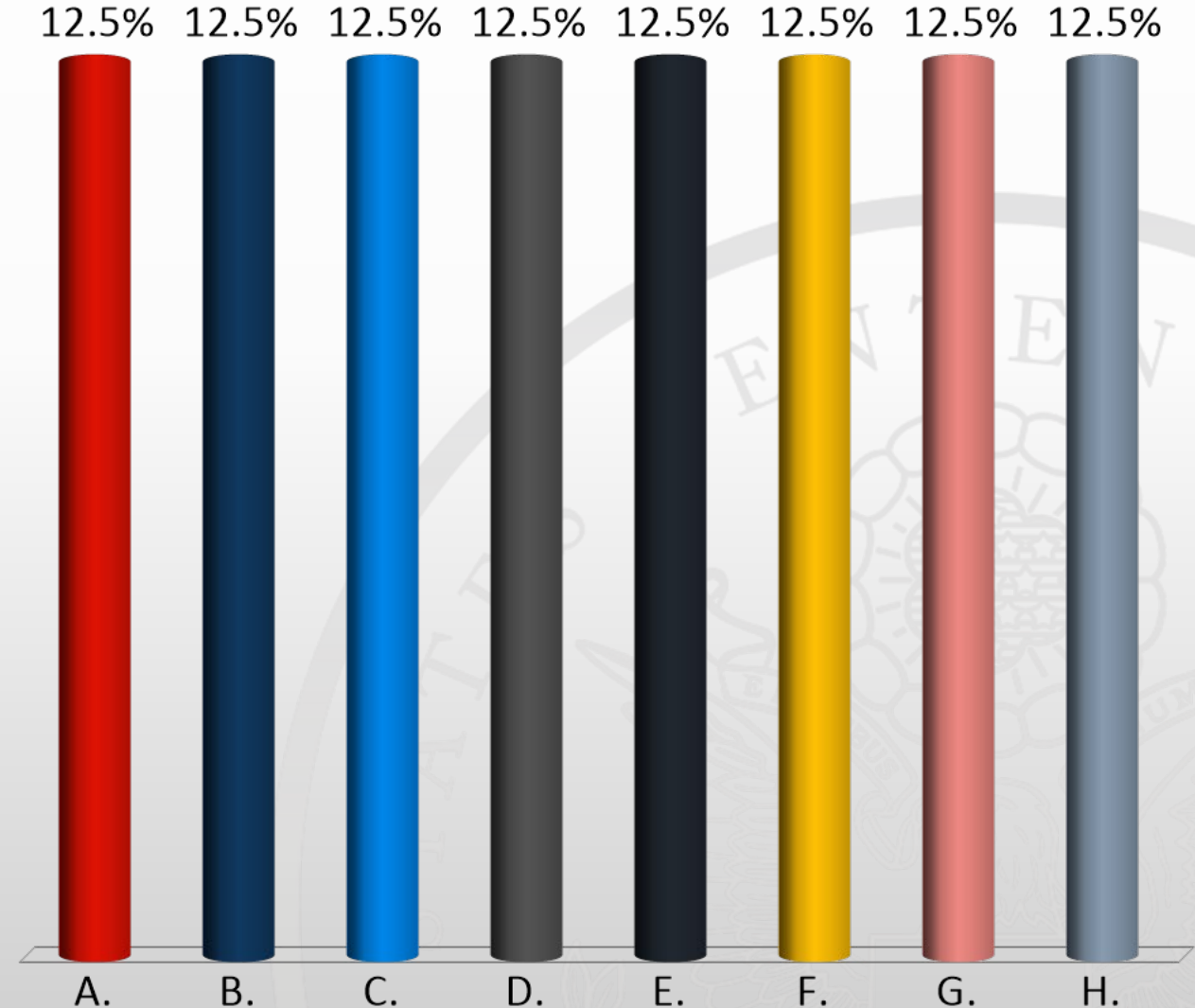




Introduction to Relevant Conduct

