

# Relevant Conduct Breakout

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# Relevant Conduct Discussion Topics

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- Recap of the analysis of relevant conduct (“RelCon”)
- RelCon vs. Criminal History
- The distinction between RelCon and the Criminal History “single/separate” determination for multiple prior sentences

# Relevant Conduct

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§1B1.3

# Relevant Conduct: The Gatekeeper

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- Relevant conduct sets the limits of information to be used in guidelines application
  - Sentencing accountability is not always the same as criminal liability
- Relevant conduct does not limit the information that ultimately can be used in imposing a sentence

## §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

# 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 8

# 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)

# Offenses **Included** at §3D1.2(d):

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Offenses covered by the following guidelines are to be grouped under this subsection:

§2A3.5;

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;

§§2C1.1, 2C1.2, 2C1.8;

§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;

§§2E4.1, 2E5.1;

§§2G2.2, 2G3.1;

§2K2.1;

§§2L1.1, 2L2.1;

§2N3.1;

§2Q2.1;

§2R1.1;

§§2S1.1, 2S1.3;

§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

# Offenses **Excluded** at §3D1.2(d):

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Specifically excluded from the operation of this subsection are:

- all offenses in Chapter Two, Part A (except §2A3.5);
- §§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
- §2C1.5;
- §§2D2.1, 2D2.2, 2D2.3;
- §§2E1.3, 2E1.4, 2E2.1;
- §§2G1.1, 2G2.1;
- §§2H1.1, 2H2.1, 2H4.1;
- §§2L2.2, 2L2.5;
- §§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
- §§2P1.1, 2P1.2, 2P1.3;
- §2X6.1.

# 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)

# Scenario

## Production of Child Porn Scenario

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- Instant conviction: 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; vio. 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

## Production of Child Porn Scenario (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

## Production of Child Porn Scenario (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

## Production of Child Porn Scenario (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. Criminal History

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# “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

## Relevant Conduct or Criminal History?

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- Instant conviction: one count distribution 400 gm cocaine; vio. 21 USC §§ 841(a) & 841(b)(1)(C); applicable guideline §2D1.1
- Within days of instant distribution, Defendant distributed 50 gm cocaine for which he was convicted in state court and sentenced to 18 mos which he is currently serving
- Determination made that the 50 gm distribution was part of the same course of conduct as the instant offense of conviction

## Relevant Conduct or Criminal History? (cont.)

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- Would the 50 gm be relevant conduct? How?
- The addition of the quantity of drugs from the state offense would not increase the Defendant's offense level (BOL 24)
- The addition of 3 criminal history points for the 18 mos state sentence would increase the Defendant's criminal history category (from CHC II to CHC III)
- Will the state conduct and resulting sentence be treated as relevant conduct or criminal history? Neither? Both?

# SENTENCING TABLE

## (in months of imprisonment)

### Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	2-8	4-10	6-12
	5	0-6	1-7	4-10	6-12	9-15
	6	1-7	2-8	6-12	9-15	12-18
	7	2-8	4-10	8-14	12-18	15-21
	8	4-10	6-12	10-16	15-21	18-24
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
Zone C	11	8-14	10-16	12-18	18-24	24-30
	12	10-16	12-18	15-21	21-27	27-33
Zone D	13	12-18	15-21	18-24	24-30	30-37
	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

# *Guidelines Manual :* Sequence of Application

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- **Ch. One** Introduction, definitions, application principles, **relevant conduct**, etc.
- Ch. Two Offense guidelines
- Ch. Three Generic adjustments
- **Ch. Four** **Criminal history**
- Ch. Five Determining the guideline range

# Escape Scenario

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- Instant conviction: one count escape from federal correctional institution (FCI) on February 1, 2010; vio. 8 USC § 1325(a); applicable guideline §2P1.1
- Defendant's escape made by stealth, with no force or threats
- Two days after escape from FCI, Defendant went to girlfriend seeking assistance. She tried to report him to authorities but Defendant wrested phone from her and beat her

## Escape Scenario (cont.)

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- A week later Defendant encountered a rival in a pool hall, and after a heated exchange, Defendant beat the man with a pool cue

## Escape Scenario (cont.)

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- Note: §2P1.1 is on “excluded” list at §3D1.2(d), but escape is a continuing offense
- Will SOC at §2P1.1(b)(1) for “if the use or threat of force against any person was involved” apply based on the assault on his girlfriend?
- Will SOC at §2P1.1(b)(1) apply based on the pool hall assault on his rival?

