



# Relevant Conduct – Economic Crimes

Wednesday, September 4, 2019

10:15 am – 11:45 am; 1:15 pm – 2:45 pm

Annual National Seminar, New Orleans, LA

# Introduction

Peter Madsen

Education & Sentencing Practice Specialist  
Office of Education and Sentencing Practice

Email – [pmadsen@ussc.gov](mailto:pmadsen@ussc.gov)

HelpLine – (202) 502-4545

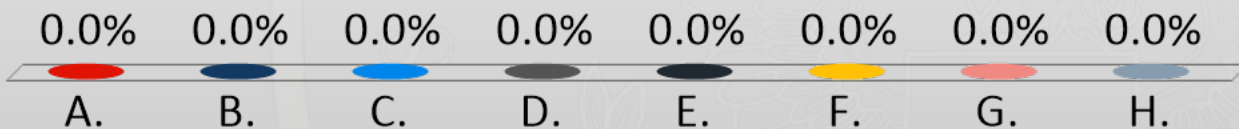


# Learning Objectives

- Ensuring correct guideline application
- Determining what is and is not relevant conduct
- Understanding what information you can use
- Working through scenarios

# Who is 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



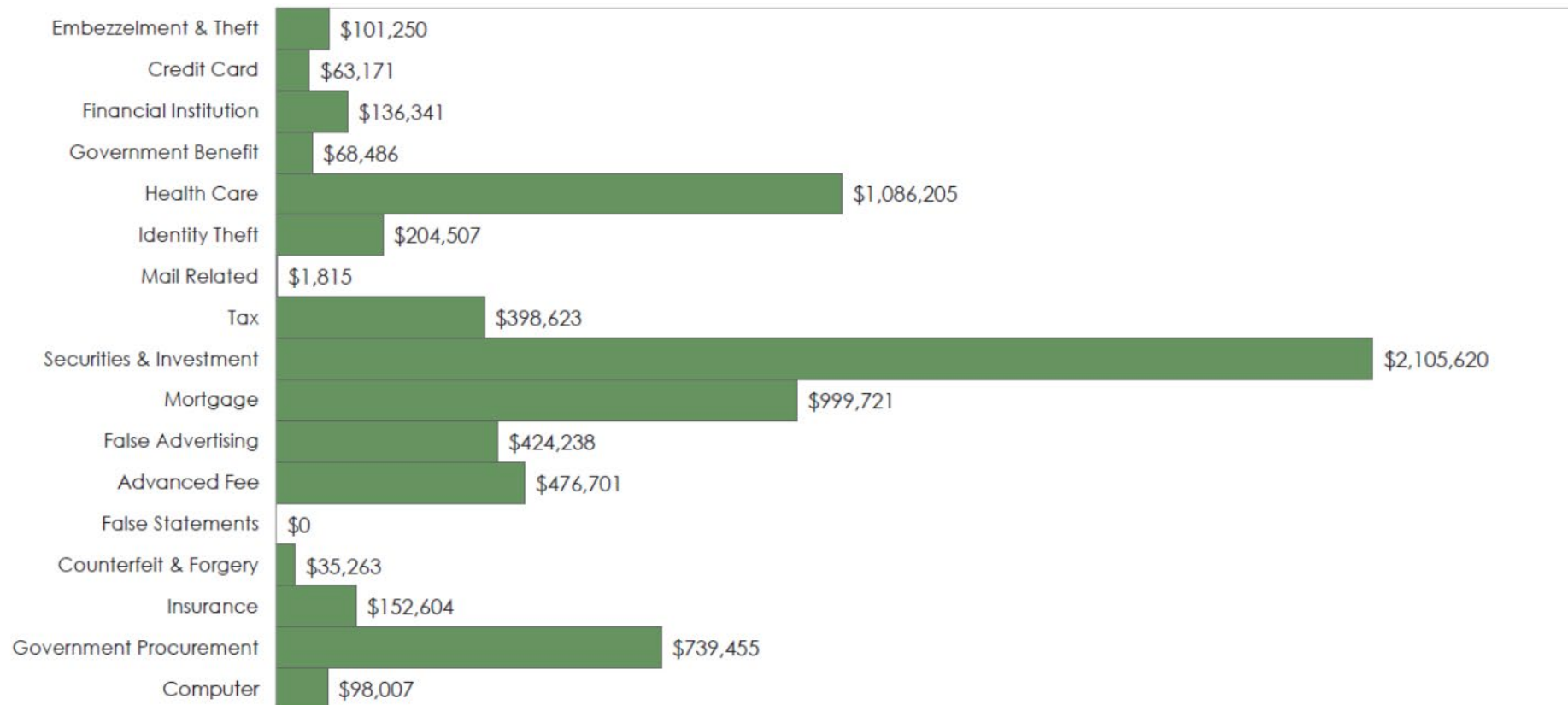
# Years of Experience with Federal Sentencing?

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



# Economic Crimes

## Median Loss Amount for Economic Crimes



# Economic Crimes

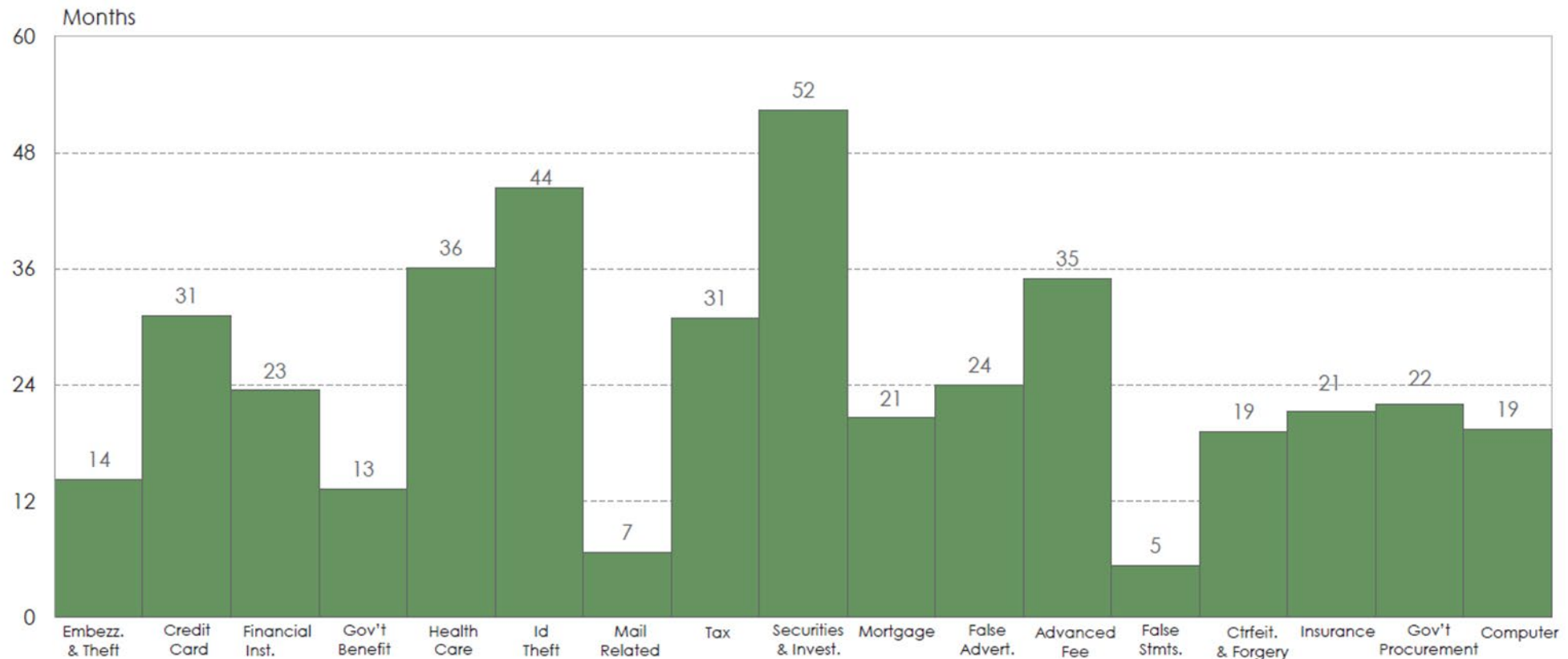
## Top 10 Economic Crimes – 2013 to 2017