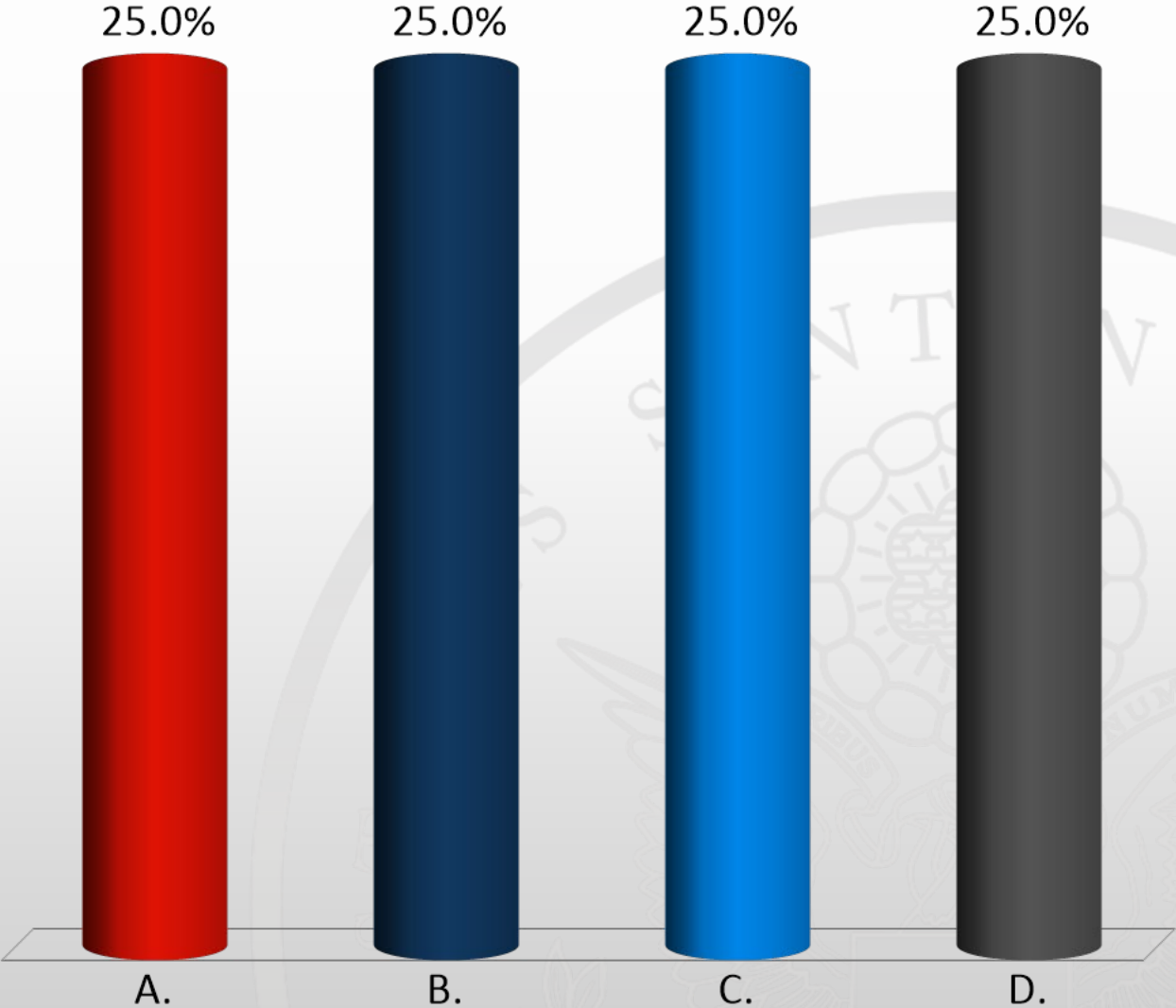
Who is in the Audience?

