



§2B1.1 | Fraud

Selected Issues

2023 National Seminar

August 29-31, 2023

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Learning Objectives

Your active engagement in this session will empower you to:

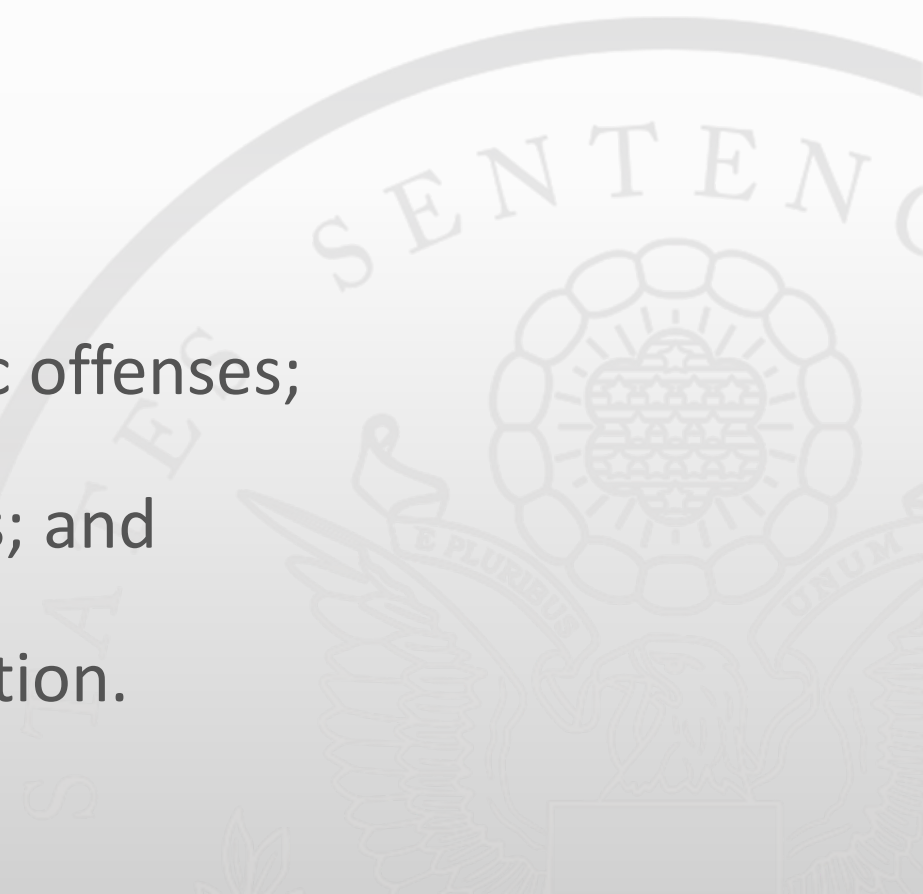
Determine the correct base offense level;

Determine the amount of §2B1.1 loss;

Apply the “special rules” for specific economic offenses;

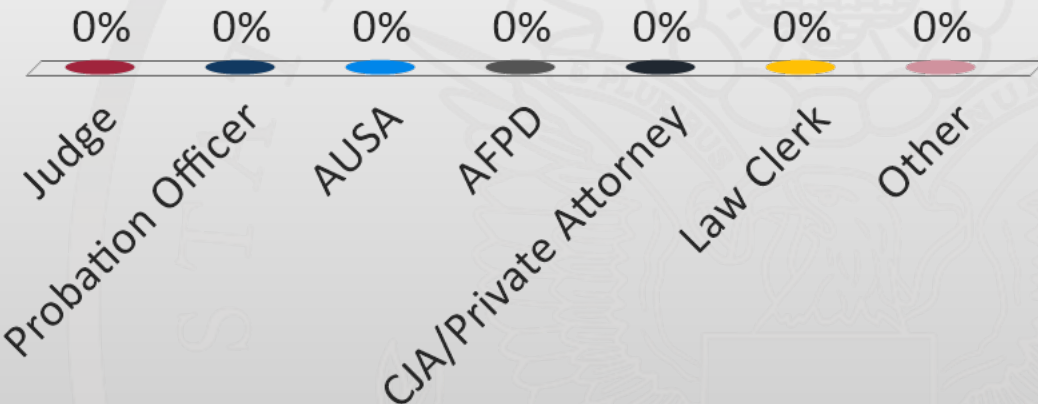
Apply common specific offense characteristics; and

Differentiate between §2B1.1 loss and restitution.



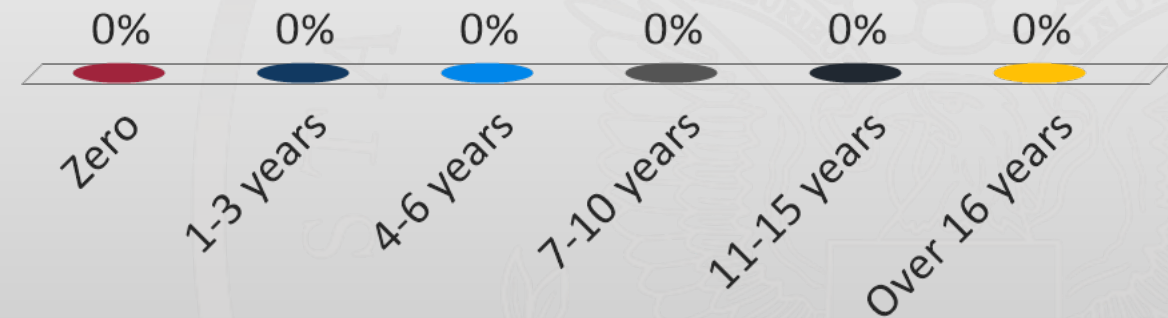
What is your position?

- A. Judge
- B. Probation Officer
- C. AUSA
- D. AFPD
- E. CJA/Private Attorney
- F. Law Clerk
- G. Other



How many years of experience with federal sentencing do you have?

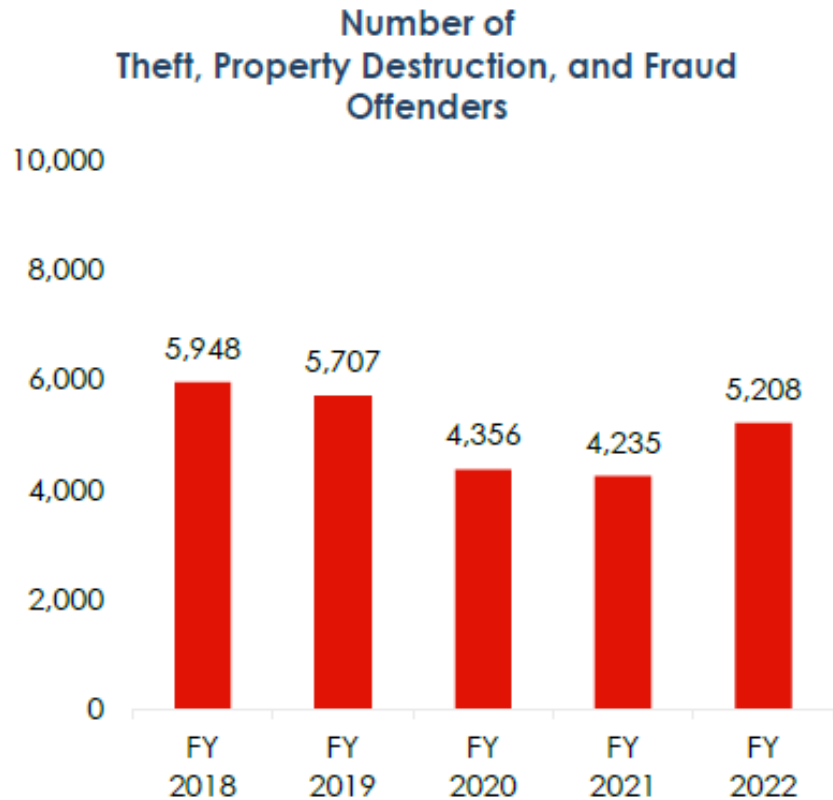
- A. Zero
- B. 1-3 years
- C. 4-6 years
- D. 7-10 years
- E. 11-15 years
- F. Over 16 years



Quick Facts FY 2022

Theft, Property Destruction and Fraud Offense

▶ THEFT, PROPERTY DESTRUCTION, AND FRAUD OFFENSES HAVE DECREASED BY 12.4% SINCE FY 2018.



The average sentence length was 23 months.

The median loss was \$160,737.

