



Basic Relevant Conduct

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Practice

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Basic Relevant Conduct Objective

- **An introduction to the analysis of Relevant Conduct**
 - A defendant's accountability for his/her own acts and certain acts of others
 - A defendant's accountability in a broadly worded conspiracy count
 - A defendant's accountability for act in the same course of conduct or the common scheme or plan as the offense of conviction

Basic Relevant Conduct Objective

- **Not included in Basic, but addressed in Advanced Relevant Conduct**
 - Impact of the terms “Offense” and “Defendant” upon the Relevant Conduct analysis
 - Relevant Conduct and the determination of grouping for multiple counts of conviction (Chapter 3, Part D)
 - Relevant Conduct and the calculation of criminal history points (Chapter 4)
 - Relevant Conduct and undischarged terms of imprisonment (§5G1.3)



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Basic Relevant Conduct

§1B1.3



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Relevant Conduct – The Gatekeeper

§1B1.3

- Relevant Conduct does not create any additional guideline characteristics or adjustments
- *Rather*, §1B1.3 (Relevant Conduct) serves as a “gatekeeper” in determining the conduct to be considered in the application of the *existing* guidelines factors



NOTE

- Relevant Conduct will limit the conduct that can be used in *guideline application*
- However for purposes of *sentencing*, generally ALL information can be used
 - 18 U.S.C. § 3661
 - §1B1.4
 - *Witte, Watts, etc.*



Relevant Conduct and Criminal Liability

§1B1.3, App. Note 1

- Sentencing accountability is not always the same as criminal liability



Relevant Conduct Synopsis

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Defendant accountable for certain acts others did in furtherance of the offense of conviction



Relevant Conduct Synopsis (cont.)

- *For certain offenses*, defendant also accountable for acts he/she did, and certain acts others did in the same course of conduct or common scheme or plan as the offense of conviction



Relevant Conduct

§1B1.3(a)

Establishes what is relevant for application of Chapters Two and Three

- Base Offense Levels (**BOLs**)
- Specific Offense Characteristics (**SOCs**)
- Cross References
- Chapter Three Adjustments (Adjustments)



Relevant Conduct

§1B1.3(a)

(a)(1) & (a)(2): Analysis to establish relevant acts

(a)(3): Harms resulting from, or that were the object of the acts established in (a)(1) & (a)(2)

-E.g., “loss” and “injury” are harms

(a)(4): Information specified for application in a particular guideline



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

§1B1.3(a)(1)(A)



(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

- Defendant convicted of one count of Bank Robbery, citing a specific robbery
- Applicable guideline §2B3.1 (Robbery)
- It is determined that Defendant possessed a firearm during the robbery
- Will the §2B3.1(b)(2) SOC “if a firearm was brandished or possessed, increase by 5 levels” apply?



Will the firearm SOC apply?

A. Yes

B. No



Exercise #1 – Variation

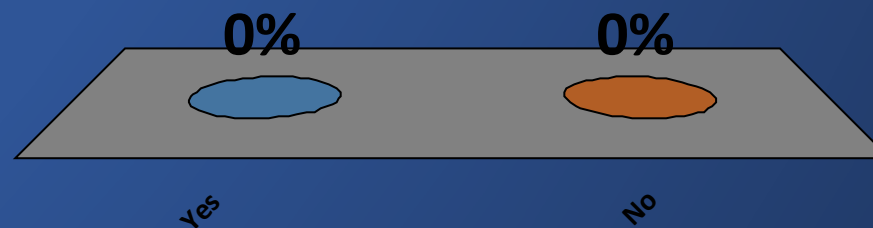
- While Defendant was actually robbing the bank there was no indication that he possessed a firearm
- After exiting the bank, in carjacking a vehicle for his getaway, Defendant discharged a firearm
- Will the §2B3.1(b)(2) SOC “if a firearm was discharged, increase by 7 levels” apply?



Will the firearm SOC apply?

A. Yes

B. No



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

§1B1.3(a)(1)(B)



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

Determinations required for acts of others to be relevant conduct

1. What was the **scope** of the defendant's *jointly undertaken criminal activity*?
 2. Were the acts of others “**in furtherance of**” the defendant's *jointly undertaken criminal activity*?
- AND**
3. Were the acts of others “**reasonably foreseeable**” in connection with the defendant's *jointly undertaken criminal activity*?



