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 in §1B1.3 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 relevant conduct analysis thus begins with the offense of conviction and then takes into account many real offense characteristics.[4]

The principle of relevant conduct impacts nearly every aspect of guidelines application, including the determination of: a defendant's base offense level where more than one level is provided; specific offense characteristics; and any cross references in Chapter Two; any adjustments in Chapter Three; the criminal history calculations in Chapter Four; and the departure for undischarged terms of imprisonment in Chapter Five.[5]

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

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1 U.S. SENT'G COMM'N, GUIDELINES MANUAL §1B1.3 (Nov. 2023) [hereinafter USSG].

2 USSG §1B1.3, comment. (backg'd.); *see also* Witte v. United States, 515 U.S. 389, 403 (1995) (relevant conduct is a "sentencing enhancement regime[] evincing the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity").

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*. *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 Section 1B1.2 instructs the court to determine the offense guideline in Chapter Two based on the offense of conviction or stipulated offense. USSG §1B1.2(a). Section 1B1.2 further instructs the court to then determine the applicable guideline range in accordance with §1B1.3. USSG §1B1.2(b).

5 USSG §§1B1.3, 4A1.2, comment. (nn.1, 8), 5G1.3(b), (c).

- **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.[6]
- **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."[7]
- **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. These rules only apply to defendants whose offenses of conviction are "of a character for which §3D1.2(d) would require grouping of multiple counts," and only to acts and omissions that involved the "same course of conduct" or a "common scheme or plan" as the offense of conviction.[8]
- **Harm Caused by Relevant Conduct**. Subsection (a)(3) holds a defendant accountable for all harm that resulted from the acts and omissions described above.[9]
- **Guideline-Specific Inquiries.** Subsection (a)(4) includes as relevant conduct any other information specified in the applicable guideline.[10]

As outlined below, determining whether conduct should be attributed to a defendant under certain of these provisions requires an examination of (1) who engaged in the conduct, and (2) when the conduct occurred. More than one provision in §1B1.3 may apply to a defendant.[11]

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."[12] 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

6 USSG §1B1.3(a)(1)(A).

7 USSG §1B1.3(a)(1)(B).

8 USSG §1B1.3(a)(2); *see also* USSG §3D1.2(d) (primarily grouping offenses whose 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").

9 USSG §1B1.3(a)(3).

10 USSG §1B1.3(a)(4).

11 USSG §1B1.3, comment. (n.2).

12 USSG §1B1.3(a)(1)(A).

controlled substance is accountable for the controlled substance in the suitcase without knowing the actual type or amount of the controlled substance.[13]

Who. Under §1B1.3(a)(1)(A), 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. With respect to aiding and abetting under §1B1.3(a)(1)(A), the defendant may also be accountable for the acts of another person.[14]

When. Relevant conduct under §1B1.3(a)(1)(A) 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 in an attempt to avoid detection or responsibility.[15]

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 activity' is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy."[16]

Who. Under §1B1.3(a)(1)(B), 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.[17]

As discussed below, all three criteria of this test must be met.[18]

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13 USSG §1B1.3, comment. (n.4(A)(i)).

14 *See, e.g.*, United States v. De Jesús-Torres, 64 F.4th 33, 41 (1st Cir.) (in determining whether enhancement applies equally under §1B1.3(a)(1)(A) "to those who aid and abet . . . the Sentencing Commission took aim at the precise type of conduct that the defendant now seeks to place on the outer periphery of the enhancement"), *cert. denied*, 144 S. Ct. 207 (2023).

15 USSG §1B1.3(a)(1).

16 USSG §1B1.3(a)(1)(B).

17 *Id.*

18 *See* USSG §1B1.3, comment. (n.3(A)); *see also* United States v. Smith, 79 F.4th 790, 795 (6th Cir. 2023) (defendant may be accountable for conduct of others "only if that conduct meets all three criteria in §1B1.3(a)(1)(i)-(iii)" (citation omitted)); United States v. Ellis, 23 F.4th 1228, 1242 (10th Cir. 2022) (under the definition of relevant conduct, scope, furtherance, and reasonable foreseeability are "independent and necessary elements" (citation omitted)).

