



Relevant Conduct

§1B1.3



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Relevant Conduct – The Gatekeeper

§1B1.3

- Relevant Conduct does not create any additional guideline characteristics or adjustments
- *Rather*, Relevant Conduct serves as a gatekeeper in determining the conduct to be considered in the application of the *existing* characteristics and adjustments



Relevant Conduct Synopsis

- The defendant is held accountable for anything he/she does during the offense of conviction, preparing for that offense, or avoiding detection/responsibility for that offense
- The defendant is held accountable for some conduct of co-conspirators



Relevant Conduct Synopsis (cont.)

- For certain offense types, the defendant is also held accountable for conduct outside the offense of conviction, when in the same course of conduct or common scheme or plan



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



Subsections (a)(1) and (a)(2)

§1B1.3(a)

- Responsible for most application issues
- Requires an analysis
 - Keyed to the offense of conviction
 - Requires determinations of “WHO” & “WHEN”



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

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

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

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)



(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**



Holding a Defendant Accountable for the Acts of Others Under Relevant Conduct

§1B1.3(a)(1)(B)



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



(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



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



Standard for “Reasonable Foreseeability”

§1B1.3, App. Note 2, Illustrations

- Not based on the foreseeability of the specific defendant
- Based on an objective person standard:
 - Would a *reasonable person* have foreseen that another person in the undertaking would commit such an act in furtherance of the undertaking?



Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of robbery: §2B3.1
- Co-participant carried gun
- If determined that
 - Def.'s undertaking with co-participant was robbery
 - co-participant carried gun in furtherance, and
 - a reasonable person would have foreseen that actit will be relevant conduct
- SOC for firearm will apply



Holding a Defendant Accountable for the Acts of Others In a Broadly Worded Count of Conviction, Such as a Drug Trafficking Conspiracy

§1B1.3(a)(1)(B)



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



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



Determining Scope in a Conspiracy (cont.)

“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.



Example: Holding Defendant Accountable for the Act of Another

§1B1.3(a)(1)(B)

- Def. convicted of drug conspiracy: §2D1.1
- Conspiracy involved multiple importations; Def. was involved in two of those
- If Def.'s undertaking was two importations, Def. will only be accountable for acts of others within those two importations, if reasonably foreseeable



“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))



Holding a Defendant Accountable for Acts in the Same Course of Conduct or Common Scheme or Plan

§1B1.3(a)(2):

“Expanded” Relevant Conduct



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**



Offenses for Which “Expanded” Relevant Conduct Applies

§1B1.3(a)(2) & “Rule (d)”

- The applicable Chapter Two guideline must be one included in a list at §3D1.2(d) (or be of that type), which is the list used for “grouping” multiple counts of conviction of a certain type
- NOTE: Multiple counts of conviction are not necessary to have “expanded” relevant conduct



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, Amendment #503

- Similarity
- Regularity (repetitions)
- Temporal proximity



Example 1:
**RelCon *Includes* Same Course of Conduct / Common
Scheme or Plan**

§1B1.3(a)(2)

- Def. convicted of one count of embezzlement of \$5,000; applicable guideline §2B1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. took \$5,000 on each of four other occasions, and that those acts were in the same course of conduct/common scheme or plan, those losses will be relevant conduct
- “Loss” amount for SOC will be \$25,000



Example 2: RelCon Includes Same Course of Conduct / Common Scheme or Plan

§1B1.3(a)(2)

- Def. convicted of drug sale of 1 kg on a single occasion; applicable guideline §2D1.1 which is on the “included list” at §3D1.2(d)
- If determined that Def. also sold 1 kg per week for 99 weeks, and those acts were in same course of conduct as offense of conviction, that will be relevant conduct
- Application will be based on 100 kg



Offenses for Which “Expanded” Relevant Conduct Does Not Apply

§1B1.3(a)(2) & §3D1.2(d)

- “Expanded” relevant conduct does not apply if the applicable Chapter Two guideline is on the “excluded list” at §3D1.2(d)



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~~



Example:

RelCon Does NOT Include Same Course of Conduct/ Common Scheme or Plan

§1B1.3(a)(1)

- Def. convicted of one count of robbery of \$5,000; applicable guideline §2B3.1 which is on the “excluded list” at §3D1.2(d)
- Even if determined that Def. robbed \$5,000 on each of four other occasions, those losses will not be relevant conduct
- Loss will be \$5,000



**Impact of Terms
“Offense” and “Defendant”
Upon the Relevant Conduct
Used in Application**



Definition of “Offense”

§1B1.1, App. Note 1(H)

- “Offense” means the offense of conviction and all relevant conduct (§1B1.3) ... unless a different meaning is specified or is otherwise clear from the context
 - Note that use of the passive voice infers “offense,” *e.g.*, “if a dangerous weapon *was possessed*” at §2D1.1(b)(2)



Use of Term “Defendant”

§1B1.3

- The use of the term “defendant” limits application from including relevant conduct based on the acts of others under §1B1.3 **(a)(1)(B)**
- NOTE: Defendant *is still accountable* for acts he/she committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused at §1B1.3 **(a)(1)(A)**



Limitation When Term “Defendant” Is Used

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



Points to Remember Regarding Relevant Conduct Analysis

§1B1.3

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



Points to Remember Regarding Relevant Conduct Analysis (cont.)

§1B1.3

- *For certain offenses* (those “included” at §3D1.2(d)), defendant also accountable for acts he/she did, and certain acts others did in the same course of conduct or common scheme or plan as the offense of conviction ((a)(1)(A) and (a)(1)(B) & (a)(2))

