RELEVANT COMMENTS ON RELEVANT CONDUCT

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I. THE TEXT OF THE RELEVANT CONDUCT RULES

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

II. WHAT CONSTITUTES RELEVANT CONDUCT UNDER § 1B1.3(a)(1)

A. Introduction. The concept of relevant conduct represents the U.S. Sentencing Commission's resolution of one of the major issues in the development of the Guidelines: whether to sentence a defendant based upon actual conduct ("real offense" sentencing) or upon the conduct comprising the elements of the offense(s) for which the defendant was indicted and convicted ("charge offense" sentencing). See U.S.S.G. Ch. 1, Pt. A(4)(a). The Commission ultimately adopted a system in which the offense of conviction determines the applicable offense guideline and relevant conduct is used to apply that guideline as well as Chapter Three adjustments. U.S.S.G. §§ 1B1.2(a)-(b); 1B1.3(a); see United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (error to apply § 2D1.2 to § 841(a) conviction)); United States v. Takahashi, ___ F.3d ____, No. 98-10219 (9th Cir. Mar. 6, 2000) (extending Crawford analysis to conspiracy cases).

B. Defendant's Own Acts, and Acts Defendant Aids or Abets. A defendant is accountable for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused, by the defendant" if those acts or omissions occurred within certain temporal limits discussed in section II(D). U.S.S.G. § 1B1.3(a)(1)(A).

1. A defendant is accountable for his own actions regardless of whether he has been convicted of a substantive offense or only of conspiracy; foreseeability does not limit accountability under § 1B1.3(a)(1)(A). See, e.g., United States v. de Velasquez, 28 F.3d 2 (2d Cir.1994) (where defendant convicted of importing heroin, proper to hold her accountable both for quantity she swallowed and for quantity in shoes despite her claim she did not know of latter amount); United States v. Charlarca, 95 F.3d 239 (2d Cir. 1996) (conspiracy); United States v. Cochran, 14 F.3d 1128 (6th Cir. 1994) (conspiracy); United States v. Corral-Ibarra, 25 F.3d 430 (7th Cir. 1994) (conspiracy and attempt); United States v. Strange, 102 F.3d 356 (8th Cir. 1996) (conspiracy); United States v. Mesa-Farias, 53 F.3d 258 (9th Cir. 1995) (substantive); United States v. Lockhart, 37 F.3d 1451 (10th Cir. 1994).

2. At least one court has found that there must be some logical connection between the conduct alleged to be relevant and the offense of conviction. In United States v. Ritsema, 31 F.3d 559 (7th Cir. 1994), the defendant pleaded guilty to possession of an unregistered silencer that had been attached to a gun that the defendant showed to his retarded victim after he sexually assaulted her in order to intimidate her. The court held that despite the fact that a literal reading of § 1B1.3(a)(1)(A) would require it to proceed to the obstruction of justice guideline, via a cross reference in the firearms guideline, the court would decline to do so because the connection between the silencer and the threat was too attenuated—there was no evidence that the victim was aware that the gun with which she was threatened bore a silencer.

C. Jointly Undertaken Criminal Activity. A defendant is accountable for the acts and omissions of another person that were in furtherance of jointly undertaken criminal activity (i.e., "a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with

others, whether or not charged as a conspiracy") and that were reasonably foreseeable, as long as the acts or omissions occurred within the temporal limitations discussed in section II(D). U.S.S.G. § 1B1.3(a)(1)(B) & comment. (n.2).

1. It is not necessary that there be a conspiracy count for conduct to be deemed jointly undertaken. E.g., United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

2. The relevant conduct attributable to each participant in jointly undertaken criminal activity is not the same as the criminal liability of each participant. U.S.S.G. § 1B1.3, comment. (n.1); United States v. Ferguson, 23 F.3d 135 (6th Cir. 1994) (reiterating rule that scope of conduct for which a defendant can be held liable under guidelines is significantly less than that for which a defendant may be liable under general law of conspiracy). Therefore, watch for issues regarding the scope of the activity in which a participant is involved and the foreseeability of the other participants' actions.

   a. Scope of defendant's agreement. The Seventh Circuit remanded a case for further hearing where the district court held street dealers in an extensive cocaine conspiracy responsible for the entire 214 kilograms of cocaine dealt by the larger conspiracy without determining the scope of the defendants' agreements and ignoring the Commission's illustrations in application note 2 of § 1B1.3. The Court of Appeals found it highly questionable that street dealers would have been aware of the full extent of the conspiracy, even if they understood that it was larger than the individual amounts each was selling. United States v. Willis, 49 F.3d 1271 (7th Cir. 1995); see also United States v. Hammond, 201 F.3d 346 (5th Cir. 1999) (finding defendant not responsible for loss caused by others because not part of joint undertaking); United States v. Pagan, 196 F.3d 884 (7th Cir. 1999) (truckload of drugs fell within scope of agreement of one defendant, but not of another); United States v. Palafox-Mazon, 198 F.3d 1182 (9th Cir. 2000) (upholding district court's refusal to aggregate amounts of marijuana imported by individual backpackers; even though defendants were hired by same person, picked up drugs at same time, and crossed border together with same guide, district court's finding of no jointly undertaken criminal activity was not clearly erroneous); United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (reversing, on plain error review, for failure to determine scope of defendant's agreement where smaller scope would drop offense level).

   b. Foreseeability. The D.C. Circuit has held that reasonable foreseeability, by itself, cannot be the basis for attributing drug quantities to coconspirators. In the situation where a defendant is a member of a "hub and spoke" conspiracy, a sentencing court may attribute only the drugs reasonably foreseeable to that defendant in furtherance of his particular, small, conspiratorial agreement. United States v. Mitchell, 49 F.3d 769 (D.C. Cir. 1995); accord United States v. Evbuomwan, 992 F.2d 70 (5th Cir. 1993) (without "absolute prerequisite"

of findings on existence and scope of defendant's agreement to undertake activity, findings of foreseeability are "simply irrelevant"); United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993).

