PRIMER

RELEVANT CONDUCT

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INTRODUCTION

This primer addresses some common questions that have arisen in the context of relevant conduct. The answers are drawn from §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) and its commentary, other related portions of the *Guidelines Manual*, and applicable caselaw. This primer is not, however, intended as a comprehensive compilation of all case law addressing these issues. The selected case law focuses on Supreme Court and published circuit precedent, and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once. Throughout the primer, examples based on those provided by the commentary to §1B1.3 are set out to accompany the discussion of the topics they illustrate.

Relevant conduct is a principle that impacts nearly every aspect of guidelines application. It reflects the sentencing guidelines' consideration of aspects of the offense and the defendant's conduct beyond the count(s) of conviction alone, while also placing limits, specific to the type of offense, on the range of conduct that is appropriately considered. In addition to a defendant's offense level as determined by Chapter Two, relevant conduct also affects role and multiple count adjustments in Chapter Three, criminal history calculations in Chapter Four, and adjustments for undischarged terms of imprisonment in Chapter Five. *See* USSG §1B1.3(a), (b).

Section §1B1.3 establishes several types of relevant conduct. Relevant conduct considers not only the defendant's own actions and omissions under §1B1.3(a)(1)(A), but, in the case of jointly undertaken criminal activity, the qualifying actions and omissions of others under §1B1.3(a)(1)(B). For certain types of offenses, §1B1.3(a)(2) provides that an expanded range of relevant conduct, including certain actions and omissions that took place on occasions beyond the charged offense, are to be considered. Subsection 1B1.3(a)(3) explains that harm is the appropriate measure of relevant conduct in some circumstances, while §1B1.3(a)(4) clarifies that relevant conduct can also be measured as specifically directed in other guidelines. An extensive set of application notes and background commentary explains the operation of relevant conduct in a variety of situations.

What is relevant conduct?

"Relevant conduct" is **"the range of conduct that is relevant to determining the applicable offense level"** under the *Guidelines Manual*. *See* §1B1.3 comment. (backg'd.). Section 1B1.3 of the *Guidelines Manual* defines relevant conduct and explains the rules for determining what acts or omissions are considered relevant conduct to a given offense type. For a broader discussion of the hybrid "real offense" and "charge offense" sentencing system adopted by the Commission, and the principles undergirding the more specific rules of relevant conduct found in §1B1.3, refer to Chapter One, Part A, Section 4(a) of the *Guidelines Manual*. *See generally Setser v. United States*, 132 S. Ct. 1463, 1475-76 (2012) (Breyer, J., dissenting) (discussing "real offense" sentencing and its "modification" by the guidelines).

What range of conduct is relevant to determining the applicable offense level?

The two main types of relevant conduct are laid out in subsections 1B1.3(a)(1) and (a)(2). Subsection (a)(1) contains the basic rules of relevant conduct applicable to all offenses. That provisions provides that, in every case, relevant conduct includes **actions of the defendant performed in preparation for the offense, during the offense, and after the offense to avoid detection.** Relevant conduct always includes **acts the defendant counseled, commanded, induced, procured, or willfully caused.** In other words, if the defendant directs someone else to do something, the defendant is responsible for that person's actions as if the defendant did the acts him or herself.

In case of such "jointly undertaken criminal activity," the defendant is liable for **all acts and omissions of others that were—(1) within the scope of the jointly undertaken criminal activity, (2) in furtherance of that criminal activity, and (3) reasonably foreseeable in connection with that criminal activity.**

Subsection (a)(2) adopts broader rules for those offense types that typically involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. These broader rules, often referred to as "expanded relevant conduct," apply to offenses such as drug trafficking and fraud, where the guidelines rely on an aggregation of quantity to determine culpability. In such instances, the defendant is liable for **acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction**.

Subsections 1B1.3(a)(3) and (a)(4) set out additional types of relevant conduct that apply less frequently.

What is included in the "standard" relevant conduct definition at 1B1.3(a)(1)?