When. Relevant conduct under §1B1.3(a)(1)(B) 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 in an attempt to avoid detection or responsibility.[19]

1. Within the Scope of the Jointly Undertaken Criminal Activity

Courts have held that 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.[20] In other words, the court must assess the "scope of the specific conduct and objectives embraced by the defendant's agreement."[21]

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.[22] Reasonable foreseeability is a separate question to be considered after the scope inquiry.[23]

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."[24] In fact, relevant

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19 USSG §1B1.3(a)(1).

20 *See Ellis*, 23 F.4th at 1247 (where the presentence report includes "legally sufficient particularized findings" on jointly undertaken criminal activity, court has made "particularized findings" regarding scope when it adopts the report (citations omitted)); United States v. Dridi, 952 F.3d 893, 899 (7th Cir. 2020) (same); United States v. McReynolds, 964 F.3d 555, 563 (6th Cir. 2020) (same); United States v. Flores-Alvarado, 779 F.3d 250, 256 (4th Cir. 2015) (same).

21 USSG §1B1.3, comment. (n.3(B)).

22 *Id.*; *see also* United States v. Johnson, 14 F.4th 342, 347 (5th Cir. 2021) (to be accountable under §1B1.3 for losses incurred by third parties, court must make findings that include that the defendant agreed to undertake criminal activity with the third parties and the losses caused by the third parties were within the scope of that agreement).

23 *See* USSG §1B1.3, comment. (n.3(D)); *see also, 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.]"), *overruled on other grounds by* United States v. Duldulao, 87 F.4th 1239, 1255 (11th Cir. 2023); 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 activity."); United States v. Willis, 476 F.3d 1121, 1129 (10th Cir. 2007) ("[T]he 'scope of the agreement' and 'reasonable foreseeability' are independent and necessary elements of relevant conduct." (citation omitted)).

24 USSG §1B1.3, comment. (n.3(B)).

conduct liability is frequently less extensive than conspiracy liability.[25] Additionally, acts of others outside a charged conspiracy that are part of the same course of conduct may be considered relevant conduct.[26]

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.[27] For example, cocaine sold prior to the defendant's joining an ongoing drug distribution conspiracy is not included as relevant conduct.[28] Courts also have held that criminal activity of which a defendant had no notice cannot 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.[29]

Several circuits have identified factors relevant to determining the scope of a defendant's jointly undertaken criminal activity. For example, the Sixth and Seventh Circuits consider 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."[30]

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[25] *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 omitted)).

[26] *See, e.g.*, United States v. Jones, 56 F.4th 455, 507 (7th Cir. 2022) (defendant's drug transactions with individuals outside conspiracy that overlapped with charged conspiracy for distribution in same city sufficiently relevant conduct), *cert. denied*, 144 S. Ct. 320 (2023).

[27] USSG §1B1.3, comment. (n.3(B)); *see, e.g.*, United States v. Evans, 90 F.4th 257, 263 (4th Cir. 2024) (acts of others not within scope of defendant's agreement to jointly undertake "the particular criminal activity" is not relevant conduct, "even if reasonably foreseeable" (citation omitted)).

[28] USSG §1B1.3, comment. (n.3(B)).

[29] *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, 440–42 (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), *abrogation on other grounds recognized by* United States v. Carabello, 88 F.4th 239, 244–45 (3d Cir. 2023).

[30] *Bailey*, 973 F.3d at 575 (quoting United States v. Donadeo, 910 F.3d 886, 895 (6th Cir. 2018)) (remanding for failure to consider factors); United States v. Salem, 657 F.3d 560, 564 (7th Cir. 2011) (citations omitted); *see also* United States v. Treadwell, 593 F.3d 990, 1005 (9th Cir. 2010) (identifying similar factors in context of telemarketing scam), *overruled on other grounds by* United States v. Miller, 953 F.3d 1095, 1103 n.10 (9th Cir. 2020); 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).[31]

The court may consider any explicit or implicit agreement "fairly inferred from the conduct of the defendant and others."[32] Courts have held that 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 co-defendants, even if there is no indication that the defendant explicitly agreed to the violence before the offense began.[33]

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."[34]

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31 USSG §1B1.3, comment. (n.4(C)(i)).