- 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



Relevant Conduct Synopsis

1. Defendant accountable for acts he/she did in furtherance of the offense of conviction
2. Defendant accountable for certain acts others did in furtherance of the offense of conviction
3. For certain offenses, defendant also accountable for acts he/she did in the same course of conduct or common scheme or plan beyond the offense of conviction

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

Scenario

- Defendant is charged with one count of Filing a False Tax Return for Tax Year 2015; in violation of 26 U.S.C. § 7206 with a “tax loss” of \$100,000 for that filing
- He also filed false tax returns in 2013, 2014, and 2016, with “tax loss” amounts of \$100K, \$200K, and \$200,000K, respectively but was not charged with these offenses
- Can the court take into account all four years of false returns at §2T1.1?



Scenario

The defendant was arrested for committing a robbery on June 7, 2019. The defendant did not possess a gun during the robbery.

The defendant also committed another bank robbery on June 6, 2019 where he possessed a gun.

If the defendant only pleads guilty to the June 7 robbery, can the court take into account the gun in the second robbery at §2B3.1

Relevant Conduct Analysis (a)(1) and (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)(1):

In preparation

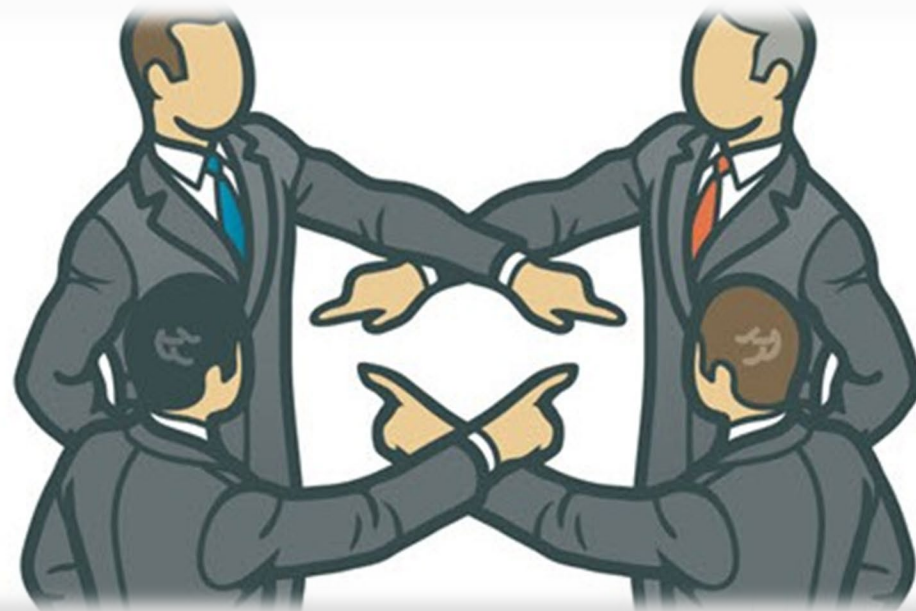
During

Avoiding detection

(a)(2):

Same course of conduct/
common scheme or plan

Holding a Defendant Accountable for His/Her Acts Under Relevant Conduct



Scenario 1: Does the gun enhancement at §2B3.1 apply?

- A. Yes
- B. No



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



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



When Can You Hold the Defendant Accountable for the Acts of Others?

§1B1.3(a)(1)(B)

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?

