Primer

Relevant Conduct

Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer addresses some common issues that arise in the context of relevant conduct, which is outlined in the *Guidelines Manual* in §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)).[1] Although the primer identifies some key cases and concepts related to relevant conduct, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. DEFINITION AND TYPES OF RELEVANT CONDUCT

Section 1B1.3 defines relevant conduct as "the range of conduct that is relevant to determining the applicable offense level."[2] The guidelines include the concept of relevant conduct as a balance between two types of sentencing systems: "charge offense" sentencing, which looks solely at the elements of the statute of conviction, and "real offense" sentencing, which considers the conduct that actually occurred in connection with an offense.[3]

The principle of relevant conduct impacts nearly every aspect of guidelines application, including the determination of a defendant's offense level in Chapter Two, the role and multiple count adjustments in Chapter Three, the criminal history calculations in Chapter Four, and the departure for undischarged terms of imprisonment in Chapter Five.[4]

This section discusses the types of relevant conduct considered in determining a defendant's guideline range. Specifically, §1B1.3 includes as relevant conduct:

- **Conduct of the Defendant.** Subsection (a)(1)(A) holds a defendant accountable for acts and omissions done or caused by the defendant in connection with the offense of conviction.
- **Certain Conduct of Others.** Subsection (a)(1)(B) holds a defendant accountable for qualifying acts and omissions done by others in connection with the offense of conviction as part of "jointly undertaken criminal activity."
- **Conduct Outside the Offense of Conviction.** Subsection (a)(2) adopts broader rules, often referred to as "expanded relevant conduct," that hold certain defendants accountable for acts outside the offense of conviction.

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1 U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.3 (Nov. 2021) [hereinafter USSG].

2 USSG §1B1.3, comment. (backg'd.).

3 USSG Ch.1, Pt.A, Subpt.1(4)(a). For further discussion of the hybrid approach adopted by the Commission, and the principles undergirding the rules of relevant conduct found in §1B1.3, refer to Chapter One, Part A, Section 4(a) of the *Guidelines Manual*. *Id*. *See generally* Setser v. United States, 566 U.S. 231, 247–50 (2012) (Breyer, J., dissenting) (discussing "real offense" sentencing and its "modification" by the guidelines).

4 USSG §§1B1.3(a), (b), 4A1.2, 5G1.3.

These rules only apply to defendants whose offenses of conviction are groupable under §3D1.2(d) (for which the guidelines rely on aggregate amounts to determine culpability), and only to acts and omissions that involved the "same course of conduct" or a "common scheme or plan" as the offense of conviction.

- **Harm Caused by Relevant Conduct**. Subsection (a)(3) holds a defendant accountable for all harm that resulted from the acts described above.
- **Guideline-Specific Inquiries.** Subsection (a)(4) includes as relevant conduct any other information specified in the applicable guideline.[5]

As outlined below, determining whether conduct should be attributed to a defendant under certain of these provisions requires an examination of (a) who engaged in the conduct, and (b) when it occurred. More than one provision may apply to a defendant.

A. Conduct of the Defendant (§ 1B1.3(a)(1)(A))

Subsection (a)(1)(A) includes as relevant conduct "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant."[6] With respect to aiding and abetting in particular, a defendant may be held accountable for the entire objective of a criminal enterprise, despite having a small role. For example, a defendant who transports a suitcase knowing that it contains a controlled substance is accountable for the controlled substance in the suitcase regardless of what he knows about the actual type or amount of the controlled substance.[7]

Who. Under this subsection, a defendant is accountable for his or her own acts and omissions. In addition, if the defendant directed someone else to engage in (or refrain from) an activity, the defendant is responsible for that person's acts and omissions.