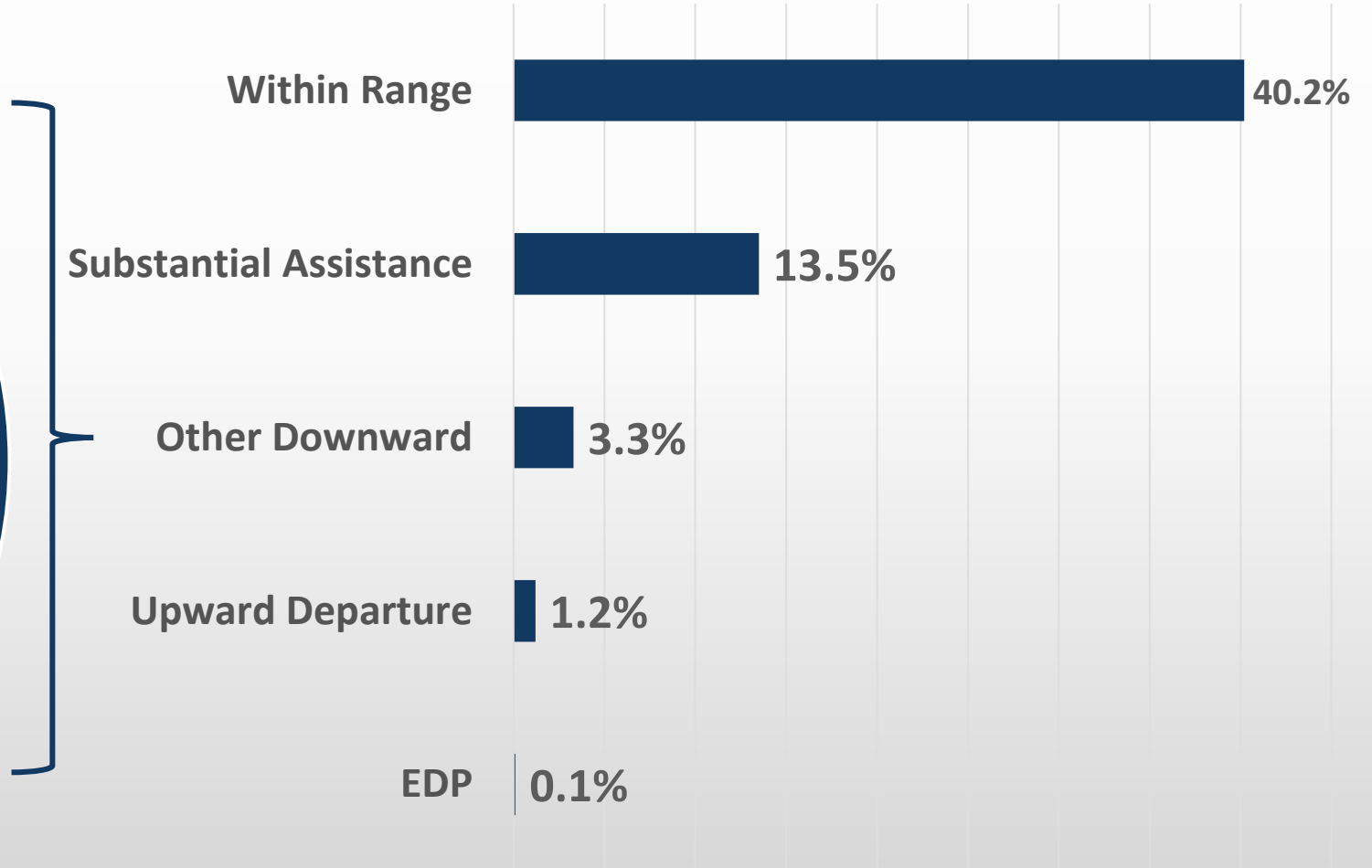
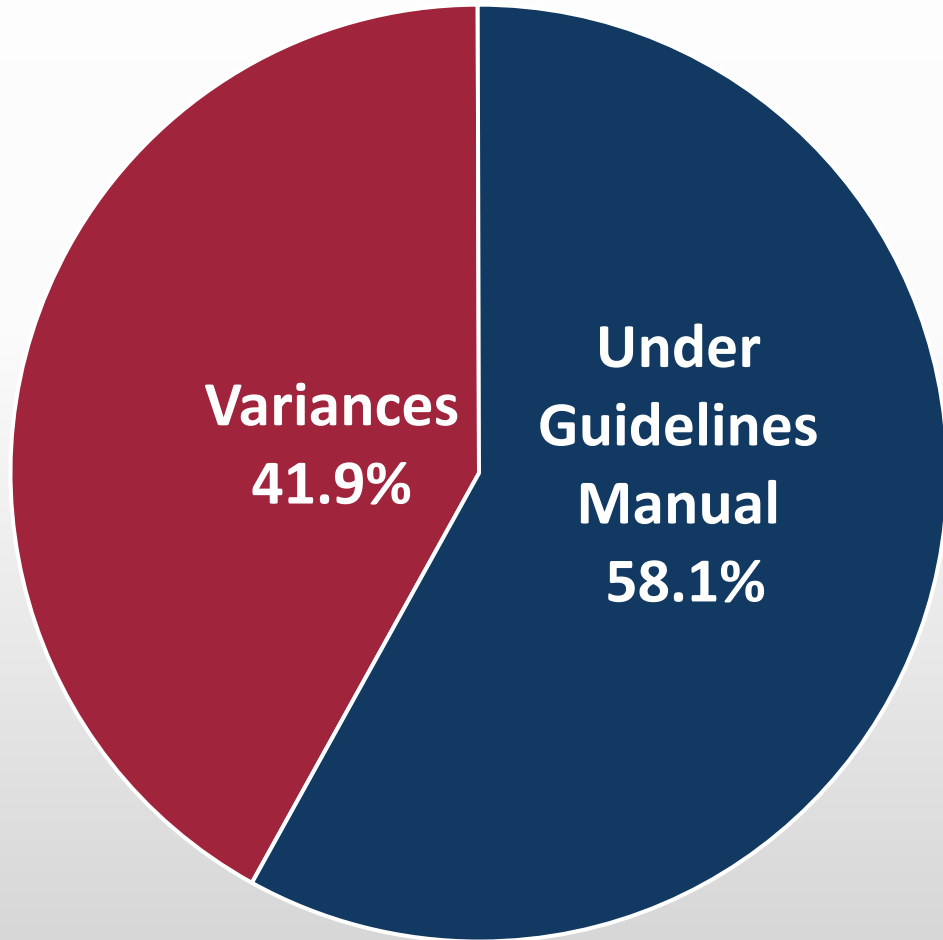
12.9% involved loss amounts of \$6,500 or less.

17.5% involved loss amounts greater than \$1.5 million.






70.6% of offender were CHC I.

Sentence Imposed Relative to the Guideline Range

FY 2022 §2B1.1 Cases



§2B1.1 Fraud Offenses Topics

-  **Determining the correct BOL**
-  **Loss – Actual/Intended**
-  **Number of Victims**
-  **Sophisticated Means**
-  **Cross Reference**



Base Offense Levels

§2B1.1(a)(1) and (2) (p. 82)

7

(a)(1)(A)

if the defendant was convicted of an offense reference to this guideline and (B) – that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

6

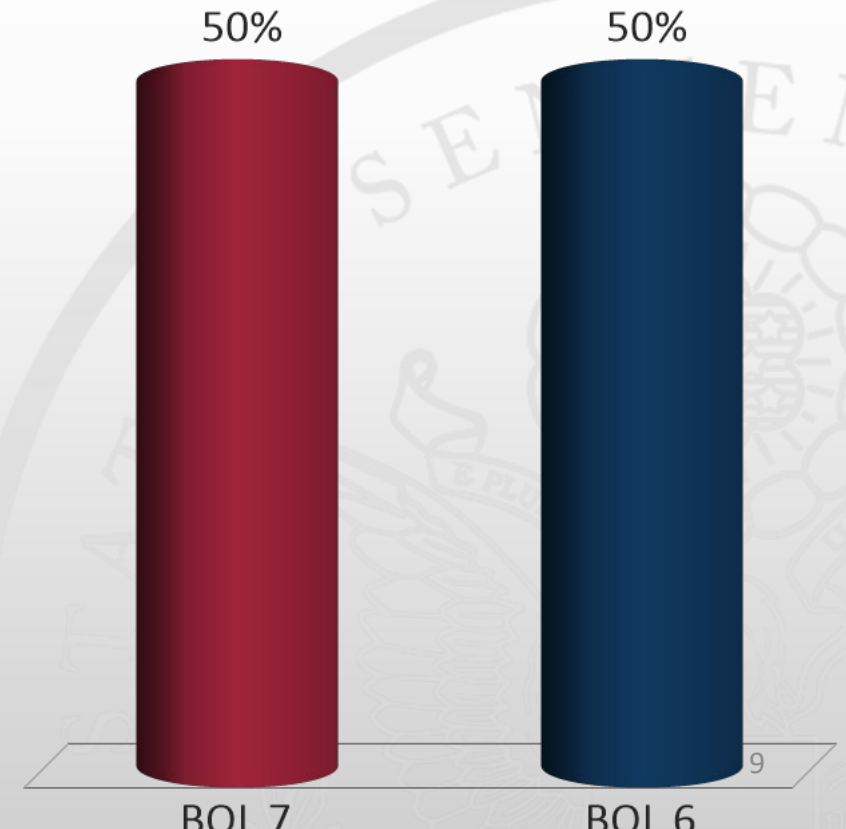
(a)(2)

otherwise

Defendant convicted of 18 U.S.C. § 1343 (Wire Fraud) which carries a 20-year statutory maximum; applicable guideline §2B1.1. Defendant was involved in a Ponzi scheme in which he received funds and investments from the wire fraud scheme.