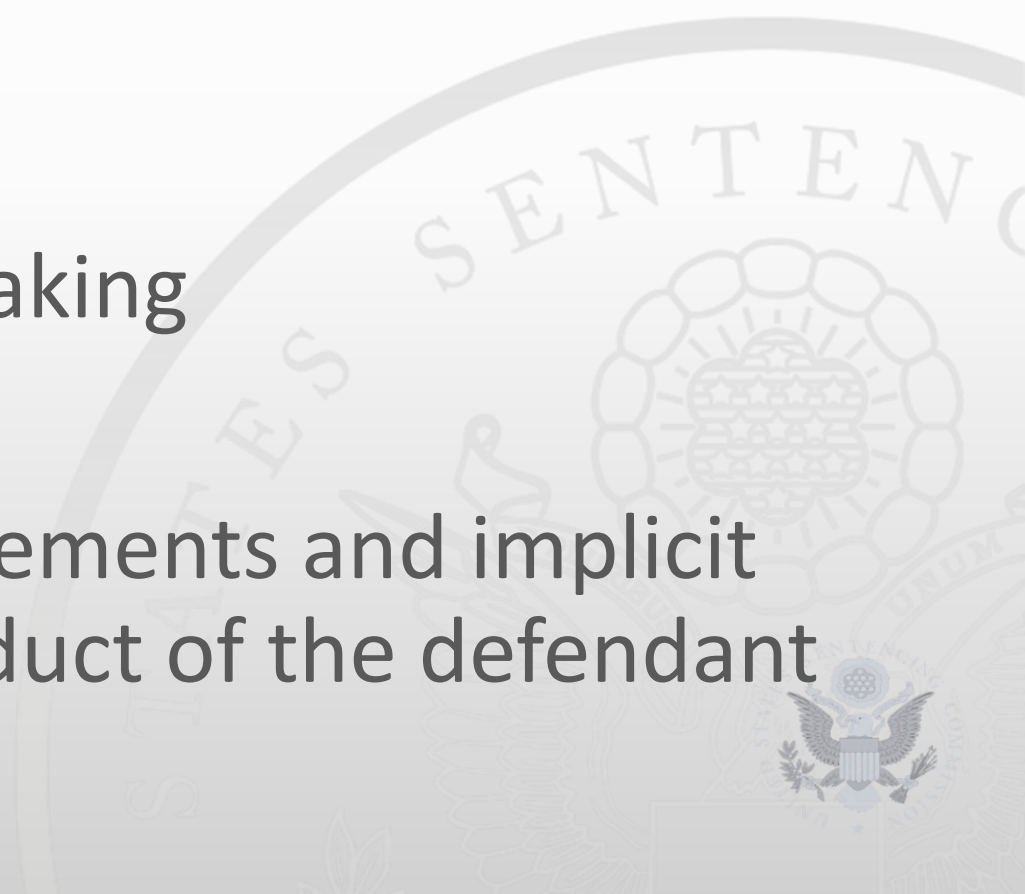
Jointly Undertaken Criminal Activity

- *U.S. v. White*, 883 F.3d 983 (7th Cir. 2018)
 - “The notes to § 1B1.3 explain that in joint criminal activity, the scope of different defendants' relevant conduct may be different.”
 - “The district court made no more explicit finding on the scope of the jointly undertaken criminal activity, whether others' actions were in furtherance of that activity, or whether White could reasonably foresee those actions.”

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination
- Based on each defendant's undertaking
- Can be established by explicit agreements and implicit agreements inferred from the conduct of the defendant and others



Scenario 2: What amount of drugs is the defendant held accountable for?

- A. 100 kg
- B. 5 kg
- C. 10 kg



Determining Scope in a Conspiracy

Scope of jointly undertaken criminal activity

≠

Scope of the entire conspiracy*

*May be the same, but not necessarily.

. §1B1.3, App. Note 3(B)

Relevant Conduct

U.S. v. Donadeo, 910 F.3d 886 (6th Cir. 2019)

These factors support the district court's finding that the scope of Defendant's jointly undertaken criminal activity was broad enough to include the conduct of co-conspirators

“Bright Line Rule”

