

## BASIC RELEVANT CONDUCT EXERCISES

### Exercise #1

- Defendant convicted of one count of Bank Robbery, citing a specific robbery
- Applicable guideline §2B3.1 (Robbery)
- It is determined that Defendant possessed a firearm during the robbery
- Will the §2B3.1(b)(2)(C) SOC “if a firearm was brandished or possessed, increase by 5 levels” apply?

Yes. The act of possessing a firearm was committed by the defendant – §1B1.3(a)(1)(A) (the “Who” component). And the act occurred “during the commission of the offense of conviction” – §1B1.3 (a)(1) (the “When” component). Therefore, it’s relevant conduct, and the §2B3.1(b)(2)(C) SOC, “if a firearm was brandished or possessed, increase by 5 levels,” will apply.

### Exercise #1-Variation

- While Defendant was actually robbing the bank there was no indication that he possessed a firearm
- After exiting the bank, in carjacking a vehicle for his getaway, Defendant discharged a firearm
- Will the §2B3.1(b)(2)(A) SOC “if a firearm was discharged, increase by 7 levels” apply?

Yes. The act of discharge of a firearm was committed by Defendant – §1B1.3(a)(1)(A) (the “Who” component). And the act occurred “in the course of attempting to avoid detection or responsibility” for the offense of conviction – §1B1.3 (a)(1) (the “When” component). Therefore, it’s relevant conduct, and the §2B3.1(b)(2)(A) SOC, “if a firearm was discharged, increase by 7 levels” will apply.

## BASIC RELEVANT CONDUCT EXERCISES

### Exercise #2

- Defendant convicted of bank robbery; Applicable guideline §2B3.1
- Co-participant possessed a firearm during the robbery, a fact unknown to Defendant until the co-participant brandished it
- Will the §2B3.1(b)(2)(C) SOC for “if a firearm was brandished or possessed” apply for Defendant?

Yes. The act of possession of a firearm was committed by a participant within Defendant’s scope of jointly undertaken criminal activity (in this case, the robbery), was done by the participant in furtherance of Defendant’s joint undertaking, and was reasonably foreseeable – §1B1.3 (a)(1)(B) (the “Who” component). And the act occurred “during” the commission of the offense of conviction – §1B1.3 (a)(1) (the “When” component). Therefore, it’s relevant conduct for Defendant, and the §2B3.1(b)(2)(C) SOC “if a firearm was brandished or possessed, increase by 5 levels” will apply to Defendant.

### Exercise #3

- Defendant is convicted of a count charging a three-year conspiracy to import 5 kg or more of cocaine, with multiple participants and multiple importations
- Applicable guideline §2D1.1 (Drugs)
- During the three years of the conspiracy a total of 300 kg was imported
- It is determined that Defendant
  - joined the conspiracy after its first year of operation, during which 100 kg had been imported, and
  - after Defendant joined the conspiracy, his undertaking was limited to two importations, each in a quantity of 5 kg
- What quantity of drugs will be used to establish Defendant’s base offense level at §2D1.1(a)(5)?

Ten kg. In determining Defendant’s scope of jointly undertaken criminal activity, Defendant’s relevant conduct does not include the conduct of

## BASIC RELEVANT CONDUCT EXERCISES

members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this “bright line rule” takes 100 kg off the table in the determination of Defendant’s relevant conduct. (§1B1.3, App. Note 3 (B))

And once Defendant did join the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two importations, and the acts of others in importing 5 kg on each of those two occasions were within the scope of the Defendant’s jointly undertaken criminal activity, in furtherance, and reasonably foreseeable – §1B1.3(a)(1)(B)(i)-(iii) (the “Who” component). And these acts occurred “during the commission of the offense of conviction” – §1B1.3(a)(1) (the “When” component). Therefore, the ten kg are relevant conduct for Defendant, and are used to establish Defendant’s base offense level at §2BD1.1(a)(5).

### Exercise #4

- Defendant convicted of one count: Conspiracy to Commit Health Care Fraud (18 USC §§ 1349 & 1347) in the three years from January 2014 through December 2016
- Applicable guideline §2X1.1 (Conspiracy) which directs use of §2B1.1 (Fraud/Theft)
- The three-year conspiracy involved numerous fraudulent claims by a health clinic to Medicare for services never provided
- The conspiracy included a total of 12 participants, with each fully involved in the fraud activity, but only during the period he/she was employed by the clinic
- Defendant doctor joined the clinic and began participating in the illegal activity during the final ten months of the conspiracy, but Defendant doctor knew of all the preceding defrauding
- Does Defendant doctor’s relevant conduct include:
  - All the fraudulent acts by all the participants and all the resulting losses during the three-year conspiracy?

## BASIC RELEVANT CONDUCT EXERCISES

- Only the fraudulent acts and resulting losses by Defendant doctor and other participants during Defendant doctor's involvement in the conspiracy?
- Only the fraudulent acts and resulting losses by Defendant doctor?

Defendant doctor's relevant conduct includes only the fraudulent acts and resulting losses committed by Defendant doctor and the other participants during Defendant doctor's involvement in the conspiracy.