3. Specific findings required. The sentencing court must make findings as to conduct attributable to each defendant. See, e.g., United States v. Gilliam, 987 F.2d 1009 (4th Cir. 1993) (no amount of cocaine from second conspiracy to which defendant pled could be attributed to him where no evidence was presented, nor information contained in presentence report, as to amount for which defendant was responsible); United States v. Wilson, 116 F.3d 1066 (5th Cir. 1997); United States v. Navarro, 979 F.2d 786 (9th Cir. 1992); United States v. Green, 175 F.3d 822 (10th Cir. 1999) (remanding for more particularized findings on scope of conspiracy).

However, the D.C. Circuit has found that particularized findings were not required where the defendant's involvement in a drug ring was overwhelming. See United States v. Thomas, 114 F.3d 228, 260-61 (D.C. Cir. 1997). Further, the failure of a sentencing court to make a foreseeability determination, where the issue was not raised by defendant below, is not plain error. United States v. Ruiz, 43 F.3d 985 (5th Cir. 1994); see also United States v. Lewis, 117 F.3d 980 (7th Cir. 1997) (appellate court will not remand for resentencing on basis of district court's failure to make foreseeability findings where appellate court can verify district court's conclusions as to quantities).

4. Pursuant to a November 1994 amendment to the last paragraph of application note 2 (U.S.S.G. App. C, amend. 503), the conduct of conspiracy members before a defendant joined it can never be relevant conduct for that defendant. This gives rise to issues regarding when a defendant joined a conspiracy. See, e.g., United States v. Narviz-Garcia, 148 F.3d 530 (5th Cir. 1998); United States v. Cain, 128 F.3d 1249 (8th Cir. 1997); United States v. Word, 129 F.3d 1209 (11th Cir. 1997); see also United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994) (discussing circuit split prior to amendment). However, where a defendant's own actions prior to joining a conspiracy are part of the same course of conduct or common scheme or plan as the conspiracy, those acts count as relevant conduct under § 1B1.3(a)(2). United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996); United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996).

5. Although foreseeability comes up most frequently in drug cases, the issue can arise wherever there are multiple defendants. See, e.g., United States v. Charroux, 3 F.3d 827 (5th Cir. 1993) (each codefendant responsible for foreseeable tax losses caused by other); United States v. Dillard, 43 F.3d 299 (7th Cir. 1994) (defendant responsible for all losses caused by stolen check conspiracy because, although he did not actively participate in the cashing of first three stolen checks, they were within scope of conspiracy and reasonably foreseeable to defendant); United States v. Mitchell, 146 F.3d 1338 (11th Cir. 1998) (defendant accountable for discharge of

codefendant's gun during bank robbery where another robber provided a gun to defendant the previous day).

6. Scope of agreement and foreseeability as limitations on accountability.

a. The examples in application note 2 of the commentary to U.S.S.G. § 1B1.3 are often more helpful than the cases.

b. United States v. Studley, 47 F.3d 569 (2d Cir. 1995). Defendant worked for a "bucket shop" as a telephone solicitor for a short period of time. No evidence indicated that his involvement with the operation extended beyond the solicitation he conducted. Unless the government could produce evidence to the contrary, defendant could not be held responsible for the fraudulent activity of other telephone solicitors. See also United States v. Morrow, 177 F.3d 272 (5th Cir. 1999) (where employment was prerequisite for participation in conspiracy, salespeople not responsible for losses incurred outside period of employment). But see United States v. Thomas, 199 F.3d 950 (7th Cir. 1999) (runner in telemarketing fraud case held accountable for all losses where he was lifelong friends of two ringleaders, his activities spanned more than two years, and there was at least some cooperation between him and other runners).

c. United States v. James, 998 F.2d 74 (2d Cir. 1993). Defendant was the getaway driver in a bank robbery who did not know his friend intended to rob the bank when he drove him there. He did allow his friend to enter the car, gun in hand, after the robbery. Because the defendant did not know the robbery would occur when he dropped his friend off, he could not have foreseen that the associate would strike a bank employee with the gun, so he could not be given the four-level enhancement for use of a firearm. He could, however, have foreseen when he let the gun-bearing friend into the car that his friend would point the gun at a pursuing bank employee, so the three-level enhancement for brandishing a weapon was proper. Cf. United States v. Cover, 199 F.3d 1270 (11th Cir. 2000) (carjacking and kidnapping by accomplice foreseeable to robbery defendant who provided getaway car, even though that car was not actually used).

d. United States v. Smith, 13 F.3d 860 (5th Cir. 1994). The Court of Appeals remanded the case for a determination of whether a quantity of crack found at a residence where defendant took undercover agents for a purchase was activity which the defendant agreed to jointly undertake with the resident of the house; defendant's conspiracy with the resident of the house did not automatically make him accountable for that quantity.

e. United States v. Redig, 27 F.3d 277 (7th Cir. 1994). Defendant's sentence could not be enhanced for his coconspirator's use of a firearm in a robbery,

absent the government establishing that it was foreseeable, where defendant's plea agreement provided that the government would strike from the count to which he pled language alleging his own use of the handgun. But see United States v. Hamilton, 19 F.3d 350 (7th Cir. 1994) (where defendant a willing participant in a bank robbery, it was reasonably foreseeable to him that codefendant would carry a firearm); United States v. Luna, 21 F.3d 874 (9th Cir. 1994) (assaultive conduct of coconspirator in a bank robbery was foreseeable to defendant who did not participate in assaults).

f. United States v. Conkins, 9 F.3d 1377 (9th Cir. 1993). The sentencing court could sentence only for conduct undertaken by, or reasonably foreseeable to, defendants who made only three or four of twenty-six marijuana smuggling trips; if other trips were not foreseeable, amounts for which the defendants could be held responsible would reduce mandatory minimum from ten to five years.