Subsection 1B1.3(a)(1) is itself broken into **two parts**. The first part, (a)(1)(A), includes as relevant conduct actions or omissions done or caused **by the defendant** in preparation for, during, or, in the course of avoiding detection for the offense of conviction. The second part, (a)(1)(B), applies only when the defendant acted with others as part of a **"jointly undertaken criminal activity."** In such a case, anything done as part of the activity is relevant conduct, if it was within the **"scope"** of the activity, was in **"furtherance"** of the activity, and was **"reasonably foreseeable"** by the defendant. All three criteria must be met for an act or omission to be relevant conduct under (a)(1)(B). As with (a)(1)(A), an act or omission falling under (a)(1)(B) is only relevant conduct if occurred in preparation for, during, or in the course of avoiding detection for the offense of conviction.

Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability.

What is a "jointly undertaken criminal activity"? (1B1.3(a)(1)(B))

A "jointly undertaken criminal activity" is a **criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.**

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii) reasonably foreseeable in connection with that criminal activity.

All three prongs of this test must be met. Additionally, the tests must be satisfied based on the individual defendant's actions or omissions, not those of an omniscient observer.

Scope

Determining the **scope** of the jointly undertaken criminal activity is often the most complex of the three inquiries. **Because a count may be worded broadly and include the conduct of many participants over time, the scope of the "jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant.** In fact, relevant conduct liability is frequently less extensive than substantive criminal liability for conspiracy. *See generally United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002) (explaining that a court must make "particularized findings" about both the scope of the agreement and reasonable foreseeability); *United States v. Hunter*, 323 F.3d 1314, 1319-20 (11th Cir. 2003) (explaining that reasonable foreseeability is irrelevant to relevant conduct if the acts in question are not also within the scope of the criminal activity); *see also United States v. Salem*, 597 F.3d 877, 887 (7th Cir. 2010); *United States v. Willis*, 476 F.3d 1121, 1130 (10th Cir. 2007); *United States v. White*, 77 F. App'x 678 (4th Cir. 2003); *United States v. Hammond*, 201 F.3d 346, 351 (5th Cir. 1999); *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). Additionally, **a defendant's 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. *See, e.g.*, *United States v. Word*, 129 F.3d 1209, 1213 (11th Cir. 1997).**

In determining the scope of a jointly undertaken criminal activity, the court must first examine what the individual defendant agreed to jointly undertake (that is, the scope of the specific conduct and objectives embraced by the defendant's agreement). **The court must make an individualized assessment of the circumstances of the case to determine the scope of the defendant's agreement, both explicit and implicit.** The court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others. However, as a bright line rule, a defendant's relevant conduct does not include the conduct of members of a conspiracy

Acts of others that were not within the scope of the defendant's agreement, **even if those acts were known or reasonably foreseeable**, are not relevant conduct under subsection (a)(1)(B). *See United States v. Barona-Bravo*, 684 F. App'x 761 (11th Cir. 2017) (remanding a case for a more detailed consideration of the scope and emphasizing that scope for relevant conduct purposes differs from the scope of a criminal conspiracy). Nor can criminal activity of which a defendant had no notice be within the scope of her agreement, even if that activity was part of the same overall conspiracy and substantially similar to the defendant's own activity. *See, e.g., United States v. Presendieu*, 880 F.3d 1228, 1246 (11th Cir. 2018 (finding that a defendant's "mere awareness" of being part of a larger scheme did not mean that losses independently caused by an actor of whom she was unaware were within the scope of her agreement); *United States v. Metro*, -- F.3d --, 2018 WL 844823, at *7

(3d Cir. Feb. 14, 2018) (in an insider trading prosecution, gains realized by individuals relying on information originally revealed by the defendant were not relevant conduct if their actions were not within the scope of the activity agreed to by the defendant).