Which base offense level (BOL) applies at §2B1.1(a)?

- ✓ A. BOL 7
- B. BOL 6

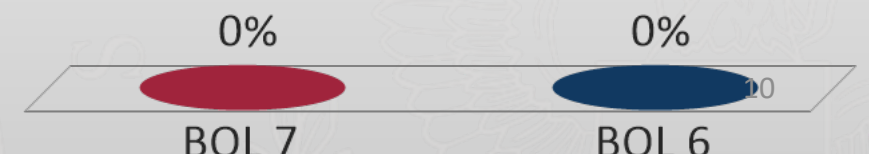


Defendant convicted of 18 U.S.C. § 1956 (Money Laundering) which carries a 20-year statutory maximum; applicable guideline §2S1.1. Defendant was involved in a wire fraud scheme and was laundering proceeds from the wire fraud scheme §2S1.1(a)(1) directs the use of the offense level for the underlying offense from which the laundered funds were derived.

Which base offense level (BOL) applies at §2B1.1(a)?

A. BOL 7

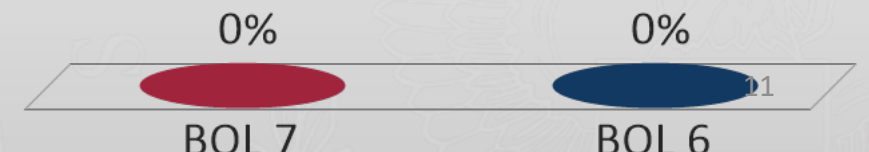
✓ B. BOL 6



Defendant convicted of 18 U.S.C. § 371 (Conspiracy) to commit a violation of 18 U.S.C. § 1343 (Wire Fraud). Per Appendix A, the applicable guideline for § 371 is §2X1.1 which references to §2B1.1. The statutory maximum for § 371 is 5 years; the statutory maximum for § 1343 is 20 years.

Which base offense level (BOL) applies at §2B1.1(a)?

- A. BOL 7
- ✓ B. BOL 6



Relevant Conduct for §2B1.1 Offenses

- **Acts of others in jointly undertaken criminal activity**

Scope – In Furtherance – Reasonably Foreseeable

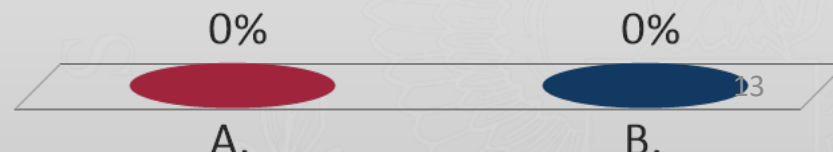
- **Expanded relevant conduct**

Same course of conduct/ common scheme or plan

Smith was convicted of Wire Fraud Conspiracy. Multiple defendants used false IDs to cash stimulus checks during the pandemic. Smith cashed 3 checks totaling \$29,000 during the summer of 2021. However, in August 2021, she left for college. The entire scheme resulted in losses of \$200,000. The government believes Smith should be responsible for \$200,000 in loss because it was reasonably foreseeable. Defense counsel and the USPO believe the loss is \$29,000.

Who is correct?

- A. Government
- ✓ B. Defense and USPO



Common Scheme or Plan

§1B1.3(a)(2), App. Note 5(B)(i) (p. 29)

Other Offense



Conviction



Victims

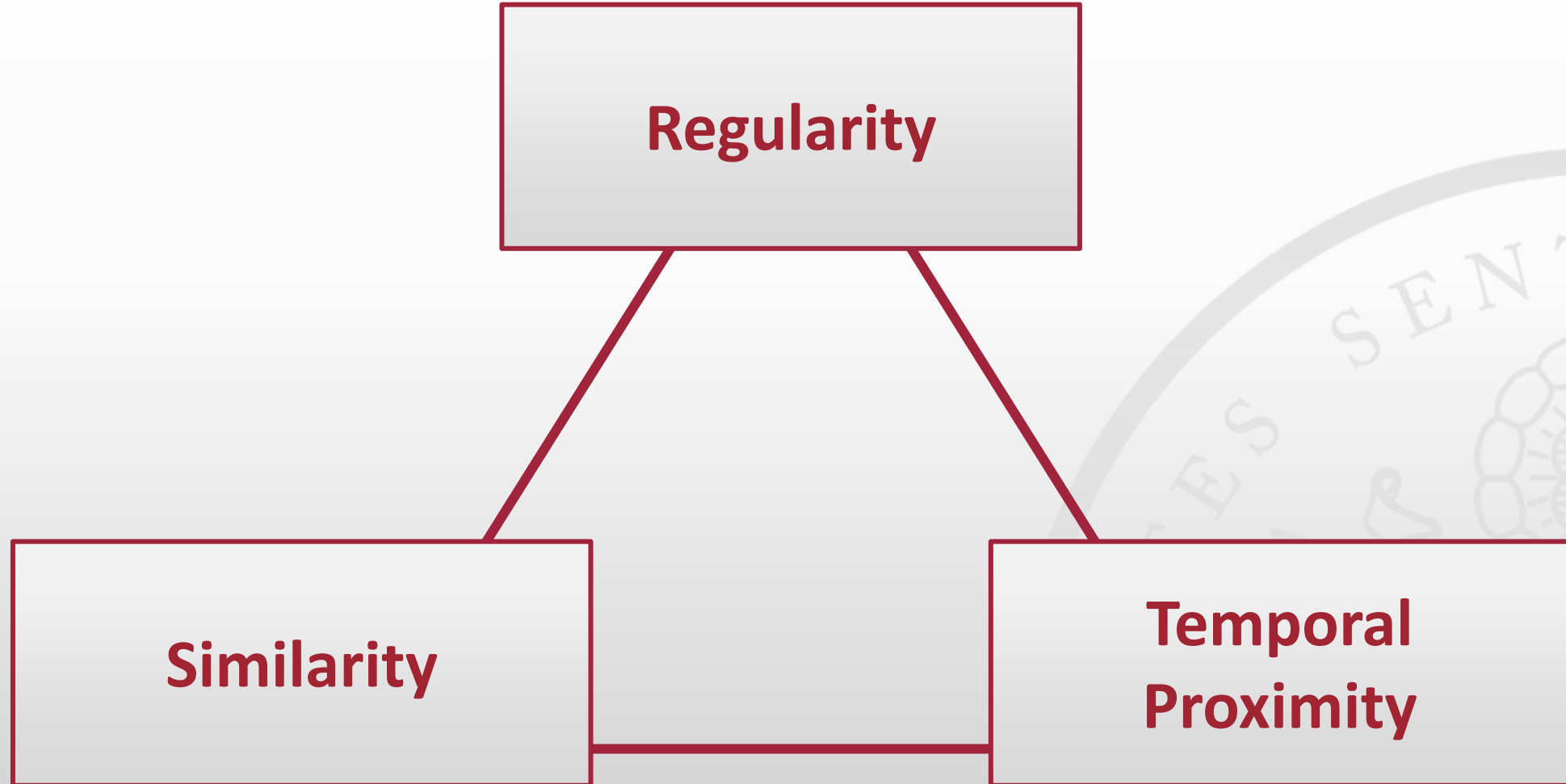
Accomplices

Purpose

Modus Operandi

Same Course of Conduct

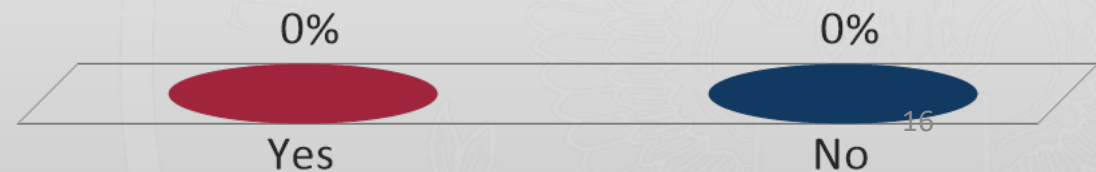
§1B1.3(a)(2), App. Note 5(B)(ii) (p. 30)



The defendant and several coconspirators submitted 15 Paycheck Protection Program (PPP) loan applications for a series of construction companies over the course of 3 months. Each application inflated payroll expenses, included doctored bank statements, and fake IRS tax forms. The defendant received 11 loans totaling \$800,000.