7. Foreseeability and expansion of liability.

a. United States v. Lacroix, 28 F.3d 223 (1st Cir. 1994). Defendant was the titular head of a real estate firm whose members conspired to defraud lenders by making secret loans to buyers needing funds for down payments. The court held that as the titular head of the firm that oversaw the marketing, building, and financing of the homes, defendant could foresee, when entering into the illicit loan scheme, that ninety of the homes could be sold in such a fashion, and was therefore responsible for the entire loss amount.

b. United States v. Morris, 46 F.3d 410 (5th Cir. 1995). Defendant, who served as banker for his brother's drug organization, could foresee the entire 285-kilogram scope of the conspiracy. See also United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999) (holding enforcer liable for all drugs that passed through conspiracy during month that he was involved); United States v. Robbins, 197 F.3d 829 (7th Cir. 1999) (holding defendant responsible for all drugs in conspiracy where he was trusted lieutenant, was involved in conspiracy from beginning, and knew generally that large quantities of drugs were involved).

c. United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995). Defendant was responsible for the entire volume of cocaine distributed by the larger conspiracy from whose leader defendant purchased smaller quantities of drugs on a regular basis. The foreseeability determination was based on the fact that the leader was loquacious in discussing the scope of his operation with an undercover agent, and therefore *likely* also described its scope to the defendant. Furthermore, defendant's success as a mid-level dealer was dependant on the success of the larger venture.

d. United States v. Rice, 49 F.3d 378 (8th Cir. 1995). Defendant was responsible for the quantities of drugs distributed by another dealer despite his lack of direct participation in that dealer's enterprise. Defendant introduced the dealer to his supplier and provided the dealer with an address to which the supplier could ship cocaine. On occasion, the dealer fronted cocaine for defendant. Even when working separately, they each gave each other tips on how to better run a drug business. Thus, it was foreseeable to defendant that his behavior was facilitating the other dealer's activities. Cf. United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (reversing sentence where district court held defendant accountable for quantities of drugs sold by friend to undercover agent whom defendant had introduced to friend, where lower court did not make findings that sales were part of an agreement between defendant and his friend and were reasonably foreseeable).

e. United States v. Youngpeter, 986 F.2d 349 (10th Cir. 1993). Defendant, who distributed 1.5 pounds of methamphetamine, was responsible for 26.6 pounds his coconspirator tried but failed, due to ineptitude, to manufacture.

8. Mandatory Minimum Sentences. A number of courts have applied the § 1B1.3(a)(1)(B) standard in determining the drug quantity on which a mandatory minimum for a conspiracy conviction should be based. See United States v. Martinez, 987 F.2d 920 (2d Cir. 1993); United States v. Irvin, 2 F.3d 72 (4th Cir. 1993); United States v. Ruiz, 43 F.3d 985 (5th Cir. 1993); United States v. Pruitt, 156 F.3d 638 (6th Cir. 1998); United States v. Young, 997 F.3d 1204 (7th Cir. 1993); United States v. Jones, 965 F.2d 1507 (8th Cir. 1992); United States v. Becerra, 992 F.2d 960 (9th Cir. 1993). For substantive drug offenses, however, only the quantity of drugs involved in the offense of conviction is used to determine whether a mandatory minimum sentence applies. See, e.g., United States v. Santos, 195 F.3d 549 (10th Cir. 1999).

D. Temporal Limitations on Relevant Conduct Rules in U.S.S.G. § 1B1.3(a)(1).

1. In order to be considered relevant conduct under § 1B1.3(a)(1), the act or omission must have occurred during commission of the offense of conviction, in preparation for that offense, or during the course of attempting to avoid detection or responsibility for that offense. E.g., United States v. Kubick, 199 F.3d 1051 (9th Cir. 1999) (finding that attorney's passing of money through law firm trust account at direction of codefendant was in preparation for bankruptcy fraud).

2. Defendant's withdrawal. United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000) (finding facts supporting withdrawal from conspiracy ("affirmative actions inconsistent with the object of the conspiracy") sufficient to limit defendant's relevant conduct for quantity determination).

3. Defendant's arrest. Although the arrest of a defendant will usually operate to limit his accountability for his own actions under § 1B1.3(a)(1)(A), it does not necessarily limit his accountability for jointly undertaken activity. Compare United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993) (defendant properly held responsible for heroin transactions conducted subsequent to his arrest where there was no showing that he disavowed conspiracy prior to his arrest) with United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (excluding value of money involved in reverse sting that began after defendant's arrest).

4. Defendant's incarceration. United States v. Diaz, 176 F.3d 52 (2d Cir. 1999) (defendant's incarceration does not preclude inclusion of drug quantities distributed after he was incarcerated).

5. Other. United States v. Morrow, 177 F.3d 272 (5th Cir. 1999) (where employment was prerequisite for participation in conspiracy, salespeople not responsible for losses incurred outside period of employment).

6. These temporal limitations do not apply to section 1B1.3(a)(2).

III. WHAT CONSTITUTES RELEVANT CONDUCT UNDER § 1B1.3(a)(2)

A. Offenses to Which § 1B1.3(a)(2) Applies. In general, the application of § 1B1.3(a)(2) operates for certain types of offenses to bring in conduct outside the offense(s) of conviction that are part of the same or a similar pattern of activity.