---

	2013	2014	2015	2016	2017
<b>TOTAL</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>
<b>Embezzlement &amp; Theft</b>	24.6	27.1	28.3	28.2	27.7
<b>Credit Card</b>	7.6	6.6	6.1	8.9	10.0
<b>Financial Institution</b>	9.7	10.2	10.0	10.1	8.8
<b>Government Benefit</b>	8.2	7.5	8.8	7.5	7.8
<b>Health Care</b>	6.7	6.2	6.2	6.5	7.4
<b>Identity Theft</b>	6.3	7.3	7.0	7.3	6.9
<b>Mail Related</b>	3.8	3.7	3.8	5.0	5.8
<b>Tax</b>	2.8	3.8	4.5	5.4	4.5
<b>Securities &amp; Investment</b>	3.4	2.9	2.8	3.0	3.5
<b>Mortgage</b>	10.2	7.8	5.5	4.3	2.9

# Economic Crimes

## Average Sentence Imposed for Economic Crimes



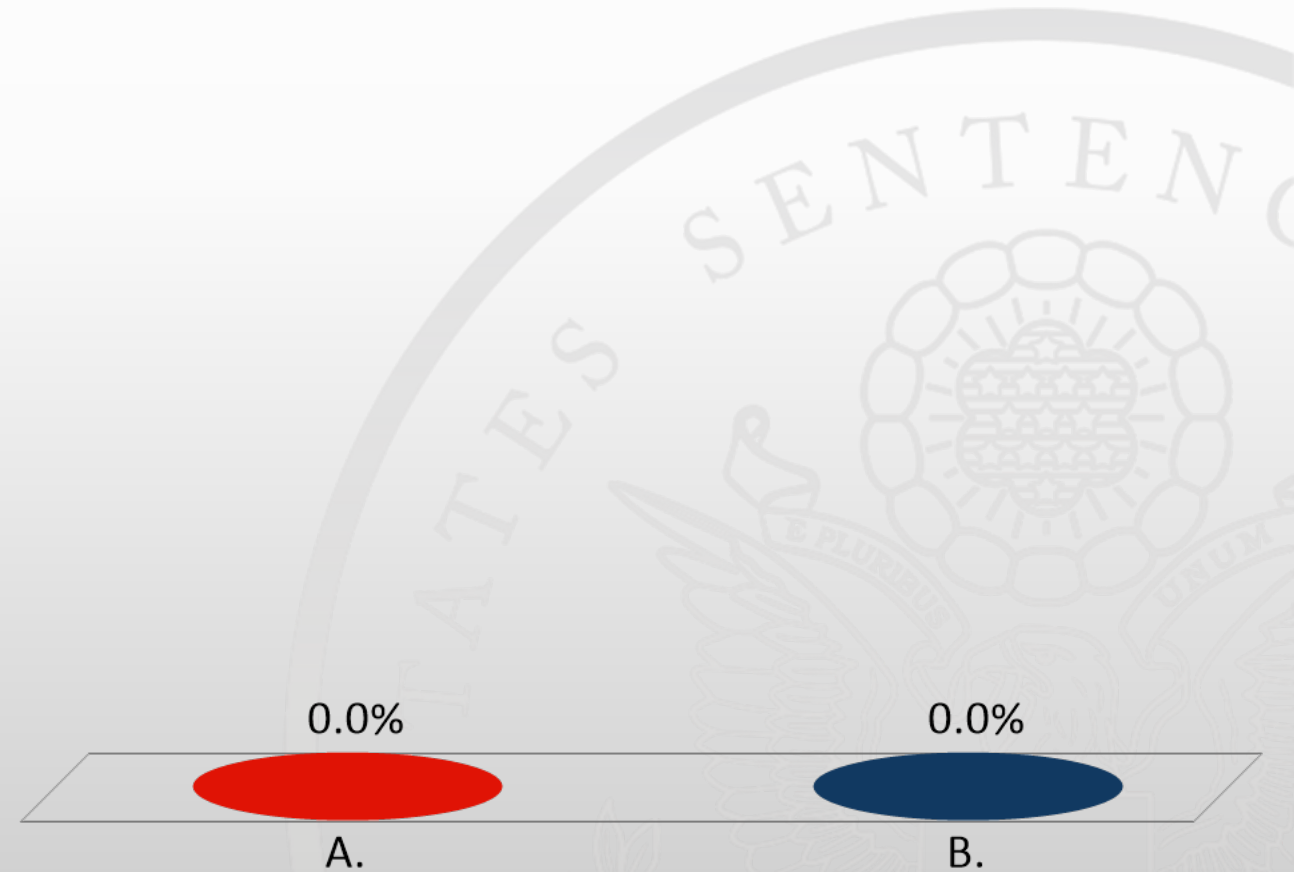


Pop Quiz!

# Can you include losses that occur outside the dates in the Indictment?

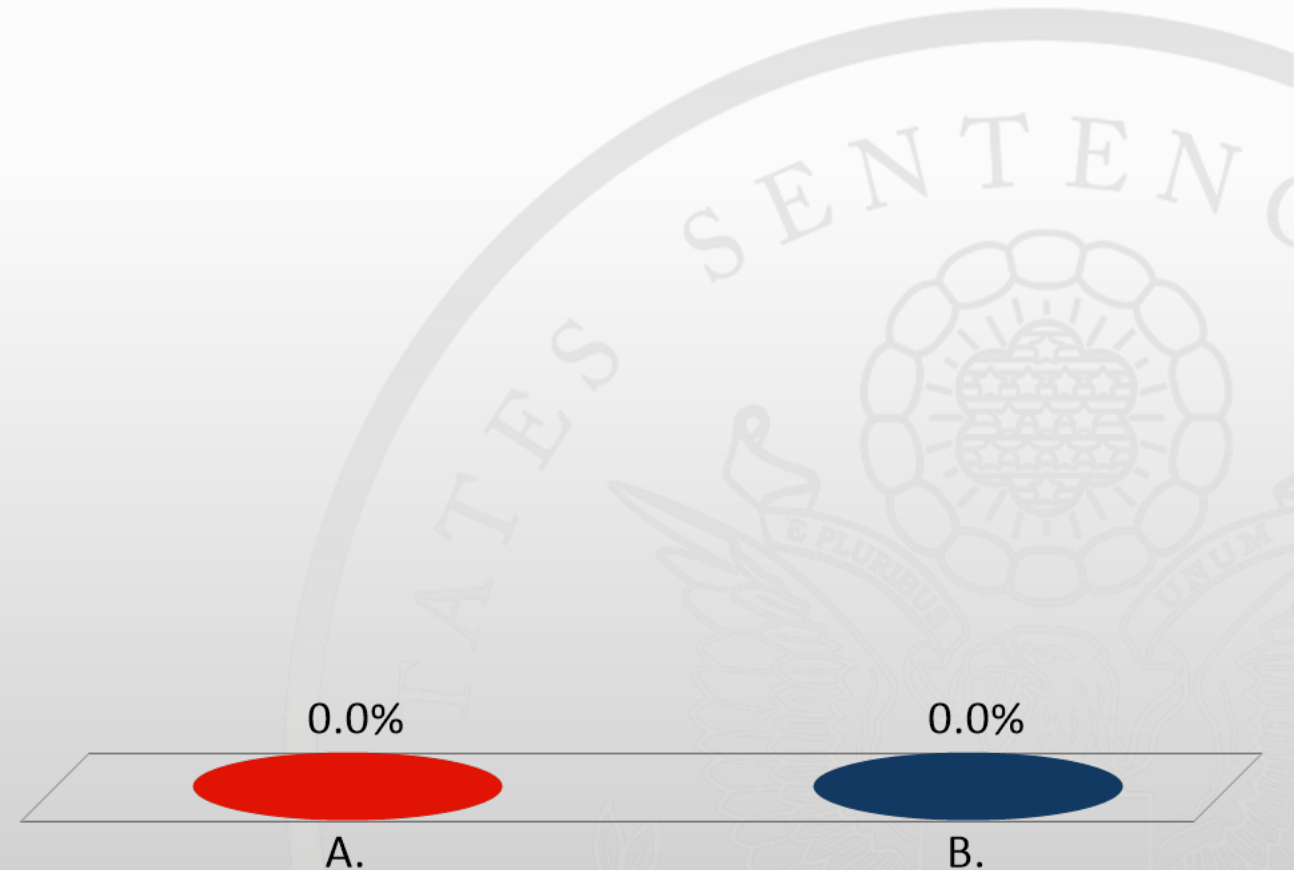
A. Yes

B. No



Does a defendant's relevant conduct include the conduct of members of a conspiracy prior to the defendant joining the conspiracy?