(a)(1)(B) Analysis of §1B1.3(a)(1)

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

3-part analysis:

- scope of defendant's undertaking
- acts of others in furtherance
- and reasonably foreseeable

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection



Determination of Scope of Undertaking

§1B1.3, App. Note 3(B)

- An individualized determination
- Based on each defendant's agreement regarding the jointly undertaken criminal activity
- Can be established by explicit agreements and implicit agreements that can be inferred from the conduct of the defendant and others



Standard for “Reasonable Foreseeability”

§1B1.3, App. Note 3(D) & Illustrations App. Note 4(C)

- Not based on the **subjective** foreseeability of the specific defendant
- Rather, the legal test is based on an **objective** standard:



Standard for “Reasonable Foreseeability” (cont.)

- Would it be foreseeable to a reasonable person in the defendant’s shoes at the time of his/her agreement that another person within the jointly undertaken criminal activity would commit such an act in furtherance of the jointly undertaken criminal activity?



Exercise #2

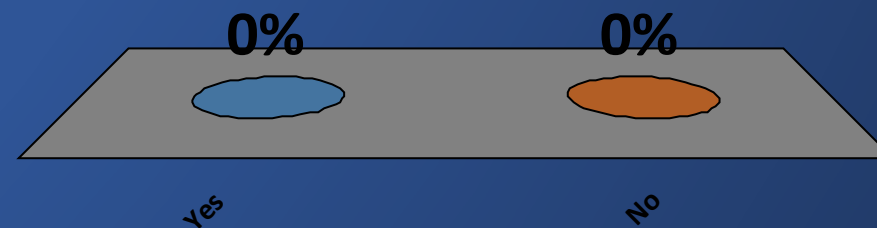
- Defendant convicted of bank robbery; Applicable guideline §2B3.1
- Co-participant possessed a firearm during the robbery, a fact unknown to Defendant until the co-participant brandished it
- Will the §2B3.1 SOC for “if a firearm was brandished or possessed” apply for Defendant?



Will the firearm SOC
apply for Defendant?

A. Yes

B. No



Holding a Defendant Accountable for the Acts of Others in a Broadly Worded Count of Conviction, Such as a Drug Trafficking Conspiracy

§1B1.3(a)(1)(B)



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

Determinations required for acts of others to be relevant conduct

1. **What was the scope of the defendant's *jointly undertaken criminal activity*?**
 2. Were the acts of others “in furtherance of” the defendant's *jointly undertaken criminal activity*?
- AND**
3. Were the acts of others “reasonably foreseeable” in connection with the defendant's *jointly undertaken criminal activity*?



Determination of Scope of Undertaking

§1B1.3, App. Note 3(B)

- **An individualized determination**
- Based on each defendant's agreement regarding the jointly undertaken criminal activity
- Can be established by explicit agreements and implicit agreements that can be inferred from the conduct of the defendant and others



Determining Scope in a Conspiracy

§1B1.3, App. Note 3(B)

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy (*i.e.*, *Pinkerton* doctrine is broader than “jointly undertaken criminal activity”)



Determining Scope in a Conspiracy (cont.)

“Bright Line Rule”

§1B1.3, App. Note 3(B)

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 3(D)

- Only one part of the conjunctive 3-part analysis regarding the conduct of others ((a)(1)(B))
 - Within the scope of the defendant’s undertaking,
 - In furtherance of the undertaking, AND
 - ***Reasonably foreseeable***
- Foreseeability alone does not make a co-participant’s act relevant conduct



Exercise #3

- Defendant is convicted of a count charging a three-year conspiracy to import 5 kg or more of cocaine, with multiple participants and multiple importations
- Applicable guideline §2D1.1 (Drugs)
- During the three years of the conspiracy a total of 300 kg was imported



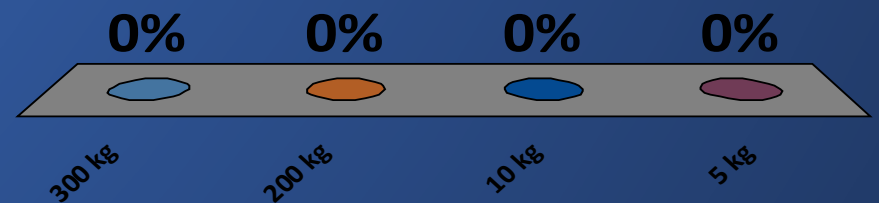
Exercise #3 (cont.)

