

The scenarios presume a working knowledge of the application of the relevant conduct guideline, §1B1.3. These scenarios are based upon actual cases, and involve not only the analysis required under §1B1.3, but also how the relevant conduct analysis impacts other provisions of the guidelines.

1. Defendant is convicted of one count of wire fraud (18 U.S.C. § 1343), which has a statute of limitations of five years. The applicable guideline is §2B1.1. When calculating the loss amount attributable to the defendant, can loss amounts that occurred outside of the statute of limitations be included as relevant conduct? Why or why not?

Yes, you can use loss from outside the statute of limitations. You are looking at expanded relevant conduct because fraud offenses (§2B1.1) are among those listed at §3D1.2(d). You can look to same course of conduct, common scheme or plan. Nothing in §1B1.3 advises against using loss outside the statute of limitations. Multiple circuits have also upheld this.

2. Defendant is convicted of one count of felon in possession (18 U.S.C. § 922(g)). Over the course of several months, the defendant asked his straw purchaser to purchase seven firearms for him. Three of the firearms transactions occurred while the defendant was a juvenile. At §2K2.1, when calculating the number of firearms attributable to the defendant, can the firearms the defendant asked for while under the age of 18 be included as relevant conduct? Why or why not?

Yes, again, the analysis is subject to expanded relevant conduct because firearms offenses (§2K2.1) are listed at §3D1.2(d). You can look to same course of conduct, common scheme or plan. Nothing in §1B1.3 advises against using juvenile conduct when determining relevant conduct. See *U.S. v. Thomas* 114 F.3d 228 (DC Cir. 1997) and *U.S. v. Gibbs* 182 F.3d 408 (6th Cir. 1999).

3. Defendant is convicted of two counts of wire fraud (18 U.S.C. § 1343) each contained in a separate indictment. The cases have been consolidated for sentencing. The first case, a mortgage fraud case, went to trial, and included a loss amount of \$150,000. The defendant pled guilty in the second case, a bank fraud case, which included a loss amount of \$175,000. The cases involve different victims and different schemes. The parties, in a non-binding plea agreement, have calculated two separate counts of §2B1.1 – one for each count, and have assigned units at §3D1.4 to determine the combined offense level. Is this correct? Why or why not?

No. When the Guidelines direct you to group under a rule, in this case §3D1.2(d), then you need to group under that rule. §2B1.1 is a listed offense under rule (d), therefore, regardless of what the parties agree to, you must group them correctly. You don't get to choose.

4. Defendant is convicted of 18 U.S.C. § 1594 (Conspiracy to Engage in the Sex Trafficking of Children). The indictment states, that from March 2015 through November 2015, the defendant, on five occasions, with five different minor victims, solicited them for sex with adult males by means of fraud, force, and coercion, in violation of 18 U.S.C. § 1591(a) and (b)(1). 18 U.S.C. § 1591(b)(1) is the penalty provision and provides an imprisonment term of 15 years to life.

The applicable guideline is §2G1.3, which provides four alternative base offense levels:

- (a) Base Offense Level:
- (1) **34**, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);
  - (2) **30**, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);
  - (3) **28**, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
  - (4) **24**, otherwise.

Which base offense level is applicable? Why?

34. §1B1.3, App. Note 7 says, “An express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute.” He was convicted of Conspiracy to Engage in the Sex Trafficking of Children, in violation of 18 U.S.C. § 1591(a). But see *US. v. Wei Lin*, 841 F.3d 823 (9th Cir. 2016)

The guideline applicable in this case also provides the following special instruction:

- (d) Special Instruction
- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Is this special instruction applicable? Why or why not?

Yes. It was a conspiracy and the offense of conviction involves 5 victims – also noted in the Indictment.

5. The defendant was convicted of 18 U.S.C. § 1956, Money Laundering. The defendant's husband was convicted of Conspiracy to Distribute a Controlled Substance (21 U.S.C. § 846), and Money Laundering (18 U.S.C. § 1956).