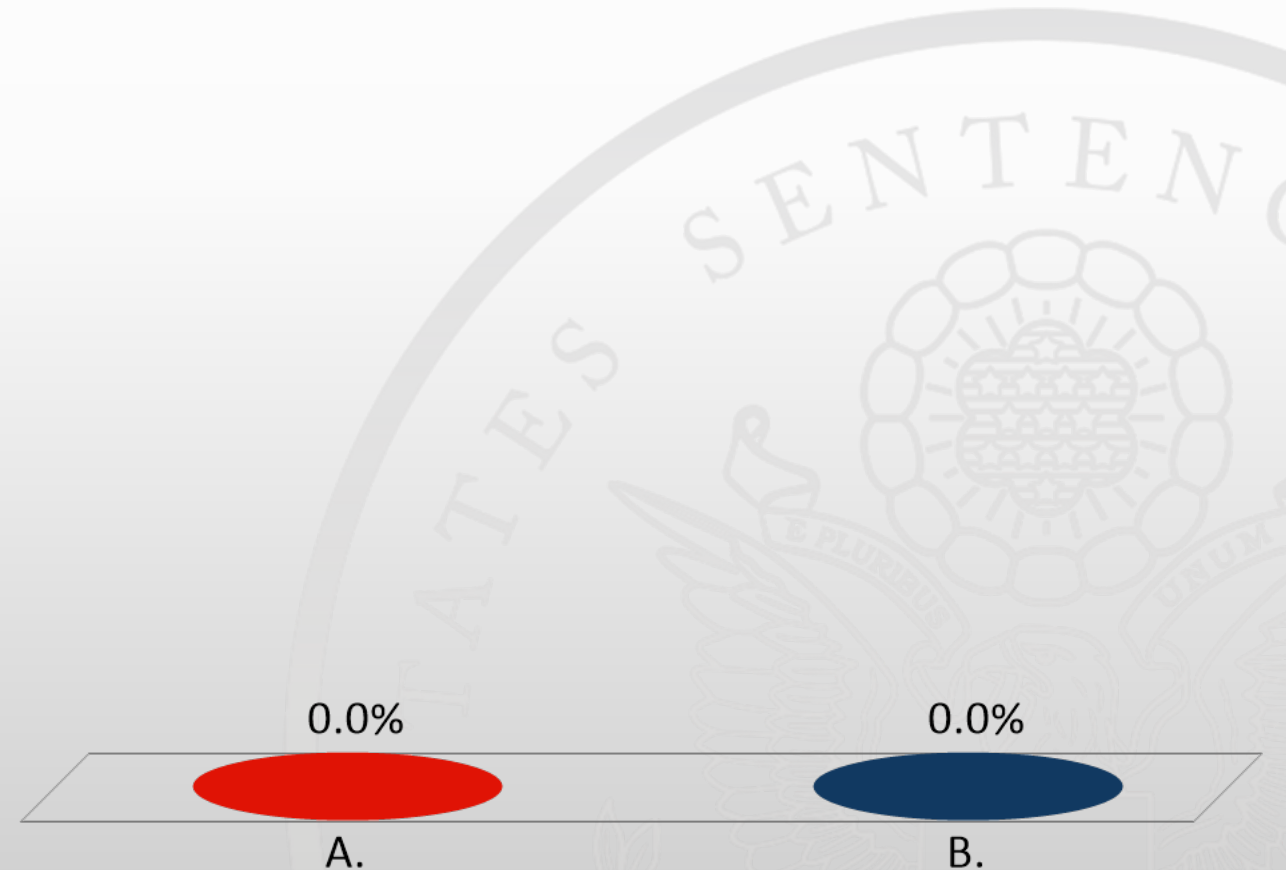
- A. Yes
- B. No



Can the Court included losses resulting from uncharged conduct in the guideline calculations for a fraud offense?

A. Yes

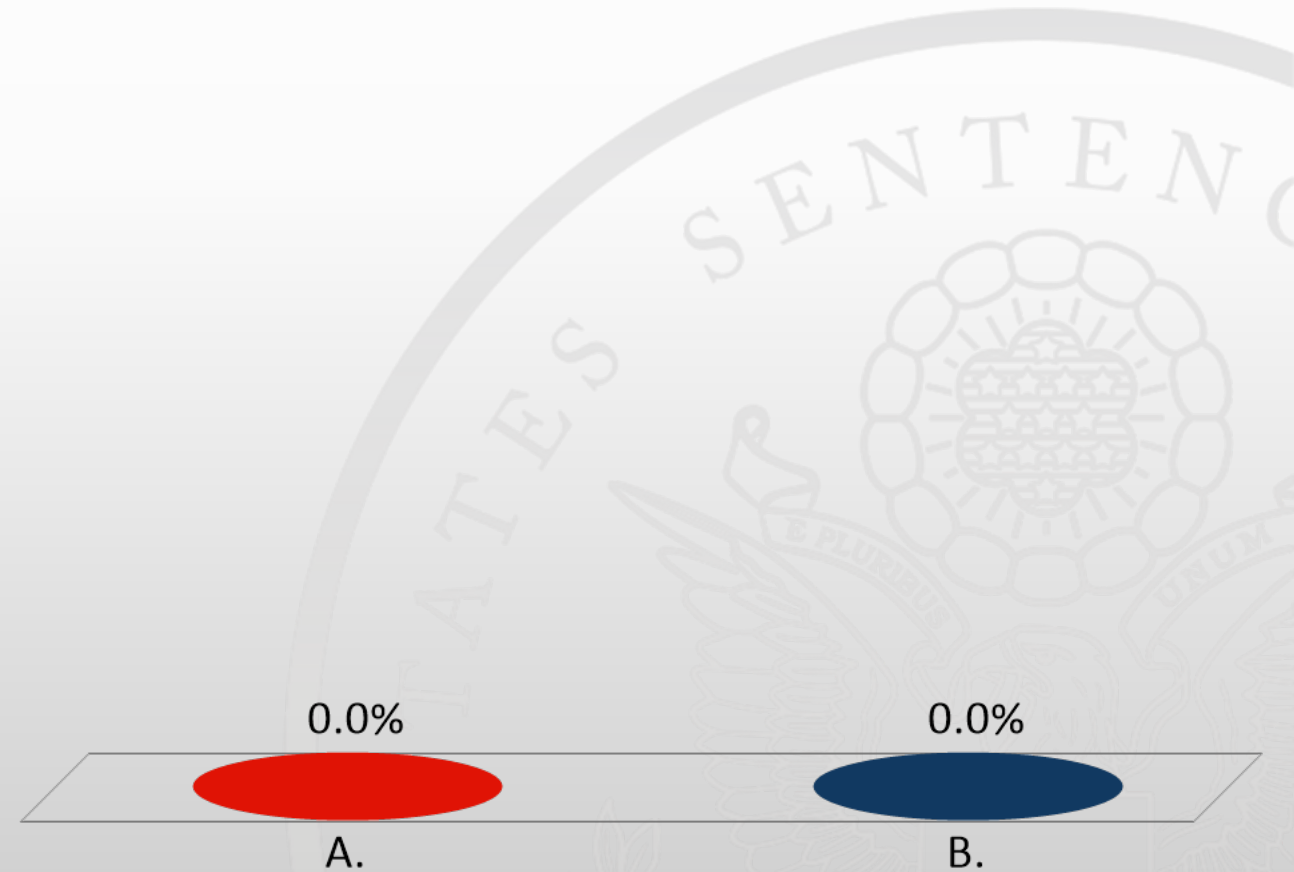
B. No



# Does intended loss also include actual loss?

A. Yes

B. No



# GUIDELINES MANUAL 2018



## Why do we need to know relevant conduct?

1. Loss –  
Actual vs. Intended Loss?
2. Victims –  
Who is a victim?
3. Sophisticated Means –  
How was the crime perpetrated?
4. Role in the Offense  
Who played what role?
5. Abuse of a Position of Trust or Use of a Special Skill –  
How did they do it?

