



RICO Offenses



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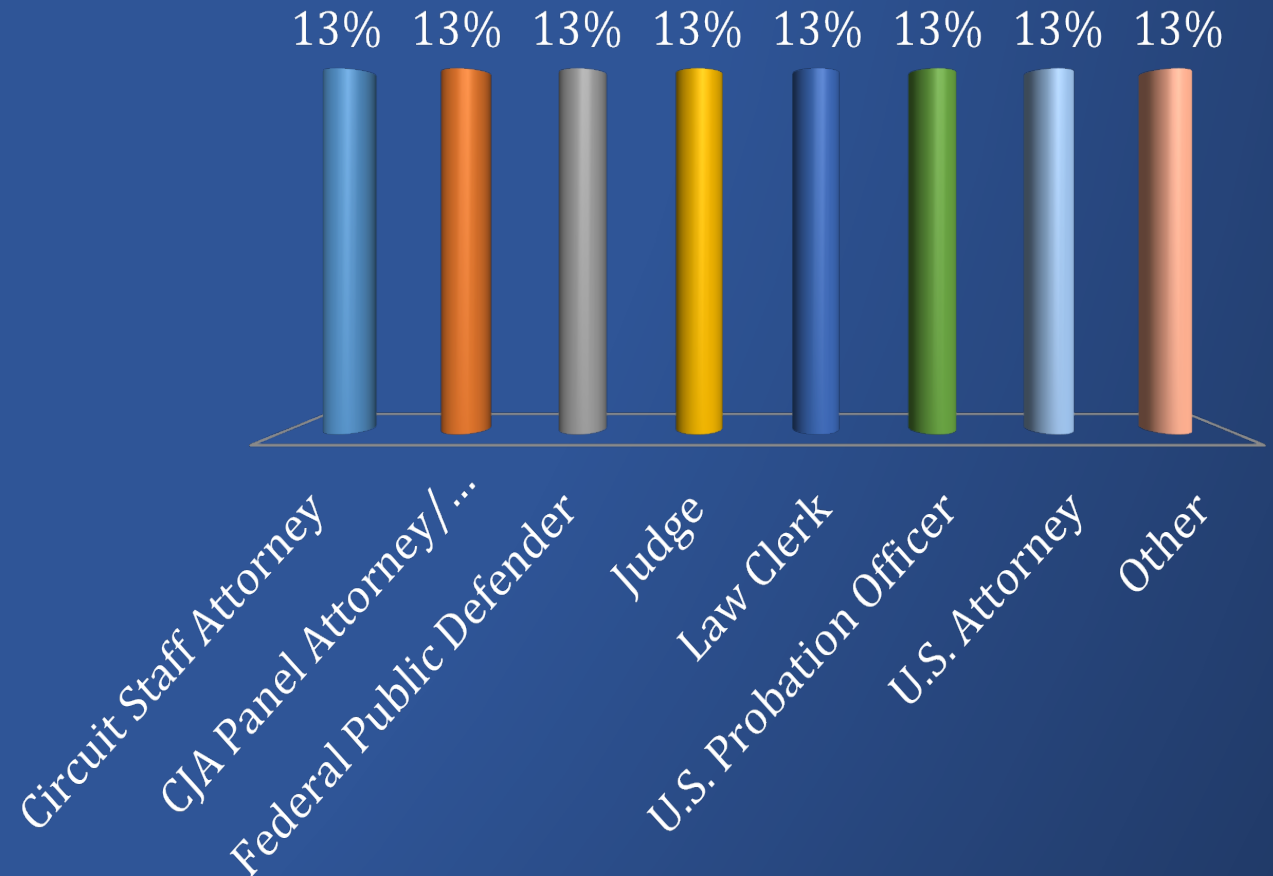
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Who's in the audience?

- 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



Discussion Outline

- Relevant statutes and guidelines
- Determining the underlying racketeering activity
- RICO Scenario
- RICO with additional substantive counts
- De-mystify RICO-is that possible????



RICO

Racketeer Influenced and Corrupt Organizations

- Relevant statutes:
 - 18 U.S.C. § 1962 – Prohibited Activities
 - 18 U.S.C. § 1961 – Definitions
 - 18 U.S.C. § 1963 – Criminal Penalties
- Statutory maximum (18 U.S.C. § 1963):
 - 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)



RICO

Racketeer Influenced and Corrupt Organizations

- Applicable guideline: §2E1.1
- “Because of the jurisdictional nature of the offenses included, this subpart covers a wide variety of criminal conduct. The offense level usually will be determined by the offense level of the underlying conduct.” (Introductory Commentary, Chapter 2, Part E)



§2E1.1 (RICO)

(a) Base Offense Level (Apply the greater)

(1) 19; or

(2) the offense level applicable to the underlying racketeering activity



Example 1

- Conviction: one count of 18 U.S.C. § 1962
- Applicable guideline §2E1.1
- Underlying racketeering activity:
 - Extortion (§2B3.2)



Example 1 (cont.)

