

Relevant Conduct

§1B1.3

June 14, 2007

Relevant Conduct

- Sets the limits of information to be used in guidelines application
 - Note however that at sentencing generally ALL information can be used
 - 18 U.S.C. § 3661
 - §1B1.4
 - *Witte, Watts, etc.*
- Sentencing accountability is not always the same as criminal liability

§1B1.3 Relevant Conduct

(a) Chapters Two and Three.

(Unless otherwise specified)

(1) (A) all acts of the defendant

(B) certain acts of others

During, in preparation, avoiding detection
for the offense of conviction

(2) for offenses at §3D1.2(d), “expanded”
relevant conduct (course of conduct or
common scheme or plan)

(3) harms resulting from (a)(1) and (a)(2)

(4) any information specified in guideline

(b) Chapters Four and Five. Conduct specified
in the respective guidelines

Relevant Conduct

§1B1.3

- (a): Establishes what is relevant for
 Chapters Two and Three
- Base offense levels (BOL's)
 - Specific offense characteristics (SOC's)
 - Cross references
 - Chapter Three Adjustments
- (b): Establishes what is relevant for
 Chapters Four and Five

Relevant Conduct

§1B1.3(a)

(a)(1) & (a)(2): Analysis to establish relevant acts

(a)(3): Harms from the acts established in (a)(1) & (a)(2)

(a)(4): Information specified for application in a particular guideline

(a)(1)(A) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(A): Acts of the defendant
(Acts committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant)

WHEN: Offense of Conviction

(a)(1): In preparation During Avoiding detection

(a)(1): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

“During”

In
preparation

Avoiding
detection

“During the Commission of the Offense of Conviction”

§1B1.3(a)(1)

- Must be more than contemporaneous
- Should also be “in furtherance of” the offense of conviction
 - See Amendments #3 and #439

Fact Pattern #1

- Conspiracy to distribute methamphetamine January 1, 1996 to December 31, 2006
- Prior sentence for possession of three firearms on November 21, 2002-during which time the defendant was in the company of four others also involved in the drug conspiracy as well as a scale and a police scanner

Fact Pattern #1 Variation

- Conspiracy to distribute methamphetamine January 1, 1996 to December 31, 2006
- Defendant convicted of felon in possession in 2002 for possessing hunting rifles in his truck while on a hunting trip

(a)(1)(B) Analysis of §1B1.3(a)(1)

WHO: (a)(1)(B): Certain acts of others
(3-part analysis: scope of undertaking,
acts of others in furtherance, and
reasonably foreseeable)

WHEN: Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

Determination of Scope of Undertaking

§1B1.3, App. Note 2

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

Determining Scope in a Conspiracy

§1B1.3, App. Note 2

Scope of criminal activity jointly undertaken by a defendant is not necessarily the same as the scope of the entire conspiracy

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

3-Part Analysis of (a)(1)(B)

Determinations required for acts of others to be relevant conduct

1. The scope of the defendant's jointly undertaken criminal activity
2. If acts of others were in furtherance of the defendant's undertaking, and
3. If acts of others were reasonably foreseeable in connection with the defendant's undertaking

“Reasonably Foreseeable”

§1B1.3, App. Note 2

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

Determining Scope in a Conspiracy

“Bright Line Rule”
of §1B1.3, App. Note 2

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.

Fact Pattern #2

- Drug Conspiracy charged from January 1, 2002 to December 31, 2006
- Defendant entered conspiracy January 14, 2006
- Defendant distributed a kilo of marijuana a week for 50 weeks
- Co-defendants also distributed 50 kilos, but agreed not to interfere with each other's sales

Offenses for which “Expanded” Relevant Conduct Applies

§1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included for grouping at §3D1.2(d) (or be of that type)
- Multiple counts of conviction are not necessary to have “expanded” relevant conduct

“Expanded” Relevant Conduct (*i.e.*, §1B1.3(a)(2) applies) for Offenses Included at §3D1.2(d)

Included:
(examples)