# Relevant Conduct – §1B1.3

## Who and When

(a)(1)(A) – Acts of the defendant

Acts committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant



# Relevant Conduct – §1B1.3

## Who and When

(a)(1)(B) – Certain acts of others

1. Scope of the defendant's undertaking
2. Acts of others in furtherance
3. Reasonably foreseeable



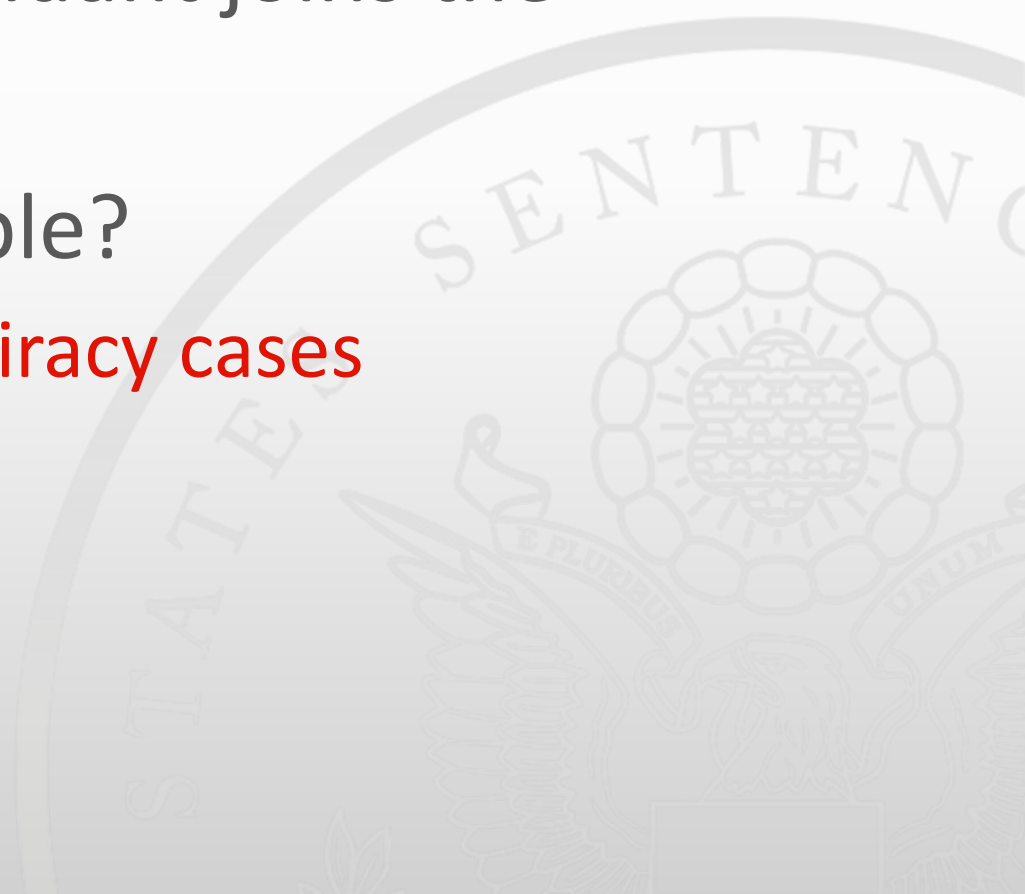


# Acts of Others 3-Part Analysis

- What was the **scope** of the defendant's *jointly undertaken criminal activity*?
- Were the acts of others **"in furtherance of"** the defendant's *jointly undertaken criminal activity*?
- Were the acts of others **"reasonably foreseeable"** in connection with the defendant's *jointly undertaken criminal activity*?

# Acts of Others 3-Part Analysis Common Questions?

- Who determines scope?
- What about conduct before a defendant joins the conspiracy?
- Isn't it always reasonably foreseeable?
  - What about white collar fraud conspiracy cases





Charles Ponzi  
(1882-1949)

## Offenses Included at 3D1.2(d) “Expanded Relevant Conduct”

- Fraud, Theft, Embezzlement
- Money Laundering
- Tax Violations
- Counterfeiting
- Bribery
- Drug Trafficking
- Firearms
- Alien Smuggling
- Trafficking -Possession of CP

## Same Course of Conduct 1B1.3(a)(2), App. Note 5(B)(ii)

- Similarity
- Regularity
- Temporal Proximity

## Common Scheme or Plan 1B1.3(a)(2), App. Note 5(B)(i)

- Common Victims
- Common Accomplices
- Common Purpose
- Similar Modus Operandi

# Loss – Actual vs. Intended

§2B1.1, App. Note 3(A)(i) and (ii)

## Actual Loss

- Means the reasonably foreseeable pecuniary harm that resulted from the offense
- Causation standard:
  - “but for” and
  - “reasonably foreseeable?”

## Intended Loss

- Means the pecuniary harm that the defendant purposely sought to inflict
- Includes intended pecuniary harm that would have been impossible or unlikely to occur:
  - Eg. Government sting

# Loss – Actual vs. Intended

§2B1.1, App. Note 3(D)

- Loss also includes uncharged and acquitted conduct
- Loss does not include the following:
  - Interest
  - Emotional stress
  - Harm to reputation
  - Non-economic harms
  - Costs to government or victims for investigation or prosecution



# Credits Against Loss

§2B1.1, App. Note 3(E)

- Loss may be reduced by:
  - Certain benefits transferred
  - Collateral pledged

 To the victim prior to the detection of the offense



# Special Rules when Determining Loss

§2B1.1, App. Note 3(F)

- Stolen/counterfeit credit cards
- Government benefits fraud
- Investment schemes
- Federal health care offenses





# Victims – Who Are They?

## §2B1.1, App. Note 1

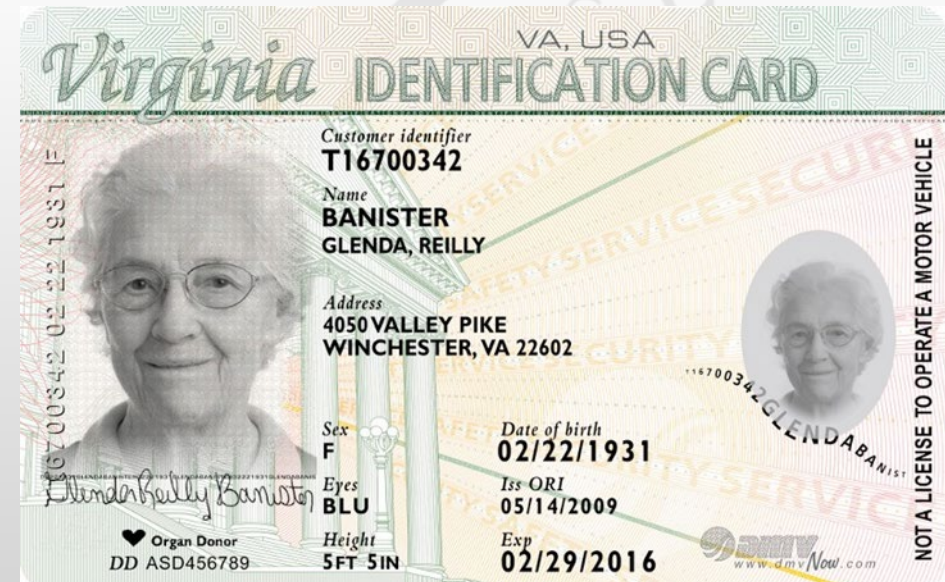
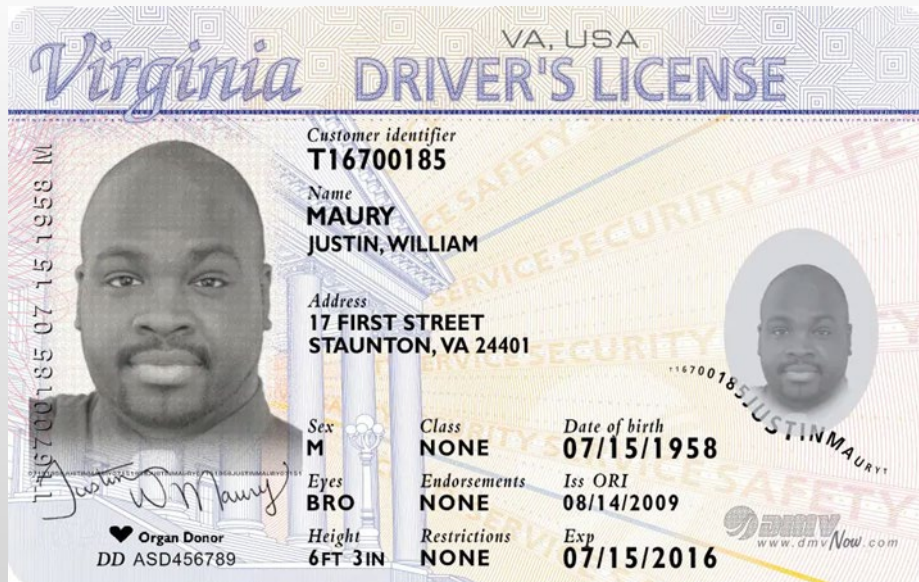
- Any person who sustained any part of the actual loss determined under subsection (b)(1) or
- Any individual who sustained bodily injury as a result of the offense
- Person includes – individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies

# Means of Identification

- 2B1.1(b)(11)(C) –
  - (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or
  - (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification

# Means of Identification - Victim

- 2B1.1(b)(2), App. Note 4(E) –
  - (i) any victim as defined in Application Note 1, or
  - (ii) any individual whose means of identification was used unlawfully or without authority.





