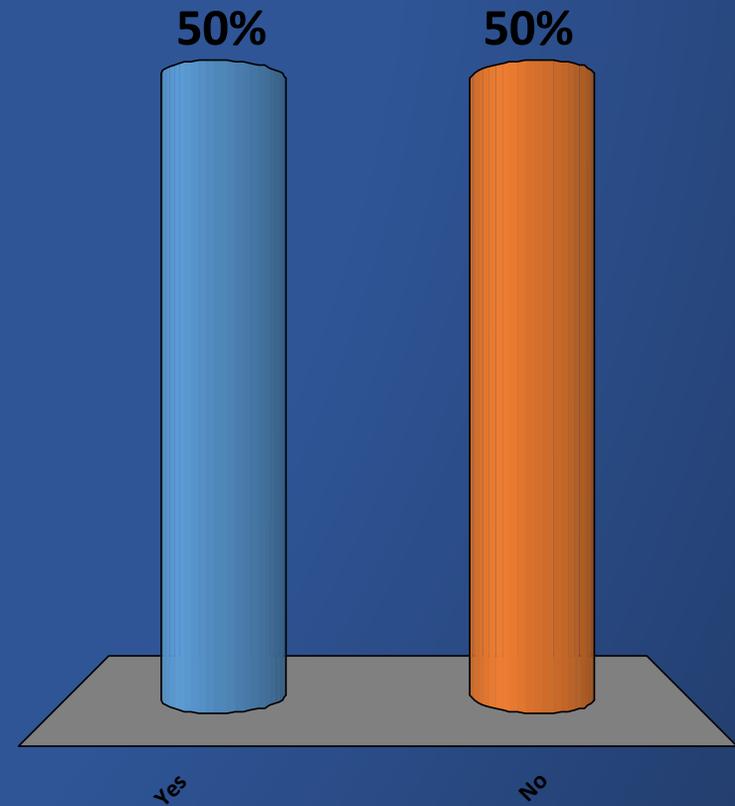
Defendant admitted to transporting 55 kilograms of marijuana concealed in her vehicle as she attempted to cross the border. Also had 2 small children with her.

- A. Yes
- B. No



Defendant admitted to transporting 55 kilograms of marijuana concealed in her vehicle as she attempted to cross the border. Also had 2 small children with her. She had never done this before.

- A. Yes
- B. No

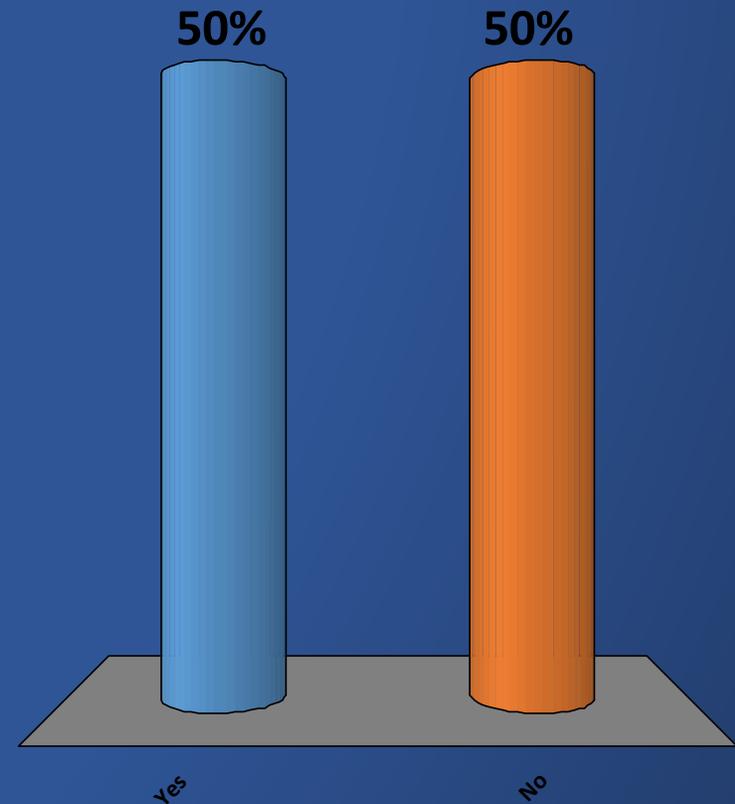


Defendant admitted to transporting 55 kilograms of marijuana concealed in her vehicle as she attempted to cross the border. Also had 2 small children with her. She had never done this before.