When. Relevant conduct under this subsection includes acts and omissions done or caused by the defendant during three time periods: (i) in preparation for the offense, (ii) during the offense, and (iii) following the offense to avoid detection.[8]

B. Certain Conduct of Others in "Jointly Undertaken Criminal Activity" (§1B1.3(a)(1)(B))

Subsection (a)(1)(B) includes as relevant conduct certain acts and omissions of others in the case of "jointly undertaken criminal activity." A "jointly undertaken criminal

5 USSG §1B1.3(a).

6 USSG §1B1.3(a)(1)(A).

7 USSG §1B1.3, comment. (n.4(A)(i)).

8 USSG §1B1.3(a)(1).

activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, regardless of whether it is charged as a conspiracy.[9]

Who. Under this subsection, 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.[10]

All three prongs of this test, which are discussed further below, must be met.[11]

When. Relevant conduct under this subsection includes qualifying conduct of others that occurred during three time periods: (i) in preparation for the offense, (ii) during the offense, and (iii) following the offense to avoid detection.[12]

1. Within the Scope of the Jointly Undertaken Criminal Activity

To hold a defendant accountable for the conduct of others, a court first must make "particularized findings" that the conduct was within the scope of what the individual defendant agreed to participate in as part of the jointly undertaken criminal activity.[13] In other words, the court must assess the scope of the specific conduct and objectives embraced by the defendant's agreement.[14]

Importantly, conduct of others that was not within the scope of the defendant's agreement is not relevant conduct under subsection (a)(1)(B), even if those acts were known or reasonably foreseeable.[15] Reasonable foreseeability is a separate question to be considered after the scope inquiry.[16]

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9 USSG §1B1.3(a)(1)(B).

10 *Id.*

11 *See* USSG §1B1.3, comment. (n.3).

12 USSG §1B1.3(a)(1).

13 United States v. McReynolds, 964 F.3d 555, 563 (6th Cir. 2020) (quotations omitted); *see also* United States v. Flores-Alvarado, 779 F.3d 250, 256 (4th Cir. 2015) (same); United States v. Willis, 476 F.3d 1121, 1130 (10th Cir. 2007) (same).

14 USSG §1B1.3, comment. (n.3(B)).

15 *Id.*; *see also* United States v. Hunter, 323 F.3d 1314, 1319–20 (11th Cir. 2003) (reasonable foreseeability is irrelevant to relevant conduct if the acts in question are not also within the scope of the criminal activity).

16 *See, e.g.*, United States v. Abovyan, 988 F.3d 1288, 1312 (11th Cir. 2021) ("The district court may determine reasonable foreseeability only after it makes those individualized findings [concerning the scope of criminal activity undertaken by a particular defendant.]"); United States v. Donadeo, 910 F.3d 886, 895 (6th Cir. 2018) ("After the district court has determined in this manner the scope of the criminal activity that the particular defendant agreed to jointly undertake, it must then proceed to determine if the conduct of others at issue was "in furtherance" of that activity and "reasonably foreseeable" in connection with that

In addition, scope for relevant conduct purposes is not the same as substantive criminal liability for a conspiracy. "Because a count may be worded broadly and include the conduct of many participants over a period of 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."[17] In fact, relevant conduct liability is frequently less extensive than conspiracy liability.[18]

Moreover, the scope of the defendant's agreement does not extend to conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct.[19] For example, cocaine sold prior to the defendant's joining an ongoing drug distribution conspiracy is not included as relevant conduct.[20] Nor can criminal activity of which a defendant had no notice be within the scope of his or her agreement, even if that activity was part of the same overall conspiracy and substantially similar to the defendant's own activity.[21]

Several circuits have identified factors relevant to determining the scope of a defendant's jointly undertaken criminal activity. For example, the Seventh Circuit considers six factors: "(1) the existence of a single scheme; (2) similarities in modus operandi; (3) coordination of activities among schemers; (4) pooling of resources or profits; (5) knowledge of the scope of the scheme; and (6) length and degree of the defendant's participation in the scheme."[22]

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activity."); *Willis*, 476 F.3d at 1129 ("[T]he 'scope of the agreement' and 'reasonable foreseeability' are independent and necessary elements of relevant conduct." (citation omitted)).

17 USSG §1B1.3, comment. (n.3(B)).

18 *See* USSG §1B1.3, comment. (n.1) ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator."); *see also* United States v. Bailey, 973 F.3d 548, 574–75 (6th Cir. 2020) ("[T]he scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy." (citation and quotations omitted)).