The background of the slide is a close-up, slightly blurred image of several US dollar bills. The focus is on the texture and patterns of the currency, with the words "ONE HUNDRED DOLLARS" and "FEDERAL RESERVE NOTE" visible on the bills. The bills are arranged in a way that creates a sense of depth and repetition.

# Relevant Conduct - Scenarios

Economic Crimes

1. What is the loss amount?

- A. \$200,000
- B. \$1.8 million
- C. \$1.6 million
- D. There is no loss





2. What amount of loss should Defendant A be held accountable for?

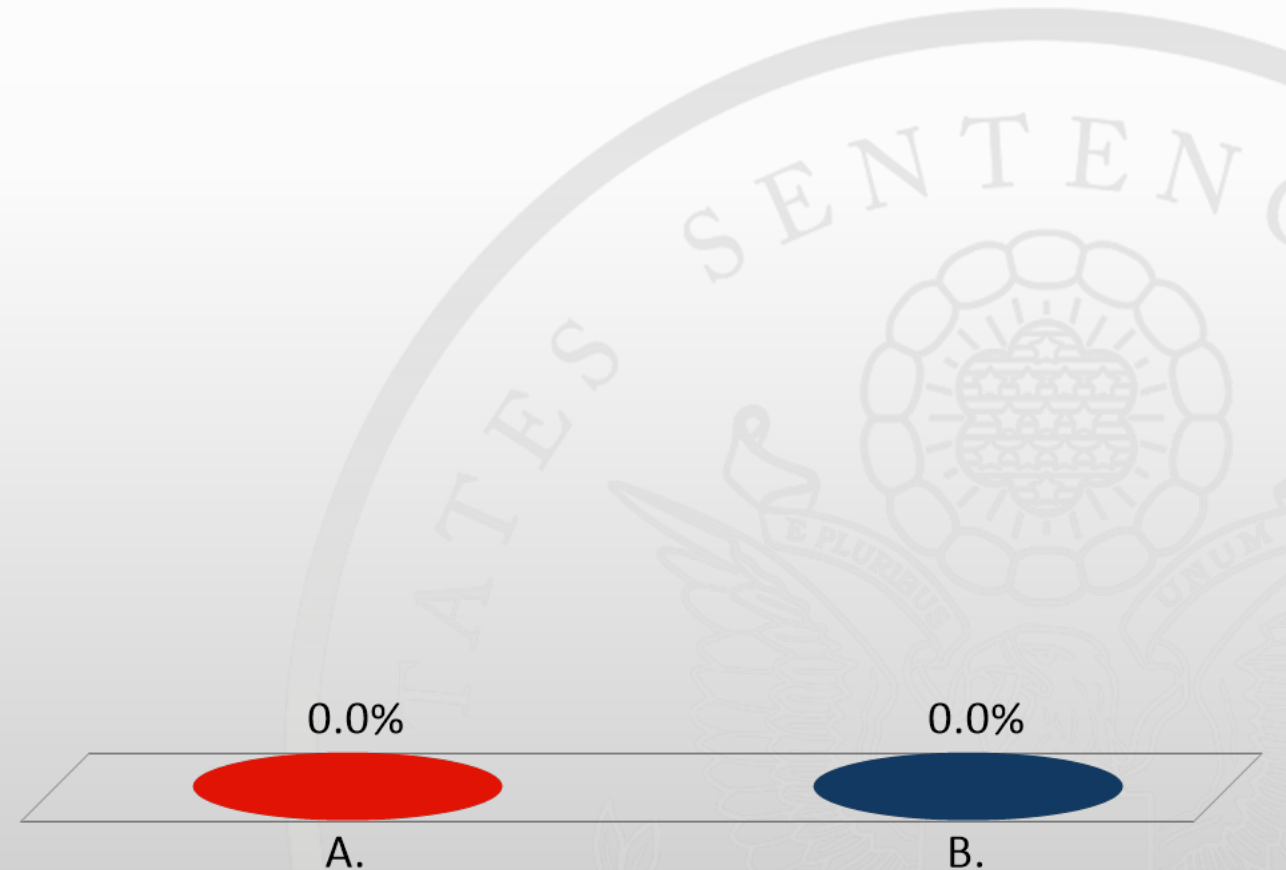
- A. \$500,000
- B. \$520,000
- C. \$20,000
- D. There is no loss



3. Can the USPO use the loss from those states as well or are there jurisdictional issues?

A. Yes

B. No



## 4. Is the initial fraud (2010 - 2014) relevant conduct or criminal history?

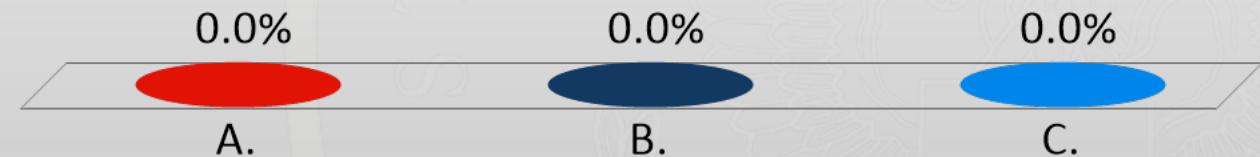
- A. Relevant Conduct
- B. Criminal History
- C. Both Relevant Conduct and Criminal History
- D. Neither Relevant Conduct or Criminal History





5. When calculating the guidelines for Defendant B, at §2B1.1, what is the amount of loss?

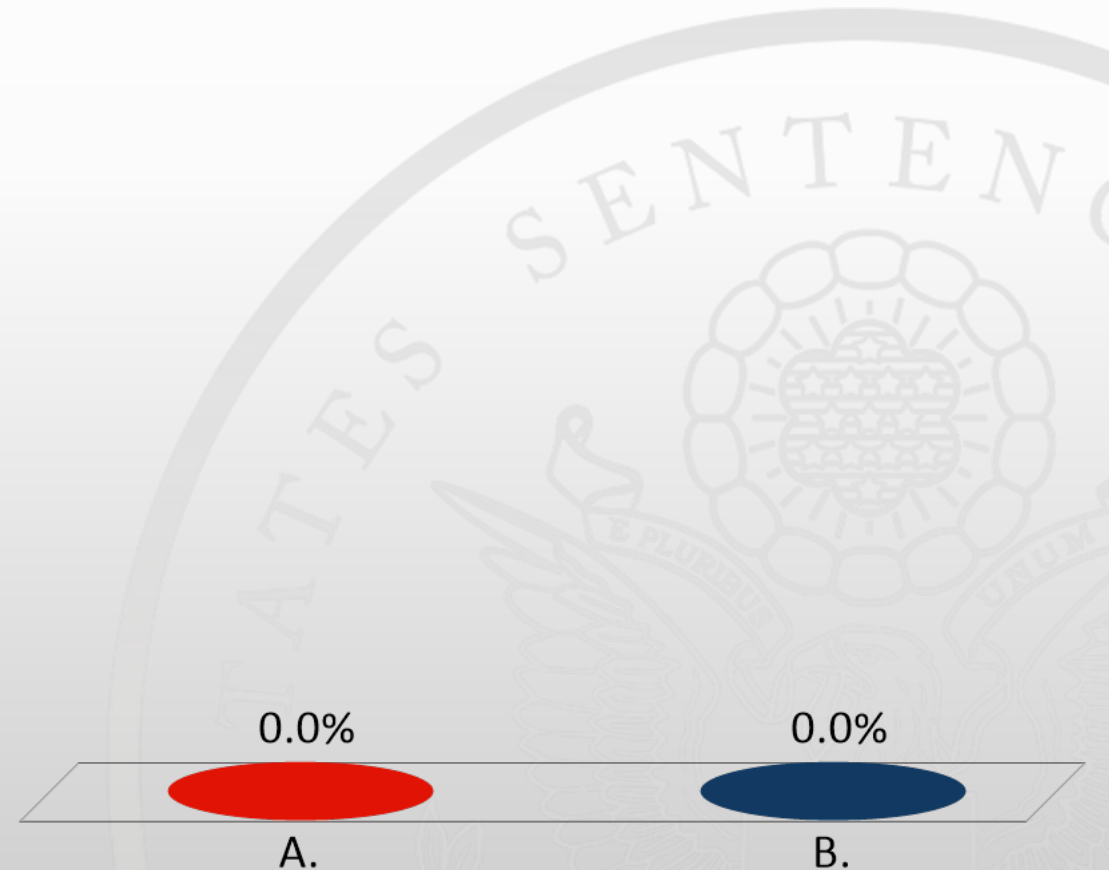
- A. \$22,000
- B. \$310,000
- C. \$810,000