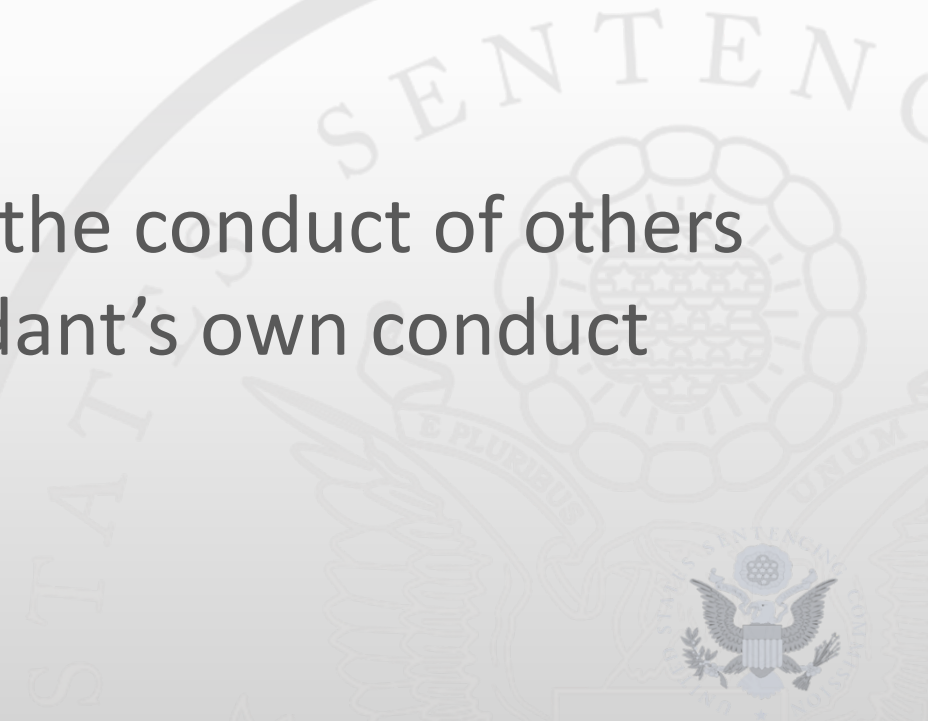
§1B1.3, App. Note 3(B)

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 2

- Only one part of the 3-part analysis regarding the conduct of others
- Reasonable foreseeability applies only to the conduct of others ((a)(1)(B)); it does not apply to the defendant’s own conduct ((a)(1)(A))



Scenario 3: Is the defendant held accountable for the gun enhancement?

- A. No
- B. Yes



Scenario 4: Does the injury enhancement apply?

- A. No
- B. Yes



Scenario 5: What amount of drugs is defendant 1 held accountable for?

- A. 10,000 kg
- B. 5,000 kg
- C. Zero



Scenario 5: What amount of drugs is defendant 2 held accountable for?

- A. 10,000 kg
- B. 5,000 kg
- C. Zero



Scenario 5: What amount of drugs is defendant 3 held accountable for?

- A. 10,000 kg
- B. 5,000 kg
- C. Zero



Scenario 6: Is each defendant accountable for the total loss amount?

- A. Yes
- B. No



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

WHEN:

Offense of Conviction

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
common scheme or plan

Not All Offenses are Created Equal

Drugs/Fraud/
Firearms



Conduct from Offense of
Conviction plus “expanded
relevant conduct”

Physical Harm Cases (*e.g.*,
Robbery, Production of
Child Porn)



Conduct from Offense of
Conviction only

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

“Expanded” Relevant Conduct (p. 367)

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Antitrust
- Counterfeiting
- Bribery
- Other similar offenses

“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*

“Same Course of Conduct”

§1B1.3(a)(2); App. Note 5(B)(ii)

- Similarity
- Regularity (repetitions)
- Temporal proximity



Included in Expanded Relevant Conduct

- “Expanded relevant conduct” can include:
 - Uncharged conduct
 - Dismissed conduct
 - Acquitted conduct

Same course of conduct

U.S. v. Amerson, 886 F.3d 568 (6th Cir. 2018)

“In analyzing the connection between offenses, we consider three factors: “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.”

Same course of conduct

U.S. v. Amerson, 886 F.3d 568 (6th Cir. 2018)

“When one of [these] factors is absent, a stronger presence of at least one of the other factors is required.” In looking for stronger evidence of similarity, we may consider whether the conduct involves common victims, common offenders, common purpose, or a common modus operandi.”

Scenario 7: What quantity of drugs will be used to determine the base offense level?

- A. 1 kg
- B. 41 kg
- C. 20 kg



Bonus Scenario

- The defendant is charged with one count of Filing a False Tax Return for Tax Year 2015; in violation of 26 U.S.C. § 7206; Applicable guideline §2T1.1 with a “tax loss” of \$100,000 for that filing
- He also filed false tax returns in 2013, 2014, and 2016, with “tax loss” amounts of \$100K, \$200K, and \$200,000K, respectively

What is the tax loss under §2T1.1?