32 USSG §1B1.3, comment. (n.3(B)); *see, e.g.*, United States v. Ahmed, 51 F.4th 12, 24 (1st Cir. 2022) (where defendant engaged in health care fraud, he "at least implicitly agreed" to providers' overbilling for clinical services where he pressured others to inflate products for which they billed); United States v. Williams, 968 F.3d 907, 911 (8th Cir. 2020) (where defendants were conducting drug transactions from the same vehicle, "[e]ven if they distributed drugs and each brought his own supply and would keep the proceeds of his individual sales," court did not err in finding jointly undertaken criminal activity); 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." (citation omitted)).

33 *See, e.g.*, United States v. Ford, 988 F.3d 970, 974–75 (7th Cir. 2021) (co-defendant's use of a firearm during attempted robbery was within scope of jointly undertaken criminal activity, in furtherance of it, and reasonably foreseeable to the defendant); United States v. Patton, 927 F.3d 1087, 1095–97 (10th Cir. 2019) (co-defendant'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); *cf.* United States v. Houston, 857 F.3d 427, 433–34 (1st Cir. 2017) (co-defendant's urging of a minor to engage in sexual activity was within scope of agreement).

34 USSG §1B1.3, comment. (n.3(B)).

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).[35]

2. In Furtherance of the Jointly Undertaken Criminal Activity

The second requirement for attributing conduct of others to a defendant is that acts and omissions by others be "in furtherance of the jointly undertaken criminal activity."[36] 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.[37]

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.[38] As discussed above, a co-defendant's acts of violence often are deemed to be within the scope of a defendant's agreement to commit an offense with an obvious

[35] USSG §1B1.3, comment. (n.4(C)(v)).

[36] USSG §1B1.3, comment. (n.3(C)); *see, e.g.*, United States v. McClinton, 23 F.4th 732, 736 (7th Cir. 2022) ("The distribution of proceeds of a robbery is undoubtedly an act that occurs in furtherance of that robbery.").

[37] USSG §1B1.3, comment. (n.4(C)(vi)).

[38] *See* USSG §1B1.3, comment. (n.3(D)) (describing that a co-defendant's assaultive conduct during a robbery is reasonably foreseeable in connection with that criminal activity, given the nature of the offense).

potential for violence.[39] Such acts also may be considered reasonably foreseeable and subject the defendant to liability, even if the defendant "cautioned" his co-defendants "not to hurt anyone."[40]

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).[41]

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."[42] 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 were reasonably foreseeable in connection with [the jointly undertaken] criminal activity."[43]

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)."[44]

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

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. 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) (Groups of Closely Related Counts) would require grouping of multiple counts.[45] These offenses have

39 *See supra* note 33 and accompanying text.

40 USSG §1B1.3, comment. (n.3(D)).

41 USSG §1B1.3, comment. (n.4(B)(i)).

42 USSG §1B1.3, comment. (n.3(D)).

43 *Id.*

44 *Id.*

45 USSG §1B1.3(a)(2).

guidelines whose offense levels are 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," including the guidelines for fraud, drug trafficking, distribution of child pornography, and firearms trafficking offenses.[46] In contrast, the guidelines for offenses involving individual victims who suffer physical harm, such as the guidelines for murder, assault, sexual abuse, and robbery, are excluded from the grouping rules in §3D1.2(d).[47] Accordingly, "expanded relevant conduct" does not apply to such offenses.

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), for guidelines listed under §3D1.2(d), 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.

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)

[46] USSG §3D1.2(d).

[47] *Id.*

- §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).[48]

Notably, §1B1.3(a)(2) does not require multiple counts of conviction in order to consider expanded relevant conduct under subsection (a)(2).[49]

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 "same course of conduct" or "common scheme or plan" as the offense of conviction.[50] These two phrases have distinct, albeit related, meanings.[51]

a. Same course of conduct

Offenses may "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."[52] 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:

- degree of similarity of offenses,
- regularity of the offenses, and

[48] *Id*.

[49] USSG §1B1.3, comment. (n.5(A)).