## 5.1. Will Defendant B receive and enhancement for causing substantial financial hardship to the victim? Why or why not?

A. Yes

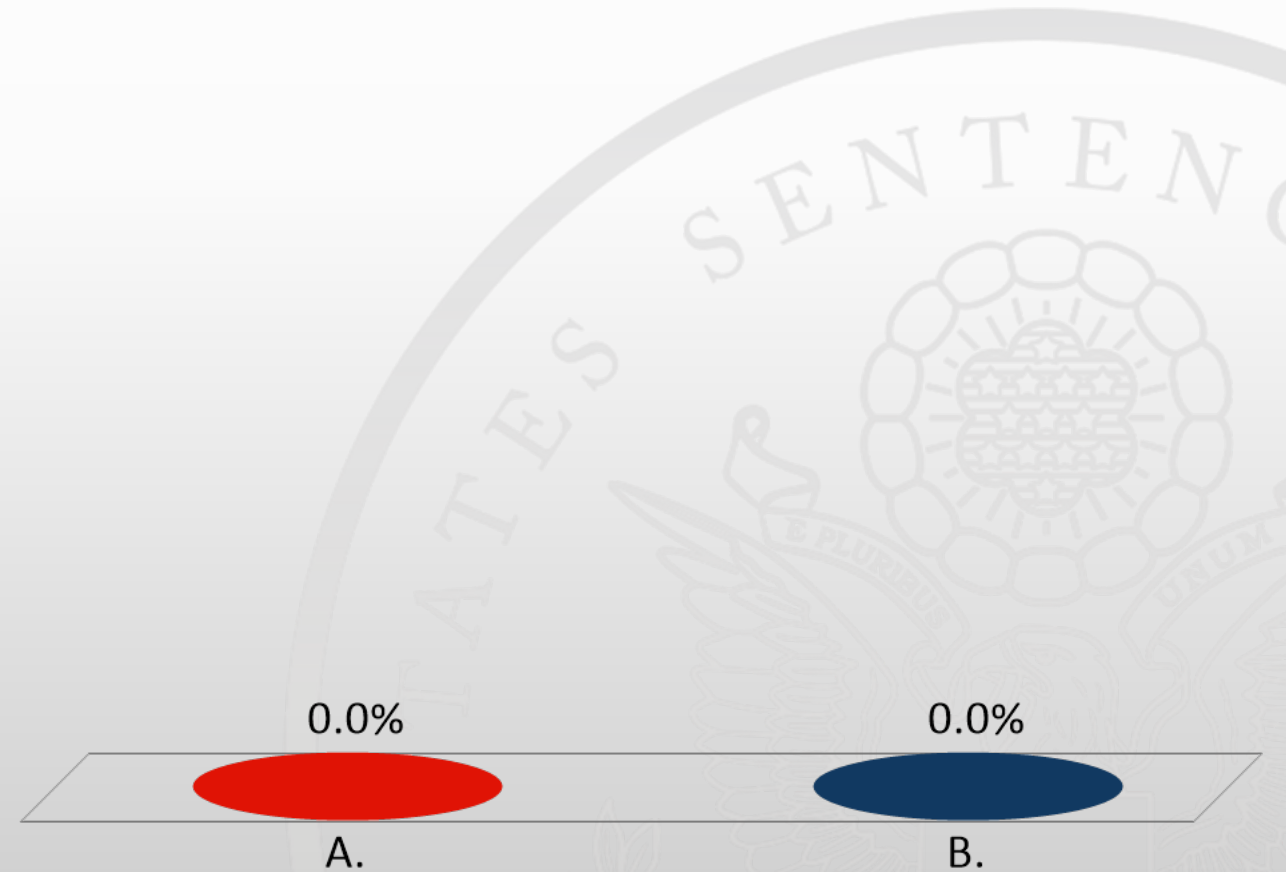
B. No



6. Is the government correct in that the total amount of loss will be the same for each defendant?

A. Yes

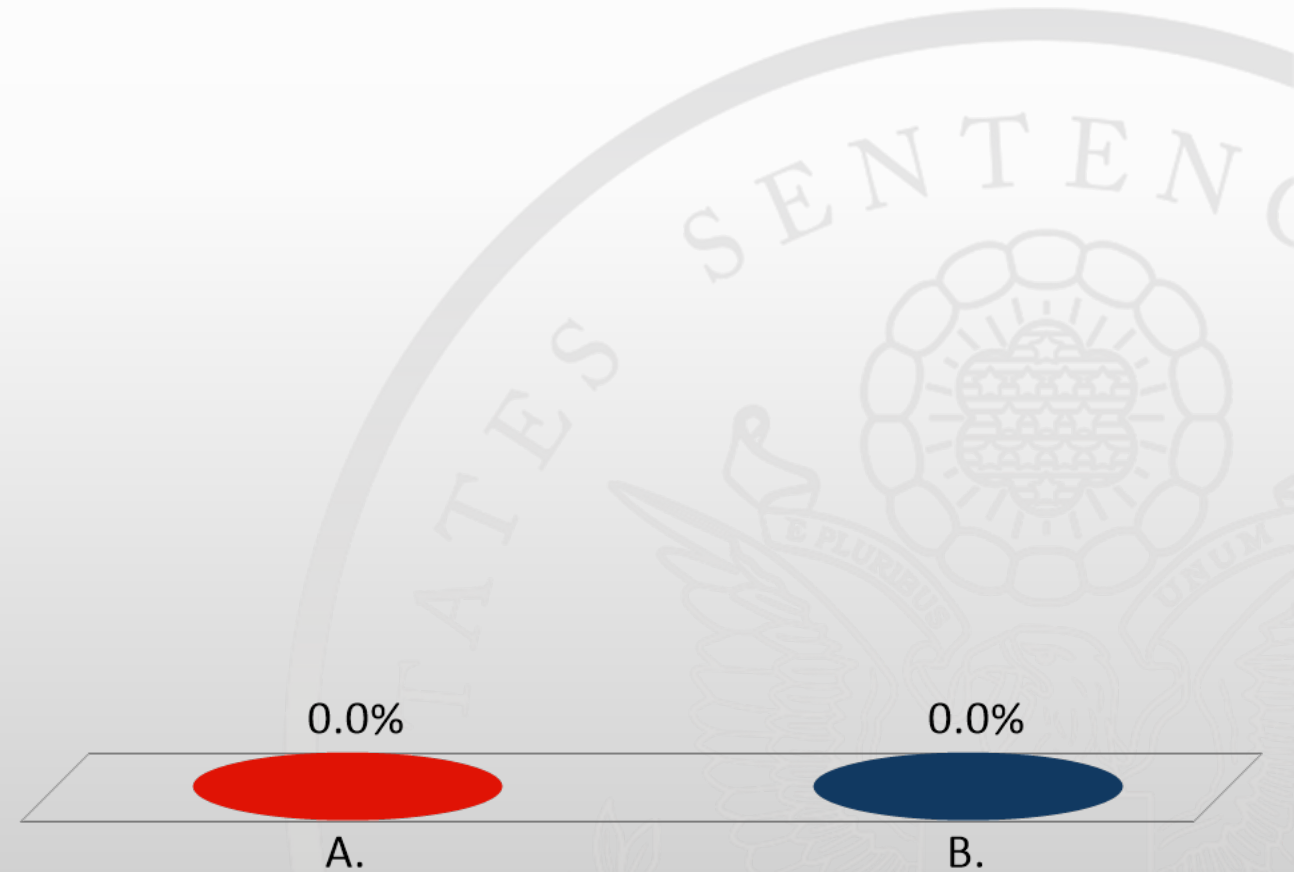
B. No



7. Was the court's ruling correct?

A. Yes

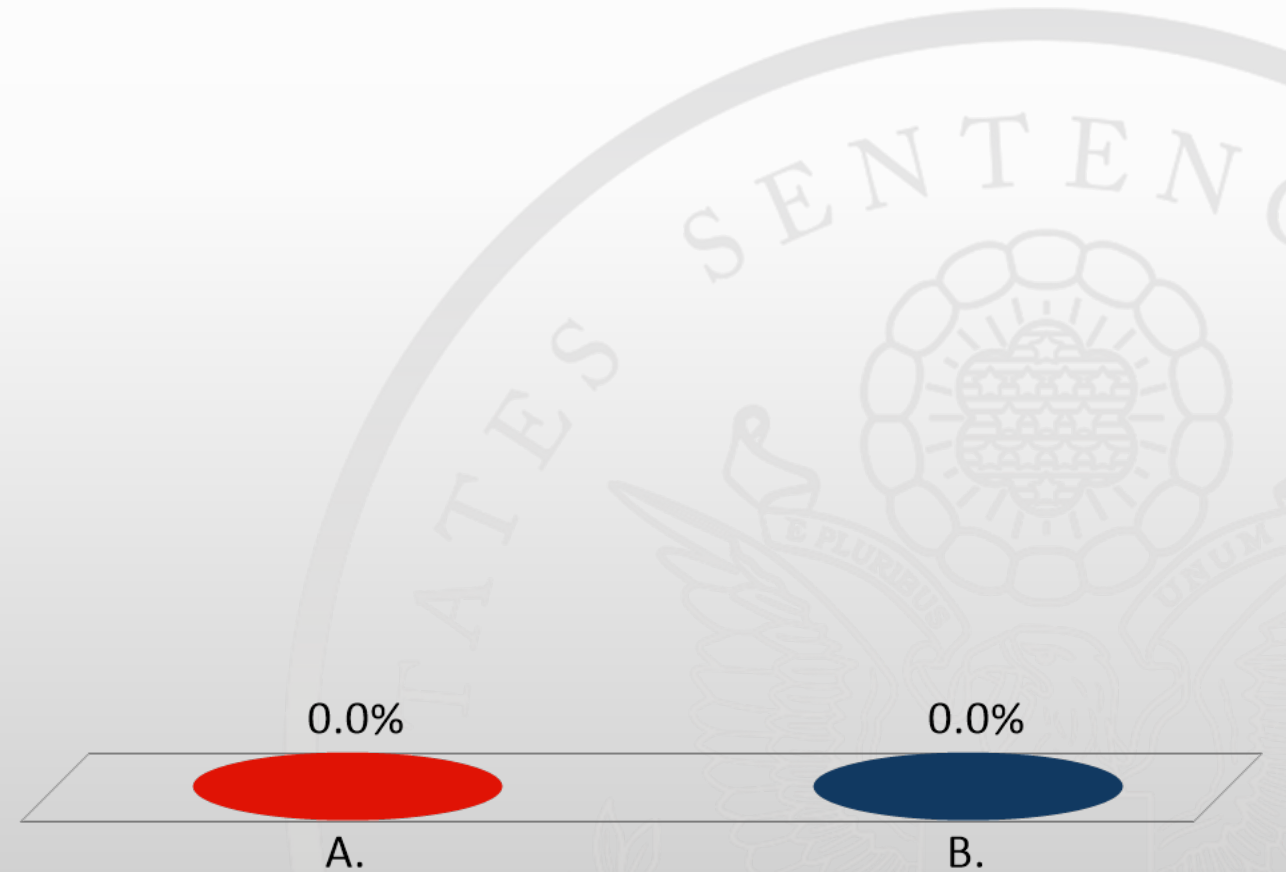