19 USSG §1B1.3, comment. (n.3(B)).

20 *Id.*

21 *See, e.g.*, United States v. Presendieu, 880 F.3d 1228, 1246 (11th Cir. 2018) (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, 882 F.3d 431, 440 (3d Cir. 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).

22 United States v. Salem, 657 F.3d 560, 564 (7th Cir. 2011) (citations omitted); *see also* United States v. Donadeo, 910 F.3d 886, 895–96 (6th Cir. 2018) (adopting *Salem* factors); United States v. Bailey, 973 F.3d 548, 575 (6th Cir. 2020) (remanding for failure to consider *Donadeo* factors); United States v. Treadwell, 593 F.3d 990, 1005 (9th Cir. 2010) (identifying factors in context of telemarketing scam); United States v. Studley, 47 F.3d 569, 574–75 (2d Cir. 1995) (same).

EXAMPLE.—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 Defendant E's jointly undertaken criminal activity (*i.e.*, the forgery of the $800 check).[23]

The court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.[24] An agreement as to scope does not need to be explicit or detailed as to every aspect of the offense as it occurs. For example, defendants who agree to participate in a bank robbery or other offenses with an obvious potential for violence may be held accountable for the violent acts of their codefendants, even if there is no indication that the defendant explicitly agreed to the violence before the offense began.[25]

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 activity) may depend upon whether the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.[26]

EXAMPLE.—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).[27]

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23 USSG §1B1.3, comment. (n.4(C)(i)).

24 USSG §1B1.3, comment. (n.3(B)); *see, e.g.*, United States v. Whitman, 887 F.3d 1240, 1248–49 (11th Cir. 2018) ("[A]n implicit agreement may be inferred if, even though 'the various participants in the scheme acted on their own behalf, each of the participants knew each other and was aware of the other's activities, and they aided and abetted one another by sharing' information necessary for the operation of the scheme.").

25 *See, e.g.*, United States v. Ford, 988 F.3d 970, 974–75 (7th Cir. 2021) (codefendant's use of a firearm during attempted robbery was within scope of jointly undertaken criminal activity; conduct also was in furtherance of it, and reasonably foreseeable to the defendant); United States v. Patton, 927 F.3d 1087, 1095–97 (10th Cir. 2019) (codefendant's shooting of an officer was within the scope of defendant's agreement to jointly undertake an armed robbery, even though defendant was arrested before it happened; shooting also was in furtherance of the robbery and reasonably foreseeable); United States v. Cook, 850 F.3d 328, 333 (7th Cir. 2017) (physical restraint perpetrated by codefendant was within scope of joint act of robbery; it also was in furtherance of the act and reasonably foreseeable); *cf.* United States v. Houston, 857 F.3d 427, 433–34 (1st Cir. 2017) (codefendant's urging of a minor to engage in sexual activity was within scope of agreement).

26 USSG §1B1.3, comment. (n.3(B)).

27 USSG §1B1.3, comment. (n.4(C)(v)).

2. In Furtherance of the Jointly Undertaken Criminal Activity

The second requirement for attributing conduct of others to a defendant in the case of "jointly undertaken criminal activity" is that acts and omissions by others be "in furtherance" of the jointly undertaken criminal enterprise.[28] Put another way, the court next considers what acts and omissions by others furthered the objectives embraced by the defendant's agreement.

> **EXAMPLE.—**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.[29]

3. Reasonably Foreseeable in Connection with the Criminal Activity

Finally, the court must determine whether the conduct of others was reasonably foreseeable. Scope and reasonable foreseeability are not necessarily the same. Reasonable foreseeability may extend beyond the activity the defendant explicitly agreed to undertake.[30] As discussed above, a codefendant's acts of violence often are deemed to be within the scope of a defendant's agreement to commit an offense with an obvious potential for violence.[31] Such acts also may be considered reasonably foreseeable and subject the defendant to liability,[32] even if the defendant "cautioned" his codefendants "not to hurt anyone."[33]

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28 USSG §1B1.3, comment. (n.3(C)).