- A. \$100,000
- B. \$600,000
- C. \$300,000



“Expanded Relevant Conduct”

Filing a
False Tax
Return
in 2013
(§2T1.1)

Filing a
False Tax
Return
in 2014
(§2T1.1)

Filing a
False Tax
Return
in 2015
(§2T1.1)

Filing a
False Tax
Return
in 2016
(§2T1.1)

Offense of
Conviction



Scenario 8: How many firearms is the defendant accountable for at §2K2.1?

- A. One
- B. Eight
- C. Seven



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

Relevant Conduct Analysis

WHEN:

Offense of Conviction

In preparation

During

Avoiding
detection

(a)(2):

~~Same course of conduct/
common scheme or plan~~

Scenario 9: Is the government correct?

- A. Yes
- B. No



NOT Expanded Relevant Conduct

Robbery 1
(§2B3.1)

~~Robbery 2
(§2B3.1)~~

**Offense of
Conviction**

June 7



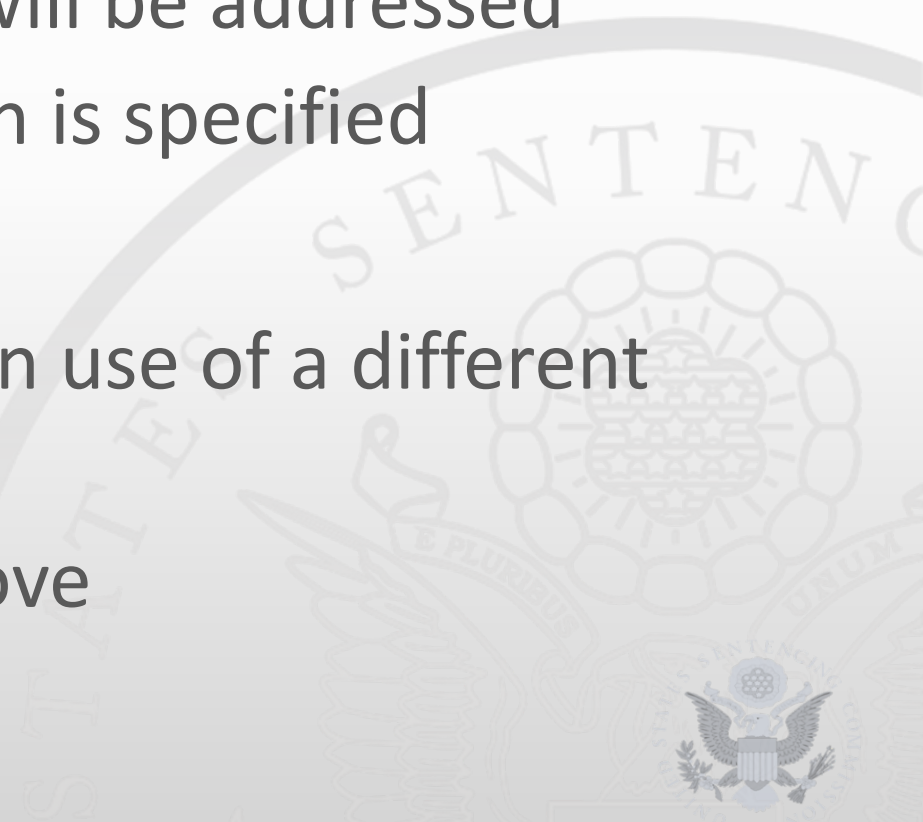
Helpful Approach to Relevant Conduct in the Application of Chapter Two

- Determine the applicable Chapter Two guideline
 - Using §1B1.2 and Appendix A
- Determine if the guideline has “expanded” relevant conduct of (a)(2)
 - Look to §3D1.2(d)



Helpful Approach

- Review the Chapter Two guideline
 - Determine what (a)(1) and (a)(2) acts will be addressed
 - Determine if any additional information is specified
- Determine if a cross reference will result in use of a different Chapter Two guideline
 - Make similar assessments as made above



Questions or Comments?



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