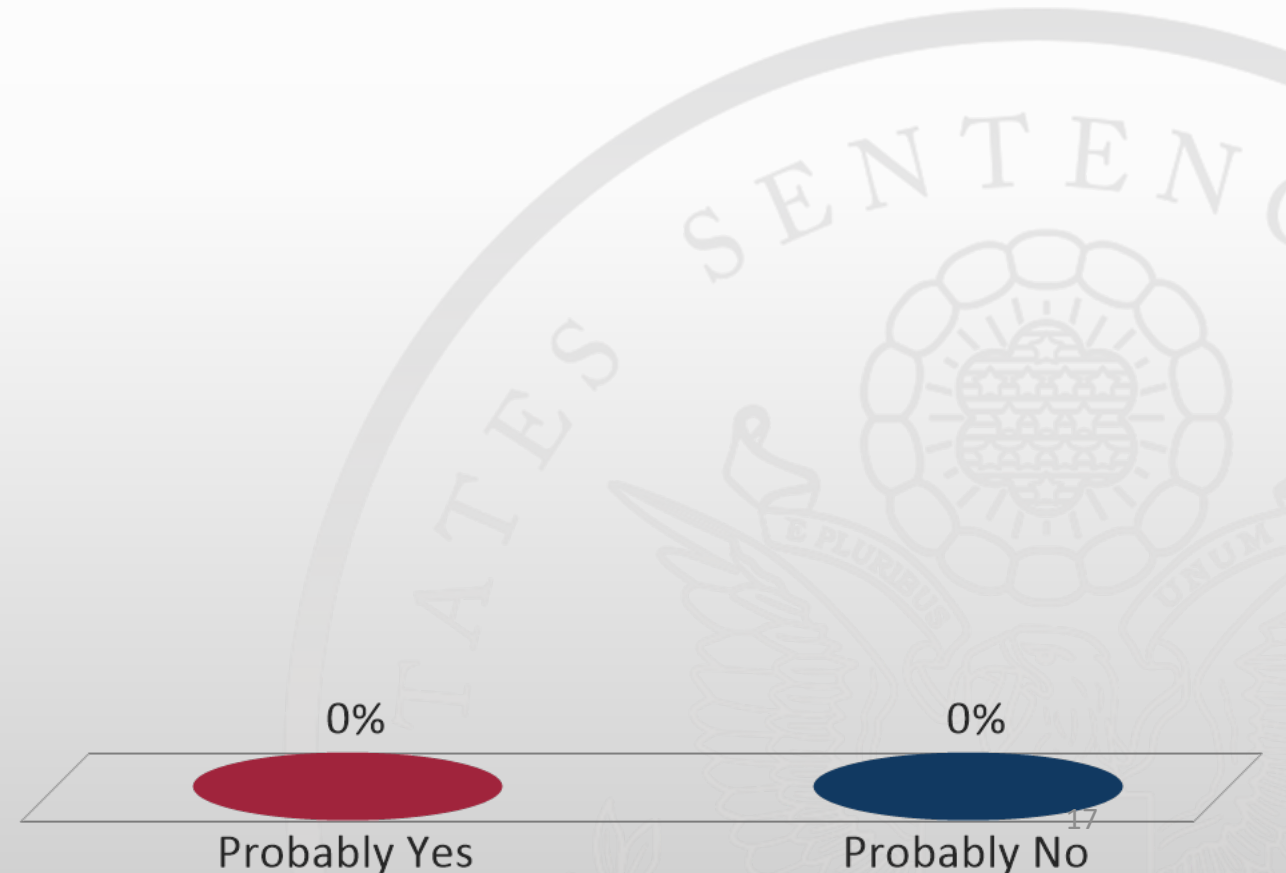
Does the defendant's relevant conduct include all of his loans?

- ✓ A. Yes
- B. No



Can you include losses that occur outside the dates of the indictment?

- ✓ A. Probably Yes
- B. Probably No



General Loss Principles

Application Note 3(A) (p. 89)

Use greater of:

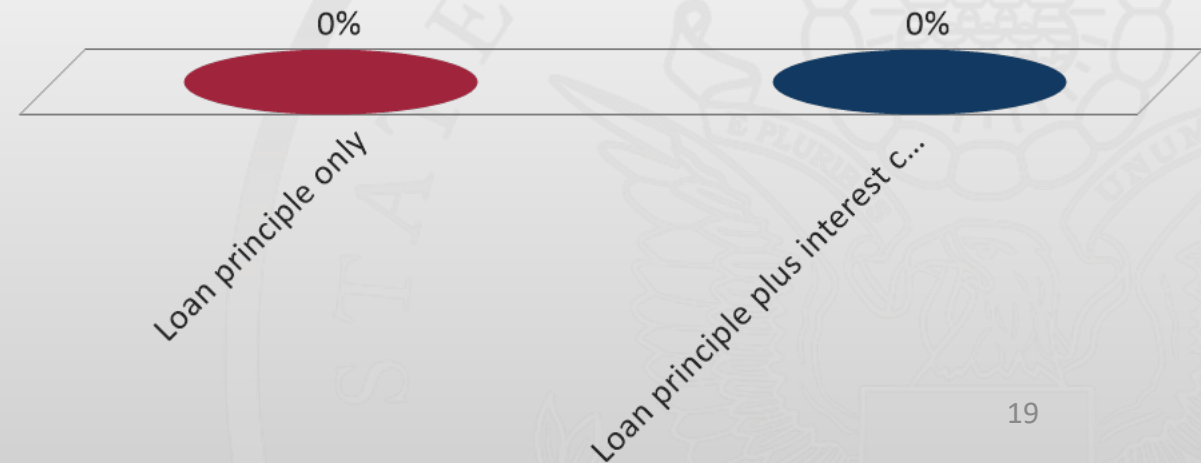
Actual Loss

or

Intended Loss

Which of the following is included in the loss calculation?

- ✓ A. Loan principle only
- B. Loan principle plus interest charges



Loss Table § 2B1.1

2B1.1(b)(1) (p. 82)

(b) Specific Offense Characteristics

(1) If the loss exceeded \$6,500, increase the offense level as follows:

	LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A)	\$6,500 or less	no increase
(B)	More than \$6,500	add 2
(C)	More than \$15,000	add 4
(D)	More than \$40,000	add 6
(E)	More than \$95,000	add 8
(F)	More than \$150,000	add 10
(G)	More than \$250,000	add 12
(H)	More than \$550,000	add 14
(I)	More than \$1,500,000	add 16

Loss – Actual vs. Intended

§2B1.1, App. Note 3(A)(i) and (ii) (p. 89)

Actual Loss

Reasonably foreseeable pecuniary harm that resulted from the offense.

Intended Loss

Pecuniary harm that the defendant purposely sought to inflict.

Actual Loss in Three Steps

“[T]he **reasonably foreseeable pecuniary harm** that **resulted from** the offense.”



Defendant orchestrated a fraudulent scheme in which he purported that he could turn coal byproducts into natural gas. Over the course of several years, the defendant raised approximately \$57 million from more than 1,900 investors. Government records reveal approximately \$10 million was used by the defendant in pursuit of his natural gas technology. He spent the rest of his money on a lavish lifestyle. The technology never worked, and the defendant was arrested and convicted of multiple counts of Mail Fraud, Wire Fraud, and Tax Evasion.

What is the loss amount?

- ✓ A. \$57 million
- B. \$30 million
- C. \$10 million



Applicability of Intended Loss

§2B1.1, App. Note 3(A)(ii) (p. 89)

U.S. v. Banks, 55 F.4th 246 (3d Cir. 2022)

“The term “loss” as used in §2B1.1 is unambiguous and means “actual loss.” Accordingly, the loss-enhancement commentary in §2B1.1 is entitled to no weight because it improperly expands the definition of “loss” to include “intended loss.”

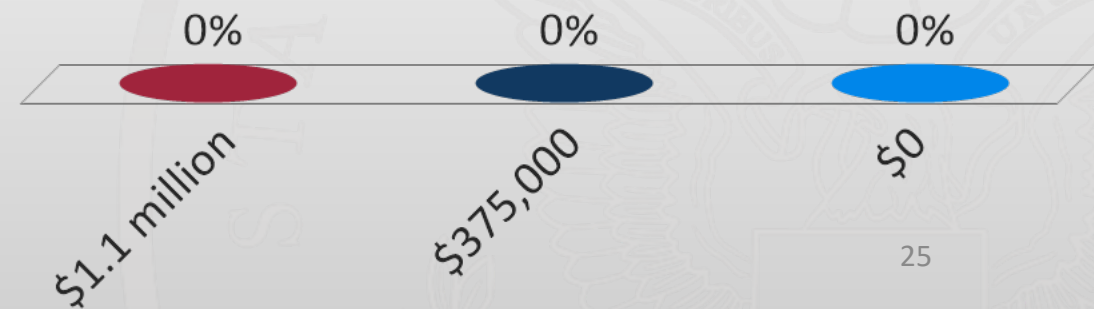
U.S. v. You, -F.4th-, 2023 WL 4446497 (6th Cir. July 2023)

“Applying *Kisor*'s framework, we defer to the Sentencing Commission's interpretation of “loss.” First, a genuine ambiguity exists. This court, canvassing several dictionaries, found that the term “loss” in § 2B1.1 has no one definition and “can mean different things in different contexts.”

