



Relevant Conduct in Conspiracies with Role Adjustments

Annual National Seminar

San Antonio , TX

May 30, 2018



Ebise Bayisa

Senior Attorney

Office of Education and Sentencing Practice

U.S. Sentencing Commission



www.ussc.gov



(202) 502-4545



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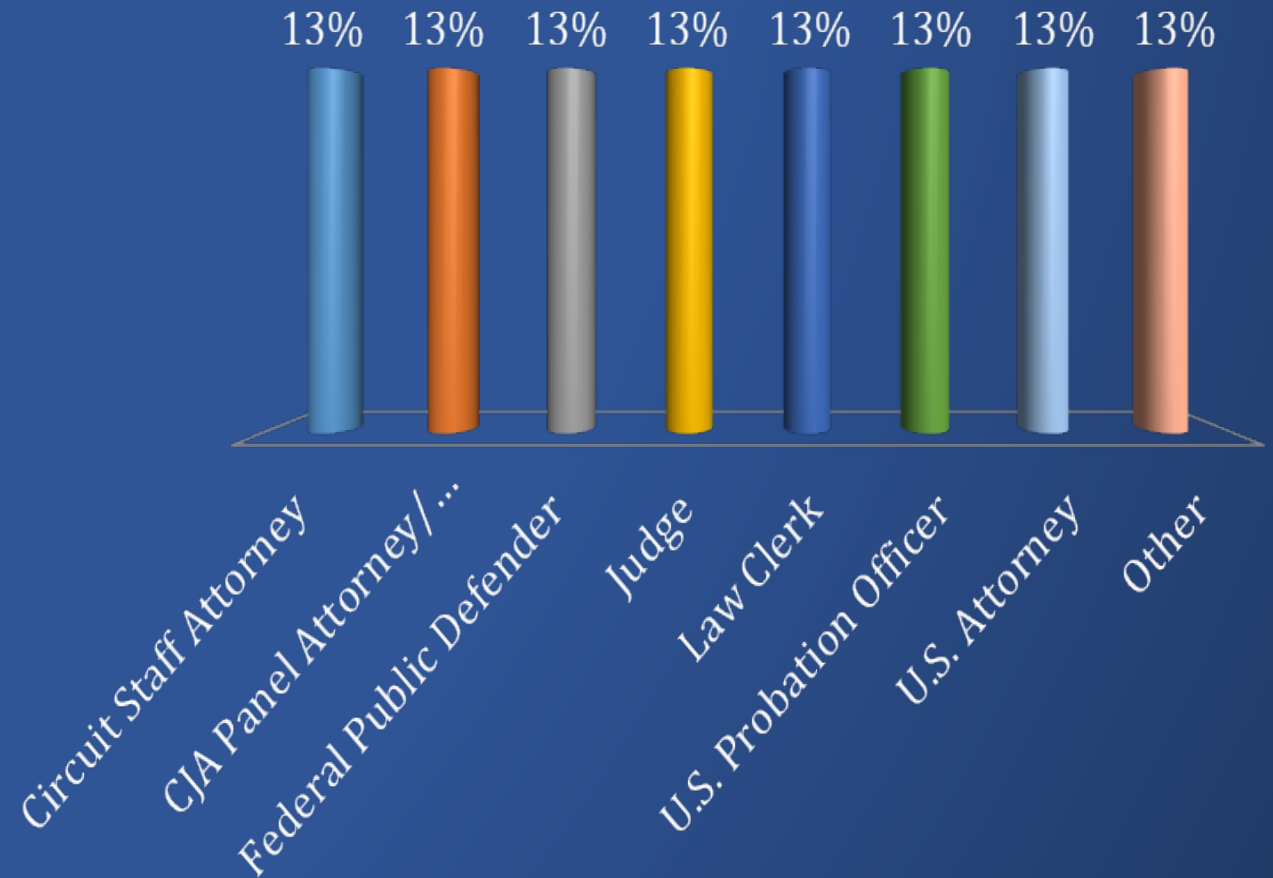
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Discussion Topics

- Relevant Conduct Principles
- Aggravating Role
- Mitigating Role

Who's in the audience?

- A. Circuit Staff Attorney
- B. CJA Panel Attorney/
Private Defense Attorney
- C. Federal Public Defender
- D. Judge
- E. Law Clerk
- F. U.S. Probation Officer
- G. U.S. Attorney
- H. Other



Years of experience with federal sentencing?

- A. Less than 2 years
- B. 2 to 5 years
- C. 5 to 10 years
- D. More than 10 years





Relevant Conduct in Conspiracies

General Principles



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Mythbusters

- All defendants in a conspiracy will have the same relevant conduct
- If a defendant knows about prior conduct by co-defendants, he is held accountable
- A defendant can be held accountable for all prior related conduct without limitation
- Prior convictions can be used for both relevant conduct and criminal history points



Relevant Conduct in a Nutshell

WHO: Acts of the defendant

Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

In preparation

During

Avoiding
detection

Outside the Offense of Conviction: Same course of
conduct/ Common scheme or plan



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



When can you hold the defendant accountable for the acts of others?

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

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



Determining Scope in a Conspiracy

Scope of jointly undertaken criminal
activity

≠

Scope of the entire conspiracy*

*May be the same, but not necessarily



Relevant Conduct: Jointly Undertaken Activity

- *United States v. Ramirez*, 2018 WL 651454 (11th Cir. January 31, 2018)
- *“The District Court determined . . . '[a]s a member of a conspiracy he is held accountable for all of the loss that was generated during the course of the conspiracy. So it's all relevant conduct that is attributable to him.' This was an incorrect statement of the law.”*



Determination of Scope of Undertaking

§1B1.3, Comment Note 2

- An individualized determination
- Based on **each** defendant's undertaking



Knowledge of Criminal Activity Not Enough for Relevant Conduct

“Bright Line Rule”

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.