§2B3.2

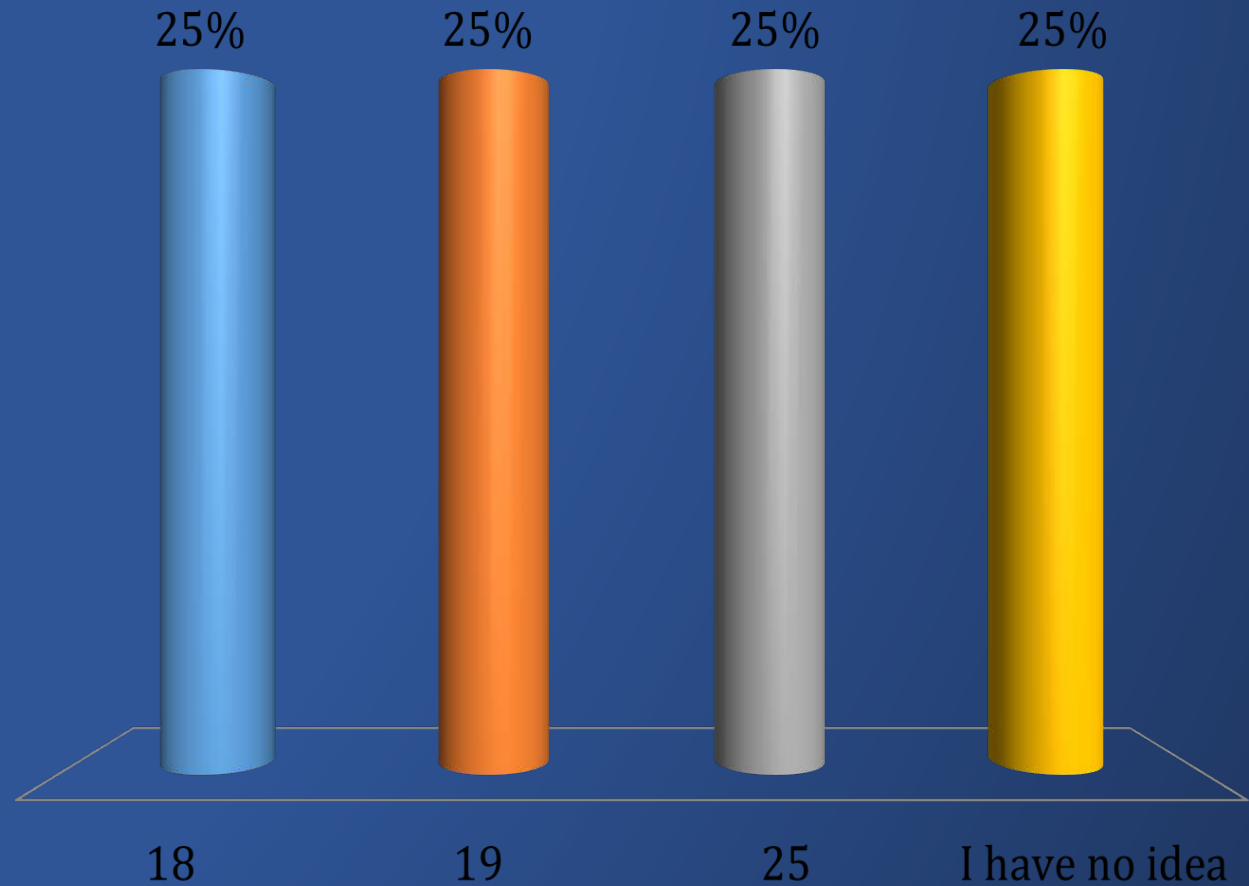
BOL 18

OL 18



What is the BOL at §2E1.1?

- A. 18
- B. 19
- C. 25
- D. I have no idea



§2E1.1 Application Note 1

- Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of (a)(2).
- To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C and D to both (a)(1) and (a)(2).



Determining the Base Offense Level

- To apply BOL (a)(2), treat each underlying offense as if a substantive count of conviction
- For each underlying offense, apply the appropriate Chapter 2 guideline and any applicable Chapter 3 adjustments from Parts A, B, and C



Example 2

- Conviction: one count of 18 U.S.C. § 1962
- Applicable guideline §2E1.1
- Underlying racketeering activity:
 - Extortion (§2B3.2)
 - Extortion (§2B3.2)
 - Extortion (§2B3.2)



Example 2 (cont.)