Defendant Walter White was convicted of one count of conspiracy to commit bank fraud. Over a period of months, White executed a scheme using stolen identifies to obtain fraudulent bank loans, cars, and electronics. During the course of the scheme, White attempted to obtain \$1.1 million in fraudulent loans and merchandise. White actually only received \$375,000 in merchandise and was denied almost every loan he applied for.

What is the loss amount?

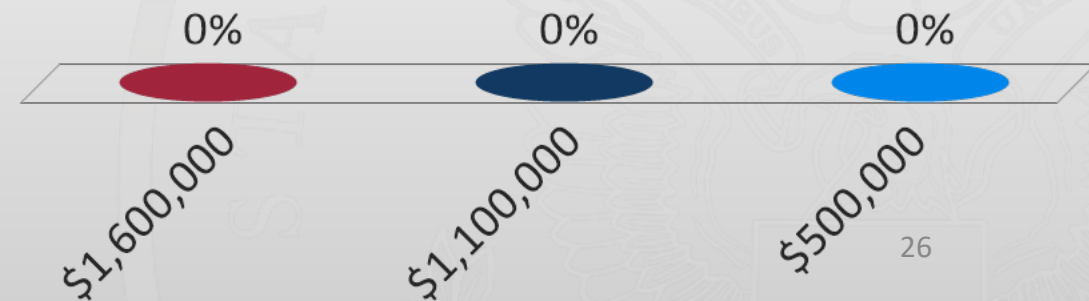
- ✓ A. \$1.1 million
- B. \$375,000
- C. \$0



Defendant Jesse Pinkman was convicted of one count of wire fraud. On May 4, 2021, he received a fraudulent PPP loan in the amount of \$700,000. Then, on June 7, 2021, he received another fraudulent PPP loan for \$900,000, of which he used \$500,000 to purchase a commercial building to begin a new business.

What is the loss amount?

- A. \$1,600,000
- B. \$1,100,000
- C. \$500,000



Credits Against Loss

App. Note 3(E) (p. 91)

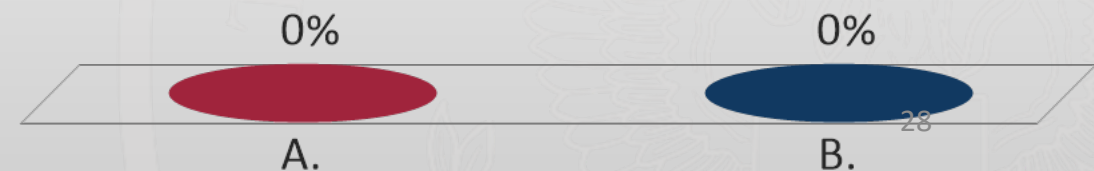
Loss shall be reduced by:

- Certain benefits transferred (before detection)
- Collateral pledged (value at time of sentencing)

Caller has a defendant who was charged with making false statements to acquire a loan for a boat. The total amount of the original loan was \$80,000. The defendant has been making monthly payments on the loan and the loan is not in default status.

Would the defendant receive any credits towards loss in this case?

- ✓ A. Yes
- B. No



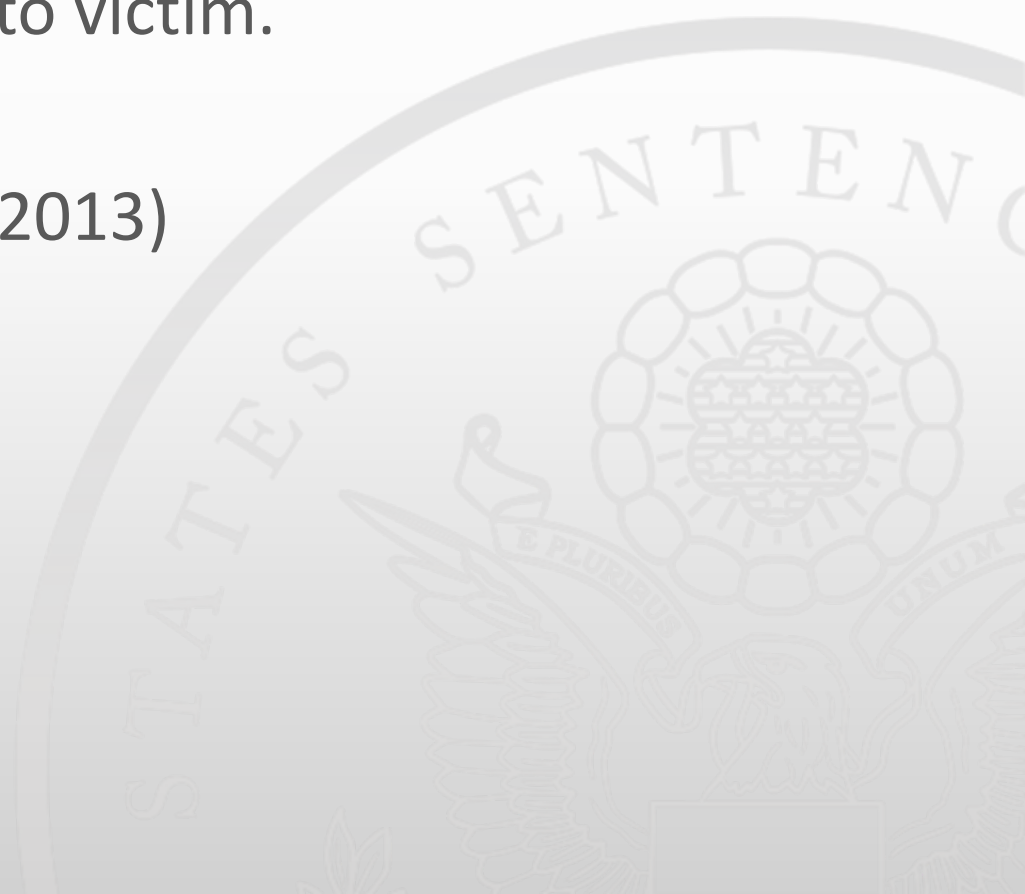
Defendant Has Burden To Prove Credit

Key point:

Defendant must prove he provided value to victim.

U.S. v. Washington, 715 F.3d 975 (6th Cir. 2013)

U.S. v. Bikundi, 926 F.3d 761 (D.C. 2019)



Estimation of Loss

Application Note 3(C) (p. 90)

Court need only make a reasonable estimate of loss.

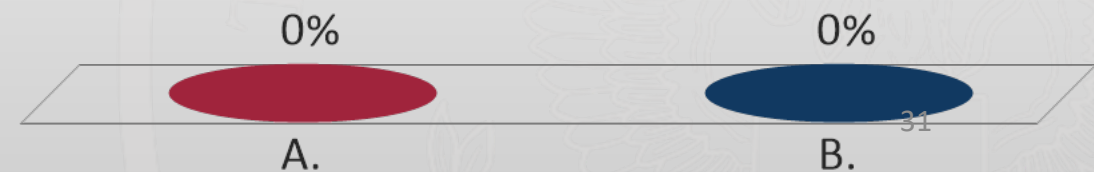
Some **factors** include:

- Fair market value of property unlawfully taken or destroyed.
- Cost of repairs.
- Approximate number of victims multiplied by average loss to each victim.

The defendant orchestrated a fraudulent scam selling items on eBay for years. An FBI Agent testified that a “conservative estimate” of the total losses generated by the scam were between \$3.5 and \$4.5 million. Of the number of victims, only 30-35% contacted the FBI. The FBI suspected the actual losses may exceed \$30 million but were unable to contact each of the victims due to the sheer number.

What should the amount of loss be in this case?

- ✓ A. \$3.5 - \$4.5 million
- B. \$30 million



Economic Offenses with “Special Rules” for §2B1.1 Loss

Access Devices

Government Benefits

Wage Violations

Ponzi Schemes

**Unlawful
Misrepresentation
Schemes**

Controlled Substances

**Cultural Heritage
Resources**

Health Care Offenses

**Securities or
Commodities**

Economic Offenses with “Special Rules” for §2B1.1 Loss

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Health Care Offenses

**Securities or
Commodities**

What is an Access Device?