29 USSG §1B1.3, comment. (n.4(C)(vi)).

30 USSG §1B1.3, comment. (n.3(D)).

31 *See supra* note 25 and accompanying text.

32 *See, e.g.*, cases cited *supra* note 25.

33 USSG §1B1.3, comment. (n.3(D)).

EXAMPLE.—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).[34]

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. In the case of a jointly undertaken criminal activity under subsection (a)(1)(B), the defendant is accountable for 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, and reasonably foreseeable in connection with that criminal activity.[35]

The requirement of reasonable foreseeability applies only to the conduct (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).[36]

C. Conduct Outside the Offense of Conviction ("Expanded Relevant Conduct") (§1B1.3(a)(2))

Subsection (a)(2) holds certain defendants accountable for conduct outside of the offense of conviction. Such "expanded relevant conduct" does not apply in every case; rather, it comes into play only for defendants convicted of offenses for which §3D1.2(d) would require grouping of multiple counts.[37] These offenses have guidelines whose offense levels are determined largely based on the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm.

Who. The "expanded relevant conduct" rules in §1B1.3(a)(2) encompass (i) acts and omissions done or caused by the defendant, and (ii) acts and omissions of others that can be attributed to the defendant as part of jointly undertaken criminal activity.

When. Under §1B1.3(a)(2), the court looks beyond conduct done in preparation for, during, or in the course of avoiding detection after the offense of conviction, and also considers conduct that was part of the "same course of conduct" or "common scheme or plan" as the offense of conviction.

34 USSG §1B1.3, comment. (n.4(B)(i)).

35 USSG §1B1.3, comment. (n.3(D)).

36 *Id.*

37 USSG §1B1.3(a)(2).

1. Initial Inquiry: Groupable Offense under §3D1.2(d)

Courts first must consult §3D1.2(d) to determine if the guideline applicable to the offense of conviction is one that would be grouped under that rule:

- §2A3.5 (Failure to Register as a Sex Offender)
- §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1 (covering financial and property offenses)
- §§2C1.1, 2C1.2, 2C1.8 (covering bribery involving public officials; offenses relating to gratuities; campaign finance offenses)
- §§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13 (covering drug trafficking offenses)
- §§2E4.1, 2E5.1 (covering trafficking in contraband tobacco; bribery involving labor organizations)
- §§2G2.2, 2G3.1 (covering offenses involving possessing, transporting, or receiving child pornography; importing, mailing, or transporting obscene matter)
- §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)
- §§2L1.1, 2L2.1 (covering certain immigration offenses)
- §2N3.1 (Odometer Laws and Regulations)
- §2Q2.1 (Offenses Involving Fish, Wildlife, and Plants)
- §2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors)
- §§2S1.1, 2S1.3 (covering money laundering; structuring and failure to report transactions)
- §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1 (covering tax offenses).[38]

Notably, §1B1.3(a)(2) does not require multiple counts of conviction in order to consider expanded relevant conduct under subsection (a)(2).[39]

2. "Same Course of Conduct" or "Common Scheme or Plan"

If the guideline for the offense of conviction is listed in §3D1.2(d), the court must consider whether the conduct potentially attributable to the defendant was part of the

[38] USSG §3D1.2(d).

[39] USSG §1B1.3, comment. (n.5(A)).

"same course of conduct" or "common scheme or plan" as the offense of conviction. These two phrases have distinct, albeit related, meanings.[40]

a. Common scheme or plan

For two or more offenses to constitute 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*.[41]

Some courts have cautioned against viewing the "common purpose" factor too broadly.[42]

b. Same course of conduct

"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."[43] A determination of whether offenses are sufficiently connected to each other to be part of the same course of conduct is made based on the following factors:

- similarity;
- regularity; and
- temporal proximity.[44]

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[40] *See* United States v McCloud, 935 F.3d 527, 533 (6th Cir. 2019) (analyses for "same course of conduct" and "common scheme or plan" are distinct and conduct can qualify under either).