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?



Holding a Defendant Accountable for Acts Outside the Offense of Conviction

§1B1.3(a)(2):

“Expanded” Relevant Conduct



Analysis of §1B1.3(a)(2)

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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 Conduct¹⁸ 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



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);

- Similarity
- Regularity (repetitions)
- Temporal proximity



Examples of Chapter Two Guidelines in the Excluded List at §3D1.2(d)

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“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~~





Role Adjustments

§3B1.1 and §3B1.2

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PRIMER



AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS §§3B1.1 & 3B1.2

June 2015

Prepared by the Office of General Counsel, U.S. Sentencing Commission

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Multiple “participants” required for a role adjustment²⁵

- 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



Aggravating Role

§3B1.1

- Based on two factors:
 - Defendant acted as organizer, leader, manager, or supervisor
 - Number of participants or “otherwise extensive”



Aggravating Role: Factors for the Court to Consider

App. Note 4, §3B1.1

- Decision making authority
- Nature of participation in the commission of the offense
- Recruitment of accomplices
- Right to a larger share of proceeds
- Planning and organizing the offense
- Degree of control over others



Mitigating Role Adjustment

Misperceptions?

- All drug couriers must or should receive a mitigating role reduction.
- In a drug case involving multiple defendants, someone must or should receive a role reduction.
- Role reductions are rare in fraud cases.
- Someone who plays an important or essential role in the criminal activity can't receive a role reduction.



Minor Role Guideline Amended in 2015

- Amendment 794
 - **REASON FOR AMENDMENT:** *This amendment is a result of the Commission's study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. **Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended.***



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.**



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.**”



Minor Role and Relevant Conduct

3B1.2 App. Note 3A

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



Factors for the Court to Consider

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§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