- Drug trafficking
- Fraud, theft, embezzlement
- Money laundering
- Firearms

Excluded:
(examples)

- Robbery
- Assault
- Murder
- Kidnapping

Two Requirements for Additional Offenses to Be Part of Expanded Relevant Conduct

§1B1.3(a)(2)

- Rule (d) grouping *would* apply

AND

- Same course of conduct or
common scheme or plan

Analysis of §1B1.3(a)(2)

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(2):

**Same course of conduct/
Common scheme or plan**

“Common Scheme or Plan”

§1B1.3(a)(2); App. Note 9(A)

- Offenses must be connected to each other by at least one common factor, such as:
 - Common victims
 - Common accomplices
 - Common purpose
 - Similar *modus operandi*

“Same Course of Conduct”

§1B1.3(a)(2); App. Note 9(B);
Appendix C, #503

- Similarity
- Regularity (repetitions)
- Temporal proximity

See: *U.S. v. Hodge*, 354 F.3d 305 (4th Cir. 2004)

Fact Pattern #3

- Defendant convicted of tax evasion for failing pay taxes in 2004
- Defendant also did not pay taxes in 2003, 2002 and 2001
- Is the tax loss from 2001 to 2003 relevant conduct?

(a)(3) of Relevant Conduct

§1B1.3(a)(3) and App. Note 4

- Makes “harms” relevant
 - *E.g.*, loss, injury, and damage
- Limited to harms resulting from acts established as relevant at (a)(1) and (a)(2)

Examples: Are these “harms” resulting from acts specified in (a)(1) and (a)(2) ?

- Teller’s bodily injury when hit by bullet the defendant fired from gun in bank robbery?
- Damage to bank vault when a codefendant detonated an explosive charge in a burglary?

**Examples: Are these “harms” resulting from acts specified in (a)(1) and (a)(2) ?
(cont.)**

- Illegal immigrant’s bodily injury when “alien hijacker” smashed his truck into defendant smuggler’s van in an attempt to snatch aliens?
- Monetary loss incurred by a home buyer when the defendant’s falsified home inspection report delayed closing, and the home buyer had to stay in a hotel for a week while situation corrected?

(a)(4) of Relevant Conduct

§1B1.3(a)(4)

- Makes information specified in a particular guideline to be relevant
- Impact on application in Chapters Two and Three limited to the discrete guideline in which the information is specified
 - May have implications in Chapter Four

(a)(1) & (a)(2): Analysis

WHO:

(a)(1)(A): Acts of the defendant

(a)(1)(B): Certain acts of others
(3-part analysis)

WHEN:

Offense of Conviction

(a)(1):

In preparation

During

Avoiding
detection

(a)(2):

Same course of conduct/
Common scheme or plan

END

Relevant Conduct and Criminal History

§1B1.3
&
§§4A1.1 & 4A1.2

“Prior Sentence”

§4A1.2(a)(1) & App. Note 1

Conduct that is part of the
relevant conduct of the instant offense
will **not** be a “prior sentence”
for criminal history



“Prior Sentence” (cont.)

§4A1.2(a)(1) & App. Note 1

Note: Some Chapter Two guidelines that consider a defendant’s prior convictions and certain other conduct direct that those considerations also be used in Criminal History, *e.g.*, §2K2.1 (Felon in Possession), App. Note 12; §2L1.2 (Illegal Reentry), App. Note 6

Scenario G: Part of relevant conduct or a “prior sentence”?

