

Relevant Conduct Breakout

Annual National Seminar on the Federal Sentencing Guidelines

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10:30-11:30 a.m. & 1:00-2:30 p.m.

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Relevant Conduct Discussion Topics

- Recap of the analysis of relevant conduct (“RelCon”)
- Relevant conduct scenarios

Relevant Conduct Recap

§1B1.3

Relevant Conduct Is Keyed to the Offense of Conviction

§1B1.3

- (a)(1)(A): Defendant accountable for acts he/she did in furtherance of the **offense of conviction**
- (a)(1)(B): Defendant accountable for certain acts others did in furtherance of the **offense of conviction**

Relevant Conduct Is Keyed to the Offense of Conviction (cont.)

§1B1.3

- (a)(2): *For certain offenses* defendant also accountable for his/her acts and certain acts of others in the same course of conduct or common scheme or plan as the **offense of conviction**

(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

Holding a Defendant Accountable for His/Her Acts Under Relevant Conduct

§1B1.3(a)(1)(A)

§1B1.3 Analysis: (a)(1)(A) & (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

Question 1

- Def. convicted of one count of bank robbery (but not the armed section of the statute), citing a specific occasion and that an amount of at least \$5,000 was taken
- Applicable guideline §2B3.1 (Robbery)

Question 1 (cont.)

- If it is determined that Def. took \$25,000 on that occasion, what is the amount of “loss” for the §2B3.1 specific offense characteristic (SOC)?
- If it is determined that Def. brandished a firearm at the time of the robbery will the §2B3.1 SOC apply for “if a firearm was brandished or possessed”?

Question 1 – Variation (RelCon (a)(1)(A))

- If it were determined that Def. did not possess a firearm in the bank, but prior to the bank robbery used a gun in stealing a car for purposes of the robbery and the getaway, would the §2B3.1 firearm SOC apply?
- With the robbery guideline definition of “loss” being the value of property taken, damaged, or destroyed, would the theft of the getaway car affect this determination?

Holding a Defendant Accountable for the Acts of Others

§1B1.3(a)(1)(B)

§1B1.3 Analysis: (a)(1)(B) & (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 ¹⁴

Determination of Scope of Undertaking

§1B1.3, App. Note 2

- An individualized determination based on each defendant's undertaking
- Can be established by either *explicit* agreements or *implicit* agreements
- 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

“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”

§1B1.3(a)(1)(B), App. Note 2

- Only one part of the 3-part analysis regarding the conduct of others
- Defendant not accountable for acts of others that were not within the scope of the defendant’s undertaking, *even* if those acts were reasonably foreseeable or known to the defendant

Question 2 (RelCon (a)(1)(B))

- Def. convicted of fraud conspiracy citing many participants and many acts in operations in five cities over five years
- Applicable guideline §2B1.1
- Def. worked two years in one city, along with four other local co-participants, for a “boss from headquarters”

Question 2 (cont.)

- Def. and the four locals each got 10% of the proceeds from that office's proceeds; the "boss" kept 50% of the office proceeds, from which he got a cut and returned the balance to "headquarters"

Question 2 (cont.)

- In the determination of the §2B1.1 SOC for “loss,” will Def. be accountable for:
 - All losses caused by the conspiracy during the five years?
 - All losses caused by the conspiracy during the two years in which Def. was involved?
 - All losses caused by the local office during the time Def. worked there?
 - Only the losses caused directly by Def.?

Holding a Defendant Accountable for His/Her Acts and Acts of Others in a Course of Conduct or Common Scheme or Plan

§1B1.3(a)(2): “Expanded” Relevant Conduct

§1B1.3 Analysis: (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)(1):

In preparation

During

Avoiding
detection

(a)(2):

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

Preliminary Determination: Does RelCon Include Same Course of Conduct / Common Scheme or Plan?

§1B1.3(a)(2)

- If the applicable Chapter Two guideline is on the “included” list at §3D1.2(d), relevant conduct **will** include the same course of conduct or common scheme or plan
- If the applicable Chapter Two guideline is on the “excluded” list at §3D1.2(d) relevant conduct **will not** include the same course of conduct or common scheme or plan

Offenses **Included** at §3D1.2(d):

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.