She was to be paid small amount of money to deliver the drugs to an unknown person upon her arrival in the U.S.

A. Yes

B. No



Questions for Scenarios

- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- Does it matter that one of the firearms was used in a murder?
- They must be substantially less culpable than the average participant in the criminal activity.



Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates.

A. Yes

B. No



Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates. She was provided with money to buy the firearms.

A. Yes

B. No



Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates. She was provided with money to buy the firearms. Defendant was aware she was buying firearms for people who could not buy them on their own. Overall conspiracy involved more than 175 firearms.

A. Yes

B. No



Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates. She was provided with money to buy the firearms. Defendant was aware she was buying firearms for people who could not buy them on their own. Overall conspiracy involved more than 175 firearms. She was paid \$100 for each firearm she purchased.

- A. Yes
- B. No



Six defendant case – One defendant (straw buyer) purchased 11 semi-automatic pistols for a member of the conspiracy on three separate dates. She was provided with money to buy the firearms. Defendant was aware she was buying firearms for people who could not buy them on their own. Overall conspiracy involved more than 175 firearms. She was paid \$100 for each firearm she purchased. However, investigators later learned one of the firearms was used in a murder.

- A. Yes
- B. No



Questions for Scenarios

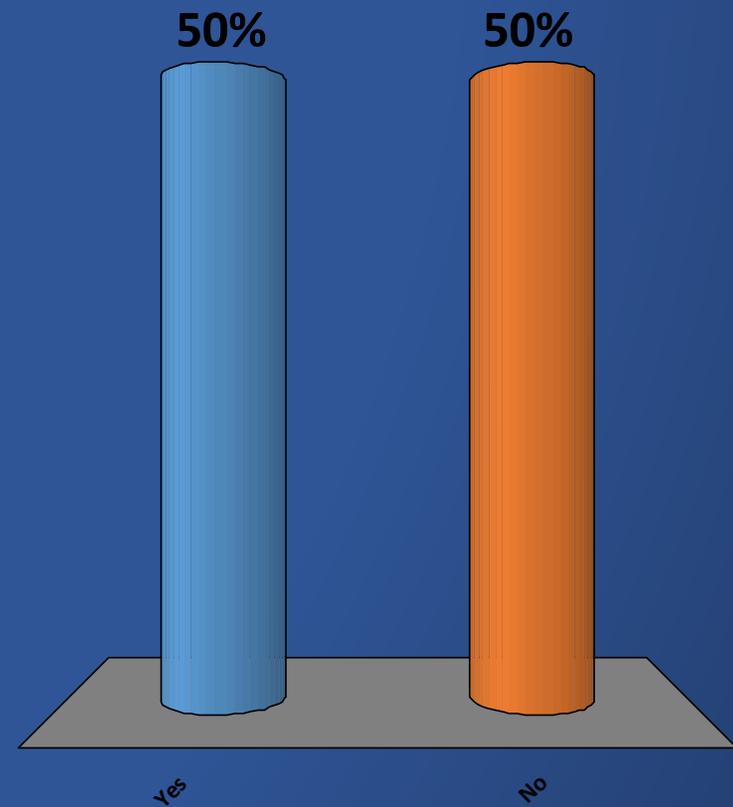
- Example shows how facts may or may not affect the determination.
- What are you looking at? - Is the defendant substantially less culpable than the average participant. What or who is the average participant?
- Does it matter that he was charged for an overall lesser amount of drugs?
- They must be substantially less culpable than the average participant **in the criminal activity.**



Defendant was involved in large conspiracy that spanned 3 years and involved 100 kilograms of cocaine