> *Defendant D pays Defendant E a small amount to forge an endorsement on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was not within the scope of the jointly undertaken criminal activity (i.e., the forgery of the $800 check).*

That said, an agreement as to scope need not be explicit or detailed as to every aspect of the offense as it occurs, which means a defendant may be held responsible for acts to which acquiescence could be fairly inferred based on willingness to participate in the offense. For example, defendants who agree to participate in a bank robbery or other offenses with an obvious potential for violence are typically held responsible for the violent acts of their co-defendants, even if there is no indication that the defendant explicitly agreed to the violence before the offense took place. *See, e.g.*, *United States v. Cook*, 850 F.3d 328, 333 (7th Cir. 2017) (defendant liable for physical restraint perpetrated by co-defendant); *United States v. Parsons*, 664 F. App'x 187 (3d Cir. 2016) (defendant liable for co-defendant's shooting of a police officer even though he left the scene before it happened); *United States v. Williamson*, 530 F. App'x 402 (6th Cir. 2013) (defendant liable for violence of co-defendant even when he had not agreed on which establishment was to be robbed); *United States v. Vigers*, 220 F. App'x 265 (5th Cir. 2007); *see also United States v. Houston*, 857 F.3d 427 (1st Cir. 2017) (in a sex-trafficking case, defendant was liable for a co-defendant's urging of a minor to engage in prohibited sexual activity). As Application Note 3(D) explains, such liability may exist even if the defendant "cautioned" his co-defendants "not to hurt anyone."

By contrast, a defendant who agrees to participate only in a telemarketing fraud is likely not liable if a co-defendant goes to a victim's house to obtain money at gunpoint, because such conduct is not within the scope of the activity agreed to. Other types of offenses – for example, a bookmaking operation or illegal debt-collection enterprise – may have an intermediate potential for violence; again, an individual assessment is required.

In cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband that was the object of that jointly undertaken activity) may depend upon

whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.

Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not within the scope of her jointly undertaken criminal activity (i.e., the one delivery).

In Furtherance of

The second requirement is that acts or omissions be **"in furtherance"** of the jointly undertaken criminal enterprise. Having determined the scope of the "jointly undertaken criminal activity," the court next considers what acts or omission attributable to the defendant furthered the objectives embraced by the defendant's agreement (whether explicit or tacit).

Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were within the scope of the jointly undertaken criminal activity, in furtherance of that criminal activity, and reasonably foreseeable in connection with that criminal activity.

It is also important to note that a defendant may be accountable for particular conduct under both (a)(1) and (a)(2). There is no need to undertake an "in furtherance" inquiry as to a defendant's own acts – the test applies only when considering whether the defendant

may be held accountable for the conduct of others. *See, e.g.*, *United States v. Kregas*, 149 F. App'x 779, 786 (10th Cir. 2005) (finding that because the defendant was convicted of aiding and abetting a fraud, he was liable for the resulting loss under (a)(1)(A), regardless of whether (a)(1)(B)'s requirements were met).

Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount ($55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was within the scope of the jointly undertaken criminal activity (the scheme to sell fraudulent stocks), was in furtherance of that criminal activity, and was reasonably foreseeable in connection with that criminal activity.

Reasonably Foreseeable

Finally, the court must determine if the conduct of others that was within the scope of, and in furtherance of, the jointly undertaken criminal activity was **reasonably foreseeable**. It is important to note that the criminal activity that the defendant agreed to jointly undertake and the reasonably foreseeable conduct of others in furtherance of that criminal activity are not necessarily the same. **Reasonable foreseeability may extend beyond the activity the defendant explicitly agreed to undertake.** As discussed above with respect to scope, a defendant who agreed to commit an offense with an obvious potential for violence will typically be liable for a co-defendant's acts of violence, because such acts, even if not planned, are within the scope of the activity agreed to, are in furtherance of the crime, and reasonably foreseeable.

Defendant C is the getaway driver in an armed bank robbery in which $15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was within the scope and in furtherance of the jointly undertaken criminal activity (the robbery), and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).

