



Multi-Defendant Cases

2023 National Seminar

August 31, 2023

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Issues in Multi-Defendant Cases

Determining relevant conduct of each defendant

Determining role of each defendant

Co-defendant disparity

Binding plea agreements

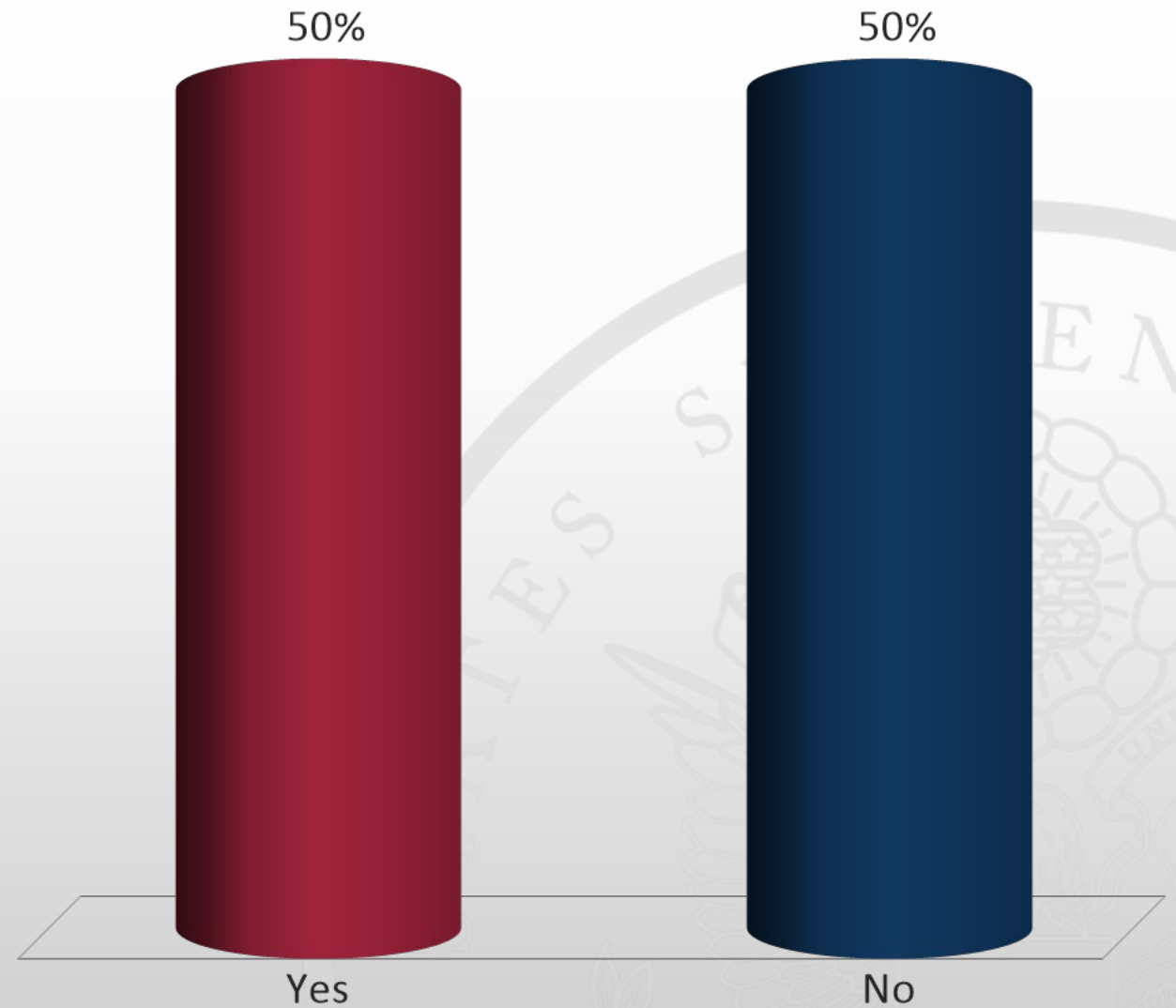
Considering substantial assistance of other defendants

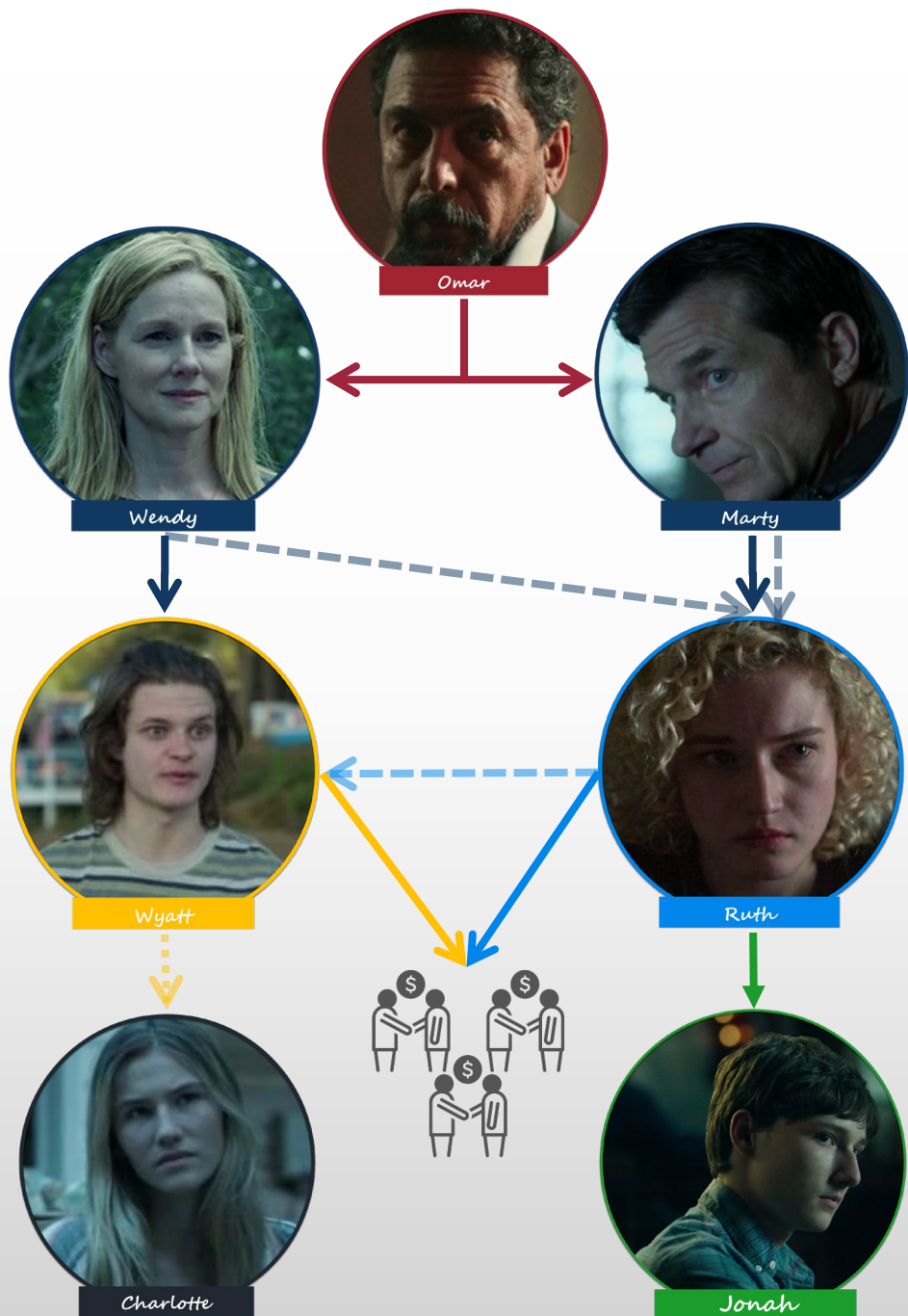


Have you watched *Ozark*?

A. Yes

B. No





- Omar, member of Mexican Cartel who oversaw the drug trafficking organization.
- Wendy and Marty (husband and wife), recipients of the heroin sent from Omar.
- They distributed to Wyatt and Ruth.
- Wendy and Marty recruited Ruth.
- Ruth recruited Wyatt.
- Wyatt and Ruth delivered heroin from Marty and Wendy to other dealers throughout the Ozarks.
- Wyatt asked Charlotte to drive him to Chicago to pick up heroin on two occasions.
- Jonah, Wendy and Marty's son, engages in money laundering on behalf of Ruth.

You Are Sentencing...



Charlotte

- 21 years old
- No prior criminal history
- Senior in college



Ruth

- 24 years old
- Multiple prior convictions
- Manages a nightclub



Jonah

- 18 years old
- No prior criminal history
- HS Grad



Marty

- 52 years old
- No prior criminal history
- Leader of conspiracy



Charlotte

Charlotte

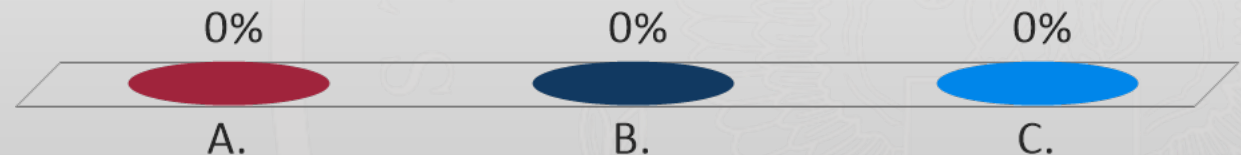


Charlotte's Relevant Conduct

The PSR based the guideline calculation on 1,000 kilos of heroin (BOL 38) because she pleaded guilty to the conspiracy and the government can prove that the conspiracy involved 1,000 kilos of heroin. Charlotte objects to the amount, stating that she only made two trips involving only a combined 4 kilos (BOL 32).