- It is determined that Defendant
 - joined the conspiracy after its first year of operation, during which 100 kg had been imported, and
 - after Defendant joined the conspiracy, his undertaking was limited to two importations, each in a quantity of 5 kg
- What quantity of drugs will be used to establish Defendant's base offense level at §2D1.1(a)(5)?



What quantity of drugs is used to determine Defendant's base offense level at §2D1.1(b)(5)?

- A. 300 kg
- B. 200 kg
- C. 10 kg
- D. 5 kg



Exercise #4

- Defendant convicted of one count: Conspiracy to Commit Health Care Fraud (18 USC §§ 1349 & 1347) in the three-years from January 2014 through December 2016
- Applicable guideline §2X1.1 (Conspiracy) which directs use of §2B1.1 (Fraud/Theft)
- The three-year conspiracy involved numerous fraudulent claims by a health clinic to Medicare for services never provided



Exercise #4 (cont.)

- The conspiracy included a total of 12 participants, with each fully involved in the fraud activity, but only during the period he/she was employed by the clinic
- Defendant doctor joined the clinic and began participating in the illegal activity during the final ten months of the conspiracy, but Defendant doctor knew of all the preceding defrauding



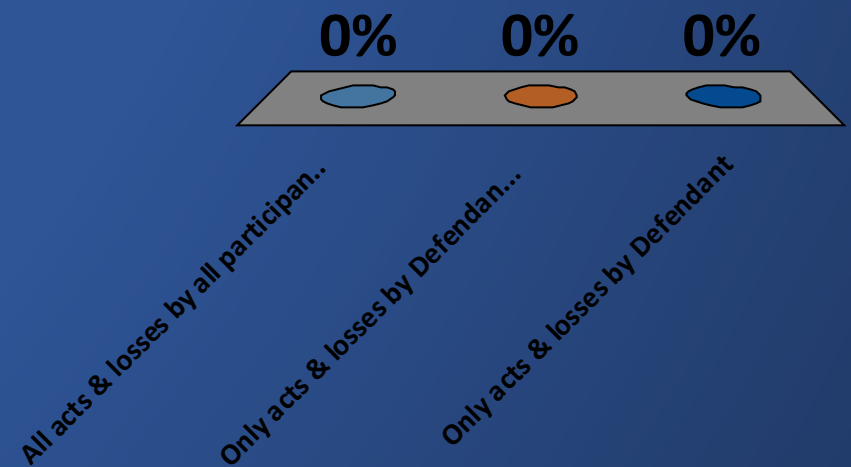
Exercise #4 (cont.)

- Does Defendant doctor's relevant conduct include:
 - All the fraudulent acts by all the participants and all the resulting losses during the three-year conspiracy?
 - Only the fraudulent acts and resulting losses by Defendant doctor and other participants during Defendant doctor's involvement in the conspiracy?
 - Only the fraudulent acts and resulting losses by Defendant doctor?



Which will be included in Defendant doctor's relevant conduct?

- A. All acts & losses by all participants during the full three years
- B. Only acts & losses by Defendant & co-participants during Defendant's involvement
- C. Only acts & losses by Defendant



A Reminder on “Reasonably Foreseeable”

§1B1.3, App. Note 3(D)

- Reasonable foreseeability applies only to the conduct of others in the 3-part analysis under (a)(1)(B)
- Reasonable foreseeability does not apply to the defendant’s own conduct under (a)(1)(A)
 - Acts the defendant committed, aided, abetted, counseled, commanded, induced, or willfully caused



Holding a Defendant Accountable for Acts in the Same Course of Conduct or Common Scheme or Plan

§1B1.3(a)(2):

“Expanded” Relevant Conduct



Relevant Conduct Analysis: §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”⁴⁵ Applies

§§1B1.3(a)(2) & 3D1.2(d) (“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



Offenses **Included** at §3D1.2(d):

Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.