Application Note 10(A) (p. 96)
18 U.S.C. §§ 1029(e)(2) &(3)



Access Devices

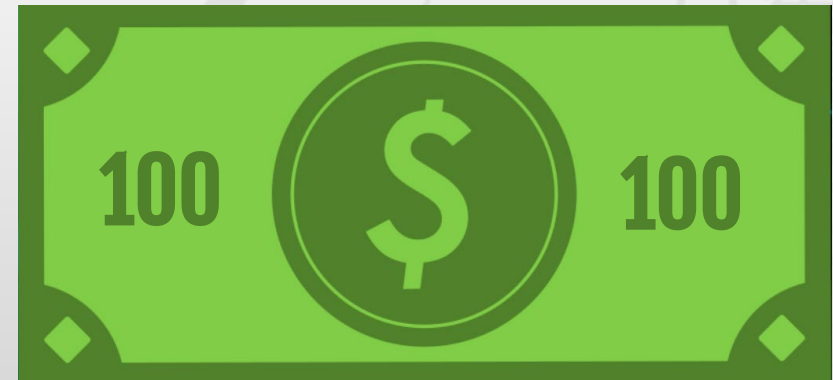
§2B1.1, App. Note 3(F)(i) (p. 91)



IV



IV



Applicability of \$500 Rule

§2B1.1, App. Note 3(F)(i) (p. 91)

The Sixth and Ninth Circuits have held that the special rule is inapplicable.

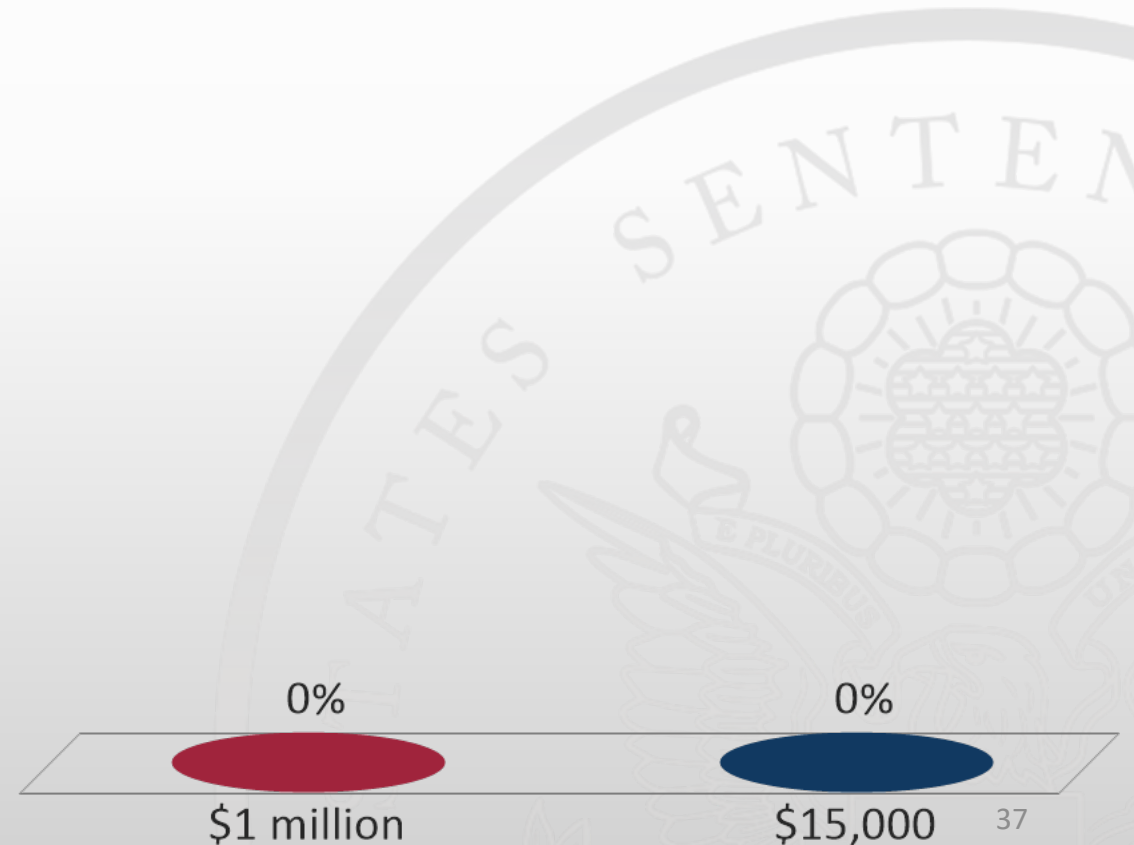
United States v. Riccardi, 989 F.3d 476, 483 (6th Cir. 2021)

United States v. Kirilyuk, 29 F.4th 1128, 1137 (9th Cir. 2022)

Raymond Reddington placed several skimming devices at a gas station. Over a period of several days, Goodman collected 2,000 credit card numbers. Goodman used several cards for a total of \$15,000 in loss. However, the PSR determined the loss was \$1,000,000 (2,000 credit cards x \$500).

What is the loss amount?

- ✓ A. \$1 million
- B. \$15,000



Federal Health Care Offenses

§2B1.1, App. Note 3(F)(viii) (p. 92)

Step 1

Determine total amount billed

Step 2

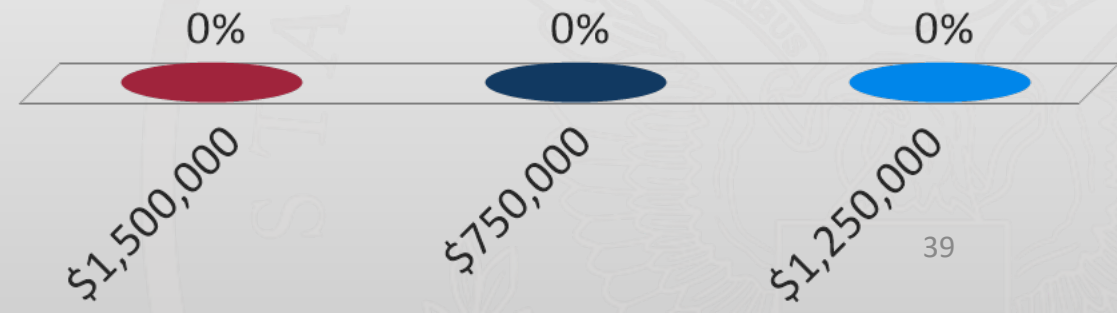
Reduce by legitimate services provided

*****Rebuttable Resumption Applies*****

Tom Keen is a medical equipment company owner who submitted fraudulent bills for power wheelchairs to Medicare. Keen billed Medicare \$750,000 for wheelchairs, but he produced evidence that \$250,000 was legitimate. The PSR also noted that Keen submitted an additional \$750,000 in fraudulent healthcare bills, noting that this fraud was same course of conduct as the conduct noted in the indictment.

What is the loss amount?

- A. \$1,500,000
- B. \$750,000
- ✓ C. \$1,250,000



Ponzi and Other Fraudulent Investment Cases

§2B1.1, App. Note 3(F)(iv) (p. 92)

Maximum offset

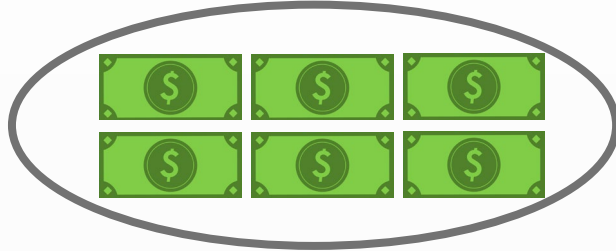
principal returned before detection

Ponzi and Other Fraudulent Investment Cases

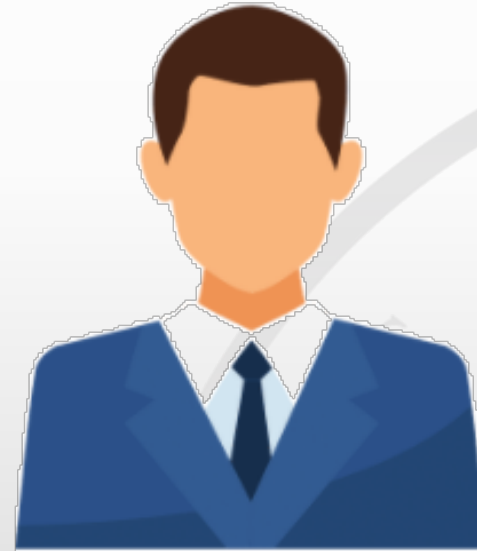
§2B1.1, App. Note 3(F)(iv) (p. 92)



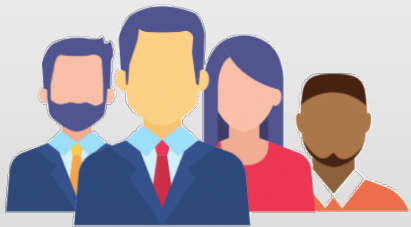
First Tier Investor



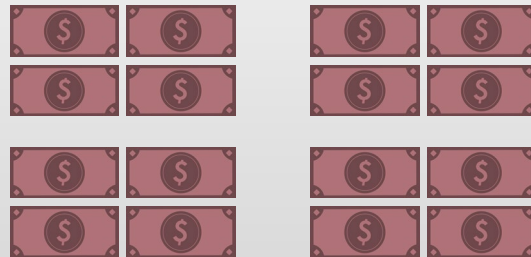
Excluded from loss



Defendant/Ponzi Schemer



Second Tier Investors



Tony Hawk defrauded two groups of investors by promising an annual return of 50% to assist in operating a highly lucrative skateboard park. The skateboard park, however, was a front for Hawk's Ponzi scheme in which the returns on earlier investors capital were simply a portion of new investors deposits. The first group collectively invested \$2 million. The second group of investors collectively invested \$8 million. After the first group was paid \$3 million, the fraud was discovered. What is the loss amount?