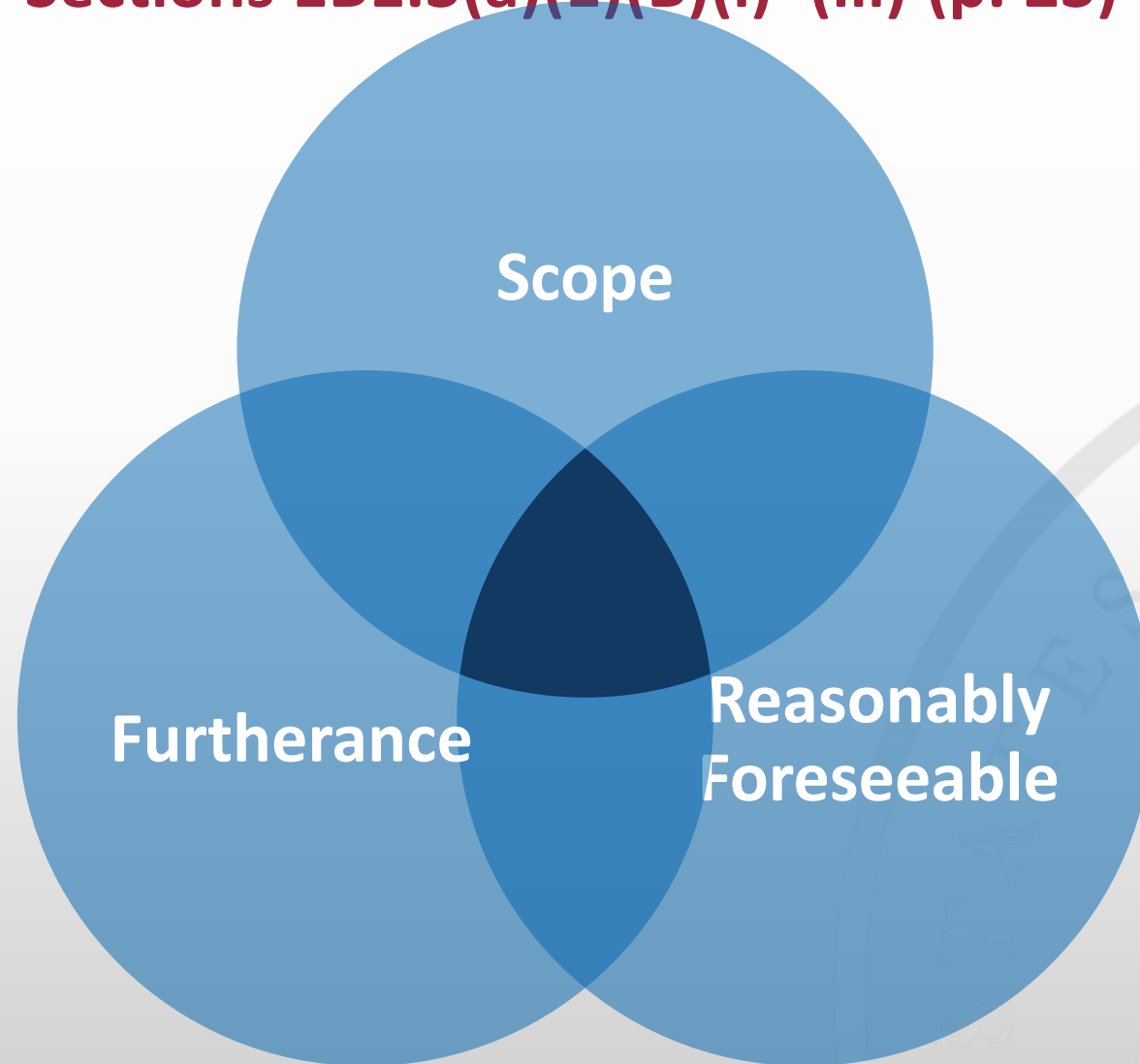
What drug amount should Charlotte be held accountable for under §2D1.1?

- A. 1,000 kilograms
- B. 1 kilogram
- ✓ C. 4 kilograms



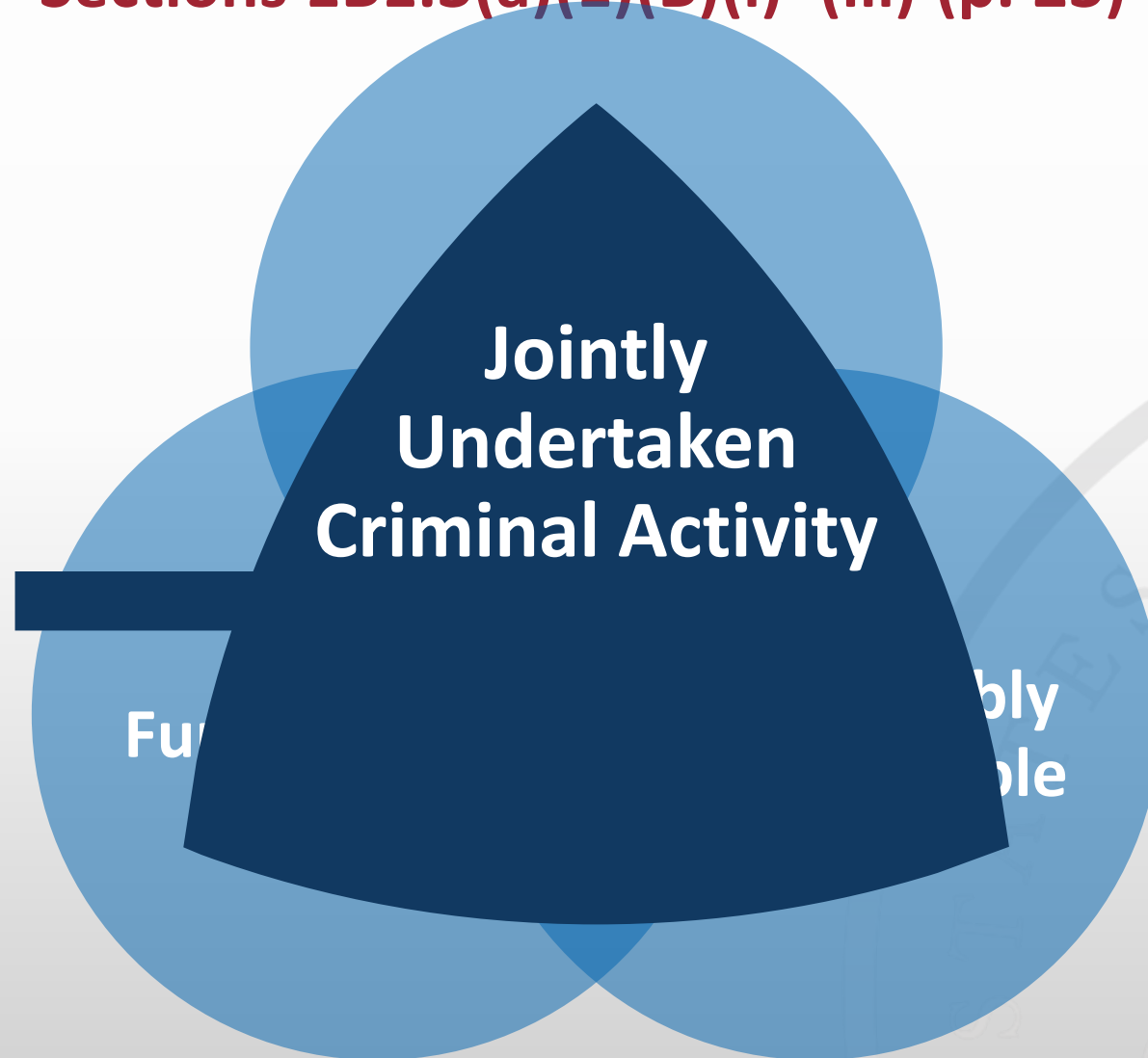
Jointly Undertaken Criminal Activity

Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



Jointly Undertaken Criminal Activity

Sections 1B1.3(a)(1)(B)(i)–(iii) (p. 23)