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



“Same Course of Conduct”

§1B1.3(a)(2); App. Note 5(B)(ii);
Appendix C, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity



“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 5(B)(i)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*



“Expanded Relevant Conduct”

Fraud 1
(§2B1.1)

Fraud 2
(§2B1.1)

Fraud 3
(§2B1.1)

Fraud 4
(§2B1.1)

Offense of Conviction

- The guideline for the offense of conviction, §2B1.1, is on the “included list” at §3D1.2(d), so it uses “expanded Relevant Conduct” (§1B1.3(a)(2))
- ***If there were*** counts of conviction for the other offenses they would also use §2B1.1
- *So if* the other offenses were in the same course of conduct or common scheme or plan as the offense of conviction, they will be used in the relevant conduct analysis



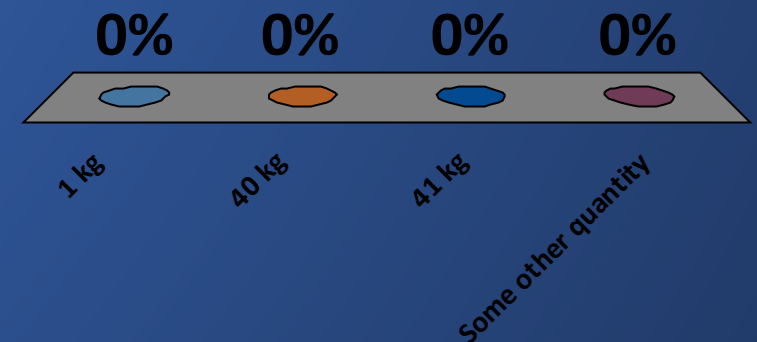
Exercise #5

- Defendant convicted of sale of 1 kg of cocaine on a single occasion; Applicable guideline §2D1.1
- The sale was to a member of a gang engaged in user-amount sales
- It is determined that Defendant additionally sold 1 kg of cocaine to a member of the gang each week for 40 weeks



What quantity of drugs will be used to determine Defendant's base offense level at §2D1.1(b)(5)?

- A. 1 kg
- B. 40 kg
- C. 41 kg
- D. Some other quantity



Exercise #6

- Defendant convicted of felon in possession of a firearm, a pistol, on a specific date
- Applicable guideline §2K2.1 (Firearms)
- A search of defendant's house the day after he had been arrested in possession of the firearm (the offense of conviction) revealed two additional firearms, both pistols, one with an obliterated serial number



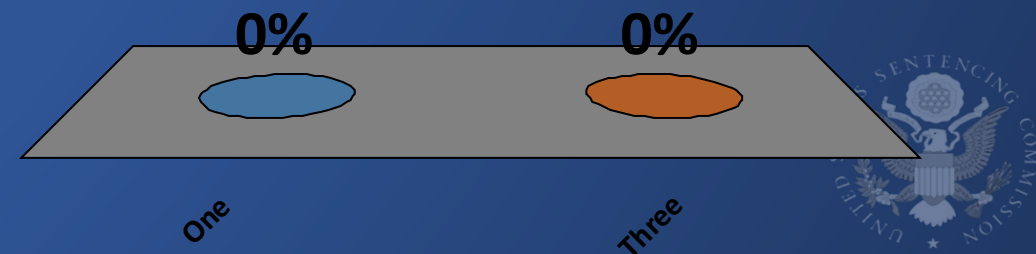
Exercise #6 (cont.)

- How many firearms will be counted for the §2K2.1(b)(1) SOC for number of firearms?
- Will the §2K2.1(b)(4)(B) SOC for obliterated serial number apply?