## (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

# “During the Commission of the Offense of Conviction”

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## §1B1.3(a)(1)

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

## Escape Scenario (cont.)

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- **Variation:** Defendant charged and convicted by state with assault on girlfriend; by county with assault on rival; sentenced on separate days: 1 yr. state, and 1 yr. county, consecutively
- Will SOC §2P1.1(b)(1) for “if the use or threat of force against any person was involved” apply? Based on what conduct?
- Will criminal history points be added for one, both or neither of the state and county sentences?

# Interstate Transportation Stolen Motor Vehicle

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- Instant conviction: one count interstate transportation stolen motor vehicle (ITSMV) on February 1, 2010; vio. 18 USC §§ 2312; applicable guideline §2B1.1
- Defendant arrested while committing domestic assault on his wife as they argued inside car on March 1, 2010; upon arrest it was determined that the car he was driving had been stolen on February 15, 2010

## Interstate Transportation Stolen Motor Vehicle (cont.)

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- Federal investigation of ITSMV initiated, leading to instant federal conviction; determination that Defendant stole and transported interstate one car per week during three month period, including car being driven at the time of the domestic assault
- Will the domestic assault be relevant conduct?
- Will the stolen car being driven at the time of the domestic assault be relevant conduct?

## Interstate Transportation Stolen Motor Vehicle (cont.)

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- **Variation:** The domestic assault and stolen car arrest resulted in a single state indictment charging both offenses, and resulted in state sentences of 18 mos for assault and 12 mos concurrent for auto theft
- Will the domestic assault be relevant conduct?
- Will the stolen car being driven at the time of the domestic assault be relevant conduct?
- Will criminal history points be added for one, both or neither of the state sentences?

## Drug *Conspiracy* Scenario

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- Instant conviction: one count of conspiracy to distribute at least 1000 kg of marijuana from January 1, 2007 to December 31, 2008; vio. 21 USC §§ 846 (to violate § 841(a)) & 841(b)(1)(A); 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

## Drug *Conspiracy* Scenario (cont.)

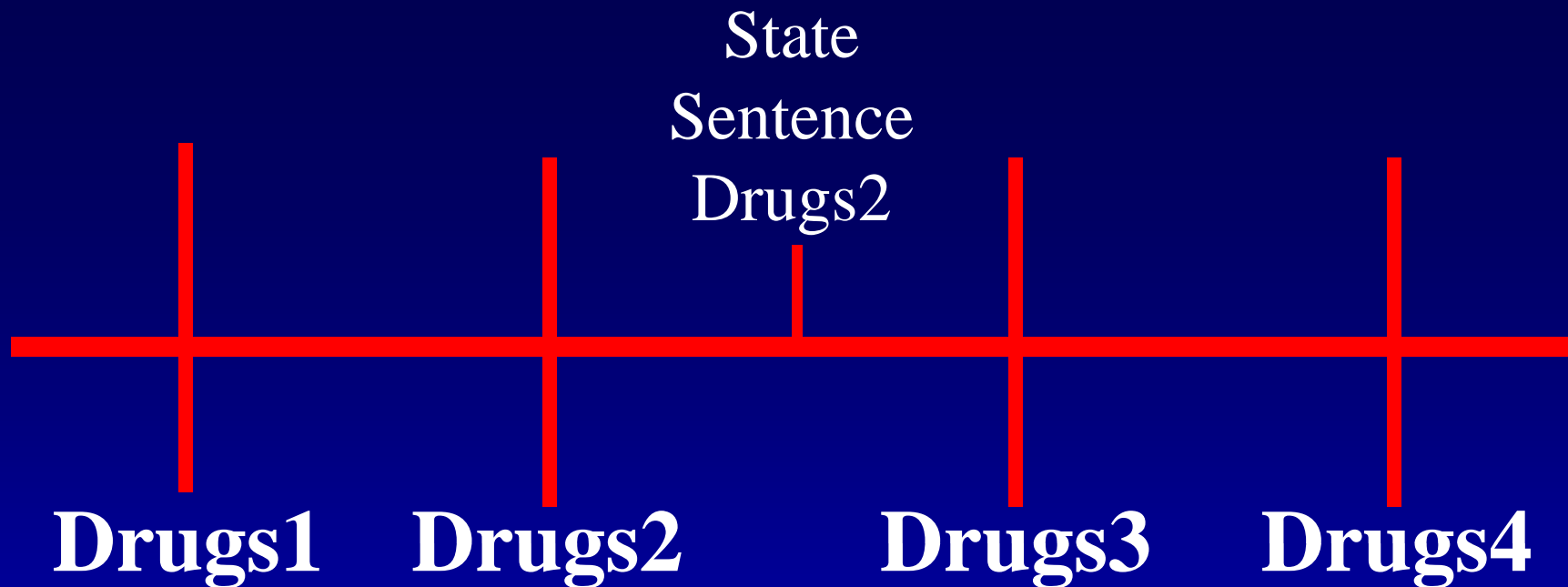
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- What quantity of marijuana is Defendant accountable for under relevant conduct: The 1,000 kg cited in the count of conviction? The 8,000 kg handled by the conspiracy? A different quantity?