B. No



8. Was the court's ruling correct in that each defendant was responsible for the entire loss amount?

A. Yes

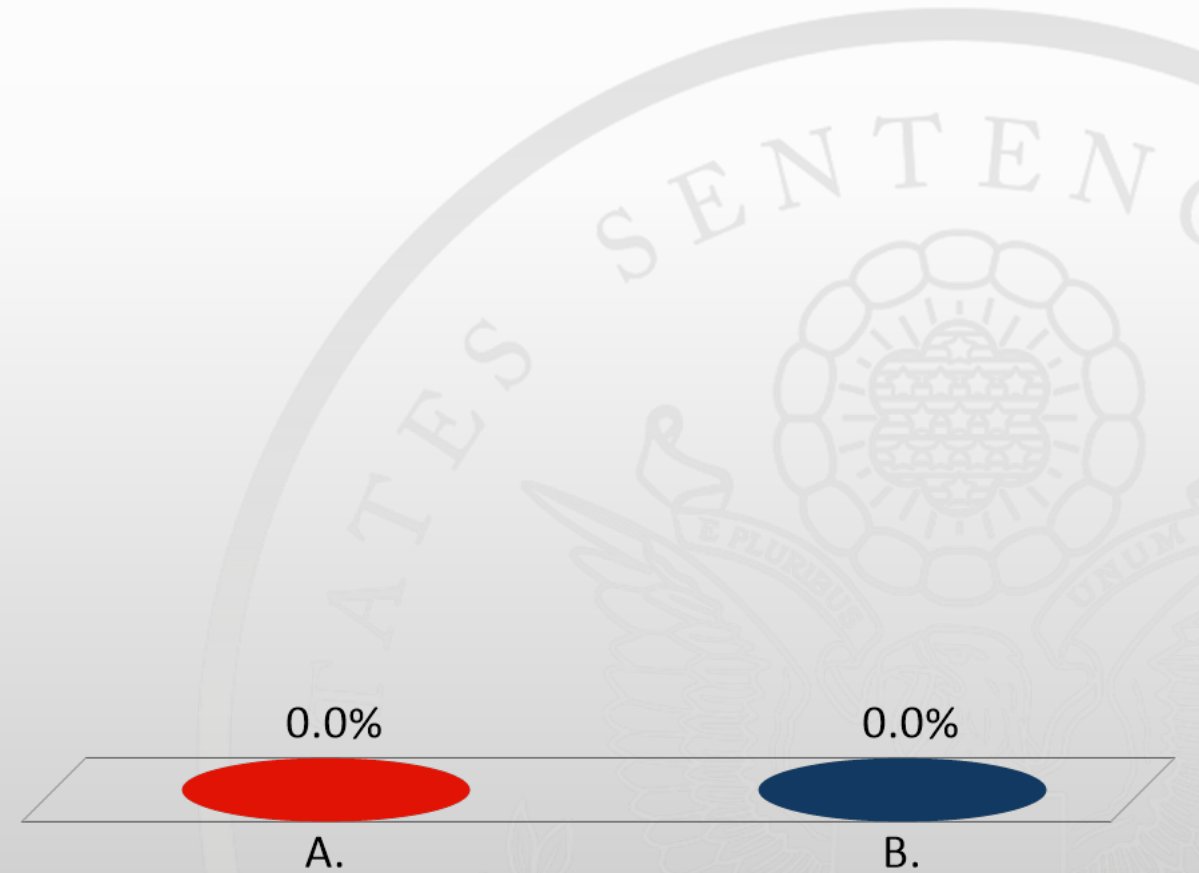
B. No



9. Was the court's ruling correct?

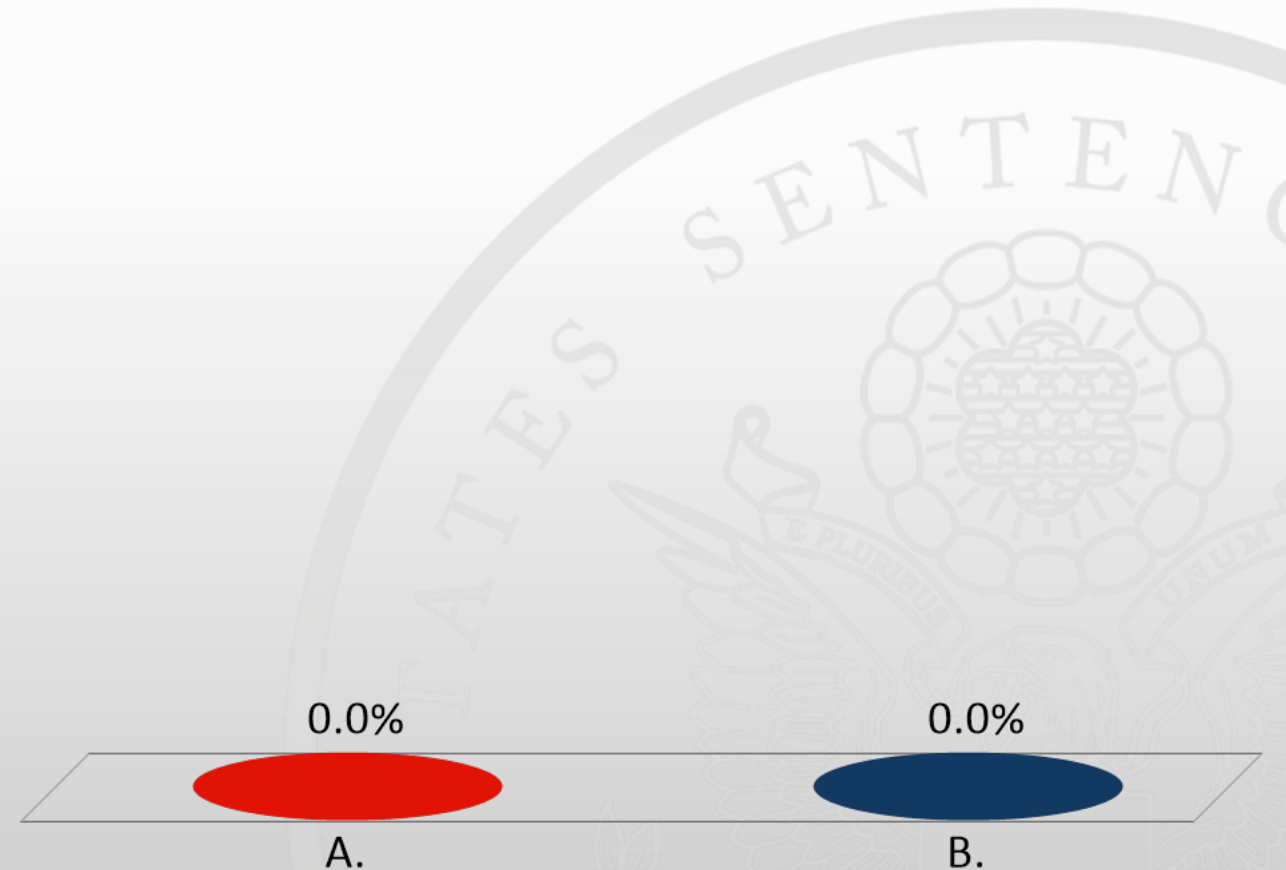
A. Yes

B. No



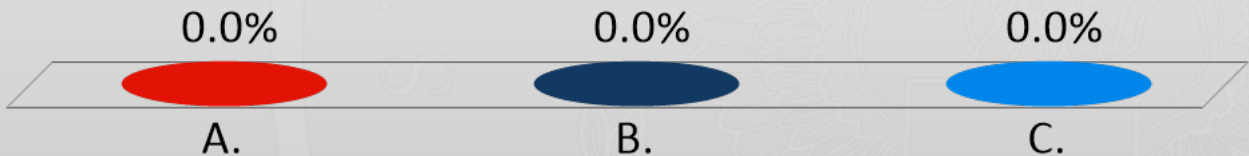
9.1 Given the downward variance, will the appellate court care whether the ruling was correct or incorrect?

- A. Yes
- B. No



