



# §1B1.3 - Relevant Conduct Analysis

## Principle Three - Expanded Relevant Conduct

### Principle Three

For certain offenses, the defendant may also be accountable for acts that are part of the same course of conduct or common scheme or plan as the offense of conviction.

Only certain Chapter Two guidelines are subject to "expanded" relevant conduct. This list, found at §3D1.2(d), is comprised of offenses in which the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm.

### Sample Guidelines Subject to Expanded Relevant Conduct

|                                     |   |                          |                           |
|-------------------------------------|---|--------------------------|---------------------------|
| §2B1.1   Fraud, Theft, Embezzlement | §2D1.1   Drug Trafficking                                       | §2K2.1   Firearms        | §2S1.1   Money Laundering |
| §2C1.1   Bribery                    | §2G2.2   Possession, Receipt, Distribution of Child Pornography | §2L1.1   Alien Smuggling | §2T1.1   Tax Evasion      |

Under §1B1.3(a)(2), for guidelines listed as included under §3D1.2(d), the "when" of the relevant conduct analysis is expanded to include acts of the defendant and certain acts of others in a jointly undertaken criminal activity that are part of the same course of conduct or common scheme or plan as the offense of conviction.

### Same Course of Conduct

1B1.3(a)(2), Application Note 5(B)(ii)



The acts must be sufficiently connected to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.

**-OR-**

### Common Scheme or Plan

1B1.3(a)(2), Application Note 5(B)(i)



The acts must be substantially connected to each other by at least one common factor.

### Excluded from "Expanded" Relevant Conduct Analysis

In contrast, many guidelines are excluded from "expanded" relevant conduct. Many of the excluded guidelines address offenses involving individual victims who suffer physical harm. For these guidelines that are excluded, the relevant conduct analysis DOES NOT include same course of conduct, common scheme or plan.

### Sample Guidelines that are Excluded from "Expanded" Relevant Conduct

|                  |                                |  |
|------------------|--------------------------------|--|
| §2A1.1   Murder  | §2A3.1   Criminal Sexual Abuse | §2G2.1   Production of Child Pornography |
| §2A2.3   Assault | §2B3.1   Robbery               | §2L2.2   Document Fraud                  |

## Example One



The defendant pleaded guilty to one count of distribution of fentanyl. The applicable guideline is §2D1.1. The offense of conviction establishes that the defendant distributed 20 grams of fentanyl to an undercover agent on a particular date. The court has determined, by a preponderance of evidence, that the defendant also distributed 20 grams of fentanyl on three separate occasions within the same month to other participants.

When applying the drug guideline for this offense, not only will the defendant's relevant conduct include the 20 grams distributed as part of the offense of conviction, but relevant conduct will also include the additional 60 grams he distributed on the three other occasions outside of the offense of conviction.

The additional 60 grams are part of a common scheme or plan because the acts involve:

- Common victims - the societal interest harmed;
- Common purpose - distribution of fentanyl; and
- Similar modus operandi - distribution of similar amounts to users.

Alternatively, the court could also determine that the additional 60 grams distributed are the same course of conduct as the distribution of the 20 grams of fentanyl in the offense of conviction, because the acts are: Similar – same drug, Regular – within same month, and Temporally-related – within same month.

## Example Two

The defendant is convicted of felon in possession of a firearm, a pistol, on a specific date. The applicable guideline is §2K2.1 (Firearms). A search of defendant's house the day after he had been arrested in possession of the firearm cited in the offense of conviction revealed two additional firearms, both pistols, one with an obliterated serial number.

True or false? The defendant's relevant conduct is limited to the one gun cited in the count of conviction and does not include the firearm with the obliterated serial number.



False - The defendant's relevant conduct includes all three firearms that he possessed unlawfully, including the firearm with the obliterated serial number. The applicable guideline, §2K2.1, is on the "included list" at §3D1.2(d), and therefore is subject to "expanded" relevant conduct. The firearms discovered during the search qualify as acts of the defendant that are part of the same course of conduct or common scheme or plan as the offense of conviction.

## Example Three



The defendant is convicted of one count of bank robbery. The applicable guideline is §2B3.1. This offense of conviction did not involve the use of a firearm. However, a day before this robbery occurred, the defendant committed another bank robbery in a similar manner, where he used a firearm and pointed at a teller. In the application of the robbery guideline, will the specific offense characteristic for possession of a firearm apply?

No. The robbery guideline, §2B3.1, is on the "excluded list" at §3D1.2(d), and therefore is not subject to expanded relevant conduct. The court cannot 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. In this case, the relevant conduct analysis is limited to acts of the defendant, and certain acts of others, that occurred during the offense, in preparation for, or to avoid detection or responsibility for the offense of conviction.