

# Relevant Conduct Breakout

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# Relevant Conduct

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§1B1.3

# Relevant Conduct: The Gatekeeper

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- Sets the limits of information to be used in guidelines application
- 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

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## §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 Includes:

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- Acts - (a)(1) & (a)(2)
  - of the defendant and certain acts of others that occurred in a specified time relationship with the offense of conviction
- Harms - (a)(3)
  - resulting from acts determined to be relevant pursuant to (a)(1) & (a)(2)
- Other specific considerations as directed by a guideline - (a)(4)

# Analysis of Relevant Conduct Acts

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## §1B1.3(a)(1) & (a)(2)

- Defendant accountable for acts he/she did in furtherance of the offense of conviction
- Sometimes defendant accountable for certain acts others did in furtherance of the offense of conviction
- For certain offenses defendant accountable for certain acts beyond the offense of conviction

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

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## 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



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

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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 9

# Determining Scope in a Conspiracy

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§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

# Determining Scope in a Conspiracy

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“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.

# “Reasonably Foreseeable”

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## §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))

**“Expanded Relevant Conduct”:  
Offenses for which Relevant Conduct  
Also Includes the Same Course of  
Conduct or Common Scheme or Plan**

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(a)(2) of §1B1.3

For all offenses using a Chapter Two guideline  
in the **included** list at §3D1.2(d)

# Examples of Chapter Two Guidelines in Lists at §3D1.2(d)

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## Included: (examples)

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

## Excluded: (examples)

- Robbery
- Assault
- Murder
- Kidnapping

# “Common Scheme or Plan”

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§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”

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§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 (4<sup>th</sup> Cir. 2004)



# “Prior Sentence”

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§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.)

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### §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

# Scenarios

## Scenario - Drug Conspiracy

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- Conviction for one count of conspiracy to distribute at least 1000 kg of marijuana from January 1, 2007 to December 31, 2008; violation of 21 USC §§ 846 (to violate § 841(a)) & 841(b)(1)(A) (stat. penalties 10 to life); applicable guideline §2D1.1
- Conspiracy involved organizer supplying marijuana on consignment to 30 distributors over a period of two years during which a total of 8,000 kg were distributed
- Defendant was a distributor who was involved in the final 30 weeks of the conspiracy and knew of the broader activity, but dealt only with the organizer from whom he received 1 kg weekly

## Scenario – Conspiracy (cont.)

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- What quantity of marijuana is Defendant accountable for under relevant conduct: The 1,000 kg cited in the count of conviction? The 8,000 kg handled by the conspiracy? A different quantity?
- In the determination of the Chapter Three Adjustment for Role for Defendant, how many participants will be considered?

## Scenario - Firearms

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- Conviction for one count of felon in possession of a firearm, a pistol, on a specific date; violation of 18 USC § 922(g); applicable guideline §2K2.1
- The offense of conviction involved Defendant being discovered with the pistol when he went through the metal detector entering a government building
- Defendant has been a “prohibited person” since a felony conviction eight years earlier

## Scenario - Firearms (cont.)

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- Six months prior to the instant offense of conviction conduct, Defendant pawned a rifle and a shotgun; the rifle had been stolen in a housebreaking, but there is no evidence as to who actually stole it
- Is Defendant accountable for the pistol in the offense of conviction?
- Is Defendant accountable for the rifle and shotgun that he pawned?

## Scenario - Firearms (cont.)

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- What number of firearms will be used for the application of the firearms table SOC at §2K2.1(b)(1)?
- Will the SOC for stolen firearm be applied at §2K2.1(b)(4)(A)?
- Will the SOC for using a firearm in the commission of a felony be applied at §2K2.1(b)(6)? The cross reference at §2K2.1(c)(1)(A)? If so, which Chapter Two guideline will apply (by way of §2X1.1)?



## Scenario - Social Security Cards

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- In exchange for dismissal of two additional counts, conviction for one count of falsely representing a social security number to be his own for the purpose of obtaining unauthorized social security payments; violation of 42 USC § 408(a)(7); applicable guideline §2B1.1
- Count of conviction sites the use of a social security number three years ago by which Defendant obtained two years of unauthorized social security benefits of \$20,000 per year (total \$40,000)

## Scenario - Social Security Cards (cont.)

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- Defendant had also used two additional social security cards in the same manner: one five years ago and one four years ago, resulting in unauthorized annual benefits of \$20,000 for four years and three years, respectively (totaling \$80,000 and \$60,000) - These are the offenses cited in the two counts to be dismissed
- Additionally, corresponding to the time of each of the charged social security offenses, Defendant used each of the social security cards to fraudulently obtain a credit card (three cards), each with a credit limit of \$10,000 which was charged to the limit and not repaid on any of the three cards (totaling \$30,000)

## Scenario - Social Security Cards (cont.)

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- Is Defendant accountable for the \$40,000 loss in the offense of conviction?
- Is Defendant accountable for the \$80,000 and \$60,000 losses from acts related to the two dismissed counts?
- Is Defendant accountable for any of the \$30,000 losses from the charge cards?