1. The provision applies only to offenses covered by a guideline that determines offense level "largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm," such as the guidelines for theft, fraud, and drug offenses. See U.S.S.G. 1B1.3, comment. (n.3); § 3D1.2(d). Thus, because sexual assault offenses are excluded under § 3D1.2(d), a defendant's additional assaults on his niece could not be considered as relevant conduct even though the assaults were clearly part of a pattern of activity. United States v. Cuthbertson, 138 F.3d 1325 (10th Cir. 1998); see also United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998).

2. If the defendant sustained a conviction for similar conduct and the sentence was imposed prior to the conduct comprising the offense of conviction, then the earlier conduct counts as criminal history, not as relevant conduct. U.S.S.G. § 1B1.3, comment. (n.8); see also Section V(E)(1).

B. Same Course of Conduct; Common Scheme or Plan. Under § 1B1.3(a)(2), a defendant is accountable for "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of

conviction" without regard to whether the acts or omissions occurred during the offense of conviction, in preparation for it, or in avoiding detection or responsibility for it.

1. Common scheme or plan.

   a. Definition. To be part of a common scheme, the offenses "must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." U.S.S.G. § 1B1.3, comment. (n.9); United States v. Brierton, 165 F.3d 1133 (7th Cir. 1999).

   b. Limits on "common scheme". Not all similar behavior constitutes a common scheme. Some examples of this include United States v. Wall, 180 F.3d 641 (5th Cir. 1999) (finding 1996 and 1997 incidents not relevant conduct to 1992 offense); United States v. Moored, 997 F.2d 139 (6th Cir. 1993) (where fraud of which defendant was convicted was motivated by his desire to pay obligations owed stemming from earlier fraud, earlier fraud was not part of relevant conduct); and United States v. Sykes, 7 F.3d 1331 (7th Cir. 1993) (credit card fraud schemes in 1989 and 1991, using same or similar false name and social security number, not part of common scheme with 1988 credit card fraud to which defendant pleaded guilty, and acts not sufficiently repetitive to constitute same course of conduct). In contrast, see United States v. Hulshof, 23 F.3d 1470 (8th Cir. 1994) (defendant bank officer convicted of transferring assets, in 1988, from the credit line of a customer into the loan account of his father; sentencing court properly considered as relevant conduct a series of transactions occurring between 1985 and 1988 in which defendant transferred assets from his father's checking account into his own personal account).

2. Same course of conduct.

   a. Definition. To be part of the same course of conduct, offenses must be "sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." Some factors to consider include the similarity of, the number of, and the amount of time between, the offenses. U.S.S.G. § 1B1.3, comment. (n.9); see, e.g., United States v. Ramsey, 165 F.3d 980 (D.C. Cir. 1999); United States v. Santiago, 906 F.2d 867 (2d Cir. 1990). When one component is missing, then the others must be stronger. United States v. Wall, 180 F.3d 641 (5th Cir. 1999); United States v. Ruiz, 178 F.3d 877 (7th Cir. 1999); United States v. Hahn, 960 F.2d 903 (9th Cir. 1992).

   b. Limits on "same course of conduct". In United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995), dismissed counts involving defendant's use of counterfeit checks to open a brokerage account under an alias and to purchase a car were

part of the same course of conduct as, and thus relevant conduct to, the count of conviction for cashing five counterfeit checks using a false name. However, a dismissed count alleging the use of two aliases to file a fraudulent credit card application was not part of the same course of conduct, because it was of a different nature than the counterfeit check fraud. The fact that both counts involved fraud to obtain money was not a sufficient connection to make the credit card count relevant conduct to the counterfeit check counts: the conduct must relate to the offense of conviction, not simply to other offenses offered as relevant conduct. Likewise, in United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999), where the defendant supplied cocaine to a conspiracy operating out of a carwash, it was error to include an amount sold to a person not part of the carwash conspiracy; the fact that both the instant offense and the conduct offered as relevant involved drugs was not enough to make them part of the same course of conduct. But see United States v. Lawrence, 915 F.2d 402 (8th Cir. 1990) (proper to include quantities of cocaine distributed during time frame of offense of conviction, conspiracy to distribute marijuana); United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (proper to include marijuana obtained from Columbia even though conspiracy charged involved marijuana from Mexico, where defendant stored Columbian marijuana in coconspirator's barn during Mexican conspiracy).

c. Distinction from "common scheme". Whereas "common scheme" requires a connection among participants and occasions, "same course of conduct" requires only that a defendant have been engaged in a particular, identifiable criminal behavior over a period of time. United States v. Svacina 137 F.3d 1179 (10th Cir. 1998). Not all courts have drawn a clear distinction between "common scheme" and "same course of conduct," but it appears that more conduct can be deemed relevant under "same course of conduct" than "common scheme." See, e.g., United States v. Martin, 157 F.3d 46 (2d Cir. 1998) (in case involving multiple thefts of airplane parts, finding that even if defendant's conduct did not constitute part of a "common scheme or plan," it would qualify as "same course of conduct").

IV. "UNLESS OTHERWISE SPECIFIED"

A. The introductory clause to § 1B1.3(a), "Unless otherwise specified," enables the Sentencing Commission to modify the application of the relevant conduct rules in particular circumstances.

B. When it has made modifications, the Commission typically has limited the scope of relevant conduct to a defendant's own acts or omissions. See, e.g., U.S.S.G. § 3C1.1, comment. (n.9) (obstruction of justice adjustment); § 3C1.2, comment. (n.5) (reckless endangerment during flight); § 3E1.1(a) & comment. (n.1) (acceptance of responsibility); § 5C1.2(2) & comment. (n.4) (safety valve). Compare U.S.S.G. § 2D1.1(b)(1) ("If a dangerous weapon (including

a firearm) was possessed . . .") with § 2D1.1(b)(2) ("If the defendant unlawfully imported or exported a controlled substance . . .").