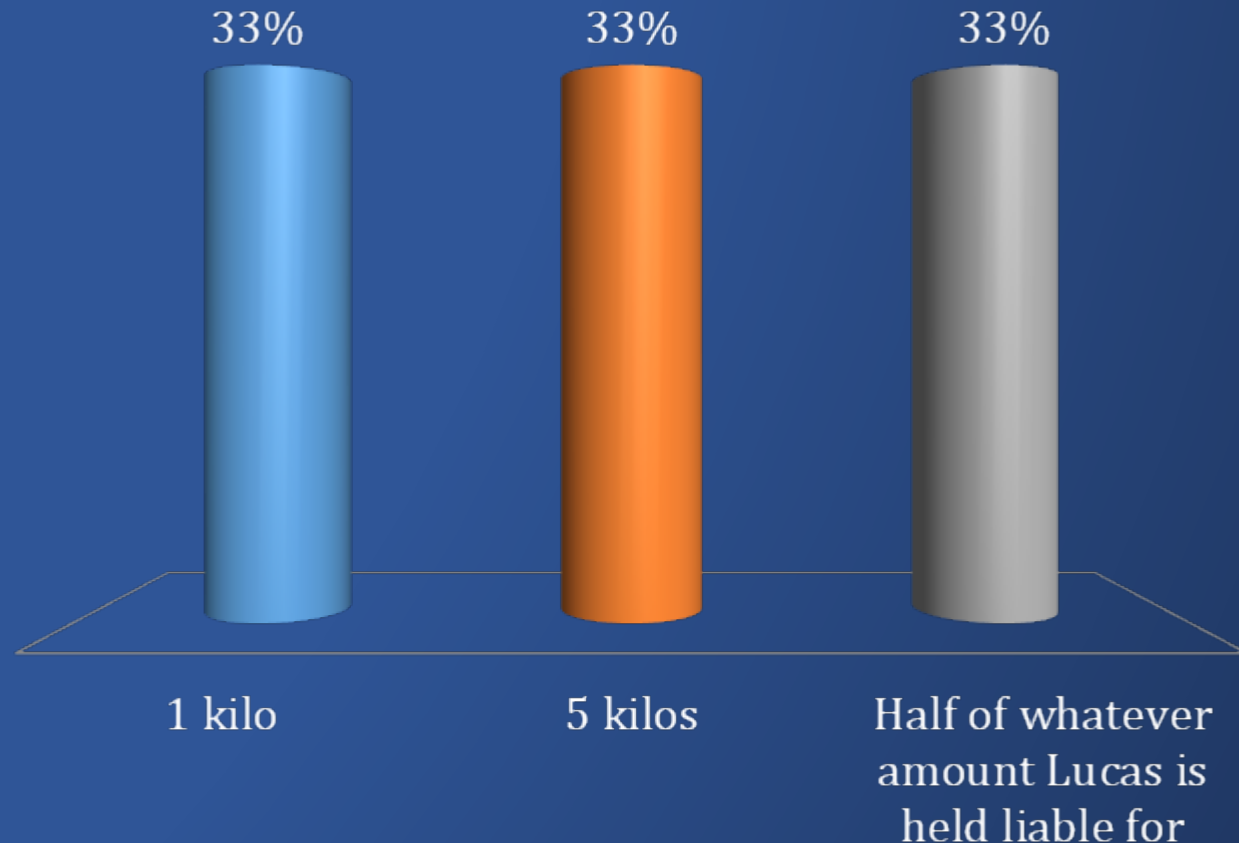


SCENARIOS



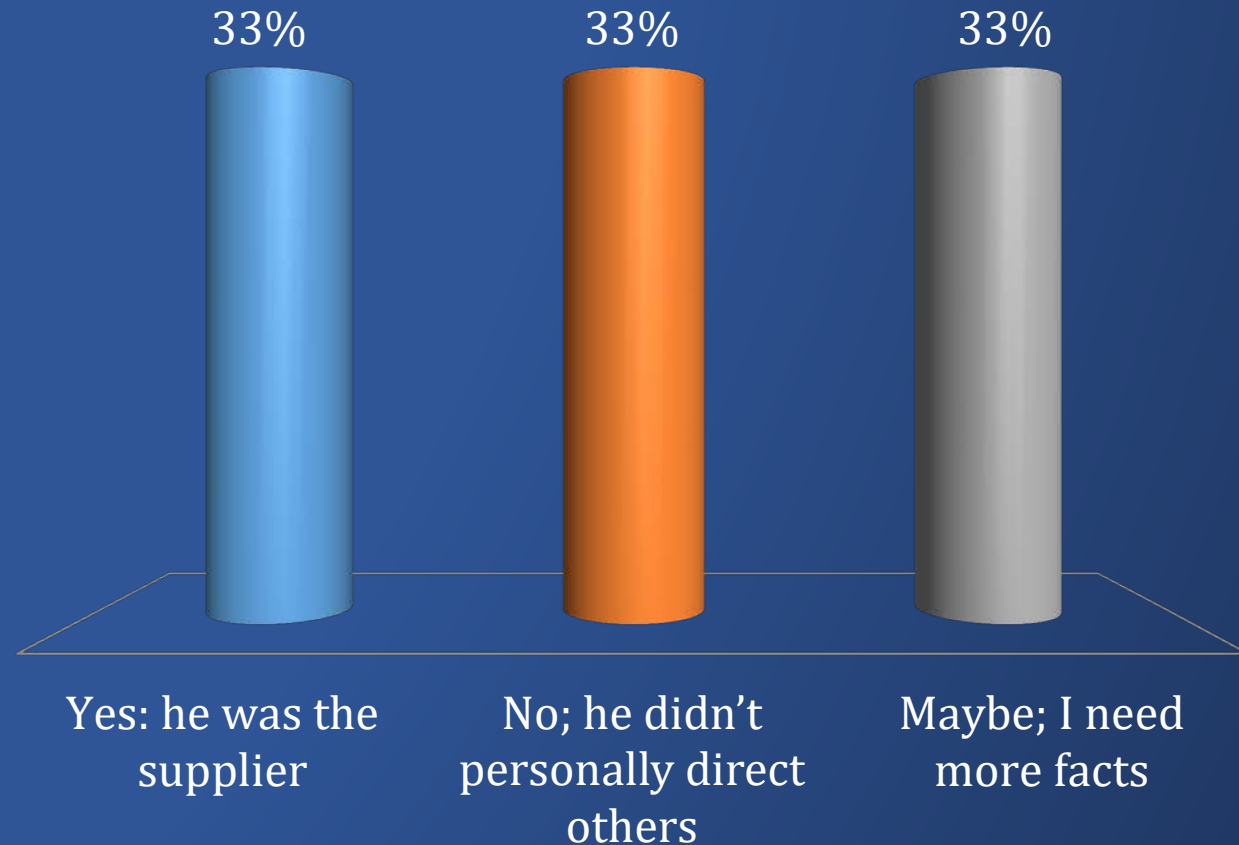
Scenario #1: What quantity of drugs will Brooks be liable for?

- A. 1 kilo
- B. 5 kilos
- C. Half of whatever amount Lucas is held liable for



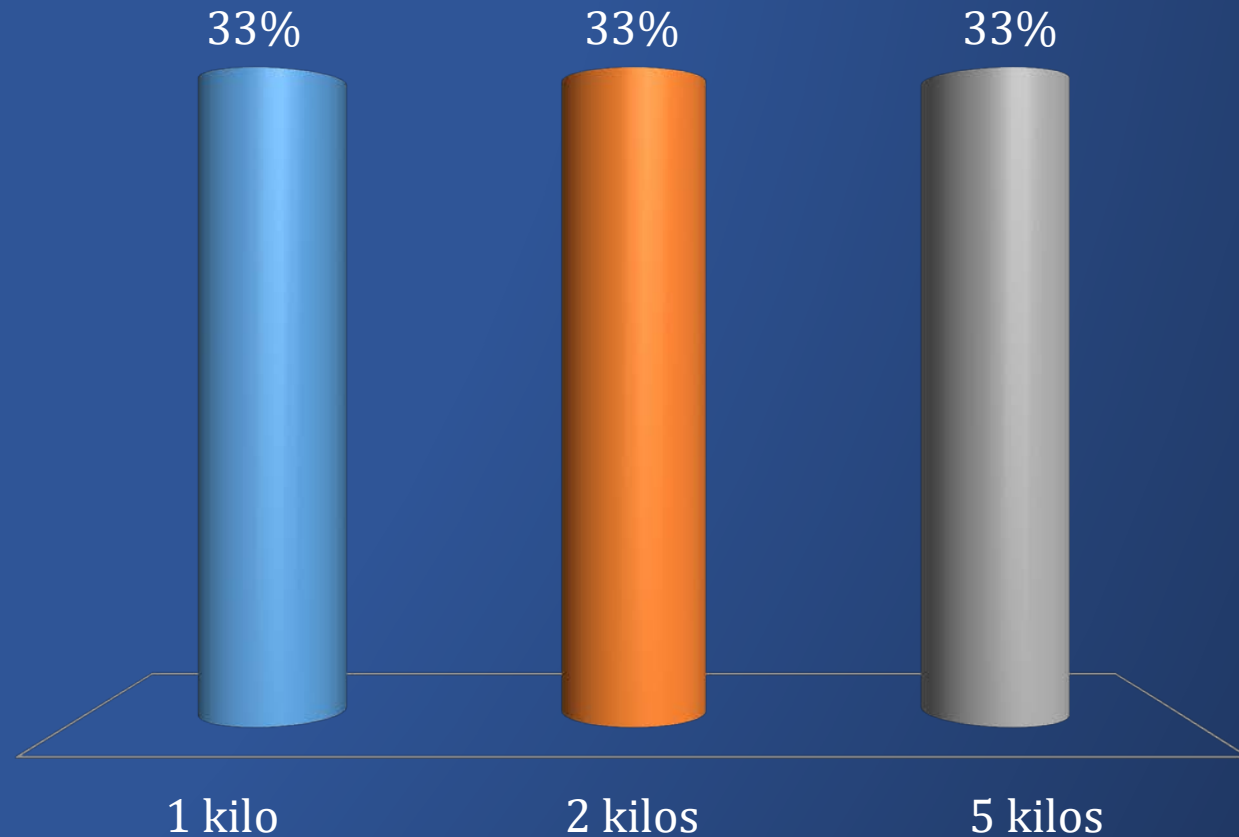
Scenario #2: Will the aggravating role enhancement apply to Brooks?