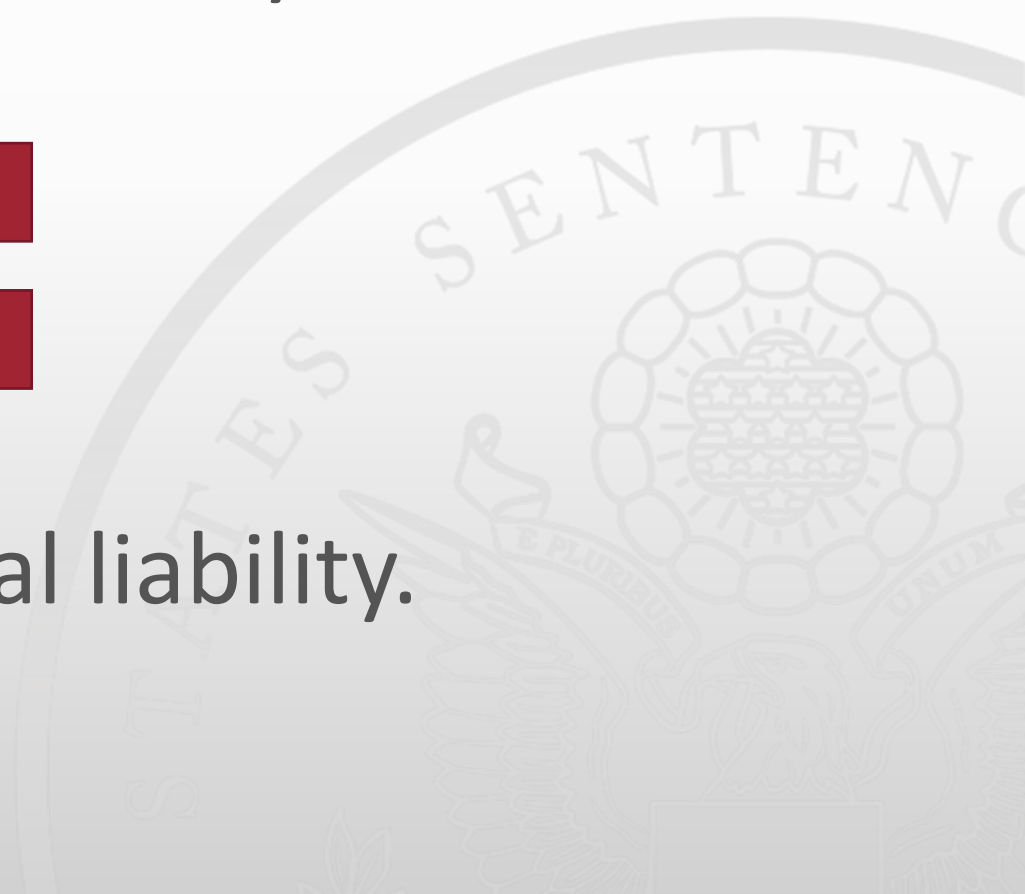
Relevant Conduct

Section 1B1.3, App. Note 1 (p. 24)

Sentencing accountability is



the same as criminal liability.



Bright Line Rule

Section 1B1.3, App. Note 3(B) (p. 25)

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.



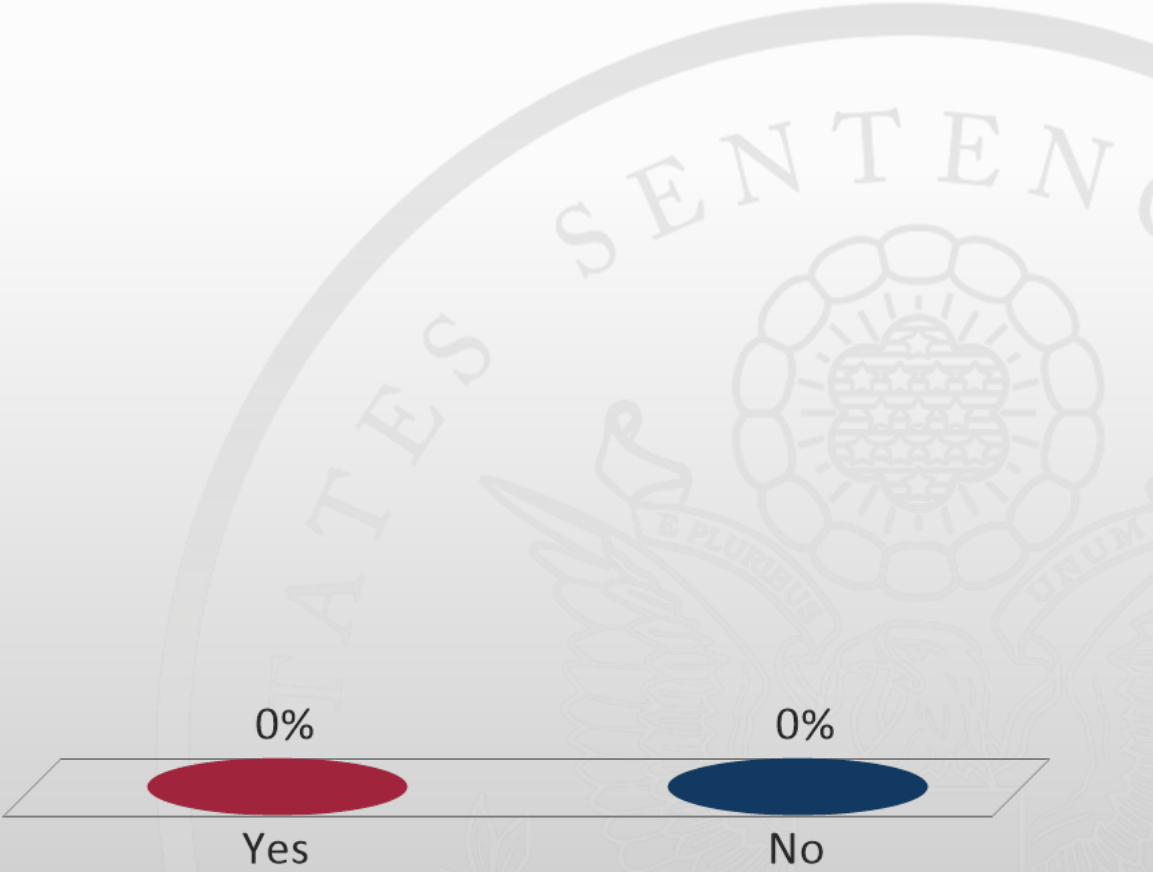
Charlotte's Firearm Enhancement

The PSR included a 2-level increase under §2D1.1 because Wyatt possessed a firearm on their trips. Charlotte stated that the increase should not apply because she never possessed the firearm.



Does Charlotte qualify for a 2-level increase under §2D1.1(b)(1) even though she did not possess the weapon ?

- ✓ A. Yes
- B. No



Weapon Enhancement

Section 2D1.1(b)(1) & App. Note 11(A) (pp. 143, 162)

If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

1

Government proves that the **weapon** and **drugs** are present

2

SOC applies unless defendant can prove “**clearly improbable.**”

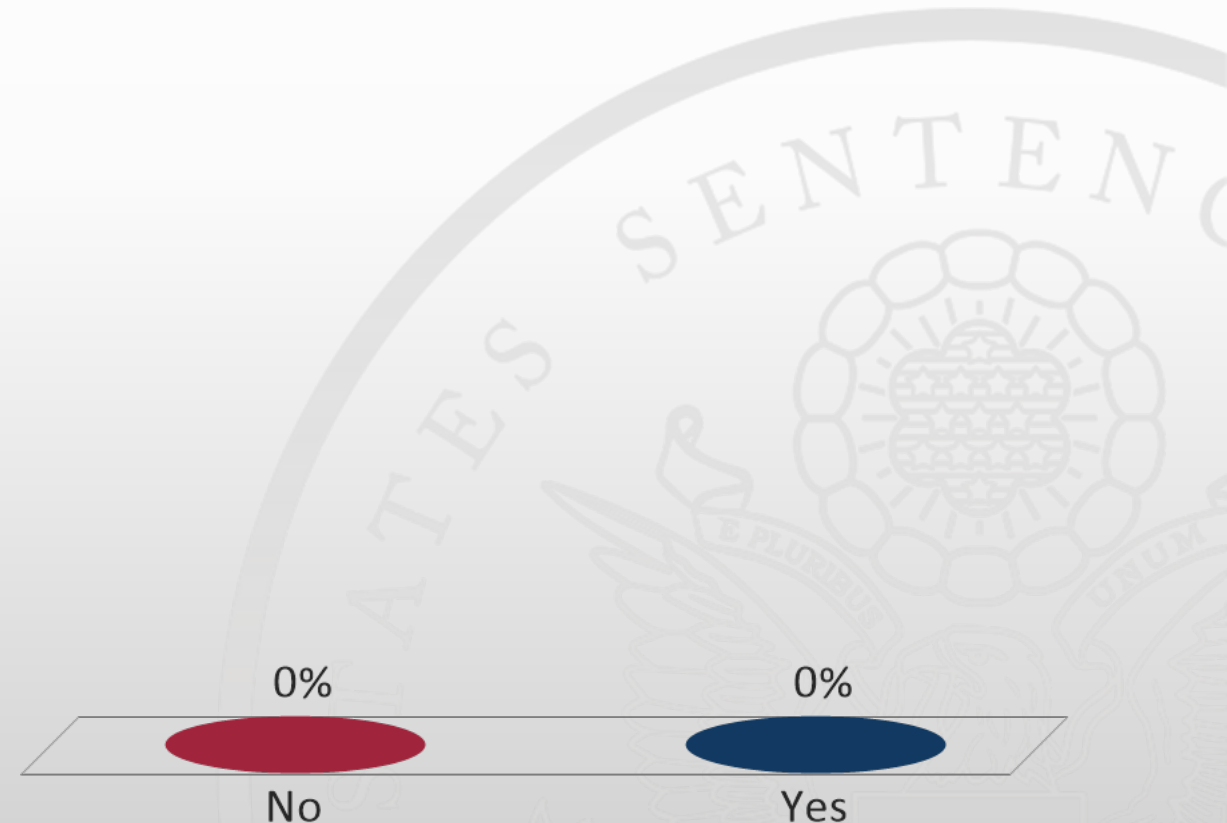
Charlotte's Safety Valve Reduction

The court concluded that §2D1.1(b)(1) applied because of Wyatt's possession.