Examples of Chapter Two Guidelines on the Included List at §3D1.2(d)

“Expanded Relevant Conduct” at §1B1.3(a)(2) Applies

- Drug trafficking
- Fraud, theft, & embezzlement
- Firearms
- Alien smuggling
- Trafficking/possession of child pornography
- Money laundering
- Tax violations
- Counterfeiting
- Bribery
- Other similar offenses

“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)

Offenses Excluded at §3D1.2(d):

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 the Excluded List at §3D1.2(d)

“Expanded Relevant Conduct” at §1B1.3(a)(2)
Does Not Apply

- Robbery
- Assault
- Murder
- Kidnapping
- Criminal sexual abuse
- Production of child pornography
- Extortion
- Blackmail
- Burglary
- Other similar offenses

§1B1.3(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~~

Question 3 (RelCon (a)(2))

- Def. convicted of production of child porn depicting involving one child during the production on a specific date
- Applicable guideline: §2G2.1
- The child in the offense of conviction was age 16
- It has been determined that within a few days of the conduct in the offense of conviction, and under similar circumstances, Def. also produced child porn involving a child age 8

Question 3 (cont.)

- Will the §2G2.1 SOC for “If the offense involved a minor who had...not attained the age of twelve years...” apply?
- Will the §2G2.1 Special Instruction for “If the offense involved the exploitation of more than one minor...” apply?

SCENARIOS

#1

Only Two Ways for an Act of Another to Be Relevant Conduct

§1B1.3

- (a)(1)(A) – Although committed by another, the act was one that the defendant
 - Aided, abetted, counseled, commanded, induced, procured, **or** willfully caused
- (a)(1)(B) - The act was committed by the defendant's co-participant
 - And the act occurred within the scope **and** in furtherance of the defendant's joint undertaking, **and** was reasonably foreseeable

Only Two Ways for an Act of Another to Be Relevant Conduct (cont.)

§1B1.3

- Relevant conduct analysis, including that regarding the acts of others, is **not** a “but for” analysis
- Check case law
 - *U.S. v. McQueen*, 670 F.3d 1168 (11th Cir. 2012)
 - *U.S. v. Metzger*, 233 F.3d 1226 (10th Cir. 2000)

#2

Applicability of the Multiple Counts Guidelines

Chapter Three, Part D Introductory Commentary

These rules apply to multiple counts of conviction

(A) contained in the same indictment or information;

or

(B) contained in different indictments or informations
for which sentences are to be imposed at the same
time or in a consolidated proceeding.

Counts Grouping Under “Rule (d)”

§3D1.3(b) & App. Note 3

When counts are grouped pursuant to §3D1.2(d), the offense level applicable to the aggregate behavior is used....

Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B and C apply based upon the combined offense behavior taken as a whole.

#3

Relevant Conduct When Referenced to Another Offense Guideline

§§1B1.3 & 1B1.5

- Reference to another guideline (most frequently by a cross reference) includes application of the entire Chapter Two offense guideline and the Chapter Three adjustments, unless otherwise expressly provided

Relevant Conduct When Referenced to Another Offense Guideline (cont.)

§§1B1.3 & 1B1.5

- The relevant conduct used in the application of a referenced guideline will be that in respect to the referenced offense guideline, unless otherwise expressly provided

Example: Relevant Conduct When Referenced to Another Offense Guideline

§§1B1.3 & 1B1.5

- §2K2.1 (Firearms) is included at §3D1.2(d), and thereby has “expanded” relevant conduct (§1B1.3(a)(2))
- §2B3.1 (Robbery) is excluded from §3D1.2(d), and thereby does not have “expanded” relevant conduct
- A cross reference from Firearms to Robbery may or may not result in the use of relevant conduct for the robbery depending on the circuit

Proposed Guideline Amendment Submitted to Congress

To Become Effective November 1, 2014
Unless Rejected by Legislation

Proposed: Felon in Possession - §2K2.1

- Clarifies the operation of Relevant Conduct at §2K2.1 regarding possession of a firearm(s) in connection with another offense (SOC (b)(6)(B) and cross reference (c)(1))
 - The circuits have had a range of approaches
- The cross reference at §2K2.1(c)(1) will be limited to the firearm(s) listed in the *offense of conviction*

#4

#5

“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

Conduct Charged in the Instant Offense of Conviction and Prior Sentences

§1B1.3, App. Note 8

- Conduct associated with a previously imposed sentence expressly charged in the instant offense of conviction will be considered relevant conduct under §1B1.3(a)(1), unless otherwise provided
 - When such conduct is not expressly charged, look to App. Note 8 regarding the §1B1.3(a)(2) determination of same course of conduct or common scheme or plan

#6

END