The defendant did not directly participate in the distribution of the controlled substances. She was primarily the "accountant" who was responsible for the money. She deposited the drug proceeds, purchased goods, and withdrew the money for her husband when he needed to purchase another shipment of drugs. The defendant laundered over \$800,000.

The applicable guideline is §2S1.1. It provides two alternative base offense levels:

(a) Base Offense Level:

- (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
- (2) 8 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

Which base offense level applies? Why?

(a)(1), pursuant to §2S1.1, App. Note 2(B), Defendants Accountable for Underlying Offense. In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be accountable for the underlying offense under §1B1.3(a)(1)(A). §1B1.3(a)(1)(A) notes - all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant. In this case, the defendant aided and abetted her husband's drug crimes as his accountant, depositing drug proceeds, purchasing goods, and withdrawing money when her husband needed it to purchase additional drugs.

6. The defendant is convicted of Conspiracy to Distribute Cocaine Base, in violation of 21 U.S.C. §846. The indictment states that from December 2015 until April 2016, the defendant, on three separate occasions, distributed 50 grams of crack, for a total of 150 grams. The presentence investigation reveals that on November 15, 2015, the defendant was sentenced in state court for distribution of 25 grams of crack cocaine that occurred in October 2015.

For what amount of drugs should the defendant be held accountable?

150 grams. Pursuant to §1B1.3, App. Note 5(C), 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. In this case, the defendant was sentenced for another drug crime before the instant offense began.

7. Defendant is convicted of Theft of Mail, a violation of 18 U.S.C. § 1708. The defendant, a mail carrier, stole several bags of mail from his mail truck. When police contacted the defendant regarding the mail theft, he fled from officers. The defendant was charged and convicted by the state for fleeing officers and false statements to police officers. As a result, the defendant is currently serving a 6 month sentence in county jail.

The court applied §2B1.1 for the theft of mail. The court did not apply an enhancement for obstruction at §3C1.1. Application Note 5(B) and (D) indicates that fleeing arrest and false statements to law enforcement are examples of conduct ordinarily not covered.

Since §3C1.1 is not applicable, should this prior conviction receive criminal history points?

**No. It is still relevant conduct, even though there is no enhancement or SOC increase. The defendant is still held accountable for what he did in preparation for the offense of conviction, for what he did during offense of conviction, and for what he did to avoid detection - §1B1.3.**

**The question sometimes is – is it relevant conduct even if the defendant does not receive an increase for it? Yes, the behavior still meets the definition of relevant conduct.**

The court now needs to determine whether to run the theft of mail sentence concurrently or consecutively to the undischarged state term under §5G1.3.

- a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
- b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
  - 1. the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
  - 2. the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

\* \* \*
- d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense

Which provision of §5G1.3 applies?

**§5G1.3(b) – it will run concurrently and he will also receive credit for time already served for that offense. It is still relevant conduct- even though he is not being penalized for it.**

**Amendment 787 from 2014 changed the requirement that the conduct result in a Chapter Two or Three increase.**

8. Defendant pled guilty to two counts of Coercion and Enticement (18 U.S.C. § 2422). The counts involve separate victims. The first count involving victim 1 was committed on February 16, 2016. The second count involving victim 2 was committed on March 28, 2016.

Further investigation has revealed that there were seven additional minors victimized on different occasions from the dates of the counts of conviction.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

When applying §2G1.3, will the special instruction apply? Why or why not?

No. You can only look to the offense of conviction. In this case, the offense of conviction involved two counts of Coercion and Enticement involving 2 victims. You can't use expanded relevant conduct – although not specifically listed at §3D1.2(d), §2G1.3 is very similar to §2G1.1, which is listed at §3D1.2(d). The additional minor victims will not be counted through the use of the special instruction.

9. The defendant pled guilty to Sexual Exploitation of a Child (18 U.S.C. § 2251) and Distribution of Child Pornography (18 U.S.C § 2252).

The defendant has two prior state convictions for rape of a minor. The first prior conviction involves the victim named in the count of sexual exploitation. The other prior conviction involves the victim's brother. The defendant distributed images of both the victim and the victim's brother as part of the instant offense.