## Drug *Conspiracy* Scenario (cont.)

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- **Variation:** During the conspiracy Defendant was arrested by the state for sale of one of the kg, and was sentenced to five years probation, during which he continued his activities in the conspiracy
- What impact, if any, will the state sentence on the 1 kg have on the quantity of marijuana for which Defendant is accountable under relevant conduct?
- Will the state probation sentence be counted as a prior sentence? Will criminal history points for status and/or recency apply?



- Instant conviction is a conspiracy count expressly charging the drug activity
- Acts committed “during the offense of conviction” are relevant conduct under (a)(1)
- State sentence for **Drugs2** is relevant conduct under (a)(1), and therefore not a prior sentence

## Drug *Distribution* Scenario

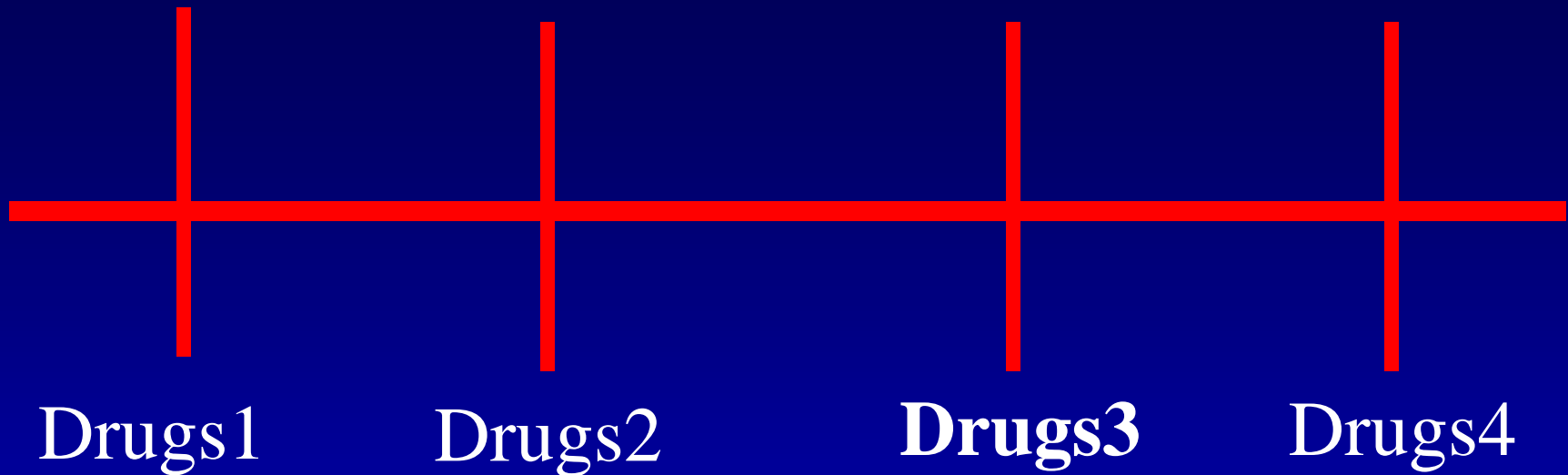
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- Instant conviction: one count distribution of 20 gm cocaine on December 1, 2009; vio. of 21 USC §§ 841(a) & 841(b)(1)(C); applicable guideline §2D1.1
- Defendant sold 20 gm of cocaine every week over a period of 100 weeks (for a total of 2,000 gm (2 kg)). The instant offense of conviction was for the sale in the 75<sup>th</sup> week
- The distribution in the offense of conviction and all other 99 distributions were carried out in the same fashion, with Defendant acting alone, obtaining the drugs from the same source, and conducting similar size transactions from the same location