In determining Defendant's scope of jointly undertaken criminal activity, Defendant's relevant conduct does not include the conduct of members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this “bright line rule” takes the first two years and two months of the conspiracy off the table in the determination of Defendant's doctor's relevant conduct. (§1B1.3, App. Note 3(B))

Once Defendant did join the conspiracy, the facts support that the scope of his jointly undertaken criminal activity was the entirety of the conspiracy for the remaining ten months of the conspiracy. Defendant's relevant conduct includes all the acts he committed (§1B1.3(a)(1)(A)), and also the acts of others within the scope of his jointly undertaken criminal activity (the entirety of the final ten months of the conspiracy) that were in furtherance of his undertaking, and reasonably foreseeable (§1B1.3(a)(1)(B)) – the “Who” component. The acts committed by Defendant, and also those acts committed by the other participants within the scope and in furtherance of Defendant's jointly undertaken criminal activity, occurred during the commission of the offense of conviction (§1B1.3(a)(1)) – the “When” component.

Losses resulting from the acts determined to be relevant conduct for Defendant are themselves relevant conduct, because they are harms resulting from relevant conduct acts. (§1B1.3(a)(3))

## BASIC RELEVANT CONDUCT EXERCISES

### Exercise #5

- Defendant convicted of sale of 1 kg of cocaine on a single occasion; Applicable guideline §2D1.1
- The sale was to a member of a gang engaged in user-amount sales
- It is determined that Defendant additionally sold 1 kg of cocaine to a member of the gang each week for 40 weeks
- What quantity of drugs will be used to determine Defendant's base offense level at §2D1.1(a)(5)?

Forty one kg. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline in this case, §2D1.1, is on the "included list" at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant (§1B1.3(a)(1)(A)) and certain acts of others (under the three-part analysis of §1B1.3(a)(1)(B))) that were part of the same course of conduct or common scheme or plan as the offense of conviction.

Defendant's relevant conduct includes the kg in the offense of conviction, because Defendant committed the act of selling the drug (§1B1.3(a)(1)(A) – the "Who" component), and the act occurred during the commission of the offense of conviction (§1B1.3(a)(1) – the "When" component).

Because relevant conduct in the application of the Chapter Two guideline, §2D1.1, includes acts in the same course of conduct or common scheme or plan as the offense of conviction, Defendant is responsible for the 40 additional kilos he sold (acts of the defendant – §1B1.3(a)(1)(A) – the "Who"), because the facts establish that those 40 sales were in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2) – the "When").

### Exercise #6

- Defendant convicted of felon in possession of a firearm, a pistol, on a specific date
- Applicable guideline §2K2.1 (Firearms)

## BASIC RELEVANT CONDUCT EXERCISES

- A search of defendant's house the day after he had been arrested in possession of the firearm (the offense of conviction) revealed two additional firearms, both pistols, one with an obliterated serial number
- How many firearms will be counted for the §2K2.1(b)(1) SOC for number of firearms?
- Will the §2K2.1(b)(4)(B) SOC for obliterated serial number apply?

Three firearms will be counted in the application of the §2K2.1(b)(1) SOC for the number of firearms. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline in this case, §2K2.1, is on the "included list" at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant and certain acts of others that were part of the same course of conduct or common scheme or plan as the offense of conviction.

Defendant's relevant conduct includes the firearm in the offense of conviction, because Defendant committed the act of possessing the firearm (§1B1.3(a)(1)(A) – the "Who" component), and the act occurred during the commission of the offense of conviction (§1B1.3(a)(1) – the "When" component).

Because relevant conduct in the application of the Chapter Two guideline, §2K2.1, includes acts in the same course of conduct or common scheme or plan as the offense of conviction, Defendant is responsible for the two additional firearms he possessed (acts of the defendant – §1B1.3(a)(1)(A) – the "Who"), because the facts establish that those two firearms were in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2) – the "When").

The SOC for obliterated serial number at §2K2.1(b)(4)(B) will apply. This is because a firearm in Defendant's relevant conduct had an obliterated serial number. Note that this applies even though the obliterated serial number was not the firearm cited in the offense of conviction, but was one that was in the same course of conduct or common scheme or plan as the offense of conviction.

## BASIC RELEVANT CONDUCT EXERCISES

Note also that in firearms cases involving the application of the cross reference at §2K2.1(c)(1), the §2K2.1 guideline specifically directs that the firearm must be one cited in the offense of conviction (as opposed to one only in the same course of conduct or common scheme or plan as the offense of conviction).

### Exercise #7

- Defendant is convicted of one count of bank robbery; Applicable guideline §2B3.1
- There were no injuries in this robbery
- However, on the day prior to the robbery of conviction, the defendant committed another bank robbery in a similar manner, and in which he struck a teller, resulting in serious bodily injury
- In the application of the robbery guideline, will the §2B3.1(b)(3)(B) SOC for serious bodily injury apply?