Charlotte seeks a 2-level decrease at §2D1.1(b)(18) ("safety valve reduction"). The government argues that she is not eligible for the reduction because one of the criteria is that the defendant not possess a gun and the court applied the gun enhancement at §2D1.1(b)(18).

Is the government correct that a defendant can't qualify for the safety valve if that defendant received the 2-level increase for a dangerous weapon?

- ✓ A. No
- B. Yes



Guidelines Safety Valve

Sections 5C1.2(a)(1)–(5) (pp. 421–22)

1

No more than 1 criminal history point

2

The defendant did not use violence or weapon

3

The offense did not result in death or SBI

4

The defendant was not leader or organizer

5

Safety Valve Proffer

The defendant

Interaction between §2D1.1(b)(1) & §5C1.2(a)(2)

§2D1.1(b)(1)

- Offense Based
- Lower Standard

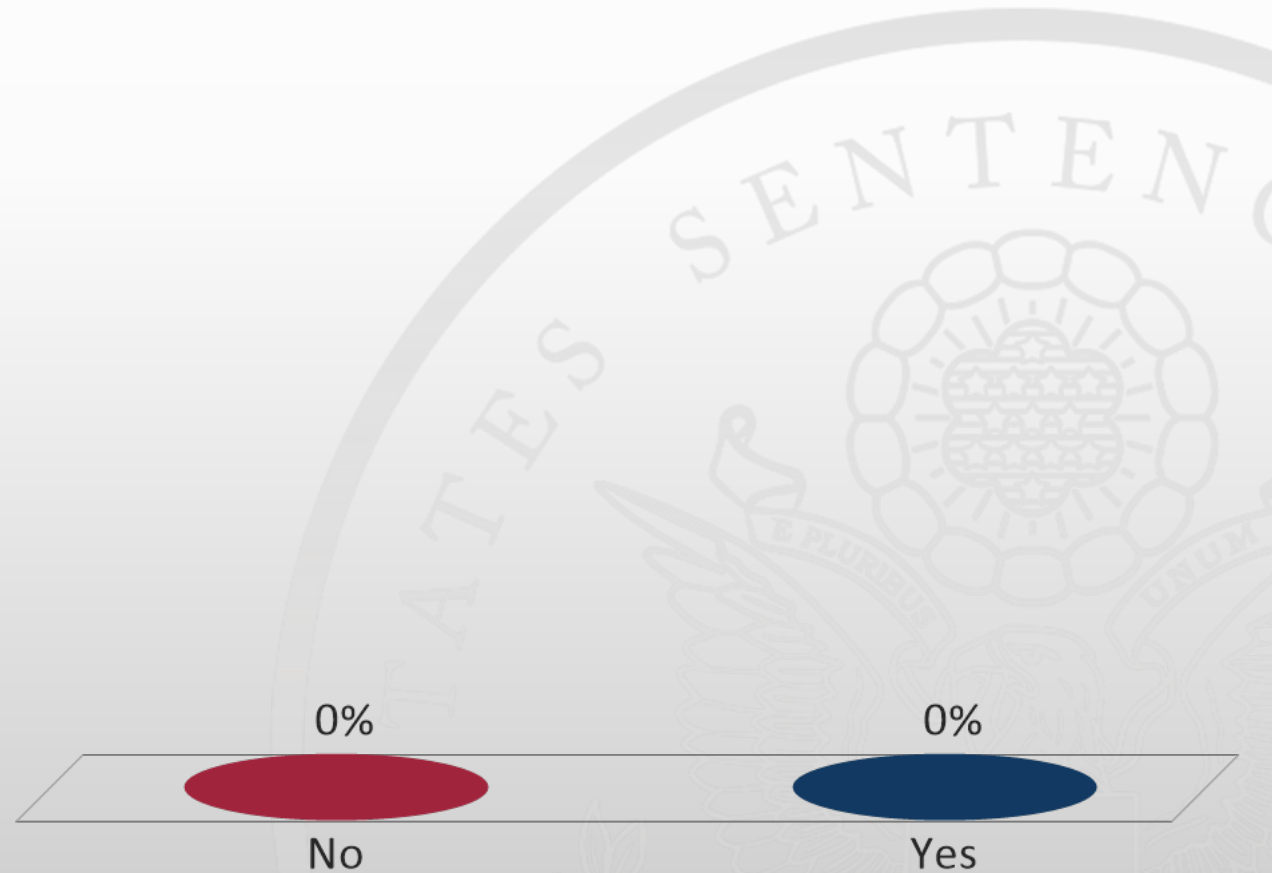


§5C1.2(a)(2)

- Defendant Based
- Higher Standard

Is a government motion required for the safety valve?

- ✓ A. No
- B. Yes



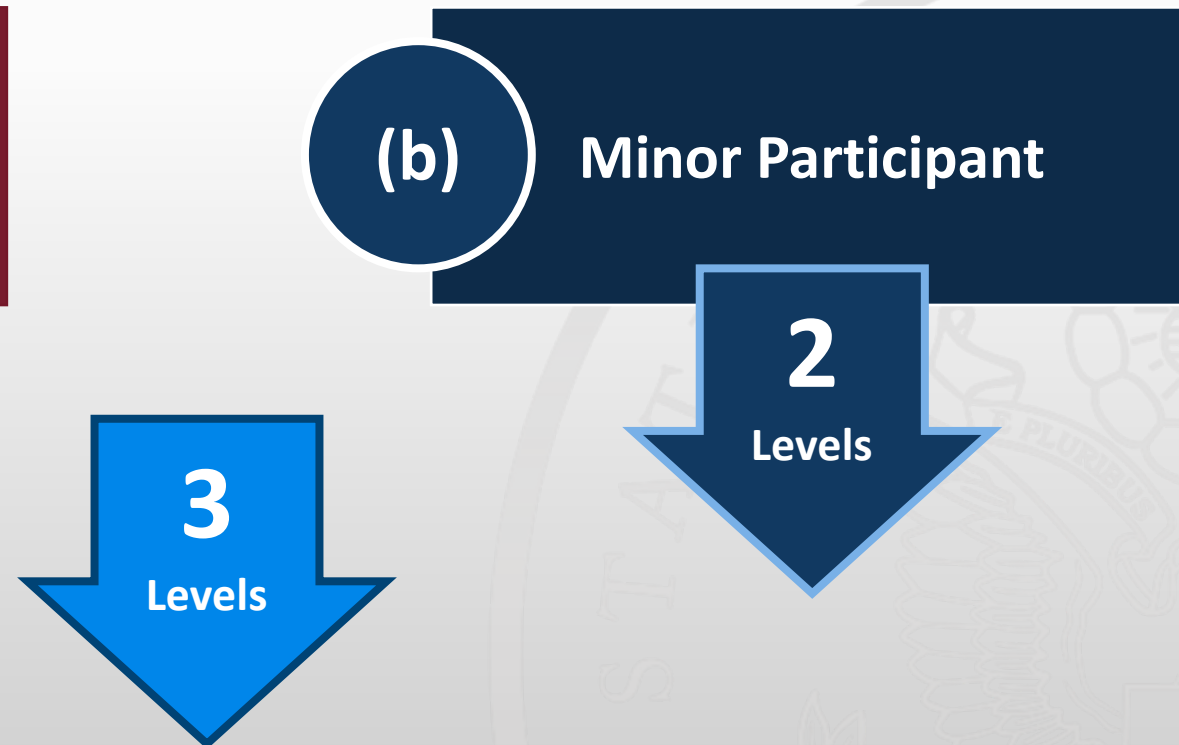
Charlotte's Role

At the sentencing hearing, the judge ruled that Charlotte is accountable for 4 kilos of heroin. Charlotte asks the court to apply a mitigating role reduction under §3B1.2. The government argues that because Charlotte is only being held accountable for the 4 kilos she personally transported, she is not deserving of a role reduction.

Mitigating Role

Section 3B1.2 (p. 352)

Based on the defendant's role in the offense, decrease the offense level as follows:



Would you give Charlotte a minor role adjustment?

- A. No
- B. Yes, a 4-level reduction
- C. Yes, a 3-level reduction
- D. Yes, a 2-level reduction



Mitigating Role and Relevant Conduct

Section 3B1.2, App. Note 3(A) (p. 353)

A defendant **may receive** a mitigating role adjustment when:

- relevant conduct is limited to only his conduct; and
- he performs a limited function in the criminal activity.