<u>§2B3.2</u>	
BOL	18
OL	18

<u>§2B3.2</u>	
BOL	18
OL	18

<u>§2B3.2</u>	
BOL	18
OL	18

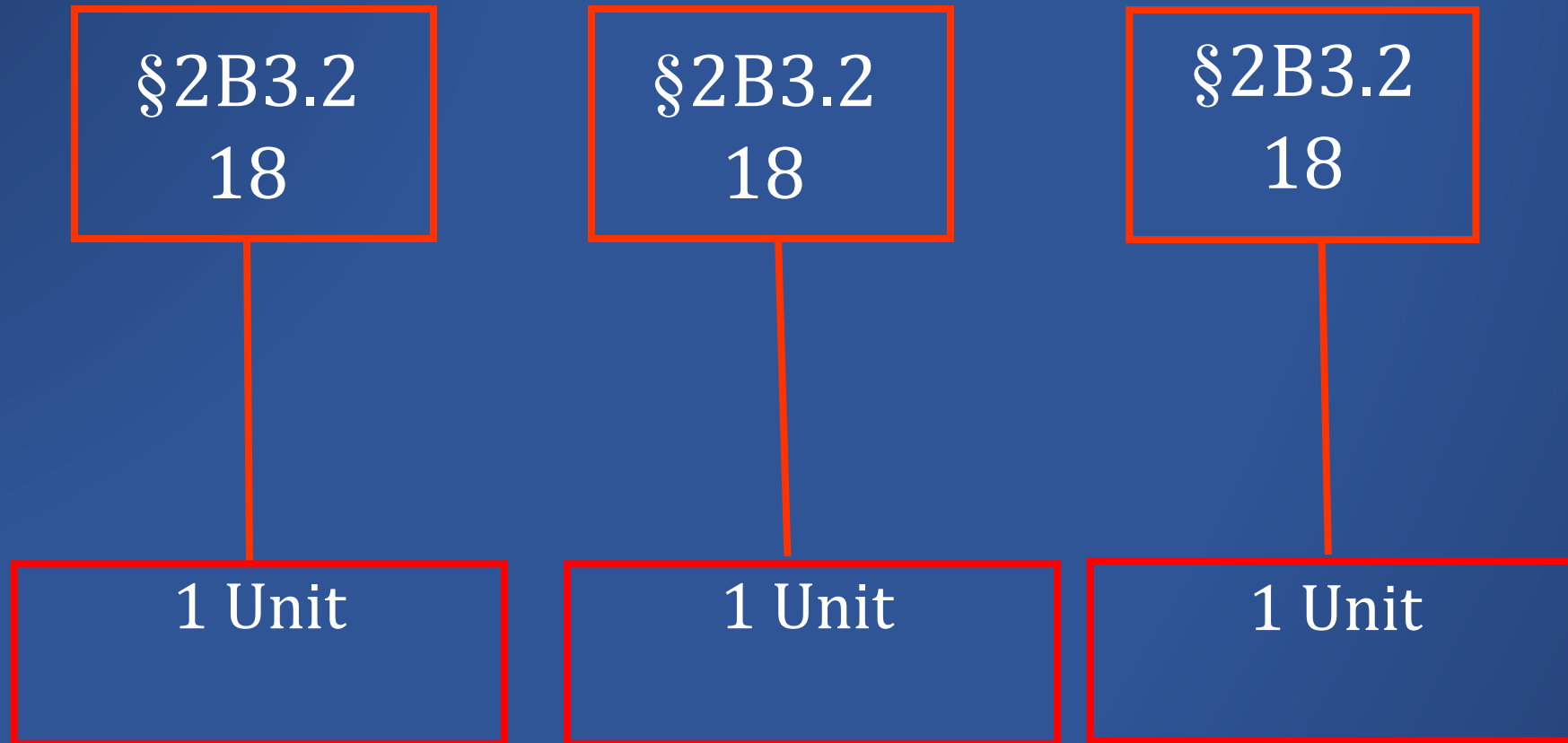


Determining the Base Offense Level (cont.)

- Apply the grouping rules in Part D of Chapter 3 to determine the combined offense level for the underlying offenses
- Compare the combined offense level for the underlying offenses determined under BOL (a)(2) to BOL (a)(1) (OL 19)



Example 2 (cont.)