## Scenario - Drug Conspiracy II

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- Conviction for one count of conspiracy to distribute at least 5 kg of cocaine between January 1, 2004 and December 31, 2008; violation of 21 USC §§ 846 (to violate § 841(a)) & 841(b)(1)(A) (stat. penalties 10 to life); applicable guideline §2D1.1
- The five year conspiracy included a total of ten individuals, including Defendant, and a total of 120 kg of cocaine was distributed

## Scenario - Drug Conspiracy II (cont.)

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- Defendant became involved in the conspiracy when he moved to the city January 1, 2007, and he remained fully involved in all aspects of the conspiracy and with all nine of the other conspirators throughout 2007 and 2008
- During the period that Defendant was involved, 48 kg were distributed, with Defendant personally distributing 4 kg, and assisting the other nine conspirators in their distribution of 44 kg

## Scenario - Drug Conspiracy II (cont.)

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- In July 2006, prior to Defendant becoming involved in the conspiracy, Defendant independently sold 3 kg of cocaine in another town where he was living at the time
- Subsequent to Defendant's arrest for the instant federal drug conspiracy, the state charged Defendant with the 3 kg sale of 2006; Defendant has pleaded guilty to the state offense and been sentenced to three years imprisonment

## Scenario - Drug Conspiracy II (cont.)

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- In regards to the conspiracy, for what quantity of cocaine is Defendant accountable under relevant conduct: The 5 kg cited in the count of conviction? The 160 kg handled by the conspiracy? The 4 kg Defendant personally distributed? The 44 kg Defendant assisted in distributing?
- Is Defendant accountable for the 3 kg of cocaine that are the basis for the state conviction, or will the conviction be counted as criminal history? Or both? Or neither?

## Scenario - Production of Child Porn

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- Conviction for one count of production of child porn, citing a video production session on a specific date, and citing one child, age 9, who was exploited on the occasion; violation of 18 USC § 2251; applicable guideline §2G2.1
- Defendant and a codefendant were involved in the production
- In addition to the 9 year old child cited in the count of conviction, there were two other children exploited in the production session, a 10 year old and a 13 year old



## Scenario - Production of Child Porn (cont.)

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- The 9 year old was the child of Defendant's girlfriend; the 10 and 13 year olds were the children of the codefendant
- The production included the codefendant having intercourse with the 9 year old and the 13 year old; the 10 year old was not engaged in intercourse but was hoisted by leather restraints into a painful position so as to exhibit her genitalia

## Scenario - Production of Child Porn (cont.)

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- In addition to the production cited in the count of conviction, and in the same month, Defendant did two other productions; each production involved the codefendant having intercourse with one of his two nieces, each niece being under age 12
- Application of §2G2.1 includes a Special Instruction at (d)(1), directing that “if the offense involved the exploitation of more than one minor,” the guideline is to be applied as if there were multiple counts with each minor cited in a separate count of conviction

## Scenario - Production of Child Porn (cont.)

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- Will there be a separate application for the 9 year old cited in the count of conviction? For the 10 year old, and for the 13 year old?
- Will there be a separate application for each of the two nieces?
- In the application of §2G2.1 for the 10 year old against whom there was not the commission of a sexual act or sexual contact, will the SOC (b)(2) for the “offense involved the commission of a sexual act” be applied based on the sexual acts being performed on the 9 and 13 year olds?

# Relevant Conduct vs. “Single or Separate” Prior Sentences

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§1B1.3 vs. §4A1.2(a)(2)

NOTE distinctions between:

relevant conduct in an **instant offense**

and

the criminal history determination of  
“single or separate” for **prior sentences**

# “Prior Sentence”

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## “Prior Sentence” (cont.)

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**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.*,

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## Relevant Conduct Determination in an Instant Offense

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- Defendant's instant federal offense of conviction is one count of bank robbery; violation of 18 USC § 2113(a); applicable guideline §2B3.1
- Defendant stole a getaway car upon exiting the bank to facilitate his escape
- Defendant was subsequently charged in state court for the auto theft, for which he has been convicted and sentenced to two years which he is currently serving, having completed service of six months

## Relevant Conduct Determination in an Instant Offense (cont.)

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- Is Defendant accountable under relevant conduct for the auto theft that is the basis for the state conviction, or will the conviction be counted as a prior sentence? Or both? Or neither?
- How does it affect the outcome of the guidelines calculation?



# Single Sentence Criteria

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## §4A1.2(a)(2)

Multiple **prior** sentences will be treated as a “single sentence” *if*

1. Prior sentences are for offenses **NOT** separated by an intervening arrest

**AND**

2. The offenses *either*

- Were named in the same charging document, *or*
- Resulted in sentences imposed on the same day

# Criminal History Determinations of Prior Sentences

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- Defendant is in federal court to be sentenced for a new federal offense
- Defendant's prior record includes the PRIOR state sentence for auto theft (a two year sentence) and the PRIOR federal sentence for bank robbery (a five year sentence that was imposed to run concurrently with the state sentence); the two PRIOR sentences were imposed six months apart

## Criminal History Determinations of Prior Sentences (cont.)

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- Will the two prior sentences will be counted as a “single sentence” or “separately”? How many criminal history points will be assigned.

END