[50] USSG §1B1.3(a)(2).

[51] *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); United States v. Vicente, 909 F.3d 20, 24 (1st Cir. 2018) ("[T]he term 'same course of conduct' is analytically distinct from the term 'common scheme or plan.' " (citation omitted)).

[52] USSG §1B1.3, comment. (n.5(B)(ii)); *see, e.g.*, United States v. McDonald, 28 F.4th 553, 564 (4th Cir. 2022) ("the same-course-of-conduct standard 'requires only that the defendant [be] engaged in an identifiable pattern of certain criminal activity' " (citation omitted)); United States v. Campbell, 37 F.4th 1345, 1350 (7th Cir. 2022) ("[w]hen the offense of conviction is the final transaction 'in an unbroken series of deals regularly made,' a court may find the prior transactions were part of the same course of conduct" (citation omitted)); *Vicente*, 909 F.3d at 24 (term "same course of conduct" focuses on "whether the defendant repeats the same type of criminal activity over time" (citation omitted)).

- temporal proximity (*i.e.*, the time interval between the offenses).[53]

Courts consider these factors in combination based on a "sliding scale approach."[54] "When one of the above factors is absent, a stronger presence of at least one of the other factors is required."[55] For instance, where the conduct is temporally remote to the offense of conviction, courts have required a stronger showing of similarity or regularity to compensate for the absence of temporal proximity.[56] 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.[57]

b. 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,

[53] USSG §1B1.3, comment (n.5(B)(ii)); *see also* United States v. Lopez, 70 F.4th 325, 329–30 (5th Cir.) (stating that "ingrafting a closeness-in-time requirement" onto similarity and regularity "would essentially conflate the relevant conduct analysis into a one-factor test"), *cert. denied*, 144 S. Ct. 318 (2023); *McDonald*, 28 F.4th at 566 (explaining that "each relevant-conduct case is fact-specific" with no "bright temporal" cut-off, and finding the necessary temporal connection for application of enhancement where defendant, convicted of being a felon in possession of ammunition, engaged in a pattern of behavior of three instances of felon-in-possession conduct over nine-month period (citations omitted)); United States v. Rollerson, 7 F.4th 565, 573 (7th Cir. 2021) (similarity, regularity, and temporal proximity where multiple uncharged buys involved heroin, same as count of conviction).

[54] United States v. Phillips, 516 F.3d 479, 483 (6th Cir. 2008) (citation omitted); *see also* United States v. Damato, 672 F.3d 832, 839–40 (10th Cir. 2012) (the court is to use a " 'sliding scale' approach" that is "mandated by . . . §1B1.3" (quoting United States v. Hill, 79 F.3d 1477, 1484 (6th Cir. 1996)).

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

[56] *Compare* United States v. Soto, 62 F.4th 430, 435 (8th Cir. 2023) (possession of firearm and drugs nearly four years after instant offense of being unlawful user of controlled substance in possession of firearm was part of same course or conduct, when "conduct similarity is striking"); *Phillips*, 516 F.3d at 483–85 (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 months apart but not otherwise similar because "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"). *See also* United States v. Schultz, 88 F.4th 1141, 1144 (5th Cir. 2023) ("[a] weak showing as to any of the factors does not preclude a finding of relevant conduct, but it does require a stronger showing from one of the other factors to compensate for the deficiency" (citation omitted)).

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

- common purpose, or
- similar *modus operandi*.[58]

Some courts have cautioned against viewing the "common purpose" factor too broadly.[59]

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).[60] "Harm" is defined to include "bodily injury, monetary loss, property damage and any resulting harm."[61] Mere risk of harm should be considered only when directed by the applicable Chapter Two guideline, and unless the applicable guideline clearly indicates otherwise, "harm that is merely risked is not to be treated as the equivalent of harm that occurred."[62] The Fifth Circuit has held that the phrase "resulted from" imposes a but-for causation standard.[63] However, the Ninth and Sixth Circuits have held the phrase establishes both a but-for causation standard and a proximate cause standard.[64]

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[58] USSG §1B1.3, comment. (n.5(B)(i)); *see also* United States v. Vicente, 909 F.3d 20, 24 (1st Cir. 2018) (term " 'common scheme or plan' . . . looks to whether the 'acts [are] connected together' by common participants or by an overall scheme" (citations omitted)); 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*).