Applicability of the Adjustment

Section 3B1.2, App. Note 3 (pp. 353–354)

A defendant who is:

“substantially less culpable than the average participant”

Application:

- **Based on totality of the circumstances.**
- **Heavily dependent on the facts of the particular case.**

Mitigating Role Factors

Section 3B1.2, App. Note. 3(C) (p. 353)

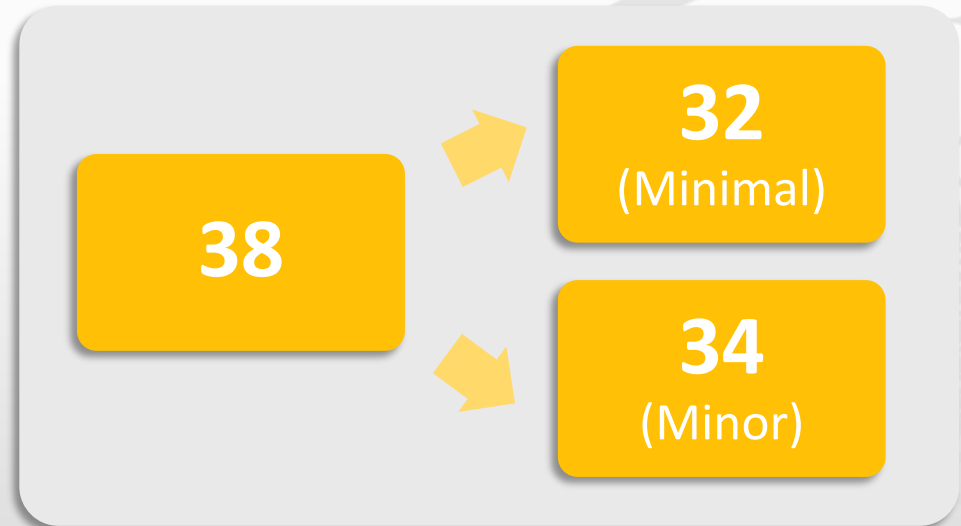
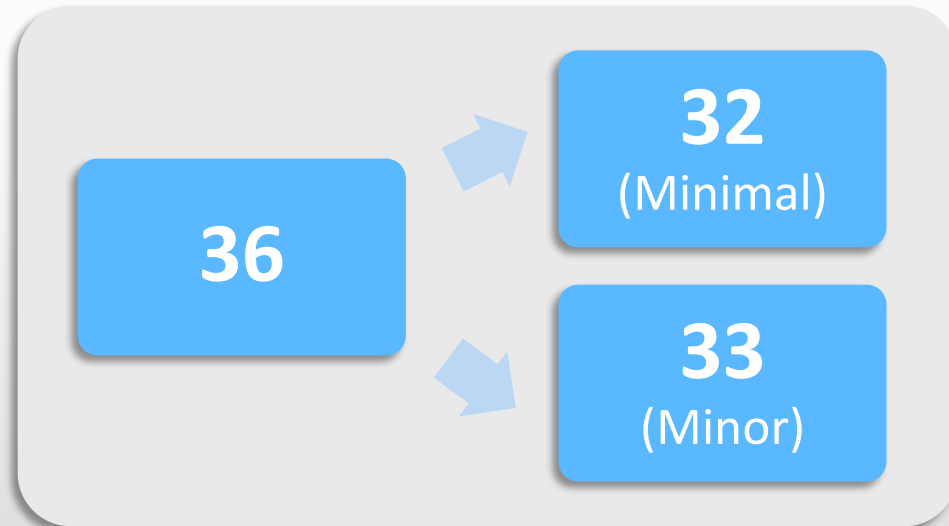
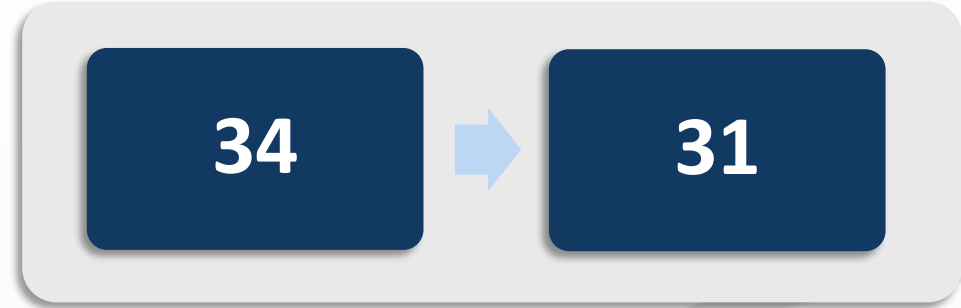
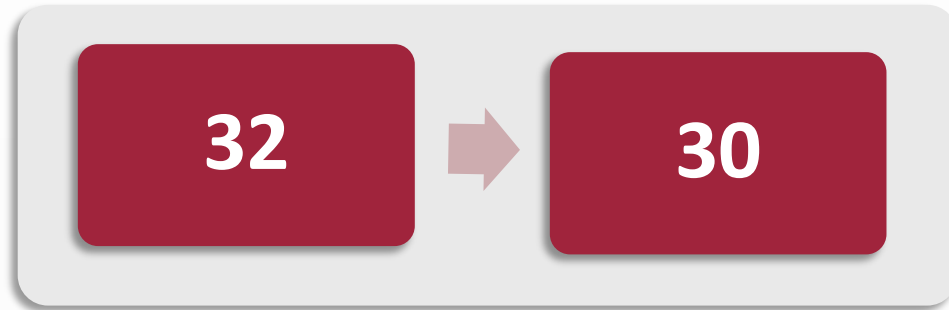
Factors to Consider

- Understanding of Scope and Structure
- Participation in Planning / Organization
- Decision-Making Authority
- Stood to Benefit
- Participation in Criminal Activity



Adjusting the BOL for Mitigating Role

Section 2D1.1(a)(5) (p. 142)



Apply Both BOL Reduction and Mitigating Role

If Charlotte were sentenced after November 1, 2023, would she be considered a “certain zero-point offender”?

A. Yes

B. No



Adjustment for Certain Zero-Point Offenders

Promulgated §4C1.1(a)

Two-Level Decrease If . . .

1

**No Criminal History
Points**

§4C1.1(a)(1)

2

No Offense Exclusions

§4C1.1(a)(2)–(10)

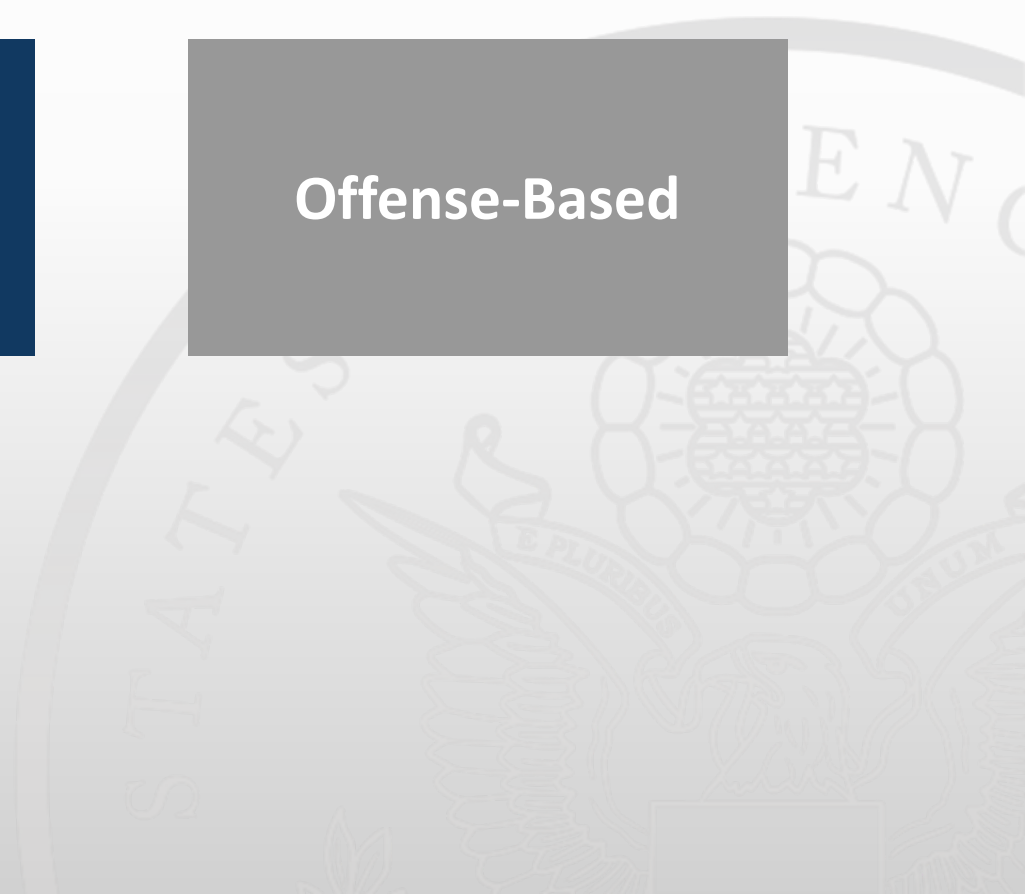
Offense Exclusions for Zero-Point Offenders

Promulgated §4C1.1(a)(2)–(10)

Conviction-Based

Defendant-Based

Offense-Based



Defendant-Based Exclusions

Promulgated §§4C1.1(a)(3), (6)–(7), (9)–(10)

Defendant-Based

Violence

Hate Crime Adjustment | §3A1.1(a)

Substantial Financial Hardship

Vulnerable Victim | §3A1.1(b)

Firearm or Dangerous Weapon***

Aggravating Role (§3B1.1) & No CCE

Charlotte's Guideline Range

BOL

30

§2D1.1 – Base Offense Level (Mitigating Cap)

+2

§2D1.1(b)(1) - Weapon

-2

§2D1.1(b)(18) – Safety Valve

-2

§3B1.2(b) – Mitigating Role

-3

§3E1.1 – Acceptance of Responsibility

-2

§4C1.1 – Zero-Point Offender

Final OL

23

CHC: I

46–57
months

Non-Incarceratory Sentences

Promulgated §5C1.1, App. Notes 4(A), (B)

If §4C1.1 applies...