V. WHAT THE RELEVANT CONDUCT RULES DETERMINE

A. The Base Offense Level. Where the guideline for the offense of conviction contains more than one base offense level, the relevant conduct rules are used to set the appropriate base level. See, e.g., U.S.S.G. § 2A1.4 (involuntary manslaughter); § 2A2.3 (minor assault); § 2K1.2 (firearms). In the case of the RICO guidelines, U.S.S.G. §§ 2E1.1-.4, the Second Circuit has limited the determination of the appropriate base offense level to conduct contained in the offenses of conviction. United States v. McCall, 915 F.2d 811 (2d Cir. 1990). But see United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993) (applying relevant conduct rules to determination of base offense level for RICO guideline).

B. Specific Offense Characteristics. The relevant conduct rules are used to determine if a specific offense characteristic applies. E.g., United States v. Breedlove, 197 F.3d 524 (D.C. Cir. 1999) (in fraud case, where dollar amounts from uncharged transactions counted as loss, proper to assess points for more than minimal planning); United States v. Shumard, 120 F.3d 339 (2d Cir. 1997) (where count of conviction charged fraud against only one bank victim, proper to enhance sentence for number of victims under § 2F1.1(b)(2) based on relevant conduct); United States v. Thomas, 120 F.3d 564 (5th Cir. 1997) (gun enhancement under § 2D1.1(b)(2) properly applied based on coconspirator's firearm); United States v. Santoro, 159 F.3d 318 (7th Cir. 1998) (applying enhancement for number of weapons based on defendant's possession of third gun 6-9 months prior to offense of conviction); United States v. Parker, 989 F.2d 948 (8th Cir. 1993) (defendant who arguably did not participate himself in more than minimal planning nonetheless received upward adjustment because planning undertaken by his coconspirators was reasonably foreseeable).

C. Cross References. Relevant conduct can determine the application of cross references. See, e.g., United States v. Jones, 994 F.2d 456 (8th Cir. 1993) (defendant properly sentenced under guideline applicable to producing child pornography despite dismissal of that count under plea bargain, because guideline for receiving child pornography contained cross reference to guideline for producing it).

D. Chapter Three Adjustments.

1. Role in Offense.

a. Generally. United States v. Cyphers, 130 F.3d 1361 (9th Cir. 1997) (in environmental crimes case, defendant properly given enhancement for supervisory role where, although he was convicted only of submitting false statements, he directed others to drain contaminated water into storm drains); United States v. Holland, 22 F.3d 1040 (11th Cir. 1994) (defendant, who committed offense of conviction—perjury by lying about his assets—alone,

but who was aided in hiding the assets, was eligible for leadership role enhancement because he was a leader in the relevant conduct of asset concealment).

b. Conflict among circuits over basis for minor role adjustment. Compare United States v. Olibrices, 979 F.2d 1557 (D.C. Cir. 1992) (adjustment for mitigating role not available where the more serious conduct not used to set offense level); United States v. Goodman, 165 F.3d 169 (2d Cir. 1999); United States v. Richardson, 130 F.3d 765 (7th Cir. 1997); United States v. Marsalla, 164 F.3d 1178 (8th Cir. 1999); United States v. James, 157 F.3d 1218 (10th Cir. 1998) and United States v. Holley, 82 F.3d 1010 (11th Cir. 1996) with United States v. Isaza-Zapata, 148 F.3d 236 (3d Cir. 1998) (holding that fact that defendant was not charged with conspiracy or was charged only with drugs in possession does not preclude consideration of mitigating role adjustment) and United States v. Ruelas, 106 F.3d 1416 (9th Cir. 1997) (adjustment for mitigating role still available even where full relevant conduct not used to set offense level).

2. Abuse of Position of Trust. Compare United States v. Duran, 15 F.3d 131 (9th Cir. 1994) (under 1990 amendment to commentary to U.S.S.G. § 3B1.3, court may look beyond conduct constituting offense of conviction to determine whether adjustment is appropriate) with United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (limiting consideration of enhancement to offense of conviction). Note that this guideline was amended significantly effective November 1993.

3. Obstruction of Justice. The Sentencing Commission has limited the application of this adjustment to a defendant's own conduct. U.S.S.G. § 3C1.1, comment. (n.9). Further, the obstruction must relate to the offense of conviction or to relevant conduct (note that this guideline was amended in both 1997 and 1998 to clarify this point; be aware of date of offense for possible ex post facto arguments), as well as occur during the investigation, prosecution or sentencing of the offense. United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1998) (reversing application of enhancement based on defendant's failure to appear for proceeding connected to conduct relevant to offense of conviction where defendant did not fail to appear at any proceeding directly related to offense of conviction); United States v. Ramunno, 133 F.3d 476 (7th Cir. 1998) (obstruction must relate to offenses charged); United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998) (false statement to probation officer during sentencing investigation warranted enhancement, even though statement related to conduct outside of offense of conviction).

4. Acceptance of Responsibility.

a. The Sentencing Commission's policy is that failure to discuss relevant conduct cannot be used to deprive the defendant of an adjustment for acceptance of responsibility, i.e., acceptance cannot be conditioned upon a

defendant's admission of relevant conduct. U.S.S.G. § 3E1.1, comment. (n.1(a)); United States v. Salinas, 122 F.3d 5 (5th Cir. 1997); United States v. Piper, 918 F.2d 839 (9th Cir. 1990).

b. If the defendant does discuss relevant conduct, however, and the court determines that he falsely denies or frivolously contest it, the adjustment can be denied. United States v. Cruz-Camacho, 137 F.3d 1220 (10th Cir. 1998); United States v. Coe, 79 F.3d 126 (11th Cir. 1996); cf. United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (although reduction properly denied for falsely denying relevant conduct, remanding case for determination as to whether uncharged conduct met relevant conduct definition).