10. What is the loss amount?

- A. \$108,600
- B. \$27,800
- C. \$80,800

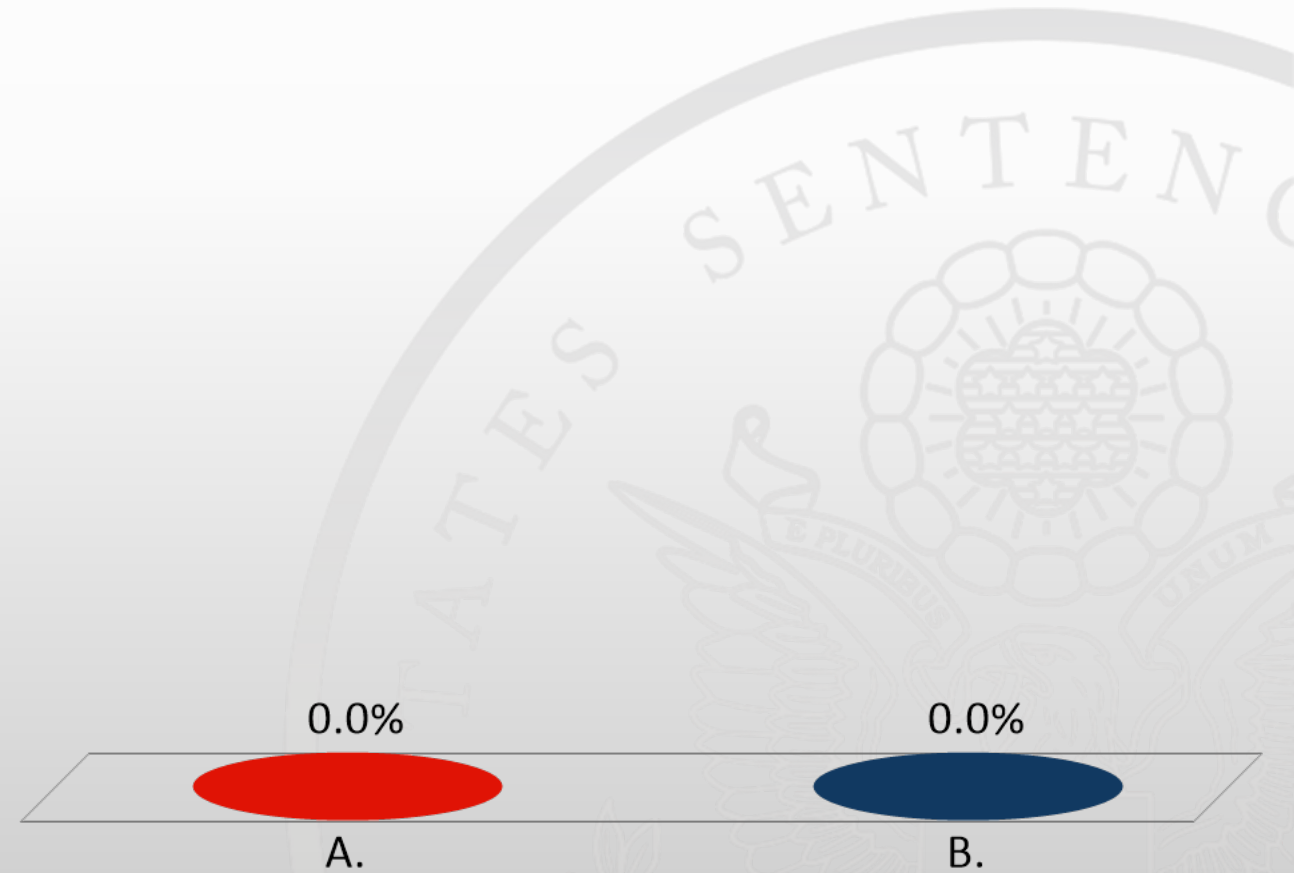




# 11. Was the court's ruling correct?

A. Yes

B. No



(Add closing statement here;  
“Questions or Comments?” is standard)



[www.ussc.gov](http://www.ussc.gov)

HelpLine (202) 502-4545



[@theusscgov](https://twitter.com/theusscgov)

[training@ussc.gov](mailto:training@ussc.gov)



*[#USSCSeminar19](#)*