- A. Yes: he was the supplier
- B. No; he didn't personally direct others
- C. Maybe; I need more facts



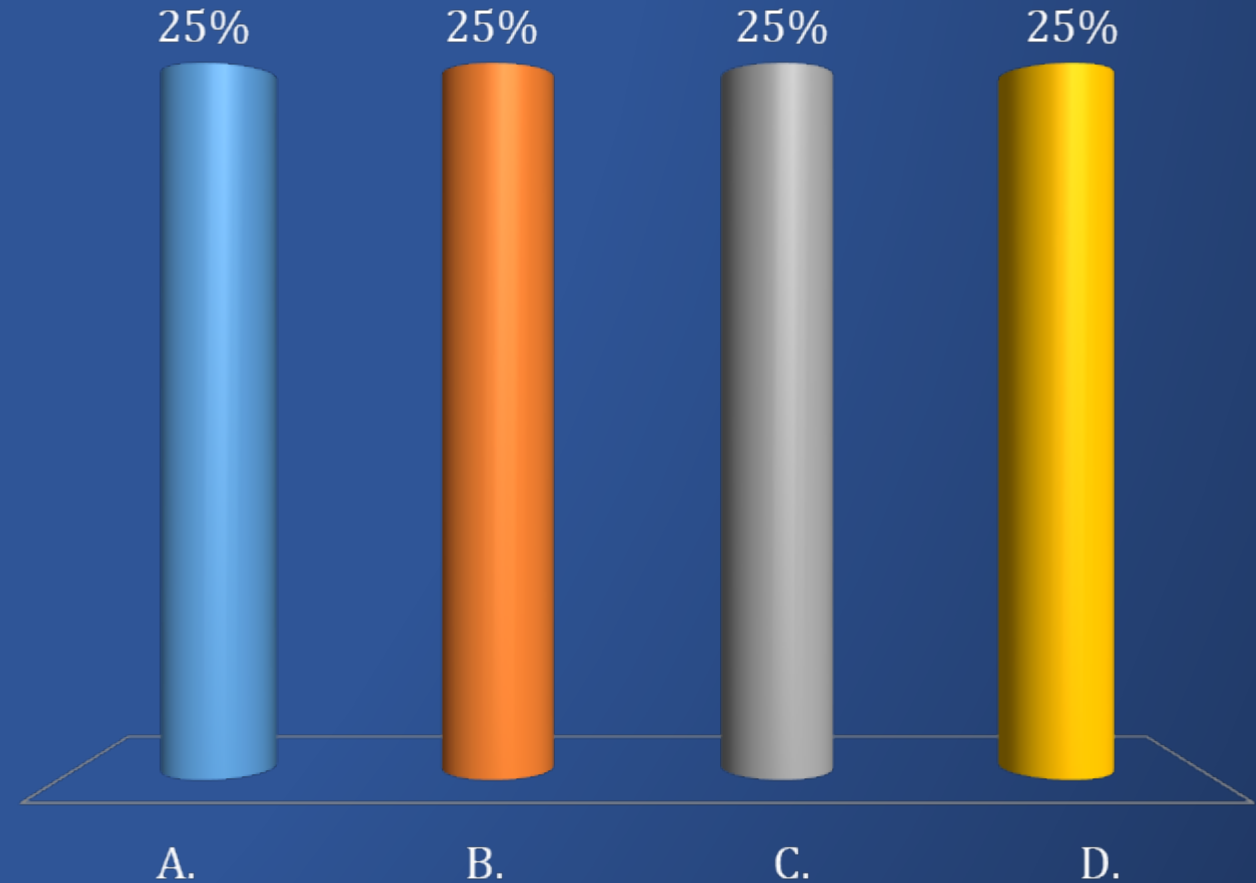
Scenario #3: What quantity of drugs are attributable to Lucas?