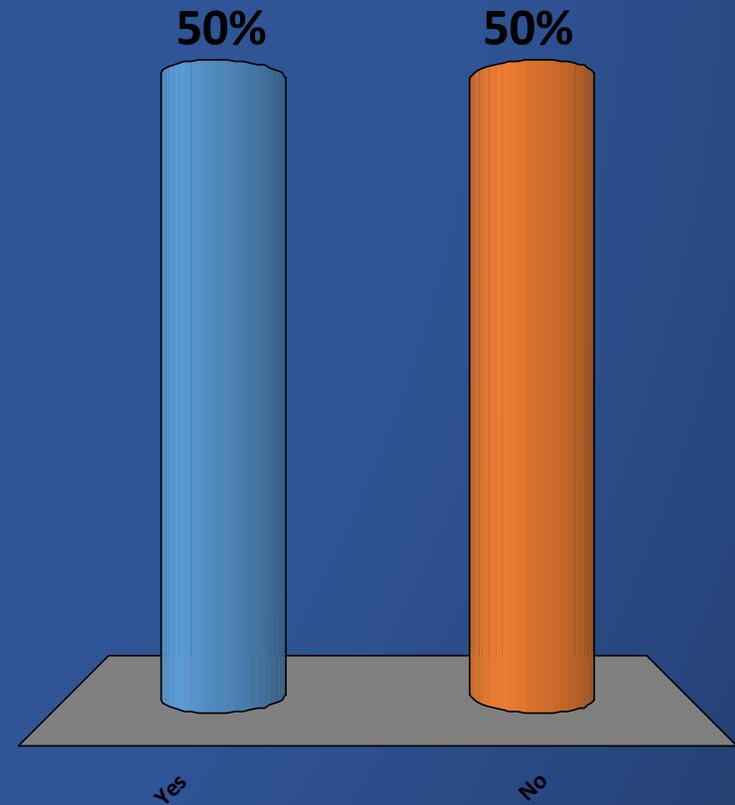
A. Yes

B. No



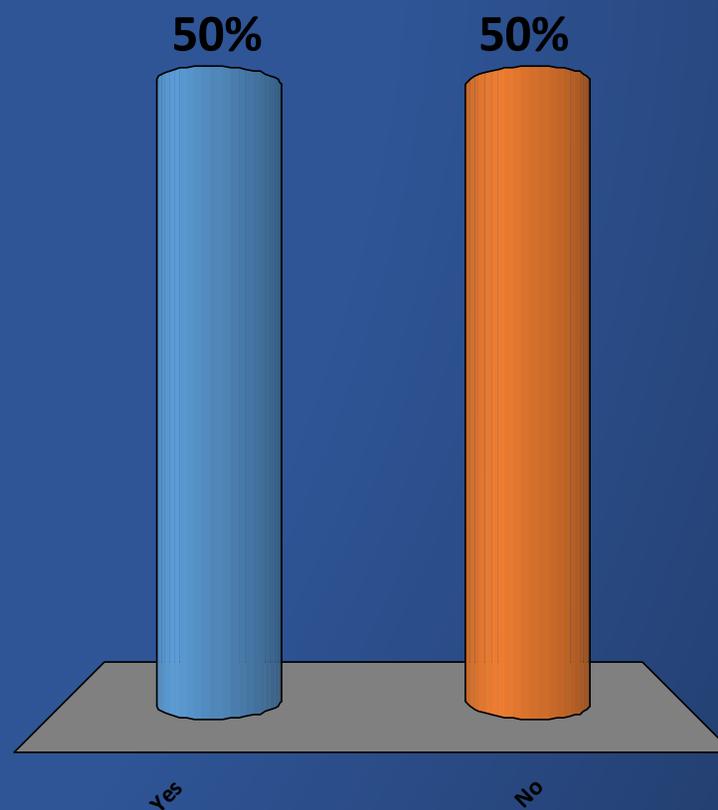
Defendant was involved in large conspiracy that spanned 3 years and involved 100 kilograms of cocaine. He was only involved for 6 months and sold drugs (1 kilogram each time) on three occasions.

- A. Yes
- B. No



Defendant accompanied her boyfriend and another co-defendant, on a trip to California to obtain drugs. She merely went along for the ride, had no financial interest, and while she made some hotel reservations for the trip, she had no additional knowledge concerning the scope of the crimes.