- Instant conviction: bank robbery
- State sentence for defendant's assault on the teller
- Instant conviction: sale of drugs
- State sentence for possession of firearm at the time of the drug sale

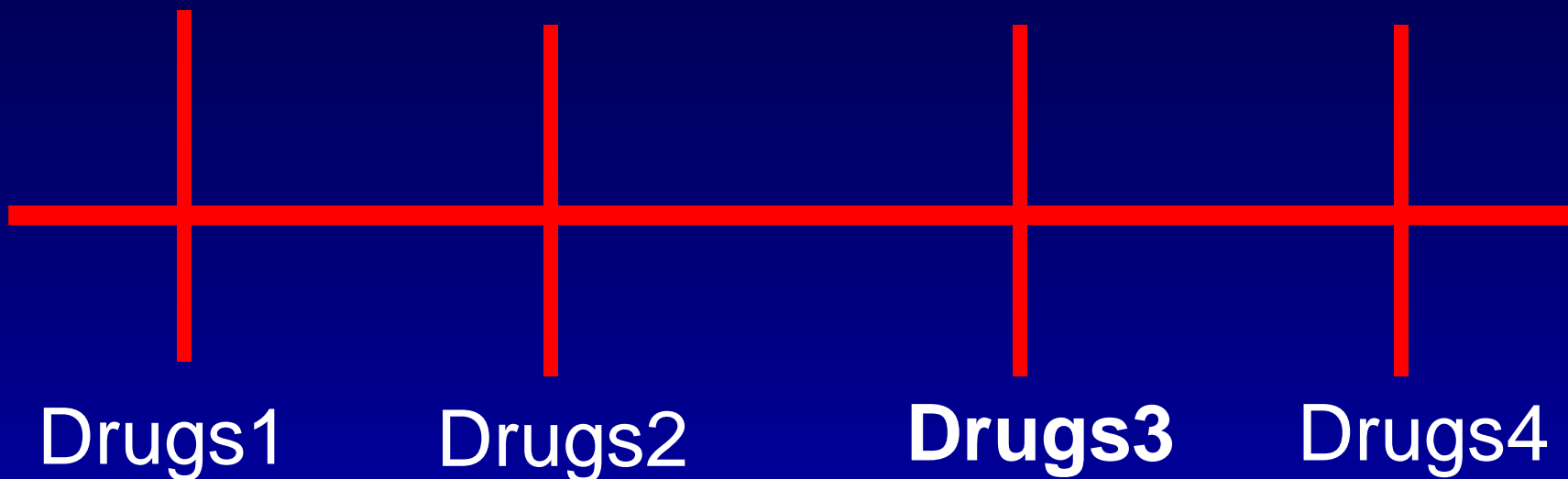
Scenario G: Part of relevant conduct or a “prior sentence”? (cont.)

- Instant conviction: felon in possession of firearm
- State sentence for DUI, the stop for which resulted in the discovery of the firearm that is the basis for the instant federal conviction

§1B1.3(a)(2)