- A. 1 kilo
- B. 2 kilos
- C. 5 kilos



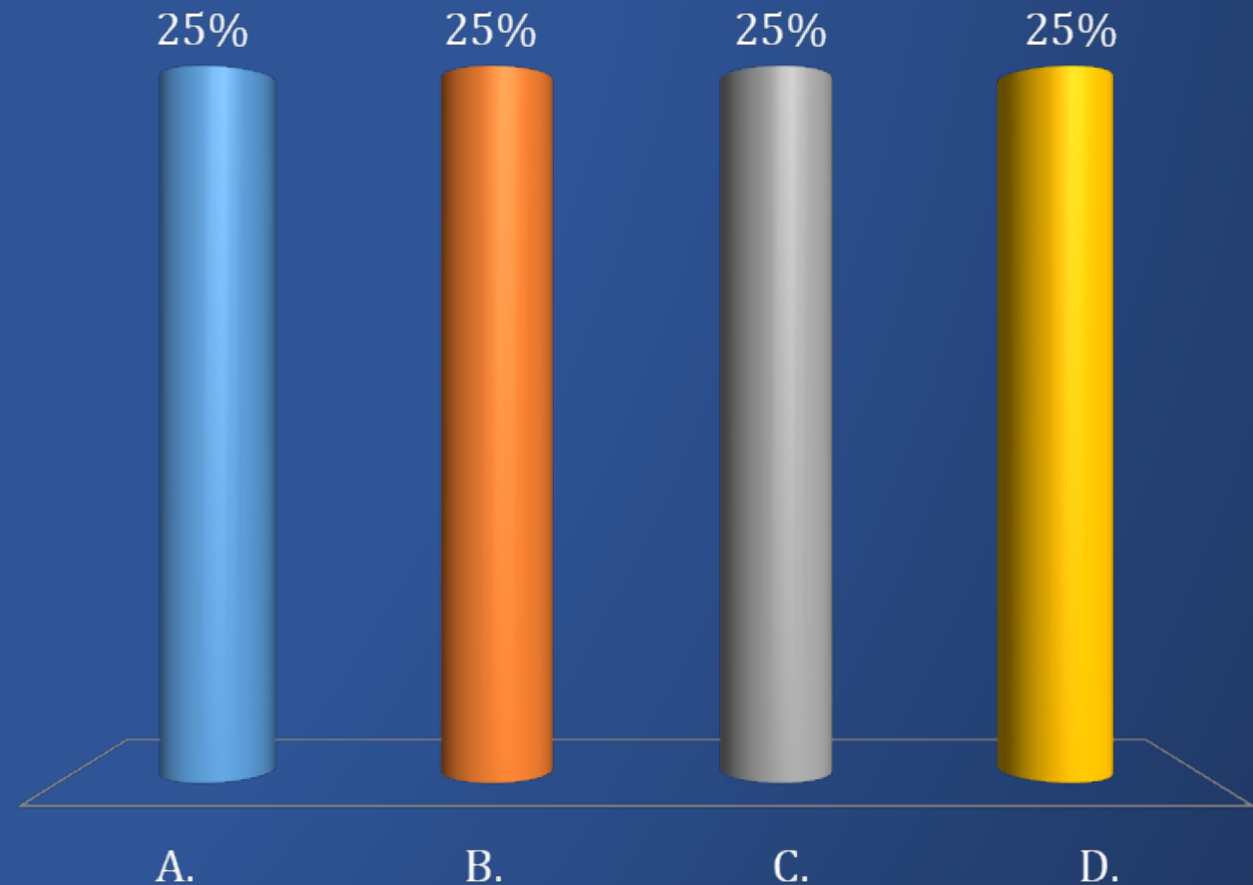
Scenario #4: Does the aggravating role enhancement apply to Lucas?

- A. Yes: he recruited others
- B. Yes: he decided where street level dealers would sell drugs
- C. No; he was a middle man
- D. No; he did not acquire drugs from the supplier



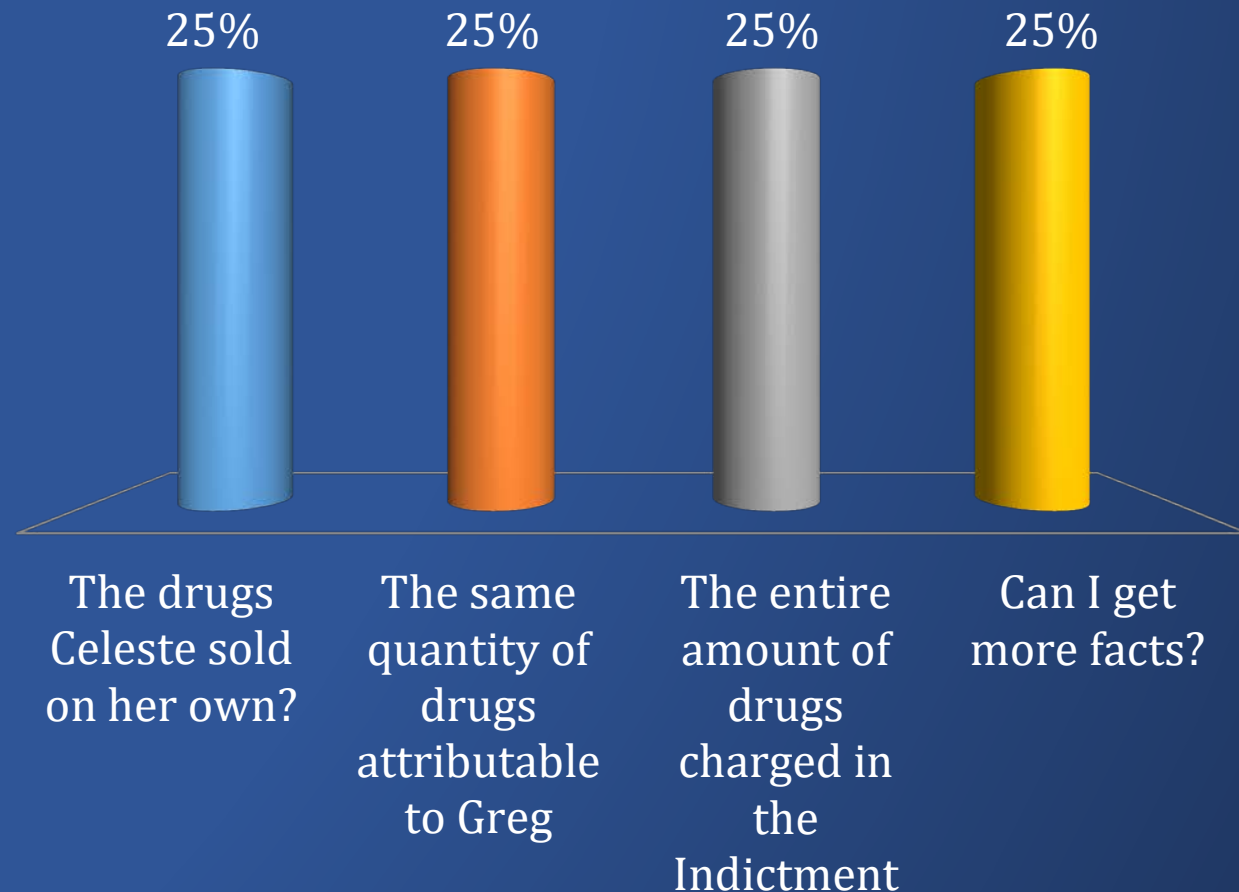
Scenario #5: Will Greg be held liable for the drugs sold by others in the conspiracy?