No. In beginning the relevant conduct analysis, note that the Chapter Two offense guideline for robbery, §2B3.1, is on the “excluded list” at §3D1.2(d), thereby not using expanded relevant conduct pursuant to §1B1.3(a)(2) and not including acts of the defendant and certain acts of others that were part of the same course of conduct or common scheme or plan as the offense of conviction.

So even if one robbery was in the same course of conduct or common scheme or plan as the offense of conviction, the conduct from one robbery will not be used in the application of a different one.

### Exercise #8

- Defendant convicted of one count of conspiracy to traffic 1 kg or more of heroin during a period of 100 weeks
- Applicable guideline §2D1.1 (Drugs)

## BASIC RELEVANT CONDUCT EXERCISES

- Conspiracy involved 100 occasions of heroin being transported into the district from a major city in a nearby state; 1 kg of heroin was transported on each occasion
- Defendant's undertaking involved only two of those occasions, #51 & #52, although he was aware of the other occasions
- For what quantity of drugs is Defendant accountable?
- Defendant never carried a firearm nor did he aid, abet, counsel, command, induce, procure, or willfully cause his co-participants to do so
- However, one of his co-participants on occasion #51 carried a gun
- Will Defendant get the 2-level increase for the SOC at §2D1.1(b)(1): "If a . . . firearm . . . was possessed . . ." ?

Two kg of heroin. Defendant's relevant conduct includes acts he did (§1B1.3(a)(1)(A) – the "Who" component), that occurred during the offense of conviction (§1B1.3(a)(1) – the "When" component). As for Defendant's relevant conduct including acts of others, in determining Defendant's scope of jointly undertaken criminal activity, Defendant's relevant conduct does not include the conduct of members of a conspiracy prior to Defendant joining the conspiracy (even if Defendant knows of that conduct) – so this "bright line rule" takes the first 50 transportations of a kilo each off the table in the determination of Defendant's relevant conduct. (§1B1.3, App. Note 3 (B))

Once Defendant joined the conspiracy, the scope of his jointly undertaken criminal activity was limited to the two transportations, #51 and #52. If the acts of other participants on those two occasions were within the scope of the Defendant's jointly undertaken criminal activity, in furtherance, and reasonably foreseeable – §1B1.3(a)(1)(B)(i)-(iii) (the "Who" component), and those acts occurred "during the commission of the offense of conviction" – §1B1.3(a)(1) (the "When" component), they are relevant conduct. Based on the facts in this case, each of the kilos on those two occasions are relevant conduct for Defendant, and the 2 kg are used to establish Defendant's base offense level at §2D1.1(a)(5).



## BASIC RELEVANT CONDUCT EXERCISES

Yes, Defendant will get the 2-level increase for the “firearm” SOC at §2D1.1(b)(1). While Defendant himself did not possess a firearm, and was not directly responsible for the co-participant possessing a firearm, the co-participant was within the scope of Defendant’s jointly undertaken criminal activity (transportation #51); the co-participant possessed the firearm in furtherance of Defendant’s jointly undertaken criminal activity; and it was reasonably foreseeable. Therefore, Defendant’s relevant conduct includes the firearm being possessed, and the §2D1.1(b)(1) firearm SOC will apply.

### Exercise #9

- Defendant convicted of one count of Mail Fraud (18 USC § 1341) citing the submission of a fraudulent claim of \$5,000 to an insurance company on a specific date
- Applicable guideline §2B1.1 (Fraud)
- In the same month that Defendant made the fraudulent claim in the count of conviction, he also submitted fraudulent \$5,000 claims of the same nature to ten additional insurance companies
- Which of the following acts and losses are included in Defendant’s relevant conduct:
  - The fraudulent act and resulting loss in the count of conviction?
  - The fraudulent acts and resulting losses related to the ten additional insurance companies?

Defendant’s relevant conduct will include a total of \$45,000 loss.

Specifically as to the offense of conviction, Defendant committed the act of fraud (§1B1.3(a)(1)(A) – the “Who” component), during the commission of the offense of conviction (§1B1.3(a)(1) – the “When” component) that resulted in the \$5,000 loss (§1B1.3(a)(3) the harm resulting from the relevant conduct act).

## BASIC RELEVANT CONDUCT EXERCISES

Additionally, in beginning the relevant conduct analysis, note that the applicable Chapter Two offense guideline in this case, §2B1.1, is on the “included list” at §3D1.2(d), thereby expanding relevant conduct pursuant to §1B1.3(a)(2) to also include acts of the defendant (§1B1.2(a)(1)(A)) and certain acts of others (the three-part analysis of §1B1.3(a)(1)(B)) that were in the same course of conduct or common scheme or plan as the offense of conviction.

The facts support that the ten additional false claims were in the same course of conduct or common scheme or plan as the offense of conviction. Therefore, because Defendant submitted the ten additional false claims of \$5,000 each (§1B1.3(a)(1)(A) – the “Who” component), in the same course of conduct or common scheme or plan as the offense of conviction (§1B1.3(a)(2) – the “When” component), these acts are relevant conduct. Therefore, there is an additional \$40,000 loss (§1B1.3(a)(3) - the harms resulting from the relevant conduct acts).