[41] USSG §1B1.3, comment. (n.5(B)(i)); *see also* United States v. Chambers, 878 F.3d 616, 622–23 (8th Cir. 2017) (per curiam) (accessing child pornography from work computer was relevant conduct to instant offense of possession of child pornography even though it occurred seven years prior and from a different location because possessing and accessing child pornography "aimed at a common purpose—viewing child pornography"); United States v. Siegelman, 786 F.3d 1322, 1334 (11th Cir. 2015) (identifying the citizens of Alabama as the common victim, "obtaining power and money" as the common purpose, and use of "political power and influence" to effectuate fraudulent actions as the similar *modus operandi*).

[42] *See, e.g.*, United States v. Purham, 754 F.3d 411, 415 (7th Cir. 2014) (while two periods of activity shared common goal of selling drugs, "[s]upplying cocaine to the residents of an individual city on two separate occasions, unlinked by common accomplices or a common modus operandi, does not link the two instances as 'relevant conduct.' "); United States v. Benns, 740 F.3d 370, 376 (5th Cir. 2014) (while defendant's "offense of conviction and alleged relevant conduct may be connected in some sense by a common purpose, circuit precedent has rejected excessively broad or general 'purposes.' ").

[43] USSG §1B1.3, comment. (n.5(B)(ii)).

[44] *Id.*

These factors are considered in combination based on a "sliding scale approach."[45] "When one of the above factors is absent, a stronger presence of at least one of the other factors is required."[46] Where the conduct is temporally remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity.[47] The nature of the offenses is also a key 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 only are required annually.[48]

D. All Harm Resulting from Relevant Conduct (§1B1.3(a)(3))

Subsection (a)(3) includes as relevant conduct "all harm" that either "resulted from" or was the object of relevant conduct described in subsections (a)(1) and (a)(2).[49] "Harm" is defined to include "bodily injury, monetary loss, property damage, and any resulting harm."[50] Mere risk of harm should be considered only when directed by the applicable Chapter Two guideline.[51] The Fifth Circuit has held that the phrase "resulted from" imposes a but-for causation standard.[52]

E. Guideline-Specific Inquiries (§1B1.3(a)(4))

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline.[53] Where a guideline directs that the offense level is determined based on the "underlying offense," relevant conduct to that underlying offense is included.[54] For

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45 United States v. Phillips, 516 F.3d 479, 483 (6th Cir. 2008) (citation omitted).

46 USSG §1B1.3, comment. (n.5(B)(ii)).

47 *Compare Phillips*, 516 F.3d at 483–84 (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), *with* United States v. Amerson, 886 F.3d 568, 575 (6th Cir. 2018) (previous handgun possession not relevant conduct in instant felon-in-possession offense even though offenses were three and a half months apart, because "with only some evidence of temporal proximity and no showing of regularity, the government had to show stronger evidence of similarity."), *and* United States v. Bowens, 938 F.3d 790, 792, 798–800 (6th Cir. 2019) (firearm under pillow not relevant conduct when there were only two instances of illegal gun possession that were not otherwise similar and "while four months is not a very long span of time, it is not short enough to make up for the lack of regularity or similarity here.").

48 USSG §1B1.3, comment. (n.5(B)(ii)).

49 USSG §1B1.3(a)(3).

50 USSG §1B1.3, comment. (n.6(A)).

51 USSG §1B1.3, comment. (n.6(B)).

52 United States v. Ramos-Delgado, 763 F.3d 398, 401 (5th Cir. 2014) ("[W]e conclude that—unless otherwise specified—the defendants relevant conduct must be a but-for cause of a harm for that harm to be considered in assigning the guideline range.").