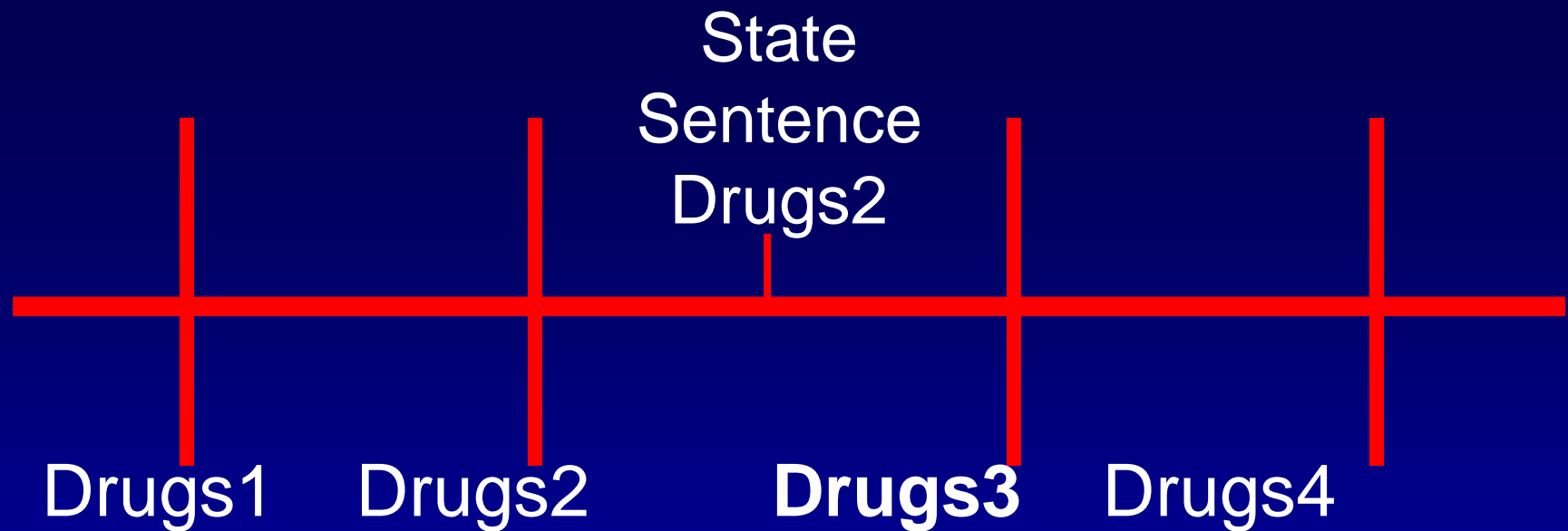
Application Note 8

In determination of “expanded” relevant conduct, the course of conduct or common scheme or plan does not include conduct “associated” with a **sentence imposed prior to the commission of the instant offense of conviction**



Instant conviction is **Drugs3**

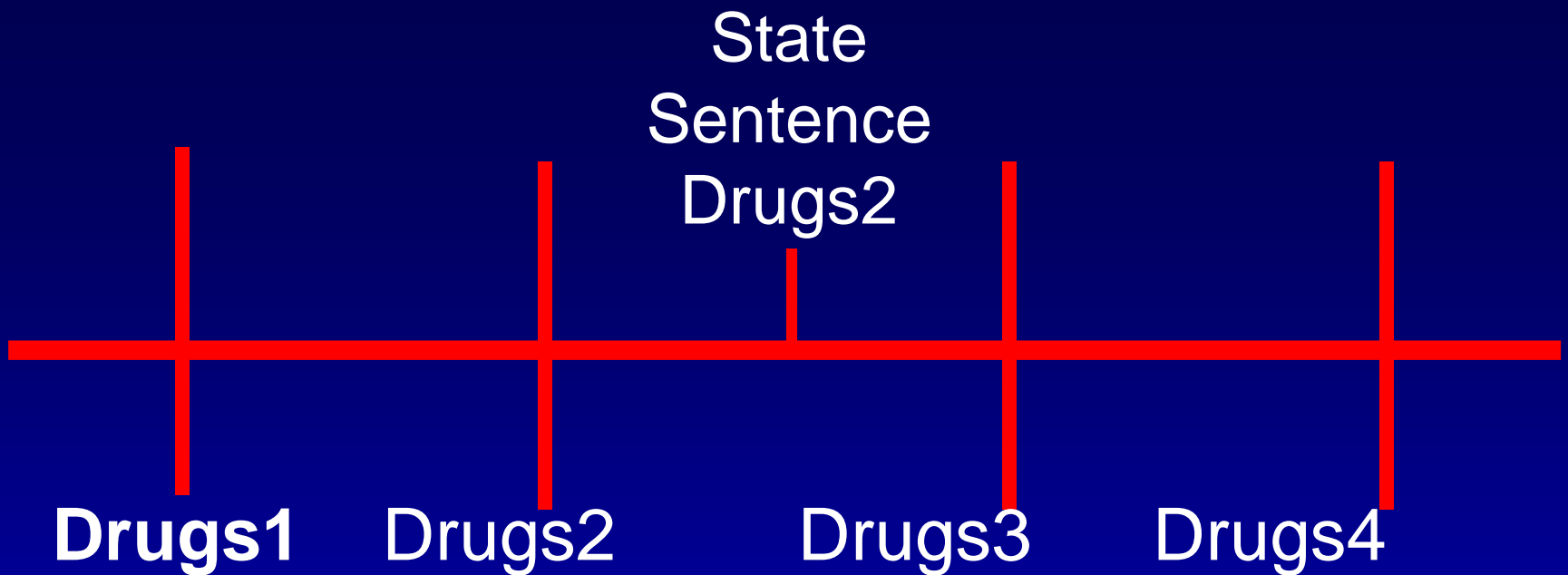
Because counts of drugs group with other counts of drugs under rule (d), if it is determined that Drugs 1, 2, & 4 were part of the same course of conduct or common scheme or plan as **Drugs3**, they will be determined to be relevant conduct.