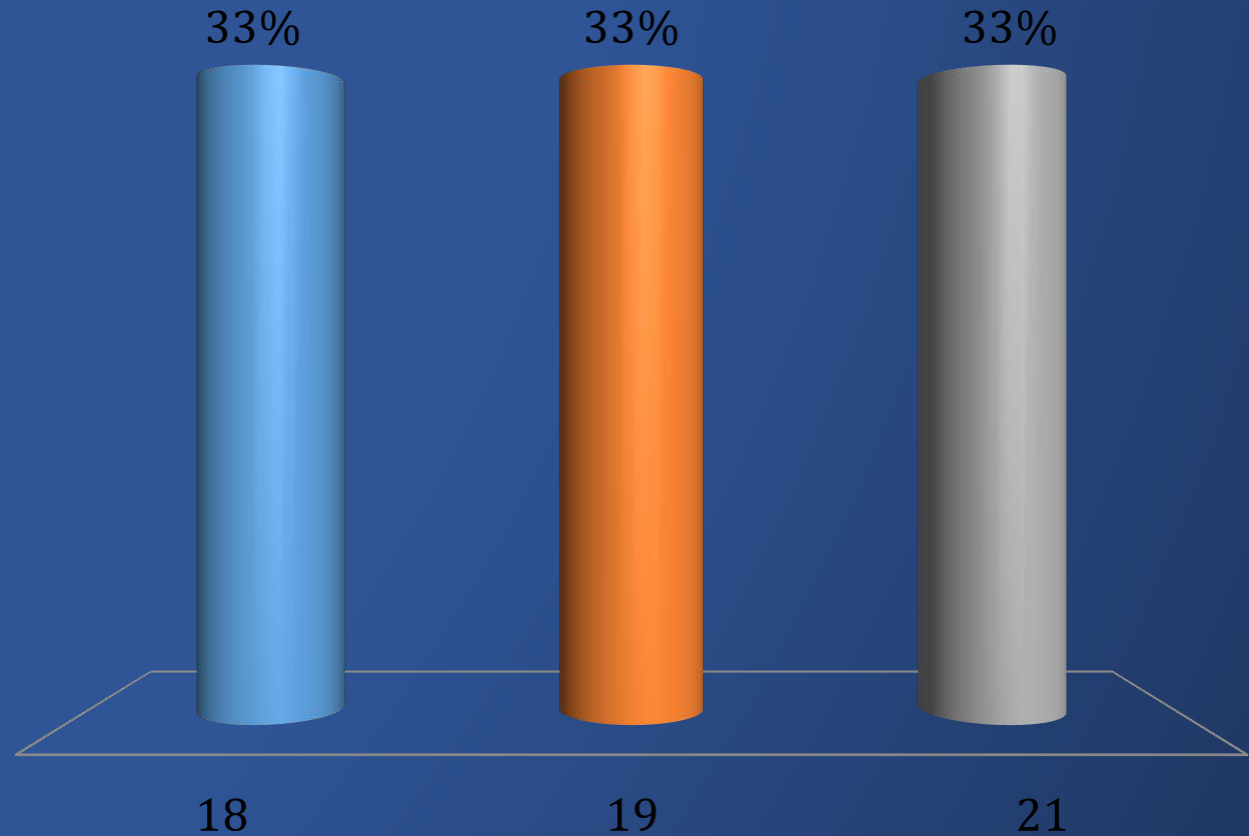


3 units = 3 OL Add to highest count
Combined OL: $18 + 3 = \text{OL } 21$



What is the BOL at §2E1.1?

- A. 18
- B. 19
- C. 21



Determining the Underlying Racketeering Activity¹⁸

Standard of Proof Required

- Preponderance of Evidence Standard (Relevant Conduct)
 - *U.S. v. Corrado*, 227 F.3d 528 (6th Cir. 2000)
 - *U.S. v. Masters*, 978 F.2d 281 (7th Cir. 1992)
 - *U.S. v. Carrozza*, 4 F.3d 70 (1st Cir. 1993)
 - *U.S. v. Yannotti*, 541 F.3d 112 (2^d Cir. 2008)
- Beyond a Reasonable Doubt Standard (§1B1.2(d))
 - *U.S. v. Farese*, 248 F.3d 1056 (11th Cir. 2000)



Determining the Base Offense Level

- To apply BOL (a)(2), treat each underlying offense as if a substantive count of conviction
- For each underlying offense, apply the appropriate Chapter 2 guideline and any applicable Chapter 3 adjustments from Parts A, B, and C



Example 3

- Conviction: one count of 18 U.S.C. § 1962
- Applicable guideline §2E1.1
- Underlying racketeering activity:
 - PWID 5 KG Cocaine (§2D1.1)
 - Attempted Murder (§2A2.1)
 - Robbery (§2B3.1)



Example 3 (cont.)

<u>§2D1.1</u>		<u>§2A2.1</u>		<u>§2B3.1</u>	
BOL	30	BOL	33	BOL	20
Firearm	+2	Injury	+4	Gun	+5
				Injury	+4
<u>§3B1.1</u>					
Leader	+4				
OL	36	OL	37	OL	29