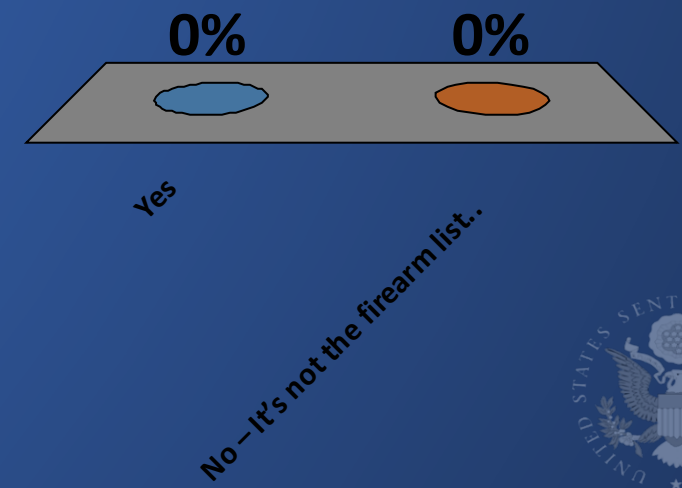
How many firearms will be counted for the §2K2.1(b)(1) SOC for number of firearms?

- A. One
- B. Three



Will the §2K2.1(b)(4)(B)
SOC for obliterated serial
number apply?

- A. Yes
- B. No – It's not the
firearm listed in the
offense of conviction



Offenses for Which “Expanded” Relevant Conduct Does Not Apply

§1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct does not apply if the applicable Chapter Two guideline is on the “excluded list” at §3D1.2(d) (or is of that type)



Offenses **Excluded** at §3D1.2(d):

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A (except §2A3.5);
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.



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~~



NOT Expanded Relevant Conduct

~~Robbery 1
(§2B3.1)~~

Robbery 2
(§2B3.1)

~~Robbery 3
(§2B3.1)~~

~~Robbery 4
(§2B3.1)~~

Offense of Conviction

- The guideline for the offense of conviction, §2B3.1, is on the “excluded list” at §3D1.2(d), so it **does not** use “expanded Relevant Conduct” (§1B1.3(a)(2))
- *So even if* the other offenses were in the same course of conduct or common scheme or plan as the offense of conviction, they will **not** be relevant conduct



Exercise #7

- Defendant is convicted of one count of bank robbery; Applicable guideline §2B3.1
- There were no injuries in this robbery
- However, on the day prior to the robbery of conviction, the defendant committed another bank robbery in a similar manner, and in which he struck a teller, resulting in serious bodily injury



Exercise #7 (cont.)

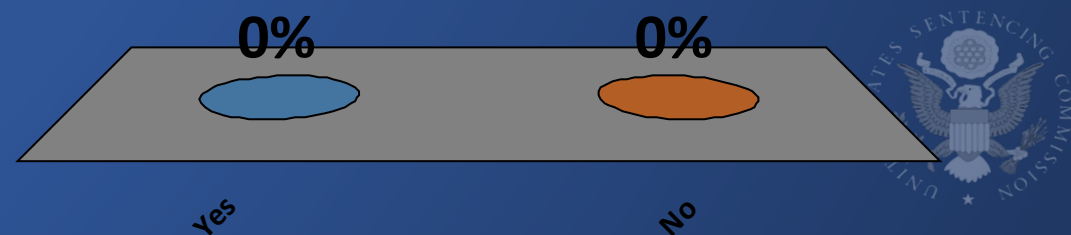
- In the application of the robbery guideline, will the §2B3.1(b)(3)(B) SOC for serious bodily injury apply?



Will the SOC for serious bodily injury apply?

A. Yes

B. No



Helpful Approach to Relevant Conduct

- Determine the applicable Chapter Two guideline
 - Using §1B1.2 and Appendix A
- Determine whether the applicable Chapter Two guideline includes use of “the same course of conduct/common scheme or plan” (“expanded relevant conduct” of §1B1.3(a)(2))
 - Look to the lists at §3D1.2(d)



Exercise #8

- Defendant convicted of one count of conspiracy to traffic 1 kg or more of heroin during a period of 100 weeks
- Applicable guideline §2D1.1 (Drugs)
- Conspiracy involved 100 occasions of heroin being transported into the district from a major city in a nearby state; 1 kg of heroin was transported on each occasion



Exercise #8 (cont.)