E. Criminal History.

1. In general. U.S.S.G. § 4A1.2(a)(1) and application note 1 define the term "prior sentence" as being a sentence previously imposed for conduct that is not part of the instant offense, i.e., is not relevant conduct. See, e.g., United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998); United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998); United States v. Flores, 149 F.3d 1272 (10th Cir. 1998). However, if the prior sentence is imposed prior to the acts or omissions constituting the offense of conviction, the sentence counts as criminal history, not relevant conduct, even if the conduct that is the subject of the sentence otherwise meets the definition of "same course of conduct or common scheme or plan." U.S.S.G. § 1B1.3, comment. (n.8). Note 8 gives examples of the operation of this provision.

2. Time periods. Prior sentences count only if they fall within the time frames specified in § 4A1.2(d) or (e). These periods run backward from the defendant's commencement of the instance offense, which includes relevant conduct. U.S.S.G. § 4A1.2 comment. (n.8); see, e.g., United States v. Peck, 161 F.3d 1171 (8th Cir. 1998).

3. "Recency" points. Relevant conduct also comes into play in determining whether a defendant committed the instant offense while under another sentence or within two years of release on a prior conviction, for which additional criminal history points are assigned. U.S.S.G. § 4A1.1(d)-(e) & comment. (nn.4-5); see, e.g., United States v. Sherwood, 156 F.3d 219 (1st Cir. 1998); United States v. Harris, 932 F.2d 1529 (5th Cir. 1991); United States v. Wilson, 168 F.3d 916 (6th Cir. 1999); United States v. Smith, 991 F.2d 1468 (9th Cir. 1993).

F. Concurrent and Consecutive Sentences. If the defendant is serving a sentence at the time of sentencing on the instance offense, and the prior sentence is for conduct that is fully taken into account in determining the sentence for the instant offense, i.e., the prior sentence is for relevant conduct, then the sentence for the instant offense must run concurrently with the prior sentence. U.S.S.G. § 5G1.3(b) & comment. (n.2); United States v. Blanc, 146 F.3d 847 (11th Cir. 1998).

G. Safety Valve.

1. Firearm possession. U.S.S.G. § 5C1.2(2) and application note 4 limit a defendant's accountability for firearm possession to his own conduct; thus, the fact that a coconspirator possessed a weapon during the offense of conviction does not preclude safety valve relief. In re Sealed Case (Sentencing Guidelines' Safety Valve), 105 F.3d 1460 (D.C. Cir. 1997); United States v. Wilson, 114 F.3d 429 (4th Cir. 1997); United States v. Wilson, 105 F.3d 219 (5th Cir. 1997). Contra United States v. Hallum, 103 F.3d 87 (10th Cir. 1996) (finding two defendants responsible for third defendant's gun on basis of "jointly undertaken criminal activity"). However, a defendant's possession of a firearm in connection with drug dealing that is relevant conduct outside the offense of conviction renders him ineligible for safety valve relief. United States v. Plunkett, 125 F.3d 873 (D.C. Cir. 1997); United States v. Chen, 127 F.3d 286 (2d Cir. 1997).

2. Fifth prong. To meet § 5C1.2(5), the defendant must provide "all information and evidence [he] has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." E.g., United States v. Miller, 151 F.3d 957 (9th Cir. 1998).

H. Upward Departures. The Fifth Circuit has stated that a district court is not limited to consideration only of acts that are relevant conduct or criminal. United States v. Arce, 118 F.3d 335 (5th Cir. 1997). The Sixth Circuit, while agreeing that a district court may consider more than "relevant conduct," found that it cannot base an upward departure on conduct completely unrelated to the offense of conviction. United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (affirming upward departure based on torture for defendant convicted of drug conspiracy, but rejecting departure for defendant who pled only to one count of distribution occurring several weeks before torture). The Ninth Circuit has said that uncharged or dismissed conduct, in the context of a plea agreement, cannot be the basis for an upward departure. United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999).

VI. WHAT CONDUCT CAN BE CONSIDERED

A. Must Conduct Be Criminal to Be Considered? Neither the relevant conduct guideline nor its commentary expressly state that, to qualify as relevant conduct, the conduct must be unlawful. By the same token, neither one expressly states that lawful conduct is excluded. Several circuits have found that conduct must be illegal before it can be considered as relevant conduct. See United States v. Dickler, 64 F.3d 818 (3d Cir. 1995); United States v. Peterson, 101 F.3d 375 (5th Cir. 1996); United States v. Shafer, 199 F.3d 826 (6th Cir. 1999); United States v. Sheahan, 31 F.3d 595 (8th Cir. 1994); United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999); see also United States v. Ahmad, 202 F.3d 588 (2d Cir. 2000) (under § 2K2.1, in determining number of guns involved, finding error in inclusion of guns whose possession by defendant violated no federal law; rejecting government's argument that guns should count because their possession violated state and local law). But see United

States v. Smallwood, 920 F.2d 1231 (5th Cir. 1991) (approving use in methamphetamine trafficking case of yield from phenylacetic acid possessed by defendant, even though at the time possession of that substance was not illegal and that substance was not listed as a precursor); United States v. Otero, 868 F.2d 1412 (5th Cir. 1989) (sustaining application of gun enhancement in drug-trafficking case even though defendant's possession not unlawful; gun enhancement not dependent on whether weapon carried illegally).