[59] *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' ").

[60] USSG §1B1.3(a)(3).

[61] USSG §1B1.3, comment. (n.6(A)).

[62] USSG §1B1.3, comment. (n.6(B)).

[63] 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.").

[64] United States v. Lonich, 23 F.4th 881, 916 (9th Cir. 2022) (stating " '[t]he term 'resulted from' establishes a causation requirement,' which includes both cause-in-fact (but-for causation) and proximate cause"); United States v. Peppel, 707 F.3d 627, 644 (6th Cir. 2013) ("[c]ausation includes two distinct principles, cause in fact, or what is commonly known as 'but for' causation, and legal causation").

E. GUIDELINE-SPECIFIC INQUIRIES (§1B1.3(a)(4))

Subsection (a)(4) includes as relevant conduct consideration of "any other information specified in the applicable guideline."[65] Where a guideline directs that the offense level is determined based on the "underlying offense," relevant conduct to that underlying offense is included.[66] For 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).[67]

F. ACCOUNTABILITY UNDER MORE THAN ONE PROVISION

A defendant may be accountable for relevant conduct under more than one subsection of §1B1.3. However, "[i]f a defendant's accountability for particular conduct is established under one provision of [§1B1.3], it is not necessary to review alternative provisions under which such accountability might be established."[68]

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.[69]

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65 USSG §1B1.3(a)(4).

66 *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").

67 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); *cf.* United States v. Diaz-Menera, 60 F.4th 1289, 1294–95 (10th Cir. 2023) (drug conspiracy can be underlying offense from which laundered funds were derived even though §2S1.1(a)(1) does not reference §1B1.3(a)(1)(B) for jointly undertaken criminal activity).

68 USSG §1B1.3, comment. (n.2).

69 USSG §1B1.3, comment. (n.4(C)(ii)).

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 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."[70] The court held that "the enhancement does not apply (to an offense against property or to any other offense) unless the facts immediately related to the offense—and not any additional relevant conduct—supports its application."[71]

B. DISTINGUISHING RELEVANT CONDUCT FOR THE INSTANT OFFENSE FROM CRIMINAL HISTORY

If the defendant was sentenced for another offense before the events constituting 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").[72] 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).[73]

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

[70] USSG §3A1.2(a) (emphasis added); *see* 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").

[71] *Ansberry*, 976 F.3d at 1123.

[72] USSG §1B1.3, comment. (n.5(C)) (Under §1B1.3(a)(2), "offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction."); *see also* United States v. Moses, 23 F.4th 347, 357–58 (4th Cir. 2022) (prior drug trafficking conviction was not part of the same course of conduct as the current offense under Application Note 5(C)).

[73] USSG §1B1.3, comment. (n.5(C)).

qualifies under subsection (a)(2). In such a case, the sentence for the relevant conduct does not accrue criminal history points.[74]

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).[75]

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.[76] The Eighth Circuit has noted that " '[f]or 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."[77] 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.[78]

[74] USSG §4A1.2, comment. (n.1) ("Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).").

[75] USSG §1B1.3, comment. (n.5(C)). For more information on intervening sentences for the calculation of a defendant's criminal history category, see U.S. SENT'G COMM'N, PRIMER ON CRIMINAL HISTORY (2023), https://www.ussc.gov/guidelines/primers/criminal-history.

[76] *See* USSG §5G1.3(b)–(c); USSG §5G1.3, comment. (nn.2–3); *see also* United States v. Boyle, 28 F.4th 798, 803–04 (7th Cir. 2022) (state sexual abuse offense was not "same course of conduct" or "common scheme or plan" as federal child pornography conviction, so state offense was not relevant conduct to federal offense within the meaning of §5G1.3(b), and the district court did not err in imposing 50-year federal sentence consecutively to 40-year state sentence).

[77] 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).