- A. Yes; he pleaded guilty to a conspiracy so he is liable for the entire amount
- B. Yes; it's foreseeable that other people are part of the conspiracy
- C. No; he doesn't know others in the conspiracy
- D. No; the acts of others are not within the scope of his actions



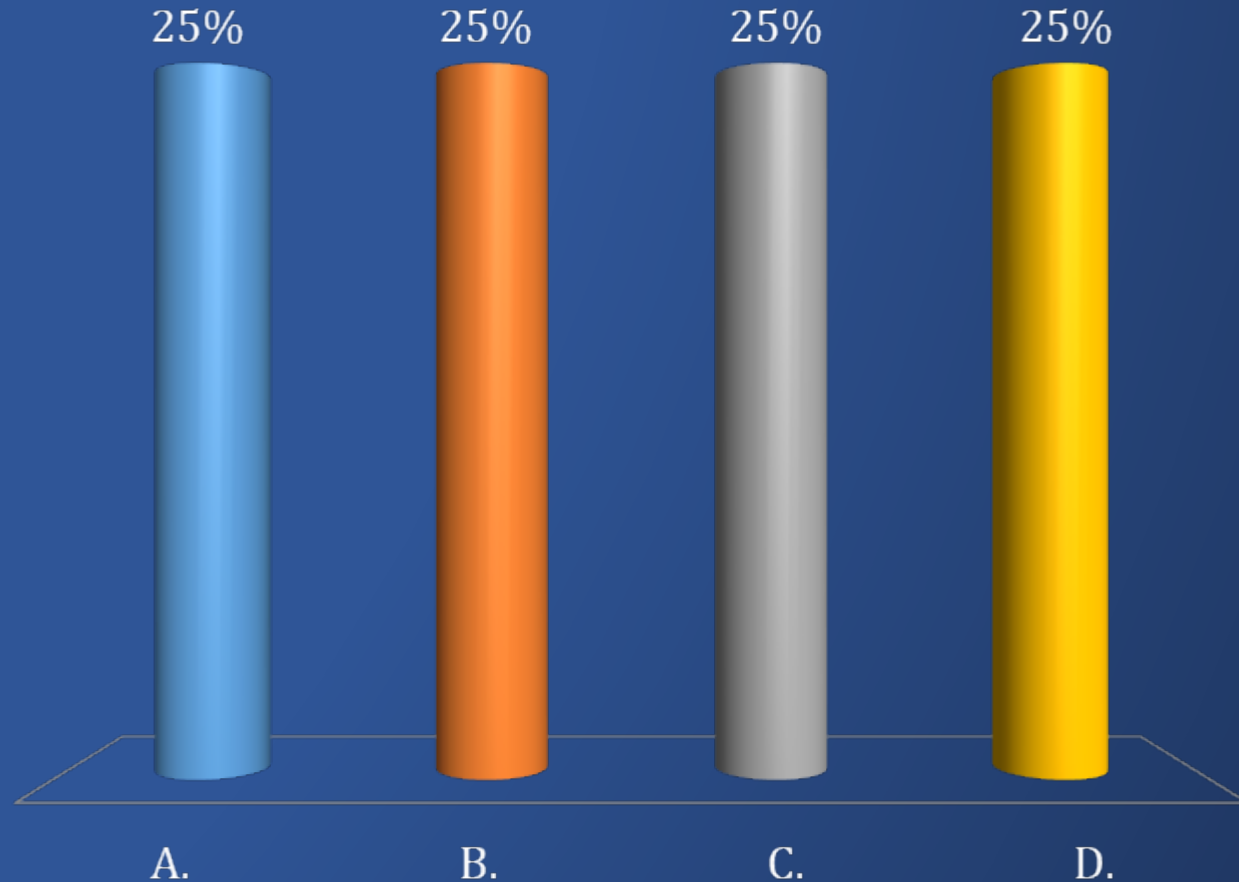
Scenario #6: What quantity of drugs will be attributable to Celeste?

- ✓ A. The drugs Celeste sold on her own?
- B. The same quantity of drugs attributable to Greg
- C. The entire amount of drugs charged in the Indictment
- ✓ D. Can I get more facts?