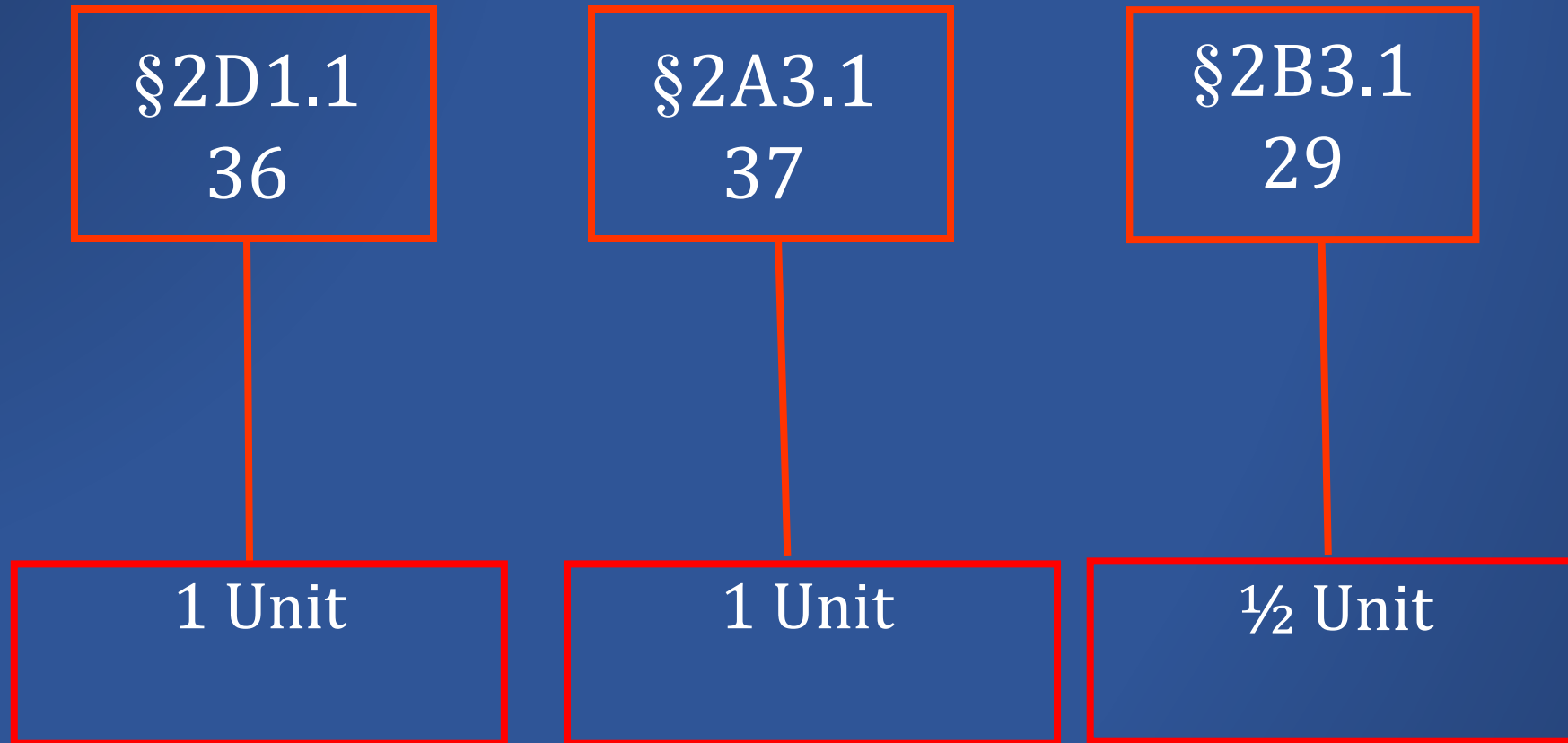


Determining the Base Offense Level (cont.)

- Apply the grouping rules in Part D of Chapter 3 to determine the combined offense level for the underlying offenses
- Compare the combined offense level for the underlying offenses determined under BOL (a)(2) to BOL (a)(1) (OL 19)



Example 3 (cont.)



2 ½ units = 3 OL Add to highest count
Combined OL: 37 + 3 = OL 40



Example 3 (cont.)

- Compare BOL (a)(1) to BOL (a)(2)
- BOL (a)(1) = 19
- BOL(a)(2) (OL 40) will apply





Calculating a Single RICO Count-Scenario



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Calculating RICO with Additional Substantive Counts