Zones A & B

Generally appropriate



Zones C & D

Maybe appropriate unless...



Crime of Violence



Otherwise Serious Offense

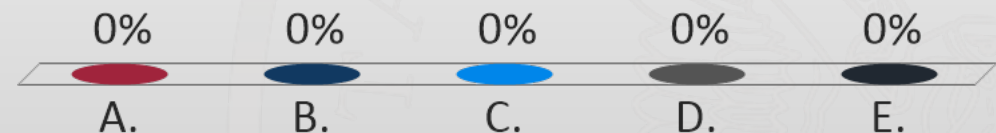
Charlotte's Sentence

Charlotte is 21 years old, has no prior criminal history and is currently a senior in college. Her parents were very successful, and she attended private high school. The probation officer recommendation is 46 months.



What sentence would you impose for Charlotte?

- A. Probation
- B. Less than 1 year
- C. 1–2 years
- D. 3–4 years
- E. 5 or more





Ruth

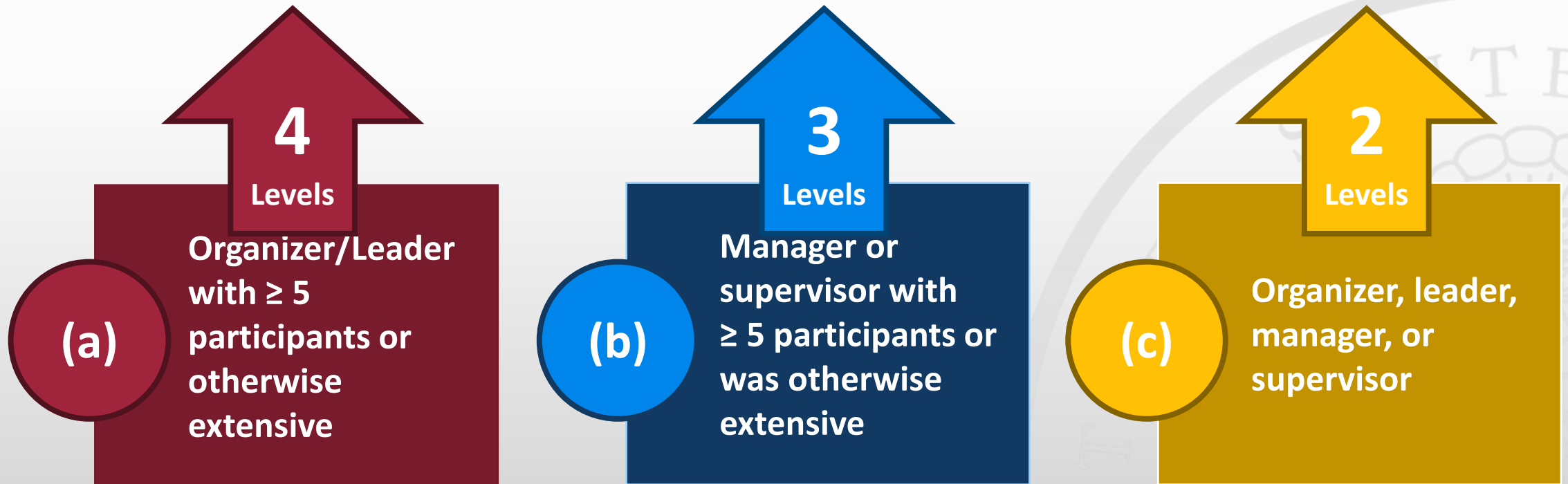
Ruth



Aggravating Role

Section 3B1.1 (p. 350)

Based on the defendant's role in the offense, increase the offense level as follows:



Would you give Ruth an aggravating role adjustment?

- A. Yes, a 4-level increase
- B. Yes, a 3-level increase
- C. Yes, a 2-level increase
- D. No



Factors to Consider

§3B1.1, App. Note. 4 (p. 352)

Factors to Consider

- Exercise of Decision-Making Authority
- Participation in the Offense
- Recruitment of Accomplices
- Larger Share of Fruits of the Crime
- Degree of Planning
- Degree of Control or Authority Over Others



United States v. Herrera

974 F.3d 1040 (9th Cir. 2020)

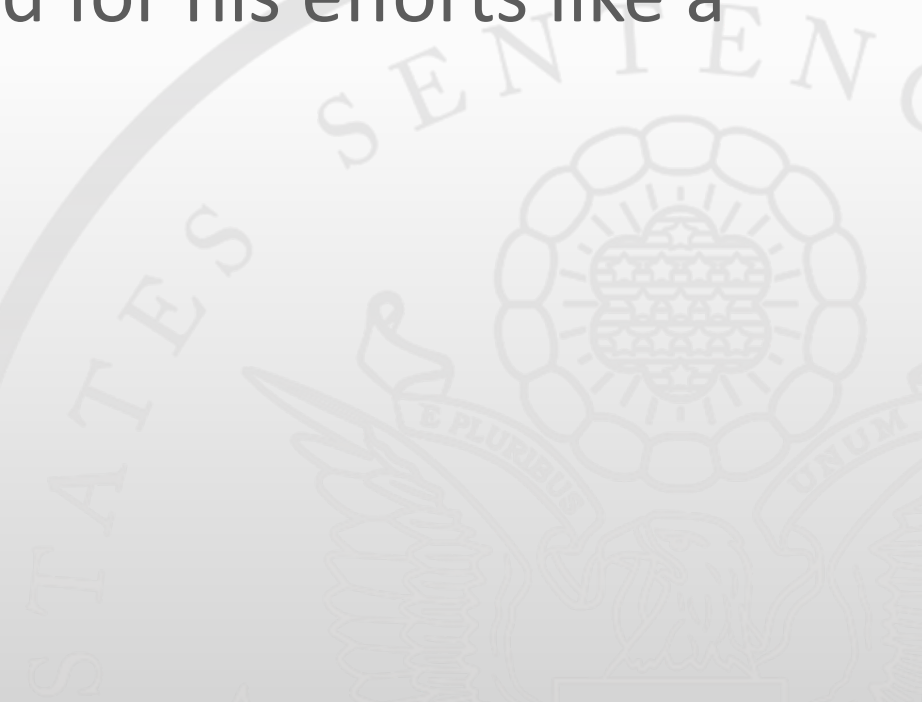
The court did not abuse its discretion in applying adjustment for aggravating role:

- the defendant played a significant role in **planning and operating** a lucrative unemployment-fraud scheme;
- the defendant **trained** one participant and provided detailed instructions directing his activities; and
- three other participants stated that the defendant **was their contact** within the scheme, filed fraudulent claims for them, controlled their mailboxes, and set up meets to disburse payments.

United States v. Aderinoye

33 F.4th 751 (5th Cir. 2022)

Section 3B1.1 applies because the defendant exercised extensive authority and control over the scheme's network of fraudulent bank accounts, and he was paid for his efforts like a leader.



Primer

Aggravating Role and Mitigating Role Adjustments

Primer



**Aggravating and
Mitigating Role
Adjustments**



Prepared by the
Office of the General Counsel

Ruth's Guideline Range

BOL

38

§2D1.1 – Base Offense Level

+3

§3B1.1(b) – Supervisory Role

-3

§3E1.1 – Acceptance of Responsibility

Final OL

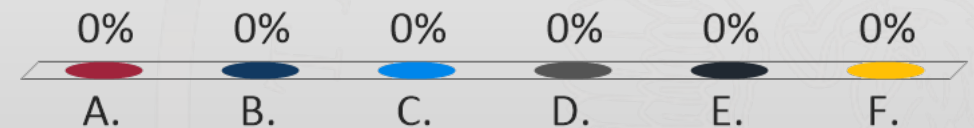
38

CHC: III

292-365
months

What sentence would you impose for Ruth?

- A. Man. Min 10 years
- B. 11-15 years
- C. 16-20 years
- D. 21-25 years
- E. 26 or more
- ✓ F. She is my favorite character so I would give her no jail time





Jonah

Jonah



Bipartisan Safer Communities Act

Effective June 25, 2022

Created Two New Offenses

18 U.S.C. § 932

Straw Purchasing of Firearms

18 U.S.C. § 933

Trafficking in Firearms

***Statutory Appendix Now References §2K2.1**

Base Offense Levels: §§ 932, 933 Convictions

Promulgated §§2K2.1(a)(4)(B)(ii)(II), (a)(6)(B)

20

(Special Firearm) + (§§ 932, 933 Convictions)

14

§§ 932, 933 Convictions

What's Jonah's BOL at §2K2.1 if he committed the offense after November 1, 2023?