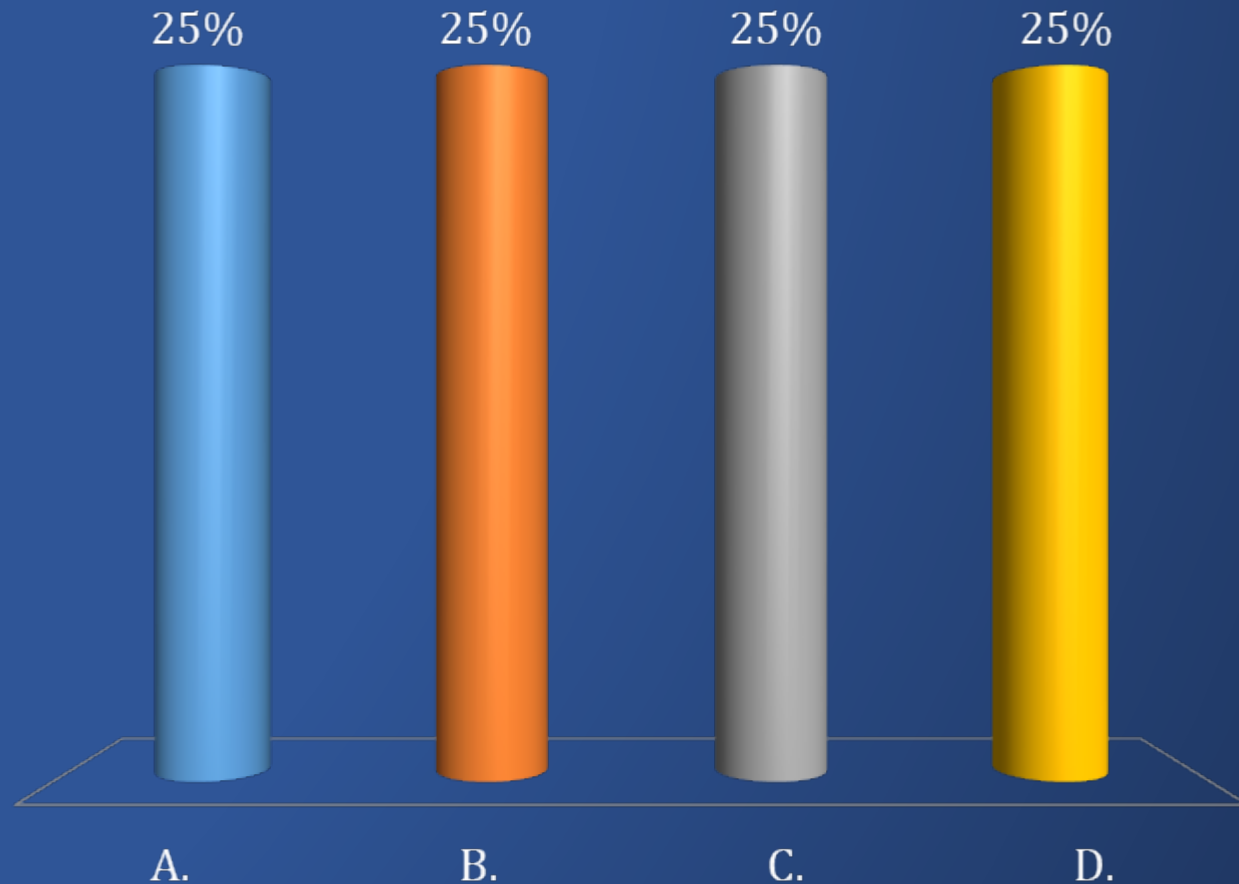
Scenario #7: Will Celeste get a 2-level enhancement for the gun Greg carried?

- A. Yes; she knew about the gun
- B. Yes; the offense of conviction involved a weapon
- C. Yes; guns and drugs always go together
- D. No; she never personally carried the weapon



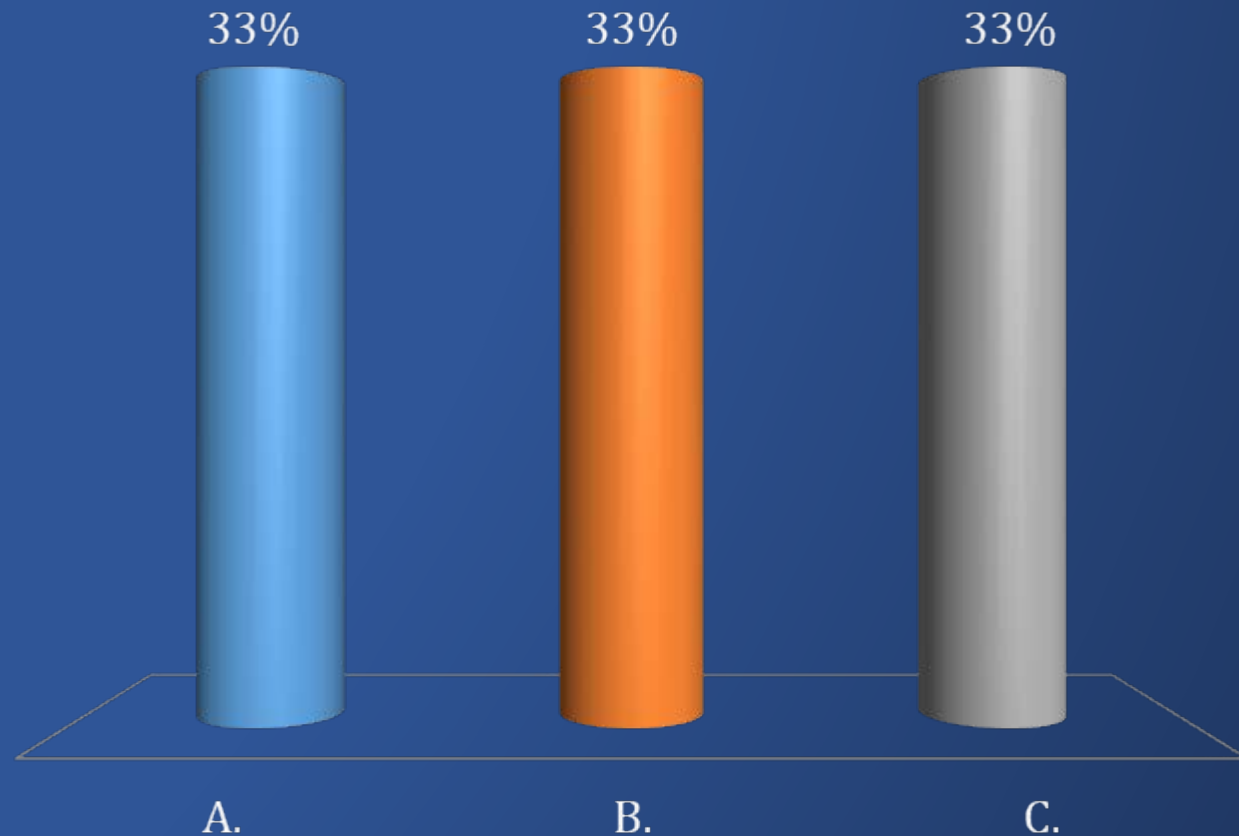
Scenario #8: Is Celeste eligible for safety valve?