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

D. Burden of Proof Applicable to Relevant Conduct

The standard of proof applicable to relevant conduct determinations is a preponderance of the evidence.[79] The Fifth Circuit has left the "door open" to a heightened standard, but it has "never actually required a heightened burden" of proof, even when relevant conduct determinations increased a defendant's sentencing range tenfold. [80]

E. Acquitted, Dismissed, and Extraterritorial Conduct

The guidelines do not currently directly address the use of acquitted conduct except in a parenthetical summary of *United States v. Watts*, wherein the Supreme Court 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.[81] However, in 2024, the Commission promulgated an amendment to §1B1.3 to address the use of acquitted conduct for purposes of determining the guideline range. Absent congressional action to the contrary, effective November 1, 2024, §1B1.3(c) will provide that "relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction."[82] In addition, the amendment includes a new application note explaining that in cases in which certain conduct underlies both a charge for which a defendant has been acquitted and the instant offense of conviction, the court is in the best position to determine whether the overlapping conduct establishes the instant offense. If the conduct establishes, in whole or in part, the instant offense of conviction, it may qualify as relevant conduct.[83]

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[79] *See* United States v. Walker-Couvertier, 860 F.3d 1, 17 (1st Cir. 2017); United States v. Hernandez, 894 F.3d 496, 505–06 (2d Cir. 2018); United States v. Lacerda, 958 F.3d 196, 214 (3d Cir. 2020); United States v. Claybrooks, 90 F.4th 248, 254 (4th Cir. 2024); United States v. Amerson, 886 F.3d 568, 573 (6th Cir. 2018); United States v. Kelly, 99 F.4th 1018, 1026–27 (7th Cir. 2024); United States v. Hogue, 66 F.4th 756, 765 (8th Cir. 2023); United States v. Lucas, No. 22-50064, 2024 WL 1919741, *4 (9th Cir. May 2, 2024) (en banc); United States v. Brown, 85 F.4th 1291, 1295 (10th Cir. 2023); United States v. Perry, 14 F.4th 1253, 1277 (11th Cir. 2021); United States v. Mohammed, 89 F.4th 158, 164–65 (D.C. Cir. 2023), *petition for cert. filed*, No. 23-7287 (U.S. Apr. 24, 2023).

[80] *See* United States v. Simpson, 741 F.3d 539, 559 (5th Cir. 2014) (citing United States v. Brooks, 681 F.3d 678, 712–13 (5th Cir. 2012)); *see also* United States v. Ramirez-Urbina, No. 22-50404, 2023 WL 3620754, at *1 (5th Cir.) (per curiam) (defendant's arguments for clear and convincing evidence standard foreclosed by precedent), *cert. denied*, 144 S. Ct. 306 (2023); United States v. Johnson, 14 F.4th 342, 347 (5th Cir. 2021) (" 'Relevant conduct' attributed to a defendant under the sentencing guidelines . . . does not require proof beyond a reasonable doubt, only [ ] a preponderance of the evidence." (citations omitted)).

[81] 519 U.S. 148, 156–57 (1997); USSG §6A1.3, comment; *see also, e.g.*, 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.").

[82] *See* Amendment 1 of the amendments submitted by the Commission to Congress on April 30, 2024, 89 FR 36853 (May 3, 2024).

[83] *Id*.

Dismissed conduct can be considered so long as it is demonstrated by a preponderance of the evidence.[84] Moreover, at least four circuits have held that relevant conduct can include acts committed outside of the United States.[85]

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

[85] *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). *But see, e.g.*, United States v. Elbaz, 52 F.4th 593, 609 (4th Cir. 2022) (because relevant conduct must be criminal conduct, district court may err if it "consider[s] losses from purely foreign conduct when setting its initial sentencing range"), *cert. denied* 144 S. Ct. 278 (2023); United States v. Levario-Quiroz, 161 F.3d 903, 906–08 (5th Cir. 1998) (explaining that certain specific actions by the defendant in Mexico could not be considered relevant conduct to the instant federal offenses of illegal importation of a firearm and illegal entry); United States v. Azeem, 946 F.2d 13, 17–18 (2d Cir. 1991) (holding that consideration of the defendant's foreign activities in the calculation of his base offense level for drug trafficking "was inappropriate").