53 USSG §1B1.3(a)(4).

54 *See* USSG §1B1.1, comment. (n.1(I)) (defining "offense" as "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context.").

example, in determining the base offense level under §2S1.1(a)(1) (covering money laundering offenses), courts are to use the "offense level for the underlying offense from which the laundered funds were derived" if the defendant committed the offense or "would be accountable for the underlying offense" under the relevant conduct principles in §1B1.3(a)(1)(A).[55]

F. ACCOUNTABILITY UNDER MORE THAN ONE PROVISION

It is also important to note that a defendant may be accountable for relevant conduct under more than one subsection of §1B1.3. However, if a defendant's accountability is established under one provision, it is not necessary to review alternative provisions under which such accountability might be established.[56]

> **EXAMPLE.—**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.[57]

III. APPLICATION ISSUES

A. GUIDELINES THAT REFER TO THE "OFFENSE OF CONVICTION"

Certain guideline provisions apply only if the "offense of conviction" involved particular conduct. The Tenth Circuit recently considered how relevant conduct relates to the three-level increase in subsection (a) of §3A1.2(Official Victim), which applies when the victim is affiliated with the government and "*the offense of conviction* was motivated by such status."[58] The court held that "the enhancement does not apply (to an offense against

[55] USSG §2S1.1(a)(1); *see, e.g.*, United States v. Duperval, 777 F.3d 1324, 1336 (11th Cir. 2015) ("The relevant conduct for this enhancement is the underlying offense, which, in this appeal, is wire fraud."); United States v. Menendez, 600 F.3d 263, 268 & n.4 (2d Cir. 2010) (agreeing with sister circuits that relevant conduct is considered in calculating the offense level for the underlying offense and collecting cases); United States v. Cruzado-Laureano, 440 F.3d 44, 48 (1st Cir. 2006) (court properly calculated offense level under §2C1.1 for underlying offense of extortion and then returned to §2S1.1 and added specific offense characteristics).

[56] USSG §1B1.3, comment. (n.2).

[57] USSG §1B1.3, comment. (n.4(C)(ii)).

[58] USSG §3A1.2(a) (emphasis added).

property or to any other offense) unless the facts immediately related to the offense—and not any additional relevant conduct—supports its application."[59]

B. Distinguishing Relevant Conduct for the Instant Offense from Criminal History

If the defendant was sentenced for another offense before the events comprising the instant offense of conviction began, the conduct underlying the other offense is not considered as part of "expanded relevant conduct" even if it otherwise would meet the subsection (a)(2) definition (*i.e.*, "same course of conduct" or "common scheme or plan").[60] The prior sentence is assigned criminal history points instead.

> **EXAMPLE.—**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).[61]

However, conduct underlying a sentence imposed *after* a defendant commenced the instant offense may be considered relevant conduct to the instant offense if it otherwise qualifies under subsection (a)(2). In such a case, the sentence for the relevant conduct does not accrue criminal history points.[62]

> **EXAMPLE.—**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).[63]

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59 United States v. Ansberry, 976 F.3d 1108, 1123 (10th Cir. 2020) (reversing imposition of official victim enhancement under §3A1.2 and remanding for consideration of whether "the facts immediately related to the offense of conviction support the enhancement").

60 *See* USSG §1B1.3, comment. (n.5(C)).

61 *Id.*

62 USSG §4A1.2, comment. (n.1).

63 USSG §1B1.3, comment. (n.5(C)).

C. Time Already Served for Relevant Conduct

The guidelines also provide that the sentence imposed for an instant offense must be adjusted to account for any time already served for relevant conduct to that instant offense. Specifically, §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) explains when a sentence must be imposed concurrently or consecutively to another sentence, and when the court has discretion in determining how to impose the sentence.[64] " 'For time already spent in custody for *solely* relevant conduct,' to the instant federal offense, the district court must adjust a sentence downward to account for time served, unless the Bureau of Prisons would otherwise credit that time to the defendant."[65] Where the undischarged or state sentence was not solely for offenses that were relevant conduct to the instant offense, the district court has discretion to impose the sentence concurrently, partially concurrently, or consecutively with the undischarged term.[66]

D. Burden of Proof Applicable to Relevant Conduct

Most circuits have held that the standard of proof applicable to relevant conduct determinations is a preponderance of the evidence.[67] The Fifth Circuit has left the "door open" to requiring a heightened burden of proof in some situations but has not imposed such a requirement, even when relevant conduct determinations increased a defendant's sentencing range tenfold. [68]

The exception is the Ninth Circuit, which has held that a clear and convincing standard of proof applies to enhancements that have an "extremely disproportionate" effect on the guidelines range.[69] The Ninth Circuit explained that "extremely disproportionate" increases in sentencing ranges raise due process concerns that therefore, require a higher burden of proof.[70] Whether an increase is "extremely disproportionate" depends on the "totality of

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64 *See* USSG §5G1.3(b)–(c); USSG §5G1.3, comment. (n.2, n.3).