- A. No; she got the gun enhancement
- B. No; she was involved a large conspiracy
- C. Yes; she never personally possessed a weapon
- D. Yes; she played a minor role in the offense



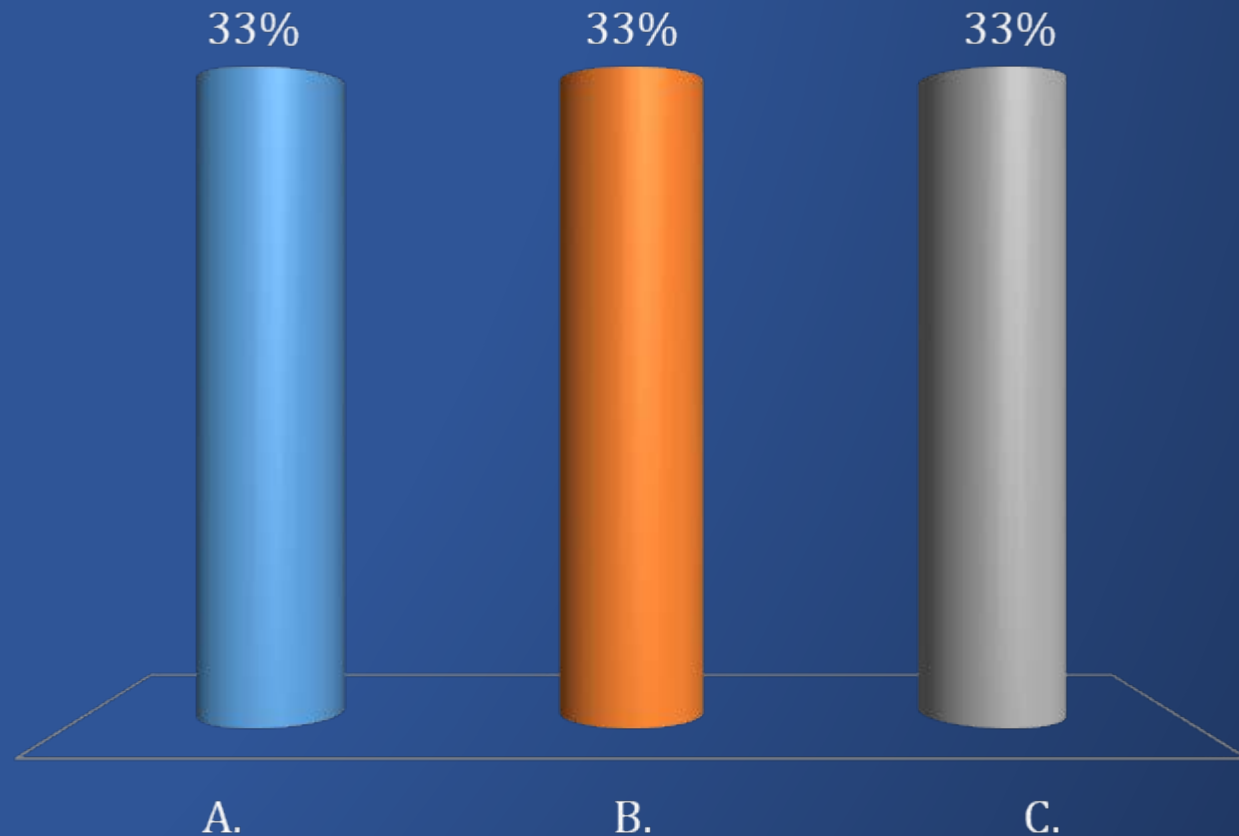
Scenario #9: Can Celeste get a minor role reduction?

- A. Yes; she sold a small quantity of drugs within the larger conspiracy
- B. No; her relevant conduct was already reduced to her own drug amount
- C. No; she got the gun enhancement



Scenario #10: Will Elliot be held responsible for the drugs he sold prior to entering the conspiracy?

- A. Yes, it was part of the same course of conduct or common scheme or plan
- B. No; he cant be held liable for acts that occurred prior to entering the conspiracy
- C. Maybe; I need more information



Scenario #11: What quantity of drugs will be attributable to Isaac?

- A. The entire quantity of drugs Elliot sold
- B. Only the quantity of drugs Isaac personally sold.
- C. The drugs Isaac sold plus the entire quantity of drugs Elliot sold
- D. The quantity of drugs both Isaac and Elliot sold after Isaac entered the conspiracy.