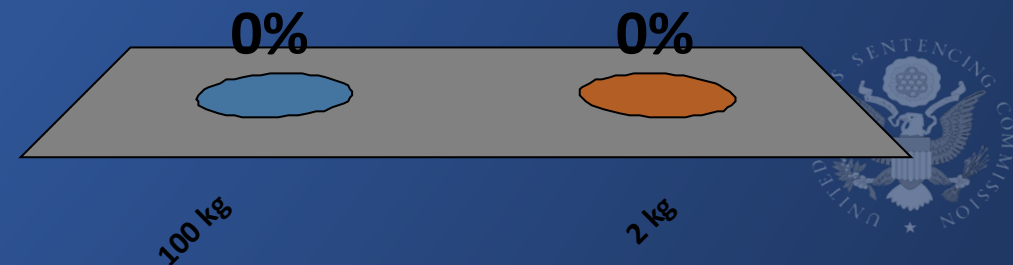
- Defendant's undertaking involved only two of those occasions, #51 & #52, although he was aware of the other occasions
- For what quantity of drugs is defendant accountable?



For what quantity of drugs is Defendant accountable?

A. 100 kg

B. 2 kg



Exercise #8 (cont.)

- Defendant never carried a firearm nor did he aid, abet, counsel, command, induce, procure, or willfully cause his co-participants to do so
- However, one of his co-participants on occasion #51 carried a gun



Exercise #8 (cont.)

- Will defendant get the 2-level increase for the SOC at §2D1.1(b)(1):
 - “If a . . . firearm . . . was possessed”



Will defendant get the
2-level increase for the
SOC at §2D1.1(b)(1):
“If a . . . firearm . . .
was possessed”

A. Yes

B. No



Exercise #9

- Defendant convicted of one count of Mail Fraud (18 USC § 1341) citing the submission of a fraudulent claim of \$5,000 to an insurance company on a specific date
- Applicable guideline §2B1.1 (Fraud)
- In the same month that Defendant made the fraudulent claim in the count of conviction, he also submitted fraudulent \$5,000 claims of the same nature to ten additional insurance companies



Exercise #9 (cont.)

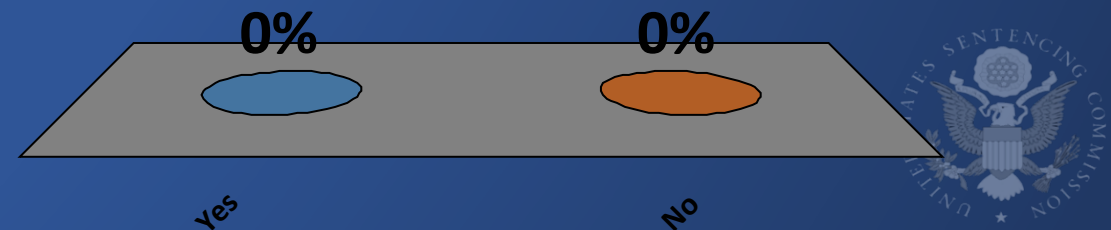
- Which of the following acts and losses are included in Defendant's relevant conduct?
 - The fraudulent act and resulting loss in the count of conviction
 - The fraudulent acts and resulting losses related to the ten additional insurance companies



Will Defendant's relevant conduct include the fraudulent act and resulting loss in the count of conviction?

A. Yes

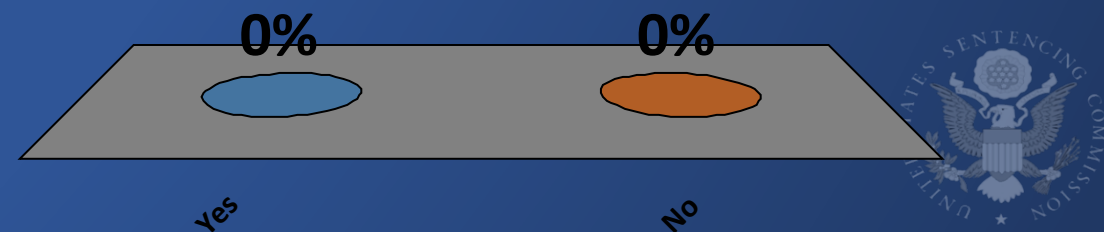
B. No



Will Defendant's relevant conduct include the fraudulent acts and resulting loss related to the ten additional insurance companies?

A. Yes

B. No



Thank You!