## Drug *Distribution* Scenario (cont.)

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- What quantity of cocaine is Defendant accountable for under relevant conduct: The 20 gm cited in the count of conviction? The additional 1,980 gm sold on the other 99 occasions?



Instant conviction is **Drugs3**

Because the drug guideline §2D1.1 is on the “included” list at §3D1.2(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 relevant conduct

## Drug *Distribution* Scenario (cont.)

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- **Variation:** Defendant was arrested by the state for one of the sales of 20 gm, the 50<sup>th</sup> of his 100 distributions, and three months later was sentenced in state court to five years probation. Defendant continued his weekly sales while the state case was pending and during his period of probation
- What impact, if any, will the state sentence for the one sale of 20 gm have on the quantity of cocaine for which Defendant is accountable under relevant conduct?

## Drug *Distribution* Scenario (cont.)

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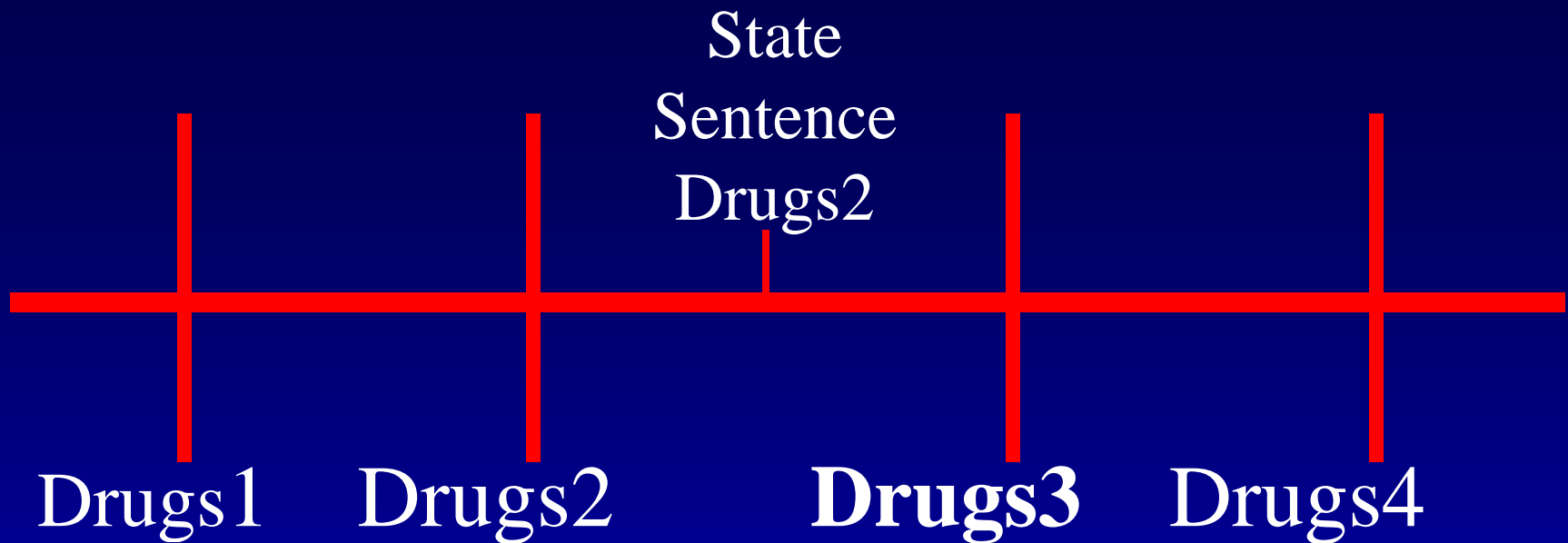
- Will the state probation sentence be counted as a prior sentence? Will criminal history points for status and/or recency apply?