- A. Yes
- B. No



US v. Hunte, 196 F.3d 687 – 7th Circuit, 1999

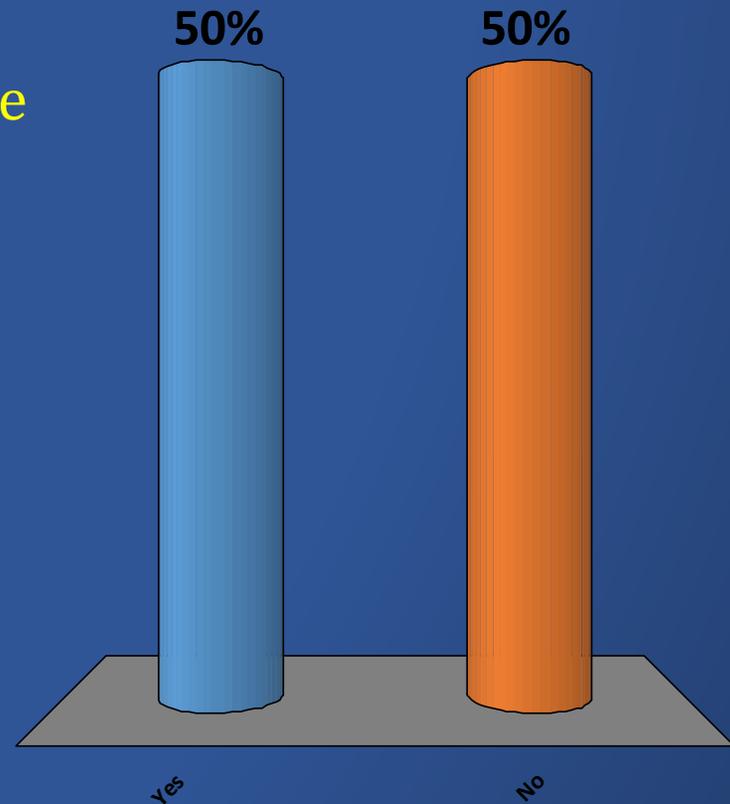
At the very least, we find that Hunte was a minor participant in that she was less culpable than most other participants. Hunte may in fact have been a minimal participant. The difference between minor and minimal depends on how the sentencing judge views the guilty conduct of the other participants. The former requires “less culpable than most” while the latter asks for “plainly among the least culpable.”

While “minor” is not necessarily synonymous with “nonessential,” Hunte's participation seems to fall well below the threshold established by the comments and cases interpreting § 3B1.2. Hunte helped hide the groups activities by closing the blinds, and registered for a motel room, but she was in no sense a courier nor did she help load or unload the drugs. She provided nothing “necessary” or “essential” to the operation.



Defendant was involved in the cultivation of marijuana plants with a co-defendant. Defendant hoped to receive 50% of the profits for his participation. However, he never received any compensation.

- A. Yes
- B. No



US v. Green, 152 F.3d 1202, 9th Circuit 1998

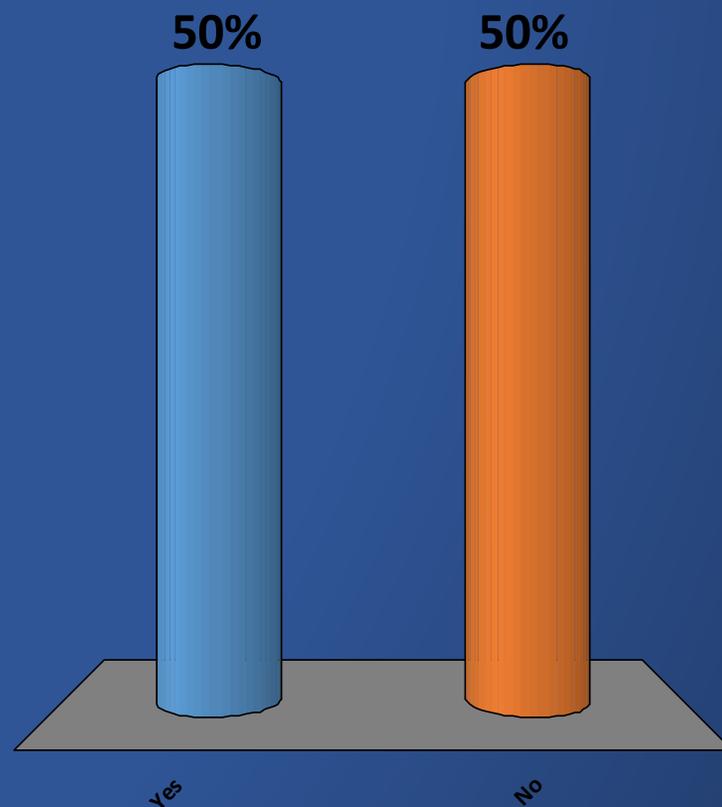
Uncontested evidence linking Green to the garden was his presence there on one confirmed occasion when he watered the plants. The fact that he gathered belongings from the campsite indicates that he was there on at least one other occasion. Indeed, he admitted that he had been to the garden on two prior occasions. He also stated that he was there on the day of his arrest as a favor to Wolf.