- A. \$10 million
- ✓ B. \$8 million
- C. \$7 million



Government Benefit Schemes

§2B1.1, App. Note 3(F)(ii) (p. 91-92)

In cases involving government benefits:

- grants
- loans
- entitlement program payments

LOSS

Should not be less than

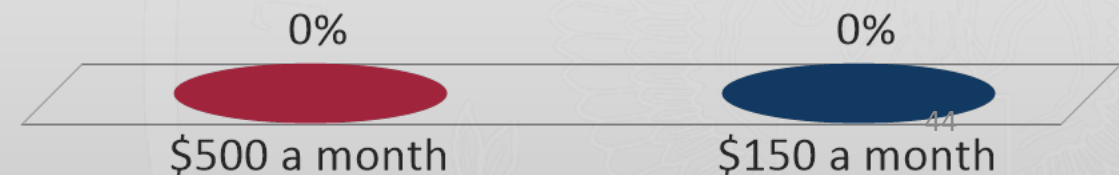
benefits obtained by unintended recipients or diverted to unintended uses.

Defendant's burden to show which claims were legitimate.

Alina Park was entitled to food stamps for herself and her two children. However, she lied on her application by stating she had four children. She received \$500 a month for 2 years before authorities found out she only had two children. With only two children, the monthly food stamp amount would have been \$350 a month.

Is the loss amount based upon \$500 a month or \$150 a month, the difference between the two?

- A. \$500 a month
- ✓ B. \$150 a month



Unlawful Misrepresentation Schemes

§2B1.1, App. Note 3(F)(v) (p. 92)

No credit for goods or services when:

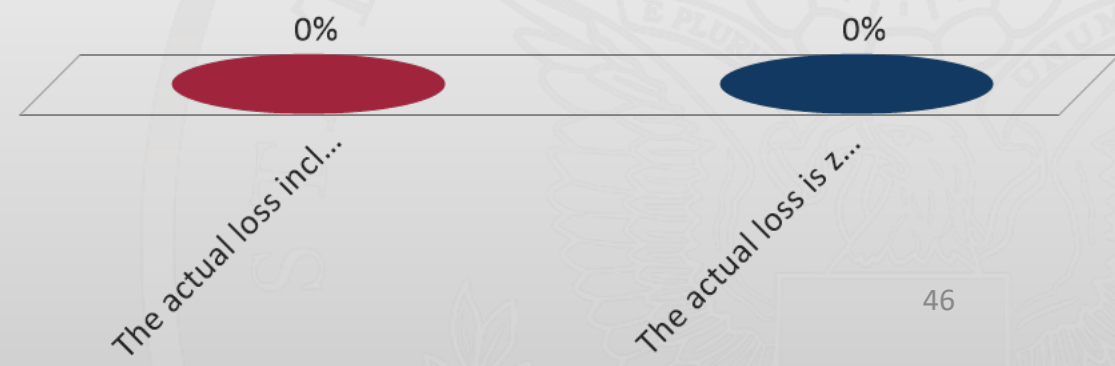
**Falsely posing as
licensed professionals**

**Goods requiring
regulatory approval**

- Falsely represented were obtained
- Not obtained
- Obtained by fraud

Glen Carter impersonated a psychologist and contracted with the government's employee's assistance program. Employees were referred to Carter at government expense. Carter treated many employees for decades, who all allege that she was the best therapist they had ever encountered and dramatically changed their lives for the better. Which statement is true?

- ✓ A. The actual loss includes the amount the government paid Carter
- B. The actual loss is zero because her patients universally said she was a great therapist



General Rule

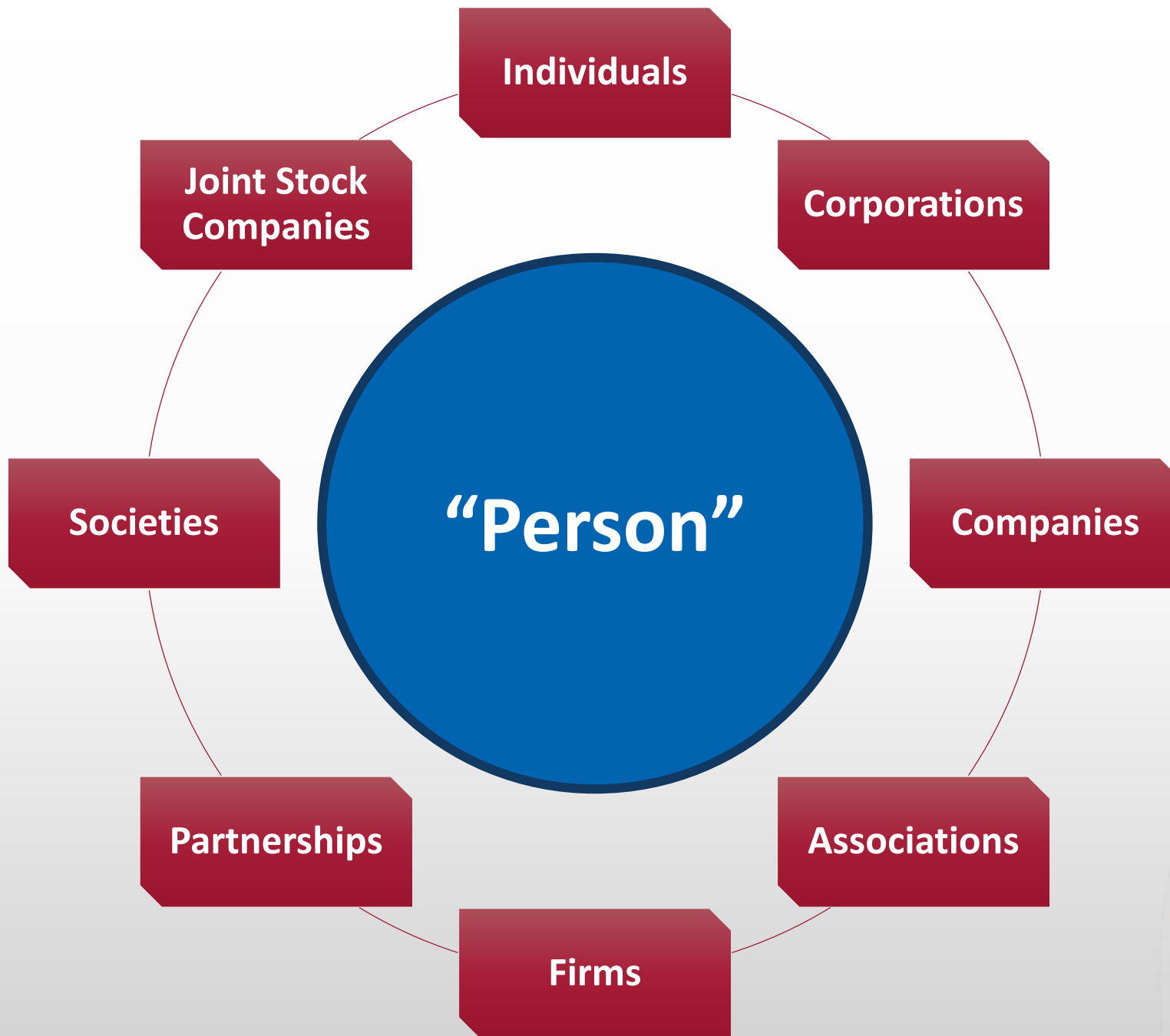
§2B1.1, App. Note 1

Victim:

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.



Who is a Person?

§2B1.1, App. Note 1

Who is a Person?

§2B1.1, App. Note 1

A person includes **governments**.

U.S. v. Cunningham, 593 F.3d 726 (8th Cir. 2010)

U.S. v. Herrera, 974 F.3d 1040 (9th Cir. 2020)



Victim Table – §2B1.1(b)(2)

+2

- 10 or more victims;
- mass-marketing;
- or resulted in **substantial financial hardship** to one or more victims.

+4

Resulted in **substantial financial hardship** to five or more victims.

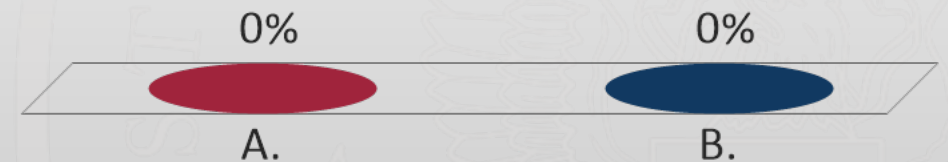
+6

Resulted in **substantial financial hardship** to twenty-five or more victims.