Instant conviction is **Drugs3**

State sentence for Drugs2 is prior to **Drugs3** so
Drugs2
is not relevant conduct but prior sentence

Drugs 1 & 4 may be determined to be relevant
conduct



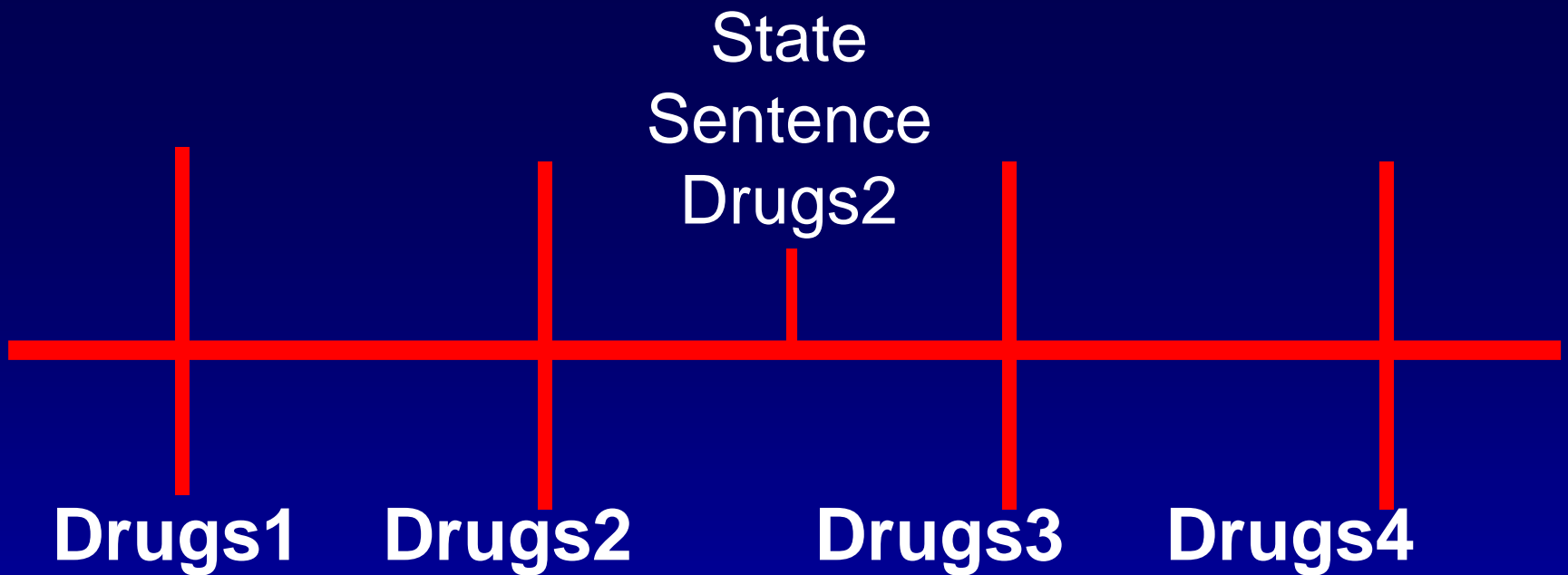
Instant conviction is **Drugs1**

State sentence for Drugs2 is not prior to **Drugs1**

and may be determined to be relevant conduct

If determined that Drugs2 is relevant conduct, it is not a prior sentence