Green's statements, that he watered the plants to assist Wolf and that he had been to the garden only a few times in the past, coupled with the lack of physical evidence linking him to the garden, support the court's finding that his role was minimal as compared to Wolf's role.



Defendant was the middle man in a drug conspiracy, which the defendant noted made him substantially less culpable. However, he also negotiated prices for drugs.

- A. Yes
- B. No



US v. Llantada, 2016 WL 873384

He argues that because he was only a middleman in the drug conspiracy, the district court clearly erred in failing to provide for a mitigating role adjustment. The mitigating role adjustment provides “a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.” USSG § 3B1.2 cmt. application note 3(A).

But we have emphasized that “a defendant is not necessarily entitled to a sentence reduction under § 3B1.2 solely because he can show that he was a middleman.” *United States v. Onheiber*, 173 F.3d 1254, 1258 (10th Cir.1999).

Here, the court found that Llantada's conduct warranted an *aggravating* role adjustment, finding that he had the authority to negotiate a price for the drugs.





Miscellaneous Issues



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Mitigating Role and the Drug Guideline

- The base offense level is established by the type and quantity of drugs on the Drug Quantity Table EXCEPT if *mitigating* role cap (§3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

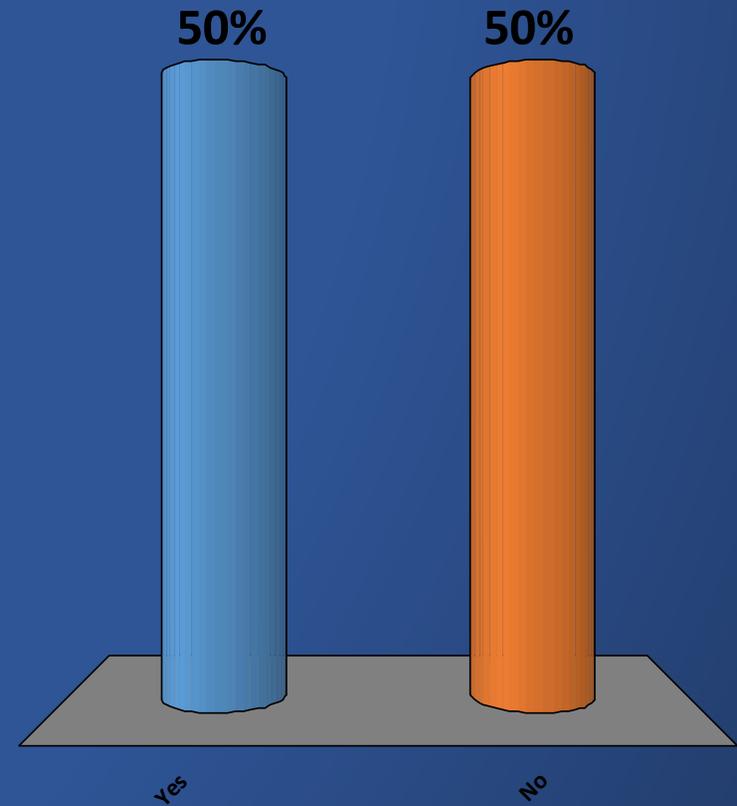
Note: the role reduction at §3B1.2 will also apply – §3B1.2 App. Note 6



Can a career offender receive a mitigating role reduction?

A. Yes

B. No



US v. Perez, 328 F.3d 96

As to the second point of law, all the circuit courts that have reached the question agree that “career offenders” cannot receive a “minor role” downward adjustment, to the extent that such an adjustment would result in an offense level that falls below the career-offender minimum established by U.S.S.G. § 4B1.1(b).² See *United States v. Beltran*, 122 F.3d 1156, 1160 (8th Cir.1997); *United States v. Griffin*, 109 F.3d 706, 708 (11th Cir.1997) (per curiam); *United States v. McCoy*, 23 F.3d 216, 218 (9th Cir.1994) (per curiam); *United States v. Morales-Diaz*, 925 F.2d 535, 540 (1st Cir.1991); and, especially, *United States v. Johnson*, 155 F.3d 682 (3d Cir.1998).



Any Questions?