B. Uncharged Conduct Can Be Considered. U.S.S.G. §1B1.3, comment. (backg'd.); e.g., United States v. Bennett, 37 F.3d 687 (1st Cir. 1994) (district court erred in finding that it was inappropriate to consider uncharged fraudulent conduct to determine loss amount in a fraudulent loan scheme); United States v. Bove, 155 F.3d 44 (2d Cir. 1998) (proper to include uncharged conduct in determining loss under tax guideline); United States v. Miller, 910 F.2d 1321 (6th Cir. 1990) (additional sales of cocaine revealed to probation officer were part of relevant conduct); United States v. Newbert, 952 F.2d 291 (9th Cir. 1991). But see United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (under 9th Circuit precedent, uncharged or dismissed conduct in context of plea agreement cannot be used as basis for upward departure).

C. Dismissed Counts Can Be Considered. E.g., United States v. Streich, 987 F.2d 104 (2d Cir. 1993); United States v. Gibson, 985 F.2d 860 (6th Cir. 1993); United States v. Redlin, 983 F.2d 893 (8th Cir.1993); United States v. Fine, 975 F.2d 596 (9th Cir. 1992); cf. United States v. Williams, 10 F.3d. 910 (1st Cir. 1993) (consideration of conduct in dismissed counts proper where nexus shown to count of conviction, even if dismissal of counts did not result in lower sentence); United States v. McGee, 7 F.3d 1496 (10th Cir. 1993) (where more serious counts dismissed, failure of defendant to stipulate to conduct in them pursuant to § 1B1.2 did not preclude consideration of that conduct pursuant to relevant conduct rules); United States v. Velez, 1 F.3d 386 (6th Cir. 1993) (court would not give effect to provision in plea agreement that relevant conduct would be limited to that which occurred in the Iowa count to which defendant pled, where defendant had committed a multi-state fraud with activities in other states as part of the same course of conduct). But see United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999) (under 9th Circuit precedent, uncharged or dismissed conduct in context of plea agreement cannot be used as basis for upward departure).

D. Acquitted Conduct.

1. The Supreme Court has ruled that conduct underlying charges of which a defendant has been acquitted can nonetheless be used as relevant conduct. United States v. Watts, 519 U.S. 148 (1997). This decision resolves a conflict among the circuits, id. at 149 & n.1, in favor of the majority position. Cases applying Watts include United States v. Conley, 156 F.3d 78 (1st Cir. 1998), and United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997).

2. Where the use of acquitted conduct changes the offense level, a higher standard of proof may be required. Compare United States v. Hopper, 177 F.3d 824 (9th Cir. 1999) (upholding increase based on violent activity of which defendants were

acquitted, but requiring use of "clear and convincing" standard for increase that more than doubled one defendant's sentence) with United States v. Kroledge, 201 F.3d 900 (7th Cir. 2000) (use of acquitted conduct of arson as relevant conduct did not require use of higher standard of proof where sentences were roughly half of what they would have been had defendants actually been convicted of arson).

3. Where the consideration of acquitted conduct results in an astronomical increase in a sentence, there is precedent for a downward departure. United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) (where consideration of acquitted conduct under § 2K2.1 resulted in increase from 30 years to mandatory life, district court has authority to depart); United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) (where acquitted conduct considered under U.S.S.G. § 2K2.1 resulted in an increase of defendant's sentencing range from 12-18 months to 210-262 months, district court had power to depart downward on the basis that Sentencing Commission did not consider adequately this drastic consequence of considering acquitted conduct).

E. Counts on Which Jury Deadlocked May Be Used. United States v. Duran, 15 F.3d 131 (9th Cir. 1994) (in making determination whether adjustment for abuse of trust was appropriate, embezzlement crimes on which jury failed to reach verdict could be used as relevant conduct).

F. Post-Arrest Conduct Can Be Considered. Conduct occurring after a defendant's arrest can meet the "same course of conduct" test. E.g., United States v. Kidd, 12 F.3d 30 (4th Cir. 1993) (defendant, who was arrested and charged with sales to undercover informant and then, after his release, sold an additional amount, could be held accountable for quantity involved in post-arrest conduct despite having pled guilty only to earlier sale).

G. Pre-Guideline Conduct Can Be Considered. Conduct occurring before the Sentencing Guidelines went into effect can be considered if it is otherwise relevant, i.e., part of the same course of conduct or common scheme or plan. E.g., United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994) (joining other circuits in holding that conduct occurring before effective date of Guidelines may be taken into consideration to determine relevant conduct for sentencing purposes).

H. Conduct Outside Statute of Limitations Can Be Considered. Conduct occurring outside the time frame established by a statute of limitations may be considered. E.g., United States v. Wishnefsky, 7 F.3d 254 (D.C. Cir. 1993) (funds embezzled outside statute of limitations period could be added to those embezzled within statutory period to determine loss amount); accord United States v. Silkowski, 32 F.3d 682 (2d Cir. 1994); United States v. Stephens, 198 F.3d 389 (3d Cir. 1999); United States v. Lokey, 945 F.2d 825 (5th Cir. 1991); United States v. Pierce, 17 F.3d 146 (6th Cir. 1994); United States v. Matthews, 116 F.3d 305 (7th Cir. 1997); United States v. Neighbors, 23 F.3d 306 (10th Cir. 1994); United States v. Behr, 93 F.3d 764 (11th Cir. 1996).