Drugs 3 & 4 may be determined to be relevant conduct



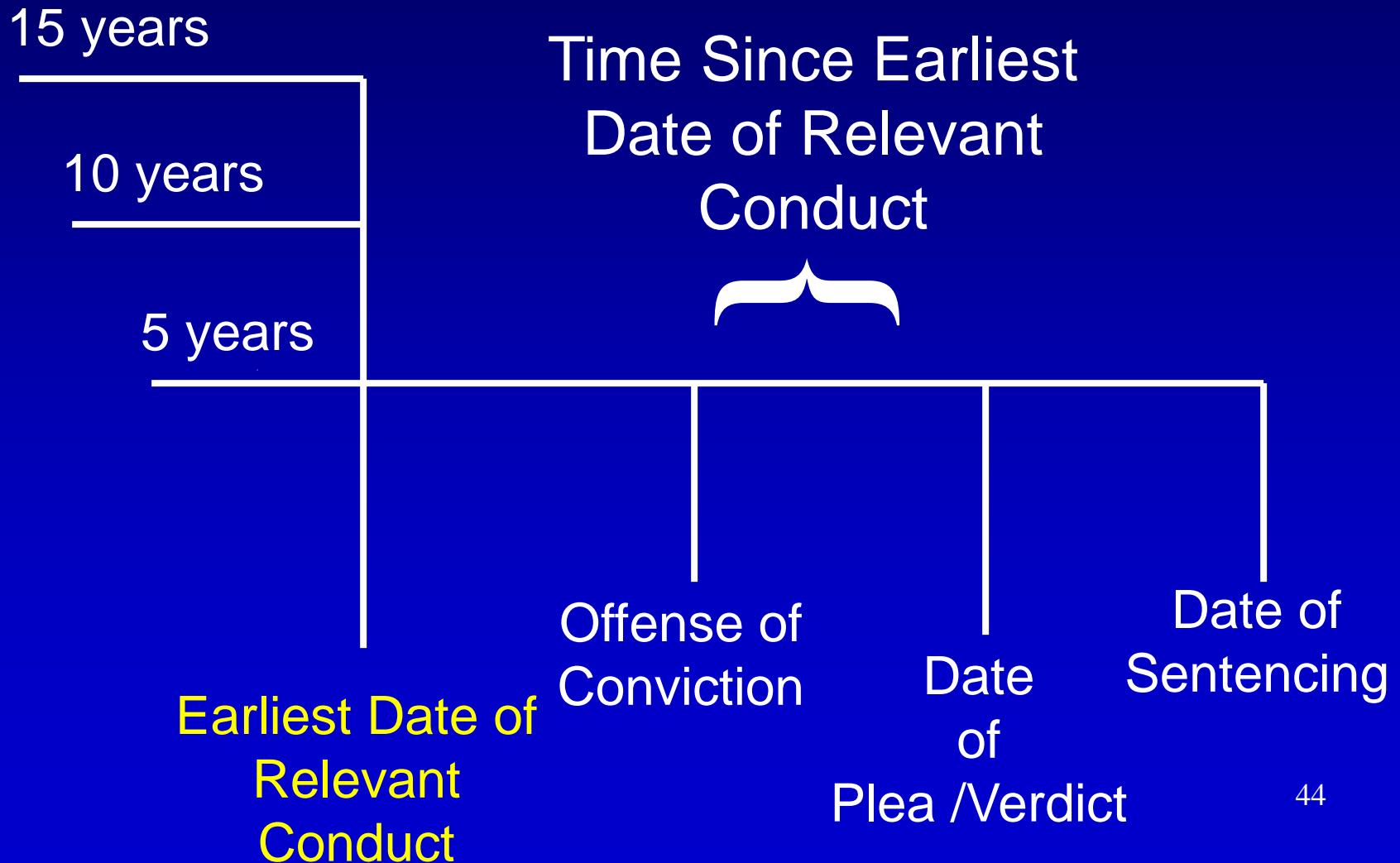
Instant conviction is a conspiracy count expressly charging **Drugs1, 2, 3, & 4**:
Acts committed “during the offense of conviction” are relevant conduct under (a)(1) (App. Note 8 re: (a)(2) not applicable)
State sentence for **Drugs2** is relevant conduct under (a)(1), and therefore not a prior sentence’