With respect to offenses involving contraband (including controlled substances), the defendant is accountable under subsection (a)(1)(A) for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity under subsection (a)(1)(B), all quantities of contraband that were involved in transactions carried out by other participants, if those transactions were within the scope of, and in furtherance of, the jointly undertaken criminal activity and were reasonably foreseeable in connection with that criminal activity.

As with the "in furtherance of" requirement, the requirement of reasonable foreseeability applies only in respect to the conduct (*i.e.*, acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).

When can the court look outside the offense of conviction to determine the offense level?

As discussed above, the defendant is liable for the actions or omissions done or caused by the defendant, as well as those of others that were within the scope, in furtherance of, and reasonably foreseeable in connection with jointly undertaken criminal activity, if the conduct was in preparation for, during, or, in the course of avoiding detection for the offense of conviction. **A court, however, must also look beyond the conduct that was in preparation for, during, or, in the course of avoiding detection for the offense of conviction in certain circumstances.** This is commonly referred to as **"expanded relevant conduct."**

As set forth in subsection (a)(2) of the relevant conduct guideline, the court must also consider acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction if—(1) the act or omission was done or caused by the defendant or the act or omission was committed by another and was within the scope, in furtherance of, and reasonably foreseeable in connection with defendant's jointly undertaken criminal activity, and (2) the offense of conviction is one "for which §3D1.2(d) would require grouping of multiple counts."

Accordingly, before applying the (a)(2) relevant conduct test, it is necessary to consult §3D1.2(d) to determine if the Chapter Two guideline applicable to the offense is one that must be grouped under that rule. Section 3D1.2(d) contains a table listing the Chapter Two guidelines to which it applies:

- §2A3.5 (*Failure to Register as a Sex Offender*);
- §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1 (*financial or property offenses*);
- §§2C1.1, 2C1.2, 2C1.8 (*bribery involving public officials; offenses relating to gratuities; campaign finance offenses*);

- §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13 (*drug trafficking offenses*);
- §§2E4.1, 2E5.1 (*trafficking in contraband tobacco; bribery involving labor organizations*);
- §§2G2.2, 2G3.1 (*possessing, transporting, or receiving child pornography*);
- §2K2.1 (*Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition*);
- §§2L1.1, 2L2.1 (*certain immigration offenses*);
- §2N3.1 (*Tampering With Intent to Injure Business*);
- §2Q2.1 (*Offenses Involving Fish, Wildlife, and Plants*);
- §2R1.1 (*Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors*);
- §§2S1.1, 2S1.3 (*money laundering*);
- §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1 (*tax offenses*).

Although "grouping" is not required in the case of a single count conviction, §1B1.3(a)(2) merely adopts §3D1.2(d)'s list by reference, and does not require that there be multiple counts in order to apply (a)(2) relevant conduct.

Expanded relevant conduct is most frequently applied in cases sentenced under the drug trafficking (§2D1.1) or fraud (§2B1.1) guidelines.

What is the "same course of conduct or common scheme or plan"?

In assessing relevant conduct for an offense to which (a)(2) applies, the court must consider all the conduct described in (a)(1), and include it not just when it was done in preparation for, during, or in the course of avoiding detection for the offense of conviction, but also if it was done as part of the **"same course of conduct or common scheme or plan"** as the conviction. These two phrases have distinct, albeit related, meanings.

First, for two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as

- common victims,
- common accomplices,
- common purpose, or
- similar modus operandi.

See, e.g., *United States v*. *Valladares*, 544 F.3d 1257, 1268 (11th Cir. 2008) (separate health care fraud scheme involving nearly identical conduct was part of a common scheme or plan).

Courts have held that the "common purpose" connecting relevant conduct to the instant offense need not be criminal in itself. For example, relevant conduct may have been connected to the charged offense by the goal of obtaining funds for an activity not otherwise illegal. *See, e.g.*, *United States v. McConnell*, 273 F. App'x 351, 355 (5th Cir. 2008) (holding that when defendant was convicted of a false-statement offense, an uncharged embezzlement was relevant conduct because the false statement had concealed his whereabouts at a casino where he gambled the embezzlement proceeds, even though gambling in itself is not an illegal purpose).

Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the

- **similarity,**
- **regularity, and**
- **temporal proximity** between the offenses.

When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses is also a relevant consideration (for example, a defendant's failure to file tax returns in three consecutive years would be considered part of the same course of conduct because such returns are only required annually). *See, e.g.*, *United States v. Phillips*, 516 F.3d 479, 483-84 (6th Cir. 2008) (possession of firearms four years prior to the instant offense was part of a common scheme or plan, when the elements of similarity and regularity were strong); *United States v. Jones*, 199 F. App'x 812, 816 (11th Cir. 2006) (fraud committed prior to a previous term of incarceration was in the same course of conduct as the instant offense, given the similarity in *modus operandi*).

Can conduct associated with a prior offense be included as relevant conduct?

It depends on when the defendant was sentenced for the prior offense. Application Note 5(C) explains that offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant offense of conviction is not to be considered part of the same course of conduct or common scheme or plan as the offense of conviction, even if it would otherwise meet the (a)(2) definition.

The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood).

Conduct associated with a sentence imposed *after* a defendant commenced the instant offense may be considered relevant conduct to the instant offense if it qualifies under subsection (a)(2) as conduct outside of the offense of conviction the court must consider ("expanded relevant conduct"). In such a case, Application Note 1 to §4A1.2 directs that the sentence for the relevant conduct is not considered a "prior conviction" that accrues criminal history points.

The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

In addition, if offense conduct associated with a previously imposed sentence (regardless of when imposed) was expressly charged in the instant offense of conviction, it may be considered relevant conduct under subsection (a)(1), not (a)(2).

What types of relevant conduct do §1B1.3(a)(3) and (a)(4) include?

Subsection (a)(3) expands the definition of relevant conduct to include "harm" that either resulted from or was the object of relevant conduct described in (a)(1) and (a)(2) (if (a)(2) is applicable to the offense). "Harm" includes bodily injury, monetary loss, and property damage. This type of relevant conduct is relevant to offenses punished under guidelines that specifically consider the degree and type of harm sustained or intended. *See, e.g.*,

§2A2.2 (Aggravated Assault); §2B3.1 (Robbery); §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy). Mere risk of harm should be considered only when directed by the applicable Chapter Two guideline. *See, e.g.*, §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides).

Although (a)(3) does not contain any specific limitation on how a defendant's conduct caused the harm, courts have typically adopted a reasonable foreseeability test that takes into account the "inherently dangerous nature" of the offenses covered by this subsection. *See, e.g.*, *United States v. Metzger*, 233 F.3d 1226, 1227-28 (10th Cir. 2000) (holding that injury to a bystander by an off-duty police officer was a reasonably foreseeable consequence of a bank robbery); *United States v. Molina*, 106 F.3d 1118, 1124-25 (2d Cir. 1997) (same when security guard shot bystander to a robbery).

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind, and §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created. Some courts have also found that (a)(4) permits a broadened application of provisions such as §2K2.1(b)(6), which imposes an increase if an illegally possessed firearm was used in connection with "another felony offense." In light of this specific instruction, the other felony offense need not fall under the ordinary types of relevant conduct to trigger the increase. *See, e.g.*, *United States v*. *Mosby*, 543 F.3d 438, 441 (8th Cir. 2008); *United States v. Swearingen*, 204 F. App'x 549, 552 (7th Cir. 2006).

What about guidelines that refer to specific statutes of conviction?

A Chapter Two guideline may expressly direct that a base offense level or specific offense characteristic be applied only if the defendant was convicted of a specified statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "was convicted under 18 U.S.C. § 1956." Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense involved conduct described in 18 U.S.C. § 2242").