I. Conduct Occurring Outside United States. Such conduct may be considered if it otherwise meets the definition of relevant conduct. E.g., United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998) (finding defendant's use of gun in battle with Mexican police not part of relevant conduct where defendant convicted of importing firearm and cross-reference in § 2K2.1(c) refers only to "another federal, state, or local offense"); United States v. Dawn, 129 F.3d 878 (7th Cir. 1997) (rejecting defendant's argument that conduct occurring in foreign country was not relevant conduct where defendant, convicted of receiving and possessing child pornography, had made in Honduras the very films he received in the United States); United States v. Farouil, 124 F.3d 838 (7th Cir. 1997) (including drugs seized in Belgium from defendant's accomplice because they were destined for distribution in United States); United States v. Wilkinson, 169 F.3d 1236 (10th Cir. 1999) (upholding consideration of child pornography produced by defendant in Thailand in applying cross-reference from § 2G2.4 to § 2G2.1); United States v. Brown, 164 F.3d 518 (10th Cir. 1998) (losses from coconspirator's activities in Germany not relevant conduct for defendant because not reasonably foreseeable to him).

J. Conduct Committed While Defendant a Juvenile. United States v. Thomas, 114 F.3d 228, 267 (D.C. Cir. 1997) (where defendant was properly convicted as an adult for conspiracy he joined as juvenile but continued after he turned 18, district court properly considered defendant's and coconspirators' conduct going back to when defendant joined conspiracy at age eleven); United States v. Gibbs, 174 F.3d 762 (6th Cir. 1999) (although vacating conspiracy conviction, holding that district court, on remand, may take into account quantities of crack cocaine defendant sold before he reached age eighteen as relevant conduct to his substantive drug trafficking convictions); United States v. Jarrett, 135 F.3d 519 (7th Cir. 1998) (although defendant could not be convicted of conspiracy because of juvenile status, once he was properly transferred to adult status and convicted of substantive offenses, conduct of other participants could be attributed to defendant).

K. Double Jeopardy.

1. Double jeopardy does not bar use of conduct to enhance a sentence where the defendant was previously convicted of an offense constituting the relevant conduct. Witte v. United States, 515 U.S. 389 (1995); Williams v. Oklahoma, 358 U.S. 576 (1959).

2. Double jeopardy does not bar prosecution for crimes previously used as relevant conduct to enhance a sentence. Witte v. United States, 515 U.S. 389 (1995); United States v. Rohde, 159 F.3d 1298 (10th Cir. 1998).

VII. WHAT EVIDENCE CAN BE CONSIDERED

A. In General. The Federal Rules of Evidence do not apply at sentencing. Fed. R. Evid. 1101(d)(3); see U.S.S.G. § 6A1.3 , p.s. , comment. However, to satisfy due process

concerns, evidence must have "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(b), p.s.

B. Testimony. United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (upholding use of coconspirator's testimony regarding drug quantity estimates where testimony consistent with other testimony and witness had no reason to single out defendant); United States v. Robbins, 197 F.3d 829 (7th Cir. 1999) (upholding use of alcoholic witness's testimony where three defense attorneys cross-examined witness and testimony was not inconsistent with other testimony); United States v. Griffin, 194 F.3d 808 (7th Cir. 1999) (upholding use of testimony of other drug dealers to determine quantity; defendant must do more to challenge reliability than simply asserting evidence is unreliable and uncorroborated); United States v. Pigee, 197 F.3d 879 (7th Cir. 1999) (upholding estimate of drug quantity based on testimony of witness who made hundreds of buys from defendants).

C. Hearsay.

1. Confrontation Clause. The Confrontation Clause does not apply at sentencing, so hearsay can be used. However, the hearsay must be reliable. See, e.g., United States v. Bird, 989 F.2d 450 (5th Cir. 1990); United States v. Wise, 976 F2d 393 (8th Cir. 1992); United States v. Petty, 982 F.2d 1365 (9th Cir. 1993). Statements by unidentified sources may be used only if there is good cause for non-disclosure of the source and there is sufficient corroboration by other means. U.S.S.G. § 6A1.3 p.s., comment.

2. Recent cases. United States v. Randall, 171 F.3d 195 (4th Cir. 1999) (upholding district court's reliance on coconspirator's statements, as related by police detective, to attribute nearly 1,900 grams of crack to defendant); United States v. Gibbs, 174 F.3d 762 (6th Cir. 1999) (vacating sentences where drug quantities based solely on statements made at post-trial private interview between probation officer and cooperating witness or on statements provided by other probation officers to testifying probation officer; witness's interview statements were at times contradictory to his trial testimony and some information was a "guess;" requiring on remand more specific evidence of source and reliability of witness's information); United States v. Jones, 195 F.3d 379 (8th Cir. 1999) (upholding use of coconspirator's pretrial statements to officer contained in PSR where officer testified at sentencing about statements and defendant cross-examined officer); United States v. Alvarez, 168 F.3d 1084 (8th Cir. 1999) (codefendant's statements to agent sufficiently reliable where agent's testimony corroborated by codefendant's statements to other officers and defendant declined to call codefendant to challenge statements); United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (finding clear error in district court's reliance on agent's estimates of conspiracy's sales where agent had no firsthand knowledge of sales, did not reveal hearsay, did not provide FBI 302 reports, and was not cross-examined).

D. Suppressed Evidence. Evidence suppressed for trial purposes can be considered against a defendant at sentencing in determining relevant conduct. United States v. Tejada, 956 F.2d 1256 (2d Cir. 1992); United States v. Torres, 926 F.2d 321 (3rd Cir. 1991); United States v. Montez, 952 F.2d 854 (5th Cir. 1992); United States v. Jenkins, 4 F.3d 1338 (6th Cir. 1993); United States v. Kim, 25 F.3d 1426 (9th Cir. 1994); United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991); see also United States v. Malone, 49 F.3d 393 (8th Cir.1995) (sentencing court could rely on evidence not admitted at trial due to government's discovery violation); cf. United States v. Raposa, 84 F.3d 502 (1st Cir. 1996) (without deciding if exclusionary rule applies at sentencing, finding that even if it did, defendant's own statements to probation officer provide independent and sufficient basis for including drug quantities).