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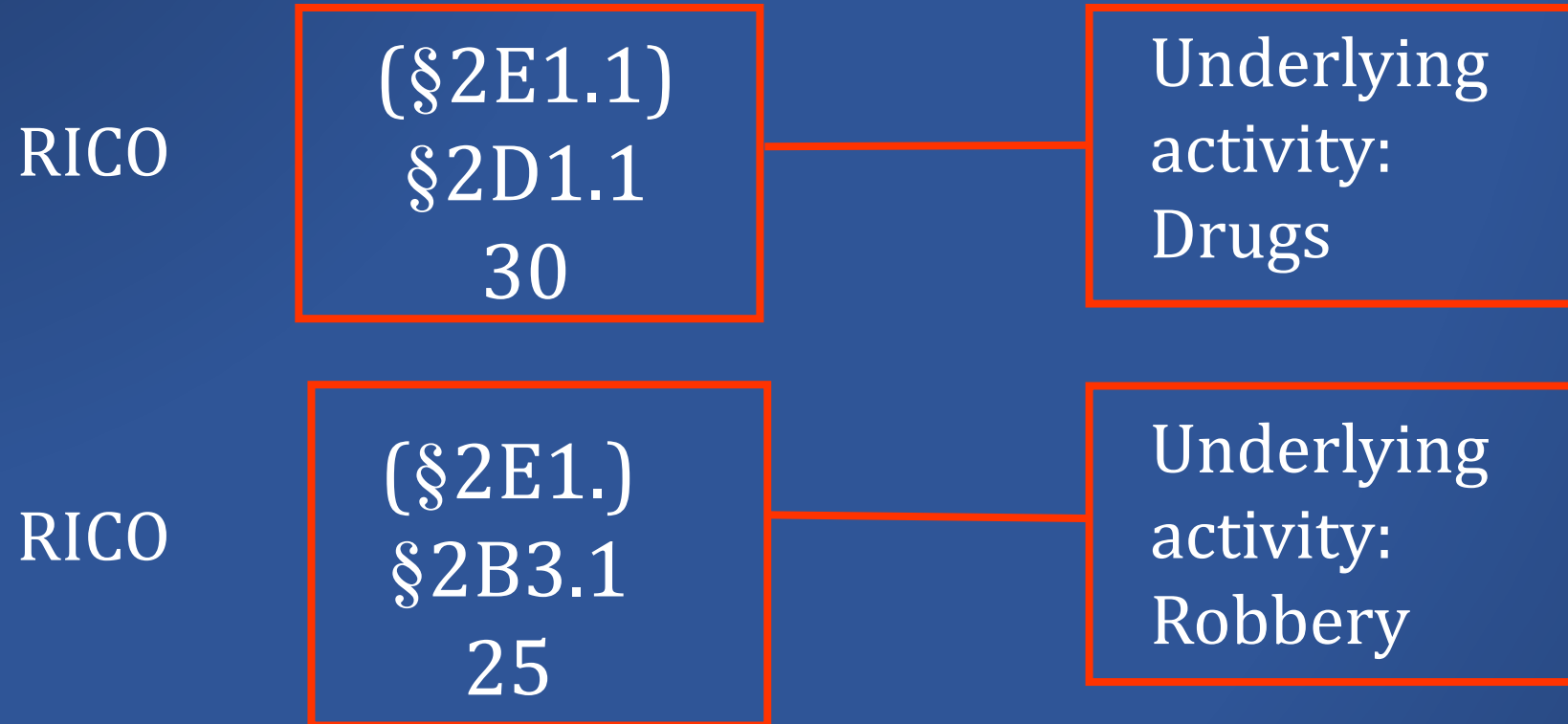
Scenario

- Counts of conviction:
 - RICO (§2E1.1)
 - Underlying offenses:
 - Drugs (§2D1.1)
 - Robbery (§2B3.1)
 - Drugs (§2D1.1)
 - Robbery (§2B3.1)



Scenario (cont.)

RICO will operate like a conspiracy count to commit more than one offense.



Scenario (cont.)

In addition to the underlying RICO offenses, calculate the guidelines for the substantive counts.

RICO

(§2E1.1)
§2D1.1
30

§2D1.1
30

RICO

(§2E1.1)
§2B3.1
25

§2B3.1
25



Scenario (cont.)

Apply the grouping rules to both the underlying RICO offenses and the substantive counts.

RICO	<p>§2D1.1 30</p>	<p>§2D1.1 30</p>	Count Group 1 – Rule (a) - same victim, same act
RICO	<p>§2B3.1 25</p>	<p>§2B3.1 25</p>	Count Group 2 – Rule (a) - same victim, same act



Example 3 (cont.)