## §1B1.3(a)(2)

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### Application Note 8

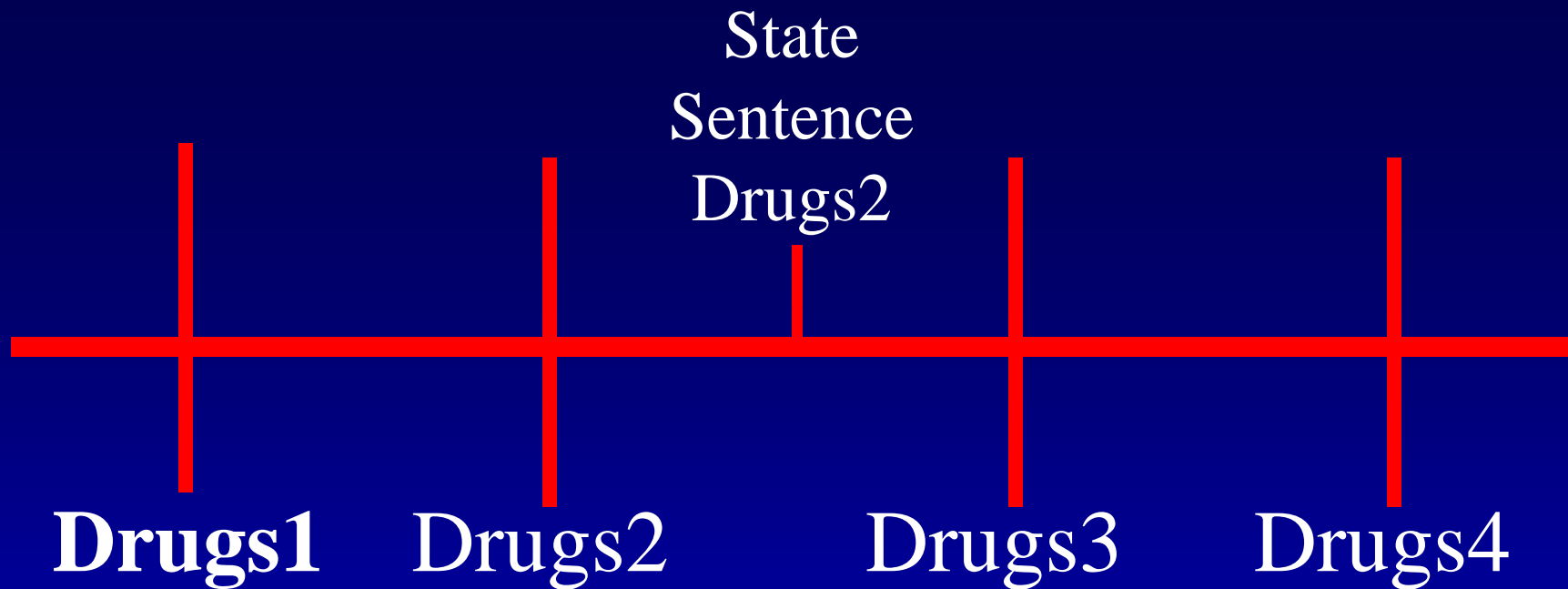
In determination of “expanded” relevant conduct, the course of conduct or common scheme or plan does not include conduct “associated” with a **sentence imposed prior to the commission of the instant offense of conviction**



Instant conviction is **Drugs3**

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

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

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# 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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§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

## Relevant Conduct Determination in an Instant Offense

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- Instant conviction: one count bank robbery; vio. 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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- Instant conviction: federal fraud
- Defendant's prior record includes the two prior sentences from eight years ago:
  - the PRIOR state sentence for auto theft (a two year sentence)
  - 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