Unless otherwise specified, an express direction to apply a factor only if the defendant was convicted of a cited 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 statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a

violation of 18 U.S.C. § 1956, but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. *See* §2S1.1, comment. (n.3(C)).

When a guideline directs the calculation of the offense level for an "underlying offense," does that include relevant conduct to the underlying offense?

Yes. For example, courts have held that, in the context of §2S1.1(a)(1), a calculation of the "offense level for the underlying offense" includes all relevant conduct under the Chapter Two guideline for the underlying offense. *See, e.g.*, *United States v. Blackmon*, 557 F.3d 113, 123 (3d Cir. 2009); *United States v. Cruzado-Laureano*, 440 F.3d 44, 48 (1st Cir. 2006); *United States v. Charon*, 442 F.3d 881, 887-88 (5th Cir. 2006).

How is relevant conduct distinguished from a defendant's prior criminal history?

A sentence that was imposed both (1) after the commencement of the instant offense by the defendant (but before sentencing for the instant offense); and (2) for conduct that was relevant conduct to the instant offense is not counted for purposes of criminal history. *See* §4A1.2 (comment.) n.1.

What burden of proof applies to making factual determinations about relevant conduct?

The standard of proof applicable to relevant conduct determinations under the advisory guidelines is a **preponderance of the evidence**. *See, e.g.*, *United States v. Grubbs*, 585 F.3d 793, 803 (4th Cir. 2009); *United States v. Villareal-Amarillas*, 562 F.3d 892, 896 n.3 (8th Cir. 2009); *United States v. Fisher*, 502 F.3d 293, 308 (3d Cir. 2007); *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006); *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005). The Fifth Circuit has left the "door open" to requiring a heightened burden of proof in some situations, but has never actually imposed such a requirement, including when relevant conduct determinations increased a defendant's sentencing range tenfold. *See United States v. Simpson*, 741 F.3d 539, 559 (5th Cir. 2014); *see also United States v. Olsen*, 519 F.3d 1096, 1105 (10th Cir. 2008) (same).

The exception to this rule is the Ninth Circuit, which has held that a **clear and convincing** standard of proof is applicable to enhancements that have an "extremely disproportionate" effect on the guidelines range. *See United States v. Staten*, 466 F.3d 708, 717 (9th Cir. 2006) (holding that a 15-level increase under §2D1.1 required clear and convincing proof); *United States v. Harrison-Philpot*, 978 F.2d 1520, 1523 (9th Cir. 1992) (listing six factors relevant to determining whether an increase is extremely disproportionate).

The Ninth Circuit has explained that extremely disproportionate increases in sentencing ranges raise due process concerns requiring a higher burden of proof, although whether an increase is extremely disproportionate depends on the totality of the circumstances rather

than the absolute amount of the increase. *Compare United States v. Zolp*, 479 F.3d 715, 718 (9th Cir. 2007) (clear and convincing standard applied to loss calculations under §2B1.1 in a stock-fraud case) *with United States v. Treadwell*, 593 F.3d 990, 1000-01 (9th Cir. 2010) (preponderance standard applied to findings supporting a 22-level increase in a fraud case, because the evidence used had been presented to the jury, which had convicted the defendant of conspiracy). More recent precedent suggests that the preponderance standard always applies when determining the scope of a conspiracy, even when it affects a quantity calculation. *See United States v. Barragan*, 871 F.3d 689, 718 (9th Cir. 2017).

May a Court Consider Acquitted, Previously Convicted, or Uncharged Conduct When Making Relevant Conduct Determinations?

The guidelines do not directly address "acquitted conduct." However, the Supreme Court has held that there is no constitutional barrier to considering such conduct if it otherwise meets the definition of relevant conduct, and is demonstrated by a preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156-57 (1997); *see also Edwards v. United States*, 523 U.S. 511 (1998) (defendant's argument that the jury may have convicted him only of a conspiracy involving cocaine powder, and not crack, was irrelevant to the trial court's determination that his offense involved crack cocaine for relevant conduct purposes).