Defendant is convicted of Mail and Wire Fraud. Defendant defrauded numerous victims in an elaborate cryptocurrency scheme. In many instances, husband and wives were co-owners of the accounts and sustained actual losses.

Which of the following statements is true?

- A. Husband and wife – 1 victim
- ✓ B. Husband and wife – 2 victims



Substantial Financial Hardship Factors

Insolvency or bankruptcy

Substantial loss of a retirement, education, or other savings

Substantial changes to living arrangements

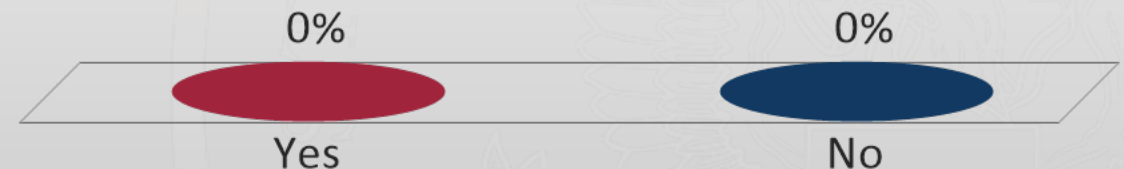
Substantial changes to employment

Substantial harm to credit

Defendant is convicted of Mail and Wire Fraud. Defendant defrauded numerous victims out of mortgage fees ranging from \$1,000 to \$3,000. He advised customers to stop paying their mortgage with the promise to renegotiate their loans. He never did. Victims were then unable to pay their mortgages, and some lost them to foreclosure. Other victims had to borrow money from family, move in with family, renegotiate loans at much higher rates, or pay additional penalties and fines.

Will the increase for substantial financial hardship apply even though the losses are between \$1,000 and \$3,000?

- ✓ A. Yes
- B. No



Sophisticated Means

§2B1.1(b)(10)(C), (p. 83)

If the offense otherwise involved sophisticated means and the defendant intentionally caused the conduct constituting the sophisticated means.



+2

OR

12

Examples of Sophisticated Means

§2B1.1(b)(10)(C)

Creation of fake company to misappropriate investor funds

U.S. v. Kitts, 27 F.4th 777 (1st Cir. 2022)

Multiple bank accounts used to obscure sources of money

U.S. v. Aderinoye, 33 F.4th 751 (5th Cir. 2022)

Altered tax forms used as proof of identity for purchasing

U.S. v. Lundberg, 990 F.3d 1087 (7th Cir. 2021)

Replacing tamper proof bags to obscure theft

U.S. v. Garbacz, 33 F.4th 459 (8th Cir. 2022)

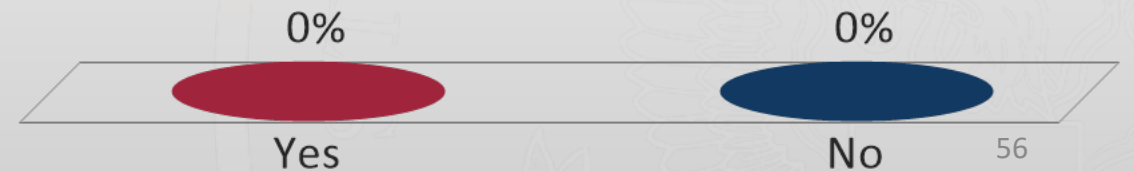
Paying employees from unknown company

U.S. v. Wheeler, 16 F.4th 805 (11th Cir. 2021)

Bernie Rudolph is convicted of one count of wire fraud. The defendant orchestrated a ponzi scheme in which he created 7 fictitious bank accounts in the Cayman Islands to deposit investor money. He converted the money into various cryptocurrencies and then utilized ChipMixer to launder the funds.

Does the 2-level enhancement under §2B1.1(b)(10(A) for sophisticated means apply?

- ✓ A. Yes
- B. No



§2B1.1 Cross Reference

§2B1.1(c)(3), (p. 87)

(A) neither subdivision (1) nor (2) of this subsection applies;

(B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and

(C) the conduct set forth in the count of conviction establishes an offense specifically covered by an-other guideline in Chapter Two (Offense Conduct), apply that other guideline.

The defendant was convicted of 18 U.S.C. § 1001 – Providing False Statement to the ATF. The offense of conviction does not establish another offense. However, the defendant acknowledged she purchased the firearm for her boyfriend, a convicted felon, who then used it to commit a robbery.

Does the cross reference from §2B1.1(c)(3) to §2K2.1 is applicable - is it?

A. Yes

B. No



Key Points

Restitution

**Offense of
Conviction**

Loss

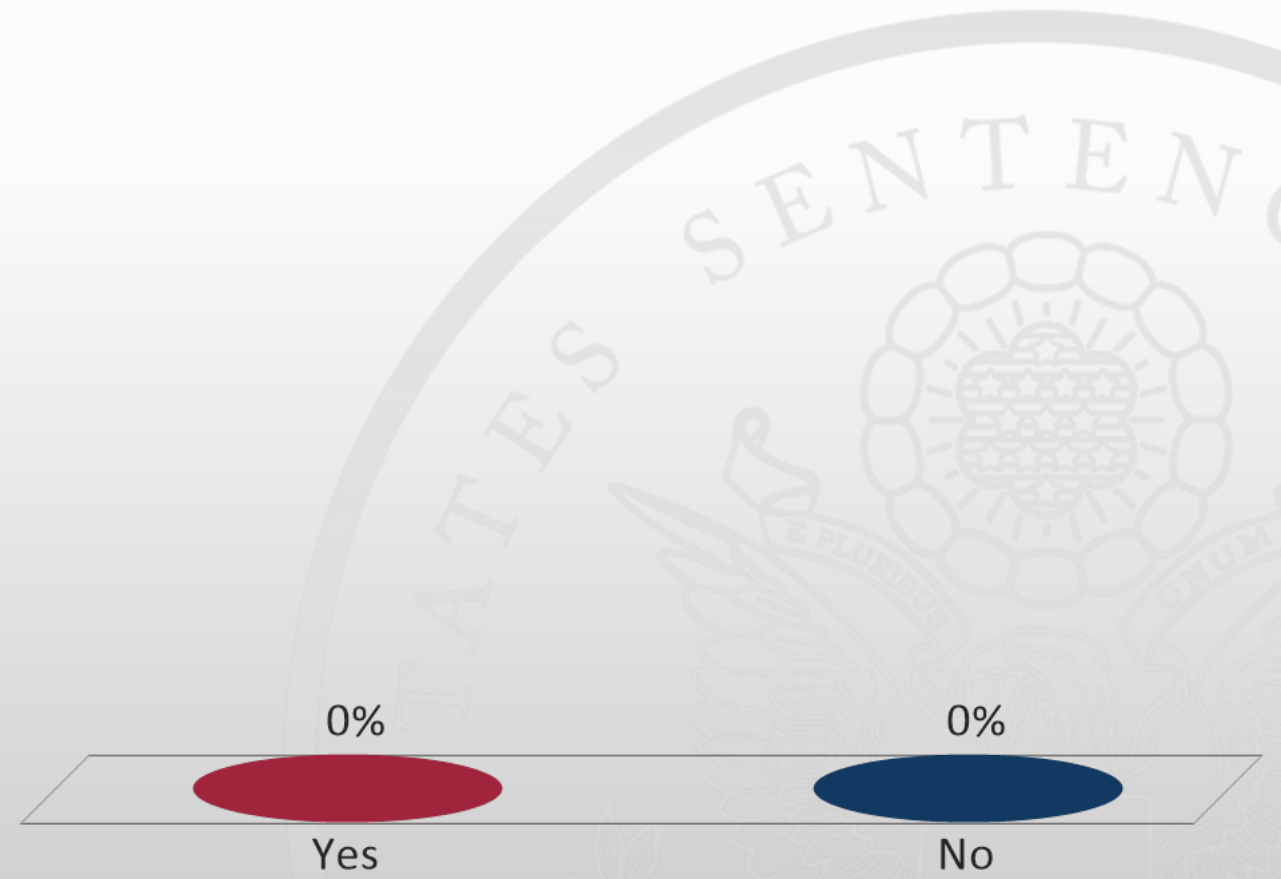
**Relevant
Conduct**

Determine independently!

The loss amount is always the same as the restitution amount.

A. Yes

✓ B. No



Fraud Pointers

§2B1.1

Relevant Conduct

Expanded and Jointly Undertaken

Loss

Greater of actual vs. intended

Special Rules

Review all application notes

Restitution

Restitution and loss are not always the same

Learning Outcomes

You should now be able to:

Determine the correct base offense level;

Determine the amount of §2B1.1 loss;

Apply the “special rules” for specific economic offenses;

Apply common specific offense characteristics; and

Differentiate between §2B1.1 loss and restitution.



Questions or Comments



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