65 United States v. Nelson, 982 F.3d 1141, 1144 (8th Cir. 2020) (quoting United States v. Winnick, 954 F.3d 1103, 1105 (8th Cir. 2020)); *see also* USSG §5G1.3(b)(1).

66 USSG §5G1.3(d); USSG §5G1.3, comment. (n.4(A)); *see Nelson*, 982 F.3d at 1145.

67 *See, e.g.*, United States v. Grubbs, 585 F.3d 793, 803 (4th Cir. 2009); United States v. Szczerba, 897 F.3d 929, 942–43 (8th Cir. 2018); United States v. Brika, 487 F.3d 450, 460–61 (6th Cir. 2007); 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).

68 *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) ("[W]e have long held that sentencing facts in the 'ordinary case' need only be proven by a preponderance. Nonetheless, we have reserved the question of whether, in some extraordinary or dramatic case, due process might require a higher standard of proof." (citations omitted)).

69 *See* United States v. Hymas, 780 F.3d 1285, 1289–90 (9th Cir. 2015) (citations omitted) (listing six factors relevant to determining whether an increase has a disproportionate impact and remanding to recalculate loss amount under a clear and convincing evidence standard); United States v. Staten, 466 F.3d 708, 718 (9th Cir. 2006) (a 15-level increase under §2D1.1 required clear and convincing proof).

70 *Hymas*, 780 F.3d at 1289.

the circumstances" rather than the absolute amount of the increase.[71] Recent Ninth Circuit case law suggests that the preponderance standard still applies when determining the scope of a conspiracy[72] and drug quantities.[73]

E. ACQUITTED, DISMISSED, AND EXTRATERRITORIAL CONDUCT

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.[74] Likewise, dismissed conduct also can be considered so long as it meets these same requirements.[75]

In addition, at least four circuits have held that relevant conduct can include acts committed outside of the United States.[76]

[71] *See* United States v. Barragan, 871 F.3d 689, 717–18 (9th Cir. 2017). *Compare* 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), *overruled on other grounds by* United States v. Miller, 953 F.3d 1095 (9th Cir. 2020), *with* 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), *and* United States v. Valle, 940 F.3d 473, 480 (9th Cir. 2019) (government required to establish defendant's continuous presence in United States by clear and convincing evidence for purposes of enhancement in §2L1.2).

[72] *See Barragan*, 871 F.3d at 718 ("We have repeatedly held that sentencing determinations relating to the extent of a criminal conspiracy need not be established by clear and convincing evidence." (citation and quotation omitted)).

[73] *See* United States v. Flores, 725 F.3d 1028, 1035 (9th Cir. 2013) ("Under the law of this Circuit, a district court is required to resolve factual disputes regarding drug quantity by applying the preponderance of the evidence standard.").

[74] *See* United States v. Watts, 519 U.S. 148, 156–57 (1997); *see also* United States v. Green, 981 F.3d 945, 953 (11th Cir. 2020) ("A district court's factual findings at sentencing—including its findings about conduct for which the defendant was acquitted—need only be supported by a preponderance of the evidence.").

[75] *See, e.g.*, United States v. Bridgewater, 950 F.3d 928, 938–39 (7th Cir. 2020) (*Watts*, 18 U.S.C. § 3661, and USSG §5K2.21 preclude the defendant's constitutional claim regarding the district court's reliance on conduct involved in dismissed charge to increase sentence).

[76] *See* United States v. Spence, 923 F.3d 929, 931–32 (11th Cir. 2019) (summarizing, and joining, decisions from the Seventh, Eighth, and Tenth Circuits), *cert. denied*, 140 S. Ct. 1131 (Feb. 24, 2020) (No. 19–5946).