The guideline applicable to the first count is §2G2.1. The offense level for this count is 38, and includes application of specific offense characteristics for: age of the victim, the commission of a sexual act, and distribution. The guideline applicable to the second count is §2G2.2. The offense level for this count is 42, and includes application of specific offense characteristics for: prepubescent minor, distribution, sadistic conduct, pattern of activity involving sexual abuse of a minor, use of computer, and number of images.

Are the two prior convictions for rape of a minor relevant conduct to the instant offense or are they part of the defendant's criminal history calculations?

It appears one will be relevant conduct and one will be assessed criminal history points.

Ct. 1 – Sexual Exploitation of a Child – 18 USC 2251 – 2G2.1. Total Offense level 38. Base 32, +2+2+2. Produced image in June.

Ct. 2 – Distribution of Child Pornography – 18 USC 2252 – 2G2.2. Total Offense Level 42. Base 18, +2+6+4+5+2+5. Distributed images over period of months.

Defendant has 2 prior state convictions for rape of a minor (actual abuse). The first state conviction involves victim in Federal Ct. 1 and the second state conviction involves the victim's brother. In Federal Ct. 2 - Defendant distributed images of both the victim and the victim's brother in the instant offense.

In order to apply +5 for Pattern of Activity – we need 2 or more instances. First is the instant offense – Federal Count 1 (victim) – and the other is Count 2 State conviction (victim's brother). Two victims, two different instances of sexual abuse or sexual exploitation, pursuant to §2G2.2 App. Note 3. Even though we are taking a prior state conviction into account under (b)(5) – Pattern of Activity - for Federal Count 2 – it is NOT EXCLUDED from consideration for criminal history points. So defendant will get criminal history points for State Conviction 2 (victim's brother).

The first State Conviction involves the victim – the actual sexual abuse or rape of the victim – whereas the Federal Count 1 involved production of the images from the victim – taken at different times. It is relevant conduct so it will not receive criminal history points.

10. Defendants A and B are convicted of wire fraud (18 U.S.C. § 1343). Defendant A fraudulently obtained \$810,000 from Victim 1 (his mother). The defendant told his mother he was terminally ill and was accepted to undergo a clinical trial to treat his illness. He created fraudulent documents to support the scheme, which he used to solicit his mother's financial support. Over a period of time, on several occasions, his mother wired money to her son's bank account, totaling \$810,000 from her trust account, rendering it insolvent.

Distraught for her son, the victim then contacted her sister (Victim 2) who began wiring money to her nephew from her trust account. Victim 2's bank became suspicious, and stopped all wire transfers. To continue with the payments, Victim 2 agreed to send payments to Defendant A via Western Union.

Defendant B (a friend of the defendant) agreed to receive every Western Union payment. On 22 occasions, Defendant B received the payments from Victim 2 totaling just over \$22,000. Victim 2, however, transferred a total amount of \$310,000 (including the Western Union transfers).

When calculating the guidelines for Defendant B, at §2B1.1, what is the amount of loss?

\$22,000. You need to do a relevant conduct analysis at §1B1.3(a)(1)(B) – was it within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity? On these facts, the answer appears to be no, as no facts indicate Defendant B agreed to Defendant A's scheme or even knew about it.

- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; (ii) was committed through mass- marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

*Substantial Financial Hardship.—In determining whether the offense resulted in substantial financial hardship to a victim, the court shall consider, among other factors, whether the offense resulted in the victim—*

- i. *becoming insolvent;*
- ii. *filing for bankruptcy under the Bankruptcy Code (title 11, United States Code);*
- iii. *suffering substantial loss of a retirement, education, or other savings or investment fund;*
- iv. *making substantial changes to his or her employment, such as postponing his or her retirement plans;*
- v. *making substantial changes to his or her living arrangements, such as relocating to a less expensive home; and*
- vi. *suffering substantial harm to his or her ability to obtain credit.*

Would this SOC apply to Defendant B? Why or why not?

No. She only received \$22,000 from Victim 2 and the facts provided do not establish that Victim 2 experienced a substantial financial hardship as a result of Defendant's B's conduct.