- A. 12
- ✓ B. 14
- C. 20
- D. 24



Specific Offense Characteristic: Straw Purchasing or Trafficking

Promulgated §2K2.1(b)(5)

Apply the Greatest

+2

§§ 933(a)(2), (3) Convictions

+2

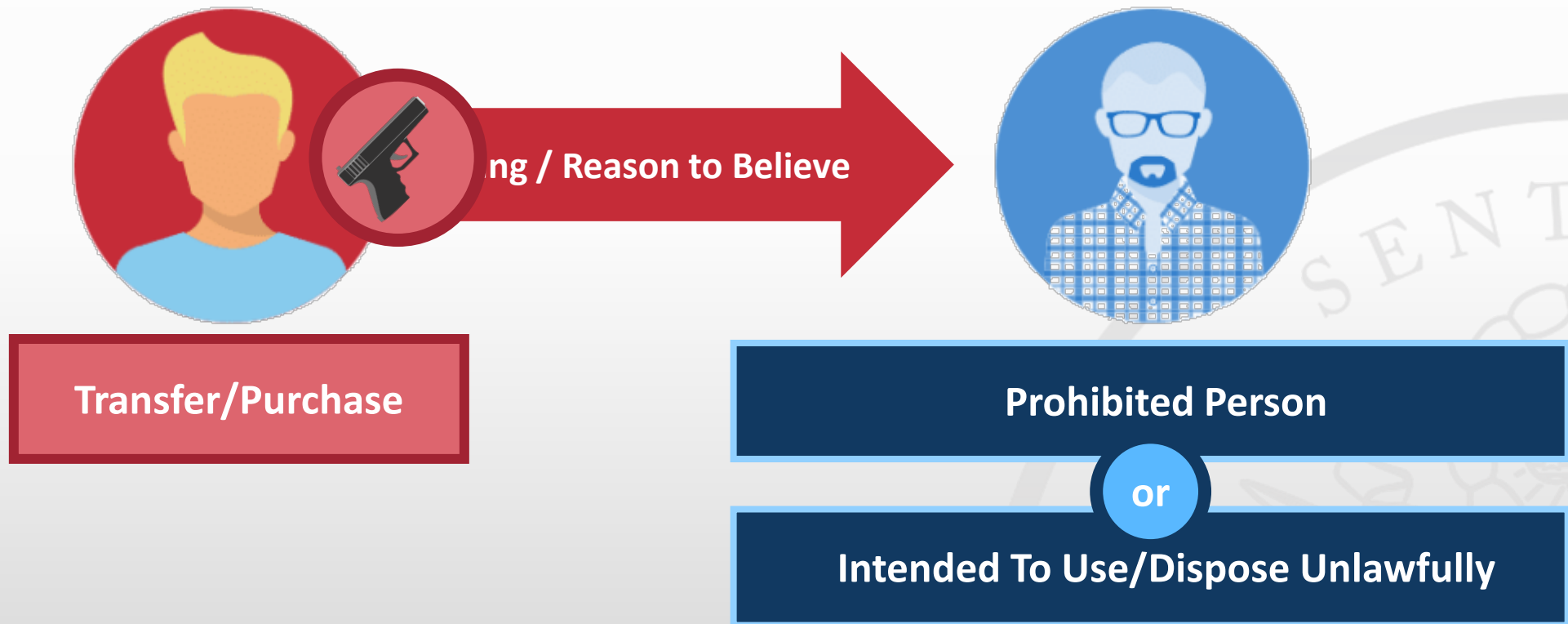
Straw Purchasing & Trafficking Conduct

+5

Multiple Firearms + Particular Individuals

Specific Offense Characteristic: Straw Purchasing or Trafficking

Promulgated §2K2.1(b)(5)(B)

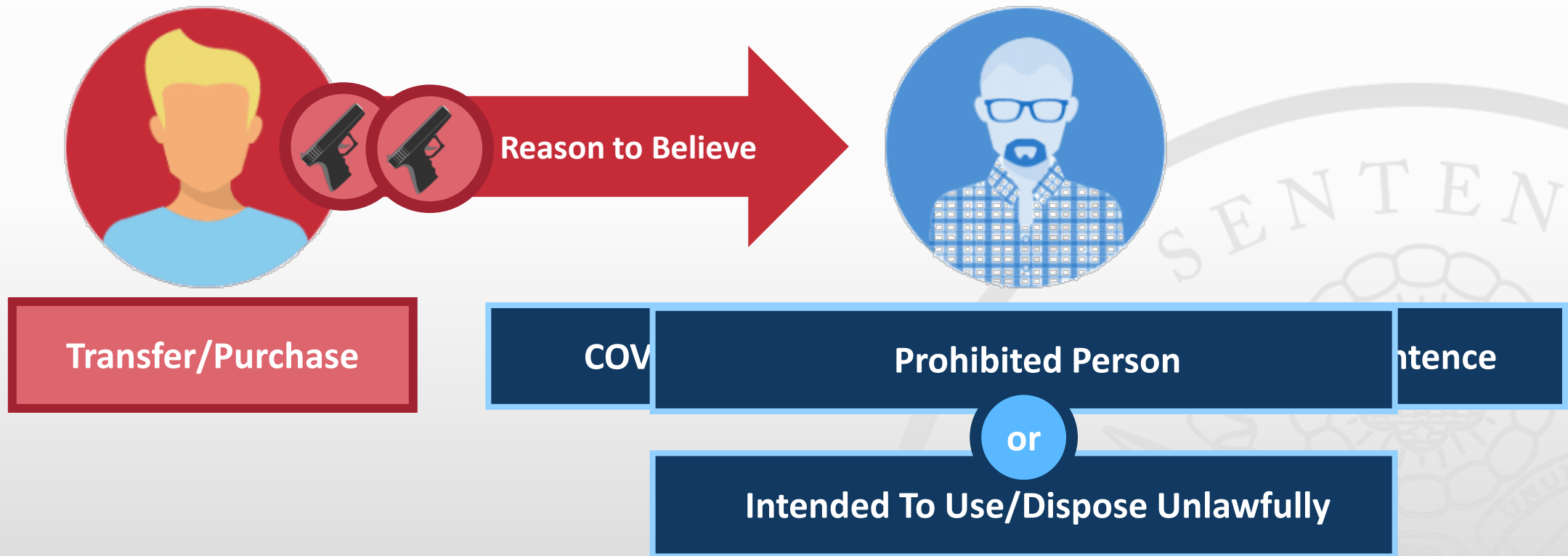


*Includes Attempts and Conspiracies

**Includes Receipt by Inducement

Specific Offense Characteristic: Straw Purchasing or Trafficking

Promulgated §2K2.1(b)(5)(C)

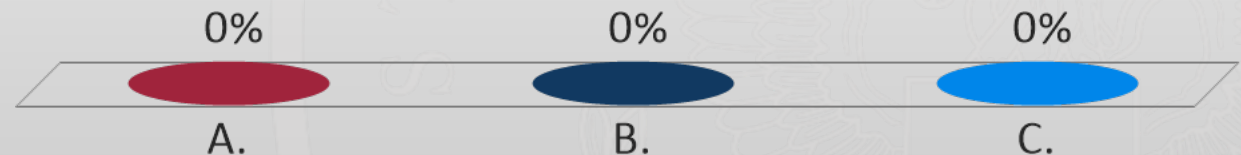


*Includes Attempts and Conspiracies

**Includes Receipt by Inducement

Would Jonah receive an enhancement for straw purchasing?

- A. No – It's Double Counting
- ✓ B. Yes, 2 levels
- C. Yes, 5 levels



Trafficking/Straw Purchasing: Mitigating Circumstances

Promulgated §2K2.1(b)(9)