Relevant Conduct and “Time Frames”

§4A1.2(d) & (e), App. Notes 7 & 8

- “Time frames” counted from earliest date of relevant conduct
 - 15, 10, and 5 year periods for including priors

Criminal History Time Frames and Relevant Conduct



Scenario H: Relevant conduct in establishing time frames

- Instant offense of conviction: bank robbery that occurred 1 year ago
- Defendant had cased the bank for 1½ years prior to robbery
- Prior state probation sentence imposed 12 years ago
- Is the state probation sentence counted for criminal history?

Scenario I: Relevant conduct in establishing time frames

- Instant offense of conviction: trafficking in child porn (§2G2.2) that occurred 1 year ago
- Acts of the defendant in the course of conduct of the child porn started 2 years ago
- §2G2.2(b)(5) SOC for “pattern of activity” that occurred 11 years ago
- Previous state probation sentence imposed 13 years ago
- Is the state probation sentence counted for criminal history?

(a)(4) Relevant Conduct in the Determination of “Time Frames”, “Status”, and “Recency”

- Traditionally the determinations of time frames, status, and recency have not included §1B1.3(a)(4)
- Anomalous results that would routinely occur if these determinations were based on §1B1.3(a)(4) suggest that only acts for which the defendant is accountable under §1B1.3(a)(1) & (a)(2) be used

Relevant Conduct and “Status” and “Recency”

§§4A1.1(d) & (e), App. Notes 4 & 5

- “Status” if under criminal justice sentence during any relevant conduct
- “Recency” if any relevant conduct less than two years from release from imprisonment

Note: “status” and “recency” can only count if the sentence from which they resulted has been counted

Scenario J: Relevant conduct and status and recency

- Instant offense of conviction: drug trafficking that occurred 1 year ago
- Acts of the defendant in the course of conduct of the drug trafficking started 3 years ago
- Defendant had been under a state probation term that ended 2 years ago
- Will criminal history points for status apply?

Relevant Conduct and “Related Cases”

§§4A1.2(a)(2) & App. Note 3

The “related cases rules” for establishing the Criminal History Category **are not applicable** in the determination of the offense conduct to be included in relevant conduct

Scenario K

- Defendant sold 100 baggies of marijuana in 25 gram amounts each week for 100 weeks
- In week 50 local police arrested the defendant when he sold one of the baggies; the defendant was released on state bond
- Following week 100 the defendant was arrested by federal authorities and charged with 20 counts of sale of marijuana, each count citing a single baggie sale occurring during the 100 weeks

Scenario K (cont.)

- Defendant has now pled in federal court to one count citing the final sale during the final week
- Following the federal arrest, the defendant was sentenced in state court for the single marijuana sale for which he was arrested in week 50; the sentence was 18 months
- What quantity of marijuana will be included in the defendant's relevant conduct?
- What is the criminal history category?

The Limits on “Expanded” Relevant Conduct for Including Conduct Associated with a Previous Sentence

§1B1.3, App. Note 8

In the determination of §1B1.3(a)(2), the course of conduct or common scheme or plan does not include conduct “associated” with a **sentence imposed prior to the commission of the instant offense of conviction**

Conduct Charged in the Instant Offense of Conviction and Previously Imposed Sentences

§1B1.3, App. Note 8

If the offense conduct associated with a previously imposed sentence is expressly charged in the instant offense of conviction it will be considered relevant conduct under §1B1.3(a)(1)

“During the Commission of the Offense of Conviction”

§1B1.3(a)(1)

- Must be more than contemporaneous
- Should also be “in furtherance of” the offense of conviction
 - See Amendments #3 and #439