Count Group 1

§2D1.1
30

1 Unit

Count Group 2

§2B3.1
25

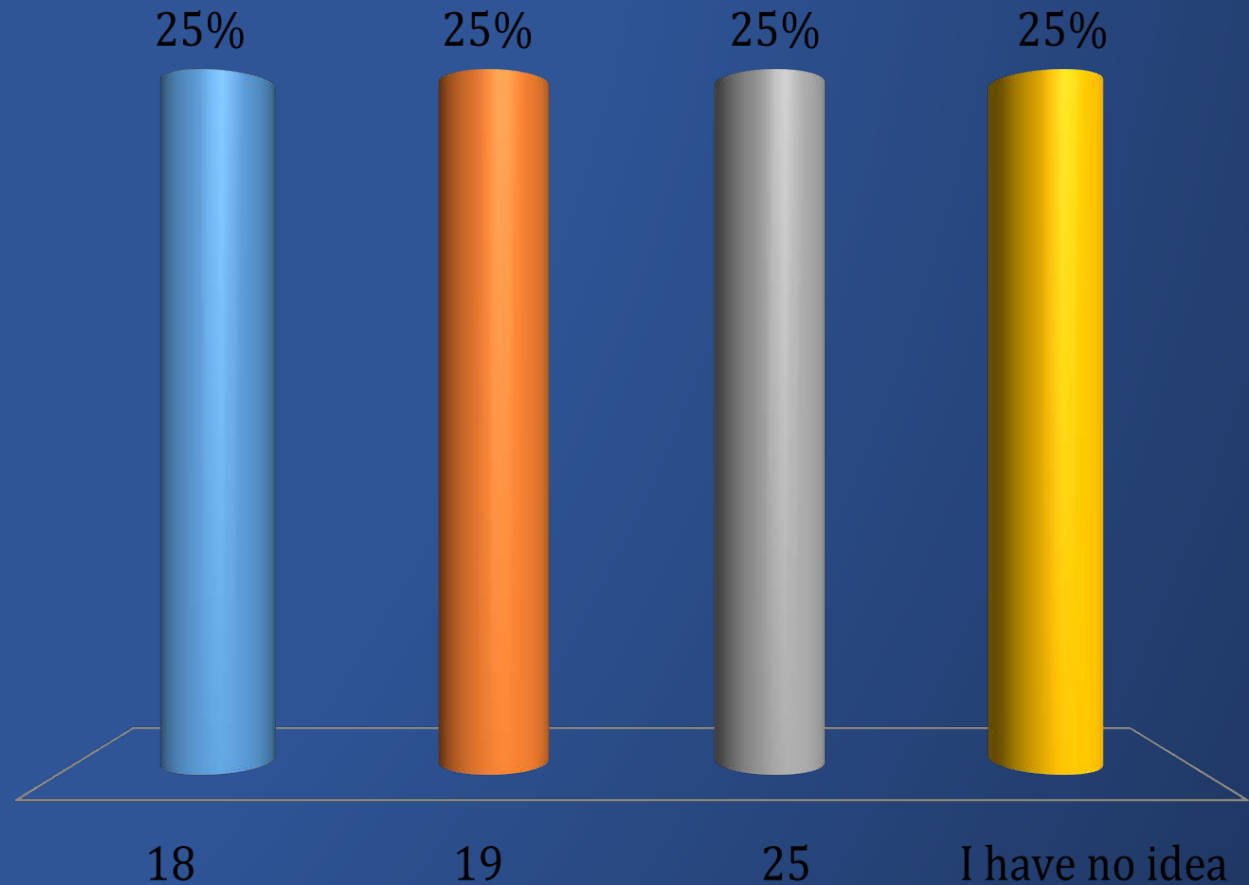
1/2 Unit

1 1/2 units = 1 OL Add to highest count
Combined OL: 30 + 1 = OL 31



What is the BOL at §2E1.1?

- A. 31
- B. 19
- C. 25
- D. I have no idea



RICO OFFENSES

Santana Falcon has pled guilty to the following offense:

- Ct. One: Racketeering Conspiracy; in violation of 18 U.S.C. § 1962(d) – Not more than life imprisonment

Background on Lincoln Park Crew RICO Conspiracy

For several years, the Lincoln Park housing project in Baltimore, Maryland has been a war zone for violent feuds between several criminal enterprises styled as neighborhood-based street gangs. The Lincoln Park Crew (LPC), which was led by Jose Cerrano until he was murdered by a rival gang in August of 2014, has been the center of the violent conflicts. The LPC has been responsible for multiple murders, attempted murders, shooting, assaults and other acts of violence that arise from the gang's ongoing feuds with other street gangs in Lincoln Park.

In approximately 2004, the LPC started as a group of young men who socialized together and were involved in street-level crime. Among the founders were Jose Cerrano and Pedro Ortiz who were both from Lincoln Park. The LPC eventually developed into a substantial criminal organization with sets of gang members who have engaged in criminal activity in neighboring counties in Maryland. The Lincoln Park housing project is considered LPC territory and in recent years a number of shootings and other violent conflicts have occurred when members of rival gangs have entered LPC territory.

The goals of the LPC include protecting the power of the gang and its members through violence and threats of violence against its rivals (including murdering and attempting to murder rivals of the gang) and enriching the gang and its members by engaging in the distribution of crack cocaine, heroin and other drugs (including prescription drugs), in and around LPC controlled territory and by acting in concert to commit robberies involving the use of violence.

Santana Falcon and the LPC RICO Conspiracy

In approximately 2006 **Falcon** became a member of the LPC because of his affiliation and friendship with the now deceased Jose Cerrano, one of the founders of the gang. As an LPC member, **Falcon** was aware that the LPC sold drugs and committed assaults and shootings of rival gang members. **Falcon** held guns for other LPC members, sold crack cocaine with other members and participated in shootings. Specifically, on November 21, 2011, **Falcon** participated in a shootout with a rival gang. During the shootout two members from the rival gang were shot and injured.

Offense Conduct

In 2009, **Falcon** got involved in the prescription drug business. The Lincoln Park grocery was owned by the Jones family. **Falcon** initially provided protection for the store in exchange for a small amount of money, and by doing this he learned the prescription drug business at the store. The Jones family would purchase pills from customers both inside and outside the store. These individuals would sell their

RICO OFFENSES

legally obtained Medicaid-dispensed prescription drug bottles to the Jones family. After aggregating large quantities and removing the patient labels, the Jones family would re-sell the medication to others. Oxycodone tablets were re-sold in loose form like any other controlled substance.