A

If §2K2.1(b)(5) applies

B

1 or fewer criminal history points

&

i

Familial Relationship
Threats/Fear

&

Otherwise Unlikely

OR

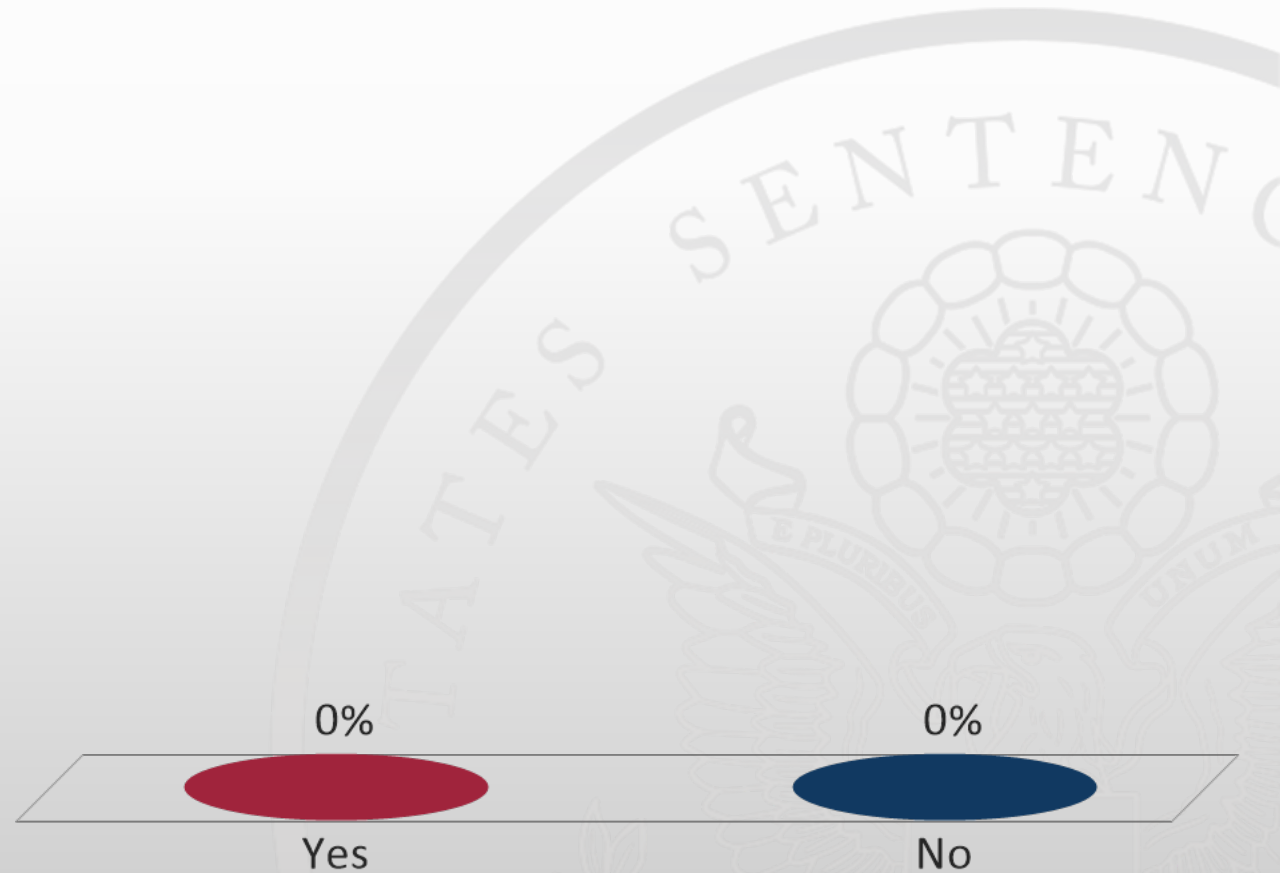
ii

vulnerable to
persuasion due to
mental or physical
condition

-2

Would you give Jonah a 2-level reduction because Ruth threatened to expose him?

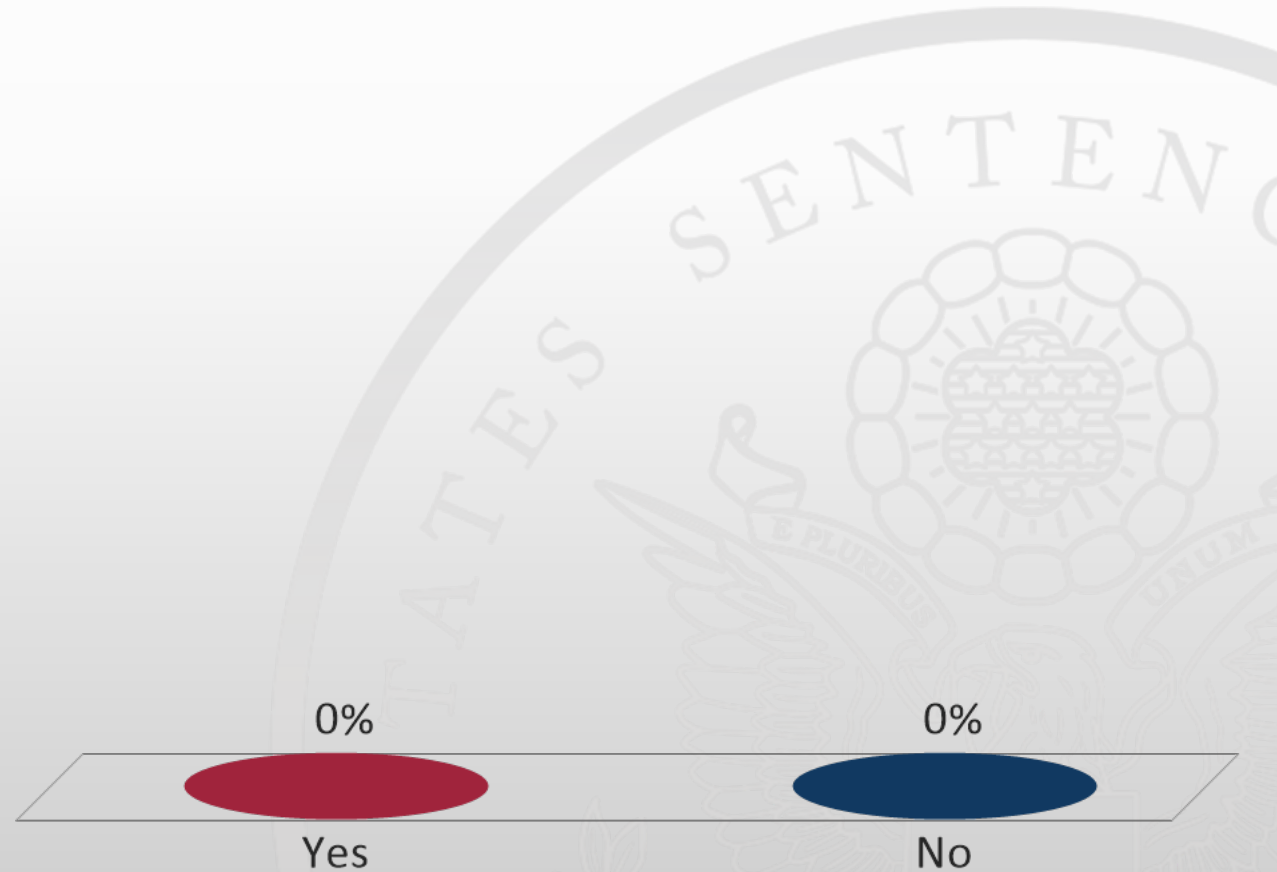
- A. Yes
- B. No



Would Jonah receive a reduction for certain zero-point offenders?

A. Yes

✓ B. No



Defendant-Based Exclusions

Promulgated §§4C1.1(a)(3), (6)–(7), (9)–(10)

Defendant-Based

Violence

Hate Crime Adjustment | §3A1.1(a)

Substantial Financial Hardship

Vulnerable Victim | §3A1.1(b)

Firearm or Dangerous Weapon***

Aggravating Role (§3B1.1) & No CCE

Jonah's Guideline Range

BOL

14

§2K2.1 – Base Offense Level

+2

§2K2.1(b)(5) – Straw Purchasing

-3

§3E1.1 – Acceptance of Responsibility

Final OL

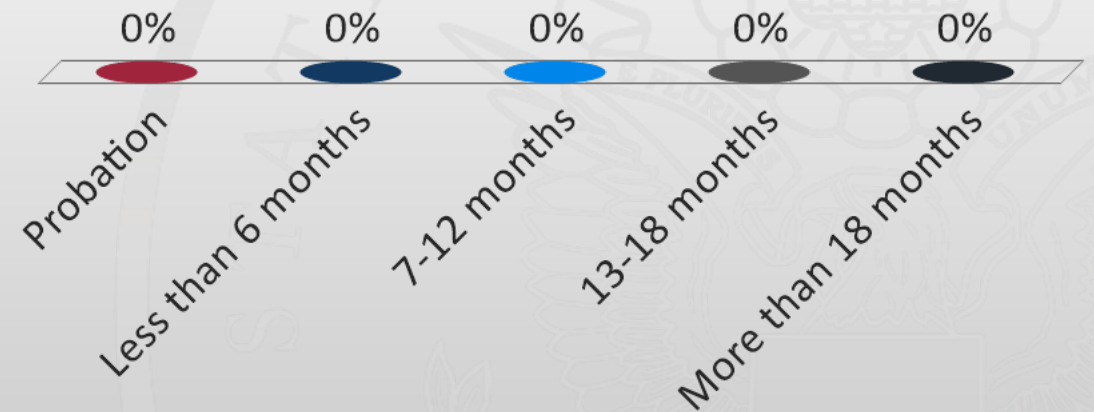
13

CHC: I

**12-18
months**

How would you sentence Jonah?

- A. Probation
- B. Less than 6 months
- C. 7-12 months
- D. 13-18 months
- E. More than 18 months





Marty

Marty



Do you see binding plea agreements under Rule 11(c)(1)(C) in your district?

- A. Never
- B. Very rarely (1-2 per year)
- C. Sometimes (5-10 per year)
- D. More than 10 per year



Marty's Guideline Range

BOL

38

§2D1.1 – Base Offense Level

+2

§2D1.1(b)(1) - Weapon

+4

§3B1.2(b) – Aggravating Role

+2

§3B1.3 – Special Skill

-3

§3E1.1 – Acceptance of Responsibility

Final OL

43

CHC: I

Life

What recommendation would you make to the court?

- A. I would recommend the court accept the binding plea to 15 years
- B. I would recommend the court reject the plea and sentence below 15 years
- C. I would recommend the court reject the plea and sentence over 15 years but not life
- D. I always thought Marty was a weasel and would sentence him to life



Questions or Comments?



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