

RELEVANT CONDUCT SCENARIOS

Wilmington, October 25, 2019

Scenario #1

Defendant was convicted of a conspiracy to distribute crack cocaine. The conspiracy began on December 1, 2017 and ended on April 1, 2018 at which time the defendant was arrested. The Indictment lists three separate deliveries made from New York and Washington, DC.

- December 28, 2017 – 50 grams
- February 9, 2018 – 50 grams
- March 2, 2018 – 50 grams

The Indictment also cites 20 grams crack delivery from New York to Philadelphia on October 10, 2017. The defendant was convicted for this conduct in Philadelphia on November 17, 2017 and sentenced to one month in jail. For what amount of drugs would the guidelines hold the defendant accountable?

- A. 50 grams
- B. 150 grams
- C. 170 grams

Scenario #2

Defendant is convicted of Theft of Mail, a violation of 18 U.S.C. § 1708. The defendant, a mail carrier, stole several bags of mail from his mail truck. When police contacted the defendant regarding the mail theft, he fled from officers. The defendant was charged and convicted by the state for fleeing officers and false statements to police officers. As a result, the defendant is currently serving a 6-month sentence in county jail.

The court applied §2B1.1 for the theft of mail. The court did not apply an enhancement for obstruction at §3C1.1. Application note 5(B) and (D) indicates that fleeing arrest and false statements to law enforcement are examples of conduct ordinarily not covered under §3C1.1.

2-A

Since §3C1.1 is not applicable, should this prior conviction receive criminal history points?

- A. Yes
- B. No

RELEVANT CONDUCT SCENARIOS, Cont.

#2-B

The court now needs to determine whether to run the theft of mail sentence concurrently or consecutively to the undischarged state term under §5G1.3.

a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:

1. the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
2. the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Which provision of §5G1.3 applies?

- A. Subsection (a)
- B. Subsection (b)
- C. Subsection (d)

RELEVANT CONDUCT SCENARIOS, Cont.

Scenario #3

Defendant is convicted of a count charging a three-year conspiracy to import 5 kg or more of cocaine, with multiple participants and multiple importations. The applicable guideline is §2D1.1 (Drugs).

During the three years of the conspiracy a total of 300 kg was imported. It is determined that Defendant (1) joined the conspiracy after its first year of operation, during which 100 kg had been imported, and (2) after Defendant joined the conspiracy, his undertaking was limited to two importations, each in a quantity of 5 kg.

For what amount of drugs would the guidelines hold Defendant accountable?

- A. 300 kg
- B. 200 kg
- C. 10 kg

Scenario #4

Defendant is convicted of one count of Conspiracy to Commit Health Care Fraud (18 USC §§ 1349 & 1347), committed in the three years from January 2015 through December 2017. Applicable guideline is §2X1.1 (Conspiracy) which directs us to use §2B1.1 (Fraud/Theft).

The three-year conspiracy involved numerous fraudulent claims by a health clinic to Medicare for services that were never provided. The conspiracy included a total of 12 participants, with each fully involved in the fraud activity, but only during the period he/she was employed by the clinic. Defendant doctor joined the clinic and began participating in the illegal activity during the final ten months of the conspiracy, but Defendant doctor knew of all the preceding defrauding.

Does Defendant doctor's relevant conduct include:

- A. All the fraudulent acts by all the participants and all the resulting losses during the three-year conspiracy?
- B. Only the fraudulent acts and resulting losses by Defendant doctor and other participants during Defendant doctor's involvement in the conspiracy?
- C. Only the fraudulent acts and resulting losses by Defendant doctor?

RELEVANT CONDUCT SCENARIOS, Cont.

Scenario #5

Defendant is convicted of one count of bank robbery; Applicable guideline is §2B3.1.

There were no injuries in this robbery.

However, on the day prior to the robbery of conviction, the defendant committed another bank robbery in a similar manner, and in which he struck a teller, resulting in serious bodily injury.

In the application of the robbery guideline, will the §2B3.1(b)(3)(B) SOC for serious bodily injury apply?

- A. Yes
- B. No
- C. It's arguable

Scenario #6

The defendant is convicted of one count of production of child pornography, citing one minor, age 14, exploited during the production on July 15, 2018. On July 7, 2018, the defendant also produced child pornography exploiting a different child, age 9.

The probation officer applied a 2-level increase for the offense involving a minor between 12-16 under §2G2.1(b)(1)(B). The government has objected, arguing that the court should impose a 4-level increase for a minor under 12 under §2G2.1(b)(1)(A).

Which enhancement at §2G2.1(b)(1) should apply, if any?

- A. 4-Levels
- B. 2-Levels
- C. Neither
- D. Both for a total of 6-Levels

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This provision, located at §1B1.3, specifies the conduct for which a defendant may be held accountable in the determination of the offense level. The conduct need not have been formally charged or proved at trial, so long as the sentencing court finds the facts by a preponderance of the evidence. Relevant conduct may include the defendant's conduct as well as the conduct of others under certain circumstances.

Key Points about Relevant Conduct

- Serves as a “gatekeeper” in determining the conduct to be considered in the application of the existing guideline factors.
- Will limit the conduct that can be used in guideline application. However, for purposes of sentencing, generally all information can be used. (See 18 U.S.C. § 3661, §1B1.4.)
- Sentencing accountability is not always the same as criminal liability. In other words, a person convicted of conspiracy may not necessarily be held accountable for the whole conspiracy under the provisions of relevant conduct.
- Relevant conduct determines application of the base offense levels, specific offense characteristics, and cross references in Chapter Two and the adjustments in Chapter Three.
- The determination of the relevant conduct for Chapters Two and Three of a particular offense will also impact the determination of a single offense level for multiple counts of conviction (Chapter 3, Part D), the calculation of criminal history points (Chapter 4), and adjustments for undischarged terms of imprisonment (§5G1.3).
- Relevant conduct is unaffected by jurisdiction and the statute of limitations.

Key Terms

Defendant – acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant

Offense – the offense of conviction and all relevant conduct

Jointly Undertaken Criminal Activity – a criminal plan, scheme, endeavor, or enterprise undertaken

by the defendant in concert with others, whether or not charged as a conspiracy

Same Course of Conduct – acts or offenses sufficiently connected by similarity, regularity, and temporal

proximity to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.

Common Scheme or Plan – acts or offenses substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose or similar *modus operandi*



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The Relevant Conduct Analysis is Keyed to the Offense of Conviction, and Requires Determinations of “Who” and “When”

Who:

- Acts committed, aided, abetted, counseled, commanded, induced, procured or willfully caused **by the defendant**; and
- **Acts of others** that:
 - 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

When:

- That occurred **during** the commission of the offense of conviction, **in preparation** for that offense, or to **avoid detection or responsibility** for the offense of conviction
- **Only for offenses listed as included at §3D1.2(d)**, Relevant Conduct includes acts of the defendant and acts of others within the jointly undertaken criminal activity that were the same course of conduct or common scheme or plan as the offense of conviction.

Relevant conduct also includes:

- All harm that resulted from the acts described above, and
- any other information outside of the above analysis that is specified in the applicable guideline.

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.