At some point, **Falcon** began stealing customers of the Jones family. Among other things, **Falcon** would stand on the same block as the grocery and intercept customers who would have otherwise sold their pills to the Jones family at the grocery store.

Falcon is responsible for possessing with intent to distribute approximately 400 grams of Oxycodone.

In 2010, **Falcon** participated in a knife-point robbery of approximately \$50,000 of stolen income tax checks. **Falcon** and another gang member arranged to purchase the checks from an individual, but then **Falcon** decided to rob the individual of the checks instead of purchase them. **Falcon** and his co-conspirator were armed with knives and robbed the individual at knifepoint when he arrived with the checks.

1. How many underlying offenses are in this RICO conspiracy?

2. Is each underlying offense compared to the base offense level of 19?

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The RICO Act (18 U.S.C. § 1962) provides for criminal prosecution of racketeering activities as part of an ongoing criminal organization. RICO is designed to address the infiltration of legitimate enterprises by organized crime and other illegal ventures.

Relevant Statutes

- 18 U.S.C. § 1962(a)-(d) (Prohibited Activities)
- 18 U.S.C. § 1961(1)-(10) (Definitions)
- 18 U.S.C. § 1963(a)-(m) (Criminal Penalties)

Predicate Acts

A “predicate act” is an enumerated crime in a RICO conspiracy used to constitute a RICO violation

(e.g. murder, kidnapping, gambling, arson, robbery, extortion etc.)

VS.

Overt Acts

An “overt act” is an outward act, however innocent in itself, done in furtherance of a conspiracy

(e.g. transfer of a firearm to another gang member to further the conspiracy)

Overt Acts are not necessarily the same as acts that would constitute RICO predicates.

Frequently Asked Questions

When determining the base offense level under the RICO guidelines, am I comparing the alternative minimum offense level 19 to each of the underlying offenses individually?

No. Compare the 19 (including any Chapter Three Adjustments) to the combined offense level determined for the underlying offenses. That is, apply Chapters Two and Three Parts A, B, C and D to the underlying offenses and determine a combined offense level.

What is the burden of proof required when there is more than one underlying offense?

The majority of circuits that have addressed the issue (1st, 2nd, 6th and 7th) have held that uncharged, underlying offenses may be accounted for under relevant conduct as long as the court finds the offense has been proved by a preponderance of evidence. The Eleventh Circuit, however, employs a beyond a reasonable doubt standard.

When the defendant has prior convictions that are part of the pattern of racketeering activity, are these priors counted for criminal history and not part of the instant offense?

Yes, if the previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, see §2E1.1, Application Note 4.

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Relevant Case Law

Burden of Proof for Uncharged Underlying Offenses

Preponderance of the Evidence

United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993)

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008)

United States v. Massino, 546 F.3d 123 (2d Cir. 2008)

United States v. Corrado, 227 F.3d 528 (6th Cir. 2000)

United States v. Garcia, 754 F.3d 460 (7th Cir. 2014)

Beyond a Reasonable Doubt

United States v. Nguyen, 255 F.3d 1335 (11th Cir. 2001)

Analogizing State Crimes

United States v. Scott, 642 F.3d 791, 801-02 (9th Cir. 2011) (“The special verdict form indicates the jury found [defendant] guilty of conspiring to murder under state law, so the district court properly analogized to the federal offense of conspiracy to murder.”).

United States v. Minicone, 960 F.2d 1099, 1110 (2d Cir. 1992) (defendant convicted of RICO conspiracy based on his involvement in the enterprise’s gambling activity and second degree murder under the New York Penal Code; district court properly analogized the definition of first degree murder in 18 U.S.C. § 1111 and used the applicable guideline for first degree murder at §2A1.1).

See also, *United States v. Carr*, 424 F.3d 213, 231 (2d Cir. 2005) (district court properly applied base offense level for federal offense of first degree murder, reiterating its conclusion in *Minicone* that the absence of reference to premeditation or malice aforethought in the state second degree murder statute does not mean that federal first degree murder is not the most analogous federal offense).

Prior Sentence Rule - §2E1.1, Application Note 4

United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992) (rejecting government’s argument that district court erred in assessing prior conviction only in calculating criminal history and not in calculating base offense level; “district court reasonably construed Note 4 to mean that the conduct underlying the previously imposed sentence should not be used in calculating the base offense level for the instant [RICO] offense”).

United States v. Riccobene, 709 F.2d 214, 232 (3d Cir. 1983) (“The predicate offenses . . . are not themselves the RICO violation[;] they are merely one element of the crime. [RICO] does not prohibit the commission of the individual racketeering acts. Rather, it bans the operation of an ongoing enterprise by means of those acts.”).

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts’ sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.